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Hidden in Plain Sight: IRS Publications and a New Path to Tax Reform

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Hidden in Plain Sight: IRS Publications and a New Path to Tax Reform

by

*Andrea Monroe**

Abstract

Internal Revenue Service (IRS) publications are everywhere in tax practice and almost nowhere in tax scholarship. These publications seek to explain substantive tax law to the general public in a simple, comprehensible, and accurate manner. IRS publications are not only the primary source of information about tax law for taxpayers who file their own returns, but such publications are also essential for online tax preparation platforms, like TurboTax, and for third-party tax return preparers, who rely on this information when selling their services to millions of taxpayers each year. From the perspective of these stakeholders, IRS publications are not simply explanations of substantive tax law; they are substantive tax law. Yet IRS publications are scarcely mentioned in legal scholarship or tax policy debates. Considering their influence and ubiquity in tax practice, the broad inattention of scholars and policymakers to IRS publications is enormously surprising.

This Article suggests that IRS publications can do more than help non-expert stakeholders navigate their annual tax filing obligations;

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these publications can also offer significant and unexpected value for experts in their world of legal scholarship and tax policy debates. Studying IRS publications can yield important lessons about one of the greatest challenges facing the federal income tax system—complexity. Virtually all stakeholders agree that tax law is too complicated, but we seldom make meaningful progress toward simplifying the law. This Article proposes that the study of IRS publications can help experts identify and prioritize complexity problems in federal tax law. By using IRS publications to recognize high-risk/high-value problems with complexity, experts can formulate a tax research and reform agenda that will bypass many theoretical and epistemological roadblocks to tax simplification. The key is that IRS publications offer experts a new starting point in the long road toward tax reform, one that has been hidden in plain sight for decades.

Introduction 83
I. The Importance of IRS Publications 90
A. IRS Publications and the Practice of Tax 91
B. IRS Publications and Tax Scholarship 100
II. IRS Publications and Tax Complexity 105
A. The Problem of Tax Complexity 105
1. Agree-to-Disagree Hypothesis 109
2. Pluralism Hypothesis 113
3. Legal Craft Hypothesis 115
B. IRS Publications and the Path Forward 118
1. The Study of IRS Publications 119
2. Next Steps 122
3. An Objection 123
III. Publication 541 and Partnership Tax Complexity 125
A. The Problem of Partnership Allocations 128
1. The General Allocation Rules of Section 704(b) 130
2. Contributed Property Allocation Rules of Section 704(c) 134
B. Partnership Allocations and Publication 541 138
1. Section 704(b) 139
2. Section 704(c) 140
3. The Future of Partnership Allocations 143
Conclusion 146

Introduction

Taxpaying is not easy. In one recent poll, 23% of the individuals surveyed said that they would rather undergo root canal surgery than do their taxes, and 32% said they feared taxpaying more than death.[1] For most taxpayers, everything about the process of paying taxes—the law, the record keeping, the forms—often feels hard, expensive, and overwhelming.[2] Part of the problem is that taxpaying is not an activity that one can do alone. Very few taxpayers turn directly to the Internal Revenue Code to determine their federal income tax liability. Instead, taxpayers rely on intermediaries—legal experts, tax return preparers, commercial software, and the IRS—to navigate their annual filing obligations. These intermediaries are quite diverse in terms of the taxpayer populations they serve, the sophistication of their advice, and their cost. Yet all of these intermediaries perform a common function, bridging

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1. Lindsay Sakrida, *51% of People Will Save Their Tax Refund, 17% More Than Last Year*, Dealnews (Feb. 25, 2014), http://dealnews.com/features/51-of-People-Will-Save-Their-Tax-Refund-17-More-Than-Last-Year/991023.html.

2. *See, e.g.*, *Tax Complexity, Compliance, and Administration: The Merits of Simplification in Tax Reform: Hearing Before the S. Comm. on Fin.*, 114th Cong. 2 (2015), https://www.finance.senate.gov/imo/media/doc/98400.pdf [hereinafter *Tax Complexity Hearing*] (statement of Sen. Orrin G. Hatch, Chairman, Comm. on Finance). In describing the federal tax law's current level of complexity, Senator Hatch stated:

> Over the years, our tax code has grown to almost 4 million words. . . . Taxpayers and businesses spend over 6 billion hours a year complying with tax filing requirements, with compliance costs totaling over $168 billion annually. That is larger than the entire economy of New Zealand. That amount would employ more than $3 million workers full-time at a wage of $25 an hour.
>
> . . . Imagine a simpler tax code that greatly reduces compliance costs, resulting in a tax code that is efficient, effective, and accountable to taxpayers—in other words, a tax code that Americans can actually understand.

Id.

the gap between substantive tax law and the millions of individual and entity taxpayers required to file federal income tax returns annually.

IRS publications play a foundational role in communicating tax law to the millions of stakeholders that make up the federal income tax community of taxpayers, practitioners, government officials, and academics.[3] Like tax forms and the accompanying instructions, IRS publications are instruments for explaining substantive tax law to stakeholders in a simple, comprehensible, and accurate manner.[4] For taxpayers who file their own income tax returns, these publications are often their primary source of information regarding substantive tax law.[5] From the vantage point of many of these taxpayers, IRS publications are the tax law.

IRS publications are also essential to the tax system's other intermediaries, who rely on these publications in providing taxpayers with commercial return preparation services. For example, online platforms like TurboTax commonly default to IRS publications, tracking the IRS's language when explaining a tax law provision or referring a taxpayer to a particular IRS publication for additional guidance.[6] Likewise, the IRS relies almost exclusively on its publications to teach thousands of volunteer return preparers participating in the Volunteer Income Tax Assistance and Tax Counseling for the Elderly programs about substantive tax law.[7] IRS publications also reach large numbers of stakeholders through the Internet, where search results commonly generate highly ranked results that include these explanatory materials.

Although central to the practice of tax, IRS publications are scarcely mentioned in legal scholarship and tax policy debates. Considering their influence and ubiquity in the federal income tax system, it is surprising how little attention scholars and policymakers pay to IRS publications. The few times that IRS publications are mentioned in the

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3. *See infra* Part I.A.

4. *See* U.S. Gen. Accounting Office, GAO/GGD-95-34, Tax Administration: IRS Efforts to Improve Forms and Publications 1–2 (1994), http://www.gao.gov/products/GGD-95-34; *see also* I.R.M. 4.10.7.2(8), https://www.irs.gov/irm/part4/irm_04-010-007.html ("IRS Publications explain the law in plain language for taxpayers and their advisors. They typically highlight changes in the law, provide examples illustrating Service positions, and include worksheets.").

5. *See infra* notes 31–32 and accompanying text.

6. *See infra* notes 35–40 and accompanying text.

7. *See infra* notes 43–49 and accompanying text.

tax scholarship, they are merely viewed as a transmittal device, delivering information about tax law to taxpayers and tax return preparers who are the stakeholders primarily responsible for filing federal income tax returns.[8] The focus is on the role of IRS publications in the "retail" taxpaying process, particularly how to improve taxpayer compliance or foster values like legitimacy and transparency that are crucial to our federal income tax system.[9]

Yet to focus only on the role of IRS publications in the taxpaying process does not tell the whole story about these publications. This Article suggests that IRS publications not only help non-expert stakeholders, they can also play a vital and unexpected role in the expert world of scholars and policymakers. In particular, studying IRS publications can shed important light on one of the most pressing challenges facing the federal income tax system—complexity.[10] There is general consensus within the stakeholder community that substantive tax law is too complicated for taxpayers who must comply with the law and also for government officials who must enforce it.[11] Simplification is thus a unique

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8. *See* Joshua D. Blank & Leigh Osofsky, *Simplexity: Plain Language and the Tax Law*, 66 Emory L.J. 189 (2017); Emily Cauble, *Detrimental Reliance on IRS Guidance*, 2015 Wis. L. Rev. 421 (2015); Kathleen DeLaney Thomas, *User-Friendly Taxpaying*, 92 Ind. L.J. 1509 (2017); Lawrence Zelenak, *The Uses and Abuses of Simplexity*, 66 Emory L.J. Online 2011 (2017); Dashiell C. Shapiro, *Can Taxpayers Rely on IRS Form Instructions?*, 149 Tax Notes 945 (Nov. 16, 2015).

9. *See infra* notes 60–64 and accompanying text.

10. *See, e.g.*, 1 Nat'l Taxpayer Advocate, 2012 Annual Report to Congress 3 (2012), http://www.taxpayeradvocate.irs.gov/2012-Annual-Report/downloads/Volume-1.pdf ("The most serious problem facing taxpayers—and the IRS—is the complexity of the Internal Revenue Code.").

11. *See, e.g.*, Joint Comm. on Tax'n, 114th Cong., JCX-49–15, Complexity in the Federal Tax System (Joint Comm. Print 2015), https://www.jct.gov/publications.html?func=startdown&id=4738 [hereinafter JCT 2015 Complexity Report]; Joint Comm. on Tax'n, 107th Cong., JCS-3-01, Study of the Overall State of the Federal Tax System and Recommendations for Simplification Pursuant to Section 8022(3)(B) of the Internal Revenue Code of 1986 (Joint Comm. Print 2001), http://www.jct.gov/s-3-01vol1.pdf [hereinafter JCT 2001 Complexity Report]; Nat'l Taxpayer Advocate, *supra* note 10, at 3; Boris I. Bittker, *Tax Reform and Tax Simplification*, 29 U. Miami L. Rev. 1 (1974); Steven A. Dean, *Attractive Complexity: Tax Deregulation, the Check-the-Box Election, and the Future of Tax*

tax reform priority that resonates with virtually all stakeholders. Even so, we never seem to make meaningful progress toward a simpler federal income tax. In fact, the more experts try to understand tax complexity, the more complicated substantive tax law seems to become. The result is a costly stasis where taxpayers are increasingly left with few good options as they struggle to navigate tax laws that they cannot understand.

This Article offers a novel framework for identifying and analyzing tax complexity through the study of IRS publications. Indeed, these instruments for communicating substantive tax law to non-expert taxpayers in a simple and accurate format also yield surprisingly important lessons for experts about the nature and prevalence of the underlying law's complexity. Expert study of IRS publications therefore represents an important first step toward isolating the tax law's most consequential complexity problems, the problems that require congressional or regulatory solutions. By evaluating the IRS's explanations of various substantive tax law provisions, experts can compare their "quality" and identify the provisions most likely to present stakeholders with serious complexity challenges.

Operationally, experts would study the IRS's explanation of a substantive tax law provision and, with a particular focus on simplicity and accuracy, ask whether the explanation is serviceable.[12] Put another way, the expert would ask whether a non-expert stakeholder could understand the explanation well enough to file her tax return and achieve something close to compliance with the underlying law. In assessing the serviceability of a particular explanation, the key is whether the IRS effectively communicates the "core" of the tax law provision, which includes its foundational rule, animating theory, and

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Simplification, 34 Hofstra L. Rev. 405 (2005); James S. Eustice, *Tax Complexity and the Tax Practitioner*, 45 Tax L. Rev. 7 (1989); Edward J. McCaffery, *The Holy Grail of Tax Simplification*, 1990 Wis. L. Rev. 1267 (1990); Paul R. McDaniel, *Federal Income Tax Simplification: The Political Process*, 34 Tax. L. Rev. 27 (1978); Sidney I. Roberts et al., *A Report on Complexity and the Income Tax*, 27 Tax L. Rev. 325 (1972); Stanley S. Surrey, *Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail*, 34 L. & Contemp. Probs. 673 (1969). Beyond federal income tax law, there is an equally rich scholarship examining legal complexity. *See, e.g.*, J.B. Ruhl & Daniel Martin Katz, *Measuring, Monitoring, and Managing Legal Complexity*, 101 Iowa L. Rev. 191 (2015); Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 Duke L.J. 1 (1992).

12. *See infra* Part II.B.

basic operating mechanics. The provision's surrounding "details," in contrast, fall outside this analysis, often involving exceptions, elections, or special rules that primarily impact sophisticated taxpayers receiving expert tax advice.

If an expert concludes that an explanation is serviceable, then the IRS has successfully mediated any complexity in the underlying law through its publication. This characterization as a relative success thus signals to experts that the substantive tax law provision should not be treated as a high priority complexity problem warranting congressional or regulatory intervention. If, however, the expert does not consider the explanation serviceable, then she has identified a substantive tax law provision that may suffer from a consequential complexity problem. Characterizing an explanation as a relative failure highlights instances where the IRS has not communicated a tax law provision's core simply or accurately. These relative failures can take many forms: the simplest form is omission, but failures may also result from explanations that are too complicated for non-expert stakeholders or from explanations that inappropriately oversimplify the underlying law.[13] In all these instances, the designation as a failed explanation functions as a red-flag, identifying substantive tax law provisions that potentially suffer from serious complexity problems and, in turn, require further study to determine the true nature and severity of the problem.[14]

This Article's approach allows experts to formulate a practical research and reform agenda that prioritizes substantive tax law provisions where the IRS has failed to mediate the underlying law's complexity through its publications. Although a failed explanation is not conclusive proof of a complexity problem in the underlying law, it signals a potential problem and, in doing so, focuses experts' attention on the complexity problems most in need of careful study. IRS publications therefore offer experts a transformative opportunity to bypass many of the theoretical roadblocks that have hampered past efforts to address the federal income tax law's chronic complexity problem. Indeed, the path to meaningful tax reform may begin in the most unexpected space, with the expert study of the decidedly non-expert explanations of substantive tax law found in IRS publications.

In order to illustrate the value of studying IRS publications, this Article turns to the rules of subchapter K, which govern the taxation of

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13. *See infra* notes 113–115 and accompanying text.

14. *See infra* note 102–109 and accompanying text.

partnerships and their partners.[15] Although partnership tax may seem like an unconventional illustrative choice, partnerships play an especially vital role in the federal income tax system. Millions of non-expert stakeholders organize their businesses as partnerships for tax purposes and must navigate portions of subchapter K annually.[16] Likewise, partnerships and other non-corporate entities are now responsible for over half of the business net income reported each year.[17] At the same time, partnership tax is universally viewed as one of the most complicated areas of substantive tax law, as evidenced by six decades of scholarship critiquing virtually every aspect of this elaborate system.[18]

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15. I.R.C. §§ 701–761.

16. Ron DeCarlo & Nina Shumofsky, *Partnership Returns, Tax Year 2014*, Stat. Income Bull., Fall 2016, at 61, 62 fig.B. In 2014, partnerships filed 3,611,255 federal income tax returns, and these returns represented 27,714,478 partners. *Id*. In fact, the overwhelming majority of business entities in the United States are partnerships and other non-corporate entities. Joint Comm. on Tax'n, 114th Cong., JCX-71-15, Choice of Business Entity: Present Law and Data Relating to C Corporations, Partnerships, and S Corporations 2 (Joint Comm. Print 2015), https://www.jct.gov/publications.html?func=startdown&id=4765.

17. In 2012, partnerships and other non-corporate entities represented approximately 60% of the net business income reported on federal income tax returns. *SOI Tax Stats—Integrated Business Data, Table 1*, IRS.gov, https://www.irs.gov/uac/soi-tax-stats-integrated-business-data (last visited Oct. 26, 2017). More generally, pass-through entities have accounted for approximately one-half of net business income generated in each year since 2004. *See id.*; *see also* White House & Treas. Dep't, The President's Framework for Business Tax Reform 8 (Feb. 2012), https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/OTA-Report-Business-Tax-Reform-2012.pdf; President's Econ. Recovery Advisory Bd., The Report on Tax Reform Options: Simplification, Compliance, and Corporate Taxation 74–75 (2010), https://www.treasury.gov/resource-center/tax-policy/Documents/Report-Tax-Reform-Options-2010.pdf; Aaron Krupkin & Adam Looney, *9 Facts About Pass-Through Businesses*, Brookings (May 15, 2017), https://brookings.edu/research/9-facts-about-pass-through-businesses/ ("Pass-through businesses now earn a majority of business income.").

18. *See* Foxman v. Comm'r, 41 T.C. 535, 551 n.9 (1964). In this case, the Tax Court perfectly described subchapter K's complexity: "The distressingly complex and confusing nature of the provisions of subchapter K present a formidable obstacle to the comprehension of these provisions without the expenditure of a disproportionate amount of time and effort even by

This Article thus highlights two vital partnership tax rules that govern how a partnership divides certain taxable items—including gains and losses—among its partners.[19] If one were to read the rich scholarship about these partnership allocation rules, one would invariably conclude that the two rules are comparably complex and equally in need of reform.[20] However, a study of the primary IRS publication addressing partnerships—Publication 541—tells a very different story about these allocation rules.[21] Perhaps most surprisingly, the IRS's explanation of one partnership allocation rule—section 704(c)—is a relative success, serviceably communicating the rule's core aspects to non-expert stakeholders in a simple and accurate manner.[22] While this explanation is not perfect, it stands in stark contrast to the IRS's failed treatment of the other partnership allocation rule—section 704(b)—where the IRS is silent, omitting any explanation of the rule from Publication 541.

When taken together, the study of Publication 541 thus sheds new and important light on subchapter K and its allocation rules, identifying section 704(b) as a potentially consequential complexity problem and prioritizing its status on any future research and reform agenda. In doing so, this small example illustrates the value of studying IRS publications—their explanations can provide experts with information

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one who is sophisticated in tax matters with many years of experience in the tax field." *Id.*; *see also* George K. Yin & David J. Shakow, Federal Income Tax Project: Taxation of Private Business Enterprises: Reporters' Study (Am. Law Inst. 1999) [hereinafter ALI 1999 Reporters' Study]; Curtis J. Berger, *W(h)ither Partnership Taxation?*, 47 Tax L. Rev. 105 (1991); Jeffrey L. Kwall, *Taxing Private Enterprise in the New Millennium*, 51 Tax Law. 229 (1997); Lawrence Lokken, *Taxation of Private Business Firms: Imagining a Future Without Subchapter K*, 4 Fla. Tax Rev. 249 (1999); Martin J. McMahon, Jr., *Rethinking Taxation of Privately Held Businesses*, 69 Tax Law. 345 (2016); Philip F. Postlewaite, *I Come to Bury Subchapter K, Not to Praise It*, 54 Tax Law. 451 (2001); Walter D. Schwidetzky, *Integrating Subchapters K and S—Just Do It*, 62 Tax Law. 749 (2009); Willard B. Taylor, *Can We Clean This Up? A Brief Journey Through the United States Rules for Taxing Business Entities*, 19 Fla. Tax Rev. 323 (2016); George K. Yin, *The Future Taxation of Private Business Firms*, 4 Fla. Tax Rev. 141 (1999).

19. I.R.C. § 704(b), (c)(1)(A); Reg. §§ 1.704–1, –3.

20. *See infra* notes 135–137.

21. IRS Pub. No. 541, Partnerships (2016), https://www.irs.gov/pub/irs-pdf/p541.pdf.

22. *Id.* at 8–9.

about substantive tax law that has not emerged from the traditional scholarship and tax policy debates.

This Article proceeds as follows. Part I makes the case for the expert study of IRS publications. IRS publications have a profound impact on the practice of tax, communicating substantive tax law to non-expert stakeholders in a simple and accurate format. This part argues that IRS publications can also play a vital role in the expert world of scholars and policymakers. Indeed, studying these non-expert publications may offer experts unexpected lessons about substantive tax law. Part II focuses in particular on the lessons IRS publications may yield about the nature and scope of the tax law's complexity. The study of these publications allows experts to assess the IRS's ability to serviceably explain the core aspects of a substantive tax law provision to non-expert stakeholders. Through this analysis, experts can thus identify explanations that are relative successes and relative failures. In doing so, this approach highlights the substantive tax law provisions—those linked to failed explanations—that are most likely to suffer from consequential complexity problems and should therefore represent high priorities in shaping any future research and reform agenda.

Part III turns to partnership tax and Publication 541, offering an illustration of the invaluable role that IRS publications can play in the experts' world. Scholars have spent decades critiquing subchapter K's allocation rules, and a review of this rich literature invariably leads to one conclusion—these rules are comparably complex and comparably in need of repair. Yet the study of Publication 541 tells a very different story about partnership allocations, identifying one allocation rule as a success and another as a failure. This surprising result, in turn, highlights a path forward in partnership tax reform toward simpler allocations and a simpler subchapter K. But the key is the starting point—this path to tax reform begins with the expert study of IRS publications.

I. The Importance of IRS Publications

IRS publications are essential to the practice of tax. They are the primary instruments of communication between the IRS and non-expert stakeholders, delivering information about substantive tax law directly and indirectly through third-party tax preparation services. Yet IRS publications are virtually absent from the experts' world, rarely appearing in the legal scholarship or tax policy debates. In the few instances where IRS publications appear in the scholarship, the focus is only on their role as a transmittal device in the retail taxpaying process. The focus is not

on what IRS publications can teach scholars and policymakers about substantive tax law, and this is a surprising—indeed, unfortunate—gap in the scholarship. This part thus takes first steps toward filling that gap and introducing IRS publications into the experts' world.

A. IRS Publications and the Practice of Tax

IRS publications are a primary means by which the IRS communicates with non-expert stakeholders about substantive tax law. Millions of taxpayers, practitioners, and tax return preparers rely on IRS publications in order to understand and apply the federal income tax law each year. One recent IRS report estimated that the potential audience for IRS publications included 150 million members of the general public.[23] Another IRS report concluded that, in 2013, there were approximately 22 million "service interactions" between the IRS and individual stakeholders related to tax forms and publications.[24]

The IRS has taken a multi-faceted approach to its publications in order to account for the diversity of the stakeholder community, dividing these communications into categories based on the target audience and its presumed level of expertise.[25] The vast majority of IRS publications,

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23. IRS Pub. No. 5206, Plain Writing Act Compliance Report 5 (2017), https://www.irs.gov/pub/irs-pdf/p5206.pdf. . Additionally, the IRS estimated that this potential audience also included approximately 1.9 million tax and legal professionals. *Id.*

24. IRS Pub. No. 3415, Electronic Tax Administration Advisory Committee Annual Report to Congress 48 (2015), https://www.irs.gov/pub/irs-prior/p3415—2015.pdf. In its 2015 report to Congress, the ETAAC studied taxpayer service interactions with the IRS in a number of areas, including the IRS's provision of tax forms and publications to taxpayers and tax return preparers. *Id.* at 46. Based on its study of the 2013 calendar year, the ETAAC determined that there were a total of 21,945,799 service interactions involving tax forms and publications. *Id.* at 48. Of those interactions, 20,394,690—or 92.9%—were electronic, with the IRS providing these services through IRS .gov. *Id.* The remaining service interactions were provided by telephone or through Taxpayer Assistance Centers. *Id.*

25. IRS Pub. No. 5206, *supra* note 23, at 3–4. There is little public information available about the process of designing, drafting, and publishing IRS publications. The IRS's Tax Forms and Publications Division is responsible for the production of tax forms, instructions, and publications. I.R.M. 33.3.7.1, https://www.irs.gov/irm/part33/irm_33-003-007.html. In particular, the Tax

and this Article's primary focus, are designed for non-expert individuals.[26] IRS publications in this "general public" category typically explain tax law in a simple and non-technical manner that allows non-expert stakeholders to understand the law and comply with their annual tax filing obligations.[27] A smaller category of IRS publications are written for tax and legal professionals who, because of their specialized training, are considered conversant in the technical and regulatory language of the federal income tax.[28]

The technicality of the explanations found in IRS publications thus varies depending on the target audience. However, the IRS's goal in all of its publications is to reflect accurately the federal income tax law in an understandable and easy-to-read manner.[29] Indeed, the Taxpayer Bill of Rights provides that "the right to be informed," which includes a right to clear explanations of substantive tax law, is a fundamental right of all taxpayers.[30]

Forms Coordinating Committee plays a primary role in this process. I.R.M. 33.3.7.1(1). Recognizing that "[t]ax forms and instructions combine the technical and administrative requirements of all functions of the Service, and are often the only contact between the Service and the taxpayer," the Tax Forms Coordinating Committee includes representatives from all functions—legal, technical, and administrative—of the IRS. *Id.*

26. IRS Pub. No. 5206, *supra* note 23, at 3.

27. *Id.*

28. *Id.* at 3–4.

29. U.S. Gen. Accounting Office, *supra* note 4, at 1; IRS Pub. No. 5206, *supra* note 23, at 2. This challenge is not unique to the federal income tax system. Tax laws throughout the world are complicated and, therefore, taxing authorities must develop instruments to communicate the relevant tax law to the taxpaying public. In doing so, these taxing authorities also must balance accuracy and comprehensibility in their explanations of tax law. *See, e.g.*, Tirza Cramwinckel, *Lost in Translation, A Multidisciplinary Approach on Legal Issues in Tax Communication*, 74 Clarity J. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2879468; *see also* JCT 2001 Complexity Report, *supra* note 11, at 115–18 (discussing tax simplification efforts in Australia, New Zealand, Sweden, and the United Kingdom designed to make the law more comprehensible and administrable).

30. IRS Pub. No. 1, Your Rights as a Taxpayer 1 (2014), https://www.irs.gov/pub/irs-pdf/p1.pdf. The Taxpayer Bill of Rights sets forth ten fundamental rights that taxpayers possess when dealing with the IRS. The first of these is the right to be informed: "Taxpayers have the right to know what they need to do to comply with the tax laws. They are entitled to clear explanations

The classic illustration of the role played by IRS publications involves an individual taxpayer sitting down at a table strewn with tax forms and a pile of personal documents trying desperately to complete her income tax return before the April 15 filing deadline.[31] In 2015, some variant of this scene occurred at approximately 51 million tables, as 15% of individual taxpayers filed their own tax returns without the assistance of a paid tax return preparer or tax preparation software.[32] When questions or ambiguities arise during the taxpaying process, these taxpayers are not likely to turn to the Internal Revenue Code for answers. On the contrary, they are likely to refer to relevant IRS publications in order to determine the proper tax treatment of a particular item. For the millions of taxpayers that fall within this category and file their own federal income tax returns, IRS publications are not simply explanations of substantive tax law—they are substantive tax law.

Taxpaying has changed dramatically in recent years, and the individual taxpayer alone at her table is no longer the only paradigm.[33] Today, many taxpayers retain third-party tax return preparers or purchase tax preparation software to satisfy their annual filing obligations. For instance, in 2015, 85% of individual taxpayers relied on commercial tax preparation services, with approximately 78 million returns filed by third-party tax return preparers and another 49 million filed using tax preparation software.[34] Thus, large numbers of contemporary taxpayers

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of the laws and IRS procedures in all tax forms, instructions, publications, notices, and correspondence." *Id*.

31. Lawrence Zelenak, *Complex Tax Legislation in the TurboTax Era*, 1 Colum. J. Tax L. 91, 92 (2010).

32. Internal Rev. Serv., 2015 Data Book 6, 6–11 tbls.3–4 (2016), https://www.irs.gov/pub/irs-soi/15databk.pdf.

33. Rodney P. Mock & Nancy E. Shurtz, *The TurboTax Defense*, 15 Fla. Tax Rev. 443, 453 (2014); Zelenak, *supra* note 31, at 91.

34. *See* 2015 Data Book, *supra* note 32, at 6–11 tbls.3–4; *see also*, *Written Testimony of John A. Koskinen Commissioner Internal Revenue Service Before the Senate Finance Committee on Regulation of Tax Return Preparers* (Apr. 8, 2014), https://www.finance.senate.gov/imo/media/doc/Koskinen%20 Testimony.pdf ("[P]aid preparers are called upon by taxpayers to complete about 80 million returns, or about 56 percent of the total individual income tax returns filed, while another 34 percent of taxpayers use tax preparation software, for a total of 90 percent who seek some form of assistance."); Nat'l Taxpayer Advocate, *supra* note 10, at 6.

rely on legal intermediaries other than the IRS—generally for-profit intermediaries—when completing their federal income tax returns.

Yet IRS publications remain as important as ever in the era of third-party tax return preparers and tax preparation software. IRS publications perform a comparable, largely underappreciated function for the new generation of commercial tax preparation services, thus facilitating many of the services they offer to the general taxpaying public. In this respect, IRS publications now represent a "super-intermediary." The IRS communicates information about substantive tax law to third-party return preparers and the creators of tax preparation software through its publications. And IRS publications, in turn, form the basis of the guidance these commercial providers sell to millions of taxpayers each year. The IRS thus continues to perform an essential function in this modern era of taxpaying, even if not apparent to many stakeholders.

Tax preparation software is a perfect example of this phenomenon. IRS publications deeply influence commercial platforms like TurboTax, TaxACT, and H&R Block. TurboTax, for instance, provides its users with direct links to IRS publications.[35] It also contains numerous discussions, as well as a video, that tout the benefits of IRS publications, even stating that "IRS publications provide answers on nearly every tax topic that you're likely to face."[36] Likewise, TurboTax allows users to ask questions online, and the responses often rely on the relevant IRS publications.[37] In the context of partnership tax, for example, it is quite

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35. *IRS Publications*, TurboTax, https://turbotax.intuit.com/tax-tools/tax-tips/IRS-Tax-Return/IRS-Publications/INF12063.html (last visited Oct. 29, 2017).

36. *Id.*; *see also What Are IRS Publications?*, TurboTax, https://turbotax.intuit.com/tax-tools/tax-tips/Taxes-101/What-Are-IRS-Publications-/INF14400.html (last visited Oct. 29, 2017). As noted, TurboTax also includes a video discussing IRS Publications. *See Video: What Are IRS Publications?*, TurboTax, https://turbotax.intuit.com/tax-tools/tax-tips/Taxes-101/Video—What-Are-IRS-Publications-/INF14668.html (last visited Oct. 29, 2017). In this video, the speaker states: "Have you ever read the instructions to your tax return but still couldn't figure out whether you qualified for that deduction? If so, IRS publications can help you fill in the gaps and ease your frustrations while preparing your tax return. . . . Because the IRS publications cover most personal income tax topics, it's likely that this is as far as you will need to go beyond the instructions to get your tax return completed." *Id.*

37. *TurboTax Support*, TurboTax, https://ttlc.intuit.com (last visited Oct. 29, 2017). Users ask tax-related questions through the TurboTax

common for user questions to receive responses that quote directly from Publication 541, *Partnerships*, and also for those responses to provide users with a link to the publication itself.[38]

There are also indirect connections between TurboTax and IRS publications, which often go unnoticed by users of the online platform. The substantive tax analysis applied by TurboTax regularly defaults to IRS publications, tracking their language and their coverage. In many instances, TurboTax relies on the actual language of IRS publications when explaining various tax rules and concepts.[39] Similarly, TurboTax's coverage of tax law parallels IRS publications. If the IRS fails to explain a particular tax law provision in the relevant publication, TurboTax commonly replicates that silence, omitting that provision from its online materials.[40] Given the substantial number of connections between IRS

"AnswerXchange," and support experts—including CPAs, Enrolled Agents, and tax return preparers—as well as other TurboTax users are free to reply. *Id.*

38. For example, one user asked the following question about the taxation of partnerships: "How do you determine the Partnership Basis when filling out the section concerning Schedule K-1 (FORM 1065)?" A TurboTax support expert responded to this question by providing the user with links to Publication 541, *Partnerships*, Publication 551, *Basis of Assets*, and the Partner's Instructions for Schedule K-1 (Form 1065). The TurboTax support expert also quoted directly from these publications when explaining to the user the concepts of basis, adjusted basis, and the basis of a partner's interest in a partnership. In response to a user question about how to record a partner's contribution of a partnership interest to his partnership, the TurboTax support expert provided a summary answer and referred the user to Publication 541. (Screenshots of the preceding TurboTax support exchanges are on file with the author and with the *Florida Tax Review.*) *See also* TurboTax, https://ttlc.intuit.com/questions/2806829-my-limited-partnership-has-dissipated-with-money-and-no-k-1-for-2014-i-have-32522-left-in-my-capital-account-how-can-i-deduct-the-loss (last visited Oct. 29. 2017) (in response to a question about the treatment of a positive capital account balance following the dissolution of a partnership, the TurboTax support expert simply referred the user to Publication 541).

39. *See supra* note 38.

40. Subchapter K provides a useful illustration of these parallels in coverage and omissions. As will be discussed, the general rules governing partnership allocations—particularly the substantial economic effect safe harbor—are not explained in Publication 541. *See infra* note 170 and accompanying text. TurboTax replicates this gap, failing to adequately address these important allocation rules on its platform. The same parallels in coverage are evident in the treatment of partnership revaluations and hot asset distributions,

publications and TurboTax, such connections cannot be coincidental; rather they appear to be a design feature of the online platform.[41]

IRS publications also have a profound impact on nonprofit and for-profit tax return preparers. Consider, for example, the IRS-sponsored Volunteer Income Tax Assistance (VITA) and Tax Counseling for the Elderly (TCE) programs.[42] During the 2015 filing season, 90,826 volunteers prepared 3,756,707 federal income tax returns for qualifying individuals through VITA and TCE.[43] In order to volunteer in the VITA or TCE programs, the IRS must certify a volunteer to prepare individual income tax returns. To this end, a volunteer receives training in substantive tax law and is required to pass a certification exam.[44] The goal of this training is accuracy—to provide a volunteer with an understanding of substantive tax law that will allow her to assist taxpayers in preparing and filing accurate tax returns.[45]

A volunteer is taught about substantive tax law through IRS publications, not through the Internal Revenue Code or accompanying Treasury Regulations. Publication 4491, *VITA/TCE Training Guide*, is the IRS's primary teaching tool, designed to provide volunteers with the information necessary to understand and apply the tax law.[46] The publication is organized by lesson, walking topic-by-topic through substantive tax law issues that often arise in preparing a VITA or TCE return. At the beginning of each lesson, there is a short section entitled "What Do

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neither of which is adequately addressed in Publication 541 or included in TurboTax. I.R.C. §§ 704(b), 751(b); Reg. § 1.704–1(b)(2)(iv)(f); Prop. Reg. § 1.751–1(b), 79 Fed. Reg. 65,151, 65,159–72 (Nov. 3, 2014).

41. Blank & Osofsky, *supra* note 8, at 229–31.

42. The VITA and TCE programs provide free tax preparation services to low- to moderate-income families and individuals 60 years of age and older who need assistance preparing their federal income tax returns. *See IRS Tax Volunteers*, Internal Rev. Serv., https://www.irs.gov/individuals/irs-tax-volunteers (last updated Sept. 30, 2017); *Free Tax Return Preparation for Qualifying Individuals*, Internal Rev. Serv., https://www.irs.gov/individuals/free-tax-return-preparation-for-you-by-volunteers (last updated Aug. 28, 2017).

43. 2015 Data Book, *supra* note 32, at 49 tbl.19 (Selected Taxpayer Education and Assistance Programs, by Type of Assistance or Program, Fiscal Year 2015); *IRS Tax Volunteers*, *supra* note 42.

44. IRS Pub. No. 4491, VITA/TCE Training Guide 1–4 (2017), https://www.irs.gov/pub/irs-pdf/p4491.pdf.

45. *Id*. at 1–1.

46. *Id*.

I Need?" that provides a volunteer with a list of materials that she may find helpful. Invariably, this list includes a number of IRS publications: Publication 4012, *VITA/TCE Volunteer Resource Guide*; Publication 17, *Your Federal Income Tax*; and more specialized publications related to the particular lesson. There is rarely, however, any mention of the actual tax statutes or regulations that govern the tax treatment of the particular lesson's subject.[47]

Once a volunteer is certified to prepare VITA and TCE tax returns, she is instructed to rely primarily on Publication 4012 and Publication 17 when assisting taxpayers in preparing and filing their tax returns.[48] Publication 4012, *VITA/TCE Volunteer Resource Guide*, explains the underlying tax law and refers a volunteer to more specialized publications if she needs additional help resolving a particular issue.[49] Again, the Internal Revenue Code and Treasury Regulations are

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47. For example, the first lesson in the *VITA/TCE Training Guide* covers a taxpayer's filing status. *Id*. at 5-1 to 5-10. This lesson, like all lessons, begins with an introduction and a statement of learning objectives. In a highlighted box to the side of these materials is a list of the additional resources that a volunteer may need in order to learn this material. This lesson's "What Do I Need?" box includes the following: (1) VITA/TCE Interview and Intake Sheet; (2) Publication 4012, *VITA/TCE Volunteer Resource Guide*; and (3) Publication 17, *Your Federal Income Tax for Individuals*. *Id*. at 5-1. Three additional IRS publications—Publication 501, *Exemptions, Standard Deduction, and Filing Information*; Publication 555, *Community Property*; and Publication 971, *Innocent Spouse Relief*—are also included in the "What Do I Need?" box as optional materials. *Id*. There is, however, no mention of any relevant provision of the Internal Revenue Code or accompanying Treasury Regulations.

48. IRS Pub. No. 4491, *supra* note 44, at 1-11. The *VITA/TCE Training Guide* provides that "[y]ou should **not** use this guide at your tax preparation site. . . . The Volunteer Resource Guide and Publication 17 will be available for use in printed or electronic format." *Id*.

49. Consider again, the determination of a taxpayer's filing status. *See supra* note 47. In order to determine a taxpayer's proper filing status, a VITA or TCE volunteer tax return preparer would look to Publication 4012 and Publication 17, as instructed by the *VITA/TCE Volunteer Resource Guide*. Publication 17 provides an explanation of substantive tax law, as well as a list of additional IRS publications that might prove helpful in answering this question. IRS Pub. No. 17, Your Federal Income Tax for Individuals 20–25 (2016), https://www.irs.gov/pub/irs-pdf/p17.pdf. Like the *VITA/TCE Training Guide*, these materials make no mention of the relevant provisions of the Internal Revenue Code or accompanying Treasury Regulations.

not the materials relied on by volunteer return preparers participating in the VITA and TCE programs; rather, they rely on IRS publications. Indeed, these volunteer tax return preparers are effectively in the same position as taxpayers filing their own tax returns—for them, IRS publications operate as though they are substantive tax law.

IRS publications play a similar role in educating and training many for-profit tax return preparers.[50] For instance, the IRS directly credentials certain return preparers, who are certified as "Enrolled Agents" upon passage of a professional competency examination called the "Special Enrollment Examination."[51] As a result of this heightened credentialing standard, enrolled agents—like attorneys and certified public accountants—are authorized to represent taxpayers before the IRS.[52] The Special Enrollment Examination, like the VITA/TCE certification, is largely grounded in IRS publications, and professional organizations regularly advise individuals to focus their course of study on IRS publications.[53] Accordingly, the training and certification of Enrolled Agents

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50. For a more general discussion of the role that IRS publications play in the work of tax accountants and tax return preparers, *see* Blank & Osofsky, *supra* note 8, at 231–32.

51. *Enrolled Agent Information*, Internal Rev. Serv., https://www.irs.gov/tax-professionals/enrolled-agents/enrolled-agent-information (last updated Aug. 4, 2017).

52. Circular 230, 31 C.F.R. §§ 10.2(a)(4), 10.3–.6; *see also Enrolled Agent Information, supra* note 51. Tax return preparers other than attorneys, certified public accountants, and enrolled agents are generally not subject to federal oversight with respect to the provision of taxpayer services. *See generally* Jay A. Soled & Kathleen DeLaney Thomas, *Regulating Tax Return Preparers*, 57 B.C. L. Rev. 152 (2017) (tracing the history, including failed efforts, to regulate tax return preparers and making the case for regulating all tax return preparers).

53. *See, e.g.*, Nat'l Ass'n of Tax Prof'ls, *Exam Information and Test Taking Tips* (2015), https://www.natptax.com/TaxKnowledgeCenter/enrolled-agent-exam/Documents/2015%20EA%20Exam%20Review%20Course%20Test%20Taking%20Tips.pdf ("Although the Internal Revenue Code is the authority for the exam content, most test questions come directly from the IRS publications or form instructions. Use the publications that relate to each section of the test for further study. Study the examples found in the publications."); John O. Everett, *24 Tips for Passing the Enrolled Agent Exam the First Time—Part 1*, Main Street Practitioner, http://mainstreetpractitioner.org/feature/24-tips-for-passing-the-ea-exam-1/ (last visited Oct. 29, 2017) (noting that

offers another example of the essential role that IRS publications play in facilitating the preparation of tax returns for millions of taxpayers.

There is one additional way through which IRS publications serve as an essential tax law intermediary: the Internet. The Internet is the most ubiquitous research tool available to stakeholders—whether taxpayers or practitioners, experts or non-experts—searching for information about tax law. In 2015 alone, individuals visited IRS.gov over 492 million times and, in doing so, they viewed over 1.99 billion pages of information.[54]

Internet search engines like Google and Bing extend the reach of IRS publications well beyond the IRS's website. Individual taxpayers, for example, often search the Internet for information about the tax consequences of particular payments or transactions. Consider a simple example involving a taxpayer who wants to determine whether any of her medical expenses are properly deductible. If this taxpayer enters the following search terms into Google—"can I deduct medical expenses on my income taxes"—out of the first ten search results listed, two are direct links to Publication 502, *Medical and Dental Expenses*, and almost all of the other eight results contain links to this IRS publication as part of their explanations of medical expense deductions.[55]

Practitioners and tax return preparers also rely on Internet searches when they encounter a novel tax question or an issue arising outside their area of expertise. These Internet searches may provide background information on the underlying tax law or help contextualize the issue and the research necessary to resolve it. Consider again a simple example involving a tax return preparer with little experience in partnership tax. If a client receives a distribution from a partnership

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many of the answers on the Special Enrollment Examination come "word-for-word" from IRS publications).

54. 2015 Data Book, *supra* note 32, at 49 tbl.19 (2016).

55. When the search was run in late October 2017, of the top ten results, two were links to IRS.gov and Tax Topic 502, *Medical and Dental Expenses*. Another six results were links to paid tax return preparers, including TurboTax, H&R Block, and 1040.com. All of these results explained the rules governing the medical expense deduction, and the H&R Block explanation included direct links to Publication 502. The remaining two search results were to articles—one appearing on forbes.com and the other on bankrate.com—providing individuals with explanations and tips relating to the medical expense deduction. Both of these articles also contained direct links to Publication 502.

during the taxable year, the return preparer may search the Internet to obtain a sense of the basic rules governing partnership distributions. If the return preparer entered "how do I treat a partnership distribution for tax purposes" in Google, two of the top five results would be Publication 541, *Partnerships*.

The Internet has become an indispensable tool for a diverse array of stakeholders to research a diverse array of tax questions. But this diversity should not mask the vital and continuing role of IRS publications as a source of information about substantive tax law. The myriad sources of information available through the Internet often lead stakeholders to explanations of tax law provisions found in IRS publications. Simply put, the world of taxpaying has changed dramatically in the twenty-first century, but the profound influence of IRS publications on the practice of tax has not. IRS publications remain the essential intermediary for millions of stakeholders preparing and filing federal income tax returns each year.

B. IRS Publications and Tax Scholarship

When it comes to tax theory, however, the opposite is true—IRS publications are rarely the focus of legal scholarship or tax policy debates. The centrality of IRS publications to the practice of tax has not translated into a comparable role in the experts' world. Considering their influence and reach, it is a real surprise that experts pay so little attention to IRS publications in their scholarship.

One might thus ask why IRS publications, which are so vital to the taxpaying process for millions of stakeholders, remain so removed from the experts' world of scholarship and tax policy debates? One explanation relates to status: IRS publications are not authoritative, binding legal documents; on the contrary, they are guidance documents offering stakeholders general information regarding substantive tax law. The IRS steadfastly maintains that taxpayers may not rely on IRS publications.[56] The Tax Court also supports this view of IRS publications,

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56. *See* I.R.M. 4.10.7.2(8) ("Publications are nonbinding on the Service and do not necessarily cover all positions for a given issue. While a good source of general information, publications should not be cited to sustain a position."). One notable exception to this "no reliance" rule is in the penalty context where the IRS may consider a taxpayer's reliance on IRS publications in assessing certain penalties. I.R.C. §§ 6662(d), 6664(c); Reg. § 1.6664–4(a).

noting in one recent opinion that taxpayers "rely on IRS guidance at their own peril."[57] Considered in this light, experts, especially those with legal training, are not likely to turn to IRS publications when evaluating questions about substantive tax law.[58] Instead, they are likely to focus on primary authorities that are binding on both taxpayers and the IRS, like the Internal Revenue Code and accompanying Treasury Regulations.

Even so, the status of IRS publications as secondary, non-binding authorities is only a partial explanation for their scant role in the tax scholarship. Alongside status is function, with IRS publications generally viewed as procedural conduits that deliver information about substantive tax law to taxpayers and tax return preparers. Put another way, IRS publications shepherd these non-expert stakeholders through the tax-paying process, explaining substantive tax law in a simple and accurate manner that allows them to fulfill their annual tax filing obligations.[59]

Recently, Michael Damasiewicz, the IRS Director of Examination—Field and Campus Policy, distributed a memorandum reminding examiners that frequently asked questions and other guidance posted on IRS.gov, including IRS Publications, that have not been published in the Internal Revenue Bulletin are not legal authority. Memorandum for Area Directors, Examination—Field, from Micahel W. Damasiewicz (May 18, 2017), https://www.irs.gov/pub/foia/ig/spder/sbse-04-0517-0030.pdf. Taxpayers may thus not rely on these forms of guidance. *Id*., *see also* Nina E. Olson, *IRS Frequently Asked Questions Can Be a Trap for the Unwary*, Taxpayer Advocate Service: NTA Blog (July 26, 2017), https://taxpayeradvocate.irs.gov/news/irs-frequently-asked-questions-can-be-a-trap-for-the-unwary.

57. Order on Motion for Reconsideration at 2, Bobrow v. Comm'r, T.C. Memo 2014-21 (Apr. 14, 2014) (No. 7022-11), https://www.ustaxcourt.gov/InternetOrders/DocumentViewer.aspx?IndexSearchableOrdersID=131933; *see also* Miller v. Comm'r, 114 T.C. 184, 195 (2000); Zimmerman v. Comm'r, 71 T.C. 367, 371 (1978). *See generally* Cauble, *supra* note 8, at 471–73.

58. In fact, legal experts learn this lesson early, often on the first day of their first federal income tax course. For example, one leading casebook notes that "[t]he Code and the regulations are law; forms and instructions are not. Thus, any guidance provided by forms and instructions is not authoritative, despite the fact that it comes from the Internal Revenue Service." Richard Schmalbeck, Lawrence Zelenak & Sarah B. Lawsky, Federal Income Taxation 2–3 (4th ed. 2015). This statement is no less apt when the subject is IRS publications.

59. *See supra* note 4; *see also* Cauble, *supra* note 8, at 438; Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View from Within*, 46 Duq. L. Rev. 323, 371–72

In doing so, IRS publications perform a largely administrative function in the retail taxpaying process—they operationalize substantive tax law with as little distortion as possible.

In recent years, scholars and policymakers have begun to pay more attention to issues surrounding tax compliance and tax administration.[60] As part of this welcome trend, a small number of scholars have even turned to IRS publications and their role in tax administration.[61] In particular, some scholars, like Emily Cauble, have challenged the longstanding position that taxpayers cannot rely on various types of IRS guidance, including IRS publications.[62] Others have addressed questions of design and function.[63] Joshua Blank and Leigh Osofsky, for instance, recently examined the relationship among plain language efforts, IRS publications, and the values that animate tax law.[64] In doing so, their

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(2008); Joshua D. Rosenberg, *A Helpful and Efficient IRS: Some Simple and Powerful Suggestions*, 88 Ky. L.J. 33, 38–39 (1999–2000).

60. *See, e.g.*, Alice G. Abreu & Richard K. Greenstein, *Tax as Everylaw: Interpretation, Enforcement, and the Legitimacy of the IRS*, 69 Tax Law. 493 (2016); Joshua D. Blank, *The Timing of Tax Transparency*, 90 S. Cal. L. Rev. 449 (2017); Blank & Osofsky, *supra* note 8; Bryan T. Camp, *Theory and Practice in Tax Administration*, 29 Va. Tax Rev. 227 (2009); Cauble, *supra* note 8; Jonathan Barry Forman & Roberta F. Mann, *Making the Internal Revenue Service Work*, 17 Fla. Tax Rev. 725 (2015); Kristen E. Hickman, *Administering the Tax System We Have*, 63 Duke L.J. 1717 (2014); Steve R. Johnson, *The Future of American Tax Administration: Conceptual Alternatives and Political Realities*, 7 Colum. J. Tax L. 5 (2016); Steve R. Johnson, *Reasoned Explanation and IRS Adjudication*, 63 Duke L.J. 1771 (2014); Leandra Lederman, *IRS Reform: Politics as Usual?*, 7 Colum. J. Tax L. 36 (2016); Leigh Osofsky, *The Case for Categorical Nonenforcement*, 69 Tax L. Rev. 73 (2015); Rosenberg, *supra* note 59; Thomas, *supra* note 8; Lawrence Zelenak, *Maybe Just a Little Bit Special, After All?*, 63 Duke L.J. 1897 (2014); Zelenak, *supra* note 8.

61. *See* Blank & Osofsky, *supra* note 8; Cauble, *supra* note 8; Shapiro, *supra* note 8; Thomas, *supra* note 8; Zelenak, *supra* note 8.

62. *See* Cauble, *supra* note 8; Shapiro, *supra* note 8; *see also* Cramwinckel, *supra* note 29 (advocating a multidisciplinary approach focused on linguistics and communications theory to the question of whether taxpayers may rely on communications of the Dutch Tax Authorities).

63. *See* Blank & Osofsky, *supra* note 8; Thomas, *supra* note 8; Zelenak, *supra* note 8.

64. *See* Blank & Osofsky, *supra* note 8. Blank and Osofsky's article makes a number of important contributions to the scholarship, most importantly

work raises a series of interrelated normative questions for future scholars: What does it mean for IRS publications to work? And how should these publications be designed in order to best promote administrability and taxpayer compliance without compromising other important values like equity, legitimacy, and civic participation?

This turn toward IRS publications, however, is too narrow. It confines IRS publications to their traditional conduit role in tax administration and the retail taxpaying process when there is in fact a bigger story to tell about IRS publications and their role in the federal income tax system. IRS publications surely play an essential role in the non-expert world, communicating substantive tax law to stakeholders simply and accurately. But IRS publications can also play an equally vital role in the experts' world, teaching scholars and policymakers about the substantive tax law provisions they explain.[65] Put another way, experts can learn a great deal from studying IRS publications and how the IRS operationalizes substantive tax law for non-expert stakeholders needing assistance in preparing tax returns.[66]

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introducing the concept of "simplexity" into the tax lexicon. Simplexity, as explained by Blank and Osofsky, occurs when the IRS provides a clear and simple explanation of substantive tax law—in its publications, for example—without signaling the underlying law's complexity or addressing such complexity through formal legal changes. *Id*. at 206–07. To them, simplexity is rampant in IRS publications, where plain language efforts create the appearance of simplicity even though the underlying law remains complicated. Their article thus aims to highlight the tradeoff between accuracy and understandability implicit in simplexification and its impact on tax administration. *Id*. at 250–51. Blank and Osofsky do not evaluate individual instances of simplexity, nor do they offer an optimal theory for reconciling accuracy and understandability in IRS publications. *Id*. On the contrary, they note that this tradeoff is entirely contextual, and there is no single means of balancing accuracy and understandability in IRS publications. *Id*. Instead, they provide a number of suggestions—largely involving the design, drafting, and government oversight of IRS publications—designed to minimize the threats of simplexity, which include reduced government transparency, government accountability, and equity among taxpayers. *Id*. at 251–59.

65. Stated differently, this Article is not about designing and drafting better IRS publications or improving the retail taxpaying process. On the contrary, this Article is about how IRS publications can help scholars and policymakers improve substantive federal income tax law.

66. Another way to conceptualize this gap in the scholarship is to think of IRS publications as translations of substantive tax law. From this

This Article thus suggests that the study of IRS publications can make a significant and unexpected contribution to the experts' world of scholarship and tax policy debates. In particular, studying IRS publications can deepen the experts' understanding of one of the most chronic and longstanding problems facing the federal income tax system—complexity.[67] It is to this problem, and the role of IRS publications in the solution, that this Article now turns.

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vantage, the existing scholarship on IRS publications is largely focused on the problem of distortion. Translations inevitably create distortions, or inaccuracies, between the original text and the reproduction—here, between substantive tax law and the IRS publications that explain the law. Likewise, translators have a unique ability to frame or shade their translations, which also create the possibility of distortions. The current scholarship targets the translations and the translators, attempting to minimize these distortions through changes to IRS publications and to the IRS itself. In doing so, it treats the original text—the underlying tax law—as fixed. This Article, in contrast, takes a different vantage and instead studies the translations in order to learn about the original text. That is, this Article looks to IRS publications in order to yield lessons about the substantive tax law they translate.

67. Other scholars have also noted that complexity in IRS guidance materials—including forms, instructions, and publications—may be a signal of complexity in the underlying tax law. *See* JCT 2001 Complexity Report, *supra* note 11, at 43 (using the length of IRS worksheets, forms, instructions, or publications as a factor in identifying tax law provisions that add complexity to the overall tax system); Blank & Osofsky, *supra* note 8, at 254 (distinguishing simplicity from simplexity in IRS publications and noting that the ultimate source of the simplexity problem is complexity in the underlying tax law); Edwin S. Cohen, *Remarks*, 26 Nat'l Tax J. 311, 314 (1973) (noting that tax forms can highlight the complexity of substantive tax law and proposing a flipped process where lawmakers identify areas of substantive tax law that may be amended in order to simplify the related tax forms); Randolph E. Paul, *Simplification of Federal Tax Laws*, 29 Cornell L.Q. 285, 288 (1944) (noting that IRS forms operate as signals of complexity in substantive tax law); McDaniel, *supra* note 11, at 29 (stating that complexity in tax forms is a manifestation of complexity in substantive tax law). This Article builds on these previous works, but flips the focus from how IRS publications can improve tax administration to how IRS publications can help experts better understand the substantive tax law they explain.

II. IRS Publications and Tax Complexity

IRS publications can play a vital role in the fight against tax complexity, yielding important lessons for experts about the nature and severity of complexity problems in substantive tax law. Studying IRS publications can help experts analyze and identify the underlying tax law provisions that require congressional or regulatory intervention in order to ameliorate their complexity. Likewise, the study of IRS publications can also identify instances where the IRS serviceably mediates the underlying tax law's complexity, providing a simple and accurate explanation of a tax law provision that might otherwise look very complicated from the experts' traditional perspective.

This part thus offers a novel approach to the problem of tax complexity, suggesting that the study of IRS publications and their explanations of substantive tax law can help experts begin to identify the most pressing complexity problems facing the federal income tax system. By highlighting these "high risk" tax law provisions, IRS publications can help experts formulate a tax research and reform agenda that bypasses many of the longstanding theoretical roadblocks to tax simplification.

A. The Problem of Tax Complexity

Tax complexity is itself a complicated problem. Virtually all taxpayers, practitioners, policymakers, and academics agree that complexity is one of the most consequential problems facing the federal income tax system.[68] To these stakeholders, tax law is simply too complicated, imposing excessive burdens on the taxpayers who must comply with the law and also the government officials who must administer it. There is thus tremendous support for tax reform efforts designed to simplify substantive tax law. Indeed, tax simplification is the rare issue that

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68. *See supra* note 11; *see also* Richard L. Doernberg, *The Market for Tax Reform: Public Pain for Private Gain*, 41 Tax Notes 965, 965 (Nov. 28, 1988) (noting that the "United States has the most complex income tax laws in the history of civilization."). *But see* Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 Va. Tax Rev. 645 (2003) (arguing that the focus on tax simplification is misguided, particularly when it distracts scholars and policymakers from addressing the tax law's foundational values of equity and efficiency).

resonates throughout the stakeholder community without regard to wealth, geography, sophistication, or political affiliation.

Even so, we seldom seem to make meaningful progress toward tax simplification. On the contrary, the efforts of scholars and policymakers are sometimes counterproductive—the more experts try to understand tax complexity, the more complicated tax law becomes. The result is a deeply dysfunctional status quo where many taxpayers, particularly taxpayers at lower income levels, are left with few good options in their annual struggle to comply with tax laws that they cannot understand.[69] Simply put, we often seem stuck when it comes to the fight against tax complexity.[70]

This stasis in the fight against complexity is not without significant cost.[71] Tax complexity leads to noncompliance: if taxpayers cannot

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69. *See, e.g.*, William L. Cary, *Reflections upon the American Law Institute Tax Project and the Internal Revenue Code: A Plea for a Moratorium and Reappraisal*, 60 Colum. L. Rev. 259, 268 (1960); Eustice, *supra* note 11, at 7; Randolph E. Paul, *supra* note 67, at 293; Stanley S. Surrey & Gerard M. Brannon, *Simplification and Equity as Goals of Tax Policy*, 9 Wm. & Mary L. Rev. 915, 921 (1968). Tax complexity also adversely impacts generalist tax practitioners and tax return preparers. *See, e.g.*, Robert B. Eichholz, *Should the Federal Income Tax Be Simplified?*, 48 Yale L.J. 1200, 1202 (1939); Lawrence Lokken, *As the World of Partnership Taxation Turns*, 56 SMU L. Rev. 365, 367 (2003); Martin J. McMahon, Jr., *Reflections on the Regulations Process: "Do the Regulations Have To Be Complex" or "Is Hyperlexis the Manna of the Tax Bar?"*, 51 Tax Notes 1441, 1450 (June 17, 1991); Yariv Brauner, *Why Examples? Towards More Behaviorally-Intelligent Regulation*, 37 Va. Tax Rev. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3008261. Indeed, Professor Joseph Isenbergh once noted "I have a relatively simple economic life (a condominium apartment with mortgage, a few securities, some elective deferred compensation, some business travel—that pretty much sums it up), but I no longer think I can file a perfect tax return." Joseph Isenbergh, *The End of Income Taxation*, 45 Tax L. Rev. 283, 314 n.139 (1990).

70. *See* Surrey & Brannon, *supra* note 69, at 915 ("It must appear to an observer of the tax scene that simplification is the most widely quoted but the least widely observed of the goals of tax policy. Nearly everyone likes to talk simplification. Only a few people . . . have said anything concrete on how to accomplish it.").

71. *See, e.g.*, JCT 2015 Complexity Report, *supra* note 11, at 6–17; JCT 2001 Complexity Report, *supra* note 11, at 101–11; Eustice, *supra* note 11, at 18–20; Sidney I. Roberts, *Simplification Symposium Overview: The Viewpoint*

understand and apply the law, then they cannot comply with it.[72] Likewise, complexity in tax law often breeds further complexity.[73] Complicated tax provisions are likely to produce loopholes or interact with other provisions in unexpected ways, and lawmakers then feel compelled to respond with complicated "fixes," which crowd out simpler tax law provisions.[74]

Tax complexity also erodes the perception that the federal income tax system is fair and principled. Stakeholders who cannot understand the federal income tax law are effectively excluded from participation in the law.[75] Inaccessibility, in turn, leads to frustration and

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of the Tax Lawyer, 34 TAX L. REV. 5, 12 (1978). *See generally* Ruhl & Katz, *supra* note 11, at 224.

72. *See, e.g.*, JCT 2015 COMPLEXITY REPORT, *supra* note 11, at 6–17; JCT 2001 COMPLEXITY REPORT, *supra* note 11, at 101–11. *But see* Donaldson, *supra* note 68, at 693–95 (noting the lack of data supporting the argument that complexity affects voluntary compliance). Tax complexity can also lead to a more nefarious form of noncompliance as taxpayers affirmatively exploit the unanticipated loopholes or interactions between elaborate tax provisions. *See, e.g.*, JCT 2015 COMPLEXITY REPORT, *supra* note 11, at 8; JCT 2001 COMPLEXITY REPORT, *supra* note 11, at 102; Surrey, *supra* note 11, at 700–01.

73. *See, e.g.*, DAVID F. BRADFORD, UNTANGLING THE INCOME TAX 5 (1986); Dean, *supra* note 11, at 410; McCaffery, *supra* note 11, at 1278; Andrea Monroe, *Integrity in Taxation: Rethinking Partnership Taxation*, 64 ALA. L. REV. 289, 300 (2012); Surrey, *supra* note 11, at 686.

74. *See, e.g.*, McCaffery, *supra* note 11, at 1278; Surrey, *supra* note 11, at 686.

75. *See, e.g.*, JCT 2015 COMPLEXITY REPORT, *supra* note 11, at 15; JCT 2001 COMPLEXITY REPORT, *supra* note 11, at 109. Indeed, many scholars have made the argument that we should be skeptical of laws that we cannot understand. Professor Boris Bittker, as is often the case, said it best:

> In a tribute to President Johnson, published in the New York Times on January 26 1974, Bill Moyers describes a session at a 1966 international conference when a final memorandum was being prepared for release to the press. The President looked at the draft, described by Mr. Moyers as written in "flat, sterile, polysyllabic prose," and insisted on rewriting the preamble. His objective, he said, was a revised version that "can be read in the public square at Johnson City." I don't propose a Code that can be read at town meetings, but if a provision intended for mass consumption cannot be summarized

alienation among stakeholders, breaking the important bonds that foster respect for the tax law.[76] At the same time, complexity reinforces the notion that the United States has a dual tax system: one for the rich and well advised, and one for everyone else.[77] The result is a vicious cycle, where civic disengagement, taxpayer noncompliance, and the perception of unfairness reinforce one another, all the while compromising the legitimacy of the tax law itself.[78]

> in language that will be understood by the citizens of Johnson City, it ought to be re-examined with great suspicion. And if a provision of the Code cannot be understood by a good law student with a grounding in taxation, there should be an irrebutable presumption that it needs to be re-written.

Bittker, *supra* note 11, at 13 (footnote omitted); *see also* Martin D. Ginsburg, *Tax Simplification—A Practitioner's View*, 26 Nat'l Tax J. 317, 318 (1973); John A. Miller, *Indeterminacy, Complexity, and Fairness: Justifying Rule Simplification in the Law of Taxation*, 68 Wash. L. Rev. 1, 72 (1993); Paul, *supra* note 67, at 286, 293; Roberts, *supra* note 71, at 6; Deborah H. Schenk, *Simplification for Individual Taxpayers: Problems and Proposals*, 45 Tax L. Rev. 121, 167 (1989).

76. Treas. Dep't, The Problem of Corporate Tax Shelters: Discussion, Analysis and Legislative Proposals 3 (1999), https://www.treasury.gov/resource-center/tax-policy/Documents/Report-Corporate-Tax-Shelters-1999.pdf. This erosion in respect for tax law is particularly problematic in a voluntary compliance system like ours where taxpayers are responsible in the first instance for reporting their federal income tax liability.

77. *See Tax Complexity Hearing*, *supra* note 2, at 3 (statement of Sen. Ron Wyden: "The fact is, our overly complicated tax code divides taxpayers into very different worlds. There are the lucky few who can afford to hire tax pros to game the system. . . . Then there is everybody else just trying to put their tax return in the rear-view mirror."); *see also* Treas. Dep't, *supra* note 76, at 3; Sheldon I. Banoff, *The Use and Misuse of Anti-Abuse Rules*, 48 Tax Law. 827, 828–30 (1995); McCaffery, *supra* note 11, at 1269.

78. In her 2012 Report to Congress, the National Taxpayer Advocate addressed the relationship between tax complexity and the legitimacy of the federal income tax system. *See* Nat'l Taxpayer Advocate, *supra* note 10, at 3. Indeed, she made the following observation:

> In 2012, TAS conducted a statistically representative national survey of over 3,300 taxpayers who operate businesses as sole proprietorships. Only 16 percent said they believe the

If we all agree that tax complexity is one of the most pressing challenges facing the federal income tax system, then why has simplifying the tax law been so difficult? Predictably, there is no simple or single explanation. Scholars have spent decades examining almost every aspect of the tax complexity problem. Yet a simpler federal income tax law remains an elusive goal. Three common theories on the nature of tax complexity are discussed below, and each theory highlights how entrenched the problem of tax complexity is. In each instance, however, the study of IRS publications can offer an unexpected path forward, providing a practical solution to many of the longstanding theoretical obstacles to tax simplification.[79]

1. Agree-to-Disagree Hypothesis

Some scholars believe that the conceptual consensus surrounding the problem of tax complexity is superficial, masking deep disagreements about the definition of tax complexity.[80] One common definition focuses

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> tax laws are fair. Only 12 percent said they believe taxpayers pay their fair share of taxes. The National Taxpayer Advocate finds this extraordinary lack of public trust in the method by which our government is funded profoundly disturbing.
>
> To alleviate taxpayer burden and enhance public confidence in the integrity of the tax system, the National Taxpayer Advocate urges Congress to vastly simplify the tax code.

Id. (footnotes omitted).

79. As will be discussed, this Article does not suggest that tax simplification is always the optimal solution. *See infra* Part II.B. On the contrary, some complexity in substantive tax law is inevitable and, in some instances, perhaps even desirable. For instance, tax complexity may promote other core values of the federal income tax system, like equity, abuse prevention, and efficiency. *See infra* notes 92–99 and accompanying text. Likewise, the costs associated with complexity may depend on the taxpayers impacted by it. If a provision of the tax law only affects sophisticated taxpayers who have access to specialized tax advice, then the underlying law's complexity may be less problematic. *See infra* notes 109–111 and accompanying text.

80. *See, e.g.*, Bittker, *supra* note 11, at 1 ("Neither 'tax simplification' nor its mirror image, complexity, is a concept that can be easily defined or measured. I know of no comprehensive analytic framework for these ideas, nor are there any empirical studies supplying a 'simplicity index' of particular

on how stakeholders interpret the law, comply with the law, and structure transactions to benefit from the law.[81] Under this definition, complicated tax law provisions often include opaque terminology, elaborate definitional schemes, or mathematical computations, and navigating these provisions therefore requires a stakeholder to possess specialized knowledge of substantive tax law.[82] Other definitions of tax complexity also exist, with scholars developing normative frameworks that focus on substantive versus procedural complexity,[83] static versus dynamic complexity,[84] or the tax legislative process.[85]

Absent a unifying definition of tax complexity to ground scholars' thinking about the problem, foundational questions about benchmarks, priorities, and the optimal level of complexity in the law remain

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areas of tax law and practice."); Donaldson, *supra* note 68, at 732; McCaffery, *supra* note 11, at 1269 ("It is not easy to arrive at ready definitions of 'simplicity' and its cognates and antonyms. No single, uncontroversial definitions of these terms exist.") (footnote omitted); McDaniel, *supra* note 11, at 27; Paul, *supra* note 67, at 285; Schenk, *supra* note 75, at 123 ("There is no disagreement about the complexity of the Internal Revenue Code. There is less consensus on how, whether, and at what cost to fix it."); Laurence N. Woodworth, *Tax Simplification and The Tax Reform Act of 1969*, 34 L. & Contemp. Probs. 711 (1969). *See generally* Ruhl & Katz, *supra* note 11, at 196–97.

81. Bradford, *supra* note 73, at 266–67; *see also* JCT 2001 Complexity Report, *supra* note 11, at 42–43; McCaffery, *supra* note 11, at 1270–72.

82. *See, e.g.*, Bittker, *supra* note 11, at 2; Miller, *supra* note 75, at 40–43; Surrey, *supra* note 11, at 677.

83. *See* Leandra Lederman & Stephen W. Mazza, *Addressing Imperfections in the Tax System: Procedural or Substantive Reform?*, 103 Mich. L. Rev. 1423, 1443–44 (2005); Rosenberg, *supra* note 59, at 53–55; Thomas, *supra* note 8, at 1516–17. In a recent article, Professor Kathleen DeLaney Thomas distinguished the complexity of substantive tax law from the complexity of the taxpaying process, which often involves "burdensome or numerous processes or steps." Thomas, *supra* note 8, at 1517. Drawing on lessons from the private sector and behavioral science research, Thomas then focuses on the ways in which the process of taxpaying could be made easier and more user-friendly—for example, increased information reporting and online taxpayer accounts—in order to improve voluntary compliance with tax law. *Id.* at 1530–50.

84. *See* McCaffrey, *supra* note 11, at 1273–79.

85. *See* Cohen, *supra* note 67, at 314; Forman & Mann, *supra* note 60, at 772–74; McDaniel, *supra* note 11, at 28.

highly contested.[86] For instance, scholars disagree about the stakeholder population—experts or non-expert taxpayers and tax return preparers—to whom complexity poses the greatest challenges and, in turn, should be the focus of tax simplification efforts.[87] Likewise, scholars disagree about the structural aspects of the federal income tax system that are the most complicated.[88] In addition, there is little consensus about how to measure tax complexity, and whether these measurements should account for the use of tax preparation platforms by taxpayers and third-party return preparers.[89] When taken together, it is thus no surprise that scholars often seem resigned to tax complexity.[90] To them, complexity

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86. In a recent article, Professors J.B. Ruhl and Daniel Martin Katz argued that legal complexity is one of the least understood aspects of the law. Ruhl & Katz, *supra* note 11, at 197. To them, federal income tax law is a perfect example of the problem:

> [P]eople speak freely and passionately about the Tax Code's complexity, yet there is no standard set of metrics for measuring Tax Code complexity, no agreement on precisely how complex the Tax Code should be (other than less complex than it is now), and little agreement on how to achieve such a target if there were one.

Id. at 196.

87. *See, e.g.*, JCT 2001 Complexity Report, *supra* note 11, at 34–35; Bittker, *supra* note 11, at 1–2; Walter J. Blum, *Simplification of the Federal Income Tax Law*, 10 Tax L. Rev. 239 (1954); McCaffrey, *supra* note 11, at 1272–73; Roberts, *supra* note 71, at 6; Roberts et al., *supra* note 11, at 327; Woodworth, *supra* note 80, at 711–12.

88. *See, e.g.*, Bittker, *supra* note 11, at 2–5; Cohen, *supra* note 67, at 312–13; Eustice, *supra* note 11, at 12–13; Sarah B. Lawsky, *Formalizing the Code*, 70 Tax L. Rev. 377, 380–81 (2017); Paul, *supra* note 67, at 289–99; Surrey, *supra* note 11, at 673–85.

89. *See, e.g.*, JCT 2015 Complexity Report, *supra* note 11, at 11–13; Mock & Shurtz, *supra* note 33, at 524–25; Roberts, *supra* note 71, at 6; Ruhl & Katz, *supra* note 11, at 195–96, 223; Zelenak, *supra* note 31, at 118; Peter E. Boos, *Decoding the Code*, 156 Tax Notes 323, 326 (July 17, 2017).

90. Many scholars have indeed noted the timeless nature of the tax complexity problem. *See, e.g.*, N. Jerold Cohen, *It Always Looks Better When You Look Back*, 46 Tax Law. 683, 684 (1993); Cohen, *supra* note 67, at 311; Eustice, *supra* note 11, at 8; Roberts, *supra* note 71, at 23; Surrey, *supra* note 11, at 702.

is likely to remain a persistent feature of tax law unless and until a meaningful consensus emerges around the definition and the particulars of tax complexity.

The study of IRS publications, however, allows experts to bypass many of these definitional and operational disagreements. As will be discussed, examining IRS publications can help experts identify the substantive tax law provisions most likely to pose consequential complexity problems.[91] In particular, experts can use the IRS's explanations of tax law provisions as a rough proxy for the complexity of the underlying law. If an expert concludes that the IRS has not serviceably communicated the core aspects of a tax law provision to non-expert stakeholders, this characterization functions as a red flag, identifying a potential complexity problem with substantive tax law. It also provides experts with a path forward—these "failed" explanations signal the substantive tax law provisions most in need of further study to determine the nature and severity of the underlying complexity problem.

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91. *See infra* Part II.B. The ability to identify and prioritize consequential complexity problems is not a challenge unique to tax law. Professors Ruhl and Katz recently noted the lack of metrics and methods available to measure and manage legal complexity. Ruhl & Katz, *supra* note 11, at 211. Without these quantitative tools, they argue, legal scholars will continue to struggle in their efforts to identify, understand, and mediate legal complexity. *Id*. Ruhl and Katz thus propose turning to the science of complex adaptive systems, or complexity science, to fill this important gap and to develop empirical tools capable of identifying and measuring legal complexity. *Id*., at 211–12; *see also Tax Complexity Hearing*, *supra* note 2, at 7–8 (statement of Mihir A. Desai, Mizuho Financial Group Professor of Finance and Professor of Law, Harvard University; noting that tax complexity could be analogized to other complex systems and, therefore, scholars and policymakers should draw on research related to complex systems in thinking about how best to manage it).

This Article's approach to tax complexity can be situated within the larger arc that Ruhl and Katz describe. Although it does not rely on complexity science or empirical data, this Article begins with the same premise as Ruhl and Katz—we understand very little about tax complexity. Relying on intuition and examples, this Article then proposes a means of bypassing the historic challenges associated with defining tax complexity. Ruhl and Katz would characterize this approach—the development of theories based on intuition, analogy, and examples—as a critical first step in developing means of identifying and measuring legal complexity. Ruhl & Katz, *supra* note 11, at 211. Their recent work, however, is largely focused on the subsequent step of empirically testing those intuitions. *Id*.

2. Pluralism Hypothesis

Other scholars view tax complexity pragmatically. To them, complexity is just one aspect of a larger federal income tax system that pursues numerous policy goals like equity and efficiency.[92] Achieving these goals requires accurate tax provisions that account for today's sophisticated economy and diverse social arrangements.[93] For instance, equity requires similarly situated taxpayers to be taxed in the same manner, yet determining which taxpayers are in fact similarly situated requires detail—often technical and elaborate detail—about their personal lives and economic affairs.[94] Likewise, certainty in the tax law promotes both

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92. The federal income tax is grounded in two related notions of fairness—horizontal equity is the notion that similarly situated taxpayers should bear the same tax burdens, and vertical equity is the notion that taxpayers who are not similarly situated should bear different tax burdens. *See, e.g.*, John F. Witte, The Politics and Development of the Federal Income Tax 30 (1985); James Repetti & Diane Ring, *Horizontal Equity Revisited*, 13 Fla. Tax Rev. 135, 135–36 (2012). Efficiency is also grounded in two notions. The first notion—administrative efficiency—looks to minimize the administrative costs of tax law, including the costs to stakeholders of understanding and applying the law and the costs to the IRS of enforcing the law. *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557, 573 (1992); Daniel N. Shaviro, *An Efficiency Analysis of Realization and Recognition Rules Under the Federal Income Tax*, 48 Tax L. Rev. 1, 4 (1992). The second notion—efficiency as tax neutrality—seeks to minimize tax law's interference with the economic decision making of taxpayers. *See, e.g.*, Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. Legal Stud. 257, 260 (1974); David A. Weisbach, *Formalism in the Tax Law*, 66 U. Chi. L. Rev. 860, 870 (1999).

93. *See, e.g.*, U.S. Gov't Accountability Office, GAO–11–747T, Tax Gap: Complexity and Taxpayer Compliance 5–7 (2011), http://www.gao.gov/assets/130/126530.pdf; JCT 2015 Complexity Report, *supra* note 11, at 6; JCT 2001 Complexity Report, *supra* note 11, at 34, 45–46; Cohen, *supra* note 67, at 312; Stewart Karlinsky, *Tax Simplification in a Complex World*, 134 Tax Notes 1017, 1018 (Feb. 20, 2012); Paul, *supra* note 67, at 285; Roberts et. al., *supra* note 11, at 333; Surrey, *supra* note 11, at 686; Surrey & Brannon, *supra* note 69, at 915–17; Woodworth, *supra* note 80, at 719–20.

94. *See, e.g.*, JCT 2001 Complexity Report, *supra* note 11, at 45–46; Donaldson, *supra* note 68, at 660–61; Miller, *supra* note 75, at 6–7; Deborah L. Paul, *The Sources of Tax Complexity: How Much Simplicity Can Fundamental Tax Reform Achieve?*, 76 N.C. L. Rev. 151, 164–69 (1997); Roberts et al.,

equity and efficiency, but legal certainty in an uncertain world requires detail, precision, and technicality in substantive tax law.[95]

For these pluralistic scholars, complexity is thus an inevitable, sometimes even desirable, component of an equitable and efficient tax system.[96] The qualities that foster equity and efficiency in tax law—detail, precision, and technicality—are also the qualities that often make tax law complicated.[97] It follows that efforts to simplify tax law are likely to require the sacrifice of some degree of equity and efficiency, and this is a tradeoff that many scholars, even those who agree that tax complexity is a serious problem, do not support.[98] As long as life is complicated, these pluralistic scholars believe that the tax law must be so as well.[99]

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supra note 11, at 333–34; Surrey, *supra* note 11, at 700; Surrey & Brannon, *supra* note 69, at 915–17.

95. *See, e.g.*, JCT 2001 Complexity Report, *supra* note 11, at 46; Bittker, *supra* note 11, at 11; Blum, *supra* note 87, at 246; Cary, *supra* note 69, at 278; Donaldson, *supra* note 68, at 661–62; Eichholz, *supra* note 69, at 1213; Paul, *supra* note 94, at 169–75; Roberts, *supra* note 71, at 6; Surrey, *supra* note 11, at 697; Surrey & Brannon, *supra* note 69, at 915–17. *But see* Miller, *supra* note 75, at 23 (challenging the commonly held view that elaboration through detailed rules produces determinacy in tax law).

96. To the extent that complexity is viewed as promoting other values like equity and efficiency, one might consider some level of complexity in substantive tax law, and in the law more broadly, normatively good. *See* Donaldson, *supra* note 68, at 732–41. *See generally* Ruhl & Katz, *supra* note 11, at 224. The challenge is thus determining the proper balance among these values that animate the tax law. As will be discussed, this Article suggests that the study of IRS publications offers a path forward. *See infra* Part II.B.

97. *See, e.g.*, Bittker, *supra* note 11, at 11; Cary, *supra* note 69, at 278; Eichholz, *supra* note 69, at 1213; Surrey, *supra* note note 11, at 697; Surrey & Brannon, *supra* note 69, at 915–17; Woodworth, *supra* note 80, at 719.

98. *See, e.g.*, JCT 2001 Complexity Report, *supra* note 11, at 44; Donaldson, *supra* note 68, at 732–41; Surrey & Brannon, *supra* note 69, at 915–17.

99. This sentiment was best captured by Professor Boris Bittker when he noted that "simplicity is like a lighthouse: everyone can attest to its value, but no one will pay the price voluntarily." Bittker, *supra* note 11, at 11; *see also* JCT 2001 Complexity Report, *supra* note 11, at 34; Cary, *supra* note 69, at 278; Karlinsky, *supra* note 93, at 1017; McCaffrey, *supra* note 11, at 1279–98; Miller, *supra* note 75, at 6; Schenk, *supra* note 75, at 123; Surrey, *supra* note 11, at 708–09; Surrey & Brannon, *supra* note 69, at 915.

Once again, the study of IRS publications can help scholars overcome this theoretical roadblock to tax simplification. As previously noted, IRS publications are designed to communicate substantive tax law to non-expert stakeholders in a simple and accurate format.[100] That is, these publications are specifically created with the goal of reconciling simplicity and accuracy in federal income tax law. To the extent IRS publications succeed in serviceably explaining substantive tax law, which they often do, these publications demonstrate that achieving pluralist values does not always require complexity in tax law.[101] On the contrary, IRS publications provide evidence that substantive tax law can be simple, equitable, and efficient. Indeed, IRS publications are a treasure trove of simplification-based materials hidden in plain sight.

3. Legal Craft Hypothesis

Another theory about the nature of tax complexity involves elite scholars and policymakers and the legal craft values that animate much of their professional work.[102] These experts, most of whom are lawyers,

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100. *See supra* note 4.

101. The discussion of simplicity versus complexity may bring to mind the ubiquitous debate about rules and standards. In very general terms, rules and standards are best viewed as opposing ends of a continuum describing the form that legal provisions take. The distinction essentially relates to when content is given to the law: rules provide content to the law ex ante, whereas standards provide content ex post. *See* Kaplow, *supra* note 92; Weisbach, *supra* note 92. *See generally* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 Yale L.J. 65 (1983). For thoughtful discussions of rules and standards in the federal income tax, see generally Alice G. Abreu & Richard K. Greenstein, *Defining Income*, 11 Fla. Tax Rev. 295 (2011); Alice G. Abreu & Richard K. Greenstein, *The Rule of Law as a Law of Standards: Interpreting the Internal Revenue Code*, 64 Duke L.J. Online 53 (2015); Ellen P. Aprill, *Tax Shelters, Tax Law, and Morality: Codifying Judicial Doctrines*, 54 SMU L. Rev. 9 (2001); Joseph Bankman, *The Business Purpose Doctrine and the Sociology of Tax*, 54 SMU L. Rev. 149 (2001); Mark P. Gergen, *The Common Knowledge of Tax Abuse*, 54 SMU L. Rev. 131 (2001); Edward D. Kleinbard, *Corporate Tax Shelters and Corporate Tax Management*, 51 Tax Executive 235 (1999); Miller, *supra* note 75; Susan C. Morse, *Safe Harbors, Sure Shipwrecks*, 49 U.C. Davis L. Rev. 1385 (2016).

102. *See, e.g.*, Bittker, *supra* note 11, at 10–11; Blum, *supra* note 87, at 253; Cary, *supra* note 69, at 259; Eustice, *supra* note 11, at 17; Andrea Monroe,

play a singular role in the intellectual life of tax law, including its relationship with complexity. They engage directly with substantive tax law, shaping tax reform priorities through their scholarship, policy debates, and professional organizations. These scholars and policymakers also play a significant role in legal education, teaching the next generation of tax professionals about the theory, practice, and challenges of tax law.[103] It is thus these experts' training, methods, and loyalty to legal craft values that frame the complexity debate, perhaps even contributing to our continuing failure to simplify substantive tax law.[104]

The distinctive perspective of these elite scholars and policymakers may skew current thinking about tax complexity, understating the severity of the complexity problems experienced by many, if not most, non-expert stakeholders. Legal elites are trained technicians who take great pride in their mastery of elaborate and endlessly intricate tax laws.[105] They understand the theories that animate tax law, and they also understand the tremendous legal skill necessary to operationalize

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What We Talk About When We Talk About Tax Complexity, 5 Mich. Bus. & Entrepreneurial L. Rev. 193, 196–200 (2016); Roberts et al., *supra* note 11, at 367; Surrey, *supra* note 11, at 698–99.

103. *See* Eustice, *supra* note 11, at 17.

104. *See generally* Schuck, *supra* note 11, at 1 ("[Scholars] have a strong taste for complexity; indeed complexity amounts to a craft value. . . ."). *See also* Eustice, *supra* note 11, at 8; Richard M. Lipton, *"We Have Met the Enemy and He Is Us": More Thoughts on Hyperlexis*, 47 Tax Law. 1, 3–9 (1993); Bayless Manning, *Hyperlexis and the Law of Conservation of Ambiguity: Thoughts on Section 385*, 36 Tax Law. 9, 15 (1982); Bayless Manning, *Hyperlexis: Our National Disease*, 71 Nw. U. L. Rev. 767, 767 (1977); Miller, *supra* note 75, at 75; Paul, *supra* note 94, at 180; Pamela F. Olson, *Now that You've Caught the Bus, What Are You Going to Do with It? Observations from the Frontlines, the Sidelines, and Between the Lines, So to Speak*, 60 Tax Law. 567, 576 (2007).

105. In a 1972 report on the complexity of federal income tax law, members of the Tax Section of the New York State Bar Association described this notion of legal craft in the following manner:

> The technically gifted practitioner, engaged in the intellectually rewarding (if cosmically less significant) pursuit of nonrecognition, capital gain or deductibility of loss, may come to view the aggregate of the Code and its administrative and judicial interpretations as a marvelously intricate playing field for a game governed by rules of sportive justice.

these theories into a series of statutes and regulations. As a consequence, these experts are deeply committed to the craft of tax, which represents a shared faith in the ability of talented tax professionals to manage the intellectual and technical challenges of the federal income tax law.[106]

When considered in this light, elite scholars and policymakers may be too saturated in complexity to appreciate fully the practical challenges faced by non-expert stakeholders and to formulate a path forward toward tax simplification. In many respects, complexity is part of the day-to-day experience of elite legal experts. To them, the problem of tax complexity is often more of an abstraction than a reality. Intellectually, scholars and policymakers know that stakeholders struggle to understand and apply substantive tax law; thus, the idea of tax simplification may have some conceptual appeal to them. Yet what counts as complexity to these scholars and policymakers may be skewed by their elite perspectives on tax law.[107] Likewise, the urgency of solving particular complexity problems may be filtered through "bread and butter" professional incentives and expert assumptions about the practical problems faced by mainstream stakeholders.[108] Indeed, it is the experts' ability to

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Roberts et al., *supra* note 11, at 367; *see also* Bittker, *supra* note 11, at 10–11; Surrey, *supra* note 11, at 698–99.

106. *See* Bittker, *supra* note 11, at 10–11; Andrea Monroe, *Subchapter K, Gateway Drugs, and Tax Reform*, 148 Tax Notes 1229, 1230–31 (Sept. 14, 2015). Indeed, many elite scholars and policymakers were likely drawn to federal income tax law precisely because of these legal craft values and the professional challenges they promise. *See, e.g.*, Bittker, *supra* note 11, at 10–11; Cary, *supra* note 69, at 259; Eichholz, *supra* note 69, at 1202; Eustice, *supra* note 11, at 17; Surrey, *supra* note 11, at 698–99; Surrey & Brannon, *supra* note 69, at 921.

107. *See, e.g.*, Eustice, *supra* note 11, at 9; Roberts et al., *supra* note 11, at 332.

108. Additional factors may also contribute to this miscalibration of the experts' perspective on tax complexity. For instance, tax scholarship and policy debates are often confined to a small—largely elite—segment of the stakeholder community, where experts speak to and write for other experts. *See, e.g.*, Bittker, *supra* note 11, at 2; Brauner, *supra* note 69; Cary, *supra* note 69, at 268; Eichholz, *supra* note 69, at 1202; Eustice, *supra* note 11, at 9; Miller, *supra* note 75, at 72; Surrey, *supra* note 11, at 697; Michelle J. White, *Why Are Taxes So Complex and Who Benefits?*, 47 Tax Notes 341 (Apr. 16, 1990). Likewise, the legal scholarship and tax policy debates are quite removed from the practical realities of the taxpaying process. *See, e.g.*, Roberts, *supra* note 71, at 9; Woodworth, *supra* note 80, at 712–13. The stakes are thus largely

manage tax complexity, perhaps even to find financial opportunity in it, that makes their professional services so valuable.[109]

The study of IRS publications, however, offers elite scholars and policymakers an opportunity to recalibrate their perspective on tax complexity. IRS publications can expose experts to a wider audience of non-expert stakeholders and the complexity challenges they face. It can also provide these scholars and policymakers with a more proximate view of the taxpaying process, which is shaped by the practical realities of deadlines, limited resources, and imperfect knowledge of substantive tax law. By expanding the experts' perspective, IRS publications can make scholars and policymakers the engine for solving—rather than perpetuating—tax complexity problems, repurposing their formidable skills for the benefit of the entire stakeholder community.

B. IRS Publications and the Path Forward

In order to begin the hard work of simplifying the federal income tax law, experts need a starting point—an initial, filtered pool of substantive

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intellectual and professional, which is in stark contrast to the stakes faced by the millions of taxpayers and tax return preparers required to complete federal income tax returns annually. Professor John Miller described this phenomenon as follows:

> [P]erhaps the most deterministic aspect of the present tax law is that its complexity tends to silence debate outside the circle of those elite few who have some conception of what it says. How can anyone not a partnership tax lawyer herself develop even a modest conception of an area of law such as that addressed by the section 704(b) regulations? The answer is that she cannot without an inordinate expenditure of time and effort. Should we be satisfied to leave these types of matters in the hands of some high priesthood of tax lawyers? I think not.

Miller, *supra* note 75, at 72.

109. One might thus view these elite scholars and policymakers as having a complicated relationship with tax complexity. On the one hand, most scholars and policymakers would likely agree that federal income tax law should be simplified. On the other hand, the complexity of the federal income tax law is part of what sustains their very lucrative guild. *See* Blum, *supra* note 87, at 253; Isenbergh, *supra* note 69, at 314; Miller, *supra* note 75, at 72.

tax law provisions that are most likely to pose consequential complexity challenges. That starting point is this Article's contribution. Studying IRS publications can provide experts with the information necessary to identify these complicated tax law provisions and to begin thinking seriously and practically about tax simplification.

1. The Study of IRS Publications

The study of IRS publications can yield important and unexpected lessons for experts about the nature and prevalence of complexity in substantive tax law. These lessons, in turn, can help experts begin the process of isolating the complexity problems that are sufficiently serious to require a congressional or regulatory solution. Put another way, studying IRS publications can identify those instances where the IRS serviceably mediates the underlying tax law's complexity through explanation and those instances where it does not. Where the IRS fails to explain substantive tax law to non-expert stakeholders simply and accurately, the failed explanation itself acts as a red flag, signaling the potential for a consequential complexity problem in the underlying law.

This Article thus proposes that experts use IRS publications to assess the relative complexity of the substantive tax law that they explain. The goal is for experts to evaluate the quality, or serviceability, of the IRS's explanations of substantive tax law. Although quality and serviceability are surely more art than science, this approach requires the expert to consider whether the IRS has explained the underlying tax law simply and accurately such that a non-expert stakeholder could file her tax return and achieve something close to compliance with the law.[110] To this end, an expert might think about how she would explain a substantive tax law provision to a client, friend, or student who knew little about tax law, and she might then use this as a baseline for evaluating the serviceability of the IRS's explanation.

In answering this question, it is useful to think of substantive tax law in terms of its "core" and surrounding "details." The core of any tax law provision includes its basic rule, animating principles, and operating mechanics. That is, the core includes the provision's foundational aspects that any taxpayer—expert or non-expert—should understand in

110. *See, e.g.*, Eustice, *supra* note 11, at 24; Ginsburg, *supra* note 75, at 317–18; Paul, *supra* note 67, at 286; Surrey, *supra* note 11, at 12–13; Surrey & Brannon, *supra* note 69, at 921.

order to apply the provision. In contrast, the details are the exceptions, exceptions to exceptions, special rules, elections, and anti-abuse rules that are layered on the provision's core. These details often address less common circumstances or transactions that impact a smaller population of sophisticated taxpayers who are likely to benefit from expert tax advice.

The experts' project is therefore to assess whether the IRS serviceably communicates the core of a substantive tax law provision to non-expert stakeholders.[111] The focus is on practical success, not perfection: to the extent the IRS explains a tax law provision's core to non-experts in a simple and accurate manner, it has effectively mediated the complexity of the underlying provision.[112] These relative successes, in turn, signal that the substantive tax law provision should not be a high priority on any tax research and reform agenda. If the IRS can serviceably mediate the underlying law's complexity through its publications, then neither congressional nor regulatory reform is required. Likewise, expert wrangling over the substantive tax law provision also may be misplaced.

If, however, the IRS has not serviceably explained the core aspects of the underlying tax law provision, the expert has identified a provision that may suffer from a consequential complexity problem. These relative failures take myriad forms, but they all share a common

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111. One might ask whether this approach sidesteps the question of what aspects of a particular tax law provision constitute the core and what aspects constitute details? For a detailed discussion of this question, see *infra* note 119 and accompanying text.

112. *See* Eustice, *supra* note 11, at 24 ("The overriding goal it seems, is a more practical and attainable one: viz., to strive for a reasonably understandable law that can be interpreted without excessive cost relative to the scope of the transaction involved."); Ginsburg, *supra* note 75, at 318. *See generally* Ruhl & Katz, *supra* note 11, at 223. Professors Ruhl and Katz note that "[c]omplexity in the underlying object may or may not project into complexity as experienced by the relevant end user." *Id*. Put another way, a legal intermediary can shield individuals from the complexity of the underlying substantive tax law. As an example of this type of shield, Ruhl and Katz refer to tax preparation software, like TurboTax, which they believe mediates tax law complexity for taxpayers. This Article suggests that IRS publications perform precisely this shielding function, serving as a "super-shield" that protects taxpayers, third-party return preparers, and the creators of tax preparation software like TurboTax from the complexity of substantive tax law. *See supra* notes 35–41 and accompanying text.

thread: the IRS's failure to communicate the core of the underlying tax law to non-expert stakeholders simply and accurately. The simplest form of failure, the type this Article highlights, is omission.[113] In these instances, the IRS excludes an explanation of a particular tax law provision from its publications.[114] Its silence, in turn, is characterized as a failed explanation; stakeholders cannot comply with tax laws that they do not know exist.

Another form of failure involves IRS explanations that are too complicated for non-expert stakeholders. This type of failed explanation may result from a diverse array of factors. On one hand, the failure might be inevitable—a tax law provision's core may be too complicated for the IRS, or anyone, to explain simply and accurately. On another hand, failure might reflect drafting decisions made by the IRS. For example, the IRS's explanation of the core may remain too technical or complex, or the explanation may include too many of the underlying law's details.

At the opposite extreme, failures may also involve explanations that oversimplify substantive tax law. If, for instance, the IRS fails to accurately communicate core aspects of a tax law provision, whether through the omission of information or through the addition of its own administrative gloss, an expert should characterize the explanation as a relative failure.[115] Although simple, the IRS's explanation of the core

113. *See infra* Part III.B.

114. As will be discussed, not all failed explanations, including failures-by-omission, are "true" failures. *See infra* notes 116–118 and accompanying text. Characterizing the IRS's explanation, or lack of an explanation, as a failure is not conclusive proof of a complexity problem requiring a congressional or regulatory response. On the contrary, the designation as a failed explanation serves as a warning sign highlighting a potentially significant complexity problem with the underlying law that warrants further attention by scholars and policymakers.

115. This category of failed explanations includes examples of what Professors Joshua Blank and Leigh Osofsky would refer to as "simplexity." Blank & Osofsky, *supra* note 8, at 206–07; *see also* Cramwinckel, *supra* note 29. Nonetheless, instances of simplexity in IRS publications do not necessarily constitute failed explanations under this Article's approach. Indeed, it is quite possible that explanations characterized as serviceable explanations may also suffer from simplexity, as defined by Blank and Osofsky. *See infra* notes 118-120 and accompanying text. To Blank and Osofsky, simplexity is not an evaluative concept; on the contrary, it simply identifies instances where the IRS's

would not be sufficiently accurate to allow a non-expert taxpayer to achieve something close to compliance with the law.

2. Next Steps

Characterizing the IRS's explanation of a tax law provision as a relative failure serves as a red flag, identifying a substantive tax law provision that may suffer from a serious and unsolved complexity problem. Characterization as a failed explanation is not conclusive proof of a complexity problem with the underlying law. On the contrary, it signals that the IRS failed to mediate the substantive tax law's complexity through explanation, and further research is required to determine the nature and severity of the underlying tax law's complexity problem. This research, in turn, should shed light on the proper path forward, which may involve myriad governmental responses that range from amending the underlying tax law to revising the relevant IRS publications to doing nothing at all. Indeed, the principal focus going forward is to further isolate those substantive tax law provisions whose complexity cannot be mediated through IRS publications and, hence, require congressional or regulatory intervention.

The next steps thus involve experts gaining a better understanding of failed explanations. In particular, an expert might consider whether she could draft a simpler, more accurate explanation of a particular tax provision's core that would mediate the complexity problems faced by non-expert stakeholders. If the expert could improve on the serviceability of the IRS's explanation of the underlying tax law provision, then reasons other than complexity—for instance, drafting errors, administration discretion, or agency capture—may explain the failed explanation characterization. If, however, the expert can explain the provision no better than the IRS, then this step provides strong support

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explanation creates the appearance of simplicity without highlighting the complexity of the underlying law. Blank & Osofsky, *supra* note 8, at 206–07. Simplexity does not address the question of whether the gap between substantive tax law and the relevant IRS publication is meaningful. Nor does it address the question of whether the IRS has struck an improper balance between accuracy and comprehensibility in its publication. *Id*. at 250–51. In contrast, this Article does evaluate the IRS's explanations of substantive tax law. Through the concepts of serviceability, core, and details, this Article provides a framework for identifying and prioritizing complexity problems in the underlying tax law.

for the position that the underlying tax law suffers from a consequential complexity problem requiring a congressional or regulatory solution.[116]

An expert might also look to the more traditional markers of tax complexity in order to more fully understand failed explanations. As previously discussed, experts have a distinctive perspective on tax complexity, and this perspective may function as a useful point of comparison to the IRS's efforts to communicate substantive tax law to non-expert stakeholders in a simple and accurate manner.[117] An expert thus might study the traditional tax scholarship and the reports of professional organizations like the American Bar Association and the New York State Bar Association that address the same substantive tax law as the relevant IRS publications. If, as above, these traditional markers support the failed explanation characterization, then the process would again suggest a serious complexity problem with the underlying tax law.

When taken together, a more comprehensive picture of substantive tax law should emerge from this study of IRS Publications, their explanations of underlying law, and the related literature. These steps should help experts further isolate the substantive tax law provisions that represent the most troublesome complexity challenges facing stakeholders today. Once these challenges are identified, experts can begin to formulate a more viable tax reform agenda aimed at meaningful tax simplification. But, again, it is important to note the vital role of IRS publications in this process—it begins with experts studying the IRS's explanations of substantive tax law and, in turn, identifying the explanations that fail and those that succeed.

3. An Objection

This Article suggests that expert study of IRS Publications is a first and vital step in simplifying federal tax law. It thus relies on experts to

116. As part of this analysis, it may also be useful to study the history of the IRS's explanation of the particular tax law provision. *See* Zelenak, *supra* note 8, at 2022. Tracing the evolution of the IRS's explanation, especially its responses to changes in the underlying law, may shed new light on how and why the IRS communicated the tax law provision to non-experts in a particular manner. More generally, a panoramic view of IRS publications is likely to offer insights into the IRS's approach to these materials that would not be available from a single, snapshot approach. *Id.*

117. *See supra* notes 102–109 and accompanying text.

analyze IRS publications and assess whether the IRS serviceably communicates to non-expert stakeholders the core aspects of various tax law provisions. That is, it depends on experts' ability to think about and evaluate decidedly non-expert materials specifically designed for a more mainstream stakeholder audience.

One might wonder about the central role of experts in this approach, questioning whether they can assess tax complexity when they are so steeped in it. This approach would require experts to perform a role contrary to much of their training, their education, and the cultural norms of their craft. Likewise, it would force experts to approach substantive tax law from an entirely different perspective—the perspective of the average stakeholder. When considered in this light, one might worry that reliance on experts as evaluators of tax complexity is a problematic choice.

This Article's approach to tax complexity does ask experts to stretch beyond their traditional thinking and perspective, but this is surely a task within their formidable abilities. Elite tax experts are in the business of making the simple more complicated and the complicated simpler. These scholars and policymakers invariably have experience "translating" complicated tax law provisions into language that a non-expert—whether a client, friend, or even a student—can understand. This approach is simply an extension of those experiences, which all involve distilling substantive tax law to its core and communicating this core to non-experts simply and accurately. Additionally, this approach does not require perfect agreement or uniformity among experts about the particulars of substantive tax law. On the contrary, the key is for experts to assess the relative serviceability of the IRS's explanations of tax law. Experts may therefore differ in how they balance the values of simplicity and accuracy when evaluating these explanations.[118] Or, they

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118. There is no right way to reconcile accuracy and simplicity in IRS publications. Indeed, the optimal balance is entirely contextual. *See* Blank & Osofsky, *supra* note 8, at 250–51. *See generally* Diver, *supra* note 101. Numerous factors—including audience, scope, and the vantage of the particular scholar studying the IRS publication—may all impact the resulting balance between accuracy and simplicity. Even so, it is possible to develop a general theory regarding the balance necessary to allow non-expert taxpayers to understand the law and achieve something close to compliance with it. The key is the underlying question that animates this entire evaluative process: how would an expert explain a particular substantive tax law provision to a client, friend, or student? In answering this question, it is reasonable to conclude that

may disagree about what aspects of a particular tax law provision constitute its core and what aspects constitute details.[119] These disagreements are not fatal—what matters is that experts compare the IRS's various explanations, assessing their relative success or failure in communicating substantive tax law to non-expert stakeholders in a simple and accurate format.

More generally, it is vital that elite tax experts engage in precisely this type of intellectual and cultural stretching. As previously discussed, this approach would force experts to engage with different perspectives on substantive tax law in a very tangible way.[120] In doing so, experts may experience tax complexity more proximately, thereby neutralizing their tendency to understate the severity of the complexity problems faced by non-expert stakeholders. At the same time, studying IRS publications would challenge a foundational tenet of the experts' craft—the drive for perfection through elaboration and detail. The process of distilling substantive tax law provisions to their core may in fact persuade some experts that details sometimes must be sacrificed in order to simplify the law.

III. Publication 541 and Partnership Tax Complexity

In order to illustrate this approach to tax complexity, this Article turns to subchapter K and Publication 541, which contain the IRS's explanations of the tax rules governing partnerships and their partners.[121] Partnership tax may seem like an unconventional choice of illustration, but

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experts' responses will share many common "core" elements. Focusing on these commonalities, rather than the inevitable variations, should help experts identify those provisions of substantive tax law that potentially present the most consequential complexity problems.

119. In many respects, the core versus detail distinction parallels the project of reconciling simplicity and accuracy. *See supra* note 118. The more details the IRS includes in an explanation, the more technically accurate the explanation is likely to be, particularly from the experts' perspective. But these details also risk making the explanation less comprehensible for the non-expert stakeholder who relies on IRS publications to understand and apply the tax law. As in balancing simplicity and accuracy, experts may disagree about a particular provision's core and details, yet these disagreements should not mask the areas of agreement among experts.

120. *See supra* note 108 and accompanying text.

121. IRS Pub. No. 541, *supra* note 21.

subchapter K provides a perfect example of the important and unexpected results that this approach can produce. From a revenue perspective, partnerships play an especially vital and ever increasing role in the federal income tax system.[122] For example, in 2014, partnerships held approximately $26.1 trillion in assets and generated approximately $837 billion in net income.[123] Likewise, partnerships and other non-corporate entities have been responsible for over half of the business net income reported by commercial entities in recent years.[124]

Partnership tax is also enormously complicated.[125] Subchapter K's formidable challenges are common knowledge within the stakeholder community, and experts have found myriad ways to capture the complexity of partnership tax in their scholarship, describing the system as a mess, a disaster, and a magic circle of tax abuse.[126] Although numerous

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122. The term "partnership" is used in this Article to refer to any entity, including a limited liability company, electing to be treated as a partnership for federal income tax purposes. Reg. §§ 301.7701–1 to –3.

123. DeCarlo & Shumofsky, *supra* note 16, at 64 fig.D.

124. *See supra* note 17.

125. *See supra* note 18; *see also* William D. Andrews, *Inside Basis Adjustments and Hot Asset Exchanges in Partnership Distributions*, 47 Tax L. Rev. 3 (1991); Karen C. Burke, *Partnership Distributions: Options for Reform*, 3 Fla. Tax Rev. 677 (1998); Laura Cunningham, *Use and Abuse of Section 704(c)*, 3 Fla. Tax Rev. 93 (1996); Victor Fleischer, *Two and Twenty: Taxing Partnership Profits in Private Equity Funds*, 83 N.Y.U. L. Rev. 1 (2008); Mark P. Gergen, *Reforming Subchapter K: Contributions and Distributions*, 47 Tax L. Rev. 173 (1991); William S. McKee, *Partnership Allocations: The Need for an Entity Approach*, 66 Va. L. Rev. 1039 (1980), Andrea Monroe, *Taxing Reality: Rethinking Partnership Distributions*, 47 Loy. L.A. L. Rev. 657 (2014); Stuart L. Rosow & Rachel A. Hughes, *Reforming Subchapter K: The Partnership Tax Simplification Act of 20___*, 94 Taxes 361 (2016).

126. Lokken, *supra* note 18, at 250 ("Subchapter K is a mess."); Andrea R. Monroe, *What's in a Name: Can the Partnership Anti-Abuse Rule Really Stop Partnership Tax Abuse*, 60 Case W. Res. L. Rev. 401, 402 (2010) ("Partnership taxation is a disaster."); McMahon, *supra* note 18, at 360 ("Despite its superficial elegance, Subchapter K, which governs partnership taxation, is a failed regime."); Lee A. Sheppard, *Partnerships, Consolidated Returns and Cognitive Dissonance*, 63 Tax Notes 936, 936 (May 23, 1994) ("A partnership is a magic circle. Anything that is dropped into it becomes exempt from taxation. Forever. . . . Adherents to this view of subchapter K understand the word 'flexible' to mean that you can do absolutely anything you want without incurring tax.").

factors contribute to this complexity problem, subchapter K's distinctive features make partnership tax complexity particularly troublesome. For instance, subchapter K is a pass-through system of taxation. Unlike a corporation whose earnings are taxed at the entity and shareholder levels, a partnership's income is only subject to one level of tax. A partnership is thus not a taxpayer; instead, its partners pay tax annually on their shares of the partnership's income.[127] This single-tier tax structure is the defining characteristic of partnership tax. In addition to all the "regular" transactions that any system of business taxation must address—contributions, distributions, and mergers, for example—subchapter K's pass-through structure must also perform a unique allocative function, dividing the partnership's income among its partners each year.[128]

Design challenges also contribute to subchapter K's unique complexity. Partnership tax is a one-size-fits-all system of taxation that must accommodate an incredibly diverse array of partnerships ranging from simple "mom and pop" operations to some of the most sophisticated financial operations in the marketplace.[129] Subchapter K therefore must be nimble, with rules that prioritize partnership flexibility. And indeed it is—Congress designed subchapter K to allow partnerships the freedom to structure their operations in whatever manner their partners considered commercially optimal.[130] This flexibility, in turn, is

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127. I.R.C. § 701.

128. I.R.C. § 704(a)–(b).

129. The diversity of entities subject to subchapter K is yet another reason why partnership tax is an excellent example of this Article's approach to complexity. In practice, subchapter K is a deeply divided system where a very small number of partnerships hold the majority of partnership wealth and draw the attention of elite partnership tax experts. In 2014, for example, approximately 3.6 million enterprises were treated as partnerships for federal income tax purposes. DeCarlo & Shumofsky, *supra* note 16, at 62 fig.B. Less than one percent of these partnerships—partnerships with $100 million or more in assets—held approximately 75.6% of all partnership assets and generated 61% of all partnership net income. *SOI Tax Stats—Partnership Data by Size of Total Assets, Table 15*, IRS.GOV, http://irs.gov/uac/SOI-Tax-Stats-Partnership-Data-by-Size-of-Total-Assets (last updated Sept. 29, 2017). At the other extreme, approximately 75% of all partnerships held less than $1 million in assets. *Id.* These mainstream partnerships held approximately 1.4% of total partnership assets and generated 12.8% of all partnership net income. *Id.*

130. *See* H.R. REP. NO. 83-1337, at 65 (1954), *as reprinted in* 1954 U.S.C.C.A.N. 4017, 4091 (noting that the principal objectives of subchapter K

responsible for much of the popularity and many of the problems of partnership tax, including the regime's complexity.[131]

A. The Problem of Partnership Allocations

This Article studies two of the complicated, yet vital, rules that govern partnership allocations—the section 704(b) general allocation rules and the section 704(c) contributed property allocation rules.[132] As previously discussed, partnership allocations are essential to a system of pass-through taxation like subchapter K.[133] Allocations are indeed the bulwark of partnership tax; subchapter K only works as well as its allocation rules work.

Over time, subchapter K's allocation rules have grown increasingly complicated.[134] Scholars have dedicated many pages to both the general allocation rules and the contributed property allocation rules. The literature is wonderfully diverse, with some scholars targeting specific flaws in these allocation rules,[135] while others advocate for more

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were "simplicity, flexibility, and equity as between the partners"); S. Rep. No. 83-1622, at 89 (1954), *as reprinted in* 1954 U.S.C.C.A.N. 4621, 4722.

131. Professor Lawrence Lokken offered an apt comparison: "The revolutionary accretion of detail in subchapter K is largely a response to aggressive uses of partnerships for tax avoidance, resembling a steady build-up in the arsenal of an army caught in an unwinnable guerilla war." Lokken, *supra* note 69, at 367; *see also* Bradford, *supra* note 73, at 5; Dean, *supra* note 11, at 436; McCaffery, *supra* note 11, at 1277.

132. I.R.C. § 704(b), (c)(1)(A); Reg. §§ 1.704–1, –3.

133. *See supra* notes 127–128 and accompanying text.

134. For a detailed discussion of the history and complexity of subchapter K's allocation rules, see generally William S. McKee et al., Federal Taxation of Partnerships and Partners ¶ 11.02 (2017); Arthur B. Willis & Philip F. Postlewaite, Partnership Taxation, ¶¶ 10.01–10.05 (7th ed. 2011); McMahon, *supra* note 18, at 360–67; Andrea R. Monroe, *Too Big To Fail: The Problem of Partnership Allocations*, 30 Va. Tax Rev. 465 (2011).

135. *See, e.g.*, Bradley T. Borden, *The Allure and Illusion of Partners' Interests in a Partnership*, 79 U. Cin. L. Rev. 1077 (2011); Bradley T. Borden, *Partnership Tax Allocations and the Internalization of Tax-Item Transactions*, 59 S.C. L. Rev. 297 (2008); Edward J. Buchholz, *Substantiality Under Section 704(c)—Some Forgotten Issues and Some Ancient Concepts Revisited*, 19 Va. Tax Rev. 165 (1999); Emily Cauble & Gregg D. Polsky, *The Problem of Abusive Related-Partner Allocations*, 16 Fla. Tax Rev. 479 (2014);

comprehensive overhauls.[136] Whatever the scholar's particular focus, all of the literature shares a common characteristic—a critique of the complexity of partnership allocations.

One reading this scholarship would invariably conclude that the general allocation rules of section 704(b) and the contributed property allocation rules of section 704(c) are comparably complex. According to the scholarship, both rules are enormously elaborate, technical, and flawed, thus creating significant practical challenges for the many stakeholders that must navigate them annually.[137] Because of this perceived

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Emily Cauble, *Making Partnerships Work for Mom and Pop and Everyone Else*, 2 Colum. J. Tax L. 247 (2011); Cunningham, *supra* note 125; Simon Friedman, *Partnership Capital Accounts and Their Discontents*, 2 N.Y.U. J.L. & Bus. 791 (2006); Thomas W. Henning, *Partnership Exit Strategies and the Failure of the Substantiality Test*, 63 Tax Law. 43 (2009); Lawrence Lokken, *Partnership Allocations*, 41 Tax L. Rev. 547 (1986); Gregg D. Polsky, *Deterring Tax-Driven Partnership Allocations*, 64 Tax Law. 97 (2010); Philip F. Postlewaite et al., *A Critique of the ALI's Federal Income Tax Project—Subchapter K: Proposals on the Taxation of Partners*, 75 Geo. L.J. 423 (1986); John P. Steines, Jr., *Partnership Allocations of Built-In Gain or Loss*, 45 Tax L. Rev. 615, 641 (1990); Donald J. Weidner, *Capital Accounts in LLCs and in Partnerships: Powerful Default Rules and Potential Tax Significance*, 14 Fla. St. U. Bus. Rev. 1 (2015).

136. *See, e.g.*, ALI 1999 Reporters' Study, *supra* note 18; Berger, *supra* note 18; Bradley T. Borden, *Aggregate-Plus Theory of Partnership Taxation*, 43 Ga. L. Rev. 717 (2009); Laura E. Cunningham & Noël B. Cunningham, *Simplifying Subchapter K: The Deferred Sale Method,* 51 SMU L. Rev. 1 (1997); Gergen, *supra* note 125; Mark P. Gergen, *Reforming Subchapter K: Special Allocations*, 46 Tax L. Rev. 1 (1990); David Hasen, *Partnership Special Allocations Revisited*, 13 Fla. Tax Rev. 349 (2012); J. Paul Jackson et al., *A Proposed Revision of the Federal Income Tax Treatment of Partnerships and Partners—American Law Institute Draft*, 9 Tax L. Rev. 109 (1954); *see also* J. Paul Jackson et al., *The Internal Revenue Code of 1954: Partnerships*, 54 Colum. L. Rev. 1183 (1954); Lokken, *supra* note 18; McKee, *supra* note 125; Andrea Monroe, *Saving Subchapter K: Substance, Shattered Ceilings, and the Problem of Contributed Property*, 74 Brook. L. Rev. 1381 (2009); Monroe, *supra* note 134; Leigh Osofsky, *Unwinding the Ceiling Rule*, 34 Va. Tax Rev. 63 (2014); Postlewaite, *supra* note 18; Rosow & Hughes, *supra* note 125; Willard Taylor, *Does One Size Fit All? Should There Be a Single Set of Federal Income Tax Rules for S Corporations and Partnerships?*, 8 Ohio St. Entrepreneurial Bus. L.J. 327 (2013); Yin, *supra* note 18.

137. *See supra* notes 135–136.

equivalence, it would be difficult to prioritize one allocation regime over the other in formulating a tax reform agenda: section 704(b) and section 704(c) would seem equally in need of simplifying tax reform from the vantage point of the traditional scholarship.

1. The General Allocation Rules of Section 704(b)

Subchapter K's general allocation rules control how partners share a partnership's taxable income, which equals the sum of its annual income, gains, losses, and deductions.[138] A partnership may choose between two basic methods when allocating this taxable income: the partnership may allocate its total taxable income among its partners, or it may allocate particular taxable items separately through "special" allocations.[139] These latter allocations are special because they need not be proportional to the partners' economic interests in the partnership. On the contrary, special allocations may be based on any ratio the partners agree to, subject only to a loose anti-abuse rule.[140]

This flexibility in partnership allocations, however, challenges one of the most foundational tenets of federal tax law: that a transaction's tax consequences should match its corresponding economic consequences.[141] Income is generally taxed to the person who earns it or owns the property that produces it.[142] And this equilibrium makes sense—because the earner or property owner is the person who benefits economically from the income, she is also the person who should bear the related tax burden. Special allocations operate in perpetual tension with this notion, allowing a partnership to shift particular taxable items from the "proper" partner

138. I.R.C. §§ 703(a), 704(b); Reg. § 1.704–1.

139. I.R.C. § 704(a)–(b).

140. *Id.*

141. *See, e.g.*, Mark P. Gergen, *Subchapter K and Passive Financial Intermediation*, 51 SMU L. Rev. 37, 65 (1997) ("[G]iven the plasticity of the partnership form, people often can achieve their economic goals using a partnership through a variety of arrangements that have different tax consequences. This thought is troubling because we expect that people will select the partnership arrangement that bears the least aggregate tax."); Lokken, *supra* note 18, at 264 ("[P]artnership allocations can be used to divorce tax consequences from economic consequences.").

142. Helvering v. Horst, 311 U.S. 112, 118 (1940); Lucas v. Earl, 281 U.S. 111, 114–15 (1930).

to another partner.[143] By permitting special allocations, subchapter K allows partners to achieve tax results they could not achieve as co-owners of the partnership's property.[144]

Congress feared that partnerships would use special allocations strategically, allocating taxable items in a manner that decreased their partners' aggregate tax liability at the expense of the public fisc.[145] It thus designed a series of rules, which are set forth in section 704(b) and the accompanying Treasury Regulations, to police partnership allocations, identifying the point at which legitimate tax planning shades into abusive tax sheltering. Drawing this line, however, has produced some of the most complicated and troublesome rules in the entire federal income tax system.

Under the section 704(b) general allocation rules, a partnership's allocation of a taxable item will be respected so long as it reasonably tracks the corresponding economic allocation and is not a device to shift income among partners in a tax-advantaged way. Congress expressed these concepts in a safe harbor that requires allocations to have substantial economic effect.[146]

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143. Schneer v. Comm'r, 97 T.C. 643, 658 (1991) ("The pooling of income is essential to the meaningful existence of subchapter K. If partners were not able to share profits in an amount disproportionate to the ratio in which they earned the underlying income, the partnership provisions of the Code would, to some extent, be rendered unnecessary.").

144. In *Schneer*, for example, the Tax Court began its opinion with a discussion of the tension between partnership taxation and the federal income tax system more generally: "The parties have couched the issue in terms of the anticipatory assignment-of-income principles. Equally important to this case, however, is the viability of the principle that partners may pool their earnings and report partnership income in amounts different from their contribution to the pool." *Id*. at 646 (citation omitted); *see also* Gergen, *supra* note 136, at 1 ("The flexibility of subchapter K, one of its most celebrated features, has given partners license to shift income and loss among themselves and dispose of assets while deferring recognition of gain in ways that are not otherwise possible under the income tax." (footnote omitted)).

145. *See, e.g.*, ALI 1999 Reporters' Study, *supra* note 18, at 78; Polsky, *supra* note 135, at 97.

146. I.R.C. § 704(b); Reg. § 1.704–1(b)(2)(i). The substantial economic effect safe harbor involves a two-part determination: (1) an allocation must have economic effect, and (2) the economic effect must be substantial. Reg. § 1.704–1(b)(2)(i). Economic effect focuses on the economic arrangement

The Treasury was tasked with operationalizing the substantial economic effect safe harbor, and the resulting regulations are elaborate, technical, and undeniably complicated. A partnership can satisfy the safe harbor's first requirement—economic effect—in one of three ways, each of which requires the partnership to navigate a byzantine series of tax accounting rules that regulate almost every aspect of a partnership's life.[147] Applying the economic effect requirement also involves a great

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among the partners, requiring that a partnership's tax allocations conform to the partners' economic arrangement. Reg. § 1.704–1(b)(2)(ii)(*a*). Accordingly, if a partner is allocated $100 of taxable income, she must also receive the economic benefit of that income. The substantiality requirement, in contrast, functions principally as an anti-abuse measure, requiring that there be a reasonable possibility that a tax allocation will meaningfully affect the partners' economic consequences, independent of the resulting tax consequences. Reg. § 1.704–1(b)(2)(iii)(*a*).

If a tax allocation violates the substantial economic effect safe harbor, then the partnership must reallocate the underlying item in accordance with subchapter K's default standard—the partner's interest in the partnership. I.R.C. § 704(b); Reg. § 1.704–1(b)(3). Unlike the substantial economic effect safe harbor, the partner's interest in the partnership is a broad, open-textured standard that requires a partnership to allocate taxable items among its partners in a manner that reflects their economic sharing arrangement. Reg. § 1.704–1(b)(3)(i). Because of the standard's indeterminacy, the partner's interest in the partnership is considered by many, if not most, scholars to be unknowable in all but the simplest partnership arrangements. *See, e.g.*, Lokken, *supra* note 135, at 613–14; Yin, *supra* note 18, at 154.

147. Reg. § 1.704–1(b)(2)(iv). The first "basic" economic effect test itself has three requirements: (1) a partnership must maintain its partners' capital accounts, which measure the partners' respective economic investments in the partnership, in accordance with a series of technical tax accounting rules; (2) it must make all liquidating distributions in accordance with the partners' positive capital account balances; and (3) each partner must agree to restore any deficit balance in her capital account existing at the time her partnership interest is liquidated. Reg. § 1.704–1(b)(2)(ii)(*b*). Unlimited deficit restoration obligations proved problematic for many partners, especially for those with limited liability. The Treasury therefore provided a second "alternate" test for economic effect for those partners that had no, or only limited, deficit restoration obligations. Reg. § 1.704–1(b)(2)(ii)(*d*). Under this alternate test, a partnership must comply with the remaining requirements of the basic test for economic effect, and its partnership agreement must also contain a qualified income offset provision. Reg. § 1.704–1(b)(2)(ii)(*d*)(3), (6) (flush language).

deal of specialized, technical terminology—"capital accounts,"[148] "deficit restoration obligations,"[149] and "qualified income offsets,"[150] for instance—that only a partnership tax expert would know. The safe harbor's second requirement—substantiality—similarly involves three intricate tests, each combining specialized language, open-textured standards, and mathematical rules.[151] This time, however, a partnership must comply with all three tests in order to satisfy the safe harbor.

If a partnership meets these alternate requirements, then its allocations will have economic effect to the extent they do not create or increase a deficit balance in a partner's capital account in excess of any limited deficit balance that she is required to restore. Reg. § 1.704–1(b)(2)(ii)(*d*)(3) (flush language). The Treasury also provided a third relief-based test—the "economic effect equivalence" test. Reg. § 1.704–1(b)(2)(ii)(*i*). Under this test, an allocation will be deemed to have economic effect if, as of the end of the relevant taxable year, a partnership liquidation would produce the same economic results as would have occurred if the partnership had complied with the basic test for economic effect. *Id*. For a general discussion of economic effect, see McKee et al., *supra* note 134, at ¶ 11.02[2][a]; Willis & Postlewaite, *supra* note 134, at ¶ 10.04[2].

148. Reg. § 1.704–1(b)(2)(iv).

149. Reg. § 1.704–1(b)(2)(ii)(*b*)(3).

150. Reg. § 1.704–1(b)(2)(ii)(*d*)(3), (d)(6) (flush language).

151. Reg. § 1.704–1(b)(2)(iii)(*a*)-(*c*). The first substantiality test is the after-tax substantiality test, which targets allocations that yield no losers within the partnership but result in a revenue loss for the federal government. An allocation violates this test if: (1) the after-tax economic consequences to any partner are enhanced as compared to the consequences that would have occurred if the allocation had not been included in the partnership agreement, and (2) there is a strong likelihood that the after-tax consequences to no partner will be substantially diminished as a result of the allocation. Reg. § 1.704–1(b)(2)(iii)(*a*). The second and third substantiality tests—the shifting and transitory tests—are virtually identical, differing only in their relevant time frames: the shifting test focuses on offsetting allocations that occur within one taxable year, while the transitory test addresses allocations that span multiple taxable years. Reg. § 1.704–1(b)(2)(iii)(*b*)-(*c*). Under both tests, the economic effect of an allocation or series of allocations is not substantial if there is a strong likelihood that (1) the changes to the partners' capital accounts will not differ substantially from those that would have occurred if the allocations were not included in the partnership agreement, and (2) the allocations reduce the partners' aggregate tax liability for the taxable year or years under consideration. *Id*. For a general discussion of the substantiality requirement, see McKee et al.,

Providing partnerships with flexibility in their allocations thus came at a steep price in terms of complexity. The substantial economic effect safe harbor, with its elaborate web of accounting rules, multi-factored tests, and computational requirements, is enormously complicated, even for the most experienced partnership tax expert. And a partnership wanting to comply with the law must apply this safe harbor to every allocation it makes, every year. At the same time, the complexity of the general allocation rules has proven counterproductive, often blurring the line that Congress hoped to draw between legitimate tax planning and abusive tax sheltering.[152]

2. Contributed Property Allocation Rules of Section 704(c)

The treatment of contributed property presents a unique challenge for subchapter K's carefully crafted allocation rules. When a partner contributes property to a partnership, the contribution is treated as a non-recognition event, and the contributing partner recognizes no gain on the transaction.[153] Any pre-contribution gain is instead preserved for future recognition in connection with a subsequent taxable event.[154] If the partnership were to subsequently sell the contributed property, the partnership would recognize the property's pre-contribution gain plus any gains attributable to post-contribution changes in its value.[155]

How to allocate this pre-contribution gain has been a perennial problem in partnership tax. In theory, the solution is straightforward: when

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supra note 134, at ¶ 11.02[2][b]; Willis & Postlewaite, *supra* note 134, at ¶ 10.04[4].

152. *See, e.g.*, ALI 1999 Reporters' Study, *supra* note 18, at 82; Buchholz, *supra* note 135, at 267–69; Henning, *supra* note 135, at 44; McMahon, *supra* note 18, at 365–66; Polsky, *supra* note 135, at 99.

153. I.R.C. § 721(a). For ease of reading, the following discussion focuses on pre-contribution gain only. This nonrecognition regime, however, also applies to contributions of pre-contribution loss property. In 2004, however, Congress enacted a special allocation rule for property contributed to a partnership with a built-in loss. For a detailed discussion of this loss allocation rule, see *infra* note 167.

154. I.R.C. §§ 722 (partner's basis in her partnership interest), 723 (partnership's basis in the contributed property). Under both of these rules, basis is computed by reference to the contributing partner's basis in the contributed property immediately before the contribution. *Id.*

155. I.R.C. § 1001(a).

a partnership sells contributed property, it should allocate any recognized pre-contribution gain to the contributing partner. Allocating pre-contribution gain in this manner would align the contributing partner's economic investment in the partnership, which already reflects the contributed property's fair market value, with her tax investment in the partnership. Subchapter K's equitable norms would indeed seem to require this result. If the contributing partner does not bear the full tax burden of her economic investment in the partnership, the pre-contribution gain would have been improperly shifted among the partners.[156] Another partner would bear the tax burden for a portion of the contributing partner's economic investment, likely producing an aggregate tax savings to the partnership at the expense of the public at large.

Operationalizing this solution, however, proved to be far less straightforward. Allocations attributable to contributed property cannot have substantial economic effect; thus these allocations fall outside the section 704(b) general allocation rules.[157] Instead, section 704(c) and the accompanying Treasury Regulation provide the rules for contributed property allocations.[158] The rules generally require a partnership to allocate any pre-contribution gain to the contributing partner.[159] However,

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156. This income shift may be temporary, potentially reversing itself on the contributing partner's sale or liquidation of her partnership interest. Even so, this type of income shift remains problematic. *See* Osofsky, *supra* note 136. In the best circumstances, where the reversal is perfect, there is likely a significant time delay—the offsetting allocation may not occur for many years. *See, e.g.*, William D. Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 HARV. L. REV. 1113, 1124 (1974). However, the reversal is often imperfect, exacerbating existing distortions and, at times, creating new ones. For example, liquidating distributions are often treated as nonrecognition transactions, where the partner recognizes no gain or loss. I.R.C. § 731(a). In these instances, the desired offsetting allocations will be further delayed at increased cost to the public fisc. Likewise, the reversal may result in a character conversion, altering the character of any resulting gain or loss from ordinary to capital or capital or ordinary.

157. Reg. § 1.704–1(b)(4)(i).

158. I.R.C. § 704(c)(1)(A); Reg. § 1.704–3. Technically these rules control the allocation of any gain, loss, or deduction attributable to contributed property. As will be discussed, the allocation of pre-contribution loss is now subject to a separate allocation rule designed to prevent the shifting of these losses among partners. *See infra* note 167.

159. I.R.C. § 704(c)(1)(A); Reg. § 1.704–3(a)(1).

it is often a challenge to ensure that pre-contribution gain is allocated to the contributing partner and, in turn, the contributed property allocation rules have become quite complicated. Congress thus allows partnerships to choose, on a property-by-property basis, from a menu of three allocation options that offer partnerships a choice among allocation methods with varying complexity levels.[160] The default method for contributed property allocations is relatively simple, but it is also potentially inequitable.[161] Partnerships that prefer a more equitable result, even at the price of greater complexity, may choose one of the remaining two allocation options.[162]

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160. Reg. § 1.704–3(a)(2).

161. Reg. § 1.704–3(b)(1). This method is called the "traditional method," and it typically results in a partnership allocating pre-contribution gain to the contributing partner. The traditional method, however, is subject to a limitation commonly referred to as the "ceiling rule," which prevents a partnership from allocating gain to a partner in excess of the amount of gain the partnership actually recognizes on the property's disposition. *Id.* The virtue of the ceiling rule is its simplicity—a partnership may only allocate amounts that it actually recognizes. The problem is that the ceiling rule produces inequitable results, shifting pre-contribution gain from the contributing partner to the non-contributing partners. *See, e.g.*, Cunningham & Cunningham, *supra* note 136; Monroe, *supra* note 136; Osofsky, *supra* note 136.

162. These alternative, elective allocation methods are the traditional method with curative allocations and the remedial allocation method. Reg. § 1.704–3(c), (d). Each method allows a partnership to mediate the inequitable results produced by the ceiling rule. The traditional method with curative allocations allows a partnership to allocate another taxable item disproportionately among its partners in order to reverse the distortions created by the ceiling rule. Reg. § 1.704–3(c)(1). The traditional method with curative allocations, however, is not a perfect antidote to the ceiling rule. A partnership may only make curative allocations with taxable items that actually exist. Absent such an item that qualifies as a reasonable curative allocation, a partnership has no ability to align the partners' economic and tax investments in the partnership.

In contrast, the remedial allocation method is not dependent on the taxable items recognized by the partnership. Reg. § 1.704–3(d). On the contrary, the remedial allocation method relies on offsetting fictional allocations to mediate ceiling rule distortions. Reg. § 1.704–3(d)(1). If, for instance, the ceiling rule prevents a partnership from allocating a taxable gain to the non-contributing partner equal to her corresponding economic gain, then the partnership would simply create the necessary taxable gain and allocate it to her. *Id.* At

Each allocation method relies on technical concepts like the "ceiling rule,"[163] "curative allocations,"[164] and "remedial items"[165] that are only understood by stakeholders with specialized knowledge. Likewise, each method has its own quirks and technicalities.[166] Yet the most complicated aspect of the contributed property allocation rules is the combined effect of the three allocation methods, which a partnership must choose among each time property is contributed to the partnership.[167] To make this choice, a partnership must understand each allocation

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the same time, the partnership would create an equal and offsetting taxable loss and allocate it to the contributing partner. *Id.* Since these notional allocations are fully offsetting, the allocations would have no effect on the partnership or its computation of taxable income. *Id.* For a general discussion of these elective allocation methods, see McKee et al., *supra* note 134, at ¶ 11.04; Willis & Postlewaite, *supra* note 134, at ¶ 10.08.

163. *See supra* note 161.

164. *See supra* note 162.

165. *See supra* note 162.

166. For instance, the application of the traditional method with curative allocations is not limited to the year of the ceiling rule distortion; instead, a partnership may apply this method over a series of years. Reg. § 1.704–3(c)(3)(ii). Unlike the other section 704(c) allocation methods, a partnership may thus make curative allocations in a taxable year other than the year in which the ceiling rule problem arises. *Id.* Likewise, under the remedial allocation method, a partnership must compute its depreciation deductions attributable to contributed property differently. Reg. § 1.704–3(d)(2). These unique, and uniquely complicated rules, require a partnership to bifurcate the contributed property into two separate depreciable assets—one with a book value equal to basis and the other equal to the excess book value—and compute economic depreciation on the first in the same manner as the property's adjusted tax basis is recovered and on the second using any method available to the partnership for newly purchased property. *Id.*

167. In 2004, Congress amended section 704(c), adding a mandatory fourth allocation method for property contributed to a partnership with a pre-contribution loss. American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 833(a), 188 Stat. 1418, 1589. Section 704(c)(1)(C) is an anti-abuse rule, prohibiting a partnership from allocating any portion of a pre-contribution loss to any partner other than the contributing partner. Section 704(c)(1)(C) thus provides that a partnership may only take a pre-contribution loss into account when determining the allocations to be made to the partner who contributed the property. I.R.C. § 704(c)(1)(C)(i). With respect to the other partners, however, the partnership is instructed to disregard the pre-contribution

method and how the contributed property would be treated over time under each method.[168] For many partnerships, this complicated process can be costly in terms of time and resources. It is, however, necessary if a partnership wants to select the allocation method best suited for a particular item of partnership property.

B. Partnership Allocations and Publication 541

Generations of scholars have chronicled the complexity of partnership allocations and advocated for the reform of the section 704(b) general allocation rules and the section 704(c) contributed property allocation rules.[169] Yet little has been accomplished, and partnership tax reform often feels like an impossible goal. In hopes of clearing a path forward, this Article thus asks the following question: what can experts learn about the complexity of partnership allocations from a careful study of Publication 541?

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loss and treat the contributed property as if it were purchased for its fair market value in a fully taxable transaction. I.R.C. § 704(c)(1)(C)(ii). Unlike the traditional section 704(c) allocation rules, the contributing partner's pre-contribution loss is preserved through a mechanism referred to as the "Section 704(c)(1)(C) Basis Adjustment," which serves to quarantine the contributed property's built-in loss with the contributing partner. Prop. Reg. § 1.704–3(f)(2)(iii), 82 Fed. Reg. 7582 (Jan. 1, 2017). The Section 704(c)(1)(C) Basis Adjustment is personal to the contributing partner, functioning as an adjustment to the basis of the contributed property for her purposes only. Prop. Reg. § 1.704–3(f)(3)(ii)(A). It does not affect the partnership's basis in the contributing property, nor does it affect the partnership's computation of taxable gain or loss following a sale of the property. *Id*. On the contrary, the Section 704(c)(1)(C) Basis Adjustment simply reduces the amount of taxable gain, or increases the amount of taxable loss, allocated to the contributing partner on the property's disposition. Prop. Reg. § 1.704–3(f)(3)(ii)(B)–(D). *See generally* Daniel L. Simmons, *Built-in Gain and Built-in Loss Property on Formation of a Partnership: An Exploration of the Grand Elegance of Partnership Capital Accounts*, 9 Fla. Tax Rev. 599 (2009); Monroe, *supra* note 136; Monroe, *supra* note 102.

168. *See, e.g.*, Cauble, *supra* note 135, at 292. *See generally* George K. Yin, *The Taxation of Private Business Enterprises: Some Policy Questions Stimulated by the "Check-the-Box" Regulations*, 51 SMU L. Rev. 125, 130 (1997).

169. *See supra* notes 135–136.

As will be discussed, the answer is unexpected and illuminating. Publication 541 tells a very different story about partnership allocations than the traditional scholarship. An examination of the IRS's explanations of the general allocation rules and the contributed property allocation rules leads to the conclusion that the two allocation rules are not comparably complex. The explanation of section 704(b) is a failure, thereby signaling that the general allocation rules may be a high priority complexity problem. The real surprise, however, is section 704(c): the IRS's explanation of contributed property allocations is serviceable, mediating the underlying law's complexity through a simple and accurate explanation of section 704(c)'s core.

1. Section 704(b)

Considering the complexity and ubiquity of partnership allocations, one would expect the IRS to provide significant operational guidance in Publication 541 to non-expert stakeholders. On the contrary, Publication 541 is silent on section 704(b) and the general rules governing partnership allocations. There is not a single mention of special allocations, the substantial economic effect safe harbor, or section 704(b) in the publication.[170]

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170. The only mention of the section 704(b) general allocation rules is found in the instructions to Form 1065, which is the informational income tax return that partnerships are required to file. IRS Instructions to Form 1065 (2017), https://www.irs.gov/pub/irs-pdf/i1065.pdf. The instructions to Schedules K and K-1 contain a very general discussion about how income is shared among partners. *Id.* at 25–27. The IRS explains that a partnership should allocate its taxable items according to the terms of its partnership agreement, which may provide for a bottom-line allocation of the partnership's income, as well as special allocations of particular taxable items. *Id.* at 25. It also explains that a "special allocation" involves an allocation of a particular taxable item according to a ratio different from the partnership's general sharing ratio. *Id.* at 25–27. Apart from distinguishing bottom-line and special allocations, however, the instructions are virtually silent on the rules governing partnership allocations, simply noting, "If the partnership agreement doesn't provide for the partner's share of income, gain, loss, deduction, or credit, or if the allocation under the agreement doesn't have substantial economic effect, the partner's share is determined according to the partner's interest in the partnership." *Id.* at 25. Indeed, this is the *only* mention of substantial economic effect or the partner's interest in the partnership in any IRS form, instruction, or publication.

Accordingly, the IRS's treatment of the section 704(b) general allocation rules is an example of a failed explanation, omitting any discussion of these foundational rules from the IRS's primary instrument for communicating information about partnership tax to non-expert stakeholders. A partner or tax return preparer relying on Publication 541 would have no idea that an elaborate regulatory regime governing partnership allocations exists. Indeed, this stakeholder would not even know that partnership allocations were subject to any rules or restrictions. And this is why the treatment of section 704(b) constitutes a failure—the IRS has not provided stakeholders with the information necessary to comply with the general rules governing partnership allocations, instead leaving compliance to chance or lucky intuition.

2. Section 704(c)

The IRS's explanation of contributed property allocations, in contrast, is a relative success, serviceably communicating the core aspects of section 704(c) to non-expert stakeholders in a simple and accurate manner and allowing them to comply with the law.[171] Although experts may disagree about some of the particulars of this explanation, an expert would likely agree that the IRS's explanation of contributed property allocations is comparable to how she would explain section 704(c)'s core to a client, friend, or student who knows very little about partnership tax. The explanation of contributed property allocations is thus an important and unexpected success story, which illustrates the IRS's ability to mediate the complexity of section 704(c).

Publication 541 includes a specific section entitled "Contribution of Property" that walks through the general rules governing contributed property from the partner's contribution to the partnership's disposition of the property.[172] The IRS explains that a contribution of property is treated as a nonrecognition event, and neither the partnership nor the contributing partner recognizes any gain on the transaction.[173] The partnership instead takes a basis in the contributed property equal

The IRS instead refers interested stakeholders to Treasury Regulation section 1.704–1 for additional information on partnership allocations. *Id*.

171. IRS Pub. No. 541, *supra* note 21, at 8–9.

172. *Id*.

173. *Id*.

to the partner's basis in order to preserve any pre-contribution gain for future recognition in connection with a more appropriate taxable event.[174]

The IRS then communicates the core notion underlying contributed property allocations: if the contributed property's fair market value differs from its basis at the time of contribution, then the partnership must allocate any future taxable items attributable to the property in a manner that accounts for this difference.[175] In the case of a sale of contributed property, this means that the partnership must allocate any recognized pre-contribution gain to the contributing partner.[176] As previously discussed, however, section 704(c)'s basic rule has the potential to produce inequitable results through the application of a limitation commonly referred to as the ceiling rule.[177] Publication 541 includes an explanation of this limitation, including a straightforward example of its application to contributed property allocations.[178]

When taken together, the IRS serviceably communicates the core of contributed property allocations in Publication 541, highlighting the foundational aspects of section 704(c) that any partner—whether elite or mainstream, expert or non-expert—should know. For instance, it successfully distills the core rules and mechanics in clear and accessible terms that a non-expert can understand: to the extent possible, pre-contribution gain should be allocated to the contributing partner.[179] Likewise, the IRS simply, accurately, and effectively explains the theory animating contributed property allocations, which aims to ensure that the taxable items allocated to all partners match their corresponding allocations of economic items.[180]

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174. *Id.*

175. *Id.*

176. *Id.* The IRS explains that there are a number of methods a partnership may use to make contributed property allocations, and it refers interested partners and practitioners to Treasury Regulation section 1.704–3 for more information. *Id.* Likewise, the IRS notes that a partnership must account for pre-contribution gain when allocating depreciation deductions attributable to contributed property, and it provides an example that illustrates the operation of these allocation rules. *Id.* at 8–9.

177. *See supra* note 161.

178. IRS Pub. No. 541, *supra* note 21, at 8–9.

179. *Id.* at 8.

180. *Id.* In describing the theory animating section 704(c), the IRS focuses on the non-contributing partner, explaining that the goal of section

It is surely true that the IRS paints with broad strokes when explaining contributed property allocations, omitting many of the surrounding details. For example, the IRS notes that a partnership may "use different allocation methods for different items of contributed property," but it omits any discussion of the particulars of section 704(c)'s alternative allocation methods, simply referring the reader to the relevant Treasury Regulation.[181] Nonetheless, the omission of these details does not detract from the serviceability of the IRS's explanation of the core aspects of contributed property allocations.[182] Indeed, Publication

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704(c) is to treat the non-contributing partner's interest in the contributed property in the same manner as if the partner had purchased an undivided interest in the contributed property in a fully taxable transaction. From this "direct investment" perspective, the only gain that should be allocated to a non-contributing partner under section 704(c) should reflect post-contribution changes in the value of the contributed property. More broadly, this theory is entirely consistent with the theory animating partnership allocations generally—a partner's tax investment in the partnership and its property should mirror her corresponding economic investment in the partnership and its property.

181. IRS Pub. No. 541, *supra* note 21, at 8. One might quibble with this Article's characterization of section 704(c)'s elective allocation methods as details, rather than part of section 704(c)'s core. *See* Blank & Osofsky, *supra* note 8, at 224–26 (noting simplexity in the IRS's explanation of early distributions from individual retirement accounts where the IRS explains three alternative distribution methods but fails to note additional distribution methods that the IRS has sanctioned in other administrative guidance). The decision to treat these alternative allocation methods as details is a product of two factors—electivity and limited applicability. Because these alternative allocation methods are elective at the option of the partnership, their omission from the IRS's explanation does not precludes compliance with section 704(c). Partnerships relying on Publication 541 lose the opportunity to remedy an inequitable result produced by the ceiling rule, but they do not lose their ability to comply with the law. Additionally, these alternative allocation methods only apply in situations where the ceiling rule causes a pre-contribution gain to shift among the partners. Reg. § 1.704–3(c), (d). In all other instances, the traditional method, which is explained in Publication 541, applies.

182. Additionally, the IRS does not explain the section 704(c)(1)(C) pre-contribution loss rule in Publication 541. Although this omission is potentially more problematic than the omission of section 704(c)'s alternative allocation methods, the IRS's explanation of contributed property allocations is still serviceable. Put another way, the omission of section 704(c)(1)(C) is not sufficiently fatal to warrant characterizing the IRS's explanation as a

541 should allow many non-expert stakeholders to comply with the basic rules of section 704(c).[183]

3. *The Future of Partnership Allocations*

Studying Publication 541 adds an important and unexpected dimension to the traditional thinking about partnership allocations. From a complexity perspective, scholars and policymakers generally consider section 704(b) and section 704(c) to be comparable—both are enormously complicated, and both are in need of reform. Publication 541, however, tells a dramatically different story about the complexity of these two

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relative failure. As an initial matter, the omission may simply be a matter of timing: Congress enacted section 704(c)(1)(C) in 2004, but the Treasury did not propose regulations explaining this novel provision until 2014. Prop. Reg. § 1.704–3, 79 Fed. Reg. 3042, 3055–3060 (Jan. 16, 2014). Once the Treasury finalizes these regulations, which it has yet to do, it is possible that the IRS will revise Publication 541 to account for this new allocation rule. *But see* Zelenak, *supra* note 8, at 2018 (noting in 2017 the IRS's "remarkable" failure to revise a publication in response to a major regulatory change reflected in regulations finalized by the Treasury in 2013). More generally, however, in many, if not most, instances, the current explanation of contributed property allocations will allow stakeholders to arrive at the correct result, even without explicit mention of section 704(c)(1)(C). Publication 541 provides that a partnership should allocate pre-contribution losses to the contributing partner following a sale of the contributed property. *See* IRS Pub. No. 541, *supra* note 21, at 8. This explanation captures the core aspects of both the "regular" contributed property allocation rules and the "special" rule for pre-contribution loss; thus, it is properly characterized as a relative success. Nonetheless, there are instances where section 704(c)(1)(C) would allocate a pre-contribution loss differently than the regular contributed property allocation rules—for instance, when the ceiling rule applies or when the contributing partner is no longer a partner because she sold her partnership interest. In these instances, section 704(c)(1)(C) is necessary to prevent the duplication of pre-contribution loss.

183. The Instructions to Form 1065 also address allocations attributable to contributed property. Form 1065 Instructions, *supra* note 170, at 10. Like Publication 541, the instructions contain the general rule requiring a partnership to allocate pre-contribution gain in a manner that is sensitive to the difference between the property's fair market value and its basis at the time of contribution. *Id*. Unlike the publication, however, the instructions note the section 704(c)(1)(C) special rule for property contributed to a partnership with a pre-contribution loss. *Id*.

allocation rules. The real surprise is the IRS's success in serviceably communicating the core aspects of contributed property allocations to non-expert stakeholders in Publication 541. In contrast, the IRS's explanation of subchapter K's general allocation rules is a failure, signaling to experts that section 704(b) may pose a consequential complexity problem and, in turn, should be a priority in formulating any future research and tax reform agenda.

The next step is thus further study, with the goal of better understanding the nature and severity of section 704(b)'s complexity problem. That is, experts must determine whether congressional or regulatory intervention is required to ameliorate the complexity of the general rules governing partnership allocations. An essential step in this process is for experts to ask whether the IRS could have explained these general allocation rules to non-expert stakeholders in a simple and accurate manner. As previously discussed, an expert might think about how she would explain section 704(b), particularly the substantial economic effect safe harbor, to a client, friend, or student. If she cannot serviceably explain these allocation rules, this is strong evidence of a significant complexity problem in section 704(b). Indeed, it would support the conclusion that explaining section 704(b)'s core simply and accurately is an impossible task, even for the IRS, and the time has come to reform partnership allocations.

If, in contrast, the expert believes that a serviceable explanation of subchapter K's general allocation rules is possible, then the expert might consider why the IRS would choose to omit an explanation of these rules from Publication 541. Numerous rationales might exist—for example, the IRS might not have believed that the revenue stakes were sufficiently high to warrant an explanation, or it might have believed that only elite well-advised partnerships use the substantial economic effect safe harbor. Whatever the rationale, it is likely to deepen our understanding of the proper path forward, suggesting, at a minimum, that congressional or regulatory reform of section 704(b) would be premature.

Additionally, scholars should examine the traditional scholarship related to section 704(b). As previously noted, there is a rich literature exploring the general rules governing partnership allocations, their complexity, and their possible reform.[184] Likewise, experts should study how elite partnership tax experts have addressed section 704(b)'s complexity when structuring partnership transactions for their clients. Many

184. *See supra* notes 135–136.

of these experts have indeed expressed their dissatisfaction with the general allocation rules in a most tangible way: they advise their clients to avoid the substantial economic effect safe harbor and, instead use a different type of allocation method referred to as "target allocations."[185] Although empirical evidence is difficult to obtain, anecdotal evidence suggests that target allocations have become increasingly popular, with some experts suggesting that they are the most commonly used method of drafting partnership allocations today.[186] Indeed, a primary reason for their popularity is the ability of target allocations to bypass the complexity of the section 704(b) general allocation rules.[187] As one partnership tax expert noted: target allocations permit "the economics to be governed by the English language, not the substantial economic effect regulations."[188]

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185. In very general terms, target allocations focus on a partnership's cash distribution provisions rather than the substantial economic effect safe harbor in order to determine the partnership's annual allocations to its partners. A partnership using target allocations determines the aggregate distributions each partner would receive at the end of the year if the partnership were to liquidate, and then the partnership allocates its taxable income such that each partner's year-end capital account balance equals the amount she would have received on the partnership's hypothetical liquidation. In this way, a partnership using target allocations "backs into" its annual allocations of taxable income. For excellent discussions of this allocation methodology, see William G. Cavanagh, *Targeted Allocations Hit the Spot*, 129 Tax Notes 89 (Oct. 4, 2010); Terence Floyd Cuff, *Working with Target Allocations—Idiot-Proof or Drafting for Idiots?*, 35 Real Est. Tax'n 116 (2008); Todd D. Golub, *Target Allocations: The Swiss Army Knife of Drafting (Good for Most Situations—but Don't Bet Your Life on It)*, 87 Taxes 157 (2009); N.Y. State Bar Ass'n Tax Section, Report on Partnership Target Allocations (2010), *reprinted in NYSBA Tax Section Submits Report on Partnership Target Allocations*, 2010 Tax Notes Today 185–18 (Sept. 23, 2010).

186. *See, e.g.*, Cuff, *supra* note 185, at 117; Amy Elliot, *IRS to Address Illogical Results Caused by LLC Conversion Guidance, Official Says*, 2010 Tax Notes Today 134–3 (July 14, 2010); Golub, *supra* note 185, at 158; N.Y. State Bar Ass'n Tax Section, *supra* note 185.

187. *See, e.g.*, Cavanagh, *supra* note 185, at 90; Cuff, *supra* note 185, at 117; Golub, *supra* note 185, at 158; N.Y. State Bar Ass'n Tax Section, *supra* note 185; *Shop Talk*: *More on "Booking Up" for Partnership Profits Interests*, 84 J. Tax'n 191, 191 (1996).

188. *Shop Talk*, *supra* note 187, at 191.

This type of panoramic study of partnership allocations would allow experts to assess section 704(b)'s complexity and decide whether the general rules governing partnership allocations are a proper focus of future tax reform efforts. My own view is that the time has in fact come for an overhaul of section 704(b), particularly the substantial economic effect safe harbor.[189] But more work needs to be done before any conclusions can be drawn. Whatever the future holds for section 704(b), studying Publication 541 would contribute greatly to our understanding of partnership allocations and the path toward a simpler, more functional subchapter K.

Conclusion

This small study of partnership allocations illustrates the vital role that IRS publications can play in the experts' world of legal scholarship and tax policy debates, particularly as it relates to the perennial problem of tax complexity. Studying these publications and how the IRS communicates substantive tax law to non-expert stakeholders can yield important lessons for experts about the nature of the underlying law's complexity. These lessons, in turn, can help experts identify the most consequential complexity problems facing the federal income tax system and, in doing so, formulate a tax reform agenda designed to promote tax simplification.

For me, subchapter K was a natural choice to illustrate the importance of studying IRS publications. As previously discussed, partnership taxation is an increasingly essential area of tax law, and it is

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189. One partnership tax expert aptly summarized the problem with the section 704(b) general allocation rules in the following manner:

> [M]any sophisticated tax practitioners now use tax allocations that do not drive liquidations. Many less sophisticated tax practitioners use traditional capital account allocation provisions but miss some of the nuances and fall short of the mark. And many even less sophisticated practitioners draft simple tax allocation provisions that do not even try to hit the mark. No matter how well conceived the section 704(b) economic effect regulations may have been, they are no longer carrying the day.

Cavanagh, *supra* note 185, at 91.

also the area that I know best.[190] Others may have their own stories to tell and surprises to report from different areas of the federal income tax. But we will only learn about these stories and surprises if scholars and policymakers begin to incorporate IRS publications into their own work. That is the first step in taking the first step toward meaningful, simplifying tax reform.

190. *See supra* notes 122–124 and accompanying text.