



UNC
SCHOOL OF LAW

University of North Carolina School of Law
Carolina Law Scholarship Repository

Faculty Publications

Faculty Scholarship

2022

The Inequity of Informal Guidance

Joshua D. Blank

Leigh Z. Osofsky

University of North Carolina School of Law, osofsky@email.unc.edu

Follow this and additional works at: https://scholarship.law.unc.edu/faculty_publications



Part of the [Administrative Law Commons](#), and the [Tax Law Commons](#)

Publication: *Vanderbilt Law Review*

This Article is brought to you for free and open access by the Faculty Scholarship at Carolina Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

The Inequity of Informal Guidance

*Joshua D. Blank**
*Leigh Osofsky***

The coexistence of formal and informal law is a hallmark feature of the U.S. tax system. Congress and the Treasury enact formal law, such as statutes and regulations, while the Internal Revenue Service offers the public informal explanations and summaries, such as taxpayer publications, website frequently asked questions, virtual assistants, and other types of taxpayer guidance. Throughout the COVID-19 pandemic, the IRS increased its use of informal law to help taxpayers understand complex emergency relief rules implemented through the tax system.

In contrast to many other legal scholars who have examined important administrative law issues regarding informal tax guidance, in this Article, we reframe the topic as a social justice issue. We argue that the two tiers of formal and informal law in the U.S. tax system systematically disadvantage taxpayers who lack access to sophisticated advisors. This imbalance occurs irrespective of whether the IRS's informal law contains statements that, if taxpayers followed them, would be taxpayer favorable or unfavorable. When the guidance contains taxpayer-favorable positions, the IRS is not legally bound by these positions and, during an audit, can contradict or ignore them. But when the guidance contains taxpayer-unfriendly positions, taxpayers who rely on them are bound to these interpretations as a practical matter. Worse yet, these taxpayers have almost no protection against tax penalties for incorrect positions that they claim based on the IRS's tax guidance. By contrast, taxpayers who can access and apply the formal sources of tax law, such as the Internal Revenue Code and Treasury Regulations, often through lawyers, are in a significantly better

* Professor of Law and Faculty Director of Strategic Initiatives, University of California, Irvine School of Law.

** William D. Spry III Distinguished Professor of Law and Associate Dean for Research, University of North Carolina School of Law. We are grateful to Ted Afield, Jeremy Bearer-Friend, Neil Buchanan, Danshera Cords, Samantha Galvin, Heather Field, Ari Glogower, Sarah Lawsky, Leandra Lederman, Jack Lerner, Roberta Mann, Orly Mazur, Noam Noked, Shu-Yi Oei, Emily Taylor Poppe, Katie Pratt, Sloan Speck and Richard Winchester, and to participants in the UC-Irvine School of Law Intellectual Life Workshop, George Washington University Law School Faculty Colloquium, ABA Tax Section Fall 2021 Meeting, 2021 National Tax Association Annual Meeting, 2021 Law and Society Annual Meeting and Tax Club of New York City for helpful comments on earlier drafts. All errors are our own.

strategic position. They can rely on binding law, they can try to take the most advantageous positions possible, and, if they meet a relatively low bar of reasonableness, they will have penalty protections in doing so.

After highlighting the growing gap between formal and informal tax law, and the resulting systemic inequity it causes, we explore potential policy approaches to address it. We consider reforming the drafting of the formal tax law; changing the drafting of informal tax law to include warnings to taxpayers and cross-references to formal tax law; revising the law regarding taxpayer reliance on informal tax law; and developing IRS research on how reliance on informal tax law varies based on taxpayers' income, filing status, race, and other personal characteristics.

INTRODUCTION	1095
I. TWO-TIERED LEGAL SYSTEMS: FORMAL AND INFORMAL LAW	1099
A. <i>Concerns About Tiered Legal Systems Generally</i> ..	1099
B. <i>Two-Tiered Legal Drafting</i>	1102
C. <i>The Expanding Gap</i>	1107
D. <i>Who Uses the Public System of Law?</i>	1108
II. TWO-TIERED LEGAL DRAFTING AND THE TAX LAW	1110
A. <i>Formal Tax Law</i>	1110
B. <i>Informal Tax Law</i>	1116
C. <i>The Role of Tax Lawyers</i>	1122
D. <i>Access to Justice</i>	1126
1. Unambiguous Informal Tax Law	1127
2. Taxpayer-Unfavorable Informal Tax Law .	1127
3. Taxpayer-Favorable Informal Tax Law	1131
E. <i>Beyond Tax Law</i>	1138
III. CAN TWO-TIERED LEGAL DRAFTING BE REFORMED?	1140
A. <i>Reform of Formal Law</i>	1140
B. <i>Reform of Informal Law</i>	1145
C. <i>Taxpayer Reliance on Informal Law</i>	1148
1. Binding Informal Law	1148
2. Tax Penalty Defenses	1151
D. <i>Taxpayer Characteristics</i>	1154
CONCLUSION	1157

INTRODUCTION

Taxpayers have the right to know what they need to do to comply with the tax laws.

—Internal Revenue Service, Taxpayer Bill of Rights¹

I didn't think that it mattered that much whether a lay person turned to the [Internal Revenue] Code and what the provisions looked like.

—Former federal tax legislation drafter²

Inequities plague the legal system. Well-known inequities exist in criminal law,³ property law,⁴ policing,⁵ immigration,⁶ judging,⁷ and many other areas. As a result, many members of the public have come to believe that, in the United States, there is a “two-tiered” legal system where the government’s disparate enforcement of the law perpetuates systems of supremacy and subordination.⁸ These inequitable

1. *Taxpayer Bill of Rights: The Right to Be Informed*, INTERNAL REVENUE SERV., <https://www.irs.gov/taxpayer-bill-of-rights> (last updated Dec. 1, 2021) [<https://perma.cc/VXB6-4YMQ>].

2. Shu-Yi Oei & Leigh Z. Osofsky, *Constituencies and Control in Statutory Drafting: Interviews with Government Tax Counsels*, 104 IOWA L. REV. 1291, 1316 n.104 (2019).

3. See, e.g., SENT’G PROJECT, REPORT TO THE UNITED NATIONS SPECIAL RAPPOREUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE (Mar. 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [<https://perma.cc/DCD4-6X39>] (discussing racial disparities in the United States criminal justice system).

4. See, e.g., K-Sue Park, *Conquest and Slavery in the Property Law Course: Notes for Teachers*, GEO. UNIV. L. CTR. (July 24, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3659947&download=yes [<https://perma.cc/ZA7B-W657>] (describing history of slavery and subordination at the heart of property law).

5. See, e.g., *Mahoney v. Owens*, 818 F. App’x 894, 899 (11th Cir. 2020) (“Racism in policing is a particularly brutal facet of our country’s mistreatment of Black people.”).

6. See, e.g., Jayashri Srikantiah & Shirin Sinnar, *Essay, White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 198–203 (2019) (suggesting that certain U.S. immigration rhetorics and policies are steeped in white nationalism).

7. See, e.g., Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 110–11 (2017) (finding negative, implicit bias by judges against certain groups, with impacts on judicial outcomes).

8. See, e.g., Jeffrey Deskovic, *Looking Back: Our Two-Tiered Justice System*, DAVIS VANGUARD (Dec. 27, 2020), <https://www.davisvanguard.org/2020/12/looking-back-our-two-tiered-justice-system/> [<https://perma.cc/TWB9-PWG4>].

substantive and enforcement features of the law, in turn, undermine social justice.⁹

But there is another important, underappreciated inequity in the legal system: different people have access to different forms of the law, and these different forms of the law do not have equal value. Formal law, such as statutes, regulations, and case law, is binding on the government, but it is nearly impossible for most people to understand.¹⁰ On the other hand, informal law, such as agency explanations, instructions, website frequently asked questions, and other forms of administrative guidance, is easier for most people to understand, yet it does not bind the government.¹¹ This two-tiered system of law both dovetails with and exacerbates the inequities in substance and enforcement of law that others have identified.

The coexistence of both formal and informal law is a defining characteristic of the U.S. tax system. The tax law has widespread reach, resulting in close to 175 million individual, estate, and trust income tax returns filed with the Internal Revenue Service (“IRS”) each year.¹² Yet very few people can comprehend the formal law that dictates tax obligations, such as the Internal Revenue Code (“the Code”), the Treasury Regulations (“Regulations”), and case law.¹³ Moreover, those who draft the formal tax law do not even intend for most people to comprehend it.¹⁴ Instead, both tax law drafters and those who administer the tax law system expect the IRS and nongovernment advisors to fill in the gulf between the formal tax law and the public’s understanding of it.¹⁵ To assist those taxpayers who lack access to sophisticated advisors, the IRS offers tax guidance, a free, publicly accessible type of informal law.¹⁶ Throughout the COVID-19 pandemic, the IRS increased its use of informal law as a way to help taxpayers understand complex emergency relief rules implemented through the tax system.¹⁷

9. The meaning of social justice is contested and context dependent, but, in any event, is undermined when institutional structures fail to protect rights and just outcomes of certain groups of people in favor of others. *See, e.g.*, JANET L. FINN, *JUST PRACTICE: A SOCIAL JUSTICE APPROACH TO SOCIAL WORK* 13–31 (4th ed. 2020) (exploring social justice practice and frameworks).

10. *See infra* notes 262–266 and accompanying text.

11. *See infra* notes 262–266 and accompanying text.

12. *Returns Filed, Taxes Collected & Refunds Issued*, INTERNAL REVENUE SERV., <https://www.irs.gov/statistics/returns-filed-taxes-collected-and-refunds-issued> (last updated June 24, 2021) [<https://perma.cc/Q9H8-D5CL>].

13. *See infra* Part II.A.

14. *See infra* Part II.A.

15. *See infra* Part II.B.

16. *See infra* Part II.B.

17. *See infra* notes 169–172 and accompanying text.

In contrast to many other legal scholars who have examined important administrative law issues regarding informal tax guidance,¹⁸ in this Article, we reframe the topic as a social justice issue. We argue that the two tiers of formal and informal tax law systematically disadvantage taxpayers who lack access to sophisticated advisors. This imbalance occurs irrespective of whether the IRS's tax guidance contains statements that, if taxpayers followed them, would be taxpayer favorable or unfavorable. When the guidance contains taxpayer-favorable positions, the IRS is not legally bound by these positions and, during an audit, can contradict or ignore them.¹⁹ When the guidance contains taxpayer-unfriendly positions, taxpayers who rely on them are bound to these interpretations as a practical matter.²⁰ Worse yet, these taxpayers have almost no protection against tax penalties for incorrect positions that they claimed based on the IRS's tax guidance.²¹

By contrast, taxpayers who can access and apply the formal sources of tax law, such as the Code, Regulations, and case law, often through lawyers, are in a significantly better strategic position. When the formal tax law makes clear what the tax outcome is, taxpayers who can access this information can rely upon it.²² When the formal tax law does not make clear what the tax outcome is, taxpayers who can access these formal sources of tax law, usually with the assistance of advisors, can at least attempt to claim the most advantageous position (within reason) that these formal sources of law permit.²³ These taxpayers often have a good shot at winning, or at least avoiding penalties for trying, even if the position they claim is contrary to a taxpayer-unfavorable approach in the IRS's tax guidance.²⁴ As a result, compared to taxpayers who must rely on tax guidance from the IRS, well-resourced taxpayers who can access the formal tax law have a greater ability to pursue taxpayer-favorable outcomes.²⁵ Further, as we discuss, the disparate effects of formal and informal law may correlate with taxpayer characteristics such as income, rurality, gender, and race.²⁶

Our Article thus underscores how the drafting of the formal law is not a mere technocratic function. Rather, legal drafting provides

18. See *infra* notes 236–244 and accompanying text.

19. See *infra* notes 262–266 and accompanying text.

20. See *infra* notes 262–266 and accompanying text.

21. See *infra* notes 262–266 and accompanying text.

22. See *infra* Part II.A.

23. See *infra* Part II.D.

24. See *infra* Part II.D.

25. See *infra* Part II.D.

26. See *infra* Part II.D.

different groups of people with different, hierarchical relationships to the formal law, even before considering the formal law's substance or enforcement. Drafting of the formal law thereby has important implications for social justice. While the tax law is an acute example of the inequitable impacts of informal and formal law, it is not unique. Rather, tax law epitomizes a phenomenon that exists throughout the U.S. legal system.²⁷

Further, this two-tiered legal drafting system is not just an unfortunate by-product of different groups of people having different access to resources, but also is an ironic by-product of the Plain Writing Act of 2010.²⁸ Formal law in many areas is often comprised of complex statutes, regulations, and other legal materials that are difficult for much of the public to understand.²⁹ The Plain Writing Act of 2010 responds to this problem by requiring federal agencies to use language that explains the law to members of the public in ways they can understand.³⁰ However, the Act systematically perpetuates the inequities we have identified in this Article. By creating an alternative system of informal law for those who do not have access to the primary sources of formal law, the Plain Writing Act necessarily creates a second-tier system of informal law that lacks some of the protections and opportunities in the formal law. In this way, the Act obscures the very advantages it solidifies for those who already have the resources to access the formal law that remains in place.

After highlighting the growing gap between formal and informal tax law, and the resulting inequity it causes, we explore potential policy approaches to address it. First, we offer proposals for reforming the way in which formal tax law is drafted, such as through the use of rule-based statutory provisions and formalization of statutory language.³¹ Second, we outline changes to informal tax law that policymakers can adopt without legislation, such as the inclusion of warnings to taxpayers of contrary authorities in the formal tax law.³² Third, we consider whether and how the current law regarding taxpayer reliance on informal tax

27. See *infra* Part II.E.

28. Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861; see also Joshua D. Blank & Leigh Osofsky, *Simplicity: Plain Language and the Tax Law*, 66 EMORY L.J. 189, 202–04 (2017) [hereinafter Blank & Osofsky, *Simplicity*] (describing the goals of the plain language movement); Joshua D. Blank & Leigh Osofsky, *Automated Legal Guidance*, 106 CORNELL L. REV. 179, 208 (2020) [hereinafter Blank & Osofsky, *Automated*] (exploring how simplicity is a by-product of the plain language movement).

29. See *infra* Part I.A.

30. *Law and Requirements*, PLAIN LANGUAGE ACTION & INFO. NETWORK, <https://www.plainlanguage.gov/law/> (last visited Feb. 7, 2022) [<https://perma.cc/25FN-HP8Y>].

31. See *infra* Part III.A.

32. See *infra* Part III.B.

law, especially regarding the application of tax penalties, could be revised to create more equitable tax enforcement.³³ Finally, we propose research that the IRS should conduct to understand how certain taxpayer characteristics, such as income, filing status, and race, correlate with the likelihood of relying on informal tax law.³⁴

The remainder of this Article proceeds as follows. Part I describes scholarly analysis of ways in which the substance and enforcement of the legal system create class, race, and gender inequities, and introduces the concept of two-tiered legal drafting. Part II shows how two-tiered legal drafting disproportionately and systematically harms taxpayers who cannot afford sophisticated advisors. Part III presents several policy options for further studying and ameliorating the effects of two-tiered legal drafting. A brief conclusion follows.

I. TWO-TIERED LEGAL SYSTEMS: FORMAL AND INFORMAL LAW

A. Concerns About Tiered Legal Systems Generally

Legal scholars and other commentators have identified ways that both the substance and enforcement of our legal system perpetuate inequities.³⁵ These inequities are deeply rooted in racism, sexism, and other class-based forms of discrimination that subordinate historically marginalized groups.³⁶ These inequities in the legal system exacerbate existing inequalities.

As an especially salient example, scholars have reached widespread agreement that criminal law and law enforcement visit great inequity on people of color.³⁷ The spate of police killings of Black people is a searing indictment and epitomization of how this inequity

33. See *infra* Part III.C.

34. See *infra* Part III.D.

35. See *infra* notes 37–51.

36. See *infra* notes 37–51; see, e.g., David Leonhardt, Opinion, *The Black-White Wage Gap Is as Big as It Was in 1950*, N.Y. TIMES (June 25, 2020), <https://www.nytimes.com/2020/06/25/opinion/sunday/race-wage-gap.html> [<https://perma.cc/BX8Q-UMYA>] (exploring large wage gaps between Black and white individuals); *Seven Charts that Show Covid-19's Impact on Women's Employment*, MCKINSEY & CO. (Mar. 8, 2021), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/seven-charts-that-show-covid-19s-impact-on-womens-employment#> [<https://perma.cc/B8BH-8JZ4>] (detailing how COVID-19 dealt a major setback to women in the workplace); Christopher Wildeman & Emily A. Wang, *Mass Incarceration, Public Health, and Widening Inequality in the USA*, 389 LANCET 1464 (2017) (examining how mass incarceration leads to health inequality).

37. Darren Lenard Hutchinson, *Who Locked Us Up? Examining the Social Meaning of Black Punitiveness*, 127 YALE L.J. 2388, 2393 (2018) (reviewing JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017)).

exacts the most extreme consequences.³⁸ Behind these horrific deaths lies a system of criminal laws that has long punished Black and brown communities disproportionately.³⁹

These inequities in the criminal law are matched by inequities across the legal system. For instance, in property law, the U.S. Supreme Court embraced a racial hierarchy in property rights⁴⁰ when it deemed Native Americans to be “fierce savages” whose claim to land was necessarily subordinate to that of European conquerors.⁴¹ For their part, Black people by and large began their experience with the U.S. property system as subjects of it, in the form of enslaved people who themselves had no property rights.⁴² Even after slavery was outlawed, the property law system continued to racially discriminate, including through a notorious “redlining” system in which the government devalued property based on explicitly racist justifications, contributing to lasting segregation.⁴³ Women have suffered their own disabilities at the hands of property law, having long been subject to the doctrine of coverture. This doctrine meant that married women were legally subsumed by their husbands. This not only prevented married women from acquiring property in their own names, devising property by will, or claiming any of their earnings during their marriage, but also subjected them to legally sanctioned “correction” by their husbands, disallowed them from bringing rape charges against their husbands, and prevented them from bringing suit without joining their

38. See Cheryl W. Thompson, *Fatal Police Shootings of Unarmed Black People Reveal Troubling Patterns*, NPR (Jan. 25, 2021, 5:00 AM), <https://www.npr.org/2021/01/25/956177021/fatal-police-shootings-of-unarmed-black-people-reveal-troubling-patterns> [<https://perma.cc/DHM7-776X>].

39. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2012) (arguing that the U.S. system of mass incarceration creates a racial caste system); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004) (identifying the mechanisms through which mass incarceration inflicts disproportionate and immoral harm on Black communities).

40. See Park, *supra* note 4, at 1–20 (discussing how U.S. property law is predicated on a history of racial violence and subjugation).

41. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 590, 603 (1823).

42. See, e.g., *Hinds v. Brazealle*, 3 Miss. (2 Howard) 837, 843–44 (1838) (“[O]ur statute law prohibits slaves from owning certain kinds of property, and it may be inferred[] that the legislature supposed they were extending the act as far as it could be necessary to exclude them from owning any property . . .”); see also Michele Goodwin, *A Different Type of Property: White Women and the Human Property They Kept*, 119 MICH. L. REV. 1081 (2021) (reviewing HARRIET A. JACOBS, *INCIDENTS IN THE LIFE OF A GIRL* (L. Maria Child & Jean Fagan Yellin eds., 1987) and STEPHANIE E. JONES-ROGERS, *THEY WERE HER PROPERTY: WHITE WOMEN AS SLAVE OWNERS IN THE AMERICAN SOUTH* (2019)) (discussing how white women subjugated Blacks during slavery).

43. NPR, *Housing Segregation and Redlining in America: A Short History*, YOUTUBE (Apr. 11, 2018), <https://www.youtube.com/watch?v=O5FBjYqfoLM> [<https://perma.cc/F9UG-69K5>].

husbands.⁴⁴ Scholars have traced how the legacy of coverture continues to disempower women with accompanying broad, societal impacts inside of marriage,⁴⁵ outside of marriage,⁴⁶ and through immigration law.⁴⁷

Scholars have also shown how even areas of the law that, at first blush, seem less likely to be foci for discriminatory treatment nonetheless are rife with it in both substance and enforcement. For instance, in pathbreaking work, Professor Dorothy Brown has shown how seemingly neutral tax law has disproportionate impacts based on race, in particular impoverishing Black Americans.⁴⁸ Brown focuses on how the tax rules that apply to marriage, home ownership, education, employee compensation, investment, and wealth create a racially discriminatory tax system.⁴⁹ Others have begun to focus on racial disparities in IRS auditing, pointing out that audit rates tend to focus to a greater extent on taxpayers of color.⁵⁰ Indeed, at least some lawmakers have demanded to know more about whether IRS audit rates reflect racially discriminatory patterns.⁵¹

The examples of how the substance and enforcement of the law have subordinated and even victimized historically marginalized groups could go on and on. The bottom line is not an uplifting one. Through a painful but critical reckoning, commentators have displayed how both the substance and enforcement of the legal system are unequal. The law, as written and in practice, systemically discriminates

44. 1 WILLIAM BLACKSTONE, COMMENTARIES *442–45.

45. Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1361 (1983); Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 844–48 (2004); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2131 (1994).

46. Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2144 (2019).

47. Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593 (1991); Mariela Olivares, *Battered by Law: The Political Subordination of Immigrant Women*, 64 AM. U. L. REV. 231 (2014).

48. DOROTHY A. BROWN, THE WHITENESS OF WEALTH (2021). *The Whiteness of Wealth* was a culminating moment, built on Brown's career as an incisive, and leading, scholar on race and the tax law.

49. *See id.*

50. *See, e.g.*, CHYE-CHING HUANG & RODERICK TAYLOR, CTR. ON BUDGET & POL'Y PRIORITIES, HOW THE FEDERAL TAX CODE CAN BETTER ADVANCE RACIAL EQUITY 17–21 (July 2019), <https://www.cbpp.org/sites/default/files/atoms/files/7-25-19tax.pdf> [<https://perma.cc/7AF6-L24R>] (summarizing findings).

51. Paul Kiel, *Lawmakers Just Confronted the IRS over Tax Audits that Target the Poor*, PROPUBLICA (Apr. 10, 2019, 4:48 PM), <https://www.propublica.org/article/lawmakers-to-irs-commissioner-charles-rettig-system-stacked-for-the-rich> [<https://perma.cc/Z4XG-8QK2>]; Steven Dean, *Beware the Unintended Consequences of Biden's New IRS Spending*, N.Y. DAILY NEWS (May 5, 2021, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-beware-the-unintended-consequences-of-bidens-irs-spending-20210505-ty6iwne2eupocyp26mnkd2au-story.html> [<https://perma.cc/Ry9G-FW5S>].

against historically marginalized groups in ways that undermine our progress toward greater social justice.

B. Two-Tiered Legal Drafting

Our Article starts where this analysis leaves off. If the law, as written and in practice, systemically discriminates, what about *how* the law is written? In other words, putting aside the substance of the law on the page and the way that agencies and law enforcement translate law to practice, what about the process of putting the law on the page in the first place? Does the drafting of the law itself discriminate?

As an initial matter, there are, of course, many sources of law which can be categorized along a variety of dimensions, including law that originates in statutes versus common law, as well as federal law versus state law versus local law, and many other variations. In this Article, we focus principally on federal law carried out by agencies. We do so for tractability, but also because the bodies of federal law that emanate from the administrative state are responsible for regulating enormous amounts of our lives, from the air we breathe, to the food we eat, to the working conditions we are entitled to, to the social security we will collect, and much more.⁵² As a result, to the extent that the drafting of this body of law has any discriminatory effects, they are likely wide-ranging and impactful. We believe similar analysis would be fruitful in other legal regimes, including those that are principally nonfederal or based in common law, the Constitution, or other sources of law.

If federal law carried out by agencies is the source of our examination, then it must begin with the federal statutes that Congress creates. These statutes set the foundation for and parameters around the law that agencies carry out.⁵³ While assessing the complexity of law is a tricky business,⁵⁴ thankfully no close calls have to be made—federal

52. Cf. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1234 (1994) (lamenting federal government's seeming "general jurisdiction over citizens' affairs").

53. See, e.g., Jason Webb Yackee & Susan Webb Yackee, *From Legislation to Regulation: An Empirical Examination of Agency Responsiveness to Congressional Delegations of Regulatory Authority*, 68 ADMIN. L. REV. 395, 397 (2016) (describing the relationship between Congress and federal agencies).

54. See, e.g., Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 2 (1992) (explaining how any attempt to examine legal complexity is "fraught with difficulties"); Mila Sohoni, *The Idea of "Too Much Law,"* 80 FORDHAM L. REV. 1585, 1601–22 (2012) (offering a trenchant critique of laments about "hyperlexis" in the law); J.B. Ruhl & Daniel Martin Katz, *Measuring, Monitoring, and Managing Legal Complexity*, 101 IOWA L. REV. 191, 194 (2015); R. George Wright, *The Illusion of Simplicity: An Explanation of Why the Law Can't Just Be Less Complex*, 27 FLA. ST. U. L. REV. 715, 716 (2000) ("Complexity in the law is much more complex than we imagine.").

statutes are both extremely extensive and complex. Ushered in by a sweeping reimagination of the federal government starting, but certainly not ending, with the New Deal, the statutes that govern the administrative state have ballooned over time, both in size and involvement in everyday life.⁵⁵ Determining with certainty the extensiveness of even one subject matter of this vast apparatus is difficult.⁵⁶ Multiplied across the entirety, this task becomes intractable. It is easy to conclude, however, that the federal statutes governing the administrative state are extremely difficult to read. For instance, environmental law scholars have bemoaned how federal environmental statutes “maintain an almost overwhelming degree of complexity.”⁵⁷ The U.S. Court of Appeals for the Second Circuit has compared federal immigration laws to “King Minos’s labyrinth.”⁵⁸ And federal courts have reasoned that the complexity of the Medicare statute is so “tremendous” that courts should be more deferential to the Agency’s interpretations.⁵⁹

As complex and detailed as these federal statutes are, the regulations that agencies promulgate to carry them out increase both the length and complexity of the law by an order of magnitude.⁶⁰ As a general matter, administrative regulations tend to contain a plethora of highly technical rules, combined with numerous unanswered questions, and even downright contradictions.⁶¹ They are also voluminous and prone to grow over time through a process of regulatory accretion.⁶² For instance, one commentator has noted that the Clean Air Act, at times referred to as “the most complicated statute in history” is

55. EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* 12–13 (5th prtg. 2010) (describing new wave of regulation promulgated in the 1960s and 1970s); Ronald A. Cass, *Staying Agency Rules: Constitutional Structure and Rule of Law in the Administrative State*, 69 ADMIN. L. REV. 225, 238 (2017) (tracing the trend back to New Deal, but noting its continuation through subsequent presidential administrations). Bayless Manning, perhaps notoriously, declared, “Statutory codes, such as those in the fields of commercial law and taxation, are becoming ever more particularistic, longer, more complex, and less comprehensible. We are drowning in law.” Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767, 767 (1977).

56. 1 TAXPAYER ADVOC. SERV., U.S. DEP’T OF THE TREASURY, NATIONAL TAXPAYER ADVOCATE: 2008 ANNUAL REPORT TO CONGRESS 1 (Dec. 2008), https://www.irs.gov/pub/tas/08_tas_arc_intro_toc_msp.pdf [<https://perma.cc/W7J3-36C9>] (describing difficulty in determining how long the Internal Revenue Code is).

57. Blake Hudson, *Relative Administrability, Conservatives, and Environmental Regulatory Reform*, 68 FLA. L. REV. 1661, 1674 (2016).

58. *Lok v. Immigr. & Naturalization Serv.*, 548 F.2d 37, 38 (2d Cir. 1977).

59. *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1229 (D.C. Cir. 1994).

60. Cass, *supra* note 55, at 228.

61. See, e.g., J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757, 761 (2003) (discussing such complexity).

62. *Id.* at 783–88; see also Manning, *supra* note 55, at 773 (“Old laws and old agencies neither die nor fade away; being nonbiodegradable they only accumulate.”).

“compounded by the thousands of pages of federal regulations and the overlapping statutes and regulations adopted by each individual state.”⁶³

To make matters even more complicated, as detailed as statutory and regulatory regimes are, they nonetheless leave many open questions. Indeed, in a somewhat perverse, but predictable, fashion the very intricacy of the statutes and regulations tends to create additional questions about how, exactly, a specific administrative provision applies in a specific context.⁶⁴ This means that courts and administrative decisionmakers have to create yet more law in order to interpret the ambiguities left in the statutory and regulatory regimes.⁶⁵ Even putting aside ambiguities in regulatory regimes, critical aspects of such regimes are often subject to legal challenge or political reversal, placing into further doubt the extent to which regulated parties can rely on regulatory rules to govern their behavior.⁶⁶ Understanding how the resulting judicial interventions and subsequent agency actions affect and change the regulatory regime requires a high level of lawyerly expertise.⁶⁷ The result is that statutory and regulatory schemes, which govern immense aspects of daily life, nonetheless are not comprehensible to large swaths of the governed.

This yields a predictable problem. How can federal statutory and regulatory regimes widely govern daily life when many, if not most, people and businesses subject to them cannot understand them? This dilemma is apparent from the examples courts pointed to above. If federal environmental laws “maintain an almost overwhelming degree of complexity,”⁶⁸ how will small businesses that are subject to them, and critical to the law’s success—know how to comply with them?⁶⁹ If federal immigration laws are akin to “King Minos’s labyrinth in ancient

63. Erich Birch, *Air Quality Regulation in the United States: A Complicated System Yields Laudable Results*, BUS. L. TODAY, July–Aug. 2007, at 13, 13.

64. See, e.g., David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860, 871 (1999) (“The more complex tax law gets, the greater the number of interactions among the rules and the more complex the law must be.”).

65. Extensive judicial attention has been paid to what deference courts should accord agencies’ interpretations of ambiguous regulations. See, e.g., *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (examining questions of *Auer* deference).

66. Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 266 (2019).

67. William J. Brennan, Jr., *Commencement Address Delivered to Loyola Law School Class of 1986*, 31 LOY. L.A. L. REV. 725, 726–27 (1998) (“[Lawyers] alone . . . are equipped to penetrate directly and incisively to the core of a problem through the cloud of statute, rules, regulations and rulings which invariably obscure it to the lay eye . . .”).

68. Hudson, *supra* note 57, at 1674.

69. Cf., e.g., *Small Business Compliance*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/compliance/small-business-compliance> (last updated Feb. 5, 2021) [<https://perma.cc/NLX3-S2FK>] (providing resources for small businesses).

Crete,”⁷⁰ how will immigrants, who are often already vulnerable and face language barriers,⁷¹ know how to navigate the system? If the Medicare statute is filled with “tremendous complexity,”⁷² how will the tens of millions of individuals enrolled in it know what they are entitled to receive?⁷³ Must each of the parties mentioned in these examples attempt to decipher the complex and voluminous federal statutes, regulations, and case law that govern their behavior, or hire highly skilled lawyers to do so?⁷⁴

The answer to this problem is that federal agencies translate complex statutory and regulatory regimes (and their accompanying case law) into easily accessible “plain language.”⁷⁵ For instance, among many other efforts, the EPA offers Compliance Assistance Centers, which “help businesses, colleges and universities, local governments, tribes and federal facilities understand and comply with environmental requirements.”⁷⁶ The Compliance Assistance Centers “offer easy access to plain-language materials and other resources on environmental compliance.”⁷⁷ The U.S. Citizenship and Immigration Services (“USCIS”) likewise offers practical advice that translates the law for people, including through a virtual assistant, Emma.⁷⁸ And the Centers for Medicare and Medicaid Services offers users the ability to enter a test, item, or service to see whether it is covered.⁷⁹ Indeed, the Agency even offers a “What’s Covered” app for mobile devices, which “helps you

70. *Lok v. Immigr. & Naturalization Serv.*, 548 F.2d 37, 38 (2d Cir. 1977).

71. *Aris v. Mukasey*, 517 F.3d 595, 600 (2008).

72. *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1229 (D.C. Cir. 1994).

73. *CMS Releases Latest Enrollment Figures for Medicare, Medicaid, and Children’s Health Insurance Programs (CHIP)*, CMS.GOV (Dec. 21, 2021), <https://www.cms.gov/newsroom/news-alert/cms-releases-latest-enrollment-figures-medicare-medicaid-and-childrens-health-insurance-program-chip> [<https://perma.cc/2UGE-CQ2X>]; see also *Medicare Enrollment*, CMS.GOV, <https://www.cms.gov/research-statistics-data-systems/cms-program-statistics/2019-medicare-enrollment-section#Total> (last modified Feb. 3, 2022, 10:28 AM) [<https://perma.cc/EW5LPGTB>].

74. There is another important question that should be examined in future work: How should the numerous federal employees charged with applying the complex statutory and regulatory regimes know how to apply them? Cf., e.g., Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 808 (2001) (exploring agencies’ explaining to their internal agents how to properly apply the law).

75. Courts have begun employing similar tactics. See Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 455–56 (2016) (describing courts’ development of “plain language forms” for tasks like pleadings).

76. *Compliance Assistance Centers*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/compliance/compliance-assistance-centers> (last updated Nov. 5, 2021) [<https://perma.cc/U27J-PR78>].

77. *Id.*

78. *Meet Emma, Our Virtual Assistant*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/emma> (last updated Apr. 13, 2018) [<https://perma.cc/GW6R-33BQ>]; see also Blank & Osofsky, *Automated*, *supra* note 28, at 181 (exploring automated legal guidance).

79. *Plain Writing*, MEDICARE.GOV, <https://www.medicare.gov/about-us/plain-writing> (last visited Feb. 7, 2022) [<https://perma.cc/4DDM-JR93>].

understand the health care coverage offered by Original Medicare Part A (Hospital Insurance) and Part B (Medical Insurance).”⁸⁰ All three agencies profess their adherence to plain language principles in offering these and other communications to the public,⁸¹ and USCIS even has a series of relatable YouTube videos explaining how to apply plain language principles to its communications.⁸²

It is no coincidence that these and other federal agencies use plain language and interactive tools to try to explain the complex statutory and regulatory regimes in a way the public can understand. The Plain Writing Act of 2010 requires agencies to use “clear Government communication that the public can understand and use” in letters, forms, notices, publications, or instructions regarding federal benefits or tax filings or compliance with federal requirements.⁸³ Notably, the Plain Writing Act does not apply to federal regulations,⁸⁴ it does not apply to Congress (or the statutes Congress produces), and it does not apply to federal courts (or the opinions that federal courts produce).

The dynamics described above create an underappreciated, two-tiered system of legal drafting: on the one hand, inordinately complex statutes, regulations, and case law offer the law in great detail for the few who can access it; on the other hand, agencies offer a significantly simplified,⁸⁵ plain language explanation of the law for the rest of the public. This creates what we refer to here as a private system of law for the few, and a public system of law for everyone else. The small number of people and businesses who have the expertise and resources to hire highly skilled attorneys to decipher the formal law (as offered in as statutes, regulations, and case law), get to access interpretations offered by a private market: namely, highly skilled attorneys. Those who lack the resources or wherewithal to access this private market

80. *App Store Preview, What's Covered: Official Medicare Coverage App*, APPLE, <https://apps.apple.com/us/app/whats-covered/id1444143600> (last visited Feb. 7, 2022) [<https://perma.cc/XF3J-G9ZL>].

81. *USCIS Plain Language*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/about-us/uscis-plain-language> (last visited Feb. 7, 2022) [<https://perma.cc/W56A-LAMC>]; *Plain Writing*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/home/plain-writing> (last visited Feb. 7, 2022) [<https://perma.cc/8HFH-KCME>]; MEDICARE.GOV, *supra* note 79.

82. *See, e.g.*, U.S. CITIZENSHIP & IMMIGR. SERVS., *USCIS Plain Language: Put Your Main Message First*, YOUTUBE (Jan. 28, 2016), <https://www.youtube.com/watch?v=G-SNW6ye9rU> [<https://perma.cc/6CYH-FULV>].

83. Plain Writing Act of 2010, Pub. L. No. 111-274, §§ 2-3, 124 Stat. 2861, 2861.

84. *Id.* § 3(2)(C).

85. *See* Blank & Osofsky, *Simplicity*, *supra* note 28, at 207 (introducing the concept of “simplicity”).

instead get the public option: explanations of the formal law in plain language that are offered as a service by government agencies.

C. *The Expanding Gap*

We believe that, if anything, the gap between the private and public options has only expanded, and will likely expand further over time. First, as the world becomes more complex, so too must the statutes and regulations that attempt to respond to it.⁸⁶ This remains true despite periodic efforts at regulatory reductions. Various recent presidential administrations have attempted to reduce unnecessary or overly burdensome regulation or reduce regulatory volume.⁸⁷ And yet, while it is very difficult to use any simple measure of regulatory activity, it is clear that regulation has continued apace,⁸⁸ resulting in a steady accretion over time.⁸⁹

At the same time, there has been increased chaos in the statutory process. As government has become more polarized and legislation has become more difficult to pass, there has been a rise in “unorthodox legislation” to accomplish legislative objectives.⁹⁰ Among other things, such unorthodox legislation includes the use of extreme legislative bundling, deterioration of expert and committee control, and increased use of rapid-fire changes and post-committee amendments.⁹¹ Together, these phenomena result in lower opportunity for quality control, more inadvertant, unanswered questions, and downright statutory mistakes.⁹²

While some forces push regulatory and statutory complexity in an upward direction, other forces pressure agencies to offer seemingly clearer, easy-to-use guidance to the public. The rise of automation in the private sector and increasing technological capacity are shaping

86. See, e.g., Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 401 (2019).

87. See, e.g., Exec. Order No. 12,866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735, 51,739–40 (Oct. 4, 1993); Exec. Order No. 13,563, *Improving Regulation and Regulatory Review*, 3 C.F.R. § 6 (2012); Exec. Order No. 13,771, *Reducing Regulation and Controlling Regulatory Costs*, 82 Fed. Reg. 9,339 (Jan. 30, 2017); Exec. Order No. 13,777, *Enforcing the Regulatory Reform Agenda*, 82 Fed. Reg. 12,285, 12,286 (Feb. 24, 2017).

88. *Reg Stats*, GW REGUL. STUD. CTR., <https://regulatorystudies.columbian.gwu.edu/reg-stats> (last visited Jan. 29, 2022) [<http://perma.cc/V84P-5WA4>]; Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 1414, 1422 (2012).

89. See Ruhl & Salzman, *supra* note 61 (exploring regulatory accretion).

90. BARBARA SINCLAIR, *PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING* (2006).

91. Leigh Osofsky, *Agency Legislative Fixes*, 105 IOWA L. REV. 2107, 2115–17 (2020); see also BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS* (5th ed. 2016) (providing background).

92. Osofsky, *supra* note 91, at 2117–18.

expectations with respect to the law as well.⁹³ Individuals and businesses that rely on agencies' explanations are thus expecting greater ease of use at the very time that the law itself grows more complex. The government is responding with more, and more innovative, attempts to simplify interactions with the law,⁹⁴ thus yielding a greater gap between the public and private options of the law.

D. Who Uses the Public System of Law?

Recognizing that two-tiered legal drafting leads to public and private versions of the law, and that, if anything, the gap between them may only be expanding, is an important development in and of itself. What makes this recognition even more pressing is the possibility that the public and private options may not be distributed evenly across the population. Rather, they are likely distributed based on income level, and may even correlate with other characteristics, such as rurality, gender, disability, and race.

The access to justice literature offers ways to begin thinking about this possibility. While much more empirical work remains to be done about access to justice,⁹⁵ it is clear that low-income Americans, who generally do not have the same access to higher education,⁹⁶ suffer from inadequate access to lawyers. Poor people are more likely to have problems that implicate the civil law than middle- or high-income individuals.⁹⁷ In attempting to resolve such problems, low-income individuals often lack adequate legal counsel. An important study documented that low-income individuals received no or inadequate legal assistance eighty-six percent of the time.⁹⁸ A complex set of explanations results in this unmet need for legal assistance, including, in addition to lack of monetary resources, dearth of available legal counsel, not knowing that legal assistance could help, a desire to handle the situation oneself, and a general aversion to the legal system created

93. Blank & Osofsky, *Simplexity*, *supra* note 28, at 197–98.

94. *See, e.g., supra* note 80 and accompanying text (describing the Medicare “What’s Covered” app).

95. Sandefur, *supra* note 75, at 453.

96. *See* LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (June 2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/DQ22-ZXPL>] [hereinafter LEGAL SERVS. REP.].

97. REBECCA L. SANDEFUR, AM. BAR FOUND., ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY (Aug. 2014), http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf [<https://perma.cc/J9KK-EKSQ>] [hereinafter SANDEFUR REP.].

98. *Id.* at 6.

by prior experiences with the justice system and/or a general distrust of the legal system and a lack of faith in institutions.⁹⁹

These findings have implications for the public versus private options created by two-tiered legal drafting. To the extent that the private option is accessible through highly skilled attorneys, individuals who are low-income (and who are less likely themselves to have access to higher education) are often unlikely to access highly skilled attorneys. Instead, they are much more likely to go it alone, relying on simplified explanations offered by the government itself in order to claim benefits and follow requirements. In interview research about access to justice, Professor Sara Sternberg Greene offered a vignette of how these dynamics played out for one individual in the case of filing for disability benefits. The individual explained,

I hated going and filling out all that paperwork for disability. I really needed it, I could hardly get up, my back was that shot. I got it, but they made me feel dumb. I resolutely there and then I'd get back on me feet. And I did. I do things for myself.¹⁰⁰

A low-income individual who goes it alone in this way is highly unlikely to access the complicated statutory and regulatory provisions that comprise the disability benefits system. They are much more likely to trudge through relying on simplified explanations offered by the government on forms, in addition to experiences and tips shared by family and friends.¹⁰¹

Lack of access to formal law may correlate with other characteristics, in addition to income. For instance, the access to justice literature has examined the extent to which various other characteristics, such as rurality, disability, and status as a veteran affect the likelihood of receiving legal assistance.¹⁰² Access to justice literature also suggests that race may correlate with likelihood of accessing lawyers.¹⁰³ Yet, as we will discuss in further detail in Part

99. LEGAL SERVS. REP., *supra* note 96, at 7; SANDEFUR REP., *supra* note 97, at 12–13.

100. Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1298 (2016); *see also* Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129 (2010).

101. SANDEFUR REP., *supra* note 97, at 11 (finding that people handled civil justice situations through the help of family or friends twenty-three percent of the time).

102. *See, e.g.*, LEGAL SERVS. REP., *supra* note 96, at 8 (identifying rate of civil legal problems in these groups, among others); *see also, e.g.*, Lisa R. Pruitt et. al., *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15 (2018) (exploring legal deserts that exist in rural areas and the accompanying access to justice crisis).

103. *See, e.g.*, Brian Libgober, *Getting a Lawyer While Black: A Field Experiment*, 24 LEWIS & CLARK L. REV. 53, 54 (2020) (finding that lawyers responded twice as frequently to requests for assistance from people with white-sounding names, relative to those with Black-sounding names); Amy Myrick, Robert L. Nelson & Laura Beth Neilsen, *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y

III.D, the Treasury Department and the IRS do not currently collect important data regarding taxpayers that would allow researchers to examine how these differing characteristics affect taxpayers' experiences with the tax law. In particular, Treasury and the IRS notably fail to collect data regarding the race of taxpayers.¹⁰⁴

To the extent that different groups of people have access to different forms of the law, and those forms are not, in fact, equivalent, the two-tiered system of law may discriminate between members of the public in problematic ways. In the next Part, we explore this possibility by examining in detail the similarities and differences between the private and public versions of the tax law, an area of law that is both extremely complicated and particularly pervasive.

II. TWO-TIERED LEGAL DRAFTING AND THE TAX LAW

The coexistence of formal and informal law is a distinguishing feature of the U.S. tax system. In large part, this is because of the extraordinary complexity of the formal tax law. This Part describes the sources of formal and informal tax law in the United States, examines the role of tax lawyers in helping taxpayers access the formal tax law, argues that the two-tiered nature of the U.S. tax system disadvantages taxpayers who lack access to sophisticated advisors, and, last, shows how these features are not unique to tax law.

A. Formal Tax Law

Congress drafts the primary source of federal tax law in tax statutes, which the Office of Law Revision Counsel then organizes in the form of the Internal Revenue Code.¹⁰⁵ By all accounts, the Code is extremely complex.¹⁰⁶ Scholars and policymakers have identified many good reasons for this complexity. The Code governs a panoply of underlying behaviors and activities, and it must be sufficiently detailed

705 (2012) (finding that higher likelihood of representation by a lawyer tended to correlate with other characteristics (such as gender and race)).

104. See *infra* discussion accompanying notes 387–389.

105. See *Drafting Legislation*, HOUSE OFF. OF THE LEGIS. COUNS., <https://legcounsel.house.gov/holc-guide-legislative-drafting#IIA> (last visited Mar. 6, 2022) [<https://perma.cc/M7N4-VJBG>] (describing codification process generally).

106. This is such a widely held view that it is difficult to choose any one source that stands for this proposition. As Taxpayer Advocate, Nina Olson was especially vocal about the extent of the complexity of the Internal Revenue Code. See, e.g., Nina E. Olson, Opinion, *We Still Need a Simpler Tax Code*, WALL ST. J. (Apr. 10, 2009, 12:01 AM), <https://www.wsj.com/articles/SB123933106888707793> [<https://perma.cc/67YV-C622>] (explaining that the complexity of the Code is one of the most significant problems in the tax system).

to do so effectively.¹⁰⁷ On top of being a source of revenue for the government, the tax law also seeks to be a source of redistribution.¹⁰⁸ As such, it must be sufficiently complex to ensure accurate targeting of the right amount of tax liability to the right people.¹⁰⁹ Moreover, in its attempts to accurately tax and redistribute, the Code has to contend with numerous taxpayers who will try to take advantage of loopholes in the law in order to avoid taxation.¹¹⁰ Plugging up any such loopholes to protect revenue and ensure a fairer and more efficient tax system increases the complexity of the Code yet again.¹¹¹ Making matters harder still, the Code has increasingly become a means to achieve many social goals, thus causing even more complicated and tangential statutory rules to be included in the Code.¹¹²

The political economy of tax legislation exacerbates these difficulties. Various legislative limitations, such as budgeting rules, often require tax legislation to be passed in nonintuitive ways, including through the use of temporary, or sunset, provisions which pervade the Code.¹¹³ The salience of tax law for lobbyists and constituents prompts politicians to frequently tinker with the Code, creating numerous changes, and often confusing effective dates, for various provisions.¹¹⁴ Limited legislative resources and difficulty in getting legislation passed can cause these changes to occur in rushed fashion, undermining the quality of the legislative product and making it yet more difficult to understand.¹¹⁵

Even after accounting for the challenges detailed above, the Code is still drafted in an extraordinarily and, some would say, unnecessarily complex way. The Code contains intricate cross-references, dependent clauses, and other drafting formulations, which

107. See, e.g., Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 VA. TAX REV. 645, 660 (2003) (explaining and supporting this proposition).

108. See, e.g., I.R.C. § 1 (providing progressive marginal income tax rates).

109. See Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150 (1995) (exploring the accuracy/complexity tradeoff).

110. See, e.g., Heather M. Field, *A Taxonomy for Tax Loopholes*, 55 HOUS. L. REV. 545 (2018) (providing a general taxonomy for tax loopholes).

111. Jeffrey Partlow, *The Necessity of Complexity in the Tax System*, 13 WYO. L. REV. 303, 315 (2013).

112. See generally Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717, 1723–36 (2014) (exploring functions of the tax law).

113. See, e.g., Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 GA. L. REV. 335, 338 (2006) (exploring sunset provisions in the tax code).

114. Heather M. Field, *Taxpayer Choice in Legal Transitions*, 29 VA. TAX REV. 505, 506 (2010) (noting frequent changes to the tax law and exploring legal transitions).

115. See, e.g., Leigh Osofsky, *Agency Legislative Fixes*, 105 IOWA L. REV. 2107, 2110 (2020) (exploring these dynamics in the context of the Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017)).

make it difficult for any non-tax-law experts to read the Code.¹¹⁶ A great example is the exception-that-swallows-the-rule drafting prevalent throughout the Code, in which one provision appears to state a universal, general principle, only to be followed by other provisions that make the general rule inapplicable in numerous circumstances.¹¹⁷

An important, but underappreciated, reason why the Code is often drafted in these complex ways is that it is drafted by experts and for experts. Many parties participate in drafting the Code, including, as with other areas of law, Congresspeople, the President, their political advisors, and lobbyists. In addition to these participants, there is also a less well-known cadre of tax law experts that plays an important role in the Code drafting process. Most notably, the Joint Committee on Taxation is a nonpartisan committee of experts charged with assisting Congress with every aspect of the legislative process, including developing legislative proposals, preparing revenue estimates, and drafting legislative histories of tax law.¹¹⁸

The Joint Committee includes both Congresspeople (as members) and high-level tax law and economics experts (as staff members).¹¹⁹ Tax law experts also guide the House Ways and Means Committee and the Senate Finance Committee, as well as the political parties on both sides, in their drafting of tax legislation. Such experts include, for instance, lawyers with decades of experience in various aspects of tax law practice.¹²⁰

The offices of legislative counsel in both the House and Senate also play a key role in drafting tax legislation. Generally, these offices work with congressional members and committees to turn Congress's policy preferences into "clear, concise, and legally effective legislative language."¹²¹ As Wade Ballou, Legislative Counsel of the House of Representatives, has described, it takes years of specialized training for

116. See, e.g., Sarah B. Lawsky, *Formalizing the Code*, 70 TAX L. REV. 377, 377 (2017) (highlighting some of these features).

117. An example of this phenomenon can be found in § 721(a) of the Code, which purports to confer no recognition of gain or loss on contribution to a partnership, a rule that has numerous exceptions that follow throughout the partnership tax rules.

118. *About Us: Overview*, JOINT COMM. ON TAX'N, <https://www.jct.gov/about-us/overview/> (last visited Jan. 11, 2022) [<https://perma.cc/B27E-6NSV>].

119. *Committee Members*, JOINT COMM. ON TAX'N, <https://www.jct.gov/about-us/committee-members/> (last visited Jan. 11, 2022) [<https://perma.cc/5HPY-W488>]; *Current Staff*, JOINT COMM. ON TAX'N, <https://www.jct.gov/about-us/current-staff/> (last visited Jan. 11, 2022) [<https://perma.cc/95L3-C6N4>].

120. Ryan McCrimmon & Peter Cohn, *End of an Era on Senate Finance as Longtime Staffer Departs*, ROLL CALL (May 23, 2018, 5:02 AM), <https://www.rollcall.com/2018/05/23/end-of-an-era-on-senate-finance-as-longtime-staffer-departs/> [<https://perma.cc/WH35-QA4V>].

121. HOUSE OFF. OF LEGIS. COUNS., <https://legcounsel.house.gov/> (last visited Jan. 11, 2022) [<https://perma.cc/3W3D-Q7ME>]; SENATE OFF. OF LEGIS. COUNS., <https://www.slc.senate.gov/> (last visited Jan. 11, 2022) [<https://perma.cc/X7C3-S8Y9>].

lawyers to be trained as legislative counsel drafters, and complex areas of law such as tax legislation “require considerably longer mentorships.”¹²²

Part of Legislative Counsel’s role is to bring tax law into conformity with long-standing tax law drafting conventions, including drafting practices and terms of art that would not occur to non-tax-law experts. As a result, Legislative Counsel follows drafting conventions that derive from as early as the 1950s, with manuals from the 1980s keeping track of these practices and perpetuating them further.¹²³ As of yet, tax law drafters have not attempted to update the Code to make it more compatible with modern modes of communication, such as programming technology.¹²⁴

When this group of tax law experts drafts the tax law, their goal is not to make it readable for taxpayers. Tax law drafters are concerned with accurately and carefully translating congressional preferences into tax legislation.¹²⁵ This is an extremely difficult job in and of itself, especially given many external constraints such as time pressure and political interference in a deliberative drafting process.¹²⁶ Almost certainly owing in part to the difficulty of meeting even this principal goal, tax legislation drafters do not expect the vast majority of taxpayers to be able to read the tax law they draft.¹²⁷ Rather, tax legislative drafters have indicated that they are drafting for constituencies of other experts, including sophisticated tax advisors, the Treasury Department, and TurboTax, who will then translate the law for taxpayers.¹²⁸ Perhaps most strikingly, one tax legislative drafter has suggested that tax legislation drafters are drafting the Code for each other as a means of impressing those who might serve as potential employers or colleagues in future contexts.¹²⁹ Another tax law drafter similarly has suggested that the Code-drafting process was “inward focused” and staffers “are writing for themselves.”¹³⁰

122. *Fiscal Year 2021 Budget Hearing Before the H. Subcomm. on Legis. Branch Appropriations*, 116th Cong. 7 (2021) (statement of E. Wade Ballou, Jr., Legislative Counsel, Office of the Legislative Counsel, United States House of Reps.).

123. Oei & Osofsky, *supra* note 2, at 1348.

124. *Id.*

125. *Id.* at 1295. The majority of tax legislation drafters interviewed “did not pay much attention to how a statute was formulated, and did not think it mattered, as long as the intended rule was accurately articulated.” *Id.*

126. *Cf., e.g.*, Victor Fleischer, *The State of America’s Tax Institutions*, 81 LAW & CONTEMP. PROBS. 7 (2018) (lamenting the difficulties of the tax legislative process).

127. Oei & Osofsky, *supra* note 2, at 1318.

128. *Id.* at 1317–18.

129. *Id.* at 1318.

130. *Id.*

The mindset that the Code is written by experts and for experts, without an expectation that most taxpayers will be able to use it directly to fill out tax returns, is evident in the final product—the Code itself. Take, as just one example, the rate of taxation imposed on taxpayers. This information, one of the seemingly most straightforward and fundamental aspects of the tax law, is contained in section 1 of the Code.¹³¹ Yet it would be impossible for anyone who was not extremely well-versed in the tax law to use section 1 of the Code to figure out what rate of taxation applies. Section 1 begins with four different tax tables that apply to individual taxpayers.¹³² Knowing which table applies to a specific taxpayer requires the taxpayer to understand complicated, embedded terms, such as a “head of household,” a nonobvious term defined by a different Code section.¹³³ Even after figuring out which rate table applies, a taxpayer does not have any idea what rate of taxation applies to that taxpayer. The rate tables offered in the beginning of section 1 are only a snapshot in time. The rest of section 1 goes on to say that the rate tables have to be modified to reflect legislative concepts like phaseouts of certain rate brackets,¹³⁴ cost-of-living adjustments,¹³⁵ special rates for unearned income of children,¹³⁶ the capital gains rate (the provisions for which are extraordinarily lengthy and convoluted and almost impossible to understand from the provisions themselves),¹³⁷ and various legislative changes to the rate tables that apply only in certain years¹³⁸ and which themselves are subject to adjustment for things like inflation.¹³⁹

As complex as the Code is, it is also only a small part of the formal tax law. As one Joint Committee on Taxation lawyer has explained, the actual Code is just a small fraction, or around four thousand pages, of the more than seventy thousand pages that is often publicly cited as the length of the Code.¹⁴⁰ Much of the remainder of this

131. I.R.C. § 1.

132. *Id.* § 1(a)-(d). There is an additional table for estates and trusts. *Id.* § 1(e).

133. *Id.* §§ 1(b), 2(b).

134. *Id.* § 1(f)(8).

135. *Id.* § 1(f)(3).

136. *Id.* § 1(g).

137. *Id.* § 1(h).

138. *Id.* § 1(i), (j).

139. *Id.* § 1(j)(5)(C).

140. Andrew L. Grossman, *Is the Tax Code Really 70,000 Pages Long?*, SLATE (Apr. 14, 2014, 11:56 PM), <https://slate.com/news-and-politics/2014/04/how-long-is-the-tax-code-it-is-far-shorter-than-70000-pages.html> [https://perma.cc/JSX4-6YWK].

more-than-seventy-thousand-page number includes the regulations and case law that amplify, explain, and implement the Code.¹⁴¹

The Regulations, which are drafted by tax experts at the Treasury Department,¹⁴² increase the complexity of the formal tax law significantly. Treasury promulgates such regulations pursuant to Congress's explicit delegation that Treasury may "prescribe all needful rules and regulations for the enforcement" of the Code.¹⁴³ As the IRS describes, the Regulations "pick up where the Internal Revenue Code . . . leaves off by providing the official interpretation of the IRC by the U.S. Department of the Treasury."¹⁴⁴ The Regulations generally multiply the length of a given Code section many times over. One example relates to section 482 of the Code. The Code section itself, which comprises a mere paragraph, provides Treasury discretion to reallocate tax items between commonly controlled businesses if necessary to "prevent evasion of taxes or clearly to reflect the income."¹⁴⁵ This one section of the Code has spawned a lengthy set of regulations, which comprises one of the most complex regulatory regimes.¹⁴⁶

As detailed as the Code and Regulations are, they nonetheless leave many questions unanswered. Indeed, the extensive complexity of the Code and Regulations seems, in some ways, to contribute to yet more questions.¹⁴⁷ Case law helps to answer some of these questions, thus introducing another important form of formal tax law. However, using case law to understand what the tax law is would be extremely difficult for anyone who is not a tax lawyer. On top of the difficulty of finding and understanding the relevant cases for any tax law questions, there are a number of different fora in which a tax case can be brought, including the Tax Court.¹⁴⁸ Thus, understanding which cases apply to a taxpayer requires understanding jurisdiction and controlling opinions, complicated further by the fact that the IRS uses

141. *Id.* It also includes legislative history and commentary by the reporter (*CCH Federal Tax Reporter*) that publishes the compilation.

142. *Tax Legislative Counsel*, U.S. DEPT OF THE TREASURY, <https://home.treasury.gov/about/offices/tax-policy/tax-legislative-counsel> (last visited Jan. 11, 2022) [<https://perma.cc/MY6Y-7QT7>].

143. I.R.C. § 7805(a).

144. *Tax Code, Regulations and Official Guidance*, INTERNAL REVENUE SERV., <https://www.irs.gov/privacy-disclosure/tax-code-regulations-and-official-guidance> (last updated Mar. 4, 2021) [<https://perma.cc/8LAS-DYNR>].

145. I.R.C. § 482.

146. 2 ALAN S. GUTTERMAN, CORPORATE COUNSEL'S GUIDE TO STRATEGIC ALLIANCES § 20:38, Westlaw CCGSTRALL (database updated Nov. 2021).

147. Weisbach, *supra* note 64, at 871 (discussing complexity spirals).

148. *Cf.* Leandra Lederman, (*Un*)*appealing Deference to the Tax Court*, 63 DUKE L.J. 1835 (2014) (exploring the role of the Tax Court and resulting complexities).

administrative announcements to indicate when it will or will not acquiesce to a specific decision even in other jurisdictions.¹⁴⁹

B. Informal Tax Law

To assist taxpayers in their attempts to comply with the formal tax law, the IRS offers a free, publicly accessible type of informal tax law—tax guidance.¹⁵⁰ When the IRS issues tax guidance, it attempts to explain the formal tax law to the general public through, among other sources, IRS publications,¹⁵¹ frequently asked questions on the IRS website (“FAQs”),¹⁵² information from IRS Taxpayer Assistance Centers,¹⁵³ and the IRS’s online Interactive Tax Assistant.¹⁵⁴ In drafting this guidance, the IRS often delivers statements that feature “simplicity”—the presentation of complex formal law as though it is simple and clear, despite the lack of actual simplification of the underlying formal law.¹⁵⁵

Two legislative mandates may have influenced the proliferation of IRS guidance. First, the IRS serves the dual missions of tax enforcement and taxpayer customer service. Following the Internal Revenue Service Restructuring and Reform Act of 1998,¹⁵⁶ the IRS officially revised its mission statement to include a commitment to providing taxpayers with “top quality service.”¹⁵⁷ It subsequently adopted a taxpayer bill of rights, later codified in statutory law, providing that taxpayers have the “right to be informed.”¹⁵⁸ The IRS has interpreted this right to include access to clear descriptions of the

149. IRM 36.3.1 (Sept. 10, 2017).

150. *Understanding IRS Guidance – A Brief Primer*, INTERNAL REVENUE SERV., <https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer> (last updated July 21, 2021) [<https://perma.cc/7HWN-8Z4D>].

151. *Publications Online*, INTERNAL REVENUE SERV., <https://www.irs.gov/publications> (last updated Jan. 11, 2022) [<https://perma.cc/KL75-W53N>].

152. *Frequently Asked Questions and Answers*, INTERNAL REVENUE SERV., <https://www.irs.gov/faqs> (last updated Nov. 4, 2021) [<https://perma.cc/69SX-DEWJ>].

153. *Taxpayer Assistance Center (TAC) Locations Where In-Person Document Review Is Provided*, INTERNAL REVENUE SERV., <https://www.irs.gov/help/tac-locations-where-in-person-document-verification-is-provided> (last updated Apr. 23, 2021) [<https://perma.cc/HLH3-HKWD>].

154. *Interactive Tax Assistant (ITA)*, INTERNAL REVENUE SERV., <https://www.irs.gov/help/ita> (last updated Dec. 14, 2021) [<https://perma.cc/CS7A-RBXQ>]. For further discussion of ITA and automated legal guidance more generally, see Blank & Osofsky, *Automated*, *supra* note 28.

155. Blank & Osofsky, *Simplicity*, *supra* note 28, at 208.

156. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1205, 112 Stat. 685, 722–23; *see also* Leandra Lederman, *Tax Compliance and the Reformed IRS*, 51 KAN. L. REV. 971, 980 (2003) (discussing the Act’s ramifications).

157. I.R.S. News Release IR-98-59 (Sept. 24, 1998).

158. *Taxpayer Bill of Rights*, INTERNAL REVENUE SERV., <https://www.irs.gov/taxpayer-bill-of-rights> (last updated Feb. 24, 2022) [<https://perma.cc/7C6H-BE6Y>] (codified at I.R.C. § 7803(a)(3)).

formal tax law and all IRS forms and procedures.¹⁵⁹ Second, as discussed earlier, the Plain Writing Act of 2010 applies to all federal agencies and requires them to provide “plain language” explanations and instructions that are “clear, concise, [and] well-organized.”¹⁶⁰ In response, the IRS publicly committed to communicating with taxpayers in clear and understandable terms on in its guidance, notices, and forms.¹⁶¹

This Part describes some of the major types of informal tax law. It also describes how even though the informal tax law originates from the IRS, it is often amplified through third-party sources.

IRS Publications. Each year, in order to help taxpayers meet their tax compliance obligations, the IRS revises and distributes dozens of “IRS publications.”¹⁶² IRS Publication 17, *Your Federal Income Tax*, for example, describes the general rules for filing an individual annual tax return, IRS Form 1040.¹⁶³ As of 2021, this publication is 138 pages and contains descriptions of the formal tax law, examples that apply the law, and a variety of icons that indicate where taxpayers should take extra caution, such as by retaining records.¹⁶⁴ In its introduction, the IRS notes that the publication does not “cover every situation” and “is not intended to replace the law or change its meaning.”¹⁶⁵ Other IRS publications address topics such as reporting of tip income, sales of personal residences, net operating losses for small business, and charitable contributions, among many others.¹⁶⁶

When the IRS describes the formal tax law in plain language, it often offers clear and simple statements that can present contested formal tax law as a series of clear rules, add administrative gloss to the formal tax law, and omit discussion of statutory and regulatory exceptions to the formal tax law.¹⁶⁷ The IRS’s reliance on simplicity to explain formal tax law in IRS publications often results in deviations between the formal and the informal tax law. Sometimes these

159. I.R.S. News Release IR-2014-72 (June 10, 2014).

160. Pub. L. No. 111-274, § 3(3), 124 Stat. 2861, 2861.

161. INTERNAL REVENUE SERV., U.S. DEP’T OF THE TREASURY, PUBL’N 5206, PLAIN WRITING ACT COMPLIANCE REPORT 2 (2015).

162. See *Publications Online*, INTERNAL REVENUE SERV., <https://www.irs.gov/publications> (last updated Mar. 4, 2022) [<https://perma.cc/936S-G3UY>]. For discussion, see Blank & Osofsky, *Simplicity*, *supra* note 28, at 202–04.

163. INTERNAL REVENUE SERV., U.S. DEP’T OF THE TREASURY, PUBL’N 17, CATALOG NO. 10311G, TAX GUIDE 2021 (Dec. 2021), <https://www.irs.gov/pub/irs-pdf/p17.pdf> [<https://perma.cc/JN9A-ZF7F>].

164. *Id.*

165. *Id.* at 2.

166. See INTERNAL REVENUE SERV., *supra* note 162 (listing other such publications).

167. See Blank & Osofsky, *Simplicity*, *supra* note 28, at 202–04.

explanations, if followed, benefit taxpayers; at other times, they conflict with taxpayers' interests.¹⁶⁸

Frequently Asked Questions. When Congress enacts new tax statutes, or when unexpected situations arise, the IRS often posts FAQs and answers to its website to help taxpayers. During the first months of 2020, the IRS issued 273 FAQs that addressed several timely topics, including special tax credits that Congress enacted in response to the COVID-19 pandemic and related economic crisis.¹⁶⁹ Commentators often criticize the IRS for using the FAQ format to present contested or novel interpretations of the formal tax law as though they are settled law.¹⁷⁰ For instance, in 2020, when the IRS issued FAQs regarding economic impact payments enacted by Congress that year, some critics disputed the IRS's answers regarding the treatment of payments received by the spouses of recently deceased taxpayers and by incarcerated individuals.¹⁷¹ In addition, as the IRS posts FAQs to its website, it may revise posted questions and answers without providing taxpayers with explanation of the changes. As the National Taxpayer Advocate has argued before Congress when criticizing the IRS's increasing use of FAQs, "FAQs can be changed, supplemented, and amended without notice and public comment, unlike regulations."¹⁷²

Taxpayer Assistance Centers and IRS Help Line. Other sources of informal tax law are the "IRS assisters," human customer service

168. For further examples, see *id.*

169. 1 TAXPAYER ADVOC. SERV., U.S. DEP'T OF THE TREASURY, NATIONAL TAXPAYER ADVOCATE: FISCAL YEAR 2021 OBJECTIVES REPORT TO CONGRESS 48 n.13 (June 2020), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/JRC21_FullReport.pdf [<https://perma.cc/A5EP-BT7D>].

170. See, e.g., Alice G. Abreu & Richard K. Greenstein, *NTA Blog Post on "Protecting the Rights of Taxpayers Who Rely on FAQs" Is Timely and Welcome, but Doesn't Go Far Enough*, PROCEDURALLY TAXING (July 9, 2020), <https://procedurallytaxing.com/nta-blog-post-on-protecting-the-rights-of-taxpayers-who-rely-on-faqs-is-timely-and-welcome-but-doesnt-go-far-enough/> [<https://perma.cc/P49K-AT79>]; Leslie Book, *Tax Administration and Racial Justice: The Illegal Denial of Tax-Based Pandemic Relief to the Nation's Incarcerated Population*, 72 S.C. L. REV. 667 (2021); Nina Olson, *IRS FAQs Can Be a Trap for the Unwary*, TAXCONNECTIONS: TAX BLOG (July 28, 2017), <https://www.taxconnections.com/taxblog/irs-faqs-can-be-a-trap-for-the-unwary/> [<https://perma.cc/D2Q3-KUPR>]; *Joint Hearing on Continued Oversight Over the Internal Revenue Service Before the Subcomm. on Health Care, Benefits, & Admin. Rules & Subcomm. on Gov't Operations of the H. Comm. on Oversight & Gov't Reform*, 115th Cong. (2018) (statement of Nina E. Olson, National Taxpayer Advocate, United States Department of the Treasury); Monte A. Jackel, *The Proper Role of FAQs*, PROCEDURALLY TAXING (May 8, 2020), <https://procedurallytaxing.com/the-proper-role-of-faqs/> [<https://perma.cc/ARP9-8QAB>].

171. See *infra* notes 232–250 and accompanying text.

172. 1 TAXPAYER ADVOC. SERV., *supra* note 169, at 67. Following criticism of the IRS's use of FAQs during the COVID-19 pandemic, in June 2021, IRS officials commented that the IRS was in the process of developing "a system to help people search for FAQs." Allyson Versprille, *IRS to Address Concerns with FAQs in Announcement Soon*, BLOOMBERG TAX (June 24, 2021, 1:21 PM), <https://news.bloombergtax.com/daily-tax-report/irs-to-address-concerns-with-faqs-in-announcement-soon> [<https://perma.cc/W8RL-AMHU>].

representatives who answer taxpayers' questions at Taxpayer Assistance Centers and by phone over the IRS help line.¹⁷³ As of 2021, taxpayers can make an appointment at a local Taxpayer Assistance Center to ask both general tax law questions and questions about their own specific circumstances.¹⁷⁴ The IRS provides training of the "publication method" to IRS assisters, where it instructs these representatives to answer questions by reiterating the IRS's positions in IRS publications.¹⁷⁵ The Treasury Inspector General for Tax Administration has issued reports that document instances in which responses from IRS assisters to the same taxpayer question have diverged from one another.¹⁷⁶ As a result of these inconsistencies, the IRS has focused its attention on ways to standardize and even automate the guidance that IRS assisters provide to taxpayers.¹⁷⁷

Interactive Tax Assistant. Since 2010, the IRS has attempted to respond to taxpayer inquiries using a form of automated legal guidance through its website, the "Interactive Tax Assistant" ("ITA").¹⁷⁸ As IRS budget cuts and the events like the COVID-19 pandemic have limited taxpayer access to human customer service representatives, the IRS has increased its publicity of ITA as a major source of personalized tax guidance.¹⁷⁹ When taxpayers access ITA through the IRS website, they select a category of questions, such as "Can I Deduct My Medical and Dental Expenses?" and then answer a series of questions provided by ITA.¹⁸⁰ As the IRS describes ITA, this resource "can determine if a type of income is taxable, if you're eligible to claim certain credits, and if you can deduct expenses on your tax return."¹⁸¹ Once taxpayers have inputted their responses to a series of questions, ITA presents a screen titled "Answers" (e.g., noting that a specific type of medical expense is

173. See INTERNAL REVENUE SERV., *supra* note 153.

174. See *id.*

175. See TREASURY INSPECTOR GEN. FOR TAX ADMIN., U.S. DEP'T OF THE TREASURY, NO. 2004-40-025, IMPROVEMENTS ARE NEEDED TO ENSURE TAX RETURNS ARE CORRECTLY PREPARED AT TAXPAYER ASSISTANCE CENTERS 11 (Dec. 2003).

176. See, e.g., TREASURY INSPECTOR GEN. FOR TAX ADMIN., U.S. DEP'T OF THE TREASURY, NO. 2011-40-043, THE INTERACTIVE TAX LAW ASSISTANT HELPS ASSISTORS PROVIDE ACCURATE ANSWERS TO TAXPAYER INQUIRIES (Apr. 2011) (one such report).

177. See *id.* at 24.

178. INTERNAL REVENUE SERV., *supra* note 154; see also TREASURY INSPECTOR GEN. FOR TAX ADMIN., U.S. DEP'T OF THE TREASURY, NO. 2011-40-070, THE INTERNAL REVENUE SERVICE PROVIDES HELPFUL AND ACCURATE TAX LAW ASSISTANCE, BUT TAXPAYERS EXPERIENCE LENGTHY WAIT TIMES TO SPEAK WITH ASSISTORS 15–17 (Aug. 2011) (history of ITA).

179. See, e.g., IRS News (@IRSnews), TWITTER (June 15, 2021, 3:01 PM) <https://twitter.com/IRSnews/status/1404876749809270785> [<https://perma.cc/7E28-AKXJ>]; IRS Videos, *Interactive Tax Assistant*, YOUTUBE (June 24, 2021), <https://www.youtube.com/watch?v=dffgkaQcR68> [<https://perma.cc/R5FB-X5JV>].

180. See INTERNAL REVENUE SERV., *supra* note 154.

181. *Id.*

“not a deductible expense”).¹⁸² ITA offers taxpayers answers that are tailored to “individual circumstances”¹⁸³ and that use friendly and accessible language, such as second-person pronouns (e.g., “you” and “your”).¹⁸⁴

While automated legal guidance such as ITA can deliver accurate answers to simple questions regarding issues like filing deadlines and types of forms, it can also present answers that differ from the underlying formal tax law. For example, ITA informs taxpayers that items like artificial teeth expenses and lead paint removal expenses qualify as deductible medical expenses, even though, in many cases, the Code, Regulations, and case law reach different results.¹⁸⁵ The IRS’s use of simplicity in automated legal guidance is especially powerful and persuasive because it offers tax guidance that is personalized (specific to the inquiring taxpayer), nonqualified (omitting discussion of contradictory exceptions and other rules), and instantaneous (sparing taxpayers from reading other authorities).¹⁸⁶

In addition to the guidance received directly from the IRS, taxpayers may also encounter the informal tax law through third-party sources, some of which are described briefly below.

Tax Preparation Software. Each year, tens of millions of taxpayers use software, such as Intuit’s TurboTax, to complete and file their tax returns with the IRS.¹⁸⁷ In many cases, the advice that TurboTax and its online tax professionals provide is identical to the statements in IRS publications, including IRS statements that deviate from the formal tax law.¹⁸⁸ By following the IRS’s position from the informal tax law, the tax preparation software reduces the likelihood of IRS audits of its users.¹⁸⁹ Some firms that sell tax preparation software promise that, in the event of an IRS audit, they will provide access to

182. *Id.*

183. *Id.*

184. *Id.*

185. See Blank & Osofsky, *Simplexity*, *supra* note 28.

186. See *id.*

187. See Intuit Inc., Annual Report (Form 10-K) (Aug. 31, 2020) (reporting over fifty million customers); KUSH PATEL, IBISWORLD, REP. NO. 54121D, TAX PREPARATION SERVICES IN THE US (Aug. 2019), <https://www.gsa.gov/cdnstatic/54121D%20Tax%20Preparation%20Services%20in%20the%20US%20Industry%20Report.pdf> [<https://perma.cc/QZS4-PN6K>] (providing an overview of tax preparation services in the United States).

188. For examples, see Blank & Osofsky, *Simplexity*, *supra* note 28, at 229–31 (discussing TurboTax examples).

189. For discussion, see *id.* at 231.

trained tax professionals and refunds of the purchase price.¹⁹⁰ This type of guarantee further encourages sellers of tax preparation software to avoid conflicting with the IRS position in its informal guidance.

Tax Advice Publications. The informal tax law may also influence taxpayers indirectly, such as through descriptions that appear in popular tax advice publications written by authors outside of the government. Many of the authors of these publications frequently refer to statements and examples from the IRS that originally appeared in IRS publications or on its website.¹⁹¹ Others repeat the IRS position as expressed in IRS publications even if this is not necessarily consistent with the formal tax law.¹⁹² Third-party tax advice publications such as these expand the reach of the informal tax law beyond the direct efforts of the IRS.

Tax Accountants and Other Return Preparers. Finally, even when taxpayers turn to tax accountants and other return preparers to complete their tax returns, they engage, indirectly, with the informal tax law. While legal education for tax lawyers focuses on statutes, regulations and case law, many educational programs for accountants and other tax-return preparers instead teach them to follow the IRS's statements in IRS publications.¹⁹³ When individuals seek to receive "enrolled agent" status from the IRS, enabling them to represent taxpayers before the Agency, they must pass a three-part comprehensive exam developed by the IRS or show that they have gained experience as former IRS employees.¹⁹⁴ The exam contains questions based on some of the most widely read IRS publications.¹⁹⁵

190. See, e.g., *TurboTax Online Guarantees*, INTUIT TURBOTAX, <https://turbotax.intuit.com/corp/guarantees/> (last visited Mar. 6, 2022) [<https://perma.cc/R4K2-VYTU>].

191. See, e.g., J.K. LASSER INST., J.K. LASSER'S YOUR INCOME TAX 2021 (2020) (example of popular tax advice publication referring to IRS materials); see also MARTHA MAEDA, HOW TO OPEN & OPERATE A FINANCIALLY SUCCESSFUL INDEPENDENT RECORD LABEL 84 (2012).

192. See, e.g., Bruce N. Edwards, *Tax Implications of Home Ownership* (Portfolio No. 594-3rd), Tax Mgmt. Portfolio (BL) (2021) (example of expert secondary source repeating IRS position).

193. See, e.g., Loc. Gov't Servs. Div., *Basic Accounting Workshop*, GA. DEP'T OF REVENUE 83 (rev. Aug. 2017), <https://dor.georgia.gov/document/training-program/basic-accounting-workshop/download> [<https://perma.cc/9BR6-AKAY>] (referencing the IRS's "Publication 946" (regarding accelerated depreciation deductions)).

194. See *Internal Revenue Service: Enrolled Agent Special Enrollment Examination*, PROMETRIC 5–20, <https://www.prometric.com/sites/default/files/IRS/IRS-SEE-Candidate-Information-Bulletin.pdf> (rev. Mar. 1, 2022) [<https://perma.cc/3TFU-69M2>] (Candidate Information Bulletin detailing the exam requirements).

195. See *Enrolled Agents – Frequently Asked Questions*, INTERNAL REVENUE SERV., <https://www.irs.gov/tax-professionals/enrolled-agents/enrolled-agents-frequently-asked-questions> (last updated Mar. 1, 2022) [<https://perma.cc/VB57-WAUS>].

C. The Role of Tax Lawyers

Having established that there are different types of tax law—formal and informal—the next question is which taxpayers can access these different types of law? Do all taxpayers have equal access to the formal tax law?

As an initial matter, only highly specialized tax law experts, namely tax lawyers, have clear access to the formal tax law. As discussed previously, the formal tax law is written so that only tax law experts are likely to be able to use it to answer tax law questions.¹⁹⁶ On top of this expertise limitation, there is also a more practical one: even when nonlawyer tax professionals, such as accountants, are able to access and use the formal tax law to answer tax questions, their ability to do so is circumscribed by rules about the unauthorized practice of law. While the boundaries of “practice of law” are not always clear, accountants are clearly limited in their ability to make interpretations of complex tax statutes, regulations, and cases.¹⁹⁷ As the Supreme Court of Minnesota explained,

[w]hen an accountant or other layman who is employed to prepare an income tax return is faced with difficult or doubtful questions of the interpretation or application of statutes, administrative regulations and rulings, court decisions, or general law, it is his duty to leave the determination of such questions to a lawyer.¹⁹⁸

This unique ability of tax lawyers to use formal tax law raises a question about which taxpayers use what type of tax professionals, if any. Tax return filing statistics reveal that most taxpayers file their tax returns using some form of assistance, whether in the form of paid preparer assistance or tax preparation software. Self-prepared tax returns (which are filed without the assistance of a paid preparer or tax preparation software) have been trending steadily downward, falling in recent years to around four percent.¹⁹⁹ Instead of self-preparing, around forty percent of taxpayers use online tax filing software, and around fifty-six percent of taxpayers use paid preparers.²⁰⁰ Over half of all paid

196. See *supra* notes 118–149 and accompanying text.

197. Elijah D. Farrell, *Accounting Firms and the Unauthorized Practice of Law: Who Is the Bar Really Trying to Protect?*, 33 IND. L. REV. 599, 605–16 (2000) (exploring case law regarding what constitutes unauthorized practice of law by accountants).

198. *Gardner v. Conway*, 48 N.W.2d 788, 790 (Minn. 1951).

199. Jacob Goldin, *Tax Benefit Complexity and Take-up: Lessons from the Earned Income Tax Credit*, 72 TAX L. REV. 59, 91 (2018).

200. *Id.*; see also INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, PUBL'N 55-B, INTERNAL REVENUE SERVICE DATA BOOK, 2020, at 2 (June 2020), <https://www.irs.gov/pub/irs-pdf/p55b.pdf> [<https://perma.cc/K5S2-J33B>].

preparers are unenrolled tax preparers who are not lawyers or accountants and are not subject to regulation by the IRS.²⁰¹

There is less data available about what types of taxpayers use what type of assistance, though there is some indication that low-income taxpayers often use tax preparers from large, national tax-return preparation chains such as Jackson Hewitt and H&R Block, as well as smaller, independent, unenrolled tax-return preparers.²⁰² There is troubling evidence about the extent to which these preparers even file accurate tax returns. As for the national chain tax-return preparers, a recent GAO study found, in a study of commercial paid preparers with ten or more locations, that nearly all prepared returns were incorrect to some degree.²⁰³ The situation with independent, unenrolled preparers is even more worrisome. During a time in which the IRS tried (unsuccessfully) to regulate unenrolled tax-return preparers, twenty-six percent of them failed a test designed to measure basic tax return filing competency.²⁰⁴ The Taxpayer Advocate has described that

[w]hen one visits a hair salon, the hair stylist will have a certificate displayed, which attests to the fact that the stylist has undergone the training necessary to obtain the license. In contrast, there is no such guarantee that an unenrolled tax return preparer has passed any exam, continues to engage in ongoing education, or meets any other minimum standard of competency to prepare federal tax returns.²⁰⁵

Putting aside questions as to filing accuracy, what is clear is that neither large tax return preparation companies nor unenrolled preparers are authorized to engage in legal analysis of the formal tax law.²⁰⁶ Indeed, in some ways, what these return preparers are doing is on the opposite end of the spectrum. In almost all cases, these return preparers are using tax-return software themselves to take the taxpayers' data and turn it into a tax return,²⁰⁷ albeit often

201. 1 TAXPAYER ADVOC. SERV., U.S. DEP'T OF THE TREASURY, NATIONAL TAXPAYER ADVOCATE: 2018 ANNUAL REPORT TO CONGRESS 105 (Feb. 2019), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_Volume1.pdf [<https://perma.cc/8R3F-LWBZ>] (“[Most Serious Problem] #7: Return Preparer Oversight”); INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, PUBL'N 947, CATALOG NO. 13392P, PRACTICE BEFORE THE IRS AND POWER OF ATTORNEY 3 (rev. Feb. 2018), <https://www.irs.gov/publications/p947> [<https://perma.cc/AM9Y-9BKK>].

202. Goldin, *supra* note 199, at 87–88.

203. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-467T, PAID TAX RETURN PREPARERS: IN A LIMITED STUDY, PREPARERS MADE SIGNIFICANT ERRORS 9–12 (Apr. 2014), <https://www.gao.gov/assets/gao-14-467t.pdf> [<https://perma.cc/HHM8-TQSN>].

204. *Protecting Taxpayers from Incompetent and Unethical Return Preparers: Hearing on H.R. 1570 Before the S. Comm. on Fin.*, 113th Cong. 6 (2014) (statement of John A. Koskinen, Commissioner, Internal Revenue Service).

205. 1 TAXPAYER ADVOC. SERV., *supra* note 201, at 106.

206. *See supra* notes 197–198.

207. Lawrence Zelenak, Essay, *Complex Tax Legislation in the TurboTax Era*, 1 COLUM. J. TAX L. 91, 94–95 (2010).

inaccurately.²⁰⁸ Low-income taxpayers are eligible to perform this exact function for free themselves using the IRS Free File program, though, for a variety of reasons, a huge number of eligible low-income taxpayers nonetheless pay preparers or pay for the software.²⁰⁹

Tax lawyers, who are unique among tax professionals in their ability to engage in legal analysis of the formal tax law to advise taxpayers about ambiguous legal questions, make up a tiny fraction of tax professionals who file tax returns. The GAO has documented that, of all paid tax-return preparers, tax lawyers only comprise 29,214, whereas there are 209,628 CPAs, 48,573 enrolled agents, and 374,812 unenrolled preparers.²¹⁰ This makes sense based on what a “paid preparer” is for these purposes. Attorneys are not “paid preparers” who must identify themselves as such with the IRS unless they “prepar[e] for compensation . . . all or a substantial portion of any return of tax or any claim for refund.”²¹¹ Thus, tax lawyers whose main function is analyzing or interpreting the formal tax law (as well as other sources of law), not filing tax returns, are not going to be counted as paid preparers in the studies about who files returns in what ways.

It is important to emphasize the extent to which we lack empirical data (an issue to which we will return in Part III, below) about use of tax lawyers. There is no tax return on which people or businesses must report they received the advice of a tax lawyer. There is no government documentation of, or even government attempt to document, such data.

However, there is useful, circumstantial evidence. Tax lawyers cost a lot of money. Whereas paid preparers tend to charge in the hundreds of dollars to prepare a tax return²¹² and tax software costs a fraction of that price,²¹³ tax lawyers cost on average around \$200 to \$400 an hour, though tax lawyers at large firms or in major cities can charge substantially more.²¹⁴ One would have to have a very large

208. See *supra* notes 197–198.

209. See, e.g., TREASURY INSPECTOR GEN. FOR TAX ADMIN., U.S. DEP’T OF THE TREASURY, NO. 2020-40-009, COMPLEXITY AND INSUFFICIENT OVERSIGHT OF THE FREE FILE PROGRAM RESULT IN LOW TAXPAYER PARTICIPATION (Feb. 2020), <https://www.documentcloud.org/documents/6768599-TIGTA-Free-File-audit.html> [<https://perma.cc/E7LM-V89G>] (exploring this and other aspects of the Free File controversy).

210. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 203, at 6.

211. 26 C.F.R. § 301.7701-15(a) (2022).

212. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 203, at 19–20.

213. For instance, Intuit TurboTax’s most popular paid option was priced at fifty-nine dollars in 2021. See INTUIT TURBOTAX, <https://turbotax.intuit.com/personal-taxes/online/> (last visited Mar. 6, 2022) [<https://perma.cc/YY33-ZRjX>].

214. See, e.g., *How Much Does a Tax Attorney Cost*, CROSS L. GRP.: BLOG (Jan. 16, 2017), <https://www.crosslawgroup.com/blog/hiring-tax-attorney-worth-cost/> [<https://perma.cc/6BAC-9YGC>]; Jen K., *Average Cost of Tax Attorney Fees*, THERVO, <https://thervo.com/costs/average-cost->

amount of tax liability at stake to justify paying a tax lawyer's fee, and the larger the amount at stake, the more valuable the tax lawyer may be. It stands to reason that those with higher income and/or greater wealth are more likely to hire tax attorneys.

Moreover, even when members of the public contemplate hiring a tax attorney, it is often for the purpose of resolving a dispute with the IRS. For instance, the website SuperMoney suggests that common reasons to hire a tax attorney include "You are being audited. You need to negotiate a settlement with the IRS. You receive a notice from the IRS about a tax issue" ²¹⁵ Left off the list is tax planning in advance of filing a tax return or interpreting the tax law as advantageously as possible in order to take the best possible position for the taxpayer.

Yet this exact type of planning is what high-end tax lawyers do for very high-income and/or wealthy individuals and businesses. Cleary Gottlieb, a major global law firm, for instance, explains that its tax practice "provides clients with sophisticated and practical advice on tax planning, tax strategies for transactions, cross-border issues and the resolution of difficult tax controversies." ²¹⁶ Likewise, Paul, Weiss, another major law firm, describes that "Identifying obscure but potentially costly tax issues is a skill. Solving them in the context of our client's goals is an art, and one that Paul, Weiss practices at the highest level. . . . [O]ur tax lawyers help clients solve problems, avoid pitfalls and uncover hidden value in all types of transactions." ²¹⁷ As Professor Heather Field describes, in this transactional context, tax lawyers "will inform the client about the tax consequences that arise from the transaction's structure, advise the client about opportunities for improving the tax treatment, and counsel the client about the risks and benefits of different approaches" ²¹⁸ In so doing, tax law firms often provide high-income and wealthy individuals and businesses with written tax opinions, which express varying levels of confidence that a client's tax position is consistent with the tax law. ²¹⁹ The opinions can

of-tax-attorney-fees (last visited Mar. 6, 2022) [<https://perma.cc/3L9D-TD6F>]; *What Is the Average Cost of Hiring a Tax Attorney?*, SUPERMONEY, <https://www.supermoney.com/what-average-cost-hiring-tax-attorney/> (last updated Apr. 27, 2020) [<https://perma.cc/6ZF3-S36P>].

215. SUPERMONEY, *supra* note 214.

216. *Tax*, CLEARY GOTTLIEB, <https://www.clearygottlieb.com/practice-landing/tax> (last visited Mar. 15, 2022) [<https://perma.cc/9MFC-9CBN>].

217. *Tax*, PAUL, WEISS, <https://www.paulweiss.com/practices/transactional/tax> (last visited Mar. 15, 2022) [<https://perma.cc/BAC5-Q9RQ>].

218. Heather M. Field, *Tax Lawyers as Tax Insurance*, 60 WM. & MARY L. REV. 2111, 2121 (2019).

219. *Id.* at 2122–26 (describing tax opinions).

provide the clients with protection from certain tax penalties in the event of a deficiency assertion by the IRS following an audit.²²⁰

D. Access to Justice

The two tiers of formal and informal tax law threaten equitable access to justice. Most taxpayers have no access to the formal tax law. Rather, they generally rely on informal tax guidance and tax preparation software (whether directly, or through paid, non-tax-lawyer preparers) to prepare their tax returns. On the other hand, high-end tax lawyers engage in extensive, pre-tax return planning for very high-income and/or wealthy individuals and businesses, thus providing these taxpayers access to the formal law and the most advantageous tax positions.

Although informal tax guidance is written in plain language and deemphasizes technical terminology, it has several important weaknesses compared to the formal tax law. First, when the formal tax law is ambiguous, the IRS sometimes takes positions in the informal tax law that are disadvantageous to taxpayers. While there might be an argument to the contrary rooted in formal tax law, taxpayers who follow the informal guidance are bound by the disadvantageous approach as a practical matter. Second, unlike the formal tax law, the informal tax law does not bind the IRS by requiring it to take positions during audits and tax controversies that are consistent with those that the Agency has expressed in its guidance publications and on its website.²²¹ Third, in contrast to the Code, Regulations, and case law, informal tax law that appears in sources such as ITA and statements in IRS publications does not constitute the type of authority that taxpayers can use to establish a “reasonable basis” defense against some of the most common civil tax penalties.²²² Finally, while tax lawyers may offer planning advice before taxpayers engage in transactions or claim tax positions, the government does not offer similar services when it distributes informal tax law.²²³ This Part offers three examples to highlight these differences between informal and formal tax law and how these differences exacerbate inequitable access to justice.

220. Treas. Reg. § 1.6664-4(c)(1) (as amended in 2003); *see also* Field, *supra* note 218, at 2124 n.66.

221. *See, e.g.*, Miller v. Comm’r, 114 T.C. 184, 194–95 (2000); *see also infra* notes 261–266 and accompanying text.

222. *See* Treas. Reg. § 1.6662-3(b)(3) (as amended in 2003); *infra* notes 268–270 and accompanying text.

223. *See infra* notes 275–285 and accompanying text.

1. Unambiguous Informal Tax Law

In many cases, informal tax guidance can deliver answers to taxpayers that are unambiguous and easy to understand. For example, consider a married couple with no children who are trying to determine whether they are required to file IRS Form 1040, the annual federal income tax return, in 2020. That year, the couple had gross income of \$30,000. By visiting ITA on the IRS website, the couple can select “Do I Need to File a Tax Return?” and then answer a series of questions regarding issues such as their filing status, their age and disability status, and the amount of their aggregate gross income.²²⁴ After answering these questions, the couple receives an answer: the couple is required to file IRS Form 1040 for 2020 because their gross income is equal to, or exceeds, \$24,800.²²⁵

This example illustrates how informal tax law, such as ITA, can provide correct guidance to taxpayers clearly and efficiently. The informal tax law in this example matches the underlying formal tax law exactly.²²⁶ Even if the taxpayers had consulted with a tax lawyer who reviewed the applicable Code provision and IRS revenue procedure stating the annual inflation adjustments directly (unlikely for this type of common question), they would have received the same answer that ITA provided. For straightforward questions like those regarding filing deadlines and requirements, taxpayers who consult IRS publications or the IRS website can access accurate tax law information quickly and without financial cost.

2. Taxpayer-Unfavorable Informal Tax Law

When the formal tax law features legal ambiguity, on the other hand, the IRS often provides taxpayers with informal tax law that may appear clear but is also adverse to taxpayers’ interests. For instance, in March 2020, as a result of the economic disruption caused by the COVID-19 public health crisis, Congress enacted the CARES Act, which, among other relief, provided “economic impact payments” (advance refundable tax credits) to joint-filing married taxpayers, as long as their adjusted gross income did not exceed certain thresholds.²²⁷ Following confusion regarding the eligibility requirements for these

224. See *Do I Need to File a Tax Return?*, INTERNAL REVENUE SERV., <https://www.irs.gov/help/ita/do-i-need-to-file-a-tax-return> (last updated Dec. 10, 2021) [<https://perma.cc/8W39-TWAE>].

225. See *id.*

226. See I.R.C. § 6012(a)(1)(A)(iv).

227. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2201, 134 Stat. 281, 335 (2020).

payments, the IRS posted a list of FAQs on its website, including the following, “Q10: Does someone who has died qualify for the Payment?”²²⁸ By this point in time, some deceased taxpayers’ estates and family members had been receiving payments.²²⁹ The IRS attempted to respond to this situation by stating in its posted answer:

A10: No. A Payment made to someone who died before receipt of the Payment should be returned to the IRS by following the instructions in the Q&A about repayments. Return the entire Payment unless the Payment was made to joint filers and one spouse had not died before receipt of the Payment, in which case, you only need to return the portion of the Payment made on account of the decedent.²³⁰

While the IRS’s guidance was unequivocal, several commentators, and even some senior IRS employees, questioned the IRS’s interpretation of the formal tax law. Shortly after the IRS posted its FAQ regarding payments to deceased taxpayers, former National Taxpayer Advocate Nina Olson analyzed the requirements of the newly enacted statute and criticized the IRS’s claim that individuals were ineligible to receive payment if they were deceased in 2020, even though they had been eligible individuals in 2018 or 2019.²³¹ She also noted that in 2008, when Congress enacted stimulus legislation during the financial crisis and used the same statutory language as in the CARES Act, the IRS adopted a contrary position in its FAQs regarding payments of stimulus checks to deceased taxpayers.²³² Several tax practitioners agreed that the statutory language provided that as long as taxpayers were “eligible individuals” in 2018 or 2019, they should be entitled to the payments in 2020, even if, in 2020, they were deceased.²³³ Commentators also suggested that, in issuing its guidance, the IRS had responded to political pressure following President Trump’s and

228. See Nina Olson, *The Uncertainty of Death and Taxes: Economic Stimulus Payments to Deceased Individuals*, PROCEDURALLY TAXING (May 11, 2020), <https://procedurallytaxing.com/the-uncertainty-of-death-and-taxes-economic-stimulus-payments-to-deceased-individuals/> [<https://perma.cc/S7NH-BF49>].

229. See Kate Davidson and Richard Rubin, *Stimulus Checks Sent to Dead Relatives Should Be Returned, Mnuchin Says*, WALL ST. J. (Apr. 28, 2020, 3:48 PM), <https://www.wsj.com/articles/stimulus-checks-sent-to-dead-relatives-should-be-returned-mnuchin-says-11588103323> [<https://perma.cc/RCN5-NPFFK>]; William Cummings, *You’re Not Supposed to Keep that Payment: Mnuchin Wants Stimulus Money Given to Dead Taxpayers Returned*, USA TODAY, <https://www.usatoday.com/story/news/politics/2020/04/29/steve-mnuchin-wants-stimulus-given-dead-people-returned/3046434001/> (last updated Apr. 29, 2020, 4:33 PM) [<https://perma.cc/N48K-HCAB>].

230. See Olson, *supra* note 228 (discussing I.R.C. § 6428).

231. *Id.*

232. *Id.*

233. See, e.g., David M. Fogel, *Must Economic Impact Payments to Deceased Individuals Be Returned?*, TAX NOTES FED., June 8, 2020, at 1719, 1721 (discussing application of I.R.C. § 6428 to deceased taxpayers); Patrick Thomas, *Analyzing the IRS FAQs on Incarcerated and Non-Resident Taxpayers*, PROCEDURALLY TAXING (May 12, 2020), <https://procedurallytaxing.com/analyzing-the-irs-faqs-on-incarcerated-and-non-resident-taxpayers/> [<https://perma.cc/Z9L7-SGVF>] (same).

Treasury Secretary Mnuchin's public condemnation of media reports regarding economic impact payments to deceased taxpayers.²³⁴ Months later, a report by the U.S. Treasury Inspector General for Tax Administration ("TIGTA") found that IRS management initially had not prevented the distribution of economic impact payments to taxpayers who had died because they believed that the CARES Act did "not prohibit the issuance of payments to deceased individuals."²³⁵

Even though the IRS's FAQ lacked the force of formal tax law,²³⁶ as a practical matter, for many taxpayers, it was binding. Many taxpayers who received payments on behalf of deceased taxpayers read the IRS's posted FAQ, which included the imperative statement "*Return* the entire Payment," and did as they were instructed.²³⁷ According to TIGTA, within six months of the IRS's posting of its FAQ on its website in May 2020, taxpayers returned nearly sixty thousand economic impact payments, totaling more than \$72 million, that the IRS had previously distributed to deceased taxpayers.²³⁸ The IRS's informal guidance in this case caused many taxpayers to take actions that were contrary to the financial interests of deceased taxpayers' estates.

In contrast, wealthy individuals and businesses who have access to the formal tax law through sophisticated advisors are much less likely to be practically bound by IRS guidance that is disadvantageous to taxpayers. For example, under the reportable transaction disclosure rules, the IRS may designate potentially abusive tax strategies as "listed transactions" or "transactions of interest," thus requiring taxpayers and their advisors to disclose information regarding their participation in these strategies.²³⁹ In *CIC Services, LLC v. IRS*,²⁴⁰ a tax advisor in Tennessee who specialized in advising clients regarding micro-captive insurance strategies attempted to prevent the IRS from

234. See, e.g., Sarah Skidmore Sell, *Dead Taxpayers Got Relief Checks. Can Survivors Keep Them?*, ASSOCIATED PRESS (May 7, 2020), <https://apnews.com/article/lifestyle-steven-mnuchin-donald-trump-virus-outbreak-business-a20f6dfd189142d3df5b7b780145e4f8> [<https://perma.cc/7RXR-YFMT>].

235. Subsequent legislation, which provided for second and third rounds of economic impact payments, provided more explicit rules regarding deceased taxpayers.

236. See, e.g., *Fargo v. Comm'r*, 447 F.3d 706, 713 (9th Cir. 2006); Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239, 240.

237. Olson, *supra* note 228.

238. TREASURY INSPECTOR GEN. FOR TAX ADMIN., U.S. DEP'T OF THE TREASURY, REP. NO. 2021-46-034, IMPLEMENTATION OF ECONOMIC IMPACT PAYMENTS 6 (May 2021), <https://www.treasury.gov/tigta/auditreports/2021reports/202146034fr.pdf> [<https://perma.cc/RJZ5-VCE8>].

239. Treas. Reg. § 1.6011-4(d) (as amended in 2010) (taxpayer disclosure); Treas. Reg. § 301.6111-3(d)(1) (as amended in 2011) (material advisor disclosure).

240. 141 S. Ct. 1582, 1588 (2021).

designating this type of tax strategy as a “transaction of interest.”²⁴¹ The Agency had done so in an “IRS Notice,” a typical form of informal guidance.²⁴² However, the tax advisor in *CIC Services* was able to provide his clients an option that the relatives of the deceased recipients of the economic impact payments lacked: the ability to use formal law to fight against the IRS’s informal guidance. In *CIC Services*, the tax advisor’s primary argument was that the IRS had not completed the notice-and-comment process required by the Administrative Procedure Act in designating the tax strategy as a transaction of interest.²⁴³ In 2021, the U.S. Supreme Court issued a unanimous decision for the tax advisor.²⁴⁴ In this example, taxpayers who had access to sophisticated legal counsel were able to benefit from the formal law, in this case rooted in administrative law and its interaction with the tax law, to fight against the IRS’s informal guidance.

In one recent case, taxpayers without significant economic resources were able to challenge the IRS’s informal interpretation of the formal tax law in court successfully.²⁴⁵ In 2020, the IRS posted an FAQ regarding the first round of economic impact payments under the CARES Act in which it stated that incarcerated individuals were ineligible to receive payments.²⁴⁶ Later that year, plaintiffs in *Scholl v. Mnuchin* brought a class action to represent affected incarcerated individuals.²⁴⁷ The district court in *Scholl* agreed with the plaintiffs’ arguments that incarcerated taxpayers were eligible to receive economic impact payments under the CARES Act and enjoined the IRS from withholding the payments to these taxpayers.²⁴⁸

While *Scholl* was a victory for the taxpayers, it is not representative of most middle- or low-income taxpayers’ experiences with informal tax guidance and the IRS. First, this case involved

241. *Id.*; IRS Notice 2016-66, 2016-47 I.R.B. (designating strategy as transaction of interest).

242. IRS Notice 2016-66, 2016-47 I.R.B.

243. *CIC Servs.*, 141 S. Ct. at 1588; IRS Notice 2016-66, 2016-47 I.R.B.

244. *CIC Servs.*, 141 S. Ct. at 1594. For further discussion, see Kristen A. Parillo, *Supreme Court’s CIC Services Opinion Clarifies Scope of AIA*, TAX NOTES (May 18, 2021), <https://www.taxnotes.com/tax-notes-today-federal/litigation-and-appeals/supreme-courts-cic-services-opinion-clarifies-scope-aia/2021/05/18/60lew> [<https://perma.cc/2RVb-N7QK>]; and Daniel Hemel, *Treasury Needs To Act Fast To Save the Tax-Shelter Disclosure Regime*, SUBSTANCE OVER FORM (May 18, 2021), <https://substanceoverform.substack.com/p/treasury-needs-to-act-fast-to-save> [<https://perma.cc/Z6LL-VFMM>]. The Court’s holding in *CIC Services* is consistent with the arguments presented by Professor Kristin Hickman in her amicus brief in this case. See Brief of Amicus Curiae Professor Kristin E. Hickman in Support of Petitioners at 2–19, *CIC Servs., LLC v. IRS*, 141 S. Ct. 1582 (2021) (No. 19-930).

245. *Scholl v. Mnuchin*, 494 F. Supp. 3d 661, 692 (N.D. Cal. 2020).

246. *Id.* at 679.

247. *Id.* at 669.

248. *Id.* at 692.

taxpayers—incarcerated individuals—who shared common characteristics and faced similar legal issues in sufficient amount to be certified as a class and participate in a class action lawsuit.²⁴⁹ In other cases of taxpayer-unfavorable IRS informal guidance, taxpayers are generally unable to participate in class actions because their factual or legal circumstances are too divergent. Second, the taxpayers in this case were represented by a prominent public interest organization and law firm that contributed pro bono legal services.²⁵⁰ In most cases, taxpayers without significant economic resources do not have similar opportunities to challenge the IRS’s informal tax guidance. As a result, unlike in *Scholl*, most middle- and low-income taxpayers are practically bound by informal tax guidance, even if it disadvantages them.

3. Taxpayer-Favorable Informal Tax Law

The IRS also uses informal tax guidance to offer rules and interpretations that, if followed by taxpayers, would appear to benefit taxpayers’ interests. Recent examples of taxpayer-favorable informal IRS guidance include the IRS’s FAQs regarding economic impact payments under the CARES Act for children who turned seventeen in 2020;²⁵¹ FAQs addressing possible ways that taxpayers may calculate the basis in cryptocurrency for purposes of calculating gains upon sale or exchange of this type of property;²⁵² and FAQs regarding requirements for a child to count as a qualifying child for purposes of the child tax credit and the earned income tax credit.²⁵³ In addition, the

249. *Id.* at 679.

250. See *Lieff Cabraser and Equal Justice Society File Class Action Challenging Trump Administration’s Theft of Congressionally-Allocated Pandemic Relief Funds from Incarcerated Persons and the Families They Support*, LIEFF CABRASER HEIMANN & BERNSTEIN (Aug. 1, 2020), <https://www.lieffcabraser.com/2020/08/lieff-cabraser-and-equal-justice-society-file-class-action-challenging-trump-administrations-theft-of-congressionally-allocated-pandemic-relief-funds-from-incarcerated-persons-and-the-familie/> [<https://perma.cc/4PJH-AM9X>].

251. For discussion, see Olson, *supra* note 228.

252. Q40 under *Frequently Asked Questions on Virtual Currency Transactions*, INTERNAL REVENUE SERV. <https://www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-on-virtual-currency-transactions> (last updated Jan. 25, 2022) [<https://perma.cc/RH26-66UB>]. For discussion, see Kristen A. Parillo, *IRS’s Cryptocurrency FAQs Could Become More Formal Guidance*, TAX NOTES (Apr. 13, 2020), <https://www.taxnotes.com/tax-notes-today-federal/cryptocurrency/irs-cryptocurrency-faqs-could-become-more-formal-guidance/2020/04/08/> [<https://perma.cc/9B4S-AC42>].

253. *Frequently Asked Questions: Qualifying Child Rules 1*, INTERNAL REVENUE SERV. <https://www.irs.gov/faqs/earned-income-tax-credit/qualifying-child-rules/qualifying-child-rules-1> (last updated Jan. 1, 2022) [<https://perma.cc/9UFB-X4M6>]. For discussion, see 1 TAXPAYER ADVOC. SERV., U.S. DEPT OF THE TREASURY, NATIONAL TAXPAYER ADVOCATE: FISCAL YEAR 2020 OBJECTIVES REPORT TO CONGRESS, 55–56 (June 2019), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/JRC20_Volume1.pdf [<https://perma.cc/7KH-YA25>] (“IRS’s own

IRS has offered seemingly taxpayer-favorable simplifications of the formal tax law in IRS publications and through automated legal guidance on topics ranging from the deductibility of business clothing to the tax treatment of home mortgage expenses.²⁵⁴

While taxpayer-favorable positions in informal tax guidance may seem to benefit taxpayers, this guidance is not legally binding on the IRS and taxpayers cannot rely upon it to defend against some of the most common civil tax penalties. As a result, taxpayers rely upon it at their peril. While the IRS may directly contradict or reject its own IRS publication or FAQs only occasionally,²⁵⁵ it is more likely that the IRS could challenge a taxpayer's interpretation of a seemingly taxpayer-favorable statement contained in informal IRS guidance. For an illustration, consider a home contractor who builds and renovates homes at the request of customers. After years of building homes one at a time, the contractor is considering whether to pursue an online Master of Business Administration ("MBA") to learn more about marketing and management. Eventually, the contractor hopes to oversee teams of builders who will conduct the construction work for many clients simultaneously. The contractor questions whether the costs of the MBA would be tax deductible. To answer this question, he visits the IRS website and ITA. ITA asks the contractor several questions, such as "Were the expenses attributable to a trade or business or employment already established at the time the education was undertaken?"²⁵⁶ The contractor answers "yes," as he is already in the business of constructing homes. ITA then asks, "Was the education necessary in order to meet the minimum educational requirements of your trade or business or your employer's trade or business?"²⁵⁷ The contractor answers "no" because he does not believe that an MBA is a minimum educational requirement for the type of marketing and management role that he hopes to create within his own existing home construction business. After answering a few more questions, the contractor receives an affirmative answer from ITA: "Your work-related education expenses are deductible."²⁵⁸

established procedures and public announcements demonstrate that its implementation of IRC § 24(h)(7) is not consistent with a 'valid or neutral law of general applicability.'").

254. See Blank & Osofsky, *Simplexity*, *supra* note 28.

255. See, e.g., *Bobrow v. Comm'r*, 107 T.C.M. (CCH) 1110 (2014) (permitting IRS to disregard statements in IRS Publication 590, Individual Retirement Arrangements ("IRAs")).

256. *Are My Work-Related Education Expenses Deductible?*, INTERNAL REVENUE SERV., <https://www.irs.gov/help/ita/are-my-work-related-education-expenses-deductible> (last updated Aug. 20, 2021) [<https://perma.cc/EK75-6DUM>].

257. *Id.*

258. *Id.*

Although ITA appears to deliver the answer that the contractor hoped he would receive, if the IRS audits the contractor, it may challenge the deduction for MBA tuition and related expenses. There are dozens of cases where the IRS rejected taxpayers' attempts to deduct this type of education expense, with the IRS losing some cases but prevailing in others.²⁵⁹ Yet in this example, ITA asked the taxpayer a series of binary questions. It did not ask any follow-up questions that could have explored the taxpayer's rationale for pursuing the MBA, the type of trade or business he had been conducting, and how he would use the knowledge he would gain during his MBA studies in the future. Nonetheless, ITA provided the taxpayer with a clear statement that he could deduct the education expenses on a screen featuring a heading that contained the word "Answer."²⁶⁰

If the IRS were to audit and challenge the contractor's ordinary and necessary business expense deduction for his MBA education expenses, the contractor would not be able to argue that the IRS should be bound by statements provided by ITA. The courts have consistently held that administrative guidance cannot alter the meaning of the formal tax law, statutes, and regulations.²⁶¹ Courts have repeatedly cited and quoted *Miller v. Commissioner*,²⁶² in which the court stated that "[t]he authoritative sources of Federal tax law are the statutes, regulations, and judicial decisions; they do not include informal IRS publications."²⁶³ The IRS takes the position that the Internal Revenue Bulletin ("IRB"), a weekly government publication, is the IRS's authoritative instrument for announcing official IRS rulings and procedures and for publishing Treasury Decisions and other items.²⁶⁴

259. See, e.g., *Link v. Comm'r*, 90 T.C. 460, 463–64 (1988), *aff'd*, 869 F.2d 1491 (6th Cir. 1989) (denying graduate education expense deduction); *Schneider v. Comm'r*, 47 T.C.M. (CCH) 675 (1983) (denying MBA work-related education expense deduction); *Sherman v. Comm'r*, 36 T.C.M. (CCH) 1191 (1977) (same); see also *Allemeier v. Comm'r*, 90 T.C.M. (CCH) 197 (2005), *supplemented by* 91 T.C.M. (CCH) 758 (2006) (allowing MBA work-related education expense deductions).

260. INTERNAL REVENUE SERV., *supra* note 256.

261. See, e.g., *Miller v. Comm'r*, 114 T.C. 184, 194–95 (2000); *United States v. Josephberg*, 562 F.3d 478, 498–500 (2d Cir. 2009); *Carpenter v. United States*, 495 F.2d 175, 184 (5th Cir. 1974); *Adler v. Comm'r*, 330 F.2d 91, 93 (9th Cir. 1964); *Zimmerman v. Comm'r*, 71 T.C. 367, 371 (1978), *aff'd*, 614 F.2d 1294 (2d Cir. 1979); *Johnson v. Comm'r*, 620 F.2d 153, 155 (7th Cir. 1980). *But see* *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1913 (2020) (explaining that "[w]hen an agency changes course . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." (internal quotations omitted)).

262. 114 T.C. at 194–95.

263. *Id.* For cases citing *Miller* for the proposition that administrative guidance by the IRS is not binding on the government, see, for example, *Dorsey v. Comm'r*, 91 T.C.M. (CCH) 907 (2006); *Dunnigan v. Comm'r*, 110 T.C.M. (CCH) 320 (2015); and *Blodgett v. Comm'r*, 104 T.C.M. (CCH) 500 (2012).

264. I.R.S. Interim Guidance Mem. SBSE-04-0517-0030, IRM 4.10.7.2.4 (Jan. 10, 2018).

The Agency has informed its employees internally that they must follow any items published in the IRB and taxpayers may rely on them.²⁶⁵ Despite the existence of this mechanism for transforming informal tax guidance into internally binding rules, the IRS does not publish the vast majority of its IRS publications, FAQs from its website, or statements made by automated legal guidance in the IRB.²⁶⁶

Additionally, if the IRS were to assert civil tax penalties against the contractor for claiming the MBA expense deduction, the contractor would encounter significant difficulties in attempting to show reliance on IRS statements in informal tax guidance to defend against these penalties. If the IRS, for example, were to assert an accuracy-related tax penalty, such as disregard of rules and regulations,²⁶⁷ the contractor might attempt to defend against this penalty by claiming that he had a “reasonable basis” for his position.²⁶⁸ However, to assert this defense, the contractor must demonstrate that he reasonably relied upon written statements contained in an authority appearing on an exclusive list of possibilities, including the Code, Regulations, Revenue Rulings, judicial decisions, and items published by the IRS in the IRB.²⁶⁹ Statements made by ITA, which are not published in the IRB, cannot be used for a reasonable-basis defense.²⁷⁰ Further, the contractor may also be unsuccessful in presenting a “reasonable cause and good faith” defense, which is provided by statute, because he would have difficulty obtaining a complete written record of his communication with ITA to show that his misunderstanding of the law was reasonable (unless he had the foresight to take a screenshot of every stage of the question-and-answer session).²⁷¹

Even if the contractor had used third-party tax return preparation software rather than ITA to determine whether he could claim a deduction for the MBA tuition expenses, it is unlikely that he could show his reliance on answers delivered by the software as a defense against accuracy-related tax penalties. As discussed above, third-party tax preparation products, such as Intuit’s TurboTax, often republish statements from informal IRS guidance and mimic the questions and answer that ITA provides.²⁷² As the Tax Court has

265. *Id.* (adding “Caution” statement to subsection of *Internal Review Manual*).

266. See Hickman, *supra* note 236, at 241; Leslie Book, *Giving Taxpayer Rights a Seat at the Table*, 91 TEMP. L. REV. 759, 769 (2019).

267. I.R.C. § 6662(b)(1).

268. Treas. Reg. § 1.6662-3(b)(3) (1991).

269. *Id.* (“[P]osition [must be] reasonably based on one or more of the authorities set forth in § 1.6662-4(d)(3)(iii) . . .”).

270. *Id.*

271. I.R.C. § 6664(c)(1).

272. See *supra* notes 189–190 and accompanying text.

commented when considering a taxpayer's attempt to rely on tax preparation software, this technology is "only as good as the information one inputs into it."²⁷³ Consequently, the Tax Court and many other courts have held that taxpayers who have relied on TurboTax when completing their returns cannot use it as a tax penalty defense.²⁷⁴

If the contractor in this example had been able to consult with a tax lawyer to access formal tax law, he may have received advice that could have allowed him to defeat a challenge by the IRS. As a result of the frequent litigation between the IRS and taxpayers over the deductibility of MBA expenses, tax lawyers advertise that, in exchange for a fee, they advise clients on how to structure their affairs before claiming the deduction.²⁷⁵ The Regulations contain ten specific, illustrative examples of situations where taxpayers deducted work-related education expenses, which are accompanied by analysis from Treasury officials.²⁷⁶ If the contractor had been able to afford to speak with a tax lawyer, for example, the lawyer might have reviewed these regulations and advised the contractor to engage in mass marketing activities and to document these efforts *before* applying to any online MBA programs.²⁷⁷ The tax lawyer would also be familiar with the relevant case law in order to help the contractor plan for his education and prepare documentation in the event of an IRS audit. And if the contractor could have paid for a written opinion from the tax lawyer, he could also use that advice to support a "reasonable cause and good faith" defense against accuracy-related tax penalties by showing he reasonably relied on advice from a professional tax advisor.²⁷⁸

On a much larger scale, wealthy individuals and business taxpayers can access formal tax law to assist with tax planning in situations in which the stakes are far higher than the contractor's deduction for work-related education expenses. In June 2021, for example, the *New York Times* published an exposé of the private equity

273. *Bunney v. Comm'r*, 114 T.C. 259, 267 (2000).

274. *Id.*; *see, e.g.*, *Bartlett v. Comm'r*, 104 T.C.M. (CCH) 267 (2012); *Bulakites v. Comm'r*, 113 T.C.M. (CCH) 1384 (2017); *see also* Randy P. Mock & Nancy E. Shurtz, *The TurboTax Defense*, 15 FL. TAX REV. 443 (2014).

275. *See, e.g.*, *MBA Student's Attempt to Deduct Tuition Fails in the Tax Court*, BERGER L., <https://www.bergerlaw.net/mba-students-attempt-to-deduct-tuition-fails-in-the-tax-court.html> (last visited Mar. 7, 2022) [<https://perma.cc/N9GG-L4F8>]; *MBA Students*, VIRTUAL TAX PRO., <http://thevirtualtaxprofessional.com/mbastudents.php> (last visited Mar. 7, 2022) [<https://perma.cc/4GB7-AYGY>].

276. Treas. Reg. § 1.162-5(b)(2) to (3) (as amended in 1967).

277. *See, e.g.*, *Allemeier v. Comm'r*, 90 T.C.M. (CCH) 197 (2005), *supplemented by* 91 T.C.M. (CCH) 758 (2006) (allowing MBA work-related education expense deductions).

278. Treas. Reg. § 1.6664-4(c)(1) (as amended in 2003).

industry's efforts to use "fee waivers" to convert their two percent management fee from ordinary income, taxed at a top ordinary income tax rate of thirty-seven percent, to income taxed at a net capital gain rate of twenty percent.²⁷⁹ The private equity industry had already used a tax planning gambit called "carried interest" to ensure that the bulk of private equity fund managers' fees were taxed at the lower capital gain rate.²⁸⁰ Despite already having this tax victory, the private equity industry wanted to get more of fund managers' fees eligible for this lower rate of taxation.²⁸¹ In order to do so, sophisticated advisors working for the private equity firms relied on a deeply ambiguous and complicated set of tax rules regarding the receipt and taxation of partnership profits interest.²⁸² The advisors had to rely on a number of different partnership Code sections, legislative history underlying such sections, case law, and more.²⁸³ The combination of the complexity and ambiguity of these provisions made the aggressive planning possible.²⁸⁴ The ambiguity, combined with the fact that the planning occurred based on the advice of counsel, also offered the private equity firms the ability to take advantage of the "reasonable cause and good faith" defense against civil tax penalties.²⁸⁵

The above examples illustrate how informal tax law offers taxpayers a "heads—the IRS wins, tails—the taxpayer loses" scenario. While informal tax law can play a critical and uncontroversial function in unambiguous situations, when the tax law is ambiguous, informal tax law has significant deficits relative to formal law. Informal tax law can practically bind taxpayers to disadvantageous outcomes on the one hand, but also fails to provide taxpayers certainty or penalty protection when it offers advantageous outcomes on the other. Informal tax law

279. Jesse Drucker & Danny Hakim, *Private Inequity: How a Powerful Industry Conquered the Tax System*, N.Y. TIMES, <https://www.nytimes.com/2021/06/12/business/private-equity-taxes.html> (last updated Sept. 8, 2021) [<https://perma.cc/CD3H-RZHX>].

280. See generally Victor Fleischer, *Two and Twenty: Taxing Partnership Profits in Private Equity Funds*, 83 N.Y.U. L. REV. 1 (2008) (describing in detail).

281. Drucker & Hakim, *supra* note 279.

282. See generally Gregg D. Polsky, *Private Equity Management Fee Conversions*, TAX NOTES, Feb. 9, 2009, at 743 (describing in detail).

283. *Id.*

284. For instance, a central issue was whether receiving an additional carried interest in investment partnerships, instead of a management fee waiver, constituted receipt of a profits interest. The taxation of profits interests is notoriously complex and ambiguous, and has spawned regulations, proposed regulations, anti-abuse Code sections, legislative history, Revenue Rulings, case law, and more. See, e.g., Laura E. Cunningham, *Taxing Partnership Interests Exchanged for Services*, 47 TAX L. REV. 247 (1991) (describing some of this context).

285. I.R.C. § 6664(c)(1); Treas. Reg. § 1.6664-4 (as amended in 2003); see also Emily Cauble, *Accessible Reliable Tax Advice*, 51 U. MICH. J.L. REFORM 589, 591 (2017) (discussing how expert opinions may be used to provide protection against IRS penalties); Field, *supra* note 218 (discussing use of tax opinions).

also offers taxpayers far fewer opportunities to engage in the type of sophisticated planning available to private equity fund managers and the many other taxpayers who have access to the formal tax law through sophisticated advisors.

Making matters worse, because of the complex way the formal tax law is written, as well as restrictions on what professionals can use formal tax law to make legal interpretations, tax lawyers have significant advantages in terms of access to formal tax law. The high cost of tax lawyers as well as other sophisticated advisors means, for all intents and purposes, that the formal tax law is available only to taxpayers with significant resources. The result is exactly what we should fear from an access to justice perspective: the combination of the two-tier system of legal drafting and inequitable access to resources in society means that different taxpayers not only have access to different types and amounts of counsel, as we would have expected; they also have access to fundamentally different forms of law.

The way in which two-tiered legal drafting systematically advantages certain groups and systematically disadvantages others should sound familiar. As we explored, scholars have shown that in many areas of the law, the substance and enforcement of the law systematically advantages certain groups and systematically disadvantages others along racial and other class-based lines.²⁸⁶

While the lack of attention to two-tiered legal drafting until now limits our ability to conclude with certainty which groups are advantaged and which are disadvantaged, it is likely that access to the formal tax law has distributive consequences since access to sophisticated advisors likely tracks income and wealth.²⁸⁷ It is an open, and pressing, question whether two-tiered legal drafting also disproportionately advantages and disadvantages taxpayers based on other characteristics.²⁸⁸ Of particular note in this regard, the IRS does not request any information about taxpayers' race on federal income tax returns or report information on the race of individual taxpayers it has audited,²⁸⁹ let alone information about the racial composition of visitors

286. See *supra* Part I.A.

287. See *supra* notes 213–214 and accompanying text.

288. For illustrations of analysis in other areas, see *supra* notes 35–51 and accompanying text.

289. See Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. 1 (2019); Dorothy Brown, *Race and Tax: Colorblind No More*, JOTWELL (Feb. 25, 2021), <https://tax.jotwell.com/race-and-tax-colorblind-no-more/> [<https://perma.cc/ZSY2-LU2M>]; Brian Faler, *Taxes May Not Be Colorblind, and Critics Say More Data Could Prove It*, POLITICO (Mar. 16, 2021, 4:22 PM), <https://www.politico.com/news/2021/03/16/race-taxes-irs-476371> [<https://perma.cc/ED9N-42Q2>]; see also Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021) (establishing equitable data working group).

to the IRS website.²⁹⁰ Yet in other areas of the law where unequal enforcement is known, government officials and scholars have access to data regarding the race and age of affected individuals.²⁹¹ Given the distinctions between formal tax law and informal tax law that this Part has illustrated, the lack of available information about the personal characteristics of the taxpayers who primarily consult and rely upon the informal tax law raises significant equity concerns.

E. Beyond Tax Law

Other federal agencies, in addition to the IRS, also issue extensive informal guidance to assist individuals and businesses and to influence their behavior. As one scholar recently noted, such informal administrative guidance has become “the bread and butter of agency practice.”²⁹² Myriad examples of informal law can be found in the context of actions of the U.S. Equal Employment Opportunity Commission regarding the Americans with Disabilities Act;²⁹³ the U.S. Department of Health and Human Services’ guidance regarding drug pricing;²⁹⁴ the Federal Communication Commission’s distribution of guidance through its “General Counsel’s Blog”;²⁹⁵ the U.S. Environmental Protection Agency’s description of hazardous waste;²⁹⁶ and the U.S. Department of Education’s guidance regarding

290. Exceptions to this statement are situations where a statutory or administrative rule affects a specific group of taxpayers, where information about these taxpayers’ race is collected by nontax agencies, such as the Federal Bureau of Prisons. See *Inmate Race*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp (last updated Feb. 26, 2022) [<https://perma.cc/AJT9-4HDK>]. In addressing the IRS’s initial decision to withhold economic impact payments from incarcerated individuals in 2020, Professor Leslie Book has argued that this type of policy “can reinforce race-based power disparities and perpetuate racial injustice.” See Book, *supra* note 170, at 672.

291. See *supra* Part I.A.

292. Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REGUL. 165, 168 (2019).

293. See Mark DeLoach, *Can’t We All Just Get Along?: The Treatment of “Interacting with Others” as a Major Life Activity in the Americans with Disabilities Act*, 57 VAND. L. REV. 1313, 1321 (2004) (“Since Congress did not define many of the key terms in the ADA, the Equal Employment Opportunity Commission (EEOC) has provided guidance through both formal regulations and informal guidelines.” (footnotes omitted)).

294. Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1814 (2015).

295. Thomas M. Johnson Jr. & Michael Carlson, *Caveat Lector: A Blog Post About Reliance on Agency Blog Posts*, FED. COMM’NS COMM’N: BLOG (Apr. 4, 2019, 12:30 PM), <https://www.fcc.gov/news-events/blog/2019/04/04/caveat-lector-blog-post-about-reliance-agency-blog-posts> [<https://perma.cc/QRZ7-AD69>].

296. See *RCRA Online*, U.S. ENV’T PROT. AGENCY, <https://rcrapublic.epa.gov/rcraonline/> (last visited Mar. 7, 2022) [<https://perma.cc/7TDG-QS6D>]. Inputting “hazardous waste” in the search bar yields 3,157 results in the form of Agency questions and answers, letters, memoranda, and publications.

transgender discrimination;²⁹⁷ among many others.²⁹⁸ Many of these examples show that even though the agency has issued explanations and positions that appear to be definitive, individuals and businesses cannot use this type of informal law to bind the agency or avoid the enforcement actions by the agency, including monetary penalties and other sanctions.

In response to federal agencies' growing use of informal administrative guidance, government officials and policymakers have attempted to institute reform measures. For example, in 2019, President Trump signed an executive order prohibiting federal agencies from creating binding rules through the issuance of guidance documents.²⁹⁹ (President Biden subsequently revoked this executive order on his first day in office.³⁰⁰) At the agency level, in 2020, the U.S. Department of Justice added a rule to its internal manual that states that lawyers cannot rely on guidance documents in any civil or criminal cases.³⁰¹ Other agencies, such as the Food and Drug Administration, have implemented "good guidance practices," in which the agency commits to seek public input before issuing guidance and to seek suggestions for guidance projects from stakeholders.³⁰² Congress has also attempted to address administrative guidance issued by the U.S. Department of Health and Human Services by requiring the Agency to afford the public notice and a chance to comment before the Agency establishes or changes a "substantive legal standard" affecting Medicare benefits.³⁰³

While each of these reform measures is designed to increase the efficiency, fairness, and transparency of agencies' issuance of administrative guidance, they do not address the access to justice gap between those who can rely on formal law through sophisticated advisors and those who have no other option than to consult informal law. Policy reforms that are designed to limit the use of informal

297. See Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 YALE L.J. 2122, 2125 (2019).

298. See, e.g., Gluck et al., *supra* note 294 (discussing informal lawmaking in various contexts); Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 GEO. MASON L. REV. 501 (2015) (examining how "perceived congressional incapacitation" has led to "administrative improvisation").

299. Exec. Order No. 13,891, 84 Fed. Reg. 55,235 (Oct. 9, 2019).

300. Exec. Order No. 13,992, 86 Fed. Reg. 7,049 (Jan. 20, 2021).

301. U.S. Dep't of Just., Just. Manual § 1-19.000 (2018).

302. *Fact Sheet: FDA Good Guidance Practices*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/about-fda/transparency-initiative/fact-sheet-fda-good-guidance-practices> (last updated Dec. 4, 2017) [<https://perma.cc/NZ9U-FDB8>].

303. 42 U.S.C. § 1395hh(a)(2); see also *Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (2019) (holding that Department of Health and Human Services was required to comply with notice-and-comment rulemaking under Medicare Act before changing payment formula).

administrative guidance, such as President Trump's 2019 executive order,³⁰⁴ would exacerbate the access to justice gap, given how unlikely it is that middle- and low-income individuals and small businesses would be able to understand the formal law in the absence of this guidance. Further, policies that focus on the government's use of informal administrative guidance to support enforcement and litigation, such as the U.S. Department of Justice's guidance policy,³⁰⁵ do not relieve concerns by individuals who rely on this guidance that the government may take contrary enforcement actions in the future. Good guidance practices aimed at involving the public in formulation of informal administrative guidance do not address the inaccessibility of formal law, such as complex statutory text that can only be interpreted and applied with aid of a lawyer.³⁰⁶ Finally, these policy responses do not offer new legal defenses to penalties and other sanctions for individuals and businesses that take actions in reasonable reliance on statements contained in informal administrative guidance.

III. CAN TWO-TIERED LEGAL DRAFTING BE REFORMED?

What steps, if any, can legislators and government officials take to address the growing gap between formal and informal law? Should policymakers focus reform efforts on one type of law (formal or informal) or the other? And is reform of the formal law itself the only possibility for addressing the imbalance between formal and informal tax law?

As this Part shows, there is unlikely to be a single, comprehensive approach that can alleviate the disadvantages faced by taxpayers who lack access to the formal law through sophisticated advisors. Instead, this Part presents a menu of possibilities for studying two-tiered legal drafting and addressing the inequities it causes.

A. Reform of Formal Law

Simplicity has long been described as one of the essential objectives of tax reform, along with fairness and efficiency.³⁰⁷ Yet this objective has also been depicted as the holy grail of tax law, an ideal

304. Exec. Order No. 13,891, 84 Fed. Reg. 55,235 (Oct. 9, 2019).

305. U.S. Dep't of Just., *supra* note 301.

306. U.S. FOOD & DRUG ADMIN., *supra* note 302.

307. For discussion, see Edward J. McCaffery, *The Holy Grail of Tax Simplification*, 1990 WIS. L. REV. 1267; and Sheldon D. Pollack, *Tax Complexity, Reform, and the Illusions of Tax Simplification*, 2 GEO. MASON INDEP. L. REV. 319 (1994).

that legislators often seek, but cannot ever seem to find.³⁰⁸ As we propose below, however, statutory simplification that is targeted to help taxpayers who lack access to sophisticated tax lawyers and accountants may gain more traction with legislators and the public.

As an initial step, legislators and other policymakers should consider the sources of simplicity, which pervades IRS publications, FAQs, and automated legal guidance.³⁰⁹ Simplicity occurs when the IRS presents contested tax law as clear tax rules, adds administrative gloss to the formal tax law, and fails to fully explain the tax law.³¹⁰ One source of simplicity is the enactment of statutes and regulations that rely on judicially created standards, such as the test for whether an item is an ordinary and necessary business expense.³¹¹ The facts-and-circumstances nature of this type of standard creates the need for the IRS to describe this type of formal law by adding its own examples and even terminology in its description of the standard in informal guidance.³¹² Another source of simplicity is the use of statutory standards that focus on the taxpayer's intent or purpose. These statutes, such as the statute governing hobby losses, often lead to judicial decisions and regulatory examples.³¹³ The IRS, then, attempts to summarize the authorities that interpret these statutes in its informal tax guidance, which sometimes results in simplifications that deviate from the underlying tax law.³¹⁴ Last, vague statutory terms may require the Treasury to offer detailed regulations to define the terms, but this text may not always carry over precisely to the IRS's informal guidance documents.³¹⁵

To reduce the potential for gaps between the formal and informal tax law, one drafting approach could be, where feasible, to adopt clear rules rather than standards when statutes address issues that disproportionately affect taxpayers who lack access to sophisticated advisors.³¹⁶ For example, rather than focusing on

308. McCaffery, *supra* note 307; *see also* Wright, *supra* note 54, at 715 (discussing complexity in the law); Steve R. Johnson, *The Future of American Tax Administration: Conceptual Alternatives and Political Realities*, 7 COLUM. J. TAX L. 5 (2016) (same).

309. For discussion, see Blank & Osofsky, *Simplicity*, *supra* note 28; and Blank & Osofsky, *Automated*, *supra* note 28.

310. Blank & Osofsky, *Simplicity*, *supra* note 28, at 189.

311. *See* I.R.C. § 162(a); Treas. Reg. § 1.162-1(a) (as amended in 1993).

312. *See* Blank & Osofsky, *Simplicity*, *supra* note 28, at 219–20 (exploring in the context of IRS publications).

313. *See* I.R.C. § 183(a); Treas. Reg. § 1.183-2(b) (1972).

314. *See* Blank & Osofsky, *Simplicity*, *supra* note 28, at 238–40.

315. *See id.* at 226–33 (discussing administrative gloss in IRS publications).

316. For discussion of rules and standards, see Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559 (1992); and Kyle D. Logue, *Tax Law Uncertainty and the Role of Tax Insurance*, 25 VA. TAX REV. 339, 363–68 (2005) (in tax law).

subjective factors like intent or purpose, Congress could use clear rules to define how specific taxpayers and activities are classified. Such provisions might include bright-line thresholds involving factors such as amounts of compensation or number of hours or days worked.³¹⁷ Rule-based statutes could clarify formal tax law that affects average individual taxpayers and small businesses on a regular basis, such as laws regarding when an activity constitutes a trade or business rather than a hobby,³¹⁸ when work-related education constitutes an ordinary and necessary business expense,³¹⁹ and when an individual is an employee rather than an independent contractor.³²⁰

Rule-based statutory drafting offers several benefits as an approach for addressing the inequities of two-tiered legal drafting. First, by clearly defining statutory terms with bright-line rules, Congress may limit the issues that could become the subject of conflicting judicial decisions, which average taxpayers would then only be able to access with the assistance of sophisticated advisors. Second, if Congress uses bright-line rules, such as dollar or time thresholds, the IRS may need to issue less informal guidance compared to situations where Congress enacts statutes that include purpose-based tests and standards. And when Congress uses a bright-line rule, the IRS is less likely to deviate from the statutory text in its informal guidance.

Despite these benefits, rule-based statutory drafting is not always possible or appropriate. If, for instance, Congress enacts a statute with a clear rule, but does not adequately address different scenarios, greater complexity in the tax system can result. The Treasury may be required to issue rules that address these omissions in regulations, which, in turn, can lead to simplicity as the IRS attempts to explain both the statute and regulations to the public. Bright-line rule-based drafting can also lead to problematic discontinuities in tax treatment when high tax liability stakes turn on small differences.³²¹ And without sufficient tax penalties or anti-abuse provisions, taxpayers may attempt to exploit bright-line rules to claim tax benefits that Congress did not intend.³²² However, in some cases,

317. See, e.g., I.R.C. § 7701(b)(3) (days-based substantial presence test).

318. See I.R.C. § 162(a); Treas. Reg. § 1.162-1(a) (as amended in 1993).

319. Treas. Reg. § 1.162-5(b)(2), (3) (as amended in 1967).

320. See I.R.C. § 3401(c) (defining employee). For discussion, see Shu-Yi Oei & Diane M. Ring, *Tax Law's Workplace Shift*, 100 B.U. L. REV. 651, 666 (2020); and David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J.L. & PUB. POL'Y 138 (2015).

321. Joel Slemrod, *Buenas Notches: Lines and Notches in Tax System Design*, 11 EJOURNAL TAX RSCH. 259 (2013).

322. For discussion, see Shannon Weeks McCormack, *Tax Shelters and Statutory Interpretation: A Much Needed Purposeful Approach*, 2009 U. ILL. L. REV. 697, 766; and Jeremy

Congress has used bright-line rules to resolve legal ambiguity effectively, such as clear rules involving issues such as the tax treatment of gifts from employers to employees (default rule of income classification),³²³ participation in a real property trade or business (hours-based threshold),³²⁴ and U.S. residency status (days-based threshold).³²⁵

Another possibility for addressing problems caused by two-tiered legal drafting is to formalize the statutory drafting of the Code, especially where low-income taxpayers are concerned.³²⁶ Tax legislation often features ambiguity and omissions as a result of errors resulting from cross-references and other drafting defects.³²⁷ For instance, in 2020, the IRS attempted to address statutory ambiguities and omissions in the CARES Act in its FAQs regarding the first round of economic impact payments by providing guidance on topics such as whether a taxpayer must return a payment received on behalf of deceased taxpayers or children who, after payment, turned seventeen.³²⁸ Professor Sarah Lawsky has argued that one response to the frequent occurrence of drafting errors is for legislative staffs to formalize statutory language prior to enactment by translating it into logical terms.³²⁹ As Lawsky argues, this approach could “help drafters avoid unintentional ambiguity and refine the language used in the statute.”³³⁰ She illustrates how formalization could be implemented to redraft statutes governing the home mortgage deduction, among other items.³³¹

Formalization could allow legislators to draft statutory text that would be more comprehensible to computers. Statutes that adopt a formalized approach could be especially helpful when the rules involve delivery of benefits to low-income individuals. The earned income tax

Scott, *Check the Box for Tax Avoidance*, FORBES (Feb. 19, 2014, 1:42 PM), <https://www.forbes.com/sites/taxanalysts/2014/02/19/check-the-box-for-tax-avoidance/?sh=5cbc446f756a> [<https://perma.cc/7FUL-SMTBJ>] (discussing abusive tax planning and check-the-box regulations).

323. I.R.C. § 102(c)(1).

324. I.R.C. § 469(c)(7)(B) (750-hour service requirement for real estate professionals).

325. I.R.C. § 7701(b)(3) (days-based substantial presence test).

326. For discussion of formalization, see Lawsky, *supra* note 116; Sarah B. Lawsky, *A Logic for Statutes*, 21 FLA. TAX REV. 60 (2017); and Stephanie Hoffer, *What If Tax Law's Future Is Now?*, 16 OHIO ST. TECH. L.J. 67 (2020).

327. For discussion, see Lawsky, *supra* note 116; Ryan D. Doerfler, *The Scrivener's Error*, 110 NW. U. L. REV. 811 (2016); and Anuj C. Desai, *The Dilemma of Interstatutory Interpretation*, 77 WASH. & LEE L. REV. 177 (2020).

328. See *supra* notes 227–235 and accompanying text.

329. See Lawsky, *supra* note 116.

330. *Id.* at 379.

331. See *id.* at 382–87.

credit (“EITC”), for instance, is often described as one of the most complex statutes in the Code.³³² One source of the complexity arises from the difficulty that taxpayers face in calculating the amount of the benefits for which they are eligible.³³³ Professor Jacob Goldin notes that for these types of issues, Lawsky’s formalization proposal could be used to draft a statute that better identifies the information required for EITC eligibility.³³⁴ By adopting formalization of statutory text where provisions feature extensive computation, Congress could reduce the potential for the IRS’s automated tools to reach wrong results or for the IRS to issue informal guidance that adds administrative gloss to statutory text. Congress could consider formalization as a way to reform statutes in addition to the EITC, such as the child tax credit³³⁵ and the childcare credit,³³⁶ each of which targets low-income taxpayers.

One objection to formalization of statutes providing benefit programs targeted at low-income taxpayers is that it would make the law appear more complex and incomprehensible to average taxpayers.³³⁷ But if Congress can draft statutes using terms that are more understandable to computers than humans, then the IRS can offer taxpayers automated legal guidance tools that apply this law accurately and efficiently. As Goldin has argued, even though the EITC features significant amounts of “computational complexity,” taxpayers can access the benefits provided by this statute with the help of “assisted preparation methods,” such as software provided through the IRS’s Free File program, a partnership between the IRS and private software companies.³³⁸ While formalized statutes involving computation may require taxpayers to rely more on computers, they are less likely to result in conflicting formal and informal tax law than statutes that feature purpose-based standards and requirements.³³⁹ These types of statutes would also be less likely to force taxpayers to seek help from sophisticated advisors, such as tax lawyers, or to disproportionately advantage those taxpayers who do.

332. See, e.g., Robert Greenstein, John Wancheck & Chuck Marr, *Reducing Overpayments in the Earned Income Tax Credit*, CTR. ON BUDGET & POL’Y PRIORITIES 3–4, <https://www.cbpp.org/research/federal-tax/reducing-overpayments-in-the-earned-income-tax-credit> (last updated Jan. 31, 2019) [<https://perma.cc/FHS7-7A6E>] (“The EITC is one of the most complex elements of the tax code that individual taxpayers face.”).

333. See *id.*

334. Goldin, *supra* note 199, at 71 n.81.

335. I.R.C. § 24.

336. I.R.C. § 21.

337. See, e.g., Zelenak, *supra* note 207, at 94–95 (criticizing the “unprecedented computational complexity” of modern tax law).

338. See Goldin, *supra* note 199.

339. See *supra* notes 309–314 and accompanying text.

Congress should not attempt to address the inequities of two-tiered legal drafting by focusing primarily on cosmetic aspects of the formal tax law in an effort to make the Code more readable. Characteristics such as the numbers of words or income tax brackets are frequent political targets of proponents of tax simplification.³⁴⁰ Compared to reforms such as greater use of rule-based statutes or formalizing statutory texts, the introduction of short, readable phrases in statutory text may not assist taxpayers who lack access to sophisticated advisors who can access the formal tax law.

B. Reform of Informal Law

Bright lines and formalization will not be appropriate in all situations, especially where legislators opt to enact a statute that addresses the principal purpose for a transaction in order to combat a potentially abusive tax position.³⁴¹ There will also be times when Congress passes legislation quickly, such as in times of economic crisis, and the IRS will be the only agency that can address unanswered questions in informal guidance.³⁴² And as a result of technological advancements and limited funding for in-person assistance, the IRS will likely continue to engage in automation of guidance through its website.³⁴³ As this Part argues, changes to informal law are needed as well.

Notice of Unsettled Formal Law. The IRS often attempts to describe the law in seemingly unambiguous terms in its informal guidance, such as when it describes the definition of “ordinary” business expenses in IRS Publication 535, *Business Expenses*, using only one judicial interpretation and without discussion of conflicting

340. See, e.g., Michelle Ye Hee Lee, *Ted Cruz’s Claim That the IRS Tax Code Has More Words Than the Bible*, WASH. POST (Mar. 11, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/03/11/ted-cruzs-claim-that-the-irs-tax-code-has-more-words-than-the-bible/> [<https://perma.cc/8ZWY-B6SY>]; Press Release, The White House, President Bush Provides Leadership on Tax Reform (Sept. 2, 2004), <https://georgewbush-whitehouse.archives.gov/news/releases/2004/09/20040902-7.html> [<https://perma.cc/QC5C-GNMU>] (“The Internal Revenue Code contains more than a million words.”); Scott Greenberg, *Federal Tax Laws and Regulations Are Now Over 10 Million Words Long*, TAX FOUND. (Oct. 8, 2015), <https://taxfoundation.org/federal-tax-laws-and-regulations-are-now-over-10-million-words-long/> [<https://perma.cc/CN37-XTBU>]. For further discussion, see Emily Cauble, *Superficial Proxies for Simplicity in Tax Law*, 53 U. RICH. L. REV. 329 (2019).

341. For discussion, see Walter J. Blum, *Motive, Intent, and Purpose in Federal Income Taxation*, 34 U. CHI. L. REV. 485 (1967); and McCormack, *supra* note 322.

342. See *supra* notes 169–172 and accompanying text.

343. See TREASURY INSPECTOR GEN. FOR TAX ADMIN., U.S. DEPT OF THE TREASURY, NO. 2015-40-032, INTERIM RESULTS OF THE 2015 FILING SEASON 14 (Mar. 31, 2015), <https://www.treasury.gov/tigta/auditreports/2015reports/201540032fr.pdf> [<https://perma.cc/F93B-CB4R>].

decisions.³⁴⁴ In contrast, in the formal tax law, the IRS often includes notices of conflicting judicial decisions. For example, in Revenue Ruling 2010-25, the IRS ruled that a hypothetical taxpayer who incurred a mortgage liability to acquire a qualified residence could treat the mortgage as home equity indebtedness to the extent it exceeded \$1 million, up to an excess of \$100,000.³⁴⁵ When issuing the ruling, the IRS stated that it disagreed with several conflicting Tax Court holdings.³⁴⁶

The IRS's approach to providing notice in the formal tax law to alert taxpayers of conflicting authorities should be incorporated in informal IRS guidance as well. In its informal guidance, including IRS publications, FAQs, and automated legal guidance, the IRS should include warnings when the formal law underlying its description is either unsettled or is in conflict with the description. In order to provide taxpayers with an opportunity to make a decision about which tax position to claim, the IRS could present the government-favorable position in its informal guidance and a notice that there are alternative interpretations that the IRS has not adopted. The benefit of this change is that taxpayers who must rely on informal guidance could make a tax planning decision appropriate to their own risk tolerance. Where they can afford it and the issue matters to them, taxpayers might consult with a lawyer or accountant or at least attempt to research the issue further.

One potential criticism of this approach is that including notice of unsettled or conflicting law in informal IRS guidance could reduce the simplicity and usability of the guidance to average taxpayers. However, especially in the case of automated legal guidance, FAQs, and other online tools—resources that lack warnings regarding conflicting law—such notice could be integrated through brief statements followed by hyperlinks to authorities. The IRS has demonstrated that it can include such authorities using this approach in situations where it has been subject to an injunction, such as when it included a reference to *Scholl v. Mnuchin*³⁴⁷ in its FAQ regarding economic impact payments to incarcerated individuals.³⁴⁸

Explanation of Changes. Another important reform that the IRS could adopt would be to provide notice to taxpayers when it makes

344. See INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, PUBL'N 535, CATALOG NO. 15065Z, BUSINESS EXPENSES (Feb. 11, 2020), <https://www.irs.gov/pub/irs-pdf/p535.pdf> [<https://perma.cc/F93B-CB4R>].

345. Rev. Rul. 2010-25, 2010-44 I.R.B. 571-72.

346. *Id.*

347. 494 F. Supp. 3d 661 (N.D. Cal. 2020).

348. Q A5 under *Questions and Answers about the First Economic Impact Payment*, INTERNAL REVENUE SERV., <https://www.irs.gov/newsroom/questions-and-answers-about-the-first-economic-impact-payment-topic-a-eligibility> (last updated Mar. 9, 2021) [<https://perma.cc/AZD6-J7Q8>].

changes to the content of informal tax guidance. In 2020, the IRS frequently made changes to online FAQs regarding COVID-19-related legislation.³⁴⁹ Taxpayers and tax practitioners criticized the IRS for making changes without highlighting them or describing the reasoning behind them.³⁵⁰ Similarly, the IRS makes changes to questions and answers in its automated legal guidance tools, such as ITA, without identifying the changes for taxpayers.³⁵¹ In addition, the IRS does not maintain an online archive of previously issued responses from ITA and descriptions of the law that have appeared on its website.³⁵² In the interest of fairness and government transparency, the IRS should provide taxpayers with notice of changes that it makes to its informal guidance, offer taxpayers an explanation of the changes, and create a searchable database that taxpayers can use to research previous IRS statements.

Effective Dates. Finally, the IRS should include effective dates on all of its informal guidance, including its online resources. Even though the IRS includes effective dates on the cover of its printed informal guidance, such as IRS publications,³⁵³ it does not include effective dates on resources such as ITA or descriptions of the formal tax law on its website.³⁵⁴ While the IRS announced in October 2021 that it would begin including dates on “Fact Sheets” involving “significant FAQs,” this policy is limited to only certain FAQs and does not extend to any other informal IRS guidance.³⁵⁵ This approach is markedly different from the way in which the formal tax law is drafted, where provisions of the Code, Regulations, and Revenue Rulings all contain effective dates.³⁵⁶ Effective dates are valuable because they alert taxpayers whether they are reading the most up-to-date IRS informal guidance. Further, if the IRS becomes bound by any of its informal guidance, a possibility discussed next, then the effective dates are critical information.

349. See *supra* notes 169–172 and accompanying text; 1 TAXPAYER ADVOC. SERV., *supra* note 169, at 36–38.

350. See 1 TAXPAYER ADVOC. SERV., *supra* note 169, at 36 (encouraging the IRS to adopt more transparent policies); Thomas, *supra* note 233 (discussing “the (lack of a) legal rationale for the [IRS’s] conclusion[s]”).

351. See Blank & Osofsky, *Automated*, *supra* note 28, at 186, 239–43.

352. See *id.* at 236–38; 1 TAXPAYER ADVOC. SERV., *supra* note 169, at 36.

353. See, e.g., INTERNAL REVENUE SERV., *supra* note 163 (described as “For use in preparing 2021 Returns”).

354. See 1 TAXPAYER ADVOC. SERV., *supra* note 169, at 36–38.

355. See *infra* notes 380–386. For instance, during the COVID-19 pandemic, as the IRS frequently updated posted FAQs, taxpayers complained that they could not determine whether they were reading the most up-to-date version or whether the version applied to dates at issue in their specific situation. See 1 TAXPAYER ADVOC. SERV., *supra* note 169, at 36–38.

356. See, e.g., IRM 32.1.1.2.5 (Aug. 2, 2018) (describing effective dates of Treasury Decisions).

C. Taxpayer Reliance on Informal Law

Equal access to justice demands equal ability to rely on formal and informal tax law. Taxpayer reliance involves two separate questions: first, whether taxpayers can use the IRS's statements in administrative guidance to prevent the Agency from applying a contrary rule or interpretation of the law against the taxpayer; and second, whether the taxpayer can offer the IRS's statements in administrative guidance as defenses against civil tax penalties. In this Part, we argue that when policymakers address these two questions, they should adopt reforms that consider differences between *unilateral* administrative guidance, where the IRS uses language that is fixed and intended for all taxpayers, and *bilateral* administrative guidance, where the IRS tailors its statements to individual taxpayers based on information they input, such as automated legal guidance tools.

1. Binding Informal Law

As we have discussed, unlike formal tax law, such as the Code and Regulations, informal administrative guidance does not bind the IRS. If the IRS makes a statement in informal administrative guidance but later applies a different interpretation of the law, an affected taxpayer cannot point to the administrative guidance to estop the IRS.³⁵⁷ For instance, even though the IRS has issued FAQs addressing the calculation of tax basis in cryptocurrency that does not appear in the formal tax law,³⁵⁸ the Agency is not restricted from deviating from these FAQs in the future, even when reviewing the tax returns of taxpayers who relied up on them. As a general matter, unless the IRS publishes administrative guidance in the Internal Revenue Bulletin, it does not commit to be internally bound by any statements it makes in its informal tax guidance.³⁵⁹

357. See *supra* notes 262–266 and accompanying text.

358. INTERNAL REVENUE SERV., *supra* note 252; see Letter from Christopher W. Hesse, Chair, AICPA Tax Exec. Comm., to Charles P. Rettig, Comm'r, Internal Revenue Serv., and Michael J. Desmond, Chief Couns., Internal Revenue Serv. 16 (Feb. 28, 2020), <https://us.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/20200228-aicpa-letter-on-irs-virtual-currency-guidance.pdf> [<https://perma.cc/8NRU-D8H3>] (“FAQ 40 suggests a method that is not allowed under the Code.”).

359. See I.R.S. Interim Guidance Mem. SBSE-04-0517-0030, IRM 4.10.7.2.4 (Jan. 10, 2018). Courts have addressed IRS simplifications as well. See, e.g., *Adler v. Comm'r*, 330 F.2d 91, 93 (9th Cir. 1964); *Miller v. Comm'r*, 114 T.C. 184, 195 (2000) (“Administrative guidance contained in IRS publications is not binding on the Government”); *Zimmerman v. Comm'r*, 71 T.C. 367, 371 (1978) (“[A]uthoritative sources of Federal tax law are . . . not in . . . informal [IRS] publications.”). Other courts have held that “IRS publications, though ‘aimed at explaining existing tax law to taxpayers,’ do not have the force of law.” *United States v. Josephberg*, 562 F.3d 478, 498 (2d Cir. 2009) (quoting *Taylor v. United States*, 57 Fed. Cl. 264, 266 (2003)).

There are several arguments in favor of allowing the IRS to issue nonbinding administrative guidance. Even though most IRS informal administrative guidance is not legally binding on the Agency under current law, it nonetheless enhances government transparency by revealing to taxpayers the Agency officials' interpretation of or administrative position regarding the formal tax law.³⁶⁰ Moreover, if IRS employees were required to apply the formal tax law in a manner consistent with all statements in its administrative guidance, the leadership of the IRS may respond by issuing less of this guidance, harming taxpayers who are most in need of plain language explanations of the formal tax law.³⁶¹

Yet there are compelling reasons to change the status quo regarding taxpayer reliance on informal IRS guidance. As a matter of procedural fairness, taxpayers should be able to rely on statements from the IRS if they are not in conflict with the formal tax law. In most cases where taxpayers have concerns about relying on the IRS statements in administrative guidance, the formal tax law is ambiguous or silent on the tax issue at stake.³⁶² For example, a significant amount of the IRS's FAQs address situations where there is no underlying formal tax law, on topics such as rules for determining basis in cryptocurrency and the eligibility for the child tax credit in certain situations.³⁶³ Further, if IRS officials were bound by the Agency's own statements in administrative guidance, IRS officials may simply exercise greater caution when making statements rather than reduce their issuance of guidance. This approach could result in statements that are more consistent with the formal tax law and less likely to result in IRS contradictions during subsequent audits of taxpayers.

There is a strong case for allowing taxpayers to rely on all *unilateral* IRS guidance—where the IRS publishes statements to all taxpayers using language that does not require inputs or responses from taxpayers. Administrative guidance such as IRS publications, online FAQs, and statements on the IRS website would fall into this category. In these cases, the Agency is the only actor speaking and it can determine the content of its communication. Especially where there is no underlying formal law that addresses the issue, as a matter of fairness, the IRS should commit to allow taxpayers to rely on its statements in unilateral administrative guidance without risk of future

360. See Blank & Osofsky, *Simplexity*, *supra* note 28, at 194, 203.

361. See, e.g., Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1249 (2017) (explaining that external abilities to monitor internal administrative law may lead to less of it).

362. See *supra* notes 251–253 and accompanying text.

363. See *supra* notes 251–253 and accompanying text.

contradiction by IRS officials. This approach, which has been advocated by the National Taxpayer Advocate and other scholars in the case of FAQs,³⁶⁴ should be adopted for all IRS unilateral administrative guidance. This change would support procedural fairness, create more equal reliance opportunities for taxpayers with different economic resources, and, potentially, enhance the perceived legitimacy of the IRS.³⁶⁵

In contrast, we propose that the IRS should not be bound by advice that the Agency delivers through *bilateral* administrative guidance—that which requires taxpayers to input information regarding their own circumstances in exchange for the output of advice from the IRS. First, the quality of the answers that the IRS's automated legal guidance such as ITA delivers is only as good as the taxpayer's inputs.³⁶⁶ As tools such as ITA do not ask the taxpayer follow-up questions, they may generate incorrect answers because of limited information supplied by taxpayers. Second, the advice that automated legal guidance tools may provide varies among taxpayers, depending on the extent to which taxpayers input requested information accurately.³⁶⁷ Allowing taxpayers to use statements from automated legal guidance to bind the IRS could result in unequal treatment of taxpayers with similar circumstances. Third, compared to unilateral IRS guidance, bilateral IRS guidance is subject to taxpayer abuse. For example, taxpayers could input information regarding a purchase of equipment into ITA but ignore the legal requirement that the equipment be related to medical care to generate an answer from ITA that the equipment is tax deductible.³⁶⁸ For these reasons, taxpayers should not be permitted to use IRS statements made in bilateral

364. See TAXPAYER ADVOC. SERV., U.S. DEPT OF THE TREASURY, NATIONAL TAXPAYER ADVOCATE: FISCAL YEAR 2022 OBJECTIVES REPORT TO CONGRESS 29–30 (June 2021), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/06/JRC22_FullReport.pdf [<https://perma.cc/ZFU7-RNQP>]; 1 TAXPAYER ADVOC. SERV., *supra* note 169, at 36, 45, 67–68.

365. See, e.g., Karyl A. Kinsey, *Deterrence and Alienation Effects of IRS Enforcement: An Analysis of Survey Data*, in WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT 259 (Joel Slemrod ed., 1992); John T. Scholz & Mark Lubell, *Trust and Taxpaying: Testing the Heuristic Approach to Collective Action*, 42 AM. J. POL. SCI. 398, 408 (1998). We do not take a position on whether, or the extent to which, the internally binding nature of guidance would affect the IRS's procedural obligations under the Administrative Procedure Act. See Metzger & Stack, *supra* note 361, at 1279–81 (discussing ambiguity). We do note that the IRS already binds itself to certain types of guidance (such as Revenue Rulings), which it claims do not require notice and comment procedures, since it is subregulatory. David J. Kautter & Brent J. McIntosh, *Policy Statement on the Tax Regulatory Process*, U.S. DEPT OF THE TREASURY 2–3 (Mar. 5, 2019), <https://home.treasury.gov/system/files/131/Policy-Statement-on-the-Tax-Regulatory-Process.pdf> [<https://perma.cc/VNC5-CNDR>]. Our claim here is a substantive one.

366. Blank & Osofsky, *Automated*, *supra* note 28, at 217, 237.

367. *Id.* at 207–12.

368. *Id.* at 210–11.

administrative guidance to estop the agency from taking a contrary position.

2. Tax Penalty Defenses

In addition, policymakers should allow taxpayers to rely upon statements in IRS guidance to defend against civil tax penalties. As a result of the “reasonableness” requirement of many existing civil tax penalty defenses,³⁶⁹ we argue that taxpayers should be permitted to assert these defenses by showing they reasonably relied upon statements in *either* unilateral or bilateral IRS administrative guidance.

Under current law, taxpayers who have legal counsel have greater opportunities to defend against accuracy-related tax penalties than taxpayers who only have access to IRS administrative guidance and third-party tax-preparation software. If the IRS asserts an accuracy-related tax penalty against a taxpayer, that taxpayer may defend against this tax penalty by showing that the taxpayer acted with “reasonable cause and good faith.”³⁷⁰ Taxpayers may satisfy this requirement by presenting the IRS with a written tax opinion from legal counsel upon which they relied.³⁷¹ Conversely, taxpayers who have only relied upon informal IRS guidance, including automated legal guidance, may face difficulty in successfully asserting the reasonable cause and good faith defense.³⁷² Additionally, taxpayers who attempt to assert a “reasonable basis” defense against any of the accuracy-related tax penalties must show that they reasonably relied upon a specific formal tax law source, such as the Code, Regulations, Revenue Rulings, judicial decisions, and announcements published by the IRS in the Internal Revenue Bulletin.³⁷³ If the IRS has not published its administrative guidance in the Internal Revenue Bulletin, taxpayers may not use it to present a reasonable basis defense.³⁷⁴

To equalize access to the tax penalty defenses, policymakers should allow taxpayers to show reasonable reliance upon unilateral IRS administrative guidance, such as IRS publications that the IRS issued to all taxpayers. The IRS would retain control over the content of its

369. *See, e.g.*, I.R.C. § 6664(c)(1) (“reasonable cause”); Treas. Reg. § 1.6662-3(b)(3) (as amended in 2003) (must be “reasonably based on one or more of the authorities set forth in § 1.6662-4(d)(3)(iii)”).

370. I.R.C. § 6664(c)(1); Treas. Reg. § 1.6664-4 (as amended in 2003).

371. *See* Treas. Reg. § 1.6664-4(c)(1) (as amended in 2003).

372. Blank & Osofsky, *Automated*, *supra* note 28, at 234.

373. Treas. Reg. § 1.6662-4(d)(3)(iii) (as amended in 2003).

374. *Id.*

administrative guidance and a new penalty regime could encourage its officials to exercise greater adherence to the formal tax law when issuing this guidance. Expansion of the penalty defense should not permit taxpayers to apply contorted readings of the IRS's statements to defend against tax penalties because they would still be required to show they acted reasonably.³⁷⁵

This treatment should be extended to statements in bilateral IRS administrative guidance as well. While we have argued that taxpayers should not be able to bind the IRS to its statements made through automated legal guidance,³⁷⁶ there are fewer opportunities for taxpayer manipulation and abuse using such statements to support tax penalty defenses. First, taxpayers who attempt to rely on statements from sources like ITA and other interactive online tools would still be required to show that they reasonably relied on them when claiming tax positions.³⁷⁷ This requirement would still allow the IRS and courts to reject a claimed penalty defense where the taxpayer submitted false or misleading inputs designed to yield a desired answer simply for penalty defense purposes.³⁷⁸ Second, in some cases, to assert a reasonable basis defense, such as when the IRS asserts the accuracy-related tax penalty for disregard of rules and regulations, taxpayers must disclose their reliance on a specific source to the IRS when filing their tax return.³⁷⁹ The advance disclosure requirement would deter abusive use of bilateral IRS administrative guidance for penalty defense purposes and could even be expanded to apply to other tax penalties.

In October 2021, the IRS announced an update to its process of releasing FAQs on newly enacted tax legislation.³⁸⁰ According to the IRS press release, starting on the date of the announcement, the IRS will announce “significant FAQs on newly enacted tax legislation” and potentially other “emerging issues” and any “updates or revisions to these FAQs” in news releases posted on the IRS website and in a separate “Fact Sheet.”³⁸¹ Each of these Fact Sheets, according to the IRS, will now be dated and prior versions will be maintained in an archive on the IRS website.³⁸² Most importantly, the IRS announced

375. See Treas. Reg. § 1.6662-4(d)(3)(ii) (as amended in 2003) (“[A] taxpayer may have substantial authority for a position that is supported only by a well-reasoned construction of the applicable statutory provision.”).

376. See *supra* notes 366–368 and accompanying text.

377. Treas. Reg. § 1.6662-4(d)(3)(iii) (as amended in 2003).

378. *Id.*

379. See Treas. Reg. § 1.6662-4(f) (method of making adequate disclosure).

380. I.R.S. News Release IR-2021-202 (Oct. 15, 2021).

381. *Id.*

382. *Id.*

that in the case of any such significant FAQs, its agents would allow taxpayers to use their reasonable and good faith reliance on any significant FAQs to assert a reasonable-cause defense against negligence and other accuracy-related tax penalties.³⁸³

While the IRS's announcement appears to benefit taxpayers, it is not enough to address the imbalance between formal and informal tax law. Notably, the IRS's new policy would not require the Agency to be bound by its statements in FAQs or to publish all FAQs in the Internal Revenue Bulletin.³⁸⁴ Further, the IRS's policy changes only apply to certain FAQs—those that are “significant” in that they involve newly enacted tax legislation (or, potentially, apply to “emerging issues”)—rather than FAQs about established tax legislation and policies.³⁸⁵ For instance, the IRS's policy could apply to FAQs regarding legislation, if enacted, that would target high-income taxpayers (including billionaires),³⁸⁶ but, presumably, would not apply to FAQs involving existing legislation that provides for the EITC, even if this latter legislation possesses complex features. And the policy changes would not extend to additional types of informal guidance such as IRS publications, automated legal guidance, and IRS administrative guidance. As a result, the new FAQ policy changes will likely do little to help unrepresented taxpayers, who rely on a broad swath of informal

383. *Id.* Arguably, taxpayers could have asserted a reasonable-cause and good-faith defense by showing reasonable reliance upon FAQs on the IRS website even before this announcement. The relevant regulations allow the taxpayer to claim this defense if the taxpayer's incorrect position was due to “an honest misunderstanding of fact or law that is reasonable in light of all of the facts and circumstances.” Treas. Reg. § 1.6664-4(b)(1) (as amended in 2003). The IRS's October 2021 announcement, however, confirms that the IRS will not object to taxpayers' attempts to assert this defense when their reliance involves “significant FAQs on newly enacted tax legislation.” I.R.S. News Release, *supra* note 380.

384. I.R.S. News Release, *supra* note 380. For additional criticism, see Alice Abreu & Richard Greenstein, *IRS Recent Guidance on FAQs: Too Little, Too Narrow*, PROCEDURALLY TAXING (Oct. 21, 2021), <https://procedurallytaxing.com/irs-recent-guidance-on-faqs-too-little-too-narrow/> [<https://perma.cc/3YSQ-EZCL>], which asserts that “the announcement does too little, because it respects taxpayer reliance for penalty purposes only”; and Ted Afield, *IRS Releases Update on Frequently Asked Questions Part 4: The Low-Income Taxpayer Perspective*, PROCEDURALLY TAXING (Oct. 22, 2021), <https://procedurallytaxing.com/irs-releases-update-on-frequently-asked-questions-part-4-the-low-income-taxpayer-perspective/> [<https://perma.cc/68D4-XA2D>], which argues that the IRS's failure to mitigate and correct FAQ errors or protect taxpayers who rely on FAQ explanations goes against its declared “service-focused mission.”

385. I.R.S. News Release, *supra* note 380; see also Monte A. Jackel, *IRS Releases Update on Frequently Asked Questions Part 1*, PROCEDURALLY TAXING (Oct. 19, 2021), <https://procedurallytaxing.com/irs-releases-update-on-frequently-asked-questions-part-1/> [<https://perma.cc/544V-JTR8>] (“And what of the so-called emerging issues?” (internal quotation marks omitted)).

386. See, e.g., Kristina Peterson & Richard Rubin, *Tax on Billionaires' Unrealized Gains Will Likely Be in Budget Package, Democrats Say*, WALL ST. J. (Oct 24, 2021, 1:26 PM), <https://www.wsj.com/articles/tax-on-billionaires-unrealized-gains-will-likely-be-in-budget-package-democrats-say-11635096384> [<https://perma.cc/D3NL-A2LH>] (describing mark-to-market legislative proposal).

guidance to understand the tax law on nonemerging issues, because they lack the ability to access formal law. We advise that broader reforms should be made, in line with the suggestions we outline above.

D. Taxpayer Characteristics

Finally, the IRS and the Treasury should study how two-tiered legal drafting affects different groups of taxpayers and report data regarding the effects on taxpayers with different personal characteristics, including, among others, income, filing status, and race. Compared to data that is available in other research areas, analysis of data on the personal characteristics of taxpayers is lacking. For example, as Professor Jeremy Bearer-Friend has documented in detail, the Treasury and IRS have not collected or published data that describes the reported taxable income, tax deductions, and tax credits disaggregated by race of taxpayers.³⁸⁷ As a result of the “cascading effects” of this lack of data, in 2021, President Biden issued an executive order that established an “Interagency Working Group on Equitable Data” that includes the Assistant Secretary of the Treasury for Tax Policy. This group must offer recommendations on best practices for studying effects of legal rules and policies on different individuals based on race, ethnicity, gender, disability, and other characteristics.³⁸⁸ To better “measure and advance equity,”³⁸⁹ we argue the government should extend this research to consider the types of taxpayers that are benefited and burdened by formal and informal tax law.

The Treasury and IRS adopt a markedly different approach to collection of data on individuals’ characteristics in tax administration compared to other agencies’ approaches to collecting this data. Each year, the IRS publishes an annual “Data Book” on the website of its Statistics of Income Division, which shows, in aggregate dollar amounts, anonymized information such as taxpayers’ taxable income, tax deductions, audit rates, and tax penalties, among many other items.³⁹⁰ Despite its length, this publication does not include information on the use of tax lawyers or accountants by taxpayers separated out by factors such as income, filing status, and race.³⁹¹ This lack of information is not surprising given the experience of scholars. For example, Professor Dorothy Brown has described the obstacles she

387. See Bearer-Friend, *supra* note 289, at 16.

388. Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

389. *Id.*

390. 1 INTERNAL REVENUE SERV., *supra* note 201.

391. *Id.* For further discussion, see Bearer-Friend, *supra* note 289, at 2–5, analyzing tax law’s colorblindness; and Brown, *supra* note 289, underscoring this dynamic.

faced in attempting to access data on the racial impact of the tax law in the United States and how, as an alternative to reviewing IRS analyses, she analyzed data collected by the U.S. Census Bureau.³⁹² The Census Bureau and other federal agencies collect information on individuals' personal characteristics routinely, offering explanations such as "We ask a question about a person's race to create statistics about race and to present other estimates by race groups."³⁹³

Treasury and the IRS should study the characteristics of taxpayers who rely on informal administrative guidance such as FAQs on the IRS website, automated legal guidance, and IRS publications. There are numerous design possibilities for such a study. For example, the IRS could include survey questions in its automated legal guidance, such as ITA, regarding users' income, filing status, and race. To incentivize responses, the Treasury could permit taxpayers to rely on the answers received from ITA for a reasonable basis defense, as we have advocated earlier, as long as taxpayers can show that they have answered ITA's questions truthfully.³⁹⁴ The IRS could also attempt to collect information on the characteristics of taxpayers who use IRS administrative guidance by including surveys following taxpayers' use of these services.³⁹⁵ Private-sector organizations use these types of surveys regularly, especially where users access a website where their activity can be tracked.³⁹⁶ Finally, the IRS could include questions about taxpayer characteristics, as well as taxpayers' use of informal administrative guidance, in the IRS Free File program, a public-private partnership that low-income taxpayers use to file their annual tax returns.³⁹⁷

Further, if the IRS were to collect information on taxpayers' characteristics, it could collect and publish data on taxpayers' use of written opinions, which are primarily written by tax lawyers, to defend against accuracy-related tax penalties by claiming the reasonable cause and good faith defense.³⁹⁸ These are just a few possibilities for gathering

392. Dorothy A. Brown, *Tales from a Tax Crit*, 10 PITT. TAX REV. 47, 52 (2012).

393. *American Community Survey: Why We Ask Questions About . . . Race*, U.S. CENSUS BUREAU, <https://www.census.gov/acs/www/about/why-we-ask-each-question/race/> (last visited Feb. 3, 2022) [<https://perma.cc/NP7D-64XZ>].

394. For discussion, see *supra* notes 369–375 and accompanying text.

395. See, e.g., RSCH., APPLIED ANALYTICS & STAT. DIV., INTERNAL REVENUE SERV., PUBL'N 5296, CATALOG NO. 71353Y, COMPREHENSIVE TAXPAYER ATTITUDE SURVEY (CTAS) 2020: EXECUTIVE REPORT (Nov. 2020), <https://www.irs.gov/pub/irs-pdf/p5296.pdf> [<https://perma.cc/4DP2-Y7AR>].

396. See *Use Analytics with Your Site*, GOOGLE, <https://support.google.com/sites/answer/97459?hl=en> (last visited Mar. 7, 2022) [<https://perma.cc/V5G9-XE6T>] (explaining how to use Google to collect website data).

397. See TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 209, at 3.

398. See I.R.C. § 6664(c)(1); Treas. Reg. § 1.6664-4 (as amended in 2003).

data on taxpayers' access to tax advice. There are other potential approaches, including analysis of the interaction of data collected by the IRS and by other agencies (efforts which the IRS has pursued on topics of taxpayer characteristics other than race).³⁹⁹

A plan by the Treasury and IRS to gather data on the characteristics of taxpayers who rely on IRS administrative guidance or sophisticated advisors would likely raise several concerns. If the IRS were to seek even more personal information from taxpayers than it currently does, taxpayers might not respond to the questions asked, especially if they are optional. This response could occur irrespective of the forum for the questions, whether in automated legal guidance systems or on the IRS Form 1040 itself. Further, if the IRS were to ask for information regarding taxpayers' race, the IRS could, as Professor Bearer-Friend has suggested in his analysis, create the appearance of discrimination against certain groups of taxpayers.⁴⁰⁰ And the introduction of questions regarding taxpayer characteristics, including race, could cause the IRS to become the focus of scrutiny and debate by legislators, potentially hampering its ability to seek increased budgetary resources.⁴⁰¹

While these concerns are plausible, there are compelling responses to each of them. First, regarding the concern that taxpayers will not supply requested information, as we have suggested, the government could incentivize participation through a variety of approaches. These incentives could include adjusting the rules for the reasonable basis penalty defense and providing taxpayers who answer a voluntary survey with benefits such as prioritized access to a live customer service representative, among others. Second, the IRS could ameliorate the appearance of discrimination by providing concurrent explanations of the reasons for the questions (similar to the approach of the U.S. Census Bureau⁴⁰²) and describing the legal rules that prevent IRS agents from engaging in discrimination and otherwise abusing their discretion. Finally, although questions regarding taxpayers' income, filing status, race, and other personal characteristics could trigger legislative scrutiny of the IRS, such questions would be consistent with data collection methods used by many other federal agencies.⁴⁰³

399. See Bearer-Friend, *supra* note 289, at 16–17 (discussing IRS's publicly reported analysis of effects of tax provisions on taxpayers, disaggregated by gender and age).

400. *Id.* at 55–56.

401. See *id.* at 54–55.

402. See U.S. CENSUS BUREAU, *supra* note 393.

403. Jeremy Bearer-Friend has shown that federal agencies other than the IRS, such as the Center for Medicare and Medicaid Services, the U.S. Social Security System, and the U.S.

CONCLUSION

While many other scholars have explored inequitable aspects of the substance and enforcement of the law throughout the legal system, this Article has highlighted an underappreciated inequity: different people have access to different forms of the law, and these different forms of the law do not have equal value. In considering the two tiers of formal and informal law, this Article has made several novel contributions.

First, we have reframed the discussion of informal administrative guidance as a social justice issue. Formal law is binding on government actors, but it is incomprehensible to most individuals who lack access to tax advisors. By contrast, informal administrative guidance is accessible to most people, but it is not binding on government actors. As we have argued, this two-tiered system of law may intensify existing inequities in substance and enforcement of the law.

Second, using the IRS and the tax system as a case study, we have demonstrated how the increasing use of informal law by agencies can, ironically, exacerbate the differences between taxpayers. We have shown how these two tiers of formal and informal tax law systematically disadvantage taxpayers who lack access to sophisticated advisors. The imbalance occurs irrespective of whether the IRS's tax guidance contains statements that, if taxpayers followed them, would be taxpayer favorable or unfavorable. Further, we have shown how taxpayers cannot use their reliance on IRS guidance to defend against many civil tax penalties. Conversely, taxpayers who have access to lawyers and accountants are in a significantly better strategic position.

Last, we have offered concrete policy prescriptions and an agenda for future research regarding two-tiered legal systems. Our proposals include reforming the drafting of the formal tax law, where possible, using bright-line rules and formalization; changing the drafting of informal tax law to include warnings of contrary authority; revising the law regarding taxpayer reliance on informal tax law, taking into account differences between unilateral and bilateral tax guidance; and developing IRS research on how reliance on informal tax law varies based on taxpayers' personal characteristics, including income, filing status, and race.

The recent explosion of administrative guidance during the COVID-19 pandemic, when new complex laws were introduced and

access to human customer service representatives was not possible, foreshadows a continually increasing issuance of informal law by government agencies. The analysis of the resulting two-tiered legal system presented in this Article should be of interest to legislators, agency officials, and practitioners, and to scholars who study tax law, administrative law, and social justice.