

## ARTICLES

### SUPERFICIAL PROXIES FOR SIMPLICITY IN TAX LAW

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#### ABSTRACT

*Simplification of tax law is complicated. Yet, political rhetoric surrounding tax simplification often focuses on simplistic, superficial indicators of complexity in tax law such as word counts, page counts, number of regulations, and similar quantitative metrics. This preoccupation with the volume of enacted law often results in law that is more complex in a real sense. Achieving real simplification—a reduction in costs faced by taxpayers at various stages in the tax planning, tax compliance, and tax enforcement process—often requires enacting more law, not less. In addition, conceptualizing simplicity in simplistic terms can leave the public vulnerable to policies advanced under the guise of simplification that have real aims that are less innocuous. A perennial example involves lawmakers proposing a reduction in the number of tax brackets under the heading of simplifying tax law. In reality, this change does very little, if anything, to simplify law in a meaningful sense, and its truer aim is to reduce progressivity in the tax code. Although the tax legislation ultimately enacted in December 2017 did not change the number of brackets applicable to individual taxpayers, political discourse preceding its enactment once again touted a reduction in the number of tax brackets as a simplifying measure.*

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## INTRODUCTION

Politicians and other public figures frequently bemoan legal complexity and cite to superficial proxies as evidence of excessively intricate legal rules.<sup>1</sup> Tax law is always a popular target for this type of rhetoric. Ted Cruz and others are fond of observing that the tax code has more words than the Bible.<sup>2</sup> Some take aim at law more generally. In order to carry out one of his campaign promises, Donald Trump signed an executive order requiring that federal agencies eliminate two existing regulations for every one that they implement.<sup>3</sup>

Rhetoric decrying legal complexity is not innocuous. As others have observed, it has the potential to undermine the political legitimacy of law.<sup>4</sup> In addition, as this article observes, if lawmakers were to subscribe to the idea that superficially simpler law is, indeed, simpler, then they might engage in measures that would make law more complex in a truer sense. For instance, if a lawmaker were to adopt the notion that shorter is better, he or she might issue legal guidance in a form that is, in fact, more complex in a meaningful sense in that it increases costs faced by taxpayers at various stages in the tax planning, tax compliance, and tax enforcement process.

Although the length of applicable law is not entirely irrelevant to an evaluation of the complexity inherent in law, an undue preoccupation with the length of law can, counterproductively, exacerbate complexity. In the tax context, this phenomenon manifests itself in at least four ways.<sup>5</sup> First, in an attempt to economize on

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1. See, e.g., Mila Sohoni, *The Idea of "Too Much Law,"* 80 FORDHAM L. REV. 1585, 1587 (2012) ("It is impossible to open a newspaper without seeing some such version of the claim that America suffers from 'hyperlexis,' or the existence of 'too much law.'").

2. Michelle Ye Hee Lee, *Ted Cruz's Claim That the IRS Tax Code Has More Words Than the Bible*, WASH. POST (Mar. 11, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/03/11/ted-cruzs-claim-that-the-irs-tax-code-has-more-words-than-the-bible/> [<https://perma.cc/JP2U-CX75>].

3. Exec. Order No. 13,771, 80 Fed. Reg. 9339 (Feb. 3, 2017).

4. See, e.g., Sohoni, *supra* note 1, at 1601, 1629 ("If lawgivers perceive and describe growth in law as illegitimate, that view will affect the public's perception of the legitimacy of the accumulated corpus of law.").

5. I cannot prove and do not claim a direct causal link between political rhetoric and counterproductive steps taken to reduce the volume of enacted law. Yet, the rhetoric presumably is used because it appeals to popular misconceptions of what complexity and simplicity entail. These same notions (if not the rhetoric itself) may influence lawmakers who design law. These notions may also prompt measures that more directly influence the form of enacted law, such as the Senate Drafting Manual and Donald Trump's executive order

words in the Internal Revenue Code (“IRC”), rather than repeat language in different code sections, Congress will frequently incorporate language from one code section into another by cross-reference, sometimes in a very convoluted fashion by referring to the other section while, at the same time, noting modifications to the incorporated language.<sup>6</sup> At least on an initial read, the meaning of the statutory provision would, in many cases, be more readily apparent if the language had been replicated with the relevant modifications. Furthermore, incorporating language by cross-reference can make it difficult for future lawmakers to amend the referenced statute, unless they want their changes to apply universally.

Second, lawmakers might adopt provisions that are shorter but less intuitive than a potentially longer version of the provision. Provisions could be less intuitive if they result in tax gain or loss departing from economic gain or loss, or if they cause minor non-tax changes to produce a significant effect on tax outcomes. In some cases, greater verbosity is necessary to ensure a close tie between tax outcome and economic outcome, or to prevent a change in tax consequences from turning on a small nontax difference. In such cases, when lawmakers use fewer words and craft less intuitive tax provisions, they create law that is more complex in two significant ways. First, for taxpayers who attempt to ascertain the content of law prior to acting, the learning process is made more difficult by the existence of counterintuitive tax provisions. Second, counterintuitive tax provisions are more likely to trap unwary taxpayers who act before determining the resulting tax consequences.

Third, just as Congress may feel pressure to be succinct, similar forces might influence the Internal Revenue Service (“IRS”) to issue concise guidance explaining applicable tax law. It is not uncommon, for instance, to read commentary that points to the length of an IRS publication on a given topic or the length of tax form instructions as evidence of the intricate nature of applicable law.<sup>7</sup> In an effort to avoid the appearance that law is overly complex, the IRS might limit the length of its publications and other guidance

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curtailing the number of regulations. For further discussion of these measures, see *infra* notes 22, 24 and accompanying text. For reports of the study of the forces that influence decisions made in the drafting process, see Shu-Yi Oei & Leigh Osofsky, *Constituencies and Control in Statutory Drafting: Interviews with Government Tax Counsels*, 104 IOWA L. REV. (forthcoming 2019) (manuscript at 1).

6. Oei & Osofsky, *supra* note 5, at 33.

7. See *infra* note 103 and accompanying text.

by omitting certain details, caveats, and exceptions. Professors Joshua D. Blank and Leigh Osofsky observe, for example, that the IRS's efforts to use plain language and make its publications understandable by a lay audience can prompt the IRS to omit details from its guidance, with the result of potentially misleading taxpayers.<sup>8</sup> In this way, efforts to achieve the appearance of simplicity in a given area of law can actually make matters more complex for taxpayers who are led astray by incomplete guidance.<sup>9</sup>

Finally, pressure to be succinct faced by Congress, the Treasury, and the IRS might, in some circumstances, manifest itself as pressure to be silent; lawmakers might simply refrain from issuing any guidance on various issues. This can lead to greater uncertainty.

Rhetoric that heightens the importance of superficial proxies for simplification is also problematic because superficial characterizations of simplicity enable politicians to advance provisions under the guise of achieving simplicity—a prospect with broad appeal—when the true effect of the provisions is something that would be much less popular.<sup>10</sup> As a perennial example, lawmakers propose reducing the number of tax brackets under the heading of simplifying tax law. In reality, this change does very little, if anything, to simplify law in a meaningful sense, and its truer aim is often to reduce progressivity in the tax code (meaning it decreases the extent to which tax rates increase as income rises). Although the tax legislation ultimately enacted in December 2017 did not change the number of brackets applicable to individual taxpayers,<sup>11</sup> political discourse preceding its enactment once again touted a reduction in the number of tax brackets as a simplifying measure.<sup>12</sup>

Before moving on, a few notes about the scope of this article and its contribution to the existing literature are in order. This article

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8. Joshua D. Blank & Leigh Osofsky, *Simplicity: Plain Language and the Tax Law*, 66 EMORY L.J. 189, 192–94 (2017).

9. *Id.*

10. In some cases, the true effect of measures advanced under the heading of simplification may be deregulation rather than simplification. See Steven A. Dean, *Attractive Complexity: Tax Deregulation, the Check-the-Box Election, and the Future of Tax Simplification*, 34 HOFSTRA L. REV. 405, 409–10, 466–67 (2005).

11. I.R.C. § 1(j)(2) (Supp. V 2018); INTERNAL REVENUE SERV., PUBLICATION 17, at 254 (2016), <https://www.irs.gov/pub/irs-prior/p17--2016.pdf> [<https://perma.cc/GA37-Z96Y>].

12. *E.g.*, *President Trump Proposed a Massive Tax Cut. Here's What You Need to Know.*, WHITEHOUSE.GOV (Apr. 26, 2017), <https://www.whitehouse.gov/articles/president-trump-proposed-massive-tax-cut-heres-need-know/> [<https://perma.cc/G86K-AGBT>] (“We are going to cut taxes and simplify the tax code by taking the current 7 tax brackets we have today and reducing them to only three brackets . . .”).

does not take a categorical stance on whether or to what degree we should simplify tax law. Pursuit of the goal of simplicity (even when it is implemented in a way that truly simplifies the law) can sometimes sacrifice other goals, and a certain amount of complexity in tax law is inevitable.<sup>13</sup> That said, at least some simplification may be possible without sacrificing other goals.<sup>14</sup> More importantly for purposes of this article, regardless of whether and to what extent simplification is desirable, policymakers seem to be intent on including simplification on their list of worthy goals. As long as this is true, it is imperative to consider whether or not simplification efforts reach their target. This article takes as a given the assumption that policymakers want to achieve simplification and focuses

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13. For discussion of the inevitability of complexity in tax law or law generally and discussion of the fact that simplification could, in some cases, undermine other goals, see, for example, Boris I. Bittker, *Tax Reform and Tax Simplification*, 29 U. MIAMI L. REV. 1, 2 (1974) (“Income taxation entails a high level of irreducible complexity.”); Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 VA. TAX REV. 645, 650–52 (2003) (describing ways in which complexity in tax law is either inevitable or necessary to advance other goals and stating, “[C]omplexity may be better than we believe. No one likes hard laws, but we dislike unfair, inefficient laws even more.”); William G. Gale, *Tax Simplification: Issues and Options*, 92 TAX NOTES 1463, 1463 (2001) (“But simpler taxes also have costs. In particular, they reduce the ability of policy makers to achieve other goals of tax policy.”); Louis Kaplow, *How Tax Complexity and Enforcement Affect the Equity and Efficiency of the Income Tax*, 49 NAT’L TAX J. 135, 147 (1996); Edward McCaffrey, *The Holy Grail of Tax Simplification*, 1990 WIS. L. REV. 1267, 1273–77; Deborah L. Paul, *The Sources of Tax Complexity: How Much Simplicity Can Fundamental Tax Reform Achieve?*, 76 N.C. L. REV. 151, 155 (1997) [hereinafter Paul, *How Much Simplicity*]; Randolph E. Paul, *Simplification of Federal Tax Laws*, 29 CORNELL L.Q. 285, 285 (1944) [hereinafter Paul, *Simplification*] (“We must have revenue. We must get it as fairly as possible from many millions of people. We must apply uniform rules. Simplicity must be weighed against all of these competing considerations.”); Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 8 (1992) (“[S]impler is not always better. Legal complexity sometimes produces fairer, more refined, more efficient, even more certain, forms of social control.” (footnotes omitted)); Karla W. Simon, *Tax Simplification and Justice*, 36 TAX NOTES 93, 93 (1987); Stanley S. Surrey, *Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail*, 34 LAW & CONTEMP. PROBS. 673, 674 (1969) (“The individual income tax is a mass tax in the United States . . . . Of necessity, this coverage sweeps under the tax an enormous variety and number of transactions for which a tax answer must be given—and given every year.”); *id.* at 700 (“Tax rules that are simple because they are arbitrary will not withstand this taxpayer pressure for fairness. The simple rule will give way to the complex as soon as the unfairnesses [sic] inherent in the simple rule are discerned and the pressure is exerted.”); *id.* at 701 (“[T]he insistence on preventing tax avoidance will demand complexity in the form of anti-tax-avoidance detail.”).

14. For discussion of the fact that some complexity may be avoidable without significant sacrifice of other goals, see, for example, Kaplow, *supra* note 13, at 139 (“Some complexity arises from poor rule writing, which involves a pure waste.”); McCaffrey, *supra* note 13, at 1284–88; Jeffrey Partlow, *The Necessity of Complexity in the Tax System*, 13 WYO. L. REV. 303, 306 (2013) (“The systemic desire for equity and certainty make complexity a necessity in the tax system; however, not all complexity is necessary.”).

on the question of whether particular reforms aimed at simplification truly achieve that goal.

Much has been written about complexity in tax law and law generally. Existing observations about complexity are summarized, to the extent relevant to this article, in Part II. In the course of summarizing existing observations, this article contributes to the body of literature on complexity by more fully describing the role of intuition in an analysis of complexity. In addition, this article contributes to existing literature by highlighting the dangers of focusing on superficial indicators of complexity. Instead, lawmakers should focus on creating a tax law that genuinely simplifies the law to benefit unsophisticated taxpayers as well as sophisticated taxpayers in various respects.

This article proceeds as follows. Part I will provide an overview of the ways in which simplicity is described by reference to superficial metrics related to the volume of law. Part II will highlight existing observations about complexity that are of relevance to this article's analysis and, in the process, will explore the role of intuition. Part III will discuss ways in which a focus on numerical metrics related to the volume of law can undermine genuine simplicity.

## I. SUPERFICIAL CONCEPTIONS OF SIMPLICITY

Politicians, journalists, and others frequently lament the amount of complexity perceived to be inherent in our legal system, often citing simplistic proxies of complexity, such as measures of the sheer volume of law.<sup>15</sup> Tax law is singled out as a notorious exemplar of excessive complexity.<sup>16</sup> Ted Cruz and others are fond of observing that the tax code has more words than the Bible.<sup>17</sup>

Even scholars occasionally fall into the habit of pointing to word count and other superficial indicators as evidence of the intricate nature of legal rules.<sup>18</sup> One commentator even went so far as to

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15. See, e.g., Sohoni, *supra* note 1, at 1586–87, 1602–08.

16. See, e.g., Bittker, *supra* note 13, at 1 (“Journalists often ridicule the Internal Revenue Code by pointing to lengthy involuted provisions and to definitions that refer the reader to other definitions that in turn compel him to go even farther afield.”).

17. See Lee, *supra* note 2.

18. See, e.g., John A. Miller, *Indeterminacy, Complexity, and Fairness: Justifying Rule Simplification in the Law of Taxation*, 68 WASH. L. REV. 1, 8 (1993) (“Today, the income tax regulations alone are perhaps ten thousand double-columned pages in length. The Treasury regulations set out in painstaking detail the tax treatment of various transactions in a mul-

propose that tax complexity ought to be curtailed by reducing the volume of applicable law through the blunt mechanism of reducing the tax-writing staff of Congress and the Treasury.<sup>19</sup> Yet, most scholars acknowledge that word count and similar indicators are poor proxies for the true degree of legal complexity.<sup>20</sup> Some even observe, in general terms, that a trade-off exists in that measures that could make law simpler in some respects would make applicable law more verbose, including efforts to contain the volume of law that can, in some cases, produce greater complexity.<sup>21</sup>

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tiplicity of circumstances. They have helped to produce layer upon layer of technical complexity in U.S. tax law in the name of certainty and fairness.”); Partlow, *supra* note 14, at 303 (“At 3.8 million words in 2010, the Code has grown so long that even the Internal Revenue Service (IRS) has trouble determining how long it is.”); Sheldon D. Pollack, *Tax Complexity, Reform, and the Illusions of Tax Simplification*, 2 GEO. MASON INDEP. L. REV. 319, 320 (1994) (“As reflected by the sheer number of provisions of the federal income tax, there was a virtual explosion in the complexity of the tax code in the post-War period.”).

19. Gordon D. Henderson, *Controlling Hyperlexis—The Most Important “Law and . . .”*, 43 TAX LAW. 177, 198 (1989) (“The tax-writing staffs of Congress and the Treasury should be reduced. This action would be partly symbolic and partly substantive.”).

20. See, e.g., McCaffrey, *supra* note 13, at 1270 (“[T]here is no consistent correlation among statutory mass, abstruseness, and complexity.”); Schuck, *supra* note 13, at 6 (“Of course, I can no more demonstrate . . . growing complexity . . . by merely citing examples than I can prove increased regulatory burdens by counting pages in the *Federal Register* (although many have purported to do so.”); Sohoni, *supra* note 1, at 1602–07; R. George Wright, *The Illusion of Simplicity: An Explanation of Why the Law Can’t Just Be Less Complex*, 27 FLA. ST. U. L. REV. 715, 724–25 (2000) (“[W]e can imagine a tax code that carefully listed, for each dollar increment in income, the ultimate tax due. This tax code could have millions, if not billions, of component sections, corresponding to every level of income in dollar units. . . . This possibility suggests two useful points. First, what is on some definitions quite complex—as a million section tax code would be complex in terms of sheer number of elements—may be easily rewritable in far fewer sections, involving one large tax table. As easily rewritten, a code loses its complexity in this numerical sense, and becomes much simpler. Thus millions of code sections can easily be reduced to one single, comprehensive code section. This begins to suggest the superficiality, or the mere stylistic conventionality, if not the sheer arbitrariness of some judgments of complexity.”).

21. See, e.g., Bittker, *supra* note 13, at 1–2 (“Journalists often ridicule the Internal Revenue Code by pointing to lengthy involuted provisions and to definitions that refer the reader to other definitions that in turn compel him to go even farther afield. . . . But these statutory intricacies may in fact be of minor importance, if they are addressed to tax experts concerned with transactions that rarely occur; and they may even clarify the law, despite their initially baffling phraseology.”); Dean, *supra* note 10, at 412–13 (“Using fewer words might seem an obvious way to make a tax provision less complex, but it may actually have the opposite effect. This is because facially complicated statutory language may actually ‘clarify the law’ by making it ‘easier to find one’s way through the wilderness.’” (quoting Bittker, *supra* note 13, at 2)); Donaldson, *supra* note 13, at 675–76 (“If Congress were to draft tax legislation in a manner accessible to the general populace, like Australia’s new tax code, Congress would have to write more text, not less. . . . Of course, one could draft clearer statements of the rule if one is willing to lengthen the Code. Remember, however, that proponents of simplification point to the fact that the Code is already approaching 1.4 million words. If length breeds complexity, then more elaborate statements of the law in the Code will not help the cause.” (footnotes omitted)); Stanley A. Koppelman, *At-Risk and Passive Activity Limitations: Can Complexity Be Reduced?*, 45 TAX L. REV. 97, 100–01 (1989) (“The

In some instances, a focus on superficial markers of complexity can manifest itself in measures that extend beyond mere rhetoric. For example, in order to carry out one of his campaign promises, in January 2017, Donald Trump signed an executive order requiring federal agencies to eliminate two existing regulations for every one that they implement.<sup>22</sup> Trump's executive order did not represent the first time that lawmakers considered the idea of limiting regulatory volume in such a manner. In 2010, Senator Mark Warner made a similar proposal that would have required eliminating one old regulation for each new regulation issued.<sup>23</sup>

At first glance, reducing the number of regulations and limiting the number of words in an existing regulation might not seem like two sides of the same coin. Under the latter approach, parties are still subject to the given regulation but must use fewer words to discern its meaning. Under the former approach, at first glance, it might seem that parties have been freed from the burden of having to consider a regulation at all, and so, of course, their lives must be easier. On further examination, however, this is often not the case, especially in tax. In the absence of any regulation on point, the conclusion is not always that taxpayers may do anything they like. In tax, eliminating a regulation may often mean that taxpayers must still comply with tax law, but now are given less guidance by regulators regarding the law's meaning. In other words, when regulations interpret law rather than create new legal requirements, a reduction in the volume of regulations does not decrease regulatory burden.

The United States Senate Legislative Drafting Manual illustrates the fixation on word count that extends beyond mere rhetoric, which provides: "Use short, simple sentences rather than complex or compound sentences. If a shorter term is as good as a longer

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error of focusing upon the length of a rule as a test of its complexity is a natural one for lawyers and accountants to make. . . . But the real measure of simplification is the extent to which the planning and compliance burdens [are reduced]. . . . One can imagine that the repeal of certain tax provisions might actually complicate the tax law."); Paul, *Simplification*, *supra* note 13, at 286 ("Some people say the language of the statute should be less legal: We should abolish verbosity and make the statute read as chastely as the Ten Commandments. This is easier to promise than to deliver. While I hold no brief for verbosity, it is safe to say that legislative reticence on a subject may often do more harm than good.").

22. Exec. Order No. 13,771, 80 Fed. Reg. 9339 (Feb. 3, 2017).

23. Mark R. Warner, Opinion, *To Revive the Economy, Pull Back the Red Tape*, WASH. POST (Dec. 13, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/12/AR2010121202639.html> [<https://perma.cc/4ZQ5-GRNL>].

term, use the shorter term.”<sup>24</sup> The idea of using more concise language when it is “as good as” a lengthier version is unobjectionable. However, in some cases, lawmakers might give the charge to be succinct too much weight in a way that involves sacrifice of genuine simplicity.

Along similar lines, one method used by the IRS to estimate the amount of time required by taxpayers to complete tax forms assumes that the amount of time required to complete a form will increase proportionately to the number of lines on the form and the number of words in the instructions.<sup>25</sup> As others have observed, this method could produce misleading results because lengthier instructions can sometimes make the task of completing forms speedier and more straightforward.<sup>26</sup> Imagine a tax form with one line “Tax Owed or Refund Due \_\_\_\_\_” accompanied by instructions stating, “Determine the amount of tax owed by the taxpayer or refund owed to the taxpayer and report on line 1.” Unless accompanied by significant substantive changes to tax law, such a form would doubtlessly take much more time to complete than the current form by any taxpayer who attempted to comply with law and who now must turn to the IRC, the Treasury Regulations, and other sources of authority that are not addressed to the nonexpert.

As suggested by the examples above, superficial markers of simplicity often involve metrics of the volume of enacted law—word counts, page counts, number of regulations, and the like. Length of applicable law is not irrelevant to an assessment of law’s complexity.<sup>27</sup> However, the volume of enacted law is not the be-all and end-all indicator of genuine complexity. Oftentimes, efforts to shorten applicable law can sacrifice other objectives in a way that, counterproductively, makes law more complex.

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24. OFFICE OF THE LEGISLATIVE COUNSEL, U.S. SENATE, LEGISLATIVE DRAFTING MANUAL § 102 (1997), [https://law.yale.edu/system/files/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel\\_LegislativeDraftingManual%281997%29.pdf](https://law.yale.edu/system/files/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual%281997%29.pdf) [<https://perma.cc/F74P-5EKL>].

25. See Gale, *supra* note 13, at 1472.

26. See *id.* (“When complexity is related to the length of instructions on the form, the ADL model may get the sign wrong. For example, if instructions were moved off of a form and into a separate publication, the ADL model would show compliance costs falling when the change may well have actually increased compliance costs.”).

27. See, e.g., William Li et al., *Law Is Code: A Software Engineering Approach to Analyzing the United States Code*, 10 J. BUS. & TECH. L. 297, 310 (2015) (“Laws that are long and verbose require more time to read, interpret, and revise. Despite being a simple and limited metric, length is a reasonable starting point for quantifying legal code.”).

## II. GENUINE SIMPLICITY AND COMPLEXITY

Much has been written about complexity in tax law and law generally.<sup>28</sup> This literature assesses genuine complexity, which is more difficult to define than superficial complexity that refers to the volume of law, but encompasses myriad of factors, including computational complexity and difficulties navigating the law. Existing literature observes that complexity is problematic because it imposes costs on various parties and at various stages in time.<sup>29</sup>

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28. There is a growing literature that imports concepts from complexity science into studies of legal complexity. See, e.g., J.B. Ruhl & Daniel Martin Katz, *Measuring, Monitoring, and Managing Legal Complexity*, 101 IOWA L. REV. 191, 194–95 (2015). As Professors Ruhl and Katz explain:

The key premise in applying complexity science to legal systems is that there is a difference between complexity in the sense of ‘complicatedness’ and complexity in the sense of system structure and behavior. . . . Few dispute that law is complicated; whether it is complex in the systems context is another matter. To be sure, the complicatedness of law should not be discounted. Law can be vast, dense, vague, and intricate, making compliance a daunting undertaking. Complexity as used in our project, however, is getting at something different. Even in a world where all individual rules are perfectly clear and cost-efficient, knowing how to comply could still be burdensome. . . . [T]he *system* of rules could be difficult to navigate and predict because of the interactions between the multitude of rules and institutions administering them. Complying with one rule could require actions that make complying with another rule more difficult. Similarly, because legal rules often are interrelated through techniques such as cross-referencing and stare decisis, how one rule is interpreted and applied could affect the meaning or operation of other rules.

*Id.* at 201–02. I acknowledge that the term “complexity” might be better understood, in a formal sense, in the way in which it is defined by this body of literature, and that some of the factors that I identify as contributing to “complexity” might be more accurately described as contributing to “complicatedness.” However, when policymakers aim to reduce “complexity,” or claim to be taking steps to do so, they are likely referring to both “complicatedness” and “complexity,” and, therefore, the discussion in this article is not limited to “complexity” in the formal sense. However, I nevertheless use the term “complexity” for ease of exposition.

29. See, e.g., DAVID F. BRADFORD, UNTANGLING THE INCOME TAX 266 (1986) (“[D]ealing with the law’s arcane provisions requires rare talents that might be better applied to other tasks in the economic system.”); Gale, *supra* note 13, at 1464–65 (“[W]e define the complexity of a tax system as the sum of compliance costs—which are incurred directly by individuals and businesses—and administrative costs—which are incurred by government. Compliance costs include the time taxpayers spend preparing and filing tax forms, learning about the law, and maintaining recordkeeping for tax purposes. The costs also include expenditures of time and money by taxpayers to avoid or evade taxes, to have their taxes prepared by others, and to respond to audits, as well as any costs imposed on third parties, such as employers. Administrative costs, although incurred by government, are ultimately borne by individuals. These costs include the budget of the tax collection agency, and the tax-related budgets of other agencies that help administer tax programs.” (footnotes omitted)); McCaffrey, *supra* note 13, at 1288–91 (discussing costs imposed on different taxpayers due to complexity); Andrea Monroe, *Integrity in Taxation: Rethinking Partnership Tax*, 64 ALA. L. REV. 289, 299–300 (2012) (“A generally accepted definition of tax complexity focuses on taxpayers’ problems in interpreting the law, complying with the law, and structuring

Complexity affects taxpayers at three stages—first, the “planning stage” (the time prior to the taxpayer initiating a transaction); second, the “compliance stage” (the time at which the taxpayer seeks to report the tax consequences of a transaction that has already occurred); and third, the “enforcement stage” (the time when the IRS audits and potentially challenges the tax consequences claimed by the taxpayer).<sup>30</sup>

At each stage, different factors of complexity will affect taxpayers who attempt to ascertain the content of tax law prior to acting and those taxpayers who do not do so. At the outset, it is worth noting that a taxpayer may fall in the former camp at some stages in time, but in the latter camp at other stages in time. For instance, some taxpayers might engage in a transaction without considering its tax consequences but seek expert assistance when reporting the transaction’s tax consequences and seek assistance if the IRS challenges the results reported. These taxpayers, at the planning stage, are uninformed about the content of tax law, but they do attempt to determine the content of tax law at the compliance stage and the enforcement stage. It is also worth noting that the presence of a taxpayer in one group or the other is not an unchangeable fact and might be influenced by the cost faced by taxpayers who do ascertain the tax consequences of law prior to acting. In particular, a decrease in the cost of ascertaining the content of law might increase the number of taxpayers who do so.<sup>31</sup> This part will discuss complexity faced by taxpayers at each stage in time.

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transactions to benefit from the law.”); Schuck, *supra* note 13, at 18 (“A more complex law entails many significant transaction costs which must be accounted for. Such law tends to be more costly and cumbersome to administer, more difficult for lawmakers to formulate and agree upon, and more difficult to reform once established. Administrators and subjects of such law must invest more in order to learn what it means, when and how it applies, and whether the costs of complying with it are worth incurring. Other costs of administering a complex legal system include those related to bargaining about and around the system’s rules and litigating over them.” (footnote omitted)).

30. See, e.g., BRADFORD, *supra* note 29, at 266–67 (“We may distinguish three kinds of complexity: ‘compliance complexity’ (referring to the problems faced by the taxpayer in keeping records, choosing forms, making necessary calculations, and so on); ‘transactional complexity’ (referring to the problems faced by taxpayers in organizing their affairs so as to minimize their taxes within the framework of the rules); and ‘rule complexity’ (referring to the problems of interpreting the written and unwritten rules).”).

31. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 596 (1992).

### A. *Taxpayers at the Planning Stage*

At the planning stage, complexity in tax law can increase the amount of effort required to predict the tax consequences of a contemplated transaction. In addition to increasing the amount of time spent to learn about tax law, complexity in tax law is costly at this stage because some taxpayers might not learn about existing tax law and, therefore, might act differently than if they had known the law.<sup>32</sup> Furthermore, complexity can impose costs at the planning stage by inducing taxpayers to make changes to their behavior that they would not otherwise make.<sup>33</sup>

#### 1. Taxpayers Who Attempt to Ascertain Content of Law

At the planning stage, anything that increases the amount of time required (on the part of the taxpayer or an advisor) to determine the likely tax outcome of a contemplated transaction represents complexity from the point of view of the group of taxpayers who attempt to ascertain the content of tax law prior to acting.<sup>34</sup> Although not the ultimate determining factor, length of applicable law can contribute to complexity, as can the technical nature of the rules.<sup>35</sup> If applicable law is located in a wide array of sources, the

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32. See, e.g., BRADFORD, *supra* note 29, at 266–67 (“We may distinguish three kinds of complexity: . . . ‘transactional complexity’ (referring to the problems faced by taxpayers in organizing their affairs so as to minimize their taxes within the framework of the rules)”; GALE, *supra* note 13, at 1465 (“[T]ax provisions that are simpler are more likely to be used. Provisions aimed at encouraging certain activities—such as saving for college—will be less likely to be used and hence less effective if people cannot understand how they work.”); McCaffrey, *supra* note 13, at 1271 (discussing “structural complexity”).

33. See sources cited *supra* note 32.

34. For this group of taxpayers, Professor Surrey’s description of complexity is apt. See Surrey, *supra* note 13, at 673 (“[C]omplex substantive tax rules with complex interrelationships, characterized by complex variations in the tax treatment of transactions often not differing greatly in substance or form, all of which are expressed in a complex statutory terminology and arrangement.”).

35. See, e.g., Donaldson, *supra* note 13, at 733 (“The federal tax laws are ‘complex’ because: (1) they contain a large number of rules, (2) those several rules are highly detailed [, and] . . . (5) they require technical expertise to comprehend fully . . . .” (footnotes omitted)); McCaffrey, *supra* note 13, at 1270–71 (“The first basic understanding of simplification may be termed ‘technical complexity.’ Such complexity refers to the pure intellectual difficulty of ascertaining the meaning of tax law.” (footnote omitted)); Monroe, *supra* note 29, at 300 (“Complex provisions typically involve opaque terminology, elaborate definitional schemes, computations, or multifactored tests”); Schuck, *supra* note 13, at 3–4 (describing technicality as a feature of a complex legal system and observing, “*Technical* rules require special sophistication or expertise on the part of those who wish to understand and apply them. Technicality is a function of the fineness of the distinctions a rule makes, the specialized terminology it employs, and the refined substantive judgments it requires. The Internal

task of the taxpayer (or the taxpayer's advisor) becomes more onerous.<sup>36</sup>

The extent to which applicable law coincides with the taxpayer's, or his or her advisor's, intuitive expectations can ease the process of determining the applicable law's content. Law is more amenable to quick understanding when it conforms to our expectations.<sup>37</sup> Moreover, when law is more consistent with expectations, a taxpayer, or his or her advisor, can more readily reach a conclusion, with some confidence, about the tax treatment of a transaction that is not explicitly covered by existing law. As Professor Stanley S. Surrey put it, when tax law is not intuitive:

[I]t becomes impossible to fly by the seat of one's tax pants. . . . While this is not a serious calamity, there is a need to provide working room for the use of tax instinct. An intelligent statutory structure makes it possible to rely on a well-trained tax instinct to provide the probable answer to the problems unforeseen by the draftsman.<sup>38</sup>

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Revenue Code is probably the leading example of technical rules." (footnotes omitted)). The technical nature of rules may matter more or less depending on the type of taxpayer at which the provision is targeted. *See, e.g.*, Bittker, *supra* note 13, at 1–2, 5 (observing that technical language is less of a concern when it is addressed to tax experts and applies to transactions that rarely occur, while simplification of "mass" provisions that affect millions of taxpayers may be more important); Donaldson, *supra* note 13, at 672 ("One cannot pick up the Code and, like a summer novel, gain an understanding by thumbing through its pages from start to finish. There is no question that the Code makes for slow reading (and in many cases, re-reading). Yet the calls to make the Code more reader-friendly forget that the Code's intended audience is not the lay taxpayer." (footnotes omitted)); Surrey, *supra* note 13, at 697 ("In general, the pattern here is that of experts speaking to experts, with the knowledgeable practitioners talking to the draftsmen in the stilted, artificial language that each understands well. But it is their language alone and not that of the less expert and uninitiated.").

36. *See, e.g.*, Partlow, *supra* note 14, at 320 ("With broad statutes and imprecise language, the task of filling in the detail is left to the courts and the Treasury. As courts interpret the law, the 'simple' and easily understood words in the Code become complex because their meanings stem from judicial interpretation and can be understood only by reference to case law."); Schuck, *supra* note 13, at 3–4 (listing differentiation as a feature of a complex legal system and stating, "A legal system is *institutionally differentiated* insofar as it contains a number of decision structures . . .").

37. *See* Schuck, *supra* note 13, at 45–46; Surrey, *supra* note 13, at 699.

38. Surrey, *supra* note 13, at 699.

Consistency in the law also eases the learning process.<sup>39</sup> One commentator, for instance, proposed the harmonization of various numerical tests in tax law that turn on some result being “greater than or equal to” or “greater than” a given baseline so that such tests would either always use a “greater than” test or always use a “greater than or equal to” test.<sup>40</sup> Although no one would claim that such a change would revolutionize tax planning, it would spare the experienced advisor the small marginal cost of verifying which test is used in a given area of law with which they might already be familiar. Consistency could also be achieved by adopting uniform definitions of various terms and concepts used across different IRC provisions, as others have proposed or suggested in various contexts.<sup>41</sup>

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39. *E.g., id.* at 696 (“The sections and provisions carrying the rules for the treatment of a given area must possess an internal consistency, so that the framework and inner logic of the statutory solution can be grasped.”). Consistency across rules and with statutory purpose also eases the process of determining the likely tax consequences of a transaction not explicitly covered by existing rules and makes it more likely that taxpayers who act without verifying the content of law might make correct guesses. *See, e.g.,* Donaldson, *supra* note 13, at 737–38 (“Tax expenditures routinely violate basic principles of the federal income tax. This breeds confusion among taxpayers. An individual, for instance, might know of the home mortgage interest deduction and reasonably extrapolate from this rule that all home-related expenses are deductible. Of course, this extrapolation is wrong, but the mortgage interest deduction reasonably leads taxpayers into thinking other, related expenditures may be deductible. Some taxpayers will likely claim such deductions without checking for authority.”); Paul, *How Much Simplicity*, *supra* note 13, at 161–62 (“[C]oherence eases application of a tax regime. Under a coherent regime, people may interpret the law in the absence of a specific authority on point by considering the regime’s purposes. Under an incoherent regime, interpretation of the law is more difficult because the competing purposes embodied in the regime favor inconsistent interpretations.”).

40. *See* Richard M. Lipton, *Statement of Richard M. Lipton on Behalf of the American Bar Association Section of Taxation Before the Committee on Finance of the United States Senate on the Subject of Tax Simplification*, 54 TAX LAW. 617, 631–32 (2001) (“Even without reexamination, the attribution rules could be simplified by providing consistently either an ‘equal to’ standard or a ‘greater than’ standard for application of ownership percentages.”).

41. *See, e.g.,* Donaldson, *supra* note 13, at 727–28 (“Consistent definitions would do a lot to reduce the tax complexity of phaseouts.”); Michelle Lyon Drumbl, *Those Who Know, Those Who Don’t and Those Who Know Better: Balancing Complexity, Sophistication, and Accuracy on Tax Returns*, 11 PITT. TAX REV. 113, 127 (2013) (“Olson recommends that Congress consolidate the family status provisions as a measure to simplify the Code.”); Lipton, *supra* note 40, at 631–32 (proposing standardization of attribution rules); Charles E. McLure, Jr., *The Budget Process and Tax Simplification/Complication*, 45 TAX L. REV. 25, 53 (1989) (discussing the problem of various definitions with little coherence); Partlow, *supra* note 14, at 328 (“Congress could eliminate one area of unnecessary complexity by adopting a uniform definition of qualified education expenses for purposes of the various education tax incentives, qualified state tuition programs, and education IRAs.” (footnotes omitted)); Deborah H. Schenk, *Simplification for Individual Taxpayers: Problems and Proposals*, 45 TAX L. REV. 121, 129 (1989) (“[D]efinitions and qualifying thresholds should be as simple and uniform as possible.”).

On an even grander scale, consistency would be achieved by taxing all similar transactions in a similar manner to the greatest extent possible.<sup>42</sup> Doing so eases the learning process—once you know how one version of the transaction is taxed, you know how all similar versions are taxed. It also might reduce the possibility that varying tax consequences will induce taxpayers to incur planning costs in the form of modifying their contemplated transactions.<sup>43</sup>

Uncertainty, caused by inconsistent and counterintuitive laws, will also increase the cost of predicting the tax consequences of a given transaction and could, in some cases, cause a taxpayer to abandon a transaction altogether.<sup>44</sup> Uncertainty could result from a shortage of clear law on a given topic. It could also be the case that uncertainty arises because a taxpayer cannot predict, with absolute confidence, the pre-tax outcome of a contemplated transaction and tax consequences vary significantly based on small changes in the pre-tax outcome. For instance, if a taxpayer's likely income places the taxpayer close to the dividing line between two tax brackets, the taxpayer may have difficulty predicting his or her marginal tax rate, which could affect the tax consequences of a contemplated transaction.

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42. See, e.g., BRADFORD, *supra* note 29, at 267 (“Transactional complexity arises basically because of the possibility that economically equivalent activities may have very different tax consequences, depending on the precise way the transactions are structured. . . . Rules with a high degree of economic consistency serve transactional simplicity, although they may impose costs in the form of compliance and rule complexity.”).

43. Whether or not this effect will occur is not entirely clear. It could occur, or it is possible that taxing some transactions similarly could induce taxpayers to make even more costly modifications to their transactions to obtain more favorable tax treatment. For further discussion, see, for example, David M. Schizer, *Frictions as a Constraint on Tax Planning*, 101 COLUM. L. REV. 1312, 1320 (2011) (“[E]ven if some planning is stopped, total planning waste could still increase if those who continue to plan face higher costs.”); David A. Weisbach, *Disrupting the Market for Tax Planning*, 26 VA. TAX REV. 971, 973–74 (2007); David A. Weisbach, *Line Drawing, Doctrine, and Efficiency in Tax Law*, 84 CORNELL L. REV. 1627, 1628–30, 1664–71 (1999); David A. Weisbach, *Ten Truths About Tax Shelters*, 55 TAX L. REV. 215, 239 (2002) [hereinafter *Ten Truths*]. See generally Phillip A. Curry et al., *Creating Failures in the Market for Tax Planning*, 26 VA. TAX REV. 943 (2007) (discussing how policymakers face a trade-off when considering taking steps to attack current tax planning strategies, namely, the trade-off between (i) costs arising from taxpayers’ use of those current tax planning strategies and (ii) costs arising from taxpayers’ search for new tax planning strategies once the existing methods are attacked).

44. See, e.g., Sidney I. Roberts, *A Report on Complexity and the Income Tax*, 27 TAX L. REV. 325, 327–28 (1972) (describing how the difficulty of reaching a sufficiently certain conclusion can prevent some transactions from going forward; stating, “In many cases, however, a proposed transaction cannot bear the cost and delay that is required [to obtain a private letter ruling]”); Schuck, *supra* note 13, at 3 (listing indeterminacy or uncertainty as a feature of a complex legal system).

In addition to increasing the cost incurred by taxpayers, uncertainty could have varying effects on different taxpayers' actions.<sup>45</sup> Taxpayers who merely want to follow the law may respond to additional uncertainty by structuring their affairs more conservatively and erring on the side of overreporting income. Taxpayers who seek to push boundaries and game the system as much as possible will try to take advantage of additional uncertainty by structuring their transactions more aggressively and erring on the side of underreporting income.

## 2. Taxpayers Who Do Not Attempt to Ascertain Content of Law

Some taxpayers do not attempt to ascertain the tax consequences of law prior to engaging in a transaction. For this group of taxpayers, the only complexity-induced cost faced at the planning stage is the cost of engaging in a transaction that differs from the transaction in which the taxpayer would have engaged had he or she acquired information about tax law prior to acting.

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45. See, e.g., Sheldon I. Banoff, *The Use and Misuse of Anti-Abuse Rules*, 48 TAX LAW. 827, 837 (1995) ("The effect of [some anti-abuse rules] . . . is to erase the bright line or relocate it for more cautious taxpayers. Those who are overly aggressive may use the vagueness and ambiguity of the rule as an indirect endorsement of their proposals. Thus, conservative practitioners may become more so, and aggressive planners will have a larger client base to solicit."); Richard J. Kovach, *Bright Lines, Facts and Circumstances Tests, and Complexity in Federal Taxation*, 46 SYRACUSE L. REV. 1287, 1303 (1996) ("Risk aversion can produce unnecessarily conservative determinations by practitioners. Yet if the risk of audit is perceived to be relatively slight, some professionals will ignore the ominous implications of a faulty facts and circumstances analysis in favor of taking a turn at the roulette wheel of the audit casino."); Kyle D. Logue, *Tax Law Uncertainty and the Role of Tax Insurance*, 25 VA. TAX REV. 339, 374–75 (2005) ("[U]sing such legal uncertainty in this way is a fairly imprecise tool for deterring aggressive tax planning, since some taxpayers will be induced to over-comply and others, the less risk-averse, will be inclined to take a chance and exploit the ambiguity."); Leigh Osofsky, *The Case Against Strategic Tax Law Uncertainty*, 64 TAX L. REV. 489, 492 (2011) ("Taxpayers may have divergent reactions to increased ambiguity, whereby taxpayers with a low chance of success on the merits would be more likely to claim tax benefits, whereas taxpayers with a high chance of success on the merits would have the opposite inclination."); Partlow, *supra* note 14, at 321 ("As courts work to apply broad laws to specific factual scenarios, gaps in time exist where people with the best lawyers and accountants can circumvent the laws and take advantage of ambiguities."); Roberts, *supra* note 44, at 330–31; *Ten Truths*, *supra* note 43, at 249–50 (2002) ("[T]hose arguing against uncertainty . . . would argue that taxpayers vary in their risk aversion, so that uncertainty affects taxpayers differently. . . . This, it might be argued, is unfair—uncertainty in the tax law helps the bad guys and hurts the good guys. It is not clear, however, why this is more unfair than disparate responses to other elements of taxation."). For a similar observation regarding standards in law generally, see, for example, Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 385 (1985) ("Because standards do not draw a sharp line between permissible and impermissible conduct, some risk-averse people will be chilled from engaging in desirable or permissible activities, and some risk-preferring people will be encouraged to engage in antisocial conduct.").

For such a taxpayer, the chief contributing factor will be how widely tax law diverges from his or her intuitive expectations. Other factors traditionally associated with complexity (such as length of enacted law and the technical nature of applicable rules) have no relevance to the costs borne by this group of taxpayers at the planning stage given that they have no contact with the rules themselves.<sup>46</sup> Thus, these factors are only relevant insofar as they correlate with a divergence between the content of law and intuitive expectations. In some cases, long, technical rules might diverge from intuitive expectations,<sup>47</sup> but this is not always true—there are circumstances in which precisely formulating an intuitive concept could require more verbosity and technical specificity than enacting a counterintuitive shortcut.<sup>48</sup>

### B. *Taxpayers at the Compliance Stage*

Complexity imposes costs at the compliance stage when taxpayers must exert effort to report the tax consequences of events that have already transpired.

#### 1. Taxpayers Who Attempt to Ascertain Content of Law

Many of the factors that contribute to complexity are relevant at both the planning stage and the compliance stage. For instance, the length and technical nature of rules and the presence of rules in diffuse sources could all be aggravating factors. In addition, at

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46. These factors may have indirect relevance by causing more taxpayers to shift from the pool of taxpayers who do not ascertain the content of law prior to acting to the pool of taxpayers who do. See *supra* note 31 and accompanying text.

47. See, e.g., George Mundstock, *Taxation of Business Intangible Capital*, 135 U. PA. L. REV. 1179, 1227 (1987) (explaining tax rules and expectations may not converge); Lawrence Zelenak, *Complex Tax Legislation in the TurboTax Era*, 1 COLUM. J. TAX L. 91, 93 (2009) (“In the TurboTax era, mere computational complexity does not rule out any legislative innovation. . . . On the curse side, however, it may be that computationally complex tax rules are usually bad rules for reasons other than mere computational complexity. . . . [P]rovisions of major computational complexity and widespread applicability usually constitute bad tax policy even when computers are available to do all the number crunching. Such provisions render the take system opaque to the average taxpayer, making it impossible for taxpayers to evaluate whether their tax liabilities are generated by a fair set of rules, and making it impossible for taxpayers to engage in informed tax planning.”).

48. For further discussion and examples, see *infra* Part III.B.

the compliance stage, taxpayers may have to contend with record-keeping and reporting obligations that require taxpayers to engage in time-consuming activities even if the tasks required are clear.<sup>49</sup>

Some factors that can ameliorate compliance complexity deserve note. First, if the taxpayer is required to produce factual information that could be difficult to obtain (such as the value of given assets), such a requirement is not costly in any meaningful sense if the taxpayer would be compelled to obtain that information for non-tax reasons (if, for instance, business considerations would require valuing the assets) even without a separate tax requirement to do so.<sup>50</sup> Second, if the technical nature of rules entails computational complexity at the compliance stage, such complexity is largely eliminated by pervasively used tax software.<sup>51</sup> For instance, any complexity resulting from the fact that a taxpayer might be required to apply multiple tax rates to his or her income that falls within multiple brackets is, as a practical matter, a non-issue at the compliance stage because the determination is automated by tax software.<sup>52</sup>

## 2. Taxpayers Who Do Not Attempt to Ascertain Content of Law

In the United States federal income tax context, compliance generally requires taxpayers to take action that they would not take but for the fact that tax law requires it. Namely, most taxpayers must file an annual income tax return. Therefore, taxpayers who do not attempt to ascertain the content of tax law are unlikely to act as required by law at the compliance stage by mere happenstance. As a result, a taxpayer who acts without obtaining information about special requirements imposed by tax law will not be

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49. BRADFORD, *supra* note 29, at 266–67 (“We may distinguish three kinds of complexity: [including] ‘compliance complexity’ (referring to the problems faced by the taxpayer in keeping records, choosing forms, making necessary calculations, and so on) . . . .”); McCaffrey, *supra* note 13, at 1272.

50. See Gale, *supra* note 13, at 1465 (“A number of issues arise in efforts to measure tax complexity . . . [including that] only the *incremental* costs due to taxes should be included. Even with no taxes, firms would need to keep track of income and expenses to calculate profits, and individuals would engage in financial planning. This activity should be omitted from compliance cost measures.”).

51. See, e.g., Zelenak, *supra* note 47, at 92–93 (“[C]omputers [are] available to perform calculations of any degree of complexity in milliseconds . . . . In the TurboTax era, mere computational complexity does not rule out any legislative innovation.”).

52. See, e.g., *id.*

in compliance and will incur the resulting costs (which could include owing interest and penalties if the taxpayer underpays his or her tax liability or forgoing a refund if the taxpayer overpaid through withholding).<sup>53</sup> Assuming self-reporting remains a feature of United States tax law, the only mechanism for alleviating costs that would be borne by individuals who do not ascertain the content of law at the compliance stage is to reduce the number of taxpayers that fall in this category. One way to do so is to ameliorate the costs faced by taxpayers who do obtain information about tax law at the compliance stage so that more taxpayers shift into this group.<sup>54</sup> To this end, factors that reduce complexity mentioned above in Part II.B.1 (such as the availability of tax software) are highly relevant as are proposals to ease compliance further, such as through the institution of a “Ready Return” system. A “Ready Return” system entails the IRS preparing a draft return on behalf of the taxpayer based on information available to the IRS for the taxpayer to verify and modify as needed.<sup>55</sup>

### C. *Taxpayers at the Enforcement Stage*

The potential costs to a taxpayer at the enforcement stage include overpayment of tax liability; for example, if the IRS imposes greater tax liability upon the taxpayer than what is due under a more correct interpretation of law and the IRS’s determination prevails. In addition, a taxpayer incurs costs of responding to an IRS audit and litigation costs if the taxpayer contests the IRS’s determination.

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53. Reducing compliance costs for taxpayers who are unaware of law would entail the institution of a return-free filing system in which all taxes are withheld at source. This would shift compliance costs from individual taxpayers to employers and other payors, and it would involve substantive changes to tax law. See, e.g., Joseph Bankman, *Simple Filing for Average Citizens: The California Ready Return*, 107 TAX NOTES 1431, 1434 (2005) (discussing the return-free filing system); Michael Hatfield, *Taxation and Surveillance: An Agenda*, 17 YALE L.J. & TECH. 319, 333–35 (2015) (discussing how third-party reporting shifts compliance from taxpayers to employers and other payors).

54. See *supra* note 31 and accompanying text.

55. For discussion of the “Ready Return” system, see Bankman, *supra* note 53, at 1432–33.

## 1. Taxpayers Who Attempt to Ascertain Content of Law

If existing guidance in an area is unclear, the enforcement costs described above will likely be higher, even for a taxpayer who attempts to ascertain the content of tax law. Uncertainty in law is more likely to result in litigation, and increases the likelihood that the IRS could successfully impose greater tax liability than what might be owed under an arguably more correct interpretation of law.<sup>56</sup>

## 2. Taxpayers Who Do Not Attempt to Ascertain Content of Law

A taxpayer who does not attempt to ascertain the content of law at the enforcement stage will presumably be at the mercy of the IRS and will simply accept whatever result the IRS determines is appropriate on audit. If the relevant law is clear and grants no discretion to the IRS, such a taxpayer is less likely to face the prospect of paying more tax liability than what is owed.<sup>57</sup>

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56. See, e.g., Miller, *supra* note 18, at 20, 53 (“The social context approach [defined as an approach to rule making that ‘employs broadly worded rules whose precise meaning is worked out in various contexts as cases arise’] is also incremental and evolutionary. Thus, it is subject to uncertainty and tends to encourage litigation.”). One potentially offsetting consideration is that more uncertainty might decrease the possibility that penalties will be assessed against taxpayers for underreporting tax liability. See Osofsky, *supra* note 45, at 507–29. The lower likelihood of penalties could exacerbate the tendency of uncertainty to affect different taxpayers differently—a possibility mentioned above. See *supra* note 45 and accompanying text.

57. See, e.g., Philip T. Hackney, *Charitable Organization Oversight: Rules v. Standards*, 13 PITT. TAX REV. 83, 103–04 (2015) (“Where standards reign, the argument goes, a biased agent can hide behind discretion. With true rules, discretion is circumscribed.”). Another relevant factor will be whether the factual information needed to determine tax liability is readily available to the IRS. See Hatfield, *supra* note 53. For instance, if all necessary information was provided to the IRS through third-party reporting, the IRS may have sufficient information even without the taxpayer responding appropriately to audit. See *id.* If some of the necessary information can be provided only by the taxpayer, then, even if the substantive law is clear, a taxpayer who simply accepts the IRS’s redetermination of tax liability may ultimately pay more in tax than what he or she in fact owed. See *id.*; see also Kyle D. Logue, *Optimal Tax Compliance and Penalties When the Law Is Uncertain*, 27 VA. TAX REV. 241, 251–55 (2007) (creating a continuum of understanding to which all taxpayers can be assessed based on their knowledge of the law, and, in regards to their level of familiarity, their liability under the law).

### III. A FOCUS ON SUPERFICIAL SIMPLICITY UNDERMINES MORE GENUINE SIMPLICITY

As discussed above in Part I, when discussing simplicity, many focus on superficial indicators of simplicity related to the volume of enacted law. Although the length of applicable law is not entirely irrelevant to evaluate the complexity inherent in law, an undue preoccupation with the length of law can, counterproductively, exacerbate complexity in some respects.

This part will discuss four ways in which a preoccupation with the length of law can exacerbate complexity. First, it will discuss how the use of cross-references (which help to reduce the volume of law) could compound complexity in some ways. Second, it will discuss how a focus on the volume of law can prompt the use of measures that make law counterintuitive, which increases the costs at the planning stage especially for taxpayers who do not ascertain the content of tax law prior to acting. Third, it will discuss how a focus on word counts could cause the IRS to curtail the volume of its guidance, making the process of determining the content of law more difficult, especially for less sophisticated taxpayers. Finally, it will discuss how limiting the amount of enacted law could make law less certain.

#### A. *Convoluting Cross-References*

In an aim to make tax law superficially simpler (in the sense of including fewer words), lawmakers use cross-references.<sup>58</sup> When cross-references are used, a particular section of the IRC or a Treasury Regulation incorporates language contained in another

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58. See, e.g., F. Scott Boyd, Symposium, *Looking Glass Law: Legislation by Reference in the States*, 68 LA. L. REV. 1201, 1216 (2008) (“Indeed, reduction in the size and complexity of published codes is the principal reason material is incorporated rather than being set forth verbatim in the first place. . . . [T]he resulting code becomes shorter and easier to read.”); Arie Poldervaart, *Legislation by Reference—a Statutory Jungle*, 38 IOWA L. REV. 705, 706 (1953) (“Use of [cross-references] . . . has become increasingly popular with legislators for several reasons. Constantly pressed by their constituents and their fellow legislators for economies in legislation they have sought ways to reduce the bulk of their proposed enactments . . . .”); Horace Emerson Read, *Is Referential Legislation Worth While?*, 25 MINN. L. REV. 261, 295 (1941) (“Greatest advantage gained by incorporating terms by reference is that the new bill may be shortened with two practical benefits, reduction in volume of the statute books, and application of established precepts of proven worth to a new situation with a minimum of legislative tinkering.”).

statutory or regulatory section, signaling the relevant section number rather than reproducing the language included in the other section.<sup>59</sup> For instance, Section X might define the term “Term-of-Art,” and Section Y, seeking to use that definition, might state “Term-of-Art, as defined in Section X” rather than repeating the language contained in Section X. In this example, Section X is the “referenced statute” and Section Y is the “referencing statute.”

In addition to making law shorter, cross-references can offer other simplification-related benefits. For an individual who is already familiar with the referenced statute, use of a cross-reference may expedite the process of becoming familiar with the referencing statute—there is no need to compare the language to make sure that it is the same, lawmakers have explicitly provided that the language used is the same. Also, when the referencing statute incorporates a term from the referenced statute without modifying

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59. Sometimes the IRC makes use of implicit cross-references, as Professor Lawsky observes. See Sarah Lawsky, *Formalizing the Code*, 70 TAX L. REV. 377, 378 (2017). An implicit cross-reference uses a term that is defined elsewhere but does not explicitly refer the reader to the other section. *Id.* at 378. Implicit cross-references may make the code even less readable for non-experts than explicit cross-references; they do not replicate the relevant language and they do not alert the reader to the location of the relevant language. *Id.* Furthermore, in some cases, they do not provide clear direction to experts because they may not make clear which portions of the language in the implicitly referenced section are part of the definition. *Id.* at 380–94. In addition to other examples, Professor Lawsky provides the example of code section 163(h)(3)(C)(i) which provided that, in order for debt to qualify as “home equity indebtedness” it must NOT be “acquisition indebtedness,” in addition to meeting other requirements. *Id.* at 382–86. (Professor Lawsky’s article was published prior to the enactment of tax legislation in December 2017 that altered the rules involved in this example). The term “acquisition indebtedness” was defined in section 163(h)(3)(B)(i) to include money borrowed to acquire, construct, or substantially improve a qualified residence under a loan secured by the residence. I.R.C. § 163(h)(3)(B)(i) (2012). Section 163(h)(3)(B)(ii) went on to provide that the total amount “treated as acquisition indebtedness” could not exceed \$1 million. *Id.* § 163(h)(3)(B)(ii). Ambiguity arose in a situation in which, for instance, a taxpayer borrowed \$1,100,000 to acquire a qualified residence and the loan was secured by the residence. Lawsky, *supra*, at 380–86. One million of the loan could constitute acquisition indebtedness. The issue was whether or not the additional \$100,000 could constitute home equity indebtedness. *Id.* If the \$1 million cap on “acquisition indebtedness” was part of the definition of “acquisition indebtedness”, then the extra \$100,000 was not “acquisition indebtedness” so that it could qualify as “home equity indebtedness” if it met the other applicable requirements. *Id.* at 383. If the \$1 million cap on “acquisition indebtedness” was not part of the definition of that term, then the extra \$100,000 was “not acquisition indebtedness” and so it could not qualify as “home equity indebtedness.” *Id.* at 384. If drafters used an explicit cross-reference, doing so might force them to think more precisely about to which part of section 163(h)(3)(B) they intend to refer, and doing so might prompt them to draft the language in a manner that avoids the ambiguity. Along similar lines, Professor Lawsky explains how formalizing the Code would force drafters to be more precise. *Id.* at 396. It is worth noting that abandoning cross-references altogether and replicating the relevant language would also force drafters to be more precise. When replicating the relevant language, they would be forced to face the question of exactly what parts of the language are intended to apply in the context of the referencing provision.

the incorporated language (as is true in the Term-of-Art example above), using cross-references promotes uniformity<sup>60</sup>—instead of multiple definitions of a given concept, there is only one—and uniformity has various simplifying benefits as discussed above.<sup>61</sup> Of course, the same uniformity could be achieved by including in the referencing statute the language from the referenced statute verbatim rather than by using a cross-reference, but that approach would sacrifice the brevity offered by cross-reference.

While cross-references offer the simplification benefits just discussed, they can also contribute to complexity in several respects.<sup>62</sup> First, while use of cross-references may make the Code and regulations more readable for tax experts (especially if they are already familiar with the referenced statute), cross-references may make the tax code and regulations less readable for tax novices by sending them on a tour of various sections, as Section X refers to Section Y which may, in turn, refer to Section Z and so on.<sup>63</sup> Even for the expert, cross-references can make tracking the meaning of a given

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60. See, e.g., Glenn E. Coven, *Bad Drafting—a Case Study of the Design and Implementation of the Income Tax Subsidies for Education*, 54 TAX LAW. 1, 16 (2000) (“While the heavy use of cross-references is one of the leading causes of textual complexity throughout the Code and accompanying regulations, the offsetting benefit of this drafting technique is the resulting uniformity.”); Read, *supra* note 58, at 295 (“[The g]reatest advantage gained by incorporating terms by reference is that the new bill may be shortened with two practical benefits, reduction in volume of the statute books, and application of established precepts of proven worth to a new situation with a minimum of legislative tinkering.”).

61. See *supra* notes 40–43 and accompanying text.

62. The use of cross-references and other drafting techniques are, by no means, the most significant factors in the overall complexity of tax law. However, they are also not entirely irrelevant. See, e.g., Bittker, *supra* note 13, at 12 (“Although the involuted phraseology of the Code may be less of a problem than humorists and even experts sometimes allege, it is certainly not a blessing.”).

63. See, e.g., Lance W. Rook, *Laying Down the Law: Canons for Drafting Complex Legislation*, 72 OR. L. REV. 663, 670 (1993) (“While cross-references are expedient for the drafter, they make reading the statute more complex by directing a reader back and forth among other provisions, which likewise may include other cross-references.”). One response to the concern that cross-references make reading the tax code difficult for the tax novice is that the Code is not targeted to non-experts. Non-experts can use IRS publications, which can be drafted in a way that does not use cross-references and other drafting techniques targeted at experts. See, e.g., Donaldson, *supra* note 13, at 674 (“The proper place for reader-friendly text with diagrams and examples is the publications and instructions published by the Service.”). Furthermore, a recent study suggests that drafters of the IRC view their role as drafting for the tax expert and have a “desire not to upset existing users’ understandings of the law.” See Oei & Osofsky, *supra* note 5, at 5–7, 28–31, 33–34. Given this, drafting techniques that make the law more understandable for the expert who is already familiar with existing tax law are unsurprising.

provision difficult, especially if a tax code section refers to a provision that falls outside the tax code.<sup>64</sup> As others have observed,<sup>65</sup> cross-references can be difficult to follow when the referencing statute incorporates provisions from the referenced statute but also modifies the language being incorporated.<sup>66</sup> In addition, even for the expert, use of cross-references could potentially raise difficult interpretation questions, such as whether regulations later issued under the referenced statute also apply in the context of the referencing statute.

Cross-references could also, in some cases, make later amendments more difficult, if, for example, lawmakers want to amend the referenced statute but do not want the amendment to apply in the context of the referencing statute.<sup>67</sup> If, instead, lawmakers seek to amend the referenced statute and want the amendment to apply for purposes of the referencing statute as well, then the presence of a cross-reference can streamline the process.

### B. *Counterintuitive Shortcuts*

When lawmakers are overly preoccupied with containing the amount of law, they may enact provisions that are counterintuitive

64. See, e.g., Coven, *supra* note 60, at 16 (“[C]ross-references to legislation codified outside of Title 26 complicates research and is an added source of potential error.”).

65. See, e.g., Rook, *supra* note 63, at 683 (“A cross-reference should not be used if the drafter needs the reader to modify the cross-referenced material. Cross-referencing is not worthwhile if the drafter adopts only bits and pieces of the cross-referenced material.”).

66. An example is contained in section 304(C)(3) which provides:

(A) In general[:] Section 318(a) (relating to constructive ownership of stock) shall apply for purposes of determining control under this section.

(B) Modification of 50-percent limitations in section 318[:] For purposes of subparagraph (A)—

(i) paragraph (2)(C) of section 318(a) shall be applied by substituting ‘5 percent’ for ‘50 percent’, and

(ii) paragraph (3)(C) of section 318(a) shall be applied—

(I) by substituting ‘5 percent’ for ‘50 percent’, and

(II) in any case where such paragraph would not apply but for subclause (I) by considering a corporation as owning the stock (other than stock in such corporation) owned by or for any shareholder of such corporation in that proportion which the value of the stock which such shareholder owned in such corporation bears to the value of all stock in such corporation.

I.R.C. § 304(C)(3) (2012).

67. See, e.g., Coven, *supra* note 60, at 60 (“Nothing undermines the positive benefits of a cross-reference more quickly than the amendment or disappearance of the cross-referenced provision.”); Li et al., *supra* note 27, at 313 (“Furthermore, revisions to any part of a chain of references could contribute to unknown, unintended downstream effects.”).

in various respects, which increases the costs at the planning stage, especially costs faced by taxpayers who do not ascertain the content of tax law prior to acting.<sup>68</sup> In other words, shorter provisions may be less intuitive than lengthier substitutes. This part will provide two examples of situations in which more intuitive provisions are lengthier than less intuitive alternatives.

#### 1. Lengthier Provisions Allowing Closer Correspondence Between Tax Outcome and Economic Outcome

Tax law is more likely to match intuitive expectations when tax gain or loss recognized by a taxpayer more closely matches the taxpayer's economic gain or loss. In some circumstances, tying tax gain or loss more closely to economic gain or loss requires greater verbosity. One example is when partnerships allocate partners' gain or loss of contributed property by one of its partners. Imagine, for instance, that a partner owns land that has increased in value in the partner's hands. The partner contributes the land to a partnership. The partner will not recognize tax gain at the time of the contribution.<sup>69</sup> When the partnership subsequently sells the land, the partnership will recognize gain or loss.<sup>70</sup> However, a partnership does not itself pay tax at an entity level on income recognized by the partnership but, rather, allocates items of taxable income, gain, loss, and deduction among its partners so that its partners will take such items into account for purposes of computing their taxable income.<sup>71</sup> Consequently, any gain or loss recognized by the partnership upon sale of the land would be allocated to its partners.

Section 704(c) of the IRC governs the allocation of gain or loss when the partnership sells the land in the example above.<sup>72</sup> The Treasury Regulations under section 704(c) provide that "allocations must be made using a reasonable method that is consistent with the purpose of section 704(c)."<sup>73</sup> This purpose, according to the

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68. I am not claiming that lengthier provisions are always more intuitive. Sometimes, the opposite may be true. Rather, my aim is to counter the belief that lengthier law is always more difficult to understand overall by pointing out a number of counter examples.

69. I.R.C. § 721(a) (2012).

70. *Id.* § 704(c).

71. *Id.* §§ 701–02.

72. *Id.* § 704(c).

73. Treas. Reg. § 1.704-3(a)(1) (2018).

Treasury Regulations, is to “prevent the shifting of tax consequences among partners with respect to” any increase or decrease in the property’s value that occurred before contribution to the partnership.<sup>74</sup> The Treasury Regulations describe three methods that are “generally reasonable.”<sup>75</sup> These three methods are the “traditional method,” the “traditional method with curative allocations,” and the “remedial allocation method” (referred to as the “remedial method” in this article).<sup>76</sup> The Treasury Regulations do not require that partnerships use any particular method, as long as the “overall method or combination of methods are reasonable based on the facts and circumstances and consistent with the purpose of section 704(c).”<sup>77</sup>

The remedial method generally does the best job of ensuring that the tax consequences of any increase in value of the property that occurred before the partner contributed the property to the partnership will not be shifted from the contributing partner to the other partners.<sup>78</sup> In other words, the remedial method ensures that the partners’ tax gain or loss will most closely correspond to their economic gain or loss.

Historical resistance to a requirement that partnerships use the remedial method or a similar approach has been driven, in part, by the view that use of such a method is overly complex.<sup>79</sup> In particular, the method is viewed as computationally complex.<sup>80</sup> The additional computational complexity inherent in the remedial method may increase, somewhat, the difficulty of calculating the tax consequences that a taxpayer must report at the compliance stage;

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74. *Id.*

75. *Id.*

76. *Id.* § 1.704-3(b)–(d).

77. *Id.* § 1.704-3(a)(2). In addition, the Treasury Regulations contain an anti-abuse rule that places some constraints on the flexibility afforded by the Regulations. *Id.* § 1.704-3(a)(10). For further discussion of the anti-abuse rule, see, for example, Emily Cauble, *Making Partnerships Work for Mom and Pop and Everyone Else*, 2 COLUM. J. TAX L. 247, 261–63 (2011).

78. For more detailed discussion, see, for example, Cauble, *supra* note 77, at 251–67.

79. Treasury also did not mandate use of this method, in part, because of a belief that it lacked authority to do so. However, even if this belief is correct, Congress could require use of the method. For further discussion, see, for example, Cauble, *supra* note 77, at 272; Laura Cunningham, *Use and Abuse of Section 704(c)*, 3 FLA. TAX REV. 93, 116–17 (1996); Leigh Osofsky, *Unwinding the Ceiling Rule*, 34 VA. TAX REV. 63, 107 (2014).

80. See Cauble, *supra* note 77, at 273 n.84 and accompanying text.

however, any additional difficulty can be ameliorated by tax software.<sup>81</sup> At the planning stage, the remedial method may actually be easier than the traditional method in that it results in tax consequences corresponding more closely to economic consequences, a result that is likely more consistent with most taxpayers' intuitive expectations.<sup>82</sup>

The remedial method under section 704(c) produces results that may be more intuitive than the traditional method by ensuring a closer tie between the tax gain or loss recognized by a partner and his or her economic gain or loss.<sup>83</sup> Yet, expressing the steps required by the remedial method necessitates more words than describing the operation of the traditional method.<sup>84</sup> Thus, this illustration presents one example of a situation in which more words are required to reach a more intuitive result. In this particular area, from a simplification perspective, lawmakers have opted for the worst of all worlds by allowing taxpayers to choose among various methods, rather than mandating use of the remedial method.<sup>85</sup> This option produces superficial complexity (the regulations contain the words necessary to describe all methods rather than one), as well as genuine complexity (the regulations allow for use of methods that produce counterintuitive results and they allow for choice which further complicates planning decisions).<sup>86</sup>

## 2. Lengthier Provisions That Prevent a Difference in Tax Outcome from Turning on a Small Non-Tax Difference

Tax law is also more likely to match intuitive expectations when small non-tax changes do not result in large changes to tax outcomes. Some tax provisions are designed in such a way that the

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81. See *id.* at 291–301; *supra* note 51 and accompanying text.

82. See Cauble, *supra* note 77, at 294–95. In addition, requiring the use of the remedial method would provide simplification at the planning stage for taxpayers who ascertain the content of law by obviating the need to compare results arising from different methods. See, e.g., Monroe, *supra* note 29, at 313–14 (“[T]he complexity of each menu option, standing alone, pales in comparison to the combined effect of three distinct allocation methods, which a partnership must choose among every time a contribution occurs.”).

83. See *supra* notes 69–82 and accompanying text.

84. Compare Treas. Reg. § 1.704-3(b) (2018) (using fewer words to describe the traditional method than used to describe the remedial method), with *id.* § 1.704-3(d) (using more words to describe the remedial method than used to describe the traditional method).

85. See Cauble, *supra* note 77, at 272.

86. See *id.* at 285, 291.

opposite is true—that is, small non-tax changes can produce drastic changes in tax outcome. Many provisions that operate in this manner are described as producing a “cliff effect.”<sup>87</sup>

In order to demonstrate this phenomenon, consider, for example, the tax treatment of certain fringe benefits provided by an employer to an employee. Section 132 of the IRC exempts from gross income various fringe benefits, provided that certain requirements are met.<sup>88</sup> “Qualified employee discounts” are one type of benefit that can be excluded from gross income.<sup>89</sup> For an employee discount to qualify for exclusion, in addition to meeting other requirements, the discount must comply with a dollar limitation.<sup>90</sup> In the case of services, the threshold is set at 20% of the price at which the service is normally offered to customers.<sup>91</sup> Imagine an employer offers a service to customers for \$100 and offers the service to employees for \$79. If the rules were designed in a way that produced a cliff effect, the \$21 discount would be taxable, in its entirety, because it exceeds the \$20 threshold (20% of \$100). As it happens, this particular provision does not produce a cliff effect, but, instead, provides that, in the situation above, \$20 of the \$21 discount can constitute a qualified employee discount (provided that the other applicable requirements are met), while only the remaining \$1 of the discount is taxable.<sup>92</sup>

Because the current rule does not produce a cliff effect, it is likely more intuitive than the hypothetical alternative that would, instead, result in small non-tax changes leading to outsized changes to tax outcome.<sup>93</sup> Under the hypothetical alternative, assuming all

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87. For a discussion of cliff effects in tax generally, see Lily L. Batchelder, *What Should Society Expect from Heirs? The Case for a Comprehensive Inheritance Tax*, 63 TAX L. REV. 1, 91–92 n.303 (2009) (explaining that limiting the deferral of some of an heir’s inheritance in his tax liability avoided a cliff effect); Karen C. Burke & Grayson M.P. McCouch, *Death Without Taxes?*, 20 VA. TAX REV. 499, 531 (2001); Glenn E. Coven, *Taxing Corporate Acquisitions: A Proposal for Mandatory Uniform Rules*, 44 TAX L. REV. 145, 174–75 (1989); Manoj Viswanathan, *The Hidden Costs of Cliff Effects in the Internal Revenue Code*, 164 U. PA. L. REV. 931, 933 (2016) (explaining how certain credits, deductions, and exclusions vanish once a numerical criterion is met); Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 59 (2000); Lawrence Zelenak, *Taxing Gains at Death*, 46 VAND. L. REV. 361, 416–17 (1993).

88. I.R.C. § 132 (2012).

89. *Id.* § 132(a)(2), (c).

90. *Id.* § 132(c)(1).

91. *Id.* § 132(c)(1)(B).

92. See Treas. Reg. § 1.132-3(e) (2018).

93. A rule that does not produce a cliff effect can also more closely correspond to its

other applicable requirements for exclusion were met, if the service were offered to employees for \$80, then none of the \$20 employee discount would be includable in income, but, if the discount were increased by a mere dollar, then the entire \$21 discount would be includable in income. Under the provision actually in effect, assuming other applicable requirements for exclusion are met, if the service was offered to employees for \$80, then none of the \$20 employee discount would be includable in income, and if the discount was increased by a mere dollar, then only the additional dollar would be includable in income.<sup>94</sup>

In the example above, current law contains a rule that does not produce a cliff effect. In other areas, however, lawmakers have adopted rules that produce cliff effects.<sup>95</sup> For example, a taxpayer who would otherwise be eligible for the Earned Income Tax Credit loses the benefit entirely if the taxpayer's investment income exceeds a given dollar threshold (\$3500 for 2018) by any amount.<sup>96</sup> Rules producing cliff effects are typically rationalized based on simplification considerations (reducing computational complexity or other compliance costs).<sup>97</sup> Although the rules may ameliorate complexity in this respect, they produce counterintuitive results, which increases the costs faced by taxpayers at the planning stage, especially for taxpayers who do not evaluate tax consequences prior to acting. In some cases, lawmakers have used an approach that is the worst of all worlds from a simplification perspective. That is, they will employ a phase-out of a rule over a range of income so that the tax effect changes gradually over that range (which would be computationally more complex than a rule that

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underlying rationale, and, in that way, it may be more likely to correspond to the intuitive expectations of a taxpayer who understands the provision's underlying rationale. For a discussion of how cliff effects involve arbitrariness which can undermine a provision's underlying purpose, see Emily Cauble, *Taxing Publicly Traded Entities*, 6 COLUM. J. TAX L. 147, 171–72 (2015).

94. See Treas. Reg. § 1.132-3(e) (2018).

95. For some examples, see Viswanathan, *supra* note 87, at 936–39.

96. I.R.C. § 132(i)–(j) (2012) (statutory threshold of \$2200 adjusted annually for inflation in accordance with subsection j).

97. See, e.g., Viswanathan, *supra* note 87, at 940 (“The use of a cliff effect with respect to the income of a qualifying relative establishes a bright-line rule which provides definitional clarity because classification as a dependent is binary and does not exist as a continuous function: a nonchild relative either is or is not a qualifying relative. Because the Internal Revenue Code does not provide a partial deduction for partially qualifying dependents, the bright-line rule creates a cliff effect with respect to the income of the nonchild relative.”).

produced a cliff effect), but the phase-out range will be narrow (so that small non-tax changes can still produce drastic tax changes).<sup>98</sup>

Just as rules that produce cliff effects may be computationally simpler than gradual alternatives,<sup>99</sup> they can also, in many cases, be embodied in fewer words. Consider the example regarding the 20% threshold for qualified employee discounts. The rule currently contained in the code that does not produce a cliff effect states: “The term ‘qualified employee discount’ means any employee discount with respect to qualified property or services *to the extent* such discount does not exceed— . . . in the case of services, 20 percent of the price at which the services are being offered by the employer to customers.”<sup>100</sup>

If the rule were modified in such a way that it did produce a cliff effect, the statutory language could be shortened slightly to provide:

The term “qualified employee discount” means any employee discount with respect to qualified property or services *if* such discount does not exceed—in the case of services, 20 percent of the price at which the services are being offered by the employer to customers.

In addition, the Treasury Regulations currently contain an example to demonstrate the tax treatment of a discount that exceeds the threshold, which could be shortened in the event of such a modification.<sup>101</sup> Thus, this illustration presents another example of a

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98. Newly enacted section 199A provides an example of this phenomenon. I.R.C. § 199A (Supp. V 2018).

99. See *supra* notes 87–97 and accompanying text.

100. I.R.C. § 132(e)(1)(B) (2012) (emphasis added).

101. In particular, Treasury Regulation section 1.132-3(e) currently provides:

With respect to services, an employee discount of up to 20 percent may be excludable. If an employee discount exceeds 20 percent, the excess discount is includable in the employee’s income. For example, assume that a commercial airline provides a pass to each of its employees permitting the employees to obtain a free round-trip coach ticket with a confirmed seat to any destination the airline services. Neither the exclusion of section 132(a)(1) (relating to no-additional-cost services) nor any other statutory exclusion applies to a flight taken primarily for personal purposes by an employee under this program. However, an employee discount of up to 20 percent may be excluded as a qualified employee discount. Thus, if the price charged to customers for the flight taken is \$300 (under restrictions comparable to those actually placed on travel associated with the employee airline ticket), \$60 is excludable from gross income as a qualified employee discount and \$240 is includable in gross income.

Treas. Reg. § 1.132-3(e) (2018). If the rules were modified so that the 20% threshold was a binary test that produced a cliff effect, this portion of the regulations could instead state:

With respect to services, an employee discount of up to 20 percent may be excludable. If an employee discount exceeds 20 percent, the entire discount is

situation in which a lengthier formulation of a rule is necessary to avoid a counterintuitive result.

### C. *Misleading Omissions*

As discussed above, a focus on volume of law can cause Congress or the Treasury to use drafting techniques that economize on words but potentially undermine simplicity in other respects.<sup>102</sup> Just as pressure to be succinct can cause Congress or the Treasury to draft provisions in ways that may be less readable or less intuitive, similar forces might influence the IRS to issue concise guidance explaining applicable tax law. Not infrequently, commentators will cite to the length of an IRS publication on a given topic as suggestive of the intricate nature of the applicable law.<sup>103</sup> A concern about optics (i.e., wanting to avoid the appearance that tax law is overly complex) might exert pressure on the IRS to keep guidance as short as possible. In addition, shorter guidance may be more likely to be read. In an effort to reduce the length of its publications, the IRS might omit certain details, caveats, and exceptions. Professors Blank and Osofsky observe, for instance, that the IRS's efforts to use plain language and make its publications understandable by a lay audience can prompt the IRS to omit details from its guidance, with the result of potentially misleading taxpayers.<sup>104</sup> As they note, in this way, efforts to achieve the appearance of simplicity in a

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includible in the employee's income. For example, assume that a commercial airline provides a pass to each of its employees permitting the employees to obtain a free round-trip coach ticket with a confirmed seat to any destination the airline services. Neither the exclusion of section 132(a)(1) (relating to no-additional-cost services) nor any other statutory exclusion applies to a flight taken primarily for personal purposes by an employee under this program. However, an employee discount of up to 20 percent may be excluded as a qualified employee discount. Thus, if the price charged to customers for the flight taken is \$300 (under restrictions comparable to those actually placed on travel associated with the employee airline ticket), \$300 is includible in gross income.

102. See *supra* Parts III.A, III.B.

103. See, e.g., Drumbl, *supra* note 41, at 125 ("The EITC statute is more than 2500 words long . . . . Because of the complexity, the Service created detailed instructions, worksheets, and a publication . . . . However, even these simplified explanations are overwhelming: Publication 596, Earned Income Credit, is 62 pages long.")

104. Blank & Osofsky, *supra* note 8, at 234, 237–40; see also Lawrence Zelenak, *The Uses and Abuses of Simplicity*, 66 EMORY L.J. ONLINE 2011, 2015, 2017–18 (2016), [http://law.emory.edu/elj\\_documents/volumes/66/online/zelenak.pdf](http://law.emory.edu/elj_documents/volumes/66/online/zelenak.pdf) [<https://perma.cc/RF4N-WJM6>].

given area of law can actually make matters more complex for taxpayers who are led astray by incomplete guidance.<sup>105</sup> This is particularly troubling given that the intended audience for IRS publications is often less sophisticated taxpayers, rather than tax experts who consult more authoritative sources of tax law when available.<sup>106</sup>

#### D. *Uncertainty*

As discussed above, less verbose statutes might contain drafting techniques that make them less readable, more concise legal enactments might take shortcuts that make law counterintuitive, and briefer IRS guidance might contain misleading omissions. It is also the case that, in an effort to contain the volume of law, Congress, the Treasury, and the IRS might simply refrain from issuing guidance on a given topic entirely. An absence of guidance issued ahead of time will contribute to uncertainty, which can increase costs for taxpayers at various stages in time, as discussed above in Part II.<sup>107</sup> In addition, as discussed above, uncertainty can affect different taxpayers differently—prompting some to take more aggressive tax positions and prompting others to act more conservatively.<sup>108</sup> In some cases, uncertainty created by a void in legislative and administrative guidance will eventually be resolved by judicial opinion, but, even in those cases, the presence of law in diffuse

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105. Blank & Osofsky, *supra* note 8, at 234, 237–38, 240.

106. *See, e.g., id.* at 194 (“IRS simplifications can impose unequal benefits and burdens on different types of taxpayers. Sophisticated taxpayers possess the ability to reject IRS simplifications that benefit the government . . .”).

107. Other scholars have noted the potential trade-off between certainty and volume of law. *See, e.g.,* Bittker, *supra* note 13, at 2 (“The statutory language was simpler in earlier years, but the taxpayer and his adviser had to weigh the implications of hundreds of judicial decisions, most of which simply announced that all of the relevant facts and circumstances [had] to be weighed in determining whether the income of a trust was taxable to the grantor or to its trustee and beneficiaries. . . . [R]egulations and . . . statutory rules that replaced these judicial decisions were complex, but they made it much easier to find one’s way through the wilderness.”); Koppelman, *supra* note 21, at 102 (“Although lengthy rules may in some cases be less accessible than shorter rules . . . , they may yield concrete answers more readily than opaque standards. . . .”); Surrey, *supra* note 13, at 697 (“The detailed statute, however, despite its intricacy, is probably more satisfactory to tax lawyers and accountants simply because it furnishes the answers to many of their problems. Generalizations, though they be easier to read, are unsatisfactory to the tax advisor when the tax burden is an important one.”).

108. *See supra* note 45 and accompanying text.

sources can complicate the task of determining applicable tax consequences.<sup>109</sup>

### E. *Implications*

At this point, a skeptical reader might be asking himself or herself, “So what?” Complexity is complicated and involves trade-offs. Measures that can simplify the law in some respects will make it more complicated in other respects.<sup>110</sup> The skeptical reader might observe, however, that if a simplification measure simplifies the law in at least one respect, then perhaps it has achieved its intended effect. Measures that curtail the volume of law, for instance, may not have missed the mark of simplification entirely because decreasing the volume of enacted law can decrease costs for some taxpayers.<sup>111</sup>

I have two responses. First, demonstrating that decreasing the volume of law can produce complexity is a more significant revelation than it may seem at first glance. At least at a rhetorical level, length of applicable law is often held up as the truest indicator of

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109. See, e.g., Bittker, *supra* note 13, at 2 (“The statutory language was simpler in earlier years, but the taxpayer and his adviser had to weigh the implications of hundreds of judicial decisions, most of which simply announced that all of the relevant facts and circumstances [had] to be weighed in determining whether the income of a trust was taxable to the grantor or to its trustee and beneficiaries. . . . [R]egulations and . . . statutory rules that replaced these judicial decisions were complex, but they made it much easier to find one’s way through the wilderness.”); Walter J. Blum, *Simplification of the Federal Income Tax Law*, 10 TAX L. REV. 239, 240 (1955) (“[A]ttention can now be turned to the various meanings of simplification which can be detected when tax experts speak of simplifying the income tax law. First is the notion that all the law on the subject should appear in a single place. . . . The obvious merit of such an extensive code is that the expert would be required to concern himself with only one instead of with several sets of legal rules. Moreover, all the rules would be of equal authority, and there would be no need to face the sometimes challenging task of reconciling rules of varying degrees of authority.”); Partlow, *supra* note 14, at 320 (“With broad statutes and imprecise language, the task of filling in the detail is left to the courts and the Treasury. As courts interpret the law, the ‘simple’ and easily understood words in the Code become complex because their meanings stem from judicial interpretation and can be understood only by reference to case law.”); Schuck, *supra* note 13, at 3–4 (listing differentiation as a feature of a complex legal system and stating, “A legal system is *institutionally differentiated* insofar as it contains a number of decision structures . . .”).

110. See, e.g., Sohoni, *supra* note 1, at 1608 (“Complexity is easy to redistribute but hard to reduce. Efforts to reduce one sort of complexity . . . often involve trading off against another form of complexity . . . .”); Wright, *supra* note 20, at 716 (“We can reduce legal complexity in one respect without also reducing the law’s complexity in other respects, and usually only at the cost of greater complexity in other respects. . . . Even when we do seem to reduce legal complexity in accordance with our own debatable value preferences, we often only succeed in shifting inescapable complexities forward or backward in time, or to a different stage of the law making and law enforcement process.”).

111. See *supra* Part II.

complexity. It is useful to moderate the enthusiasm for curtailing the volume of law by bearing in mind that doing so can, in some cases, make law more complex in other respects.

Second, this article's analysis points toward a verdict for superficial indicators of complexity that is even harsher than the conclusion that such indicators are not the only relevant barometers of complexity. In instances in which shortening law increases complexity in the ways identified in Parts III.A through III.D, the offsetting increases to complexity are likely to outweigh any simplification benefits achieved by shortening a statute, regulation, or IRS publication. This outcome results from the fact that the presence of fewer words is, in many cases, of most benefit to experts (who least need simplification) while the offsetting costs fall disproportionately on nonexperts (who most need simplification).

My skeptical reader may remain unconvinced. In many areas of law, people who can afford to obtain expert advice will fare better than those who cannot. Is there any reason to be particularly concerned about this phenomenon in the tax context? In response, I would argue that the existence in tax law of advantages for sophisticated individuals is especially problematic. Objections to the advantages that are bestowed upon wealthy individuals by other areas of law are often met with the response that redistribution should be relegated to the tax system.<sup>112</sup> For example, those arguing for rules that facilitate economically efficient outcomes in contractual relationships will often contend that the manner in which the benefit of a contract is divided between the parties need not be addressed by contract law because any desired redistribution should be accomplished through the tax system.<sup>113</sup> Because tax law is often held up as the area of law best-suited to address distributional concerns, tax law must be less tolerant of bias against unsophisticated individuals who lack financial resources. Otherwise, distributional concerns remain unaddressed.

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112. See, e.g., Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821, 822 (2000) [hereinafter *Clarifying the Role*]; Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667 (1994) [hereinafter *Redistributing Income*]; Cass. R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106, 125 (2002); David A. Weisbach, *Should Legal Rules Be Used to Redistribute Income?*, 70 U. CHI. L. REV. 439, 439 (2003).

113. See, e.g., *Clarifying the Role*, *supra* note 112, at 822–25; *Redistributing Income*, *supra* note 112, at 667–68; Sunstein, *supra* note 112, at 125–26; Weisbach, *supra* note 112, at 439.

In order to demonstrate the ways in which the costs of some simplification measures fall disproportionately on unsophisticated taxpayers, consider, first, the example of cross-references. As discussed in Part III.A, use of cross-references in a statute or regulation makes the provision that uses the cross-reference shorter than an alternative provision that, instead, replicates the language in the referenced statute verbatim. As discussed in Part II, for taxpayers who ascertain the content of tax law prior to acting, curtailing the volume of law can, at least to some degree, expedite the process of learning the content of applicable law. In the case of cross-references in particular, for an expert who is already familiar with the referenced statute, the use of a cross-reference may hasten the process of becoming familiar with the referencing statute—there is no need to compare the language to make sure that it is the same, lawmakers have explicitly provided that the language used is the same.

Thus, the benefits of cross-references accrue to taxpayers who ascertain the content of tax law prior to acting and who are themselves experts or who are represented by experienced advisors. For any taxpayer who attempts to ascertain the content of tax law prior to acting and who is not an expert and who is not represented by an expert, use of cross-references (instead of repeating language verbatim) may make the applicable provision less readable and, as a result, impede the process of understanding applicable law.

For taxpayers who act without ascertaining the content of law at all, the use of cross-references has no effect. Such taxpayers have no contact with the rules themselves, and, therefore, the length and readability of the rules has no effect on such taxpayers. Factors such as length and readability only matter insofar as they correlate with how closely the rules match intuitive expectations. The decision between using a cross-reference and replicating applicable language affects a provision's form but not its substance. Therefore, it has no effect on the extent to which the provision coincides with intuitive expectations.

Thus, the benefits of cross-references accrue mainly to the most sophisticated taxpayers (or the taxpayers with the most sophisticated advisors) while the costs are borne mainly by taxpayers who attempt to ascertain the content of tax law prior to acting but who are unrepresented or represented by less experienced counsel. As such, from a simplification perspective, cross-references target the wrong taxpayers—they benefit those least in need of simplification and burden those who need simplification more.

In response, one might argue that statutes and regulations (in which cross-references are used) are not written for an audience of tax novices but are aimed at experts (or those seeking to be experts).<sup>114</sup> Other materials (such as IRS publications) are aimed at the novice.<sup>115</sup> This argument misses the mark for a few reasons. First, even for the tax expert, cross-references can contribute to complexity in some contexts, as discussed above in Part III.A.<sup>116</sup> Second, referring the novice to IRS publications is not a satisfying solution when such publications are not always binding on the IRS (and, therefore, cannot be relied upon by taxpayers)<sup>117</sup> and when such publications contain misleading omissions in some cases, as discussed above in Part III.C. Third, a more satisfying solution to better target each audience would involve issuance of an equally authoritative version of each provision that replicated the applicable language rather than use a cross-reference. This version would be more readable by the tax novice and, unlike publications, could be relied upon.<sup>118</sup> Of course, doing so would make the tax code and regulations even longer.

Just as cross-references offer simplification to taxpayers who need it the least, so too do counterintuitive shortcuts. Part III.B provided examples of contexts in which more words are required to make tax law more intuitive, i.e., to describe a rule that more closely ties tax consequences to economic consequences or to encapsulate a rule that ensures that a drastic change in tax consequences does not turn on a minor non-tax difference. In these cases, lawmakers sometimes opt for the shorter version even though fewer words create a departure between tax consequences and economic consequences or allow for incremental non-tax changes to cause outsized changes in tax outcome.<sup>119</sup> Doing so offers superficial simplicity by curtailing the volume of enacted law. This effect benefits taxpayers who attempt to ascertain the content

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114. See, e.g., Donaldson, *supra* note 13, at 672; Schuck, *supra* note 13, at 4; Surrey, *supra* note 13, at 697.

115. See *supra* note 62 and accompanying text.

116. This can be true, for instance, when the provision refers to a provision outside the tax code or when regulations under a referenced statute are later adopted.

117. See, e.g., Emily Cauble, *Detrimental Reliance on IRS Guidance*, 2015 WIS. L. REV. 421, 438.

118. For additional discussion of mechanisms for targeting simplification measures at unsophisticated taxpayers that involve the use of various taxpayer relief rules, see Oei & Osofsky, *supra* note 5, at 57–61.

119. See *supra* Part III.B.

of law. In some cases, it is also true that the shorter version happens to be computationally simpler.<sup>120</sup> Thus, it may offer benefits to taxpayers at the compliance stage who attempt to comply with tax law. However, by driving a wedge between tax outcome and what an uninformed taxpayer might intuitively expect, using the shorter version burdens taxpayers who engage in transactions without contemplating their likely tax consequences. When tax consequences depart from intuitive expectations, uninformed taxpayers are more likely to engage in transactions that differ from the transactions in which they would have engaged had they known the resulting tax consequences.

Thus, counterintuitive shortcuts are a mixed bag—on the upside, they shorten the law and sometimes reduce compliance costs; on the downside, they burden taxpayers, especially uninformed taxpayers, at the planning stage. Whether this represents a net good or a net bad is not entirely clear. However, it is at least plausible that, on net, the complexity created by such measures outweighs any simplification produced.<sup>121</sup> This outcome is plausible if more taxpayers receive expert advice at the compliance stage than the planning stage. Ultimately, whether or not this is true is an empirical question. However, it is plausibly true because most people are aware, at least in general terms, of the requirement to file a tax return. Therefore, if they are not capable of complying with the filing requirements independently, they will seek expert advice.<sup>122</sup> By contrast, many people may be unaware of the myriad ways in which tax planning could improve the tax consequences of everyday transactions, and, thus, they may act without seeking tax advice. As a result, the pool of unsophisticated taxpayers at the planning stage likely may be much larger than the pool of unsophisticated taxpayers at the compliance stage. If this is true, measures that prioritize compliance simplicity over planning simplicity, which entails a better match between tax law and intuition, may be inadvisable. Such measures burden a (plausibly large)

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120. See *supra* Part III.B.2.

121. In the case of provisions governing the tax treatment of events that are unlikely to be influenced by tax consequences, the opposite conclusion is possible. In particular, it is possible that low-income taxpayers would benefit most from a reduction in compliance complexity with respect to certain tax provisions. See, e.g., Schenk, *supra* note 41, at 127–28.

122. Increased compliance complexity may require lower income taxpayers to spend additional amounts seeking filing assistance. Rather than addressing this issue by ameliorating compliance complexity in a way that exacerbates planning complexity, it may be more advisable to address it by increasing the availability of volunteer income tax assistance or otherwise providing funding to lower income individuals for filing assistance.

group of unsophisticated taxpayers at the planning stage and benefit a (plausibly smaller) group of unsophisticated taxpayers at the compliance stage.

Just as cross-references and counterintuitive shortcuts are likely misdirected simplification efforts, so too are misleading omissions in IRS publications. The costs of such omissions will almost always fall on unsophisticated taxpayers. Sophisticated taxpayers will not follow misleading advice in IRS publications when doing so is to their detriment, while unsophisticated taxpayers might follow it in all cases.<sup>123</sup> Thus, by burdening unsophisticated taxpayers who most need simplification, superficial simplification efforts that entail shortening IRS publications will almost always miss the mark. One might argue that, if a publication is shorter, it is more likely to be read, and, if the publication is not read, it has no chance of providing assistance. However, rather than simply omitting material entirely, other measures, proposed by Professors Blank and Osofsky, would be more likely to keep publications at a manageable length without leading unsophisticated taxpayers astray.<sup>124</sup>

As discussed above in Part III.D, measures that shorten applicable law can sometimes produce uncertainty. It is not clear whether such measures would have a greater effect on unsophisticated or sophisticated taxpayers. Some measures that produce certainty can make the law less intuitive, which could burden unsophisticated taxpayers who engage in transactions without considering their tax consequences. In particular, if greater certainty is achieved in a way that makes use of arbitrary, mathematical rules, it can make the law less intuitive and, therefore, increase costs faced at the planning stage by taxpayers who do not ascertain the content of tax law prior to acting.<sup>125</sup> For taxpayers

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123. See Blank & Osofsky, *supra* note 8, at 194 (“IRS simplifications can impose unequal benefits and burdens on different types of taxpayers. Sophisticated taxpayers possess the ability to reject IRS simplifications that benefit the government . . .”).

124. See, e.g., Blank & Osofsky, *supra* note 8, at 252–56 (discussing the use of red-flagging to point out IRS simplifications).

125. See, e.g., Miller, *supra* note 18, at 43 (“The unfairness of mathematical rules is not always so evident, but their essential feature is the failure to distinguish between individual circumstances in their application in a way that is more pronounced than other rules. In short, the mathematical rule is overtly arbitrary. This overt arbitrariness accounts for its relative determinacy. It also supports the idea that there is a correlation between arbitrariness and determinacy. The widespread use of the mathematical rule in tax law is probably the strongest point in favor of the contention that tax law is more determinate than law generally.”); Surrey, *supra* note 13, at 699 (“Given such a detailed, often mathematically-

who are somewhat more sophisticated (at least sophisticated enough to consider tax consequences prior to acting), but who are unrepresented or are represented by less experienced counsel, clear rules may be easier to apply than less certain standards; therefore, such taxpayers could be burdened by measures that shorten the law and sacrifice certainty.<sup>126</sup> Furthermore, some tools for providing certainty that increase the volume of applicable law (such as safe harbors) could make the content of law easier to learn for those who attempt to do so and, at the same time, soften the harshness of an arbitrary rule for those who act without considering tax consequences.<sup>127</sup>

In short, it is not entirely clear whether simplification measures that sacrifice certainty disproportionately burden unsophisticated taxpayers; in part, whether or not this is true depends on the means by which lawmakers would provide greater certainty. In another sense, measures that sacrifice certainty may be poorly targeted in that they disproportionately benefit aggressive taxpayers and burden conservative taxpayers.<sup>128</sup> Taxpayers who merely want

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oriented statute, it becomes impossible to fly by the seat of one's tax pants. Tax intuition and instinct are of no help in the face of myriads of rules turning on eighty per cent of this or that, one year from this or that date, this or that being done before this or that date, this or that attribution of stock ownership, and so on.”).

126. See, e.g., Kaplow, *supra* note 31, at 569 (“Because a standard requires a prediction of how an enforcement authority will decide questions that are already answered in the case of a rule, advice about a standard is more costly.” (citing RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 44–45 (1990))); Schizer, *supra* note 43, at 1319 (“Since wealthy and well advised taxpayers have an edge in planning, limiting this advantage can lead to a more equitable distribution of tax burdens. The average taxpayer’s faith in their system is preferred, promising voluntary compliance and attendant savings in enforcement costs.”).

127. For discussion of safe harbors, see generally Emily Cauble, *Safe Harbors in Tax Law*, 47 *CONN. L. REV.* 1385 (2015) (developing a conceptual framework for understanding safe harbors in tax law as a rules-standards hybrid while also articulating the advantages and disadvantages of such a conception); Susan C. Morse, *Safe Harbors, Sure Shipwrecks*, 49 *U.C. DAVIS L. REV.* 1385 (2015) (examining the asymmetrical behavioral effects of safe harbors and sure shipwrecks in relation to taxpayers in the modern tax regime).

128. See Banoff, *supra* note 45, at 837 (“The effect of [some anti-abuse rules] . . . is to erase the bright line or relocate it for more cautious taxpayers. Those who are overly aggressive may use the vagueness and ambiguity of the rule as an indirect endorsement of their proposals. Thus, conservative practitioners may become more so, and aggressive planners will have a larger client base to solicit.”); Kovach, *supra* note 45, at 1303 (“Risk aversion can produce unnecessarily conservative determinations by practitioners. Yet if the risk of audit is perceived to be relatively slight, some professionals will ignore the ominous implications of a faulty facts and circumstances analysis in favor of taking a turn at the roulette wheel of the audit casino.”); Logue, *supra* note 45, at 374–75 (“[U]sing such legal uncertainty in this way is a fairly imprecise tool for deterring aggressive tax planning, since some taxpayers will be induced to over-comply and others, the less risk-averse, will be inclined to take a chance and exploit the ambiguity.”); Osofsky, *supra* note 45, at 492 (“Taxpayers may have divergent reactions to increased ambiguity, whereby taxpayers with a low chance of

to follow the law may respond to additional uncertainty by structuring their affairs more conservatively and erring on the side of overreporting income. Taxpayers who seek to push boundaries and game the system as much as possible will try to take advantage of additional uncertainty by structuring their transactions more aggressively and erring on the side of underreporting income. Furthermore, we might view this disparate effect of uncertainty as particularly undesirable because it could contribute to the perception that taxpayers who exploit the system are not subject to the same rules that apply to the rest of us. This perception, in turn, could embolden more taxpayers to take aggressive reporting positions and cause more tax advisors to provide aggressive advice in order to compete for client business effectively.<sup>129</sup>

### CONCLUSION

Political rhetoric and measures that extend beyond rhetoric often focus on superficial indicators of complexity in tax law (word counts, page counts, number of regulations, and similar quantita-

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success on the merits would be more likely to claim tax benefits, whereas taxpayers with a high chance of success on the merits would have the opposite inclination.”); Partlow, *supra* note 14, at 321 (“As courts work to apply broad laws to specific factual scenarios, gaps in time exist where people with the best lawyers and accountants can circumvent the laws and take advantage of ambiguities.”); Roberts, *supra* note 44, at 330–31; *see also Ten Truths*, *supra* note 43, at 249–50 (“[T]hose arguing against uncertainty . . . would argue that taxpayers vary in their risk aversion, so that uncertainty affects taxpayers differently. . . . This, it might be argued, is unfair—uncertainty in the tax law helps the bad guys and hurts the good guys. It is not clear, however, why this is more unfair than disparate responses to other elements of taxation.”). For a similar observation regarding standards in law generally, *see*, for example, Schlag, *supra* note 45, at 385 (“Because standards do not draw a sharp line between permissible and impermissible conduct, some risk-averse people will be chilled from engaging in desirable or permissible activities, and some risk-preferring people will be encouraged to engage in antisocial conduct.”).

129. *See, e.g.*, Linda M. Beale, *Book-Tax Conformity and the Corporate Tax Shelter Debate: Assessing the Proposed Section 475 Mark-to-Market Safe Harbor*, 24 VA. TAX REV. 301, 371 (2004) (“[T]axpayers . . . are more likely to comply if they believe that the tax system is fairly and consistently applied across taxpayers.”); Michael S. Knoll, *Tax Planning, Effective Marginal Tax Rates, and the Structure of the Income Tax*, 54 TAX. L. REV. 555, 555 (2001) (“The specter of wealthy individuals and large corporations hiring legions of high-priced lawyers and accountants to develop and implement tax saving strategies creates the perception that the system is unfair.”); Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L.J. 1453, 1461, 1513 (2003) (discussing the effects of perceptions of fairness on tax compliance); Schizer, *supra* note 43, at 1319 (“Since wealthy and well advised taxpayers have an edge in planning, limiting this advantage can lead to a more equitable distribution of tax burdens. The average taxpayer’s faith in the system is preserved, promoting voluntary compliance and the attendant savings in enforcement costs.”).

tive measures). Counterproductively, a preoccupation with the volume of enacted law can prompt measures that make law more complex in a real sense. In addition, conceptualizing simplicity in simplistic terms can leave the public vulnerable to policies advanced under the guise of simplification that have real aims that are less innocuous.<sup>130</sup>

As a perennial example that we saw again in the discourse preceding the recent enactment of new tax legislation, lawmakers propose reducing the number of tax brackets under the heading of simplifying tax law.<sup>131</sup> In reality, this change does very little, if anything, to simplify law in a meaningful sense, and its truer aim is to reduce progressivity (meaning the extent to which the percentage of income paid in tax increases as income rises).<sup>132</sup>

Reducing the number of tax brackets does very little to ameliorate complexity in any meaningful sense. Applying fewer tax brackets to an individual's taxable income would result in a slight reduction in computational complexity at the compliance stage. However, for many taxpayers, the application of tax brackets to taxable income at the compliance stage is addressed by tax software, so any reduction in computational complexity resulting from fewer tax brackets would not even be noticed by taxpayers. Even for the occasional taxpayer who completes tax returns by hand, the IRS publishes tax tables<sup>133</sup> that list the tax liability owed for each

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130. See, e.g., Donaldson, *supra* note 13, at 647–48 (“In some cases, proposals for simplifying the Code appear to be mere rhetorical diversions that conceal other, more controversial objectives. Proponents of the flat tax, for example, argued that applying one rate to all forms of income would significantly ease taxpayer and administrative burdens. However, cutting the number of tax brackets and eliminating preferential rates for certain types of income does little to make the computation of tax any easier. Tax computation is but one line on the income tax return, and most taxpayers consult tax tables prepared by the Service that already simplify the calculation. As other authors have suggested, the subtle objective of the flat tax proposal is to undermine the progressivity of the income tax.” (footnotes omitted)); Sheldon D. Pollack, *Tax Reform: The 1980's in Perspective*, 46 TAX L. REV. 489, 536 (1991) (“It is entirely disingenuous to cast the issue of tax simplification in terms of simplifying the preparation of tax returns by eliminating tax deductions or imposing threshold requirements (for instance, as a percentage of adjusted gross income) which most taxpayers will be unable to satisfy. This may serve to implement the tax reformists' vision of a comprehensive tax base, but it misses altogether the underlying source of tax law complexity.”).

131. E.g., WHITEHOUSE.GOV, *supra* note 12 (“We are going to cut taxes and simplify the tax code by taking the current 7 tax brackets we have today and reducing them to only three brackets . . .”). As noted above, the legislation ultimately enacted did not reduce the number of tax brackets applicable to individuals. See *supra* note 11 and accompanying text.

132. See, e.g., Donaldson, *supra* note 13, at 648 (“As other authors have suggested, the subtle objective of the flat tax proposal is to undermine the progressivity of the income tax.”).

133. E.g., INTERNAL REVENUE SERV., 1040 TAX TABLES 2017 (2017), <https://www.irs.gov/pub/irs-pdf/i1040tt.pdf> [<https://perma.cc/42HS-3JVS>].

range of income for any given filing status—regardless of the number of brackets, a taxpayer would consult the table and still find only one relevant number.<sup>134</sup>

At the planning stage, all of the tax rates that might potentially apply to a taxpayer's income are not relevant—what is relevant is the taxpayer's marginal rate, or the rate at which the last dollar earned is taxed.<sup>135</sup> For example, when a taxpayer contemplates donating a dollar to charity, the taxpayer's marginal rate will determine the amount of tax liability saved as a result of a charitable contribution deduction. Thus, at the planning stage, reducing the number of brackets does little to reduce complexity.<sup>136</sup> An extremely large number of tax brackets might increase planning costs by making more difficult the task of predicting a taxpayer's marginal rate or rates,<sup>137</sup> but a modest difference in the number of tax brackets is unlikely to have the same effect.<sup>138</sup>

The path forward is unclear. Simplistic metrics of simplicity have rhetorical appeal. Genuine simplicity is, for lack of a better word, complicated, and involves trade-offs. There is no sound bite

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134. See, e.g., Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CALIF. L. REV. 1905, 1932–33 (1987) (“Few taxpayers are apt to be confused by the tax table; in any event, confusion on this matter would be unrelated to progressivity. Even under a proportionate tax such as a state sales tax, most taxpayers elect to use a tax table, rather than a calculator or mathematical algorithm, to determine their tax liability.”); Donaldson, *supra* note 13, at 648 (“[C]utting the number of tax brackets and eliminating preferential rates for certain types of income does little to make the computation of tax any easier. Tax computation is but one line on the income tax return, and most taxpayers consult tax tables prepared by the Service that already simplify the calculation.” (footnote omitted)).

135. See Bankman & Griffith, *supra* note 134, at 1907–09.

136. See *id.* at 1935 (“[T]he assertion that tax lawyers spend most of their day on progressivity-related issues is inconsistent with our experience and intuition that such issues occupy only a small portion of a tax lawyer’s time.”); Donaldson, *supra* note 13, at 648 (discussing how reducing tax brackets does not make tax computation easier).

137. See, e.g., Zelenak, *supra* note 47, at 97 (discussing how continuously varying marginal tax rates would cause “frustration of tax planning (which requires knowledge of one’s marginal tax rate or rates)”).

138. Just as some argue that a reduction in the number of tax brackets produces simplification, proponents of a flat tax also contend that its adoption would simplify tax law. The claimed simplifying effects of a flat tax are questionable and turn on issues of implementation and other factors. See, e.g., Bankman & Griffith, *supra* note 134, at 1929–37; David A. Weisbach, *Ironing Out the Flat Tax*, 52 STAN. L. REV. 599, 625 (2000); Lawrence Zelenak, *The Selling of the Flat Tax: The Dubious Link Between Rate and Base*, 85 TAX NOTES 1177, 1178 (1999). Furthermore, even if the elimination of a progressive rate structure entirely might produce certain simplification benefits (such as obviating the need to prevent schemes to shift income from one taxpayer to a related taxpayer subject to a lower tax rate), merely reducing the number of tax brackets would not do so. For further discussion, see, for example, Bankman & Griffith, *supra* note 134, at 1929–31; Zelenak, *supra*, at 1185–86.

encapsulating genuine complexity that is equivalent to mentioning the number of words in the code as a proxy for superficial complexity. From a rhetorical standpoint, the best option for those who want to cast doubt on a policy advanced under the guise of simplicity may be to emphasize the policy's truer aim when it can be conveyed in a sound bite. For instance, countervailing rhetoric can refer to a reduction in the number of tax brackets as a tax break for the wealthy.<sup>139</sup>

On the policy front, lawmakers who are genuinely interested in simplicity should bear in mind that simplification measures often involve trade-offs. Thus, in many situations, simplification in one respect will have to be prioritized over simplification in other respects. When faced with this dilemma, arguably lawmakers should give the most weight to simplification for unsophisticated taxpayers who are most in need of simplification.

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139. See, e.g., Donaldson, *supra* note 13, at 648.