# *Chapter 1*

# Deference: When the Court Must Yield to the Government's Interpretation


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## § 1:1 Introduction

With its landmark decision in *Chevron U.S.A., Inc. v. Natural Resource Defense Council Inc.*,[1] the Supreme Court introduced a significant alteration in administrative-law principles. In general, the alteration has resulted in a transfer of interpretive authority away from the courts and in favor administrative agencies. In the jargon of administrative law, courts are now required to give more deference to agency interpretations. Under the Supreme Court's taxonomy, as explicated in post-*Chevron* decisions, there are now, in essence, three different strands of deference. The courts are required to employ one of these strands (standards) depending on the type of interpretation the agency invokes. The three strands are:

1. Chevron U.S.A., Inc. v. Nat. Res. Def. Council Inc., 467 U.S. 837 (1984).

- the *Chevron* standard, applicable to certain types of statutory interpretation issued by an agency;
- the *Skidmore* standard, applicable where the agency interpretation is not subject to the *Chevron* standard; and
- the *Auer* standard, applicable where the agency's interpretation, as distinguished from the statute, is ambiguous.

Each of these strands is considered in this chapter.

### § 1:1.1 Legislative Regulations

In the tax context, there are two types of regulations: those issued under a specific grant of authority in a particular Code section; and those issued under the general authority of section 7805.[2] Whereas the former type of regulation, often referred to as a legislative regulation, had at one time received greater deference,[3] this is no longer the case. In

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2. *See, e.g.*, Irving Salem et al., *Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717 (2004) (making this distinction); *see also* Kristin E. Hickman, *Need for* Mead, 90 MINN. L. REV. 1537 (2006); Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View from Within*, 46 DUQ. L. REV. 323 (2008) (discussing the distinction between legislative and interpretive tax regulations and the various kinds of authority that the Service issues).

3. *See* Rowan Cos. v. United States, 452 U.S. 247, 253, 101 S. Ct. 2288, 68 L. Ed. 2d 814 (1981); United States v. Vogel Fertilizer Co., 455 U.S. 16, 24, 102 S. Ct. 821, 70 L. Ed. 2d 792 (1982). *See also* Krukowski v. Comm'r, 279 F.3d 547, 551 (7th Cir. 2002) (upholding a regulation issued under a specific grant of authority contained in I.R.C. § 469 because not arbitrary, capricious, or manifestly contrary to the statute); *see also* United States v. Mead, 533 U.S. 218, 227 (2001) (indicating that such a "regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute"); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment) (suggesting that it is no longer useful to distinguish between the legislative-regulation standard and the *Chevron* standard); Boeing Co. v. United States, 258 F.3d 958 (9th Cir. 2001) (concluding that deciding whether the regulation was legislative or interpretive was unnecessary because it would be valid under either standard). *But see* Walton v. Comm'r, 115 T.C. 589, 597 (2000) (indicating that legislative regulations are entitled to more deference than interpretive regulations); Tiger's Eye Trading, LLC v. Comm'r, 138 T.C. No. 6 (2012) (indicating that the regulation at issue was legislative in nature in upholding it and thus implying that such regulations receive greater deference). In Lindsay Manor Nursing Home, Inc. v. Comm'r, 148 T.C. No. 9 (2017), the court made reference to the Code's specific grant of authority in the course of finding that the section left room for interpretation, suggesting that the presence of such a grant of authority is relevant to *Chevron*'s step one inquiry. *Cf.* Nancy McDonald, T.C. Memo 2015-169 (indicating that, in the step two context, *Mayo* requires the same analysis for both types of regulations).

*Mayo Foundation for Medical Education & Research v. United States*,[4] the Supreme Court indicated that the distinction was no longer viable. As a result, both types of regulation are now evaluated under the *Chevron* standard.[5]

## § 1:2 *Chevron* Deference

Where the *Chevron* standard is applicable, the courts are required to give controlling deference to an agency interpretation if the statute is ambiguous and the interpretation reasonably resolves the ambiguity.[6] Thus, even if the court were inclined to read the statute differently, it must nonetheless defer to the agency's interpretation where

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4. Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 57 (2011) ("Our inquiry in that regard does not turn on whether Congress's delegation of authority was general or specific."). *See also* SIH Partners LLLP v. Comm'r, 150 T.C. No. 3 (2018) ("The applicability of Chevron deference 'does not turn on whether Congress's delegation of authority was general or specific'" (quoting *Mayo*)).

   Nonetheless, despite the *Mayo* Court's indication that the deference analysis should be the same whether the regulation is issued under section 7805 or under a section that contains a specific grant of regulation-writing authority, a difference may remain. In terms of *Chevron*'s step one, it would seem appropriate to read a specific grant of authority as an indication that Congress did not unambiguously resolve the issue. *But see* King v. Burwell, 135 S. Ct. 2480 (2015) (ignoring a specific grant in determining whether to apply *Chevron*); Leandra Lederman & Joseph C. Dugan, King v. Burwell: *What Does it Portend for Chevron's Domain?*, 2015 PEPP. L. REV. 72 (2015) (making this observation about *King*). In contrast, in the case of a regulation issued under section 7805, a more searching examination to determine if ambiguity is present may be required. On the other hand, in terms of *Chevron*'s step two, as *Mayo* makes clear, the deference analysis should be the same regardless of the section under which the regulation is issued.

5. In a pre-*Mayo* case, it was held that Circular 230 constitutes a legislative regulation. *See* Wright v. Everson, 543 F.3d 649 (11th Cir. 2008).

   Occasionally, a Code section granting specific authority to issue a regulation does not clearly provide whether it is intended to be self-executing. The question, in other words, is whether the statutory provision is to be given effect during a period in which no regulation is in fact issued. In 15 West 17th Street LLC v. Comm'r, 147 T.C. No. 19 (2016), the court explored the question at some length. Ultimately, the court held that the statutory delegation of authority that was at issue was discretionary, not mandatory, and was therefore not self-executing. As a result, the taxpayer could not invoke the statute given the fact that the Service had not issued any regulations implementing the provision in question. *See also* SIH Partners LLLP v. Comm'r, 150 T.C. No. 3 (2018) (concluding regulation was not mandatory based on an IRS concession).

6. *See Chevron*, 467 U.S. at 842–43. Note that, in King v. Burwell, 135 S. Ct. 2480 (2015), the Court refused to apply *Chevron* in the case of a Code section it found ambiguous. Indicating that that the healthcare issue before the Court was one of "deep economic and political significance," the Court

concluded that Congress could not have intended to delegate the authority to the Treasury or the IRS to resolve such a momentous question. The Court stated: "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." Thus, while deference to the agency remains the pervasive approach under *Chevron*, the courts may in unusual cases refuse to invoke *Chevron* where the issue is of great moment. This is somewhat ironic in that an important justification for *Chevron* deference is political accountability: the executive branch is more politically accountable than the judicial branch and should therefore have the responsibility for making decisions about policy. One would think, given the political-accountability justification, that an issue of great moment would be uniquely qualified for *Chevron* deference in that the opportunity for such accountability is presumably at its height where the public is well aware of the issue. Yet, precisely in such a case, *Chevron* is inappropriate, according to the Court. For a discussion of *King* and its potential applicability to regulations that address the limitation on state and local income tax deductions, see Mitchell M. Gans, *The SALT Regulations and Deference*, __TAX NOTES __ (Oct. 1, 2018).

Under the "step two" prong of *Chevron*, the question is whether the regulation reasonably resolves the ambiguity in the Code. This is equivalent to an arbitrary-and-capricious standard. Judulang v. Holder, 132 S. Ct. 476 (2011). *See also* Altera Corp. v. Comm'r, 145 T.C. 3 (2015) (citing *Judulang* for the proposition that the *Chevron* step two is equivalent to the arbitrary-and-capricious standard); Balestra v. United States, 803 F.3d 1363 (Fed. Cir. 2015) (indicating that there is an overlap in terms of the *Chevron* step two analysis and the arbitrary-and-capricious inquiry under Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)); Chamber of Commerce v. IRS, 2017 WL 4682050 (W.D. Tex. 2017) (applying the arbitrary and capricious test established in *Motor Vehicle* in determining the validity of a legislative regulation).

For a discussion of the overlap and differences between the step two review under *Chevron* and the requirement that an agency not act in an arbitrary and capricious manner, see Steele v. United States, __ F. Supp. __, 2017 WL 2392425 (D.D.C. June 1, 2017) (engaging in such discussion in the context of analyzing whether the IRS has authority to impose a fee in connection with providing a PTIN).

Note that, in applying "step two," courts inquire whether the agency applied the kind of principles that a court would apply when engaging in statutory construction. For example, in *Mayo*, the Court, in finding the regulation valid under "step two," indicated that the agency had appropriately considered administrative-convenience concerns and had properly given the exemption a narrow construction in accordance with the principle that exemptions should be so construed. *See* 562 U.S. at 59–60. *See also* Good Fortune Shipping SA v. Comm'r, 148 T.C. No. 10 (2017), *rev'd on other grounds*, 897 F.3d 256 (D.C. Cir. 2018) (*Chevron* step two satisfied, as in *Mayo*, based on administrative-convenience concerns and the principle requiring narrow construction of an exemption). In reversing *Good Fortune*, the D.C. Circuit concluded that the regulation failed under "step two" because it was tantamount to a conclusive presumption; created disparate treatment without sufficient justification; and the government did not adequately justify its change in position.

*Chevron* applies and these two elements are satisfied.[7] As a practical matter, once the statute is found to be ambiguous, an argument that the agency's interpretation is invalid becomes exceedingly difficult.[8]

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7. A regulation that fails to comply with the procedural requirements of the Administrative Procedure Act could be invalidated on that ground. In Intermountain Ins. Serv. of Vail LLC v. Comm'r, 134 T.C. No. 11 (2010), a concurring opinion by Judges Halpern and Holmes argued that a temporary regulation should be invalidated on the ground that it was issued without an opportunity for public comment. *See also* Chamber of Commerce v. IRS, 2017 WL 4682050 (W.D. Tex. 2017) (holding a temporary regulation invalid under the APA where no notice and comment was provided even though it accompanied a proposed regulation and concluding that nothing in section 7805 overrides the notice and comment requirement under the APA). *See also* Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1201 (2008). Should the analysis in this concurring opinion become more widely adopted, most, if not all, temporary regulations would be vulnerable to this kind of challenge. It is, moreover, not clear whether *Chevron* applies in the case of a temporary regulation. *See* Burks v. United States, 633 F.3d 347 (5th Cir. 2011); Beard v. Comm'r, 633 F.3d 616 (7th Cir. 2011). For a discussion of deference in the context of temporary regulations, see Kristin Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465 (2013).

   In Altera Corp. v. Comm'r, 145 T.C. 3 (2015), the court held that a regulation which had been issued under the authority of section 7805(a) and for which the IRS claimed force-of-law effect was a legislative rule for purposes of the Administrative Procedure Act. The court then went on to invalidate the regulation for its failure to respect the notice-and-comment mandate under the Act—with the court concluding that the Treasury had failed to properly consider the comments or the evidence and had failed to make a reasoned decision. *See* Michael Duffy, Altera *Leaves Treasury Regulations Open to APA-Based Challenges in Tax Court*, 123 J. TAX'N 265 (Dec. 2015) (discussing *Altera* and suggesting that *Altera* should be read as indicating that any regulation designed to overrule judicial precedent is a legislative rule for APA purposes).

8. In Altera Corp. v. Comm'r, 145 T.C. 3 (2015), even though the parties had agreed that the Code section was ambiguous, the court nonetheless invalidated the regulation. Emphasizing that the question was empirical in nature, rather than merely a question of statutory interpretation, the court concluded that the Treasury did not adequately consider the evidence and the comments it had received and that the regulation was therefore invalid under Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)—but, in applying this standard, rather than *Chevron*, the court acknowledged that the analysis would be the same under either standard.

   In SIH Partners LLLP v. Comm'r, 150 T.C. No. 3 (2018), the court revisited *Altera*. Whereas *Altera* involved empirical evidence, *SIH Partners* concerned a question of pure statutory construction. The court clarified the distinction between a legislative rule and an interpretive rule for purposes of the Administrative Procedure Act. The distinction has significance, the court explained, because a legislative regulation is only valid if it satisfies the

In determining whether a statute is ambiguous, conflict in the lower courts could prove to be critical. In *Smiley v. Citibank*,[9] the Court, in making the threshold inquiry, emphasized that the different readings the statute had received in the Supreme Courts of New Jersey and California was in itself a strong indication of ambiguity.[10] If this approach is generalized and applied at the federal level—and no apparent reason exists why disagreement in the federal courts should be treated differently—*Chevron* may transform the role of the Supreme Court itself. Inter-circuit conflict traditionally has been a basis for granting review of tax litigation in the Supreme Court, but such conflict may now argue in favor of deference to the Treasury's construction. As a result, there may be less occasion for the Supreme Court to grant review in tax cases.[11]

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reasoned-decision-making test applied in Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co. 463 U.S. 29 (1983); it must also be preceded by notice and an opportunity for comment. The *SIH Partners* court focused on three elements in determining whether a regulation is legislative or interpretive: (i) the regulation adds something that the Code (or statute) itself does not contain; (ii) the regulation has "force of law" effect, meaning that it is entitled to *Chevron* deference; and (iii) failure to respect the regulation can result in penalties. Given this definition, as a practical matter, any regulation that goes beyond the Code will be likely required to satisfy the reasoned-decision-making test. The latter two elements of the definition will ordinarily be satisfied in the case of all tax regulations.

After concluding that the regulation at issue in *SIH Partners* was legislative, the court went on to apply the reasoned-decision-making test and found that the IRS had satisfied it (the agency's explanation must "enable the court to evaluate the agency's rationale at the time of decision"). In doing so, the court distinguished *State Farm*—where the Court had found a legislative rule wanting—on the ground that empirical data was involved in *State Farm* and the agency had reversed itself. In *SIH Partners*, in contrast, there was no such reversal, and the question of statutory construction did not implicate empirical data. Thus applying a less rigorous version of the reasoned-decision-making test, the court upheld the regulation after finding it was supported by sufficient reasoning and that "the agency's path may reasonably be discerned." *See also* Santos v. Comm'r, T.C. Memo 2016-100 (indicating that an "empirical" question is different from a question of statutory interpretation); Chief Counsel Advice 201747005 (indicating that the stringent requirements of *State Farm* do not apply in the case of pure statutory construction but that a failure to include a preamble along with a regulation creates a "hazard to the Service").

9. Smiley v. Citibank, 517 U.S. 735 (1996).

10. *See id*. at 739.

11. *But see* Gitlitz v. Comm'r, 531 U.S. 206, 217 n.7 (2001) (noting that a conflict in the circuit courts had developed on the issue, but concluding that the statute was unambiguous). *Gitlitz* could be read as inconsistent with *Smiley*'s notion that lower-court conflict is suggestive of ambiguity, but a distinction may be made between these cases. In *Gitlitz*, unlike *Smiley*, the Court engaged in conventional statutory construction and, therefore,

In *Estate of Hubert v. Commissioner*,[12] without citing *Chevron*, a three-justice concurring opinion invited new regulations incorporating the very argument that the government had advanced unsuccessfully before the Court.[13] Shortly after the *Hubert* decision, the Treasury accepted the invitation and overturned the Court's decision by issuing regulations.[14] Similarly, in *United Dominion Industries, Inc. v. United States*,[15] the Court again invited the IRS to amend its regulations to overturn the pro-taxpayer construction of the regulation adopted by the Court. From this vantage point, it would seem that the Court made an unwise commitment of resources in deciding to grant review in *Hubert*. And given the Supreme Court's more recent endorsement of the notion that court decisions, including those from the Court itself, can be overturned by agency interpretation (which will be discussed below), it is unlikely that the Court will devote much of its resources to tax questions in the future.

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did not make a *Chevron* analysis. Although the Treasury had issued a proposed regulation addressing the question before the Court in *Gitlitz* (*see* Prop. Treas. Reg. § 1.1366-1(a)(2)(viii), 63 Fed. Reg. 44,181 (1998)), the Court, not surprisingly, chose to omit the proposed regulation from its discussion and was therefore left to decide the case without the assistance of any administrative interpretation. *See* Boeing Co. v. United States, 537 U.S. 437, 453 n.13 (2003) (indicating that proposed regulations are of little consequence). *See* Howard Hughes Co. v. Comm'r, 805 F.3d 175 (5th Cir. 2015) (rejecting a taxpayer's argument based on a taxpayer-friendly proposed regulation and indicating that giving deference to a proposed regulation would raise a separation of powers issue). The Court was presumably anxious to find the statute unambiguous in order to avoid two points made by Justice Breyer in his dissent: that the Court's analysis was inconsistent with the statute's legislative history, and that an ambiguous Code section should be construed to avoid a loophole rather than to preserve it, which was the effect of the Court's holding. *See Gitlitz*, 531 U.S. at 220–24 (Breyer, J., dissenting). Perhaps, another way to read *Smiley*, in light of *Gitlitz*, is that although inter-circuit conflict presumptively leads to a finding of ambiguity, it does not necessarily do so in every case. Parenthetically, note that *Gitlitz* has been overruled by Congress. *See* Job Creation and Worker Assistance Act of 2002. *See also* I.R.C. § 108(d)(7).

12. Estate of Hubert v. Comm'r, 520 U.S. 93 (1997).
13. *See id*. at 122.
14. For a discussion of these regulations, see Mitchell M. Gans, Jonathan G. Blattmachr & Carlyn S. McCaffrey, *The Anti-Hubert Regulations*, 87 TAX NOTES 969 (2000).
15. United Dominion Indus., Inc. v. United States, 532 U.S. 822, 838 (2001). Note that, in Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 55 (2011), the Court reiterated this aspect of *United Dominion Industries*.

Prior to *Chevron*, agency interpretations also received deference.[16] In essence, however, *Chevron* made two important changes. First, it increased the level of deference.[17] Previously, the courts were required to examine a variety of factors in determining whether or not in any given case the interpretation was persuasive and, therefore, entitled to deference.[18] Now, as suggested, *Chevron* requires courts to give controlling deference to an interpretation if its two elements are satisfied without regard to whether the court finds it to be the best or most persuasive reading of the statute.[19]

Second, *Chevron* began to justify deference in a new way. No longer focusing exclusively on agency expertise as a justification, the Court began to emphasize political accountability.[20] As a part of the executive branch, agencies are more politically accountable than courts and

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16. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (discussing the standard for deference for Treasury and other regulations). *See also* United States v. Mead Corp., 533 U.S. 218, 227–28 (2001) (reviewing the pre-*Chevron* history).

17. *See id.; see also* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 615 (1995).

18. *See Skidmore*, 323 U.S. at 140 (demonstrating whether the courts are required to defer to an agency interpretation depends upon, inter alia, the thoroughness of the agency's analysis, the soundness of the analysis, and its consistency with earlier interpretations); Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979) (indicating that courts should review tax regulations based on a variety of factors, including the consistency of the Treasury's position; whether the government issued regulations contemporaneously with the enactment of the statute; how the regulation evolved; the length of time the regulation has remained in effect; the degree of taxpayer reliance; and the level of scrutiny the regulation received from Congress during the consideration of any reenacting legislation). *See also* E.I. du Pont de Nemours & Co. v. Comm'r, 102 T.C. 1, 13, *aff'd*, 41 F.3d 130 (3d Cir. 1994), *aff'd sub nom.* Conoco, Inc. v. Comm'r, 42 F.3d 972 (5th Cir. 1995) (applying *Nat'l Muffler*, a pre-*Chevron* formulation, the court intimated that if the regulation under inquiry had been made in order to gain a litigating advantage, its validity might have been questionable); Comm'r v. Sternberger's Estate, 348 U.S. 187, 199 (1955) (showing that long-standing regulations are entitled to special weight).

19. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (upholding an interpretation under *Chevron* even if the court were to conclude that the agency's reading of the statute is not the best reading).

20. *See Chevron*, 467 U.S. at 865–66 (setting forth the political accountability theory, but also acknowledging the limited expertise of judges as compared to the agencies). Consistent with its political accountability theory, the Court, in Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (May 21, 2018), refused to grant *Chevron* deference to the agency given the fact that the arms of the executive branch—the Solicitor General and the agency—were not aligned on the meaning of the statute. Put differently, there can be no accountability, and therefore no *Chevron* deference, where such conflict is present within the executive branch.

are therefore a more suitable repository for interpretive responsibility.[21] The connection between political accountability and interpretive responsibility flows from the growing realization that law construction is often the equivalent of lawmaking.[22] Law construction entails the making of policy, a function better served, under the Court's new theory, by the politically accountable agencies rather than by the politically insulated courts.[23] Thus, under *Chevron*, deference no longer rests solely on agency expertise for its justification but rather, as the Court stressed, on an agency's political accountability as well.[24]

This shift in theory translates into important practical consequences. For example, under a theory of political accountability, agencies should have more discretion to change their position about the meaning of a statute: Since the administration must pay a political price if it allows an unpopular interpretation to stand, it should have the latitude to change position as circumstances warrant. Thus, not surprisingly, *Chevron* itself contemplates that agencies be given more flexibility to change their interpretations over time.[25] Whereas, prior to *Chevron*, a change in agency position would weaken its claim of deference,[26] such

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21. *See* Schacter, *supra* note 17, at 616–17.
22. *See Chevron*, 467 U.S. at 865–66; Schacter, *supra* note 17, at 595–96. *See also* David Millon, *Objectivity and Democracy*, 67 N.Y.U. L. REV. 1, 16–22 (1992).
23. While *Chevron* deference has also been justified as a matter of separation of powers (*see, e.g., Mead*, 533 U.S. at 241–42 (Scalia, J., dissenting)), the predominant view is that it derives from a delegation by Congress. *See* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GA. L.J. 833, 836 (2001). Indeed, in making *Chevron*'s applicability turn on whether Congress intended the agency to have the authority to invoke it, United States v. Mead, 533 U.S. 218 (2001), makes clear that Congress could constitutionally eliminate the *Chevron* standard.
24. Although one might read *Chevron* as deemphasizing the significance of expertise as a justificatory theory for deference, the Court has made clear that expertise remains an important justificatory component. *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 651–52 (1990) (stating that "practical agency expertise is one of the principal justifications behind *Chevron* deference"); Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 56 (2011) (discussing expertise as a justification for giving deference to tax regulations without mentioning political accountability). *See also* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2088–90 (1990).
25. *See Chevron*, 467 U.S. at 863–64 ("The fact that the agency has from time to time changed its interpretation of the term 'source' does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.").
26. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

inconsistency is largely irrelevant under *Chevron*.[27] For example, in *Central Laborers' Pension Fund v. Heinz*,[28] the Supreme Court upheld the validity of a regulation even though the IRS had maintained a long-standing contrary position.[29] In *Mayo Foundation for Medical Education -& Research v. United States*,[30] the Court, in upholding an interpretive tax regulation, found such inconsistency to be irrelevant.

*Chevron* similarly makes the contemporaneousness of a regulation irrelevant. Indeed, given *Chevron*'s political-accountability underpinnings, agency-administered statutes may no longer have a fixed meaning.[31] In *Smiley v. Citibank*,[32] a regulation was promulgated approximately 100 years after the enactment of the underlying statute.[33] After acknowledging the traditional view that a regulation issued contemporaneously with the enactment of the statute ordinarily receives deference on that account, the Court in *Smiley* concluded that the delay was of no consequence.[34] The Court reasoned that because Congress intended for ambiguities to be resolved by the politically accountable agencies, the validity of a regulation is not undermined by a lapse in time.[35]

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27. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1001 n.4 (2005) (indicating that a lack of consistency does not undermine an agency's deference claim under *Chevron* as long as it has offered some reasoned explanation for changing position). Note also that, in Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016), the Supreme Court invalidated a regulation that sought to effect a change in policy on the ground that the agency failed to provide an explanation for the change. The Court indicated that, in the case of a change from a long-standing approach, it is not change in and of itself that is impermissible; rather, according to the Court, reliance interests must be "taken into account" and a reasoned explanation must be supplied for disregarding the assumptions underlying the prior policy.
28. Cent. Laborers' Pension Fund v. Heinz, 541 U.S. 739 (2004).
29. *See id*. at 748.
30. Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44 (2011).
31. *See* Laurence H. Silberman, Chevron: *The Intersection of Law -& Policy*, 58 GEO. WASH. L. REV. 821, 822 (1990) (indicating that statutes have become more plastic under *Chevron*); T. Alexander Aleinikoff, *Symposium:* Patterson v. McLean, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 43 (1988) (indicating that, under *Chevron*, statutes are more likely to receive an interpretation that is reflective of policy as currently formulated, rather than policy considerations at the time of enactment).
32. Smiley v. Citibank, 517 U.S. 735 (1996).
33. *See id*. at 740.
34. *See id*.
35. *See id*. at 740–41. Although under *Smiley* a regulation need not be long-standing in nature in order to be valid, such a regulation does gain legitimacy on this account. *See* Carlebach v. Comm'r, 139 T.C. 1 (2012) (quoting from *Smiley* for this proposition). *See also* SIH Partners LLLP v. Comm'r, 150 T.C. No. 3 (2018) (same).

In short, with delay irrelevant and consistency not essential, agency-administered statutes containing ambiguities become mutable—or, to borrow from the constitutional lexicon, "living documents"[36]—no longer having the meaning fixed by Congress[37] at the time of their enactment.[38]

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36. *See* Silberman, *supra* note 31, at 822 (suggesting that some might find it surprising that judges who subscribe to originalism in constitutional adjudication can at the same time argue for *Chevron*'s implicit commitment to viewing statutes as plastic).

    Indeed, the Supreme Court has intimated a willingness to reconsider *Chevron*. *See* Epic Sys. Corp. v. Lewis, __ U.S. __, 2018 WL 2292444 ("No party to these cases has asked us to reconsider *Chevron* deference."); SAS Inst. Inc. v. Iancu, ____ U.S. ____, ____, 138 S. Ct. 1348, 1358, ____ L. Ed. 2d ____ (2018) ("But whether *Chevron* should remain is a question we may leave for another day."). For a discussion of bills designed to overrule *Chevron*, see Roger W. Dorsey & Kathryn Kisska-Schulze, *Indexing Capital Gains for Inflation: "Phase Two" of Tax Reform*, J. TAX'N (June 2018).

    Indirect expressions of skepticism about *Chevron* can also be detected in the lower courts. In Good Fortune Shipping v. Comm'r, 897 F.3d 256, 261–65 (D.C. Cir. 2018), for example, the court invalidated a regulation under *Chevron*'s step two–a step under which the agency ordinarily enjoys great deference–reflecting perhaps emerging hostility toward the *Chevron* framework.

37. While *Chevron*, at first blush, appears rather radical in its willingness to allow the current administration to employ a policy analysis based on considerations at the time the interpretation is promulgated when the statute was enacted years earlier, courts use a similar approach when doing conventional statutory construction. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 345–62 (1990) (indicating that courts interpret statutory language through the prism of post-enactment values). For an example where the Supreme Court explicitly acknowledged the role of post-enactment change in constitutional values affecting the interpretation of a statute, see Circuit City, Inc. v. Adams, 532 U.S. 105 (2001) (holding, in effect, that the reach of a statute can expand over time where the Supreme Court's jurisprudence on the contours of the commerce clause have changed since enactment). *But see* Wis. Cent. Ltd. v. United States, __ U.S. __, 138 S. Ct. 2067, 2018 WL 3058014 (June 21, 2018) ("Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law.").

38. For an argument that the mutability *Chevron* offers is salutary, see *Mead*, 533 U.S. at 240–41, 247–48 (Scalia, J., dissenting). *See also* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2088–90 (1990). Note, however, that in Wis. Cent. Ltd. v. United States, __ U.S. __, 138 S. Ct. 2067, 2018 WL 3058014 (June 21, 2018), the Court explained that "every statute's meaning is fixed at the time of

In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[39] the Supreme Court confirmed that agencies acting under *Chevron* have the authority to overrule court decisions. In doing so, the Court further expanded the interpretive authority of the agencies under *Chevron*. In *National Cable*, the Ninth Circuit had first construed the statute. Subsequently, the FCC, acting under its authority to issue interpretations under *Chevron*, adopted a construction of the statute that was contrary to the Ninth Circuit's construction. When a case raising the validity of the FCC's interpretation reached the Ninth Circuit, the court held that it was bound by its earlier decision as a matter of stare decisis. It therefore concluded that the FCC's interpretation was invalid.

The Supreme Court reversed. It held that, since the earlier decision did not hold that the statute was unambiguous, the FCC was permitted to adopt a different interpretation and thereby in effect overturn the court's decision.[40] Citing its decision in *Smiley*, the Court emphasized that *Chevron* contemplates that the discretion to resolve

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enactment." It held that, along with other contemporaneous cues, a contemporaneous regulation was evidence of Congress' intent and that the statute was therefore sufficiently unambiguous to make a later, potentially inconsistent regulation ineligible for *Chevron* deference. This strand of analysis is in tension with the pro-change approach adopted in *Smiley* and may presage the beginning of the end of *Chevron*. *See also* Epic Sys. Corp. v. Lewis, __ U.S. __, 2018 WL 2292444 (suggesting the need to reexamine *Chevron*).

39. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

40. As indicated in the text, the Supreme Court in *National Cable* contemplates that agencies will be foreclosed from trumping a court decision only where the decision *holds* that the statute is unambiguous. *See* 545 U.S. at 982. This would appear to suggest that, if the court were to observe in mere dicta that the statute was unambiguous, the agency would remain free to adopt a regulation overturning the decision. Given *Chevron*, this approach makes sense. After all, unless the courts definitively conclude that the statute is unambiguous, the agencies should, under *Chevron*, retain the flexibility to adopt regulations that flesh out the meaning of a statute that the agency determines is ambiguous. Yet, in Home Concrete & Supply, LLC v. United States, 634 F.3d 249, 2011 WL 361495 (4th Cir. 2011), the court, seemingly oblivious to this distinction, invalidates a regulation based on dicta in a prior Supreme Court decision to the effect that the statute was unambiguous. In United States v. U.S. Home Concrete & Supply, LLC, 132 S. Ct. 1836 (2012), the Supreme Court applied its decision in *National Cable* to its pre-*Chevron* decision in Colony, Inc. v. Comm'r, 357 U.S. 28 (1958). In *Colony*, the Court had concluded that the Code provision at issue was not unambiguous. It then considered a number of factors, including legislative history, in determining Congress's intent. Based on this determination, it rejected the IRS's argument. The question in *Home Concrete* was whether a regulation designed to overrule

the decision in *Colony* (insofar as it remained relevant under a reenacted version of the section) was valid. As Justice Scalia pointed out in his separate opinion in *Home Concrete*, one would have thought, given *National Cable*, that the Court's conclusion in *Colony* that the statute was not unambiguous would be dispositive. After all, in *National Cable*, the Court held that a regulation can overturn a court decision unless the court had held that the statute was unambiguous.

But the four-justice plurality opinion in *Home Concrete*, sensitive to the concern that in pre-*Chevron* cases the Court could not have appreciated the importance of ambiguity under the *Chevron* framework, concluded that it was appropriate to consult traditional tools of statutory construction, like legislative history, in determining whether the earlier decision found Congress had intended to speak to the issue in question. Pointing to the legislative history, among other factors, the four-justice plurality concluded that the Court in *Colony* had found that Congress had in fact formed an intent on the issue. As a result, the four-justice plurality held that the regulation overturning the decision in *Colony* was invalid. Thus, given *Home Concrete*, it would seem that *National Cable* must be applied in a somewhat less rigorous fashion when a pre-*Chevron* decision is at issue. Whether this less rigorous approach will be utilized in the case of lower-court decisions, as well as Supreme Court decisions, remains to be seen. *See* William J. Wilkins IRS Chief Counsel, comments at the ABA Tax Section Meeting (May 12, 2012) (discussing the possibility that *National Cable* will be applied differently depending on whether the earlier decision was rendered by the Supreme Court or a lower court); Richard M. Lipton, *Supreme Court's Decision in* Home Concrete *Reveals Cracks in the Foundation of Brand X*, 117 J. TAX'N 4 (July 2012) (discussing Wilkins' comments about *Home Concrete*); Steve R. Johnson, *Reflections on* Home Concrete: *Writing Tax Regulations & Interpreting Tax Statutes*, 13 FLA. ST. U. BUS. REV. 77 (2014) (discussing *Home Concrete*).

What is perhaps more important than this reworking of *National Cable* by the four-justice plurality is an observation made by the four-justice dissent: that the Court has not yet decided whether *National Cable* applies to a Supreme Court precedent. Thus, at least four justices are of the view that *National Cable* did not definitively establish that an agency has the authority to overrule a Supreme Court precedent even where the Court found the statute to be ambiguous. And given Justice Scalia's position—that *National Cable* was wrongly decided and that it may well be unconstitutional for an agency to overturn a Supreme Court decision—it would seem that there are presently five justices willing to entertain the possibility of limiting the scope of *National Cable*. And, indeed, in King v. Burwell, __ U.S. __, 2015 WL 2473448 (2015), the Court did begin to narrow the scope of *National Cable*—albeit in a limited context. In *King*, the meaning of section 36B of the Code was at issue, a provision critical to the operation of the Affordable Care Act. The Court concluded that *Chevron* did not apply given the momentous nature of the issue and its assumption that Congress would not expect such an issue to be decided by an agency. Without elaborating on the implications in terms of *National Cable*, the Court determined the meaning of the Code section without regard to the interpretation embodied in the regulation. In doing so, it would seem, the Court implicitly rendered its decision invulnerable to the possibility of a different approach under a new administration. For once it concluded that *Chevron* did not apply, the rationale under *National Cable* that permits agencies to overrule the courts should not be available.

questions of statutory ambiguity resides in the agency having jurisdiction over the statute rather than the courts. Significantly, the same analysis would apply even in the case of a Supreme Court decision. So, for example, if the Supreme Court were to construe a statute, the decision would not preclude the agency from adopting a regulation that in effect overruled the decision as long as the Court did not hold that its construction was unambiguously required by the statute.[41]

Perhaps recognizing the significant shift in power away from the courts and in favor of the government that the combination of *Chevron* and *National Cable* has the potential to effect, the Tax Court at first resisted the notion that an interpretive tax regulation could overturn judicial precedent. In *Swallows Holding v. Commissioner*,[42]

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In Altera Corp. v. Comm'r, 145 T.C. 3 (2015), the court may have betrayed its own resistance to *National Cable*. In *Altera*, the taxpayer challenged the validity of a regulation that was designed to overrule a prior Tax Court decision that had been endorsed by the Ninth Circuit. Emphasizing that the question was empirical, and not merely a matter of statutory interpretation, the court concluded that Treasury had not adequately analyzed the evidence or the comments it had received. Nor, the court concluded, did Treasury "directly respond" to the evidence alluded to by the court in its earlier decision. Whether *Altera* should be read as simply making *National Cable* irrelevant in the empirical context or, more broadly, as a reflection of the court's hostility to the notion that Treasury has the authority to overrule court decisions with which it disagrees remains to be seen. *See also* Santos v. Comm'r, T.C. Memo 2016-100 (indicating that *Altera* involved an "empirical" question and not a question of statutory interpretation).

41. In Estate of Hubert v. Comm'r, 520 U.S. 93 (1997), the three-justice plurality opinion suggested that Treasury promulgate a new regulation incorporating the approach that the Court rejected. The Court's holding in *National Cable* goes much further. Whereas in *Hubert*, the Court was required to decide merely the meaning of an unclear regulation, the meaning of the statute itself was at issue in *National Cable*.

42. Swallows Holding v. Comm'r, 126 T.C. 6 (2006), *vacated*, 515 F.3d 162 (3d Cir. 2008). In reversing, the Third Circuit concluded that, because the prior cases had not held that the Code section was unambiguous, the regulation permissibly overturned the cases and was therefore valid under *Chevron*.

In Intermountain Ins. Serv. of Vail LLC v. Comm'r, 134 T.C. No. 11 (2010), the court explored the relevance of legislative history under the *National Cable* framework. The majority invalidated a regulation that was designed to overturn the Supreme Court's decision in Colony, Inc. v. Comm'r, 357 U.S. 28 (1958). Although the Supreme Court had found that the text of the statute was ambiguous, it was nonetheless able to conclude that the statute unambiguously called for the result it reached by examining the legislative history. The majority in *Intermountain*, unlike the concurring opinion, reasoned that the Supreme Court's conclusion in *Colony* that the statute was unambiguous, even though based on the legislative history, is sufficient to foreclose a contrary regulation. Given the many Supreme Court decisions that have rested at least in part on

which has now been reversed by the Third Circuit, the Tax Court, over dissenting opinions, refused to apply the framework that the Supreme Court adopted in *National Cable*. In essence, the court offered two rationales for rejecting the framework. First, in *National Cable*, the FCC interpretation overturning the Ninth Circuit decision was entitled to deference under the *Chevron* standard. In contrast, according to the Tax Court in *Swallows Holding*, it was not clear whether interpretive tax regulations qualify for the *Chevron* standard.

Second, the FCC had not been a party to the earlier litigation in the Ninth Circuit. In the perception of the Tax Court, had it been a party, the Supreme Court would have reached the opposite conclusion: not permitting the FCC's interpretation to overturn the decision. Thus,

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legislative history, the issue in *Intermountain* is an important one. After the Tax Court's decision in *Intermountain*, the IRS issued regulations finalizing the temporary regulations that were at issue in *Intermountain*. *See* T.D. 9511. For the Supreme Court's later decision on this issue, see the discussion in note 40 of United States v. U.S. Home Concrete & Supply, LLC, 132 S. Ct. 1836 (2012). Note also that, in *Home Concrete*, the Court indicated that traditional tools of statutory construction are to be used in determining if the statute is sufficiently ambiguous to uphold the regulation. *See* Carlebach v. Comm'r, 139 T.C. 1 (2012) (quoting from the Supreme Court's decision in *Home Concrete* for this proposition). For a discussion of the role of legislative history in the context of *Chevron* generally, see Balestra v. United States, 803 F.3d 1363 (Fed. Cir. 2015) (acknowledging the debate about whether legislative history is relevant at step one or step two of the *Chevron* analysis and indicating that it should be used in the context of step one and then focusing on it again in the context of step two of the analysis).

*See also* Good Fortune Shipping SA v. Comm'r, 148 T.C. No. 10 (2017), *rev'd on other grounds*, 897 F.3d 256 (D.C. Cir. 2018) (concluding that the government satisfied *Chevron*'s step one based on failure of the Code and the legislative history to address the question); Lindsay Manor Nursing Home, Inc. v. Comm'r, 148 T.C. No. 9 (2017) (examining legislative history in the context of *Chevron*'s step one). Note also that, in Epic Sys. Corp. v. Lewis, __ U.S. __, 2018 WL 2292444, the Court rejected *Chevron* deference based on its ability to resolve the statutory ambiguity through the application of traditional tools like a canon of construction. *See also* Wis. Cent. Ltd. v. United States, __ U.S. __, 2018 WL 3058014 (2018) (relying on text, structure, contemporaneous cues and a contemporaneous regulation to conclude that the statute was unambiguous and therefore ineligible for *Chevron* deference).

For a suggestion that a "drafting glitch" in the Code can be cured by a regulation based on legislative history, even though a plain reading of the Code section appears to be contrary to the legislative history, see the concurring opinion in Gregory v. Comm'r, 149 T.C. No. 2 (2017). Note also that, in Good Fortune Shipping v. Comm'r, 897 F.3d 256, 263–64 (D.C. Cir. 2018), the court invalidated a regulation under *Chevron*'s "step two," concluding among other things that the government failed to justify its change in position.

according to the Tax Court, in tax litigation, where the government is necessarily a party, the *National Cable* framework is unavailable. There is, however, no hint of a suggestion in the Supreme Court's decision in *National Cable* that it is to be read in this limited fashion, and the Tax Court now embraces *National Cable* as well as *Chevron*.[43]

*Chevron*'s implications, as embellished by *National Cable*, may presage the end of a traditional aspect of tax litigation. In the past, the

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43. For a case where the Tax Court applied *National Cable*, see Intermountain Ins. Serv. of Vail LLC v. Comm'r, 134 T.C. 11 (2010). And, in terms of *Chevron* itself, the Supreme Court decision in *Mayo* eliminates any doubt about applicability of *Chevron* in tax cases. *See* Carpenter Family Invs., LLC v. Comm'r, 136 T.C. 373 (2011); Rothman v. Comm'r, T.C. Memo 2012-218 (2012).

Note also that in Estate of Gerson v. Comm'r, 127 T.C. 11 (2006), *aff'd*, 507 F.3d 345 (6th Cir. 2007), the majority sustained a GST regulation designed to overturn circuit court precedent. Without acknowledging its shift, the majority deviated from its decision in *Swallows Holding*. It concluded that, under the *National Cable* framework, where, as in *Gerson*, the courts are in conflict about the meaning of a Code section, an interpretive regulation can resolve the conflict. Thus, unlike *Swallows Holding, Gerson* contemplates that *National Cable* can apply to interpretive tax regulations. Unfortunately, however, *Gerson* fails to recognize that only a *Chevron*-type interpretation can overturn a court decision. *See National Cable*, 545 U.S. at 983 (indicating that "the court's prior ruling remains binding law" in the case of an "agency interpretation to which *Chevron* is inapplicable"). Thus, given the majority's failure to embrace *Chevron*—in both *Swallows Holding* and *Gerson*—its conclusion that an interpretive tax regulation can overturn court precedent cannot be reconciled with *National Cable*. *Gerson* is problematic on a second ground: the regulation seeks to overturn an Eighth Circuit decision finding the statute unambiguous. *See* Simpson v. United States, 183 F.3d 812 (8th Cir. 1999); *see also* Bachler v. United States, 281 F.3d 1078 (9th Cir. 2002) (following *Simpson* but, unlike *Simpson*, not indicating that the statute is unambiguous). Contrary to the majority's intimation that the regulation supersedes the prior cases, the Eighth Circuit should not yield. For, as indicated, under *National Cable*, not even a *Chevron*-type regulation can overturn a court's conclusion that the statute is unambiguous. This is not to suggest, however, that the Tax Court should have viewed itself as bound by the Eighth Circuit's decision in *Simpson*. It was certainly permissible for the Tax Court to find, unlike the Eighth Circuit, ambiguity in the statute and then to conclude that the regulation appropriately resolves the ambiguity. Indeed, in affirming the Tax Court in *Gerson*, the Sixth Circuit also concluded that the statute is ambiguous and therefore sustained the regulation without exhaustively analyzing the Tax Court's treatment of *National Cable*. *See* 507 F.3d at 440 n.2. But, unless the Eighth Circuit overturns its decision in *Simpson* and now concludes that the statute is ambiguous, the regulation can have no effect in that circuit. For a discussion of the deference issues with regard to the GST regulation sustained by the court in *Gerson*, see Mitchell M. Gans, *Deference and the End of Tax Practice*, 36 REAL PROP. PROB. & TR. J. 731 (2002).

government's defeat in a circuit court would likely lead to further review in other circuits, or perhaps in the Supreme Court on the ground that there is inter-circuit conflict. Now, the government can instead simply write a new regulation announcing the result it failed to secure in court. As indicated, rather than becoming a predicate for Supreme Court review, inter-circuit conflict becomes evidence of statutory ambiguity, making the Treasury, not the Supreme Court, the ultimate interpretive authority. If the tax bar at one time viewed the Treasury as a mere adversary, that view no longer accurately reflects the more dynamic role the Treasury now enjoys. In short, given its enhanced quasi-legislative function under *Chevron*, the government is no ordinary adversary in that it can rewrite the rules in many cases rather than litigate the meaning of the rules as originally written.

Is this a salutary alteration? The answer is not clear. On the one hand, allowing the Treasury more influence is valuable because of its enormous expertise—an expertise understandably lacking in many judges sitting on tax cases.[44] Unlike the courts, the Treasury is able to bring this expertise to bear on an entire area of law at one time, facilitating an appreciation of the various ways in which the rules it promulgates interface. Also, Congress may not be able to respond as quickly as the Treasury to resolve issues not contemplated at the time of the statute's enactment.[45] Moreover, Congress may be completely disabled from acting because non-policy-based concerns trump any legitimate policy objective.[46] And, as some commentators have suggested, increased deference tends to create more uniform application

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44. Of course, Treasury expertise as a justification for *Chevron* deference is not entirely convincing, as much litigation occurs in the specialized Tax Court. However, taxpayers can seek to exploit the lack of expertise in other courts by choosing to litigate elsewhere.

45. *See Mead*, 533 U.S. at 247 (Scalia, J., dissenting) (arguing that "ossification" of the law would occur if the agencies did not receive *Chevron* deference); Sunstein, *supra* note 24, at 2088 (indicating that agencies are better situated than Congress to respond to changed circumstances and new developments).

46. *See* DANIEL SHAVIRO, WHEN RULES CHANGE: AN ECONOMIC AND POLITICAL ANALYSIS OF TRANSITION RELIEF AND RETROACTIVITY, 86–88 (2001) (arguing that the public choice critique of legislation is particularly compelling in the tax context). *See also* THE FEDERALIST NO. 10, at 56 (James Madison) (Legal Classics Library ed., 1983) ("The apportionment of taxes on the various de[s]criptions of property, is an act which [s]eems to require the mo[s]t exact impartiality, yet there is perhaps no legi[s]lative act in which greater opportunity and temptation are given to a predominant party, to trample on the rules of justice."). Note also that, in Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44 (2011), the Court upheld a regulation that was amended to create a pro-government outcome after the government had been defeated in court based on an earlier iteration of the regulation.

of the law by reducing the potential for disagreement among the circuit courts.[47]

On the other hand, there is the question of the Treasury's bias. Where the government is defeated, it would be surprising if its perspective were unaffected. Indeed, the Treasury's very position as the taxpayer's adversary in tax litigation will tend to produce bias. Just as criminal prosecutors are not given the quasi-legislative responsibility of defining the elements of the crimes they prosecute, so too, one might argue, more skepticism would be appropriate regarding the scope of the Treasury's lawmaking function. Although judges are certainly not free of bias,[48] at least they do not suffer the bias one acquires as an

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47. *See* Silberman, *supra* note 31, at 824; *see also* Colin Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 585–92 (1985) (granting deference to agencies will make policy more coherent and will unify the law by locating decision-making authority in the agencies rather than in the various courts of appeals). Moreover, at least in the tax area, some sentiment favors minimizing inter-circuit conflict. *See* Popov v. Comm'r, 246 F.3d 1190, 1195 (9th Cir. 2001) (stressing the importance of uniformity in the tax area and the need to maintain consistency among the circuits). On the other hand, uniformity creates another concern: the lost opportunity for the courts to experiment with different approaches and to reflect on alternative ways of addressing the problem. Note that, in Carpenter Family Invs., LLC v. Comm'r, 136 T.C. 17 (2011), the court adhered to its decision in *Intermountain*, invalidating the final regulation.

The Tax Court's approach in *Intermountain* and *Carpenter* has received mixed results in the circuit courts. In Grapevine Imps., Ltd. v. United States, 636 F.3d 1368 (Fed. Cir. 2011), the court upheld the regulation, which had not been issued until after the trial court's decision favoring the taxpayer. The court reversed—and indeed overruled one of its own precedents in doing so—based on the new regulation. Citing *Chevron, Mayo* and *Smiley*, the court indicated that there is nothing inherently problematic in terms of the *Chevron* framework for an agency to issue a regulation in the "heat of litigation." The court applied the regulation retroactively based on the pre-1996 version of section 7805 (*i.e.*, retroactivity is generally impermissible under the 1996 amendment, but this amendment does not apply to regulations issued under a Code section enacted prior to 1996). The court concluded that the retroactive application of the regulation did not constitute an abuse of discretion. *See also* Salman Ranch, Ltd. v. Comm'r, 647 F.3d 929 (10th Cir. 2011) (same); Beard v. Comm'r, 633 F.3d 616 (7th Cir. 2011) (rejecting the taxpayer's argument based on the court's reading of the statute). On the other hand, in Burks v. United States, 633 F.3d 347 (5th Cir. 2011), the court found the temporary regulation to be invalid based on its conclusion that the statute is unambiguous given the Supreme Court's decision in *Colony*. *See also* Home Concrete & Supply, LLC v. United States, 634 F.3d 249 (4th Cir. 2011) (same).

48. *See, e.g.*, Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777–830 (2001); *see generally* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000) (describing cultural myths that affect judges' decision-making).

adversary.[49] Thus, if disinterested, unbiased analysis is the objective,[50] one can make a fairly compelling argument that *Chevron*'s shift of power from the courts to the agencies[51] is not entirely desirable.

One might also take a negative view of this alteration because of the resulting diminution in the courts' authority to limit the abusive exercise of power by another branch of government.[52] The Service has recently been perceived as an unresponsive bureaucracy.[53] To the extent that a disinterested judge might be able to restrain bureaucratic power, *Chevron* can be seen as bureaucracy-entrenching. This is somewhat ironic. As the perception of the Service has grown more negative, a corresponding popular impulse to curtail its authority has arisen.[54] Oddly, at the very time this impulse took root, the courts enhanced the government's authority through *Chevron* in the name of political accountability. In other words, the Supreme Court has, in effect, enhanced the power of an unpopular agency in the name of sensitivity to popular will.[55]

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49. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (indicating that the Court gives considerable and, in some cases, decisive weight to tax regulations, provided that the regulation is "not of adversary origin").
50. To the extent that one perceives the government as acting unfairly, the willingness of taxpayers to comply voluntarily will be affected adversely. *See* Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1812 (2000) (suggesting that when the Service acts unfairly, it sends a signal to taxpayers that will undermine voluntary compliance).
51. Prior to *Chevron*, the Court was reluctant to review regulations deferentially when issued in order to gain adversarial advantage. *See Skidmore*, 323 U.S. at 140. Under *Chevron*, however, a regulation is entitled to controlling deference even if adopted for the purpose of influencing pending litigation. *See* Smiley v. Citibank, 517 U.S. 735 (1996) (granting *Chevron* deference even though the interpretation was issued during the litigation). The government's ability to influence a pending tax litigation by issuing a regulation has been constrained by the 1996 amendment to I.R.C. § 7805(b)(1) which prohibits, as a general matter, retroactive regulations. *See* Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 1101(a), 110 Stat. 1452, 1468 (1996). On the other hand, *Smiley* does contemplate that a regulation issued after a transaction has been consummated can be relevant even when the agency does not have the authority to issue regulations on a retroactive basis. *See Smiley*, 517 U.S. at 744 n.3.
52. *See* Thomas W. Merrill, *Judicial Deference to Executive President*, 101 YALE L.J. 969, 996–97 (1992) (emphasizing the weakness of presidential oversight and the need for judicial review to limit the potential for agency abuse of power).
53. *See* Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules*, 84 IOWA L. REV. 413, 446 (1999) (describing the Service as having a "fortress mentality," and as being self-protective and unresponsive).
54. *See, e.g.*, Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 (1996).
55. For a contrary view, see Merrill & Hickman, *supra* note 23.

## § 1:3 *Skidmore* Deference

In *United States v. Mead*,[56] the Supreme Court clarified *Chevron*'s scope as well as the kind of deference non-*Chevron* interpretations are entitled to receive. In terms of *Chevron*'s scope, the Court indicated that two conditions must be satisfied for *Chevron* to apply: (i) Congress must have intended to confer the authority on the agency to issue interpretations having force-of-law effect (that is, the authority to invoke the *Chevron* standard), and (ii) the particular interpretation must be issued in the type of format that Congress contemplated would be eligible for the *Chevron* standard.[57] The consensus view is that revenue rulings do not qualify for *Chevron* treatment,[58] thus

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56. United States v. Mead, 533 U.S. 218 (2001).
57. *See id.* at 226–27.
58. *See, e.g.*, Aeroquip-Vickers, Inc. v. Comm'r, 347 F.3d 173, 181 (6th Cir. 2003) ("When promulgating revenue rulings, the IRS does not invoke its authority to make rules with the force of law."); *In re* Quality Stores, Inc., 693 F.3d 605 (6th Cir. 2012) (indicating that revenue rulings do not receive *Chevron* deference and then finding the revenue ruling inconsistent with Congress's intent); McLaulin v. Comm'r, 276 F.3d 1269, 1275 n.12 (11th Cir. 2001) (considering the level of deference a revenue ruling should receive); Del Commercial Props., Inc. v. Comm'r, 251 F.3d 210 (D.C. Cir. 2001) (applying *Skidmore*, not *Chevron*, in the case of a revenue ruling); Med. Emergency Care Assocs., S.C. v. Comm'r, 120 T.C. 436 (2003) (same); Taproot Admin. Servs., Inc. v. Comm'r, 133 T.C. 9 (2009), *aff'd*, 679 F.3d 1109 (9th Cir. 2012) (same); N.J. Council of Teaching Hosps. v. Comm'r, 149 T.C. No. 22 (2017) ("Under Skidmore . . ., the weight we afford them [revenue rulings] depends upon their persuasiveness and the consistency of the Commissioner's position over time."); Vichich v. Comm'r, 146 T.C. No. 12 (2016) (applying *Skidmore* in the case of a revenue ruling); Anderson v. Comm'r, 123 T.C. 219 (2004) (citing *Skidmore*); Omohundro v. United States, 300 F.3d 1065 (9th Cir. 2002) (applying *Skidmore* to a revenue ruling). Indeed, *Mead* itself appears to signal that revenue rulings are not entitled to *Chevron* deference. *See* 533 U.S. at 229 (discussing the fact that, under the *Chevron* decision, the Court of Federal Claims had not been giving any deference to revenue rulings). *See* Estate of Elkins v. Comm'r, 140 T.C. 5 (2013) (refusing to respect pro-IRS revenue rulings on the ground that the IRS had not offered a persuasive rationale in the rulings); Grecian Magnesite Mining v. Comm'r, 149 T.C. No. 3 (2017) (rejecting a pro-IRS revenue ruling on the ground that its reasoning was extremely cursory); Corbalis v. Comm'r, 142 T.C. 2 (2014) (refusing to grant any deference to a revenue procedure and pointing out that an agency interpretation that is contrary to the plain meaning of the statute is invalid under Comm'r v. Schleier, 515 U.S. 323, 336 n.8 (1995)); Fed. Nat'l Mortg. Ass'n v. United States, 379 F.3d 1303 (Fed. Cir. 2004) (rejecting *Chevron* deference in the case of a revenue procedure and then refusing to grant it persuasive under the *Skidmore* deference); Ibrahim v. Comm'r, __ F.3d __ (8th Cir. 2015) (indicating that a

leaving regulations as the only IRS guidance eligible for such treatment.[59]

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long-standing and reasonable interpretation in a revenue ruling is entitled to substantial deference but then concluding that the ruling at issue was unreasonable and contrary to the plain meaning of the Code and therefore invalid); Estate of Schaefer v. Comm'r, 145 T.C. 4 (2015) (granting *Skidmore* deference to a revenue ruling and a revenue procedure based on the fact that the IRS had been consistent over a period of years, had engaged in thorough reasoning and had taken a position that was consistent with the legislative history); Khafra v. IRS, No. 8:17-cv-03100-PX, 2018 WL 5809704 (D. Md. Nov. 6, 2018) (applying less deference to a revenue ruling than a regulation); Battle Flat, LLC v. United States, 2015 WL 5554807 (D.S.D. 2015) (finding a revenue procedure entitled to deference under *Skidmore*). It has been suggested that a position taken in the IRS Manual qualifies for *Skidmore* deference. *See* Rothkamm v. United States, 802 F.3d 699 (5th Cir. 2015) (dissent suggesting that the Manual should receive *Skidmore* deference).

In Am. Inst. of Certified Pub. Accountants v. IRS, 746 F. App'x 1 (D.C. Cir. 2018), the court upheld a revenue procedure over an argument that it was invalid on the grounds that (1) it was not issued with notice and comment, and (2) it was arbitrary and capricious based on a claimed IRS failure to sufficiently examine the data and articulate its reasoning. In reaching this conclusion, the court ruled that the notice-and-comment procedure was not necessary because the revenue procedure did not adopt a rule that was binding or entitled to force-of-law effect; nor did it revoke authority that had been issued with notice and comment. The court ultimately concluded, without citing *Skidmore*, that the IRS was not arbitrary or capricious in adopting the revenue procedure. Parenthetically, it is worth noting that, while the IRS was thus ultimately successful, the court's use of the arbitrary-and-capricious standard reflects an approach available to taxpayers who challenge the validity of revenue procedures (or, perhaps, revenue rulings). *Cf.* Good Fortune Shipping AS v. Comm'r, 897 F.3d 256, 261–65 (D.C. Cir. 2018) (finding a regulation invalid under *Chevron*'s step two, in effect concluding that the interpretation contained in the regulation was arbitrary or capricious or unreasonable).

59. The Department of Justice has indicated that it will not seek *Chevron* deference for revenue rulings or revenue procedures. *See* Marie Sapirie, ABA Section of Taxation Meeting: *DOJ Won't Argue for Chevron Deference for Revenue Rulings and Procedures, Official Says*, 131 TAX NOTES 674 (May 16, 2011). *See also* Exxon Mobil Corp. & Affiliated Cos. v. Comm'r, 689 F.3d 191 (2d Cir. 2012) (rejecting *Chevron* deference in the case of a revenue procedure). In addition, the Tax Court has indicated that it will not grant *Chevron* deference to an IRS Notice. *See* Hellweg v. Comm'r, T.C. Memo 2011-58 (indicating that a Notice is not entitled to *Chevron* deference but may be entitled to *Skidmore* deference); Morehouse v. Comm'r, 140 T.C. 16 (2013) (granting what appears to be *Skidmore* deference to a Notice), *rev'd*, 769 F.3d 616 (8th Cir. 2014) (concluding that the Notice, which was accompanied by a proposed revenue ruling that was never formally adopted and that was contrary to a long-standing revenue ruling, was entitled to no deference and that the Tax Court had erred in giving it deference); Topsnik v. Comm'r, 146 T.C. No. 1 (2016) (granting

In *Mead*, the Court held that any interpretation not eligible for the *Chevron* standard is to be analyzed under *Skidmore v. Swift & Co.*[60] Under the *Skidmore* standard, the court must determine whether the interpretation is persuasive.[61] In making this judgment, the court must consider a number of factors: whether the agency has consistently maintained its position;[62] how thoroughly the agency considered its position; whether the agency's reasoning is valid; and whether other factors make the interpretation persuasive.[63] To illustrate the very significant difference between the *Chevron* and *Skidmore* standards, consider again the Court's decision in *Smiley*.[64] In *Smiley*, the Court upheld an interpretation even though it was issued 100 years after the enactment of the underlying statute, the agency had been inconsistent and it was issued after litigation had already broken out about the meaning of the statute. Applying *Chevron*, the Court did not permit any of these considerations to undermine the validity of the

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what appears to be *Skidmore* deference to a Notice); BMC Software, Inc. v. Comm'r, 780 F.3d 669 (5th Cir. 2015) (indicating that a Notice receives *Skidmore* deference but refusing to give deference on the ground that it was not persuasive); Sutardja v. United States, 109 Fed. Cl. 358 (Fed. Cl. 2013) (granting *Skidmore* deference to a Notice).

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

61. *See Mead*, 533 U.S. at 228.

62. In Taproot v. Comm'r, 679 F.3d 1109 (9th Cir. 2012), the court upheld a pro-government revenue ruling, pointing out that the IRS had consistently followed the revenue ruling in private letter rulings—a somewhat surprising conclusion given the non-precedential nature of such rulings under section 6110 of the Code; N.J. Council of Teaching Hosps. v. Comm'r, 149 T.C. No. 22 (2017) ("Under Skidmore . . ., the weight we afford them [revenue rulings] depends upon their persuasiveness and the consistency of the Commissioner's position over time."). *See also* Webber v. Comm'r, 144 T.C. 17 (2015) (citing *Taproot* for the proposition that a "history of consistent private letter rulings based on published ruling favors a finding of deference under Skidmore"); Hall v. United States, 566 U.S. 506, 132 S. Ct. 1882, 2012 WL 1658486 (2012) (citing a chief counsel advisory, also non-precedential under section 6110 of the Code, as well as the *Internal Revenue Manual*, in reaching a pro-government position); Voss v. Comm'r, 796 F.3d 1051, 2015 WL 4664437 (9th Cir. 2015) (discussing whether the Supreme Court decision in *Hall* contemplates *Skidmore* deference with respect to a Chief Counsel Advice—with the majority pointing out that a Chief Counsel Advice, by its own terms, is not precedential and the dissent citing *Hall* in support of its deference claim). In Sunoco, Inc. v. United States, 128 Fed. Cl. 345 (Fed. Cl. 2016), the court indicates that *Skidmore* deference is inappropriate in the case of an IRS Notice where issued in the heat of litigation and where inconsistent with a chief counsel advisory; Seaview Trading, LLC v. Comm'r, __ F.3d __, 2017 WL 2453958 (9th Cir. 2017) (giving *Skidmore* deference to a revenue ruling and indicating that a CCA "buttressed" the ruling); Hardy v. Comm'r, T.C. Memo 2017-16 (citing to a TAM in finding the IRS construction of the Code correct).

63. *See Mead*, 533 U.S. at 228.

64. Smiley v. Citibank, 517 U.S. 735 (1996).

interpretation. Under the *Skidmore* standard, in contrast, the interpretation would have presumably been invalidated. Indeed, the cumulative effect of the cited considerations aside, any one of them would have likely led to such a conclusion.

### *§ 1:3.1 Revenue Rulings*

With revenue rulings seemingly ineligible for the *Chevron* standard, they necessarily become subject to *Skidmore*.[65] This raises the question whether pro-government and pro-taxpayer revenue rulings should be treated alike. In a series of cases, the Tax Court has begun to give more binding effect to pro-taxpayer revenue rulings.[66] In other

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65. For authorities applying *Skidmore* to revenue rulings, see *supra* note 58. Note that, prior to *Mead*, some courts had given *Chevron*-like deference to pro-government revenue rulings. *See* Salomon, Inc. v. Comm'r, 976 F.2d 837 (2d Cir. 1992). In the aftermath of *Mead*, courts will presumably retreat from granting this much deference and will instead apply the *Skidmore* methodology. On the other hand, where Congress reenacts a section of the Code after a pro-government revenue ruling has been issued, *Skidmore* will not apply. Instead, the reenactment may be viewed as a ratification of the ruling, thus rendering it invulnerable to taxpayer challenge. *See, e.g.*, Davis v. United States, 495 U.S. 472, 482 (1990). On the other hand, in the case of reenactment, the government is not necessarily precluded from revoking the ruling and adopting a new, post-reenactment interpretation. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (permitting agencies to adopt a different interpretation despite reenactment unless Congress unambiguously indicated its intent to freeze the interpretation in place).

66. Rauenhorst v. Comm'r, 119 T.C. 157 (2002); Baker v. Comm'r, 122 T.C. 143 (2004); Dover Corp. & Subsidiaries v. Comm'r, 122 T.C. 324 (2004). It should be noted that the court emphasized in these cases that the Service had consistently followed the taxpayer-friendly ruling in private letter rulings. Whether the outcome might be different in the case of a revenue ruling never cited by the Service is an interesting question. For a Tax Court decision where the court did not follow *Rauenhorst*, see Gluckman v. Comm'r, T.C. Memo 2012-329 (refusing to follow a taxpayer-friendly revenue ruling without citing *Rauenhorst* or the other Tax Court decisions embracing it). For a case where the court embraces a taxpayer-friendly interpretation in a Chief Counsel Memorandum, see Park v. Comm'r, 722 F.3d 384, 2013 WL 3388414 (D.C. Cir. 2013). *See also* Dixon v. Comm'r, 141 T.C. No. 3 (2013) (citing *Rauenhorst* for the proposition that the court is obligated to follow taxpayer-friendly revenue rulings). In a letter dated October 17, 2002, the Office of Chief Counsel announced that it would not take a position in litigation contrary to an outstanding revenue ruling. *See also* Chief Counsel Advice 201501010 (citing *Rauenhorst* and stating, "The Commissioner must follow his own relevant revenue rulings in Tax Court proceedings"). In a letter dated May 18, 2017 (Control Number: SBSE-04-0517-0030), the IRS states that IRS personnel are required to follow authority published in the Internal Revenue Bulletin and that taxpayers may rely on such authority. In terms of FAQs, the IRS states: "FAQs that appear on IRS.gov but that have not been published in the

words, while applying *Skidmore* to pro-government revenue rulings—inquiring whether they are persuasive based on *Skidmore*'s relevant considerations—it has refused to permit the Service to disavow pro-taxpayer revenue rulings without regard to their persuasiveness.[67]

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Bulletin are not legal authority and should not be used to sustain a position unless the items (e.g., FAQs) explicitly indicate otherwise or the IRS indicates otherwise by press release or by notice or announcement published in the Bulletin."

What if the ruling is not revoked after the Code is amended? In Pilgrim's Pride Corp. v. Comm'r, 141 T.C. 17 (2013), *rev'd on another ground*, 779 F.3d 311 (5th Cir. 2015), the IRS maintained a position that was contrary to an outstanding revenue ruling (Rev. Rul. 93-80, 1993-2 C.B. 239). Without citing *Rauenhorst*, the court agreed with the IRS on the substantive issue on the ground that the ruling was issued before an amendment to the Code that, in the court's view, effected a change in the law. The court stated that the IRS is not required "to assert a particular position as soon as the statute authorizes such an interpretation," citing, inter alia, Dickman v. Comm'r, 465 U.S. 330, 343 (1984); *see also* Farrell v. United States, 313 F.3d 1214 (9th Cir. 2002) (refusing to apply a taxpayer-friendly regulation that had not been revoked on the ground that it was in effect invalidated by a later amendment to the Code); Norman v. United States, 138 Fed. Cl. 189 (Fed. Cl. 2018) (invalidating regulation based on later-enacted amendment to Code); Kimble v. United States, __ Fed. Cl. __ (Fed. Cl. Dec. 27, 2018) (same); Young v. Comm'r, T.C. Memo 2009-24 (same); Heckman v. Comm'r, 788 F.3d 845, 2015 WL 3604861 (8th Cir. 2015) (intimating that a revenue ruling that interpreted a prior version of the Code should be disregarded). It is surprising that the court in *Pilgrim's Pride* failed to cite a post-amendment revenue ruling that adhered to the position taken by the IRS in the earlier ruling (Rev. Rul. 2004-58, 2004-1 C.B. 1043). It is also somewhat troubling that the IRS could allow a taxpayer-friendly ruling to remain "on the books" for many years after an amendment to the Code without giving notice to taxpayers that it intends to argue the ruling is no longer viable in light of the amendment until the IRS takes the position in court. *Cf.* E. Norman Peterson Marital Tr. v. Comm'r, 78 F.3d 795 (2d Cir. 1996) (suggesting that it would make sense to hold the IRS's failure to clarify its position in a regulation against the IRS); Applied Research Assocs., Inc. & Affiliate v. Comm'r, 143 T.C. 17 (2014) (refusing to construe a regulation in favor of the IRS where the IRS had not amended the regulation to incorporate its litigating position); Cosentino v. Comm'r, T.C. Memo 2014-186 (indicating that taxpayers may rely on taxpayer-friendly revenue rulings). *Cf.* Morehouse v. Comm'r, 769 F.3d 616 (8th Cir. 2014) (deferring to a revenue ruling on the ground that it was long-standing without addressing the question whether, as a taxpayer-friendly ruling, it was binding on the IRS).

67. It remains to be seen whether other courts will follow the Tax Court's approach. For cases where the court appeared to be willing to permit the Service to disavow a taxpayer-friendly ruling, see Black & Decker Corp. v. United States, 436 F.3d 431 (4th Cir. 2006); Batchelor-Robjohns v. United States, 788 F.3d 1280, 2015 WL 3514674 (11th Cir. 2015) (finding a taxpayer-friendly revenue ruling not persuasive); Ford v. United States, 2012 WL 6579598 (6th Cir. 2012) (not officially reported) (refusing to hold the IRS bound by a revenue procedure); Vons Cos. v. United States, 55 Fed. Cl. 709, 718 (Fed. Cl. 2003); Omohundro v. United States, 300 F.3d 1065

The principle established in these cases is subject to two qualifications. First, as the Supreme Court has indicated, where a Code provision is unambiguous, the Service cannot rewrite it by making a taxpayer-friendly concession in a revenue ruling.[68] Thus, if the Service were able to convince the court that the Code unambiguously calls for result contrary to the one set forth in the revenue ruling, the court would be required to apply the Code without regard to the ruling. This qualification is driven by constitutional concerns: While the executive branch may have interpretive discretion under *Chevron* or *Skidmore*,

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(9th Cir. 2002) (applying *Skidmore* in upholding a taxpayer-friendly revenue ruling without acknowledging that in Estate of Rapp v. Comm'r, 140 F.3d 1211 (9th Cir. 1998), an earlier Ninth Circuit panel had indicated in dicta that taxpayers may use a taxpayer-friendly revenue ruling as a shield). On the other hand, under the Fifth Circuit's approach, which the Tax Court cited, the Service is deemed bound by taxpayer-friendly revenue rulings. *See* Estate of McLendon v. Comm'r, 135 F.3d 1017, 1024 n.15 (5th Cir. 1998). The Second Circuit's approach is similar to the Fifth Circuit's. *See* Weisbart v. U.S. Dep't of Treasury, 222 F.3d 93, 98 (2d Cir. 2000). The Second Circuit has, however, called into question the continuing viability of *Weisbart*, intimating that all revenue rulings are to be analyzed under *Skidmore*. *See* Reimels v. Comm'r, 436 F.3d 344, 347 n.2 (2d Cir. 2006). In AmBase Corp. v. United States, 731 F.3d 109, 121 n.12 (2d Cir. 2013), the court ruled for the taxpayer based on an approach outlined in a revenue ruling and a general counsel memorandum. The court indicates that it previously stated in dicta that a general counsel memorandum, like a revenue ruling, is entitled to deference under the *Skidmore* standard. It then concludes that there is no need to reexamine the issue because, in this case, the same approach is contained in a revenue ruling. The court then takes the view that the revenue ruling is valid under *Skidmore* and therefore determinative. In reaching its conclusion, the court does not make a distinction between a taxpayer-friendly ruling, as here, and an IRS-friendly ruling. *See also* Chai v. Comm'r, 851 F.3d 190 (2d Cir. 2017) (giving *Skidmore* deference to a taxpayer-friendly provision in the Internal Revenue Manual). Whereas the validity of an IRS-friendly ruling depends on its persuasiveness (as *Skidmore* requires), the validity of a taxpayer-friendly ruling should not, as a general matter, be questioned by the IRS. *See* Rauenhorst v. Comm'r, 119 T.C. 157 (2002). *But see* Comm'r v. Schleier, 515 U.S. 323, 335 n.8 (1995) (indicating that a taxpayer-friendly ruling is invalid if contrary to the unambiguous terms of the Code).

In Estate of Morrissette v. Comm'r, 146 T.C. No. 11 (2016), the Tax Court held that the preamble to a regulation is not binding on the IRS. The court instead concluded that a statement in a preamble should receive *Skidmore* deference. Surprisingly, however, the court failed to acknowledge that the preamble contained taxpayer-friendly language, which should presumably be binding on the IRS via an analogy to *Rauenhorst* (although *Rauenhorst* involved a taxpayer-friendly revenue ruling, not a preamble).

68. *See* Comm'r v. Schleier, 515 U.S. 323, 345 (1995). *See also* Liljeberg v. Comm'r, 907 F.3d 623, 628 (D.C. Cir. 2018) ("Agency guidance could not, in any event, contradict the plain terms of the third condition of the statute.").

it does not have the authority to alter the meaning of an unambiguous statute that Congress has enacted.[69]

The second qualification is that, in each of the cases in which the court held the Service bound by its concession, the ruling was still outstanding at the time of the litigation. In effect, the court would not permit the Service to argue against its own extant, published position. If, however, the Service were to revoke its ruling before the court issued its decision, these cases would presumably no longer be relevant. The question would rather become whether the revocation constituted an abuse of discretion. If, for example, the taxpayer consummated a transaction in reliance on the revenue ruling, could the Service revoke the ruling retroactively and then apply its new position to the taxpayer?[70] As a practical matter, the Service tends to exercise its authority under section 7805 to revoke on a retroactive basis sparingly, typically providing that the revocation is to be given prospective effect.[71] Practitioners may take some comfort from the Service's unwillingness to use its authority too aggressively.

Nonetheless, the abuse-of-discretion question remains an important one. Given the extent to which practitioners rely on taxpayer-friendly revenue rulings in structuring transactions, a change in the Service's practice would radically affect the ability of practitioners to give advice and the ability of taxpayers to engage in transactions with a sense of

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69. United States v. Burke, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) ("the Secretary of the Treasury would effectively be empowered to repeal taxes that the Congress enacts" if a taxpayer-friendly interpretation were upheld, even if contrary to the Code); Dixon v. United States, 381 U.S. 68 (1965); Auto. Club of Mich. v. Comm'r, 353 U.S. 180 (1957); Manhattan Gen. Equip. Co. v. Comm'r, 297 U.S. 129 (1936). *See also* Mitchell M. Gans, *Deference and the End of Tax Practice*, 36 REAL PROP. PROB. & TR. J. 731, 797–98 (2002).

70. While it is not clear whether a regulation can be revoked retroactively, see Benjamin J. Cohen and Catherine A. Harrington, *Is The Internal Revenue Service Bound by Its Own Regulations and Rulings*, 51 TAX LAW. 675 (1998), revenue rulings may be revoked on this basis. *See* I.R.C. § 7805(b)(8). In Burleson v. Comm'r, T.C. Memo 1994-364, after the taxpayer and the Service had entered into a stipulation in the Tax Court, the Service revoked and clarified a relevant taxpayer-friendly revenue ruling. Emphasizing the fact that the revocation occurred after the stipulation had been executed, the court found that the revocation was an abuse of discretion and refused to permit the Service to disavow its earlier ruling. *See also* La. Rest. Ass'n Self Ins. Tr. v. United States, 2014 WL 2600080 (E.D. La. Apr. 16, 2014) (finding a retroactive revocation of a *private letter ruling* on which the taxpayer had relied was an abuse of discretion).

71. I.R.C. § 7805(b)(8) authorizes the Service to make any ruling, even including a judicial ruling, prospective. Thus, in Cent. Laborers' Pension Fund v. Heinz, 541 U.S. 739, 748 n.4 (2004), the Court held that the Service could make the Court's ruling prospective.

certainty about the tax consequences. If in fact the Service can retroactively revoke a taxpayer-friendly revenue ruling, might it not be prudent for practitioners to inform clients of this possibility where their advice is based on a taxpayer-friendly revenue ruling—just as a practitioner who relies on private letter rulings will ordinarily inform the client that they are not entitled to precedential effect?

In *Dixon v. United States*,[72] the Service revoked a ruling retroactively. Even though the taxpayer had acquired an investment in reliance on the ruling, the Court held that there was no abuse of discretion. Emphasizing the Service's statutory authority to revoke a ruling retroactively and the statement in the controlling revenue procedure concerning revocation policy, the Court concluded that the taxpayer's reliance was not justifiable and that the Service could therefore correct its mistake of law.[73] Thus, the Service was not precluded from maintaining a position that was contrary to the revoked ruling.

Questions have, however, been raised about *Dixon*'s significance. In *Estate of McLendon v. Commissioner*,[74] the court raised two such questions. First, the court suggested the possibility that the Supreme Court's refusal to hold the Service bound by the revoked ruling was based on its conclusion that the ruling was contrary to a clear Code section and that the Service could not be permitted to rewrite such a section by concession (or otherwise).[75] If this reading of *Dixon* is correct, then its import is rather limited. For in the vast majority of cases where the Service has issued a taxpayer-friendly revenue ruling, it will not be found to be inconsistent with unambiguous statutory language. Second, the *McLendon* court discerned a change in the Service's revocation-policy language, reading the controlling revenue procedure as inviting more taxpayer reliance than the revenue procedure at issue in *Dixon*.[76] Thus, were the Service to revoke a revenue ruling retroactively, a taxpayer seeking to establish justifiable reliance could perhaps point to this change in language (but if the ruling

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72. Dixon v. United States, 381 U.S. 68 (1965). *See also* Auto. Club of Mich. v. Comm'r, 353 U.S. 180 (1957).
73. *See Dixon*, 381 U.S. at 72–76.
74. Estate of McLendon v. Comm'r, 135 F.3d 1017 (5th Cir. 1998).
75. *See id*. at 1024 n.15. In Bobrow v. Comm'r, T.C. Memo 2014-21, the IRS had taken a taxpayer-friendly position in one of its publications. Before the court, the IRS maintained a position contrary to the publication. Without citing or even mentioning the publication, the court agreed with the IRS on the substantive issue. The IRS, however, later announced that it would seek to apply its victory in *Bobrow* only on a prospective basis and that it would delete the taxpayer-friendly statement from the publication. *See* IRS Announcement 2014-15, 2014-16 I.R.B. 973.
76. *See id*.

were contrary to a clear Code section, this argument would fail).[77] In short, while there is a trend in the direction of holding the Service bound by an unrevoked revenue ruling, questions do remain about its ability to revoke after the transaction is consummated but before the court rules on the issue.[78]

### § 1:3.2 *Interpretive Regulations and* Mayo

In the case of interpretive regulations (that is, those issued under the general authority of Code section 7805 rather than under a specific grant of authority), there were questions about the applicability of the *Chevron* standard. Until the Supreme Court's decision in *Mayo Foundation for Medical Education & Research v. United States*,[79] some lower courts had suggested that a more taxpayer-friendly standard might apply. For example, the Tax Court, in *Swallows Holding v. Commissioner*,[80] invalidated an interpretive regulation. In doing so, it

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77. *See* Comm'r v. Schleier, 515 U.S. 323, 345 (1995) (indicating that a revenue ruling contrary to an unambiguous Code provision is invalid).

78. IRS General Counsel Memoranda, unlike revenue rulings, are not intended to have precedential effect. *See* IRS INFO 2001-0199 ("they do not represent the position of the IRS"). Nonetheless, at least one court has granted them *Skidmore* deference. *See* Nathel v. Comm'r, 615 F.3d 83 (2d Cir. 2010). As acknowledged by the U.S. Court of Appeals for the Second Circuit in *Nathel*, however, other courts have refused to grant any deference in this context. In AmBase Corp. v. United States, 731 F.3d 109, 121 n.12 (2d Cir. 2013), the court ruled for the taxpayer based on an approach outlined in a revenue ruling and a general counsel memorandum. The court indicates that it previously stated in dicta in *Nathel* that a general counsel memorandum, like a revenue ruling, is entitled to deference under the *Skidmore* standard. It then concludes that there is no need to reexamine the issue because, in this case, the same approach is contained in a revenue ruling that is, according to the court, determinative under the *Skidmore* framework.

79. Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44 (2011).

80. Swallows Holding v. Comm'r, 126 T.C. 6 (2006). In reversing, the Third Circuit applied *Chevron*, indicating that the Tax Court erroneously applied factors that would be relevant under *National Muffler* but not under *Chevron*. For a critique of the Tax Court's decision in *Swallows Holding* on the same grounds, see Mitchell M. Gans & Jay A. Soled, *A New Model for Identifying Basis in Life Insurance Policies: Implementation and Deference*, 7 FLA. TAX REV. 569 (2006). Note also that in PSB Holdings, Inc. v. Comm'r, 129 T.C. 15 (2007), the Tax Court in dicta, without citing its decision in *Swallows Holding*, suggests that *Chevron* applies to interpretive regulations. On the other hand, the Tax Court has opted for applying *Chevron* under the *Golsen* Doctrine (*i.e.*, in those cases where an appeal would lie in a circuit court that applies *Chevron*), suggesting there is continuing disagreement among the court's judges on the question. *See* Lantz v. Comm'r, 132 T.C. 8 (2009).

refused to decide whether the *Chevron* standard or the deference standard articulated by the Supreme Court in *National Muffler v. Commissioner*[81] applies to interpretive tax regulations.[82] Under either standard, the court ruled the regulation was invalid.[83] The Third Circuit reversed, applying *Chevron* and finding the regulation valid under this standard.

In *National Muffler*, decided before *Chevron*, the Court found this inquiry controlling in determining the validity of a regulation: whether it "harmonizes with the plain language of the statute, its origin and its purpose."[84] The Court indicated that various factors are to be considered in reaching a resolution: whether the regulation was adopted at the time the statute was enacted; whether the regulation is a long-standing one; whether taxpayers have relied on the regulation; whether the Service has consistently adhered to the position taken in the regulation; and whether Congress has considered the regulation in adopting subsequent legislation.[85]

The *National Muffler* standard is very similar, if not equivalent, to the *Skidmore* standard. Both set forth an ultimate question—whether the regulation is persuasive in the case of *Skidmore* and whether it harmonizes with the statute in the case of *National Muffler*—and both go on to require that the ultimate question be answered based on an examination of similar second-order considerations. Thus, at least in the Tax Court, the possibility remained that the *National Muffler* standard, a *Skidmore*-like standard, would govern where the validity of an interpretive regulation was at issue. Given the Supreme Court's

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81. Nat'l Muffler v. Comm'r, 440 U.S. 442 (1979).

82. It should be noted that the court's deference analysis in *Swallows Holding* is largely, if not entirely, dicta. Once the court concluded that the Code section was unambiguous, there was no need to consider the level of deference to which the regulation was entitled. *See* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004) (indicating that there is no need to consider the deference question if the statute is determined to be unambiguous). For a further discussion of *Swallows Holding*, see Mitchell M. Gans & Jay A. Soled, *A New Model for Identifying Basis in Life Insurance Policies: Implementation and Deference*, 7 FLA. TAX REV. 569 (forthcoming).

83. *See also* Estate of Gerson v. Comm'r, 127 T.C. 11 (2006) (again refusing to decide whether *Chevron* or *National Muffler* applies, but concluding, unlike *Swallows Holding*, that the challenged regulation was valid).

In Mayo Found. for Med. Educ. & Research v. United States, 568 F.3d 675 (8th Cir. 2009), the court applied a mixture of *Chevron* and *National Muffler*. As indicated in the text, the Supreme Court held in *Mayo* that *Chevron* is the controlling standard.

84. *See id*. at 476–77.

85. *See id*.

decision in *United States v. Mead*,[86] however, the Tax Court's conclusion that the *National Muffler* standard might continue to be viable was rather surprising. After all, *Mead* established a two-tier framework, under which agency interpretations are to be analyzed under either the *Chevron* or the *Skidmore* standard. *Mead* certainly does not contemplate the possibility of a third standard. Thus, to the extent the Tax Court in *Swallows Holding* held open the possibility that the *National Muffler* standard might not have been supplanted, it was questionable.[87]

Given the substantial difference between the *Skidmore* and *Chevron* standards, the question whether *National Muffler*, a *Skidmore*-like

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86. United States v. Mead, 533 U.S. 218, 227 (2001).

87. Commentators had questioned whether the *National Muffler* standard remains viable. For a sample of the literature, see Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002); Coverdale, Chevron*'s Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After* Mead, 55 ADMIN. L. REV. 39 (2003); Irving Salem et al., *Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717 (2004); Ellen P. Aprill, *The Interpretive Voice*, 38 LOY. L.A. L. REV. 2081 (2005); Noel Cunningham & James Repetti, *Textualism and Tax Shelters*, 24 VA. TAX REV. 1 (2004); Gregg D. Polsky, *Can Treasury Overrule the Supreme Court?*, 84 B.U. L. REV. 185 (2004); Kristin E. Hickman, *Need for* Mead, 90 MINN. L. REV. 1537 (2006); Mark E. Berg, *Judicial Deference to Tax Regulations: A Reconsideration in Light of* National Cable, Swallows Holding *and Other Developments*, 61 TAX LAW. 481 (2008); Mitchell M. Gans, *Deference and the End of Tax Practice*, 36 REAL PROP. PROB. & TR. J. 731 (2002).

Speculation about the fate of *National Muffler* could be attributed to the Supreme Court's tax cases. While the Court has cited to *Chevron* in some of its tax cases (*see Mead*, 533 U.S. at 230, indicating that it had applied *Chevron* to an interpretive tax regulation in Atl. Mut. Ins. Co. v. Comm'r, 523 U.S. 382 (1998); United States v. Haggar Apparel Co., 526 U.S. 380 (1999)), it has failed to do so in others. *See* Boeing Co. v. United States, 537 U.S. 437 (2003). *See also* United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001) (citing *National Muffler*). In its most recent tax case, Cent. Laborers' Pension v. Heinz, 541 U.S. 739 (2004), although it did not cite *Chevron*, it held in the context of an ERISA litigation that an interpretive tax regulation had force-of-law effect. Since the Court uses force-of-law nomenclature only when it invokes *Chevron* (*see Mead*, 533 U.S. at 221), any argument that it contemplates the continuing use of the *National Muffler* standard has become rather weak. Interestingly, however, the Tax Court in *Swallows Holding* apparently overlooked the Supreme Court's decision in *Central Laborers' Pension*, with neither the majority nor the dissenting opinions citing it. *See also* Scanlon White, Inc. v. Comm'r, 427 F.2d 1173 (10th Cir. 2006) (applying *National Muffler* without citing or acknowledging *Central Laborers' Pension*); Stobie Creek Invs. v. United States, 82 Fed. Cl. 636 (Fed. Cl. 2008) (applying *National Muffler*).

standard, remained viable was an important one. For under the *National Muffler* standard, taxpayers would bear a much easier burden when challenging the validity of interpretive regulations.[88]

In *Mayo Foundation for Medical Education & Research v. United States*,[89] the Supreme Court resolved the question. It held that *National Muffler* had been supplanted by *Chevron*, overruling earlier cases holding that less deference was appropriate in the case of an interpretive regulation than one issued under a specific grant of authority. As a result, the validity of interpretive regulations is to be determined under *Chevron*, thus making *National Muffler*'s second-order considerations irrelevant. For example, in *Mayo*, the Court upheld the regulation even though it was inconsistent with the position taken under a prior regulation. Whereas such inconsistency would cut against the validity of a regulation under *National Muffler*, it is irrelevant under *Chevron*. *Mayo* thus conclusively resolves the question of *National Muffler*'s continuing viability and makes the task of taxpayers seeking to invalidate an interpretive regulation a much more difficult one.[90]

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88. It should be noted that in Barnhart v. Thomas, 540 U.S. 20 (2003), the Court granted *Chevron* deference to agency interpretation issued without notice and comment. *See also* United States v. Mead Corp., 533 U.S. 218, 231 (2001) (indicating that *Chevron* may be appropriate in certain cases even absent notice and comment). But note that the Court later indicated that, where an agency issues an interpretation without notice and comment, it will not receive "force of law" (*Chevron*) effect in the courts. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015). For a further discussion of *Swallows Holding*, see Mitchell M. Gans & Jay A. Soled, *A New Model for Identifying Basis in Life Insurance Policies: Implementation and Basis*, 7 FLA. TAX REV. 569 (2006) (forthcoming).

89. Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44 (2011).

90. *See, e.g.*, Our Country Home Enters. Inc. v. Comm'r, 145 T.C. 1 (2015) (concluding that the split-dollar insurance regulations are valid based on *Chevron* and *Mayo*, and saying that they were not "'arbitrary or capricious in substance, or manifestly contrary to the statute"); *cf.* Altera Corp. v. Comm'r, 145 T.C. 3 (2015) (distinguishing between an interpretive rule and a legislative rule for purposes of the Administrative Procedure Act, treating a regulation issued under the general authority of section 7805 as a legislative rule for purposes of the Act and invalidating the regulation on the ground that it did not adequately address the comments received and the evidence).

Despite the Supreme Court's seemingly unequivocal embrace of *Chevron* in *Mayo*, a relatively obscure concurrence in 2014 by Justices Scalia and Thomas raises core questions about deference, perhaps signaling a fundamental reexamination of the concept in tax and other contexts.

In Whitman v. United States, 135 S. Ct. 352 (2014) (mem.), the Supreme Court denied certiorari in a case involving a criminal conviction based on a violation of the securities law. The lower courts had upheld the conviction

based on the SEC's interpretation of the statute. Justices Scalia and Thomas, while concurring in the decision to deny certiorari, suggest that there is a need for the Supreme Court to consider the appropriateness of granting *Chevron* deference to an interpretation of a statute that carries both civil and criminal implications. They point to the rule of lenity, under which ambiguity in a criminal statute must be resolved in favor of the defendant. They maintain that the rule serves two functions: to make sure that criminal defendants have fair warning as to the nature of the proscribed conduct and to effectuate the "norm" that only the legislature, not the executive branch, defines crime. The two Justices also make the point that a statute cannot have a dual meaning: it cannot have one meaning for civil purposes and a different one for criminal purposes. *See also* United States v. Thompson/Center Arms Co., 504 U.S. 505 (1992) (plurality opinion); Leocal v. Ashcroft, 543 U.S. 1, 11–12 n.8 (2004).

What does this suggest about the applicability of *Chevron* in the tax context and about the validity of *Mayo*? Whereas under *Chevron/Mayo*, ambiguous provisions in the Code can be resolved by regulation, ambiguity would be uniformly resolved in favor of the taxpayer under the principle of lenity. In effect, if the principle applies—on the rationale that the Code carries not just civil, but potentially criminal, sanctions—*Chevron* deference would no longer be appropriate in the tax context and *Mayo* would need to be overruled.

As the two Justices acknowledge, there is authority to the effect that the principle should not apply in the civil context even if the statute also carries criminal sanctions—that, in other words, ambiguity should be resolved differently in the criminal and civil contexts. *See* Babbitt v. Sweet Home Chapter, Cmtys. for Great Or., 515 U.S. 687 (1995). But, as indicated, the Justices cite to other decisions (*United States v. Thompson/Center Arms Co., supra; Leocal v. Ashcroft, supra*) that preclude statutes from having a dual meaning. What, in essence, the two Justices seek is a plenary review of the Court's treatment of the issue in *Babbitt*.

Should the Court eventually decide to consider the issue, its decision in *United States v. Thompson/Center Arms Co., supra*, will be of importance. A tax case, it involved the construction of a Code provision dealing with firearms. The Court, in a plurality opinion, applied the principle of lenity in construing an ambiguous Code section even though the issue was civil, not criminal, in nature. In doing so, the plurality emphasized that the statute under consideration would carry a criminal sanction even if the defendant did not know that his conduct was illegal. The Court distinguished the typical tax case, where a criminal prosecution can only be maintained if the defendant knew that the position taken on the return was contrary to the Code (citing Cheek v. United States, 498 U.S. 192 (1991)).

The implication is that, in a typical case, the applicability of *Cheek* would somehow undercut the concern that animates the principle of lenity. Perhaps, the plurality tacitly reasoned that, given *Cheek*, a criminal prosecution could not be brought on the basis of an ambiguous Code provision—thus permitting courts to resolve ambiguity in the civil context without concern about the principle.

The difficulty with this reasoning from the Scalia/Thomas perspective is that it deals only with the question of notice and not with their suggested "norm" requiring that crime be defined by the legislature. In sum, if, as Scalia and Thomas maintain, it is not possible for statutes to

## § 1:4 *Auer* Deference

Finally, an entirely different strand of deference has been applied by the Supreme Court where the agency's interpretation, as distinguished from the statute, is ambiguous. In *Auer v. Robbins*,[91] a non-tax case, the Court held that an agency's interpretation of an ambiguous regulation is entitled to controlling deference as long as it is not plainly inconsistent with the regulation or plainly erroneous.[92] The courts have begun applying *Auer* in tax cases[93] as well as in the interpretation of

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have a dual meaning and if ambiguity cannot be resolved by the executive branch where criminal sanctions are possible, it seems that the fate of *Chevron/Mayo* may well be in doubt.

Broader questions about *Chevron*'s viability have also been raised. For a suggestion that *Chevron* may not be consistent with the constitution's requirement that questions of statutory interpretation be vested in the judicial branch and that lawmaking authority be vested exclusively in the legislative branch, see Michigan v. Envtl. Prot. Agency, 135 S. Ct. 2699 (2015) (Thomas, J., concurring).

91. Auer v. Robbins, 519 U.S. 452 (1997).

92. *See id*. at 461. In Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326 (2013), the Court indicates that, under *Auer,* an agency's interpretation of its regulation is to be upheld even if it is not the best interpretation, as long as it is a reasonable one.

93. In United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001), the Court gave what it called "substantial judicial deference" based on a long-standing revenue ruling that resolved an ambiguity in the regulation. *See id*. at 219. The Court's emphasis on the long-standing nature of the ruling is difficult to understand: in *Auer,* it deferred to the agency's construction without inquiring whether it was a long-standing one. Perhaps, it is possible that the Court's analysis was driven by a *Skidmore-Auer* overlap: applying *Skidmore* because it was a revenue ruling but applying *Auer* because the revenue ruling resolved an ambiguity in a regulation. *See, e.g.*, Mellow Partners v. Comm'r, 890 F.3d 1070, 1078 (D.C. Cir. 2018) ("We need not choose between these positions because, in our view, the agency's interpretation easily passes muster, whether reviewed pursuant to *Skidmore* or *Auer.*"). For lower court cases applying *Auer* in the tax context, see, *e.g.*, Am. Express Co. v. United States, 262 F.3d 1376 (Fed. Cir. 2001) (applying *Auer* in the case of an ambiguous revenue procedure); Cinema '84 v. Comm'r, 294 F.3d 432, 439 (2d Cir. 2003) (applying substantial deference unless the interpretation is plainly erroneous); Kurzet v. Comm'r, 222 F.3d 830 (10th Cir. 2000); Focardi v. Comm'r, T.C. Memo 2006-56 (indicating that great deference is appropriate in this context); Schott v. Comm'r, 319 F.3d 1203 (9th Cir. 2003) (indicating that the Service's interpretation of an ambiguous regulation is to be respected unless it is an unreasonable one and then concluding, however, that the Service's interpretation was unreasonable); Polm Family Found., Inc. v. United States, 651 F.3d 118 (D.C. Cir. 2011); Union Carbide Corp. & Subsidiaries v. C.I.R., 697 F.3d 104 (2d Cir. 2012) (citing *Auer,* the court upheld an interpretation of a regulation proffered in the government's

the Circular itself.[94] *Auer* is similar to *Chevron* in that it also uses a two-step analysis: first inquiring whether the regulation is ambiguous (in *Chevron*, in the first step, inquiry is made as to whether the statute is ambiguous), and then inquiring whether the agency's proffered resolution of the ambiguity in its regulation is abusive or clearly inappropriate (in *Chevron*, in the second step, inquiry is made as to whether the regulation reasonably resolves the ambiguity in the statute).[95]

A problematic aspect of *Auer* deference is the retroactive effect that it creates. In general, regulations must be issued on a prospective basis,[96] thus giving taxpayers an opportunity to understand the consequences of a transaction before undertaking it. Under *Auer*, in contrast, the Service could suggest in its brief how an ambiguous

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brief); Mitchell v. Comm'r, 775 F.3d 1243, 2015 WL 64927 (10th Cir. 2015) (applying *Auer* to a regulation even though the IRS did not seek such deference, indicating that it would be inappropriate to apply *Auer* if there were reason to suspect that the IRS did not reach a considered judgment on the issue); Minnick v. Comm'r, 796 F.3d 1156, 2015 WL 4747545 (9th Cir. 2015) (applying *Auer* and indicating that the IRS was consistent in maintaining the same position before the Tax Court and before the Tenth Circuit). Some Tax Court judges are unwilling to apply *Auer* in the absence of published guidance that resolves the ambiguity in the regulation or some other indication that the Secretary of the Treasury is in agreement with the IRS position. *See* Pierre v. Comm'r, 133 T.C. 2, concurring opinion by Cohen, J. (2009) (adopting this position); *but see* Lantz v. Comm'r, 132 T.C. 131, 144 n.10 (2009) (indicating that *Auer* can be invoked without discussing the preconditions suggested by Judge Cohen); Wells Fargo & Co. v. United States, 260 F. Supp. 3d 1140 (D. Minn. 2017) (applying *Auer* to conclude that a regulation under section 6662 requires the taxpayer to show actual reliance on authority in order to establish a reasonable basis).

94. *See* Am. Inst. of Certified Pub. Accountants v. IRS, 114 A.F.T.R.2d (RIA) 2014-6451, 2014 WL 5585334 (D. Colo. 2014) (deferring to IRS interpretation of section 10.36 of the Circular).

95. Note that *Auer* does not apply where the regulation merely parrots the language of the statute. *See* Hanah Metchis Volokh, *The Anti-Parroting Canon*, 6 N.Y.U. J. L. & LIBERTY 290 (2011) (discussing the Supreme Court decision in *Gonzales v. Oregon*).

96. *See* I.R.C. § 7805(b). Note, however, that apparently, in the case of a Code section enacted before the 1996 amendment to section 7805, regulations can be issued on a retroactive basis. *See* Howard E. Clendenen, Inc. v. Comm'r, 207 F.3d 1071 (8th Cir. 2000). Note also that the Code authorizes retroactive regulations in a case where abuse would otherwise result. *See* I.R.C. § 7805(b)(3). Finally, even though an agency does not have the authority to issue a regulation on a retroactive basis, a court might consider a post-transaction regulation and even defer to it under *Chevron* as long as it does not modify a prior regulation. *See* Smiley v. Citibank, 517 U.S. 735, 744 n.3 (1996); *see also* Focardi v. Comm'r, T.C. Memo 2006-56 (considering a post-transaction regulation in upholding the Service's position).

regulation should be construed[97] and thereby make its construction applicable to the very transaction at issue in the litigation, even though the transaction had occurred long before the Service proffered its construction.[98] Perhaps out of concern about the retroactive

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97. In Keys v. Barnhart, 347 F.3d 990 (7th Cir. 2003), Judge Posner, in dicta, questioned whether it is appropriate to defer under *Auer* based on a brief written by an agency staff attorney. He went on to question whether *Auer* can be reconciled with *Chevron*, suggesting that *Chevron*'s delegation-of-lawmaking rationale does not comfortably accommodate the grant of deference under *Auer* in the case of such a brief. *See also* Matz v. Household Int'l Tax Reduction Inv. Plan, 265 F.3d 572, 574 (7th Cir. 2001); Eastman Kodak Co. v. STWB, Inc., 452 F.3d 215 (2d Cir. 2006) (citing *Keys* and raising the question whether *Auer* deference, rather than *Skidmore* deference, should be granted where an agency proffered a construction of its regulation in an amicus brief filed in the circuit court). *But see* Edsen v. Bank of Bos., 229 F.3d 154 (2d Cir. 2000) (granting *Auer* deference to a Notice resolving an ambiguity in a regulation). While, as Judge Posner suggests, there may be some tension between *Chevron* and *Auer*, the Supreme Court does appear to contemplate two different forms of deference: *Chevron* deference in the case of an ambiguous statute and *Auer* deference in the case of an ambiguous regulation. As distinct doctrines, with each having its own rationale, it is not surprising that each has its own, different contours. Indeed, in *Auer* itself, the Court granted deference based on an interpretation proffered in the agency's Supreme Court brief (Judge Posner acknowledges this aspect of *Auer* in *Keys*, but suggests that *Auer* should not apply in the case of an interpretation proffered in a lower court brief). For a further discussion of *Auer* and its relationship to *Chevron*, see John F. Coverdale, Chevron*'s Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After* Mead, 55 ADMIN. L. REV. 39 (2003); Irving Salem et al., *Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717 (2004).

In PBBM-Rose Hill, Ltd. v. Comm'r, 900 F.3d 193 (5th Cir. 2018), the court refused to permit a *taxpayer* to invoke *Auer*. While, typically, *Auer* is only invoked by a government agency, the taxpayer in *PBBM-Rose Hill* argued that the regulation was ambiguous and that a taxpayer-friendly private letter ruling should serve as the basis for invoking *Auer*. Rejecting this argument, the court ruled that the regulation was not ambiguous and that, in any event, a private letter ruling is not precedent and could not be cited as a basis for invoking *Auer*. The court did not address the question whether a taxpayer may, in other circumstances, invoke *Auer*.

98. To the extent that the agency has not been consistent in its interpretation of the ambiguity, it may not be entitled to any deference. *See* Comm'r v. Schleier, 515 U.S. 323, 334 n.7 (1995); Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1208 n.4 (2015) (where an agency is inconsistent in interpreting its own regulations, it is "entitled to considerably less deference than a consistently held agency view"). *See also* U.S. Freightways Corp. v. Comm'r, 270 F.3d 1137 (7th Cir. 2001) (refusing to grant deference where the agency had been inconsistent); Mitchell v. Comm'r, 775 F.3d 1243, 2015 WL 64927 (10th Cir. 2015) (applying *Auer* but noting that it would be inappropriate to do so had the IRS been inconsistent); Green Forest Mfg. Inc. v. Comm'r, T.C. Memo 2003-75 (applying *Skidmore*-type analysis in

effect of *Auer*, the Supreme Court has suggested, in a non-tax context, that it may not continue to be receptive to such deference claims in the absence of some advanced notice by the agency of its new interpretation.[99]

Given *Auer*, practitioners should be cautious about giving advice whenever a regulation appears to be ambiguous. Prudent practitioners will disclose to the client the possibility that the Service might proffer a resolution of the ambiguity at the time of litigation and that, under *Auer*, the court would be required to defer if it is determined not to be plainly erroneous or plainly inconsistent with the regulation. In short,

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determining whether court should defer to the Service's interpretation). These cases raise an interesting question: whether a court must apply a *Skidmore*-type or *Chevron*-type analysis in the second step of inquiry under *Auer*. In other words, if the agency's interpretation of its regulation is not plainly erroneous or plainly inconsistent with the regulation, must the court defer even if it concludes that the interpretation is not persuasive based on an analysis of the *Skidmore* factors? For example, an interpretation issued while the litigation is pending would presumably receive little deference under *Skidmore*. *See* Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 563 n.7 (1991) (speculating that the Service might not have claimed deference for a revenue ruling because it was issued during the litigation). Thus, if the *Skidmore* factors must be consulted in the second step of inquiry under *Auer*, an interpretation proffered during the litigation would never be entitled to *Auer* deference. Yet *Auer* seems to contemplate that deference is appropriate in just these circumstances. Perhaps, given the Supreme Court's decision in *Schleier*, agency inconsistency is relevant under *Auer*'s second step while the other *Skidmore* factors, like the fact that the interpretation is issued during the litigation, are not. For a further discussion of this issue, see Irving Salem et al., *Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717 (2004); *see also* John F. Coverdale, Chevron*'s Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After* Mead, 55 ADMIN. L. REV. 39, 64 (2003).

99. In Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 132 S. Ct. 2156 (2012), the Court emphasized that it would be inappropriate to impose "massive liability" on a party for conduct occurring before the government announced its interpretation. It can be expected that, in future cases, taxpayers will argue that, based on *SmithKline*, an IRS failure to announce its interpretation prior to litigation will preclude it from seeking *Auer* deference. Whether the Court will follow this approach in cases that do not involve the imposition of "massive liability" remains to be seen. In any event, note that the Court suggests that, even if an interpretation is not entitled to *Auer* deference for this reason, it may nonetheless be entitled to *Skidmore* deference. In Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326 (2013), several justices argue that a reexamination of *Auer* is necessary. Justice Scalia, in dissent, argues that allowing an agency to interpret the rules it has written constitutes a constitutional violation of the separation of powers.

with tax advice so often based on the meaning of regulations, practitioners must be sensitive to *Auer* and its implications.[100]

100. For a discussion of the Tax Court's treatment of *Auer*, see Steve R. Johnson, *Auer/Seminole Rock Deference in the Tax Court*, 11 PITT. TAX REV. 1 (2013); *see also* Shea Homes, Inc. v. Comm'r, 142 T.C. 3 (2014) (refusing to give *Auer* deference to an IRS interpretation of a regulation, distinguishing between "'fair and considered judgment on the issue'" and "'a post hoc rationalization for past agency action'"). For a district court decision refusing to defer to an IRS interpretation of a regulation involving the statute of limitations concerning the assessment of a penalty under section 6707A, see May v. United States, __ F. Supp. 3d __, 2015 WL 3714573 (D. Ariz. 2015). However, the Ninth Circuit reversed the district court, holding that the Code is unambiguous and the statute of limitations remained open. May v. United States, 691 F. App'x 334 (9th Cir. 2017).