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The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference

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Article

**The Need for *Mead*: Rejecting Tax
Exceptionalism in Judicial Deference**

Kristin E. Hickman†

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† Associate Professor of Law, University of Minnesota Law School. I thank Ellen Aprill, Michael Asimow, Guy Charles, Jim Chen, Mary Lou Fellows, Dan Gifford, Gary Lawson, Gregg Polsky, Daria Roithmayr, Kevin Washburn, and David Weissbrodt for helpful suggestions and comments, and Chris Blanchard and Sarah Bunce for invaluable research assistance. Thank you also to participants in the Half-Baked Club and in workshops at the law schools of Florida State University, George Mason University, and the Universities of Minnesota, Colorado, and Washington for stimulating discussions and comments on a very early draft.

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The Treasury Department and the Internal Revenue Service interpret the Internal Revenue Code (I.R.C. or Code) using several formats, but Treasury regulations are by far the most prominent and carry the greatest legal weight.¹ Identifying the proper standard for evaluating Treasury regulations that interpret the Code should be easy: Treasury regulations are entitled to *Chevron* deference. Yet more than twenty years after the Supreme Court decided *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,² the question of judicial deference toward Treasury regulations remains stubbornly unresolved. The circuits are split and scholars are divided over whether *Chevron* deference or some other evaluative standard should apply to judicial review of Treasury regulations.³ The Seventh Circuit, quite rightly, has labeled this “seemingly simple” issue a “free-fire zone” and a “melee.”⁴

In its more recent decision in *United States v. Mead Corp.*, the Court offered a new test aimed at resolving long-standing disagreements over when *Chevron* deference should apply.⁵ *Mead* makes clear that *Chevron* deference is warranted only for agency interpretations promulgated through the exercise of congressionally delegated authority to bind regulated parties with the force of law.⁶ Since there is no question that Treasury regulations are legally binding upon taxpayers and the government alike, to the extent that there was real doubt before

1. See BORIS I. BITTKER ET AL., FEDERAL INCOME TAXATION OF INDIVIDUALS ¶ 46.01[3] (3d ed. 2002) (recognizing Treasury regulations as the most authoritative administrative guidance issued by the Treasury Department and the Internal Revenue Service); MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE ¶ 3.01 (2d ed. 2002) (same).

2. 467 U.S. 837 (1984).

3. See *Gen. Elec. Co. v. Comm’r*, 245 F.3d 149, 154 n.8 (2d Cir. 2001) (acknowledging the split); *Cent. Pa. Sav. Ass’n v. Comm’r*, 104 T.C. 384, 390–92 (1995) (noting *Chevron*’s “checkered career in the tax arena”); Noël B. Cunningham & James R. Repetti, *Textualism and Tax Shelters*, 24 VA. TAX REV. 1, 41–50 (2004) (summarizing the disagreement).

4. *Bankers Life & Cas. Co. v. United States*, 142 F.3d 973, 977–78 (7th Cir. 1998).

5. 533 U.S. 218, 226–27 (2001). As the sole dissenter from *Mead*, Justice Scalia described the Court’s decision as “one of the most significant opinions ever rendered by the Court dealing with the judicial review of administrative action.” *Id.* at 261 (Scalia, J., dissenting).

6. *Id.* at 226–27 (majority opinion).

Mead whether Treasury regulations are entitled to *Chevron* deference, the *Mead* inquiry should easily resolve the issue.⁷ Yet the post-*Mead* scholarship and jurisprudence continues to avoid that straight-forward conclusion.

Settling the question of deference toward Treasury regulations carries significant implications for both tax jurisprudence and tax policy. *Chevron* deference is premised on assumptions about congressional delegations of primary interpretive authority.⁸ Such delegations in turn reflect a presumptive evaluation that independent and executive branch agencies, rather than the courts, should be responsible for the policy choices inherent in statutory interpretation.⁹ Treasury officials are more democratically accountable, are better positioned to respond through regulations to changes in taxpayer behavior and tax policy trends, and possess significantly more expertise over the complexities of the tax laws than most judges.¹⁰ Yet the consequence of less judicial deference to Treasury regulations is greater judicial intervention in tax policy. Allowing judges to

7. *But see* William S. Jordan, III, *Judicial Review of Informal Statutory Interpretations: The Answer is Chevron Step Two, Not Christensen or Mead*, 54 ADMIN. L. REV. 719, 719 (2002) (describing *Mead*'s test as "a cumbersome, unworkable regime under which courts must draw increasingly fine distinctions using impossibly vague standards"); Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 353-58 (2003) (criticizing *Mead* as overly abstract, "producing a great deal of confusion and error").

8. *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688, 2699 (2005) (noting a delegation premise); *Mead*, 533 U.S. at 226-27 (same); Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 812 (2002) ("At the most general level, *Mead* eliminates any doubt that *Chevron* deference is grounded in congressional intent.").

9. *See* *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984) (emphasizing the reasons for delegation). *But see infra* note 278 and accompanying text (noting the fictionality of this presumption).

10. A small number of lower court judges have extensive tax expertise. The United States Tax Court, an Article I court, specializes in and handles only tax matters, and most tax cases are brought before this court. *See* I.R.C. § 7442 (2000) (establishing Tax Court jurisdiction); BITTKER, *supra* note 1, ¶ 51.03[1] (discussing Tax Court history and jurisdiction). The Tax Court's decisions, and particularly its legal interpretations, are reviewable by the generalist circuit courts of appeals and the United States Supreme Court, however. *See* I.R.C. § 7482(a)(1) (2000) (providing for appellate review of Tax Court decisions); BITTKER, *supra* note 1, ¶ 51.07 (summarizing appellate review of Tax Court decisions). Tax refund claims are also included within the comparatively limited subject matter jurisdiction of the Court of Federal Claims, another Article I court, and the Court of Appeals for the Federal Circuit. Judges on these courts are not necessarily tax specialists, either. *See* BITTKER, *supra* note 1, ¶ 51.08.

second-guess Treasury's interpretive choices increases the incidence of like taxpayers not being treated alike, as circuits split and Treasury's ability to resolve interpretive issues is hampered by stare decisis. Congressional preference aside, these factors represent powerful normative arguments in favor of *Chevron* deference for Treasury regulations.

Several prominent tax scholars and practitioners have written thoroughly and eloquently against applying *Chevron* deference to at least some, if not all, Treasury regulations.¹¹ Doctrinally, the arguments against applying *Chevron* to Treasury regulations draw principally from a belief that the tax area has its own, unique deference tradition represented principally by the Court's pre-*Chevron* opinion in *National Muffler Dealers Association v. Commissioner*.¹² The normative arguments against *Chevron* deference for Treasury regulations likewise rely on various assertions that "tax is different" to support greater judicial involvement in interpreting the Code.

To some extent, these scholarly efforts reflect varying conceptions of what *Chevron* is and does. Of course different understandings of *Chevron* will yield disparate opinions as to how the *Chevron* doctrine should apply in the tax context. Yet that aspect of the existing scholarship merely reflects the more general scholarly disagreement over *Chevron's* meaning. Where tax scholars and practitioners addressing the issue of tax deference are fairly consistent is in their insistence that when it comes to *Chevron*, tax is special and should be treated differently from other areas of administrative law.

The framework articulated in *Chevron* and *Mead* has many critics.¹³ Nevertheless, the deference model offered by these cases represents the present administrative law norm. This fact alone does not necessitate cross-disciplinary uniformity. The

11. See *infra* Part I.D (summarizing the existing scholarship).

12. 440 U.S. 472, 484-87 (1979).

13. See, e.g., Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989) (calling *Chevron* "a siren's song, seductive but treacherous" for the "fundamental alterations it makes in our constitutional conception of the administrative state"); Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 68-81 (2000) (suggesting that *Chevron* deference undermines the judicial role in our constitutional structure); Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 445-46 (1989) (stating that *Chevron* confuses ambiguity with delegation and contravenes established separation of powers principles).

courts should be open to deviating from legal norms where circumstances justify departure. Ernest Gellhorn and Glen Robinson notoriously decried “the tendency of administrative law to examine the process of judicial review without reference to the substantive content of the agency action being reviewed.”¹⁴ *Mead* itself requires a statute-by-statute, agency-by-agency evaluation of *Chevron*’s applicability. The courts should not reject legal norms simply for the sake of doing so, however. Deviation should be premised only on clear justification; such justification should be context-specific, not a mere rehashing of the general criticism of the norm.

Yet the emphasis of the existing scholarship on the uniqueness of the tax field—and the resulting complexity that this focus has added to what otherwise should be a fairly simple analysis—are emblematic of a perception of tax exceptionalism that intrudes upon much contemporary tax scholarship and jurisprudence.¹⁵ The view that tax is different or special creates, among other problems, a cloistering effect that too often leads practitioners, scholars, and courts considering tax issues to misconstrue or disregard otherwise interesting and relevant developments in non-tax areas, even when the questions involved are not particularly unique to tax.¹⁶ The ongoing debate over judicial deference toward tax regulations offers an especially frustrating example of this tax exceptionalism at work.

A few scholars have suggested that, perhaps, *Chevron* and *National Muffler* can be reconciled in favor of *Chevron* deference for Treasury regulations.¹⁷ Others have lamented the tendency of tax scholars and practitioners to ignore the broader legal universe in evaluating tax issues, including the deference question.¹⁸ To date, however, no one has squarely refuted the exceptionalist claims about the uniqueness of tax deference

14. Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 783 (1975); see also John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the Chevron Era*, 64 GEO. WASH. L. REV. 35, 35 (1995) (quoting same).

15. See Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 531 (1994) (discussing this phenomenon).

16. See *id.* at 518–19.

17. See David A. Brennan, *Treasury Regulations and Judicial Deference in the Post-Chevron Era*, 13 GA. ST. U. L. REV. 387, 428–30 (1997) (attempting to reconcile the Court’s post-*Chevron* tax jurisprudence with *Chevron*); Cunningham & Repetti, *supra* note 3, at 47–53 (equating *Chevron*’s analysis with that of *National Muffler* and applying *Chevron* to anti-abuse Treasury regulations).

18. See Caron, *supra* note 15, at 518, 531–36.

traditions and practices and the resulting case against *Chevron* deference toward Treasury regulations. This Article fills that void in the literature and explains why the more straightforward conclusion of *Chevron* deference for Treasury regulations really is the right one, despite previous scholarly and judicial efforts to complicate the matter. More broadly, however, the Article debunks the perception of tax exceptionalism that, I believe, is the primary reason why the issue of *Chevron* deference for tax regulations continues to be so thorny.

My argument is a comparative one, laying tax and non-tax jurisprudence, scholarship, and regulatory practice side by side to show that tax does not have, has never had, and should not have its own unique deference tradition. *National Muffler* offers nothing more than a particularly clear articulation of the Court's pre-*Chevron* approach toward a broad category of agency actions that included, but was not limited to, most Treasury regulations. *Chevron* and *Mead* clearly extend the applicability of strong, mandatory judicial deference to encompass that group of comparable agency actions in other administrative law contexts; so the courts should apply that same standard to Treasury regulations as well. The normative case is similar, as a comparison of tax and non-tax case law and practices shows that tax has more in common with other complex regulatory areas where *Chevron* clearly applies than tax lawyers tend to recognize.

Part I of this Article will briefly summarize the *Chevron/Mead* framework, the allegedly competing *National Muffler* standard, and the ongoing debate over the relationship between the two. Part II will articulate the case against tax exceptionalism in judicial deference. Part II.A. will establish the tax deference tradition as well within the larger context of more general administrative law jurisprudence and scholarship from the early days of the Internal Revenue Code to the present; and Part II.B will similarly compare tax and non-tax cases and practices to refute various normative arguments raised to justify a different deference standard in the tax context. Part III of this Article will then apply *Mead's* two-part test to illustrate that Treasury regulations are entitled to *Chevron* deference.

I. DUELING DEFERENCE STANDARDS

Underlying the argument against judicial deference toward Treasury regulations is a certain degree of hostility toward *Chevron* that is not limited to tax scholars and practitioners.

Many critics of *Chevron* generally are wary of agency authority absent strong judicial oversight;¹⁹ and many in the tax community regard Treasury's authority over the Code absent strong judicial oversight with similar misgiving.²⁰ Given *Chevron's* dominance in other areas of administrative law, it is to be expected that those with such concerns might argue in favor of carving out an exception for tax cases. The question is whether there is a case for doing so.

The tax-specific argument against judicial deference toward Treasury regulations flows from a combination of terminology and tradition. As with most government agencies, Treasury and the IRS are bound to follow the Administrative Procedure Act (APA).²¹ The APA requires agencies promulgating regulations to follow public notice and comment procedures in developing certain types of regulations unless one of several listed exceptions applies.²² Drawing from pre-APA terminology, regulations for which the APA requires notice and comment are called "legislative" rules, while one of the exceptions from the notice and comment requirements is for so-called "interpretative rules," also known by the minimally shorter "interpretive rules."²³

19. See, e.g., William N. Eskridge, Jr. & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J.L. ECON. & ORG. 165, 182 (1992) (advocating "aggressive judicial review of agency rule-making" to ameliorate separation of powers concerns); Farina, *supra* note 13, at 452–53 (criticizing *Chevron* as exacerbating an imbalance in federal separation of powers); Sunstein, *supra* note 13, at 446 (calling for a "firm judicial hand in the interpretation of statutes").

20. See, e.g., Mitchell M. Gans, *Deference and the End of Tax Practice*, 36 REAL PROP. PROB. & TR. J. 731, 758 (2002) (expressing concerns about anti-taxpayer bias); Irving Salem et al., *ABA Section on Taxation: Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717, 724–25 (2004) (raising questions about IRS motivations and willingness to push statutory boundaries).

21. The Administrative Procedure Act (APA) is a statute passed by Congress in 1946 that mandates procedures for different formats of federal governmental agency action, including the promulgation of regulations, or "rules" in APA terminology. See 5 U.S.C. §§ 551–59 (2000).

22. See *id.* § 553(b).

23. See *id.* § 551. The APA itself does not use the legislative term to describe rules subject to the notice and comment requirements. However, explanations of APA provisions and both pre- and post-APA literature and jurisprudence use the term in distinguishing such rules from interpretative rules. See 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.1, at 305 (4th ed. 2002); Robert C. Brown, *Regulations, Reenactment, and the Revenue Acts*, 54 HARV. L. REV. 377, 384–85 (1941); Kenneth Culp Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive*, 57 YALE L.J. 919, 919–31

Treasury utilizes two types of delegated authority in promulgating Treasury regulations.²⁴ Many provisions of the Code contain specific grants of authority to issue regulations.²⁵ The vast majority of Treasury regulations, however, are established through the exercise of general rulemaking authority in I.R.C. § 7805(a), which grants Treasury the power to develop “all needful rules and regulations for the enforcement of” the Code.²⁶ Even where a specific authority grant supports a Treasury regulation, Treasury often will cite I.R.C. § 7805(a) as the primary or only authority behind the regulation in question.²⁷

(1948); Frederic P. Lee, *Legislative and Interpretive Regulations*, 29 GEO. L.J. 1, 2 (1940).

24. Although the I.R.C. delegates authority for promulgating regulations to the Secretary of the Treasury, *see, e.g.*, I.R.C. §§ 1502, 7805(a) (2000), and Treasury regulations are issued by the Treasury Department, the IRS Office of Chief Counsel performs the function of initially drafting most regulations. *See* INTERNAL REVENUE SERV., DEP'T OF TREASURY, INTERNAL REVENUE MANUAL, § 32.1.1.4.4 (2004), available at <http://www.irs.gov/irm/part32/ch01s01.html> [hereinafter INTERNAL REVENUE MANUAL]; *see also* LEANDRA LEDERMAN & STEPHEN W. MAZZA, TAX CONTROVERSIES: PRACTICE AND PROCEDURE § 1.04 (2d ed. 2002). This division of labor is consistent with historic practice. *See* Paul F. Schmid, *The Tax Regulations Making Progress—Then and Now*, 24 TAX LAW. 541, 541–49 (1971) (describing past procedures for promulgating Treasury regulations). Despite the IRS's involvement in the regulatory process, because Treasury is the final and official issuer of Treasury regulations, this Article only addresses Treasury as the primary interpreter of the I.R.C.

25. *See, e.g.*, I.R.C. §§ 163(i)(5), 167(e)(6), 357(d)(3), 453(j)(1), 952(d), 1502 (2000). A search in the Westlaw FTX-USCA database for specific authority delegations derived from just one common phrasing, “Secretary shall /s prescribe /s regulations,” resulted in 291 hits as of April 2006.

26. I.R.C. § 7805(a).

27. *See, e.g.*, T.D. 9192, 2005-15 I.R.B. 866; T.D. 9155, 2004-40 I.R.B.562; T.D. 9154, 2004-40 I.R.B. 560; T.D. 8825, 1999-28 I.R.B. 19; T.D. 8560, 1994-38 I.R.B. 5; T.D. 8531, 1994-17 I.R.B. 7; *see also* Boeing Co. v. United States, 537 U.S. 437, 447–48 (2002) (noting Treasury's reliance on I.R.C. § 7805(a) (2000) notwithstanding the applicable specific authority grant); Ellen P. Aprill, *Muffled Chevron: Judicial Review of Tax Regulations*, 3 FLA. TAX REV. 51, 57 & nn.28–29 (1996) (noting Treasury's position that tax regulations are almost always interpretative). For example, the Treasury issued a notice of proposed rulemaking in 1992 and published final regulations in 1994 that dramatically overhauled the investment adjustment system for consolidated entities under I.R.C. § 1502, one of the broadest specific authority delegations in the Code. *See* T.D. 8560, 1994-38 I.R.B. 5; Proposed Rules, Dep't of Treasury, 57 Fed. Reg. 53,634 (Nov. 12, 1992); ANDREW J. DUBROFF ET AL., FEDERAL INCOME TAXATION OF CORPORATIONS FILING CONSOLIDATED RETURNS § 1.02 (2d ed. 2002) (discussing the regulatory history of Treasury). In both the original notice and the final Treasury decision, the IRS cited § 7805 as the primary authority supporting the regulation and I.R.C. § 1502 and other specific authority grant provisions only for certain limited aspects of the new

The tax community differentiates the two types of regulations by calling specific authority regulations "legislative" and general authority ones "interpretative."²⁸ Nevertheless, in practice, Treasury purports to develop all of its regulations, whether premised upon specific or general authority, using the APA's public notice and comment procedures.²⁹ Since long before *Chevron*, however, and consistent with the tax community's categorization, Treasury has taken the position that its general authority regulations are interpretative only and that it does not have to follow the notice-and-comment process for such regulations.³⁰ Since Treasury regularly cites I.R.C. § 7805(a) as the legal basis even for regulations that seemingly fall within the scope of a specific authority provision, Treasury's position on this point means that Treasury rarely admits to the applicability of the APA's notice and comment requirements.

With *National Muffler* and other, earlier tax cases, the Court spoke directly to the question of judicial deference in the tax context. In the years before deciding *Chevron*, the Supreme Court was quite clear that it considered general authority Treasury regulations elaborating ambiguous or undefined statutory terms to be interpretative in nature and entitled to less deference than specific authority Treasury regulations.³¹ The accepted theory among the tax community is that, at least before *Chevron* if not also after, specific authority Treasury regulations were given "controlling deference," meaning that

regulations. See T.D. 8560, 1994-38 I.R.B. 5; Proposed Rules, Dep't of Treasury, 57 Fed. Reg. at 53,634 (Nov. 12, 1992). In the final Treasury Decision, the Treasury stated without explanation its position that the APA's notice and comment requirements were inapplicable notwithstanding the clearly legislative nature of these regulations. See T.D. 8560, 1994-38 I.R.B. 5.

28. See, e.g., LEDERMAN & MAZZA, *supra* note 24, § 9.02[A][1]; SALTZMAN, *supra* note 1, ¶ 3.02[3][a]-[b] (2d ed. 2002); Aprill, *supra* note 27, at 56-57; Coverdale, *supra* note 14, at 35; Salem et al., *supra* note 20, at 728.

29. See LEDERMAN & MAZZA, *supra* note 24, § 9.02[A][1]; Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 524 (1977); Peter A. Lowy & Juan F. Vasquez, Jr., 101 J. TAX'N 230, 231 (2004). My own sense from reviewing the Treasury's notices and final Treasury Decisions is that the Treasury's adherence to APA rulemaking requirements is sufficiently spotty to be susceptible to legal challenge. More substantial analysis of this perception is beyond the scope of this Article.

30. See INTERNAL REVENUE MANUAL, *supra* note 24, § 32.1.2.3 (2004); Salem et al., *supra* note 20, at 728.

31. See *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24-25 (1982); *Rowan Cos. v. United States*, 452 U.S. 247, 252-53 (1981).

the courts would only reject such regulations if they were plainly inconsistent with the statute. Meanwhile, general authority Treasury regulations were accorded some lesser degree of "weight" to the extent they satisfied various factors articulated in *National Muffler* and its predecessors.³² In practice, the Court has not always been so consistent.³³

Chevron was not a tax case, and the Court's post-*Chevron* analysis of Treasury regulations has been markedly erratic and thus can be read to support almost any argument.³⁴ Ultimately, however, those in favor of tax exceptionalism rely largely on pre-*Chevron* practices and deference doctrine to excuse tax from the broader *Chevron* revolution. Like any other revolution, *Chevron* altered preexisting norms. Consequently, arguments against applying *Chevron* in the tax context that are premised on pre-*Chevron* standards only work if the pre-*Chevron* tax tradition differs from the broader jurisprudence supplanted by *Chevron*.

Part II below explains why I believe that the supposedly unique tax-deference tradition is in fact not at all exceptional, and instead merely reflects general pre-*Chevron* administrative law doctrine. To understand that discussion fully, however, it is important briefly to review the two allegedly competing deference approaches—the *Chevron/Mead* framework and *National Muffler*—and the struggle of scholars and courts to reconcile them. Although *National Muffler* was decided first chronologically, *Chevron* and *Mead* represent the current general norm against which to evaluate *National Muffler* (rather than vice versa, as some in the tax community seem to believe). Accordingly, let us consider the *Chevron* regime first.

32. See Aprill, *supra* note 27, at 58–61 (describing tax deference standards); Coverdale, *supra* note 14, at 53, 63–75 (same).

33. See, e.g., *Comm'r v. Portland Cement Co.* 450 U.S. 156, 169 (1981) (applying *National Muffler* deference to a specific authority Treasury regulation); *Fulman v. United States*, 434 U.S. 528, 533 (1978) (applying strong deference to a general authority Treasury regulation); see also 5 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 424 (2d ed. 1984) (noting the Court's inconsistency).

34. *Compare Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 560–61 (1991) (citing *National Muffler*), with *Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 575–76 (1993) (Souter, J., dissenting) (citing both *National Muffler* and *Chevron*), and *Atl. Mut. Ins. Co. v. Comm'r*, 523 U.S. 382, 387–89 (1998) (citing *Chevron* and applying its two-step analytical approach). See also *infra* Part II.A.3.

A. *CHEVRON* (AND *MEAD* AND *SKIDMORE*)

The *Chevron* story is so well-known that it can be quickly summarized. Similar to I.R.C. § 7805(a), the Clean Air Act gives the Administrator of the Environmental Protection Agency (EPA) the authority to “prescribe such regulations as are necessary to carry out his functions under” the Act.³⁵ Using APA notice and comment procedures, the EPA exercised its general rulemaking authority to promulgate a regulation defining a statutorily undefined term freighted with policy implications, “stationary source.”³⁶ A change in presidential administrations prompted reconsideration, however, and the EPA employed the same procedures again to adopt a new regulatory definition with different consequences for regulated parties.³⁷ In upholding the latter interpretation against a challenge by the Natural Resources Defense Council, the Supreme Court called for a strong form of judicial deference for all such agency regulations, so long as the regulations were “reasonable.” The Court chastised the Court of Appeals, which had rejected the new regulation, for substituting its own judgment for that of the agency.³⁸

Chevron is most often recognized for the two-part inquiry the Court articulated for evaluating agency interpretations of law: first, whether the statute being interpreted clearly and unambiguously resolves the issue; and if not, whether the agency’s interpretation of the statute is a permissible one.³⁹ Standing alone, however, the two-part test is remarkable more as a tool for organizing judicial analysis than as a doctrinal statement. Even before *Chevron*, if the meaning of the statute was plain, then there was no opportunity for an agency to claim judicial deference.⁴⁰ Unambiguous statutes are not susceptible

35. 42 U.S.C. § 7601(a)(1) (2000).

36. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 840–41 (1984) (citing 46 Fed. Reg. 50,766 (Oct. 14, 1981)).

37. *See id.* at 853–57 (discussing the history of the EPA’s amendments and definitions).

38. *See id.* at 843–45.

39. *See id.* at 843–44.

40. *See, e.g., SEC v. Sloan*, 436 U.S. 103, 117–19 (1978) (rejecting an agency interpretation as inconsistent with the statutory language); *Zuber v. Allen*, 396 U.S. 168, 181, 183–85 (1969) (same); *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 610–11 (1944) (same); *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315 (1933) (“True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction.”).

of multiple interpretations; and absent constitutionality issues, it is axiomatic that the courts are bound to follow the clearly expressed intent of Congress. Moreover, long before deciding *Chevron*, the Court advocated strong, mandatory deference toward "legislative" regulations promulgated pursuant to express congressional command.⁴¹

The more revolutionary but less often recognized aspect of *Chevron* is its call for strong, mandatory deference not only where Congress specifically mandates regulations, but also where Congress implicitly delegates rulemaking authority through the combination of statutory ambiguity and administrative responsibility, as exemplified by the Clean Air Act and the EPA.⁴² This extension of strong judicial deference from explicit to so-called implicit delegations represents a transfer of interpretive power from the judicial branch to administrative agencies.⁴³ This, more than the two-part test, is the heart of the *Chevron* doctrine.⁴⁴

Why extend the Court's existing strong deference tradition beyond legislative regulations promulgated pursuant to express congressional command? The Court here was quite plain. Resolving statutory ambiguity necessarily implicates choosing among various policy alternatives; and it is the job of adminis-

41. See *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981); *Batterton v. Francis*, 432 U.S. 416, 425-26 (1977); *Atchison, Topeka & Santa Fe Ry. Co. v. Scarlett*, 300 U.S. 471, 474 (1937); *AT&T Corp. v. United States*, 299 U.S. 232, 236-37 (1936); KENNETH CULP DAVIS, *ADMINISTRATIVE LAW OF THE EIGHTIES: 1989 SUPPLEMENT TO ADMINISTRATIVE LAW TREATISE 2D* at 505-14 (1989) (suggesting that *Chevron* reflects long-standing doctrine); BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* § 10.34 (3d ed. 1991) (same); see also *infra* Part II.A (discussing pre-*Chevron* deference standards).

42. See *Chevron*, 467 U.S. at 844 ("Sometimes the legislative delegation to an agency on a particular question is *implicit rather than explicit*. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." (emphasis added)); see also *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005) (citing *Chevron*, 467 U.S. at 843-44) (recognizing statutory ambiguity as a delegation of interpretive authority to agencies); DAVIS, *supra* note 41, at 508, 525 (acknowledging *Chevron's* expansion of the strong deference doctrine).

43. See, e.g., DAVIS, *supra* note 41, at 508 (describing *Chevron* as transferring power from courts to agencies); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 834 (2001) (same); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2075 (1990) (same).

44. See Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 B.C. L. REV. 757, 759, 762 (1991); Farina, *supra* note 13, at 456-57.

tering agencies, not the courts, to make those policy choices.⁴⁵ By recognizing that there may be more than one permissible way to interpret an ambiguous statute, and allowing the agency freedom within the boundaries of permissibility, the Court not only gives an agency flexibility to choose the policy alternative it thinks best, but also allows the agency to change its mind if its first approach proves inadequate or ill conceived in hindsight.⁴⁶

Nevertheless, for most of *Chevron's* tenure, it has been unclear precisely how far the Court intended to extend its reach.⁴⁷ As in *Chevron* itself, the most obvious implicit delegation would seem to be a general grant of authority to issue rules and/or regulations where necessary to implement and administer a statute.⁴⁸ *Chevron* jurisprudence from the 1990s is a mess of circuit splits and general confusion over the scope of the doctrine's applicability—asking, among other things, the question of what precisely constitutes an implicit delegation.⁴⁹

A primary source of the confusion over *Chevron's* applicability was disagreement among courts and scholars over the legal foundation supporting the *Chevron* doctrine.⁵⁰ The *Chevron* opinion itself sounds themes of congressional delegation, agency technical expertise, and democratic accountability.⁵¹

45. See *Chevron*, 467 U.S. at 844–45 (quoting *United States v. Shimer*, 367 U.S. 374, 382, 383 (1961)).

46. In the *Chevron* opinion alone, the Court's willingness to permit an agency to change its mind is apparent. First, the Court disregarded the fact that the EPA initially adopted one regulatory definition but then, upon a change of presidential administrations, reconsidered the issue and adopted the definition at issue through a second round of notice-and-comment rulemaking. Second, the Court criticized the D.C. Circuit for adopting a "static" definition of stationary source even though the statute was more flexible. *Chevron*, 467 U.S. at 842, 857–58; see also *Brand X*, 125 S. Ct. at 2699–2700 (describing "the whole point of *Chevron*" as to give agencies "the discretion provided by" statutory ambiguity to change interpretations "in response to changed factual circumstances, or a change in administrations").

47. See Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 3–5 (1990); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 199–203 (1998); Merrill & Hickman, *supra* note 43, at 835.

48. See Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 471 (2002).

49. See Merrill & Hickman, *supra* note 43, at 848–52.

50. See, e.g., Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2139 (2002) (discussing the debate); Merrill & Hickman, *supra* note 43, at 863–73 (same).

51. See *Chevron*, 467 U.S. at 843–44, 865; see also, e.g., *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 703 (1995) (emphasiz-

Scholars posited a variety of legal foundations for *Chevron* including not only congressional delegation⁵² but others ranging from constitutional requirement⁵³ to mere judicial policy.⁵⁴ Changing *Chevron's* underlying premise alters the scope of the doctrine's applicability.⁵⁵ Complicating the issue further still was the conception that the choice for the courts would be *Chevron's* strong, mandatory deference or no deference at all,⁵⁶ notwithstanding clear policy arguments in favor of some deference even where strong *Chevron* deference might seem inappropriate.⁵⁷

The Court took a significant step toward resolving the general confusion, however, in *United States v. Mead Corp.* *Mead* declared congressional delegation to be the underlying rationale for *Chevron* deference and offered a companion two-part test for determining whether *Chevron* should apply in a given situation: first, whether Congress has given the agency in question the authority to bind regulated parties with "the force of

ing agency expertise); *Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 575 (1993) (Souter, J., dissenting) (characterizing regulation writing as inherently political); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696–97 (1991) (stressing agency expertise and respect for political branches).

52. See, e.g., Anthony, *supra* note 47, at 4; Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663, 1666 (1991); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 623–27 (1996); Merrill & Hickman, *supra* note 43, at 872; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516–17.

53. See, e.g., Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269 (1988); Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2227 (1997).

54. See, e.g., Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for Chevron* U.S.A., Inc. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275, 1289–98; William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 618–19 (1992); David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327, 357–62 (2000).

55. See Callahan, *supra* note 54, at 1294; Gans, *supra* note 20, at 734–35; Merrill & Hickman, *supra* note 43, at 863–73.

56. See, e.g., *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483–84 (Fed. Cir. 1997); *United States v. Richards*, 67 F.3d 1531, 1542 (10th Cir. 1995); *Rapaport v. U.S. Dep't of the Treasury*, 59 F.3d 212, 216–17 (D.C. Cir. 1995).

57. See *United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001) (indicating that in the absence of *Chevron* deference, there are still viable policy reasons for granting a lesser degree of deference); see also Merrill & Hickman, *supra* note 43, at 858–63 (discussing same).

law"; and if so, whether the agency has "exercised that authority."⁵⁸ As part of that scheme, *Mead* and its foreshadowing predecessor, *Christensen v. Harris County*,⁵⁹ clearly establish that the choice for the courts is not between *Chevron* or no deference at all by revitalizing the classic, pre-*Chevron* deference case of *Skidmore v. Swift & Co.*⁶⁰ as an intermediate deferential alternative.⁶¹

Like *Chevron* after it, *Skidmore* required the Court to consider the validity of an agency's interpretation of an ambiguous statute, in this case the Fair Labor Standards Act (FLSA) concerning eligibility for overtime pay.⁶² The Administrator of the Department of Labor's Wage and Hours Division had issued only informal rulings applying the statute in various circumstances, as opposed to a regulation; and none of those rulings resolved the case in question.⁶³ Nevertheless, the Administrator filed an amicus brief expressing his view of how that informal guidance should be applied to the case at bar.⁶⁴ Congress had expressly by statute given the courts, rather than the Administrator, primary interpretive responsibility over the FLSA,⁶⁵ but the Court recognized its own past practice of giving weight to interpretations by executive agencies of statutes they administered.⁶⁶ To reconcile these considerations, the Court offered a series of factors for courts to use in assessing the appropriate level of judicial deference toward agency views in such

58. *Mead*, 533 U.S. at 226–27.

59. 529 U.S. 576 (2000).

60. 323 U.S. 134 (1944).

61. See *Mead*, 533 U.S. at 234–35; *Christensen*, 529 U.S. at 587.

62. The FLSA requires employers to pay one and one-half times an employee's regular wages for hours worked in excess of forty per week. See 29 U.S.C. § 207(a)(1) (2000). The question before the Court in *Skidmore* was whether firefighters were working for purposes of the FLSA overtime provision during the time they were required to be on duty at or near the firehouse to respond to incoming fire alarms, even though the firefighters typically spent such waiting time sleeping or engaged in other amusement activities like pool or dominos. 323 U.S. at 136. In a companion case, *Armour & Co. v. Wantock*, 323 U.S. 126 (1944), the Court analyzed the relevant statutory provisions and found the question dependent upon the interpretation of the statutory definition of "employ" as "to suffer or permit work," which definition the Court found not to be dispositive of the *Skidmore* question. See *Skidmore*, 323 U.S. at 136 (discussing *Armour*); see also *Armour*, 323 U.S. at 133–34.

63. See *Skidmore*, 323 U.S. at 138–39.

64. See *id.* at 139.

65. See *id.* at 137 (citing *Kirschbaum v. Walling*, 316 U.S. 517, 523 (1942)).

66. See *id.* at 140.

circumstances:

The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.⁶⁷

By its own terms, *Skidmore* "respect" is both limited and open ended.⁶⁸ *Skidmore* allows a reviewing court to be the final arbiter of whether the agency's interpretation is persuasive but specifies some factors and allows for the existence of others that a court should consider in evaluating the agency's case.⁶⁹ Some commentators have likened *Skidmore* respect to a sliding scale, with informal agency interpretations qualifying for levels of deference ranging from *Chevron*-like to none at all depending upon a court's analysis of the various factors.⁷⁰ Others would describe *Skidmore* as considerably less defined.⁷¹

Regardless of the precise contours of *Skidmore* respect, *Chevron* and *Skidmore* have divergent justifications and serve

67. *Id.* Citing *Skidmore*, the *Mead* Court paraphrased these factors in saying that agency interpretations not entitled to *Chevron* deference should be evaluated based upon "the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001).

68. In its holding, the *Mead* Court held that the tariff ruling at issue was entitled to "respect according to its persuasiveness." *Mead*, 533 U.S. at 221. Alluding to this phraseology, some scholars use the term "*Skidmore* respect" rather than "*Skidmore* deference" in distinguishing the *Skidmore* approach from *Chevron* deference. *See, e.g.*, Gregg D. Polsky, *Can Treasury Overrule the Supreme Court?*, 84 B.U. L. REV. 185, 198 n.80 (2004) (explaining his rationale for using "*Skidmore* respect" terminology); Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1127, 1132-33 (2001) (using the phrase). *But see* Merrill & Hickman, *supra* note 43, at 855 (suggesting that *Skidmore* is better regarded as a true deference doctrine). Thorough consideration of whether *Skidmore*'s standard is more appropriately characterized as truly deferential or merely respectful is beyond the scope of this Article. Solely for purposes of clarity, I will refer to the *Skidmore* standard as "*Skidmore* respect" rather than "*Skidmore* deference."

69. *See Skidmore*, 323 U.S. at 140 (describing informal rulings as "not controlling upon the courts").

70. *See* Anthony, *supra* note 47, at 14; Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 977 (1992).

71. *See, e.g.*, Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 565-66 (1985) (recognizing the pre-*Chevron* deference doctrine as reflecting degrees of deference and discussing relevant factors); Rossi, *supra* note 68, at 1125-29 (analyzing *Christensen v. Harris County*, 529 U.S. 576 (2000), as reflecting three different views of *Skidmore* respect).

different purposes. As the Supreme Court in *Mead* affirmed, *Chevron* “rests on a presumption about congressional intent” that Congress, at least implicitly, wanted an agency rather than the courts to be the primary interpreter of a particular statutory scheme.⁷² *Chevron*’s scope is limited, with *Chevron* only applying where a court affirmatively finds that Congress implicitly delegated primary interpretive power and the agency at least exercised that power with the action in question.⁷³ Moreover, *Chevron* does not call on the courts to abdicate their responsibility for interpreting the law altogether. The APA clearly contemplates judicial oversight of agency action;⁷⁴ and *Chevron* has never been a blank check.⁷⁵ But where the reviewing court finds the requisite delegation and exercise thereof, and where Congress either declined or failed to resolve the question at issue, *Chevron* deference is required.

By contrast, *Skidmore* is at heart a doctrine of judicial prudence. Even where the courts, rather than the agency, are the designated interpreter of statutory language, the courts may lack the resources and expertise to understand and evaluate fully the consequences of complex statutory schemes.⁷⁶ As the Court acknowledged in *Skidmore*, agencies often are simply better positioned to assess and apply alternative statutory interpretations.⁷⁷ Where the courts are satisfied that an agency is not otherwise behaving in an arbitrary or unreasonable manner, they are often sensible to defer to the agency’s greater expertise and, sometimes, extensive interpretive efforts.⁷⁸ By fo-

72. *Mead*, 533 U.S. at 229–30 n.11.

73. *Id.* at 226–27; see also Merrill, *supra* note 8, at 813 (describing *Mead*’s holding).

74. See 5 U.S.C. § 706 (2000).

75. See, e.g., *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 481 (2001) (rejecting the agency’s interpretation at *Chevron* step two); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) (rejecting the agency’s interpretation at *Chevron* step one); *AT&T Corp. v. Ia. Utils. Bd.*, 525 U.S. 366, 389–92 (1999) (rejecting the agency’s interpretation at *Chevron* step two).

76. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

77. See *id.*

78. Where *Skidmore* or even *Chevron* deference applies to an agency’s legal interpretation, the courts still evaluate agency action for adequacy of process under the arbitrary and capricious review standard of APA § 706(2)(A). See *Motor Vehicle Mfr. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983); see also *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699–2700 (2005) (discussing the relationship between *Chevron* and hard-look review); *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 157–58 (1991) (noting the applicability of both *Skidmore* and hard look review).

cluding as much on the agency's thoroughness and consistency as on the interpretation itself, the *Skidmore* factors allow a reviewing court leeway to police and defer to an agency simultaneously. And by bringing *Skidmore* back into the deference lexicon, *Mead* appropriately precludes *Chevron* deference from impermissibly encroaching upon the function that Congress, through the APA, intended courts to serve.

B. THE *NATIONAL MUFFLER* "ALTERNATIVE"

Although *National Muffler* predates *Chevron* by several years, *National Muffler* quite resembles *Chevron*, in that *National Muffler* also involved a regulatory definition of an important but undefined statutory term, "business league."⁷⁹ Much like the EPA in *Chevron*, Treasury initially exercised its general rulemaking authority under I.R.C. § 7805(a) to adopt a definition that clearly would have included the petitioner.⁸⁰ Within a few years, however, Treasury changed its mind and promulgated a new regulation with a narrower definition that arguably excluded the petitioner.⁸¹ This second definition stood unchanged and unchallenged for decades,⁸² but like the statutory term it defined, the regulation proved ambiguous, leading the IRS to issue several clarifying revenue rulings.⁸³ Applying the standard it developed through those revenue rulings, the IRS maintained that the petitioner's organization was not a business league.⁸⁴

The Court's analysis in *National Muffler* is somewhat convoluted, which may partly explain why its post-*Chevron* applicability remains such a question. The petitioning taxpayer's challenge raised two separate underlying issues: first, whether Treasury properly interpreted the Code when it adopted its revised definition of business league; and second, whether the IRS correctly interpreted its own regulation in concluding that

79. Section 501(c)(6) of the I.R.C. has long exempted from federal income taxation any organization that is a business league. See I.R.C. § 501(c)(6) (2000).

80. See *Nat'l Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 475-78 (1979).

81. See 26 C.F.R. § 1.501(c)(6)-1 (2005).

82. The current definition was adopted in 1925. See *Nat'l Muffler*, 440 U.S. at 481.

83. *Id.* at 482-83; see also Rev. Rul. 76-400, 1976-2 C.B. 153; Rev. Rul. 68-182, 1968-1 C.B. 263; Rev. Rul. 67-77, 1967-1 C.B. 138; Rev. Rul. 58-294, 1958-1 C.B. 244.

84. See *Nat'l Muffler*, 440 U.S. at 488-89.

the taxpayer was not a business league. The latter question arguably implicates a wholly separate pre-*Chevron* deference doctrine, known as *Seminole Rock* deference, which counsels deference to an agency's interpretation of its own regulation so long as not "plainly erroneous or inconsistent with the regulation."⁸⁵

Regardless, while recognizing the dual nature of the inquiry, the Court's opinion in *National Muffler* nevertheless blends much of the analysis of the two questions. Speaking particularly to the regulation, the Court spoke at length of the appropriateness of deference.⁸⁶ The Court acknowledged Congress's delegation of rulemaking authority to Treasury, Treasury's expertise in the field, and the need for consistent treatment of taxpayers.⁸⁷ While emphasizing particularly the first of these considerations, the Court nevertheless articulated a full grab-bag of relevant factors in considering the validity of Treasury regulations:

In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency

85. *Seminole Rock* deference is named for the case that articulated it, *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). In that case, the Court expressed a policy of strong, mandatory deference to an agency's interpretation of its own regulations. *Id.* at 413-14. In lieu of *Seminole Rock*, the Court often cites one of its progeny for the same proposition. See, e.g., *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512-13 (1994); *Stinson v. United States*, 508 U.S. 36, 44-45 (1993); *Udall v. Tallman*, 380 U.S. 1, 16 (1965). The lower courts generally have recognized *Chevron* and *Seminole Rock* as separate deference doctrines, but lower courts occasionally have applied *Chevron* to agency interpretations of agency regulations. See, e.g., *Samsung Elecs. Am., Inc. v. United States*, 106 F.3d 376, 378 (Fed. Cir. 1997); *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 369 (4th Cir. 1994); see also *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997) ("It would seem that there are few, if any, cases in which the standard applicable under *Chevron* would yield a different result [than under *Seminole Rock*]."). The significance of *Chevron* and *Mead* for *Seminole Rock* deference is unclear and beyond the scope of this Article. For a defense of *Seminole Rock* in relation to *Chevron* and *Skidmore*, see Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49 (2000).

86. See *Nat'l Muffler*, 440 U.S. at 475-77.

87. See *id.* at 477.

of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.⁸⁸

The Court then applied these factors to evaluate the regulation at issue, discussing at length the relevant statutory and regulatory history, and also noting that the regulation was of substantial duration and had been consistently applied by the IRS in its series of revenue rulings.⁸⁹ Ignoring its own earlier inclusion of contemporaneity as a relevant factor, and perhaps foreshadowing a bit *Chevron's* emphasis on regulatory flexibility and policy choice, the Court dismissed the observation that the Treasury's current definition was not its first: "We would be reluctant to adopt the rigid view that an agency may not alter its interpretation in light of administrative experience."⁹⁰ Without distinguishing between the regulation and the revenue rulings in its holding, the Court acknowledged that the government's interpretation was not "the only possible one," but concluded that "it does bear a fair relationship to the language of the statute, it reflects the views of those who sought its enactment, and it matches the purpose they articulated."⁹¹ Accordingly, the Court upheld that interpretation as meriting "serious deference" and "implement[ing] the congressional mandate" in a "reasonable manner."⁹²

Particularly when viewed through a post-*Mead* lens, the *National Muffler* opinion is perplexing. On the one hand, the analytical approach suggested by the *National Muffler* standard closely resembles the multifactor inquiry advocated by *Skidmore*. At the same time, however, the Court dismissed the relevance of contemporaneity, approved of allowing interpretive flexibility, and otherwise spoke in a very *Chevron*-like manner of delegation and of "serious" deference toward reasonable regulations.

C. CONFLICTING JURISPRUDENCE

Interpreting *National Muffler* in the post-*Chevron* era has confounded the lower courts. The circuit courts of appeal and

88. *Id.* (internal citations omitted).

89. *Id.* at 484.

90. *Id.* at 485.

91. *Id.* at 484.

92. *Id.* at 476 (citing *United States v. Cartwright*, 441 U.S. 546, 550 (1973) and quoting *United States v. Correll*, 389 U.S. 299, 307 (1967)).

the Tax Court are divided on the relationship between the two cases.⁹³

At least one circuit—the Sixth—has declared outright that, post-*Mead*, *Chevron* deference applies to Treasury regulations issued pursuant to I.R.C. § 7805(a) as well as to Treasury regulations expressly mandated by Congress.⁹⁴ Yielding a similar outcome for different reasons, some of the circuit courts have decided that *Chevron* and *National Muffler* are indistinguishable.⁹⁵ “[A]ny regulation which is ‘based upon a permissible construction’ of an ambiguous statute will almost always ‘implement the congressional mandate in some reasonable manner’ and vice versa.”⁹⁶ Accordingly, these courts also ultimately apply the *Chevron* two-step analysis and controlling deference standard in evaluating all Treasury regulations regardless of their authority. Still other courts, however, believe *National Muffler* to require a lesser degree of deference than *Chevron*. Although the practical difference is not always apparent, in such jurisdictions, specific authority regulations are given “controlling weight” pursuant to *Chevron* while general authority regulations promulgated under I.R.C. § 7805(a) are given only “considerable weight” under *National Muffler*.⁹⁷

93. See, e.g., *Boeing Co. v. United States*, 258 F.3d 958, 963 (9th Cir. 2001) (acknowledging a split and reserving the question); *Gen. Elec. Co. v. Comm’r*, 245 F.3d 149, 154 n.8 (2d Cir. 2001) (same).

94. See *Hosp. Corp. of Am. & Subsidiaries v. Comm’r*, 348 F.3d 136, 140–41 (6th Cir. 2003).

95. See *Bankers Life & Cas. Co. v. United States*, 142 F.3d 973, 978–83 (7th Cir. 1998) (acknowledging some differences between the two cases but concluding that they are practically indistinguishable); *Tate & Lyle, Inc. v. Comm’r*, 87 F.3d 99, 106 n.13 (3d Cir. 1996) (equating the two doctrines implicitly by citation); *Norwest Corp. v. Comm’r*, 69 F.3d 1404, 1408–09 (8th Cir. 1995) (citing both *Chevron* and *National Muffler* for substantial deference to reasonable Treasury regulations); *Cent. Pa. Sav. Ass’n v. Comm’r*, 104 T.C. 384, 390–92 (1995) (seeing a negligible difference between the two doctrines). The Eighth Circuit seems to follow this approach as well, but its precedents are mixed. *Compare* *Walshire v. United States*, 288 F.3d 342, 345–46 (8th Cir. 2002) (citing *Chevron* for controlling deference toward general authority regulation), *and* *Norwest*, 69 F.3d at 1408–09 (citing both *Chevron* and *National Muffler* for substantial deference to reasonable Treasury regulation), *with* *St. Jude Med. Ctr., Inc. v. Comm’r*, 34 F.3d 1394, 1402 (8th Cir. 1994) (applying less deferential *National Muffler* standard to general authority regulation).

96. *Bankers Life*, 142 F.3d at 981 (quoting *Bell Fed. Sav. & Loan Ass’n v. Comm’r*, 40 F.3d 224, 227 (7th Cir. 1994)).

97. See *Snowa v. Comm’r*, 123 F.3d 190, 197 (4th Cir. 1997); *see also* *Schuler Indus., Inc. v. United States*, 109 F.3d 753, 754–55 (Fed. Cir. 1997) (saying that *Chevron* is more deferential than *National Muffler*).

The Tax Court seems to be particularly divided and even more confused. In *Robinson v. Commissioner*, a post-*Mead* case decided by the Tax Court en banc regarding general authority Treasury regulations, the majority opinion stated that, “[a]lthough interpretative regulations are entitled to considerable weight, they are accorded less deference than legislative regulations, which are issued under a specific grant of authority to address a matter raised by the relevant statute.”⁹⁸ Yet the court then went on, in the very next paragraph, to prescribe *Chevron*’s two-step analysis, citing *Chevron* and admonishing that, “[i]f the administrator’s reading fills a gap or defines a term in a way that is reasonable in light of the legislature’s revealed design, we give the administrator’s judgment ‘controlling weight.’”⁹⁹ Moreover, despite extensive cites to *National Muffler* and other pre-*Chevron* tax deference cases describing the nature of its inquiry, the Tax Court’s evaluation of the regulation is indistinguishable from an opinion issued a few months earlier by Judge Gale in *Square D. Co. & Subs. v. Commissioner*, in which he applied *Chevron* to a specific authority Treasury regulation.¹⁰⁰ Judge Gale concurred in *Robinson* by joining an opinion that did not discuss the *Chevron* issue, even though in *Square D.* he indicated that *Chevron* would be appropriate for all Treasury regulations, whether issued pursuant to general or specific authority.¹⁰¹ Meanwhile, two of the three dissenting opinions in *Robinson*, representing five of

98. *Robinson v. Comm’r*, 119 T.C. 44, 68 (2002). *Robinson* actually called into question the validity of certain temporary Treasury regulations promulgated pursuant to the general authority of I.R.C. § 7805(a) (2000) but without the benefit of public notice and comment. See *Robinson*, 119 T.C. at 66–67. Whether temporary regulations so issued are generally entitled to *Chevron* deference remains an open question. See, e.g., Merrill & Hickman, *supra* note 43, at 906–07 (discussing the question); Juan F. Vasquez, Jr. & Peter A. Lowy, *Challenging Temporary Treasury Regulations: An Analysis of the Administrative Procedure Act, Legislative Reenactment Doctrine, Deference, and Invalidity*, 3 HOUS. BUS. & TAX L.J. 248, 267–81 (2003) (same). Regardless, for purposes of its evaluation, the Tax Court in *Robinson* expressly equated temporary regulations with other interpretative regulations adopted pursuant to § 7805(a). See *Robinson*, 119 T.C. at 67.

99. *Robinson*, 119 T.C. at 68 (quoting *Nationsbank of N.C. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995)). Judge Vasquez, dissenting in the *Robinson* case, observed the majority’s general adherence to *Chevron* analysis notwithstanding the majority’s statements to the contrary. See *id.* at 119–20 (Vasquez, J., dissenting).

100. *Compare Square D. Co. & Subsidiaries v. Comm’r*, 118 T.C. 299, 307–13 (2002), with *Robinson*, 119 T.C. at 69–75.

101. See *Square D.*, 118 T.C. at 307 (citing *Bankers Life*, 142 F.3d 973).

the sixteen judges participating, concluded that *Skidmore*, not *Chevron*, provided the appropriate standard of review and that the majority's opinion was inconsistent with that standard.¹⁰² The Tax Court continued its inter-court disagreement over the applicability of the various standards more recently in *Swallows Holding Ltd. v. Commissioner*.¹⁰³ There the majority rejected *Chevron* deference and declined to defer to general authority Treasury regulations based on a less deferential *National Muffler* analysis notwithstanding strong, separate dissenting opinions by Judges Swift and Halpern advocating *Chevron* deference.¹⁰⁴

The disagreements among the lower courts are perhaps to be expected when one considers not only *National Muffler*'s muddled rhetoric but also the Supreme Court's confusing signals on the issue. The Court on several occasions has had the opportunity to evaluate long-standing but ambiguous Treasury regulations interpreted by the IRS through revenue rulings or other more informal formats. Yet the Court's record of deference in such cases is all over the map, alternatively citing *Chevron* or *National Muffler* while seemingly oblivious to the raging debate over the relationship between the two.¹⁰⁵

D. SCHOLARLY SUGGESTIONS

Scholarly attempts to reconcile the jurisprudential mess similarly fail to achieve consensus, and indeed render the question even more complicated than necessary. A prime example of this is the most recent entry, which in some sense is perhaps the most authoritative given the institution and individuals involved: the report by the American Bar Association Tax Section's Task Force on Judicial Deference,¹⁰⁶ which included such prominent contributors to the tax deference debate as Irving

102. See *Robinson*, 119 T.C. at 107–08 (Swift, J., dissenting); *id.* at 113–21 (Vasquez, J., dissenting).

103. See *Swallows Holding, Ltd. v. Comm'r*, 126 T.C. No. 6, 2006 WL 196305 (Jan. 26, 2006).

104. *Id.*

105. *Compare Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 560–61 (1991) (citing *National Muffler*), with *Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 575–76 (1993) (Souter, J., dissenting) (citing both *National Muffler* and *Chevron*), and *Atl. Mut. Ins. Co. v. Comm'r*, 523 U.S. 382, 387–89 (1998) (citing *Chevron* and applying its two-step analytical approach); see also *infra* Part II.A.3.

106. See Salem et al., *supra* note 20.

Salem,¹⁰⁷ Ellen Aprill,¹⁰⁸ and Linda Galler.¹⁰⁹ The Task Force recommends *Chevron* deference for specific authority Treasury regulations; but for general authority Treasury regulations, the Task Force prescribed what they label as *Chevron* deference but which closer inspection of their analysis reveals is really a blended approach that incorporates *National Muffler's* multi-factor analysis as the standard for reasonableness at *Chevron* step two.¹¹⁰ In other words, the Task Force said, the Treasury's interpretations would still be "controlling" on the courts, just like under *Chevron* proper; but the range of reasonableness for a general authority Treasury regulation would be narrower than that for a specific authority Treasury regulation.¹¹¹

Although the Task Force acknowledged that general authority Treasury regulations are properly categorized as "legislative" for APA purposes, the Task Force emphasized the "traditional and well-entrenched use of the term 'interpretive'" for such regulations as the primary justification for this hybrid ap-

107. See, e.g., Irving Salem & Richard Bress, *Agency Deference Under the Judicial Microscope of the Supreme Court*, 88 TAX NOTES 1257 (2000); Irving Salem, *Judicial Deference, Consolidated Returns, and Loss Disallowance: Could LDR Survive a Court Challenge?*, 43 TAX EXECUTIVE 167 (1991).

108. See Aprill, *supra* note 27; Ellen P. Aprill, *The Interpretive Voice*, 38 LOY. L.A. L. REV. 2081 (2005) [hereinafter, Aprill, *Interpretive Voice*].

109. See, e.g., Linda Galler, *Chevron and the Administrative Regulation of Indexation: Challenging the Cooper Memorandum*, 56 TAX NOTES 1791 (1992) [hereinafter Galler, *Chevron and Administrative Regulation*]; Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, 72 B.U. L. REV. 841 (1992); Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 OHIO ST. L.J. 1037 (1995).

110. See Salem et al., *supra* note 20, at 737-44.

111. Ellen Aprill made a similar pre-*Mead* attempt to combine *Chevron* and *National Muffler* with her "muffled *Chevron*" proposal. Aprill, *supra* note 27, at 82-84. Aprill's proposal was premised on a perception that the Court's application of *Chevron* is limited largely to a textualist inquiry that ignores legislative history and is subject to a presumption that the statutory language is plain and unambiguous. See *id.* at 64-67; see also Merrill, *supra* note 70, at 972-75 (analyzing early *Chevron* cases to find textualism undermining *Chevron*). Given *National Muffler's* reliance on statutory purpose and history, Aprill suggested incorporating those elements into *Chevron* step-two analysis as guides to ascertaining the reasonableness of the Treasury's interpretation of the Code. See Aprill, *Muffled Chevron*, *supra* note 27, at 83-84. While the Court's *Chevron* analysis has been inconsistent in many respects, several opinions issued since Aprill made her proposal have considered legislative history extensively in ordinary *Chevron* analysis. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133-156 (2000); *Regions Hosp. v. Shalala*, 522 U.S. 448, 457 (1998); see also *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 845-53, 862-63 (1984) (including extensive discussion of the Clean Air Act's legislative history).

proach.¹¹² The Task Force stated that *National Muffler* provides “considerable guidance” for its methodology, of course;¹¹³ but the Task Force also carefully parsed *Chevron* and *Mead* to find support for its hybrid model¹¹⁴ and raised several normative justifications for taking “a cautious approach to a grant of broad deference” in tax cases.¹¹⁵

The *National Muffler* considerations of statutory language, origin, and purpose are already incorporated in *Chevron* analysis, however, which leaves such factors as contemporaneity, longevity, and consistency to be added by this modification to *Chevron* step two.¹¹⁶ Given the tendency of these latter factors to bind an agency to one interpretation, it is difficult to see how they are consistent with *Chevron*’s emphasis on giving the agency flexibility in making statutorily permissible policy choices to address changing conditions and political administrations. Treasury’s range of reasonableness would be narrowed right down to its original interpretation, or something close to it, even if the statutory language allowed alternatives.¹¹⁷ Other than the two-step organization, it is difficult to distinguish the Task Force’s proposed modified-*Chevron* from *National Muffler* or *Skidmore*.

Edward Schnee and Eugene Seago offer a similar but slightly different proposal for modifying *Chevron* in the tax con-

112. Salem et al., *supra* note 20, at 739.

113. *Id.* at 740.

114. *Id.* at 738–41; *see also* discussion *infra* notes 256–59 and accompanying text.

115. *Id.* at 723–26.

116. A common description of *Chevron* step one allows a reviewing court to utilize the traditional tools of statutory construction to ascertain the statute’s plain meaning, which would include considering the statute’s origin and purpose at that stage. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 320 nn.44–45 (2001) (considering the statute’s original purpose at *Chevron* step one); *Brown & Williamson*, 529 U.S. at 133–34; *Regions Hosp.*, 522 U.S. at 457. Even contemporaneity may enter into *Chevron* analysis to the extent that an agency’s contemporaneous construction of a statute may offer insight into congressional intent. *See, e.g.*, *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933) (recognizing these methodologies).

117. *National Muffler* involved the agency’s second attempt to define business league, but that second interpretation survived in part by not being challenged for fifty years. *See supra* notes 80–83 and accompanying text. Presumably the Task Force’s standard would allow that regulatory interpretation to stand; however, the Task Force offers no guidance for discerning at what point longevity and contemporaneity would trump the sort of statutorily permissible but politically inspired policy change generally sanctioned by *Chevron*.

text. Like the Task Force, Schnee and Seago concede *Chevron's* applicability to specific authority Treasury regulations; but they believe that general authority Treasury regulations should only be given what they describe as a lesser degree of deference premised on "reasonableness."¹¹⁸ Whereas the Court generally uses that term interchangeably with permissibility in the *Chevron* context,¹¹⁹ Schnee and Seago define their reasonableness standard as whatever produces "the better answer for the majority of taxpayers."¹²⁰ Yet Schnee and Seago fail to articulate what makes one interpretation better than another. Consequently, their proposed standard would seem to require a reviewing court to make an independent judgment as to whether the better interpretation is one that reduces (or increases) taxes, imposes less paperwork, or appeals to more abstract notions of fairness or efficiency, even if the court's preferred policy goals differ from those of Treasury. Indeed, it is difficult to see how the standard Schnee and Seago propose defers to Treasury at all.

While the Task Force and Schnee and Seago attempt to bridge the gap between *Chevron* and so-called traditional tax deference, other scholars argue more generally for the applicability of *Skidmore* rather than *Chevron* to Treasury regulations. Mitchell Gans interprets *Mead* to mean that *Chevron* applies to both specific authority and general authority Treasury regulations, but for normative reasons he advocates legislation expressly adopting *Skidmore* respect as the more appropriate standard for the latter.¹²¹ John Coverdale applies the frame-

118. See Edward J. Schnee & W. Eugene Seago, *Deference Issues in the Tax Law: Mead Clarifies the Chevron Rule—Or Does It?*, 96 J. TAX'N 366, 371–72 (2002).

119. The Court in *Chevron* seemed to use "reasonable" and "permissible" or derivations thereof interchangeably. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843–44 (1984). In subsequent cases, the Court seemed to use one or the other in connection with *Chevron* step two, but offered no hint that it regards the terms as anything other than synonymous in that context. Compare, e.g., *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (articulating step two as "when the statute 'is silent or ambiguous' we must defer to a reasonable construction by the agency charged with its implementation"), with *Barnhart v. Walton*, 535 U.S. 212, 218 (2002) (describing step two as "whether the interpretation, for other reasons, exceeds the bounds of the permissible").

120. Schnee & Seago, *supra* note 118, at 372.

121. See Gans, *supra* note 20, at 792–93. Peter Lowy and Juan Vasquez, Jr., similarly imply in their analysis of deference and revenue rulings that Treasury regulations would be entitled to *Chevron* deference under *Mead*, but they do not discuss the issue outright. See Lowy & Vasquez, *supra* note 29, at

work of *Chevron*, *Skidmore*, and *Mead* to conclude that specific authority Treasury regulations warrant *Chevron* deference while general authority Treasury regulations qualify only for *Skidmore* respect.¹²² Coverdale also has expressed his preference for what he identifies as traditional tax deference principles for both types of regulations: controlling deference through an inquiry that collapses *Chevron*'s two steps into one for specific authority Treasury regulations, and *National Muffler* or *Skidmore* respect (which Coverdale equates) for general authority ones.¹²³

To some degree, these scholarly efforts all build upon different understandings of the *Chevron* doctrine; and the diverse conceptions of *Chevron* necessarily lead to inconsistent conclusions concerning how the *Chevron* doctrine should apply in the tax context.¹²⁴ That aspect of these analyses merely reflects the more general scholarly disagreement over what *Chevron* means. These disparate approaches to tax deference are consistent, however, in their insistence that, whatever *Chevron* may mean for other areas of the law, tax is different and should be treated thus.

II. THE CASE AGAINST THE NATIONAL MUFFLER "ALTERNATIVE"

As noted, the arguments for alternative, tax-specific deference standards for tax cases fall roughly into two categories: one doctrinal, resting on the belief that tax has its own deference tradition that should and perhaps does trump *Chevron*; and the other normative, based on various claims that tax is unique among regulatory fields. In truth, however, neither claim is accurate.

A. COMPARING THE DOCTRINAL HISTORY

The Court has a long history of deference toward Treasury regulations that not only pre-dates *Chevron* but extends back to the origins of the modern income tax. The Court also has an equally long pre-*Chevron* tradition of judicial deference toward

232–33.

122. See John F. Coverdale, *Chevron's Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings after Mead*, 55 ADMIN. L. REV. 39, 81–83 (2003).

123. See Coverdale, *supra* note 14, at 54–55, 67–68.

124. Cf. *supra* notes 50–57 and accompanying text.

agency legal interpretations generally. The questions as-yet unexamined are whether and how these conventions are related. Tracing the history of judicial deference in both tax and non-tax cases turns up more similarities than differences.

1. Early Assumptions

The rise of the administrative state in the early twentieth century yielded tremendous tension between the executive branch and independent administrative agencies on the one hand and the judicial branch on the other over questions of statutory interpretation.¹²⁵ Agencies bring special resources and expertise to the task of administering the complicated regulatory schemes enacted by Congress; but the courts are also experts at statutory interpretation, and *Marbury v. Madison* clearly established the Court as the primary interpreter of the law.¹²⁶

Giving executive branch and independent agencies extensive authority to adopt legally binding regulations is largely a twentieth-century phenomenon. Many non-tax statutes enacted in the Progressive and New Deal Eras granted rulemaking authority to executive branch and independent agencies.¹²⁷ Some such authorizations were narrow and specific: for example, giving a specific agency like the Interstate Commerce Commission or the Federal Power Commission the power to impose uniform accounting rules for an industry whose rates were regulated and who consequently had to file annual reports of their assets, income, and expenses.¹²⁸ Other grants of authority were broad

125. See Edward Clark Lukens, *The Delegation of Power—A Neglected Constitutional Question*, 9 TEMP. L.Q. 367, 367 (1935); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2079–82 (1990).

126. See *Marbury v. Madison*, 5 U.S. 137 (1803); see also Thomas W. Merrill, *Marbury v. Madison as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 496 (2004) (“The tradition in administrative law is that *Marbury* stands foursquare for the proposition that courts must engage in *de novo* or independent review of all questions of law.”); Sunstein, *supra* note 125, at 2080 (acknowledging the same).

127. See generally John A. Fairlie, *Administrative Legislation*, 18 MICH. L. REV. 181, 183–88 (1920) (cataloguing early examples); Merrill & Watts, *supra* note 48, at 495–98 (discussing early statutes).

128. See, e.g., Federal Power Act of 1935, Pub. L. No. 74-333, 49 Stat. 847, 854 (codified at 16 U.S.C. § 825(a) (2000)) (giving the FPC such authority); Communications Act of 1934, ch. 652, § 220, 48 Stat. 1064, 1078–80 (codified at 47 U.S.C. § 220 (2000)) (giving the same to the FCC); Interstate Commerce Act of 1887, Pub. L. No. 49-104, § 20, 24 Stat. 379, amended by Hepburn Act of 1906, ch. 3591, § 7, 34 Stat. 584, 593–95 (codified as amended in scattered sec-

and general, giving agencies the power to adopt rules and regulations as they deemed necessary to effectuate the statutes they administered.¹²⁹

Some of the very earliest of the modern income tax statutes granted both specific and general rulemaking authority to the Secretary of the Treasury and, under him, the Commissioner of Internal Revenue. The Revenue Act of 1916 introduced a few specific rulemaking grants.¹³⁰ Subsequent tax statutes included those and added more.¹³¹ The War Revenue Act of 1917 additionally introduced the predecessor to I.R.C. § 7805(a) allowing the promulgation of “all necessary rules and regulations for the enforcement” of the Act.¹³²

During this early period of regulatory expansion, non-tax commentators discussed at length the extent to which the Constitution permitted Congress to delegate the authority to promulgate binding, substantive regulations without violating the nondelegation doctrine.¹³³ In cases addressing a wide range of administrative actions, such as *Buttfield v. Stranahan*¹³⁴ and *United States v. Grimaud*,¹³⁵ the Supreme Court repeatedly de-

tions of 49 U.S.C.) (granting the same to the ICC).

129. See, e.g., Federal Food, Drug, and Cosmetic Act of 1938, Pub. L. No. 75-717, § 701, 52 Stat. 1040, 1055-58 (codified at 21 U.S.C. § 371 (2000)); Communications Act of 1934 § 4(i).

130. See, e.g., Revenue Act of 1916, Pub. L. No. 64-271, ch. 463, §§ 5(a)(8), 6(a)(7), 12(a)(2), 12(b)(2), 39 Stat. 756, 757 (codified as amended in scattered sections of 26 U.S.C. (2000)) (authorizing regulations providing reasonable depletion allowances for oil and gas wells and mines); *id.* §§ 8(g), 13(d) (codified as amended in scattered sections of 26 U.S.C. (2000)) (authorizing regulations establishing permissible accounting methods other than “actual receipts and disbursements”).

131. See Ellsworth C. Alvord, *Treasury Regulations and the Wilshire Oil Case*, 40 COLUM. L. REV. 252, 258 (1940) (identifying fifty-six specific authority delegations in the Internal Revenue Code of 1939); Fred T. Field, *The Legal Force and Effect of Treasury Interpretation*, in *THE FEDERAL INCOME TAX* 91, 95-96 (Robert Murray Haig ed., 1921) (listing specific authority grants found in the Revenue Act of 1918).

132. See War Revenue Act of 1917, ch. 63, 40 Stat. 300 (codified at 15 U.S.C. §§ 71-77 (2000)).

133. See, e.g., John B. Cheadle, *The Delegation of Legislative Functions*, 27 YALE L.J. 892 (1918); Fairlie, *supra* note 127, at 189; Lee, *supra* note 23, at 2-3; John D. McGowen, *An Economic Interpretation of the Doctrine of Delegation of Governmental Powers*, 12 TUL. L. REV. 179 (1938).

134. 192 U.S. 470, 494 (1904) (upholding a statute delegating to the Secretary of the Treasury the authority to “fix and establish uniform standards of purity, quality and fitness for consumption of all kinds of teas imported into the United States”).

135. 220 U.S. 506, 522-23 (1911) (upholding the Forest Reserve Act’s dele-

clined to characterize even broad delegations of authority to adopt binding regulations as unconstitutional delegations of legislative power.¹³⁶ Yet the New Deal cases of *Panama Refining Co. v. Ryan*¹³⁷ and *A.L.A. Schechter Poultry Corp. v. United States*,¹³⁸ which in 1935 struck down provisions of the National Industrial Recovery Act,¹³⁹ offered proof that at least some delegations of legislative authority were unconstitutional.

Although the Court almost always upheld congressional delegations of rulemaking authority on one ground or another,¹⁴⁰ the Court's rhetoric in its nondelegation jurisprudence strongly influenced the scholarly characterization of regulations and their relative legal weight. Scholars and practitioners of that period who surveyed the Court's nondelegation cases generally agreed that Congress could constitutionally delegate the authority to promulgate binding regulations, so long as the grant to do so was narrow and specific.¹⁴¹ Regulations promulgated pursuant to such specific authority created "new law," carried the force and effect of law, and were deemed legislative in character.¹⁴²

gation to the Secretary of Agriculture the broad authority to protect national forests and to impose criminal penalties for violating such regulations).

136. See also, e.g., *Kan. City So. Ry. v. United States*, 231 U.S. 423, 443 (1913) (upholding a Hepburn Act provision giving the ICC discretion over accounting rules for railroads); *St. Louis & Iron Mountain Ry. v. Taylor*, 210 U.S. 281, 287 (1908) (upholding a Safety Appliance Act provision delegating to the ICC authority to certify certain freight car standards).

137. 293 U.S. 388 (1935).

138. 295 U.S. 495 (1935).

139. See *Panama Refining*, 293 U.S. at 432, *A.L.A. Schechter*, 295 U.S. at 541-42.

140. *Panama Refining* and *Schechter Poultry* are the only two cases in which the Court has rejected congressional delegations of power to regulatory agencies as unconstitutional on nondelegation grounds. See PIERCE, *supra* note 23, § 2.6, at 91.

141. See 1 F. TROWBRIDGE VOM BAUR, *FEDERAL ADMINISTRATIVE LAW* § 489 (1942); Fairlie, *supra* note 127, at 189-97; Lee, *supra* note 23, at 2-3, 21-25.

142. See, e.g., *Md. Cas. Co. v. United States*, 251 U.S. 342, 349 (1920) (describing such regulations as having "the force and effect of law if [they] be not in conflict with express statutory provision"). Both tax and non-tax commentators recognized this definition of legislative regulations. See Alvord, *supra* note 131, at 259-60; Brown, *supra* note 23, at 384-85; Davis, *supra* note 23, at 928-29; Lee, *supra* note 23, at 2-3; see also *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 416-22 (1942) (recognizing the legal force of specific authority regulations). In their analysis of congressional intent and the force of law, Thomas Merrill and Kathryn Tongue Watts downplay the role of the nondelegation doctrine and emphasize the importance of penalties as evidence of congressional intent that regulations carry the force and effect of law. See Merrill

By contrast, so-called interpretative regulations adopted pursuant to more general rulemaking grants of the "all necessary rules and regulations" variety merely interpreted existing law, so could not carry such legal effect.¹⁴³ A general rulemaking grant that authorized binding regulations carrying the force and effect of law would be inconsistent with the nondelegation doctrine and thus constitutionally invalid.¹⁴⁴ By contrast, non-binding regulations reflecting administrative officials' best guess of a statute's meaning were merely exercises of executive power and did not require congressionally delegated authority.¹⁴⁵ The Administrative Procedure Act, adopted in 1946 to reform and bring uniformity to federal administrative process, implicitly incorporated these general principles in requiring procedures including public notice and opportunity for comment for legislative regulations but not for interpretative ones.¹⁴⁶

Adhering to this analytical model, both tax and non-tax commentators considered Treasury's specific authority regulations to be legislative but its general authority regulations to be

& Watts, *supra* note 48, at 488–92. They acknowledge, however, that Progressive- and New Deal-Era courts and commentators showed no recognition of that convention. *See id.* at 503. Accordingly, the congressional convention Merrill and Watts identify is not inconsistent with my argument that the common understanding of the period required a specific authority grant before a regulation could be characterized as legislative and treated as binding on regulated parties as well as the government.

143. *See, e.g.,* VOM BAUR, *supra* note 141, § 489; Alvord, *supra* note 131, at 260–61; Davis, *supra* note 23, at 928–29; Stanley S. Surrey, *The Scope and Effect of Treasury Regulations Under the Income, Estate, and Gift Taxes*, 88 U. PA. L. REV. 556, 557–58 (1940).

144. *See, e.g.,* Alvord, *supra* note 131, at 260–61; Surrey, *supra* note 143, at 557–58.

145. *See, e.g.,* Fairlie, *supra* note 127, at 189; Surrey, *supra* note 143, at 558.

146. The *Attorney General's Manual on the Administrative Procedure Act*, generally considered the authoritative history of that statute, is consistent with this understanding. The Manual defines legislative regulations (which it calls "substantive rules") as "rules, other than organizational or procedural . . . , issued by an agency pursuant to statutory authority and which implement the statute." U.S. DEPT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 23, 30 n.3 (1947). The Manual offers as examples of such regulations the Federal Power Commission's rules prescribing uniform systems of accounts and the SEC's proxy rules, both of which, the Manual notes, carry the force and effect of law. *See id.* By contrast, the Manual defines as interpretative regulations (which it and the APA both call "interpretative rules") as "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *See id.*

merely interpretative and nonbinding on nondelegation grounds.¹⁴⁷ As observed by Kenneth Culp Davis, however, “[a]lthough the theoretical distinction between legislative and interpretative rules is often clear, the practice does not always follow the theory, and in the borderland between the two kinds of rules, the differences, if any, are sometimes obscured or ignored.”¹⁴⁸ Davis offered as one example certain general authority Treasury regulations interpreting the vague, one-sentence definition of “gross income” in what is now I.R.C. § 61.¹⁴⁹

Nevertheless, at least in theory, the implications of categorizing a regulation as legislative or interpretative were marked when it came to judicial review. The Court made clear in non-tax cases like *Atchison, Topeka & Santa Fe Railway v. Scarlett*¹⁵⁰ and *AT&T v. United States*¹⁵¹ that, so long as the delegation was constitutionally valid, reviewing courts must uphold legislative regulations unless it was clear that the agency exceeded the scope of its rulemaking authority.¹⁵² In such cases, said the Court, “This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers.”¹⁵³ The courts regularly applied this “controlling deference” standard in reviewing specific authority Treasury regulations as well.¹⁵⁴

147. See, e.g., Alvord, *supra* note 131, at 259–61; Davis, *supra* note 23, at 930; Lee, *supra* note 23, at 2; Surrey, *supra* note 143, at 557–58.

148. Davis, *supra* note 23, at 932.

149. See *id.* at 933–34 (“That the regulations are intended to be merely interpretative along with the bulk of other tax regulations seems beyond doubt. Yet they are clearly designed to make bold and abrupt changes in the law.”); see also I.R.C. § 61(a) (2000) (defining gross income as “all income from whatever source derived” including but not limited to several listed items).

150. 300 U.S. 471, 474 (1937).

151. 299 U.S. 232, 236–37 (1936).

152. The same principle of controlling deference applied as well where an agency exercised a specific authority grant through formal-adjudication processes. See, e.g., *NLRB v. Hearst Publ'ns*, 322 U.S. 111, 131 (1944) (“But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court’s function is limited.”); *Gray v. Powell*, 314 U.S. 402, 412 (1941) (“Where, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched.”).

153. *AT&T*, 299 U.S. at 236–37; see also *Atchison, Topeka & Santa Fe Ry.*, 300 U.S. at 474; *Norfolk & W. Ry. Co. v. United States*, 287 U.S. 134, 141 (1932); *Kan. City S. Ry. Co. v. United States*, 231 U.S. 423, 447 (1913); *VOM BAUR*, *supra* note 141, §§ 497, 499 (recognizing this standard); Davis, *supra* note 23, at 929 (same); Lee, *supra* note 23, at 29 (same).

154. See, e.g., *Comm’r v. S. Tex. Lumber Co.*, 333 U.S. 496, 503 (1948) (con-

In both non-tax and tax cases involving interpretative regulations, by contrast, the strong deference applicable to legislative regulations did not apply. Instead, the Court reviewed interpretative regulations independently, but offered a variety of factors such as contemporaneity, longevity, and consistency that, where present, justified giving agency interpretations respect.¹⁵⁵ Subject-matter complexity and comparative institutional expertise also played a role.¹⁵⁶ Ultimately, the Court wrote the oft-quoted passage in *Skidmore* that has become the dominant articulation of this multifactor standard.¹⁵⁷ Although *Skidmore*, like *Chevron*, was not a tax case, the Court in *Skidmore* analogized the Wage and Hour Division rulings at issue to general authority Treasury regulations, signaling that the same standard should apply to both.¹⁵⁸

Again comparing actual practice to theory, Kenneth Culp

sidering a broad, specific authority grant as the reason why a regulation "should not be overruled by the courts unless clearly contrary to the will of Congress"); *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 103 (1939) (describing the subject of specific authority regulation as "for the Congress and the Commissioner"); *Fawcus Mach. Co. v. United States*, 282 U.S. 375, 378 (1931) (describing a specific authority regulation as "valid unless unreasonable or inconsistent with the statute"); see also *Pictorial Review Co. v. Helvering*, 68 F.2d 766, 768 (D.C. Cir. 1934) (applying a strong deference standard); *Hamill v. Comm'r*, 30 BTA 955, 958 (1934) (same); Erwin N. Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398, 401 (1941) (discussing judicial review of specific authority Treasury regulations).

155. See, e.g., *Burnet v. Chi. Portrait Co.*, 285 U.S. 1, 16 (1932) (acknowledging that consistency is given great weight); *Mason v. Routzahn*, 275 U.S. 175, 178 (1927) (deferring to contemporaneous and long-standing Treasury practice embodied in regulations); see also *United States v. Pleasants*, 305 U.S. 357, 363 (1939) (declining to defer to a regulation inconsistently followed by the IRS); Griswold, *supra* note 154, at 404-11 (discussing the role of contemporaneousness and "long-continuedness" in giving interpretative Treasury regulations a legally binding effect).

156. See, e.g., *California v. United States*, 320 U.S. 577, 584 (1944) (emphasizing the U.S. Maritime Commission's expertise in interpreting the Shipping Act); *Fed. Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 607 (1942) (deferring to the Federal Power Commission's "highly expert judgment" regarding the Natural Gas Act); *Estate of Sanford v. Comm'r*, 308 U.S. 39, 52 (1939) (acknowledging IRS expertise concerning the I.R.C.); *Chi., Rock Island & Pac. Ry. Co. v. United States*, 284 U.S. 80, 95 (1931) (deferring to the Interstate Commerce Commission as "a body of trained and experienced experts"); see also *Haggar Co. v. Helvering*, 308 U.S. 389, 398 (1940) (declining to defer to Treasury regulations interpreting the National Industrial Recovery Act that "have not been consistent in their interpretation of the statute and do not embody the results of any specialized departmental knowledge or experience").

157. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); see also *supra* notes 62-66 and accompanying text.

158. See *Skidmore*, 323 U.S. at 140.

Davis in particular noted that the authoritative weight of interpretative rules varied considerably at the hands of courts weighing these factors.¹⁵⁹ Within the general range of potential outcomes, complexity and expertise likely explain the courts' propensity to give general authority Treasury regulations as a class slightly more deference than similar rules issued by other agencies.¹⁶⁰ That tendency did not, however, rise to the level of a unique standard of review.¹⁶¹ Instead, the Court regularly applied *Skidmore* and/or its multifactor approach to evaluate interpretative regulations in tax and non-tax cases alike, but with one important practical distinction in terms of outcome.¹⁶²

Early in the first half of the twentieth century, the Court advocated a strong version of what is known as the reenactment doctrine.¹⁶³ Under this doctrine, interpretative regulations that were contemporaneously adopted could become binding and carry the force of law if Congress reenacted the statute without substantially altering the regulation.¹⁶⁴ The Court's application of the reenactment doctrine was not limited to tax cases;¹⁶⁵ but the ability of congressional reenactment to move

159. See Davis, *supra* note 23, at 934–43 (discussing judicial review of interpretative regulations generally and Treasury regulations specifically).

160. See *id.* at 934–35 (noting a trend of giving Treasury regulations significant deference).

161. See *id.*; see also Griswold, *supra* note 154, at 404–11 (emphasizing the importance of contemporaneity and longevity in evaluating general authority Treasury regulations).

162. Compare *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (applying *Skidmore* to non-tax regulation), and *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n.5 (1978) (same), with *United States v. Stapf*, 375 U.S. 118, 127 & n.11 (1963) (applying *Skidmore* to a general authority Treasury regulation).

163. See *Brown*, *supra* note 23, at 378–83. *But see Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 99–101 (1939) (suggesting limitations on the reenactment doctrine's applicability); *Koshland v. Helvering*, 298 U.S. 441, 447 (1936) (rejecting a long-standing Treasury regulation where the Court deemed the statute unambiguous).

164. See, e.g., *Comm'r v. Wheeler*, 324 U.S. 542, 546–47 n.10 (1945); *Douglas v. Comm'r*, 322 U.S. 275, 281–82 (1944); *Helvering v. R.J. Reynolds Tobacco Co.*, 306 U.S. 110, 114–15 (1939); *Helvering v. Winnill*, 305 U.S. 79, 82–83 (1938); *Hartley v. Comm'r*, 295 U.S. 216, 220 (1935); *United States v. Dakota-Mont. Oil Co.*, 288 U.S. 459, 466 (1933); see also *Brown*, *supra* note 23, at 399–404 (noting and criticizing the practice); Randolph E. Paul, *Use and Abuse of Tax Regulations in Statutory Construction*, 49 *YALE L.J.* 660, 664–65 (1940) (same).

165. See, e.g., *Costanzo v. Tillinghast*, 287 U.S. 341, 345 (1932) (giving “great weight” to a Department of Labor regulation predating congressional reenactment); *Nat'l Lead Co. v. United States*, 252 U.S. 140, 146 (1920) (calling reenactment “an implied legislative recognition and approval of the execu-

an interpretative regulation into the legislative category had important consequences in the tax context.

For the first few decades of the federal income tax, whenever Congress chose to alter the income tax provisions significantly, which it did every few years, Congress did so by reenacting the entire statute rather than merely enacting amendments.¹⁶⁶ Although the common understanding was that general authority Treasury regulations were interpretative and nonbinding, the Court's adherence to a strong form of the reenactment doctrine through the 1930s meant that an entire generation of general authority regulations was given virtually automatic legislative characterization, and consequently the force and effect of law, on reenactment doctrine grounds.¹⁶⁷ Several prominent tax commentators found this conclusion troubling and, in an effort to move general authority Treasury regulations back into the interpretative category, voiced additional justifications for distinguishing general from specific authority Treasury regulations.¹⁶⁸ One thought was that Treasury did not need specific authority to adopt interpretative regulations in light of the general authority grant, so by including both types of authority in the various Revenue Acts, Congress must be signaling its intent that the specific authority regulations be legislative and the general authority regulations be interpretative in character.¹⁶⁹ Regardless of the merits of these arguments relative to the original nondelegation basis for distinguishing the two types of Treasury regulations, the goal was to counter the impact of the reenactment doctrine to bring tax deference in line with general norms, not vice versa.

In tax and non-tax cases both, the Court's adherence to its own standards for reviewing legislative and interpretative

tive construction of the statute"); *United States v. Cerecedo Hermanos y Compañía*, 209 U.S. 337, 339 (1908) ("[T]he reenactment by Congress, without change, of a statute which had previously received long-continued executive construction, is an adoption by Congress of such construction."); *United States v. G. Falk & Bros.*, 204 U.S. 143, 152 (1907) (expressing same).

166. It was not until 1939 that Congress restructured the various existing tax laws into a single Internal Revenue Code and began making regular changes by merely amending that Code. See BITTKER, *supra* note 1, ¶ 1.1.5; Alvord, *supra* note 131, at 263.

167. See Paul, *supra* note 164, at 664 ("Our tax laws are reenacted so repeatedly that this [reenactment] rule is invoked more often than the general statement as to the validity of regulations standing alone.")

168. See, e.g., Brown, *supra* note 23, at 384–86; Griswold, *supra* note 154, at 400–01, 411–13; Surrey, *supra* note 143, at 557–59.

169. See Surrey, *supra* note 143, at 558.

regulations was frequently inconsistent.¹⁷⁰ Reviewing the Court's jurisprudence from the first half of the twentieth century, one can find references to contemporaneity, longevity, and reenactment in cases involving specific authority regulations¹⁷¹ and reliance on specific authority precedents in cases involving general authority regulations.¹⁷² The excessive intrusion of the reenactment doctrine in tax cases only makes those cases even more difficult to reconcile coherently. Regardless, the jurisprudence from this period does not distinguish between tax and non-tax on the issue of judicial deference; and the scholarship likewise is remarkably consistent regarding the distinction between specific and general authority regulations and the theoretical ramifications for judicial review. In sum, the comparative analysis of this period does not support the existence of a unique tax deference tradition.

2. The Road to *Chevron*

A significant strain of the Court's jurisprudence continued to counsel different deference standards for specific authority/legislative regulations as opposed to general authority/interpretative regulations right up until the Court's decision in *Chevron*.¹⁷³ In 1977, in *Batterton v. Francis*, the Court evaluated a challenge to a legislative regulation promulgated by the Secretary of Health, Education, and Welfare pursuant to a specific authority grant in the Social Security Act and, in so doing, articulated deference standards fully consistent with the early understandings.¹⁷⁴ The Court stated, "In exercising [the expressly delegated power to prescribe standards interpreting a statutory term], the Secretary adopts regulations with legislative effect. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner."¹⁷⁵ The Court then noted, "By way of con-

170. See Davis, *supra* note 23, at 934 ("Courts frequently give as much effect to interpretative rules as to legislative rules, and courts frequently find ways to set aside legislative rules.").

171. See, e.g., *Comm'r v. S. Tex. Lumber Co.*, 333 U.S. 496, 501 (1948); *Burnet v. Sav. & Loan Bldg. Corp.*, 288 U.S. 406, 415 (1933); *Fawcus Mach. Co. v. United States*, 282 U.S. 375, 378 (1931).

172. See, e.g., *Comm'r v. Wheeler*, 324 U.S. 542, 547 n.10 (1945) (citing *Fawcus Mach.*, 282 U.S. 375).

173. See 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7.8, 7.13 (2d ed. 1979); Merrill, *supra* note 70, at 973.

174. See 432 U.S. 416, 425-26 (1977).

175. *Id.* at 425.

trast, a court is not required to give effect to an interpretative regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise."¹⁷⁶

Subsequently, in *Chrysler Corp. v. Brown*, the Court considered at length whether certain voluntary disclosure regulations issued by the Department of Labor's Office of Federal Contract Compliance Programs constituted "law" for purposes of the Trade Secrets Act.¹⁷⁷ Recognizing the distinction between legislative and interpretative regulations in the APA's legislative history, the Court focused its inquiry on whether Congress had delegated to the agency the requisite legislative authority to act in such a manner.¹⁷⁸ The only congressional authority grant the OFCCP could identify in support of its regulations was a general authority provision known as the "housekeeping statute," which gives the heads of executive branch agencies general authority to issue procedural regulations governing employee behavior, record retention, and other general departmental business performance matters.¹⁷⁹ Recognizing the APA's distinction between legislative and interpretative rules, the Court found the general authority grant in the housekeeping statute inadequate to support legally binding, legislative regulations.¹⁸⁰ In dicta, the Court quoted *Batterton v. Francis* also for the proposition that the appropriate evaluative standard for such regulations would be the multifactor analysis represented by *Skidmore* and its predecessors and progeny.¹⁸¹

176. *Id.* (internal citations omitted); see also *Herweg v. Ray*, 455 U.S. 265, 274-75 (1982) (articulating the same strong deference standard for specific authority regulations); *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981) (same).

177. See 441 U.S. 281, 295-316 (1979).

178. *Id.* at 302.

179. *Id.* at 308-09 (citing the housekeeping statute, 5 U.S.C. § 301 (2000)). The OFCCP also offered as authority for its regulations another Department of Labor regulation and a presidential Executive Order, neither of which the Court considered representative of congressional delegation. See *Chrysler*, 441 U.S. at 303-08.

180. See *id.* at 314-16. The Court left open the possibility that some general authority grants might support legislative regulations, but then said without elaboration that the statute must show at least that Congress contemplated the regulations at issue. *Id.* at 308. Separately, the Court considered relevant the agency's failure to utilize notice-and-comment rulemaking in promulgating the regulations at issue. See *id.* at 313-15.

181. *Id.* at 315.

Other non-tax opinions issued by the Court during this period similarly emphasized the legislative or interpretative character of the source of the agency authority behind the regulations under consideration.¹⁸² Likewise in the tax area. In *Rowan Companies, Inc. v. United States*, the Court considered the validity of general authority Treasury regulations interpreting the Federal Insurance Contributions Act (FICA) and Federal Unemployment Tax Act (FUTA) provisions of the Code.¹⁸³ Citing *Batterton v. Francis* among other cases, the Court made clear that it was applying a less deferential review standard because Treasury relied on the general authority grant of I.R.C. § 7805(a) rather than more specific authority in promulgating the regulation.¹⁸⁴ By contrast, "[w]here the Commissioner acts under specific authority, our primary inquiry is whether the interpretation or method is within the delegation of authority."¹⁸⁵

Despite the Court's expressions of continued commitment to these long-standing principles, it was during this period that weaknesses in the old approach became more problematic. The 1960s and 1970s saw a virtual explosion of agency rulemaking, with agencies seeking to achieve more policy objectives through general authority regulations.¹⁸⁶ Traditional doctrine treated

182. See, e.g., *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981) (citing *Batterton v. Francis*, 432 U.S. 416, 426 (1977), in support of strong deference due to Congress's explicit delegation to the Secretary of Health and Human Services of authority over the Medicaid statute); *United States v. Clark*, 445 U.S. 23, 33-34 n.10 (1980) (citing *Batterton*, 432 U.S. at 425 n.9, in discussing the contemporaneity of, and declining to defer to, an informal Civil Service Commission interpretation of the Civil Service Retirement Act); see also Arthur Earl Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the A.P.A.*, 23 ADMIN. L. REV. 101, 108-17 (1970) (citing earlier cases for the same dichotomy).

183. 452 U.S. 247, 248 (1981).

184. *Id.* at 253.

185. *Id.*

186. See 1 PIERCE, *supra* note 23, § 1.6; Clark Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823, 1823 (1978); Merrill & Watts, *supra* note 48, at 546-49. Pierce traces the dramatic rise in rulemaking activity to several factors including the enactment of several new federal statutes in the mid- to late-1960s that delegated rulemaking authorities to new or existing agencies. See PIERCE, *supra*. Pierce also points to the Court's decisions in *United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973), and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978), which largely replaced formal rulemaking with informal rulemaking as the norm and precluded judges from imposing procedural requirements beyond those ex-

general authority rulemaking as interpretative, nonbinding, and not entitled to controlling deference.¹⁸⁷ Modern practice, however, involved agencies increasingly utilizing general rulemaking grants to choose among alternative reasonable interpretations of ambiguous statutes and defending their interpretive choices in such terms.¹⁸⁸ Meanwhile, since the Court never again invalidated a delegation of power to an agency on non-delegation grounds after *Panama Refining* and *Schechter Poultry*, that doctrine faded as a limitation on congressional delegation of rulemaking authority.¹⁸⁹

Both tax and non-tax opinions from this period reflect this tension. The lower courts addressed the expansion of rulemaking activity by characterizing many general authority regulations as legislative rather than interpretative based on what the regulations did rather than the source of their authority.¹⁹⁰ The Court likewise indicated more concern for the distinction between legislative and interpretative regulations and the consequences for both the APA's procedural requirements and judicial deference.¹⁹¹ In a few cases, the Court even made clear that it was evaluating regulations, as interpretative rather

pressed in APA § 553 upon informal rulemaking efforts. See *PIERCE*, *supra*.

187. See *supra* Part II.A.1.

188. See, e.g., BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* § 4.3 (3d ed. 1991) (noting a rise in rulemaking); Merrill & Watts, *supra* note 48, at 549–70 (documenting efforts by the Federal Trade Commission, Food and Drug Administration, and National Labor Relations Board to claim previously unasserted legislative authority).

189. See *PIERCE*, *supra* note 186, § 2.6, at 91–93; see also 1 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 3.2 (2d ed. 1978) (describing non-delegation as a failed legal doctrine); BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* § 12 (1976) (opining that the nondelegation doctrine “can not be taken literally”).

190. See, e.g., *Nat'l Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 697 (2d Cir. 1975) (concluding that FDA regulations issued pursuant to general authority were nonetheless legislative because they were legally binding); see also 2 DAVIS, *supra* note 173, §§ 7.13, 7.15 (reflecting the change from prior understanding by noting that “[i]nterpretative rules sometimes have force of law and sometimes [do] not,” and documenting lower court blurring of the distinction between legislative and interpretative regulations); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 *DUKE L.J.* 381, 393–401 (discussing various tests for distinguishing legislative and interpretative regulations, and noting the declining relevance of the specific versus general authority distinction).

191. See, e.g., *Rowan Cos., Inc. v. United States*, 452 U.S. 247, 252–53 (1981); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 517 n.13 (1981); *Chrysler v. Brown*, 441 U.S. 281, 295–316 (1979); *Batterton v. Francis*, 432 U.S. 416, 425–26 n.9 (1977); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 140–42 (1976); *Morton v. Ruiz*, 415 U.S. 199, 235–36 (1974).

than legislative, and thus using the *Skidmore*-type multifactor review standard, at the insistence of the parties.¹⁹² Oral argument transcripts in such cases include passages in which the Justices suggest to the litigants that the regulations at issue might be legislative instead, only to be rebuffed by attorneys relying on the traditional definitions of those categories.¹⁹³ Notwithstanding fairly evident interest by the Court, the parties before it simply would not take the hint.

Alessi v. Raybestos-Manhattan, Inc. offers a particularly good example of such behavior.¹⁹⁴ *Alessi* involved an interpretation of I.R.C. § 411, issued pursuant to I.R.C. § 7805(a) general authority through notice-and-comment rulemaking, as applied in the Employee Retirement Income Security Act context.¹⁹⁵ With extensive discussion, the Third Circuit determined that the regulation at issue was “plainly legislative in nature” and used a controlling-deference review standard.¹⁹⁶ In an amicus brief filed with the Court, however, the government rejected that characterization even as it defended the regulation as an interpretive choice delegated to Treasury and the IRS by Congress.¹⁹⁷ At oral argument, when the Court inquired as to Treasury’s regulatory authority, attorneys for both parties declined to defend the Third Circuit’s view.¹⁹⁸ Since neither party cared to challenge the government’s characterization of the

192. See, e.g., *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 & n.15 (1980); *Alessi*, 451 U.S. at 517 n.13.

193. See, e.g., Transcript of Oral Argument, *Alessi*, 451 U.S. 504 (Nos. 79-1943, 80-193), 1981 U.S. Trans. LEXIS 75, at *2-3; Transcript of Oral Argument, *Whirlpool Corp.*, 445 U.S. 1 (No. 78-1870), 1980 U.S. Trans. LEXIS 9, at *4-8.

194. 451 U.S. 504.

195. *Id.* at 517-18. ERISA is a complicated statute that governs employee pension and welfare plans. Although most of the statute falls within Department of Labor jurisdiction, the Secretary of the Treasury has regulatory authority over certain ERISA provisions incorporated into the Internal Revenue Code. See, e.g., 60A AM. JUR. 2D *Pensions* § 3 (2005) (describing the ERISA statute); JOHN H. LANGBEIN & BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW* 89-96 (3d ed. 2000) (same).

196. *Buczynski v. Gen. Motors Corp.*, 616 F.2d 1238, 1242-43 (3d Cir. 1980). *Buczynski* and *Alessi* are the names of two different cases that were consolidated on appeal. At the Third Circuit, the cases were consolidated under the *Buczynski* name, while at the Supreme Court, the cases are consolidated under the *Alessi* name. See *Alessi*, 451 U.S. at 504.

197. See Brief for the United States as Amicus Curiae, at 19 n.12, *Alessi*, 451 U.S. 504 (Nos. 79-1943, 80-193), 1981 U.S. S. Ct. Briefs LEXIS 1079, *28 n.12.

198. See Transcript of Oral Argument, *supra* note 193 at *2-3, *27-28.

regulation, the Court disregarded the Third Circuit's analysis, treated the regulation as interpretative, and reviewed it under the multifactor review standard for interpretative rules.¹⁹⁹

The Court's opinions from this period also demonstrate an increasingly deferential characterization of the *Skidmore*-style multifactor analysis, particularly where the interpretative rule in question was a regulation as opposed to a less formal format. I previously described *National Muffler's* analysis as "perplexing" for its combination of *Chevron*-style and *Skidmore*-style rhetoric.²⁰⁰ The same is true of the two cases routinely cited for the proposition that general authority Treasury regulations are entitled to "less deference" than specific authority ones, *Rowan Cos. Inc. v. Commissioner* and *United States v. Vogel Fertilizer Co.*²⁰¹ In both, the Court expressly made such a statement and cited *National Muffler* as providing the evaluative standard for challenges to the validity of general authority Treasury regulations.²⁰² Yet the Court's opinions in both cases also contain *Chevron*-like concepts, speaking of such regulations as valid so long as "they 'implement the congressional mandate in some reasonable manner,'"²⁰³ and stating that "[a] Treasury Regulation is not invalid simply because the statutory language will support a contrary interpretation."²⁰⁴

The Court's articulation of its deference principles in the years leading up to *Chevron* was often similarly muddled in non-tax cases as well. For example, in *Whirlpool Corp. v. Marshall*, a case involving an Occupational Safety and Health Act regulation adopted pursuant to a general rulemaking grant similar to I.R.C. § 7805(a), the Court identified the regulation as interpretative according to the Secretary of Labor's characterization, said that the *Skidmore* standard governed, but described that standard as whether the regulation

constitutes a permissible gloss on the Act by the Secretary, in light of the Act's language, structure, and legislative history. Our inquiry is informed by an awareness that the regulation is entitled to deference

199. See *Alessi*, 451 U.S. at 517–18 n.13 (citing *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977), and other sources).

200. See *supra* notes 85–92 and accompanying text.

201. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16 (1982); *Rowan Cos., Inc. v. United States*, 452 U.S. 247 (1981).

202. See *Vogel Fertilizer*, 455 U.S. at 24–25; *Rowan Cos.*, 452 U.S. at 253.

203. *Rowan Cos.*, 452 U.S. at 252 (quoting *United States v. Correll*, 389 U.S. 299, 307 (1967)); see also *Vogel Fertilizer*, 455 U.S. at 24 (quoting same).

204. *Vogel Fertilizer*, 455 U.S. at 26.

unless it can be said not to be a reasoned and supportable interpretation of the Act.²⁰⁵

The Court could have resolved the tension between traditional deference standards and expanded rulemaking activity by following the lead of the circuit courts and acknowledging the legislative character of many general authority regulations.²⁰⁶ There is little evidence, however, that the Court ever contemplated resolving its concerns about the deference applicable to general authority regulations this way.²⁰⁷ Instead, the Court offered *Chevron*, expanding the applicability of strong deference to implicit as well as explicit delegations and, subsequently, *Mead*, limiting *Chevron*'s scope to agency action carrying the force of law.

3. Post-*Chevron* Considerations

The general consensus is that the Court did not intend to announce a major shift in its deference doctrine with *Chevron*.²⁰⁸ Other scholars have ably demonstrated that the Court's application of *Chevron* across the administrative law spectrum was inconsistent at best during its first decade, with the Court reaching independent decisions without mentioning *Chevron* in many cases in which deference was arguably appropriate.²⁰⁹ In fact, the Court did not cite *Chevron* any more often in the doc-

205. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980).

206. See *supra* note 89 and accompanying text.

207. In *Chrysler v. Brown*, the Court alluded to the legal-effects test for distinguishing between legislative and interpretative rules. See 441 U.S. 281, 302 (1981) (quoting *Morton v. Ruiz*, 415 U.S. 199, 232, 235-36 (1974)). Since then, however, the Court has not articulated any alternative for distinguishing between legislative and interpretative regulations other than the source of authority. The only two cases addressing the issue, *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99-100 (1995), and *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512-18 (1994), involved 5-4 decisions and offered mostly unhelpful, conclusory statements as to the character of the rules at issue.

208. See Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 ENVTL. L. REP. (ENVTL. LAW INST.) 10,606, 10,613 (1993) (analyzing Justice Thurgood Marshall's papers to conclude that the Justices did not focus on the broader implications of the *Chevron* opinion); see also Merrill & Hickman, *supra* note 43, at 838 (discussing how *Chevron* first achieved prominence in the lower courts).

209. See, e.g., Merrill, *supra* note 70, at 980-85 (reviewing and performing empirical surveys and arguing that *Chevron* did not actually result in increased Supreme Court deference to agency interpretations); Russell L. Weaver, *Some Realism About Chevron*, 58 MO. L. REV. 129, 131 (1993) (suggesting that "*Chevron*'s importance has been exaggerated").

trine's second decade than in the first.²¹⁰ Nevertheless, the lower courts rely heavily on *Chevron*,²¹¹ and when the Court acts in a deferential mode, it typically speaks in terms of *Chevron* and, in the last few years, *Mead* and *Skidmore*.²¹²

But not always. In the tax context, as noted above, the Court has been woefully inconsistent in what, if any, deference doctrine it intends to apply. Since deciding *Chevron*, the Court has cited *National Muffler* and *Chevron* each twice in majority opinions, and it has cited *National Muffler* three times to *Chevron*'s two in separate concurring or dissenting opinions.²¹³ Once, in *Newark Morning Ledger Co. v. Commissioner*, Justice Souter, writing in dissent, cited both *Chevron* and *National Muffler* in the same passage for general deference propositions.²¹⁴

Post-*Chevron*, the Court cites *National Muffler* most routinely for the proposition that courts should defer to Treasury regulations that reasonably interpret the Code,²¹⁵ an unre-

210. Though hardly a careful analysis of the Court's application of *Chevron*, a quick Westlaw search demonstrated that the Court cited *Chevron* 86 times from the day it was decided in June 1984 through June 1994, but only 74 times from October 1994 through June 2004. Additionally, there are four post-*Mead* cases through the 2003–2004 Term in which the Court cited *Mead* and/or *Skidmore* but not *Chevron*. Search of WESTLAW (April 21, 2006).

211. See, e.g., E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts, and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 9–10 (2005) (describing empirical research).

212. See, e.g., Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688, 2699–2711 (2005); *Smith v. City of Jackson*, 125 S. Ct. 1536, 1546–49 (2005) (Scalia, J., concurring); *Clark v. Martinez*, 125 S. Ct. 716, 736 (2005) (Thomas, J. dissenting); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 269 (2004) (Breyer, J., dissenting); *Household Credit Serv., Inc. v. Pfennig*, 541 U.S. 232, 239 (2004); *Yates v. Hendon*, 541 U.S. 1, 24 (2004) (Scalia, J., concurring); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004); *Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461, 487 (2004); *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003).

213. Compare *Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 576 (1993) (Souter, J., dissenting) (citing *Chevron*), and *United States v. Burke*, 504 U.S. 229, 242 (1992) (Scalia, J., concurring) (same), with *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 840 (2001) (Stevens, J., dissenting) (citing *National Muffler*); *Comm'r v. Estate of Hubert*, 520 U.S. 93, 120, 127 (1997) (O'Connor, J., concurring and Scalia, J., dissenting) (same), and *Newark Morning Ledger*, 507 U.S. at 576 (Souter, J., dissenting) (same).

214. See *Newark Morning Ledger*, 507 U.S. at 576 (Souter, J., dissenting).

215. See, e.g., *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 219 (2001); *Estate of Hubert*, 520 U.S. at 120; *Newark Morning Ledger*, 507 U.S. at 575–76 (Souter, J., dissenting); *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 560–61 (1990); see also *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 222 (1989) (citing *National Muffler* for such a proposition in connection

markable pronouncement under any of *Mead*, *Chevron*, or *Skidmore*.²¹⁶ The Court similarly cites *Chevron* regularly in non-tax cases for the mere point that courts should defer to reasonable agency interpretations of the statutes they administer.²¹⁷ In one non-tax case, *Meyer v. Holley*, the Court even cited both *Chevron* and *Skidmore* for the statement that “the Court ordinarily defers to an administering agency’s reasonable statutory interpretation.”²¹⁸ Carefully reading the Court’s language can be illuminating at times, but in post-*Chevron* tax cases, the Court’s reliance on *National Muffler* for this point is best characterized as deference boilerplate. By way of comparison, the Court regularly cites non-tax pre-*Chevron* cases like *Batterton v. Francis* and *Schweiker v. Gray Panthers* to support similar deference rhetoric, either in conjunction with *Chevron* or not.²¹⁹

Citation counts and the Court’s rhetoric in citing *National Muffler* therefore say little or nothing about *National Muffler*’s continuing significance. The real question is whether the Court’s analysis of the issues before it suggests that the Court is applying a less deferential multifactor or hybrid analysis

with a Department of Transportation case).

216. All three of these opinions contain such statements. See *United States v. Mead Corp.*, 533 U.S. 218, 227–28 (2001); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

217. See, e.g., *Barnhart*, 540 U.S. at 26 (citing *Chevron* for the proposition that “when the statute ‘is silent or ambiguous’ we must defer to a reasonable construction by the agency charged with its implementation”); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 680 n.4 (2003) (describing the *Chevron* step-two inquiry as “whether the agency construction is reasonable”); *Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449, 453 (1999) (finding the agency interpretation “within the bounds of reasonable interpretation, and hence entitled to deference under” *Chevron*); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) (citing *Chevron* for the “fundamental principle” of law “requiring judicial deference to a reasonable statutory interpretation by an administering agency”).

218. *Meyer v. Holley*, 537 U.S. 280, 281 (2003).

219. See, e.g., *Wis. Dep’t of Health & Family Servs. v. Blumer*, 534 U.S. 473, 479, 495, 497 (2002) (citing *Batterton v. Francis*, 432 U.S. 416, 429 (1977), for deferring to “permissible” agency choices and *Schweiker v. Gray Panthers*, 453 U.S. 34, 43–44 (1981), along with *United States v. Mead Corp.*, 533 U.S. 218, for giving a proposed Health & Human Services regulation “respectful consideration”); *United States v. O’Hagan*, 521 U.S. 642, 673 (1997) (applying *Chevron* and citing *Batterton*, 432 U.S. at 424–26, for the proposition that the Court owes the agency’s interpretation “more than mere deference or weight”); *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990) (citing *Batterton*, 432 U.S. at 425, along with *Chevron* and several other pre- and post-*Chevron* cases).

rather than *Chevron's* two steps and controlling deference. The *Cottage Savings*²²⁰ and *Cleveland Indians Baseball*²²¹ cases are most substantive examples of the Court's reliance on *National Muffler*.

The issue in *Cottage Savings* was whether exchanging one portfolio of residential mortgage loans for another represented a "disposition of property" under I.R.C. § 1001.²²² No regulation or pre-litigation ruling addressed the issue precisely; but Treasury Regulation § 1.1001-1 treated an exchange of "properly differing materially" as a disposition, and, as in *National Muffler*, the Court characterized the case as challenging both the validity and the meaning of that regulatory language.²²³ Concerning the former question, the Court cited *National Muffler* principally in favor of deference to reasonable interpretations.²²⁴ Nevertheless, the Court employed the reenactment doctrine in assessing reasonableness.²²⁵ The Court noted that its own jurisprudence had incorporated the "'materially' or 'essentially' different" standard in the 1920s, that the regulation had employed that standard since 1934, and that Congress had reenacted the Code several times since.²²⁶ In discussing deference, except when citing the case in deference boilerplate,²²⁷ the Court typically cites *Cottage Savings* as support for reenactment doctrine applicability, in both tax and non-tax cases.²²⁸

As already noted, reenactment doctrine figured prominently in pre-*Chevron* multifactor deference analysis, particu-

220. 499 U.S. 554 (1990).

221. *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001).

222. *Cottage Sav.*, 499 U.S. at 559.

223. *Id.* at 560 ("We must therefore determine whether the realization principle in § 1001(a) incorporates a 'material difference' requirement. If it does, we must further decide what that requirement amounts to and how it applies in this case.").

224. *Id.* at 560 ("Because Congress has delegated to the Commissioner the power to promulgate 'all needful rules and regulations for the enforcement of [the Internal Revenue Code],' 26 U.S.C. § 7805(a), we must defer to his regulatory interpretations of the Code so long as they are reasonable.").

225. *See id.* at 561-62.

226. *Id.*

227. *See Boeing Co. v. United States*, 537 U.S. 437, 448 (2003) (stating that general authority regulations must be treated with "deference"); *Comm'r v. Estate of Hubert*, 520 U.S. 93, 120, 123 (1997) (noting that the Court defers to reasonable interpretative Treasury regulations).

228. *See United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001); *see also Williams v. Taylor*, 529 U.S. 420, 434 (2000) (citing *Cottage Savings*, 499 U.S. at 562, in support of the reenactment doctrine in a non-tax case); *Johnson v. Home State Bank*, 501 U.S. 78, 86 (1991) (same).

larly in tax cases but also in non-tax ones. That does not necessarily mean that reenactment doctrine is inconsistent with *Chevron*.²²⁹ To the extent that the Court often considers legislative history in ascertaining plain meaning at *Chevron* step one,²³⁰ reenactment doctrine may be of use in that task. In *FDA v. Brown & Williamson Tobacco Corp.*, for example, the Court employed the reenactment doctrine heavily in *Chevron* step-one analysis to conclude that Congress clearly did not intend with the Food, Drug, and Cosmetics Act to give the FDA authority to regulate tobacco.²³¹ Although the reenactment doctrine is inconsistent with *Chevron*'s emphasis on interpretive flexibility, the Court has also acknowledged the doctrine in connection with *Chevron* step-two analysis.²³² Consequently, the analysis of *Cottage Savings* sheds little light on the *Chevron* versus *National Muffler* debate.

Cleveland Indians Baseball offers even less to clarify the question of deference toward Treasury regulations, notwithstanding its more extended deference discussion. The issue raised by *Cleveland Indians Baseball* was whether backpay awards are "wages" for purposes of FICA and FUTA, the relevant portions of which are incorporated in the Internal Revenue Code and within the interpretive authority of I.R.C. § 7805(a).²³³ In analyzing the issue, the Court cited *National Muffler* for the proposition that deference is appropriate for reasonable Treasury regulations promulgated under I.R.C. § 7805.²³⁴ The Court acknowledged that the regulations are ambiguous as to the question at hand, noted a long-standing revenue ruling that was on point, and cited a case from the *Seminole Rock* line in favor of substantial deference for an

229. See Caron, *supra* note 15, at 563–73 (discussing relationship between tax, *Chevron*, and the reenactment doctrine generally); Gans, *supra* note 20, at 764–75 (same).

230. See *e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133–59 (2000); *Regions Hosp. v. Shalala*, 522 U.S. 448, 457–60 (1998); *Chevron*, 467 U.S. at 848–53, 862–64 (1984).

231. See *Brown & Williamson*, 529 U.S. at 143–59.

232. See *Barnhart v. Walton*, 535 U.S. 212, 226–27 (2002); see also *Brown & Williamson*, 529 U.S. at 186 (Breyer, J., dissenting) (criticizing the majority for limiting agency interpretive choice); Robert A. Anthony, *Keeping Chevron Pure*, 5 GREEN BAG 2D 371 (2002) (same).

233. See, *e.g.*, I.R.C. §§ 3101 (FICA), 3111 (FICA), 3121 (FICA), 3301 (FUTA), 3306 (FUTA) (2000).

234. See *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 219 (2001).

agency's interpretation of its own regulations.²³⁵ The Court then cited *Cottage Savings* along with pre-*Chevron* tax jurisprudence other than *National Muffler* for the reenactment doctrine point that agency interpretations that survive congressional reenactment carry the force and effect of law.²³⁶ Whatever the significance of this analysis for *Seminole Rock* deference or the reenactment doctrine, without stretching the rhetoric significantly, it is impossible to discern any clear statement concerning the applicability of controlling deference versus multifactor respect to Treasury regulations.

By contrast, the Court was significantly clearer in *Atlantic Mutual Insurance Co. v. Commissioner*,²³⁷ another case that post-dates *Cottage Savings*. That case involved a general authority Treasury regulation interpreting the phrase "reserve strengthening" used in I.R.C. § 1023.²³⁸ In this opinion, the Court cited *Chevron* and expressly and unequivocally employed *Chevron's* two-step analysis, concluding first that the statute is ambiguous,²³⁹ then continued to consider the regulation's reasonableness.²⁴⁰ The Court did not cite *National Muffler*, but did cite *Cottage Savings* for the proposition that the Court's task at step two "is to decide, not whether the Treasury Regulation represents the best interpretation of the statute, but whether it represents a reasonable one."²⁴¹ The Court's *Chevron* step-two analysis in *Atlantic Mutual* does not mention reenactment, lon-

235. See *id.* at 218–19. The Court cites *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994), in favor of substantial deference for an agency's interpretation of its own regulations. See *Cleveland Indians Baseball*, 532 U.S. at 220. The relevant passage from *Thomas Jefferson University* makes the same point and cites, among other cases, *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), and *Udall v. Tallman*, 380 U.S. 1, 16 (1965), as support. See *Thomas Jefferson Univ.*, 512 U.S. at 512; see also discussion *supra* note 85 (discussing *Seminole Rock* deference).

236. See *Cleveland Indians Baseball*, 532 U.S. at 219–20 (citing *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 561 (1990)). The relevant passage in *Cottage Savings* quotes *United States v. Correll*, 389 U.S. 299, 305–06 (1967), which in turn quotes *Helvering v. Winmill*, 305 U.S. 79, 83 (1938), for the point that "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Cottage Sav.*, 499 U.S. at 561.

237. 523 U.S. 382 (1998).

238. *Id.* at 385–86.

239. See *id.* at 387–89.

240. See *id.* at 389–91.

241. *Id.* at 389.

gevity, or contemporaneity, but rather Treasury's reasonableness in balancing competing policy goals.²⁴²

The taxpayer in *Atlantic Mutual* named *Chevron* as providing the appropriate evaluative standard before the Court.²⁴³ By contrast, the taxpayers in *Cleveland Indians Baseball* primarily emphasized that the revenue rulings were not entitled to *Chevron* deference in light of *Christensen v. Harris County* because revenue rulings do not carry the force of law.²⁴⁴ The taxpayers in *Cottage Savings* did not mention deference at all.²⁴⁵ In each of these cases, however, the deference discussions in the government's briefs were hedged, offering platitudes and string citations supporting deference, sometimes citing both *Chevron* and *National Muffler* together, without clearly articulating the appropriate reviewing standard.²⁴⁶ Thomas Merrill has recalled from his experience as Deputy Solicitor General in the late 1980s that, at least at that time, the Solicitor General's Office perceived *Chevron* as very important in the lower courts but vulnerable at the Supreme Court, and so deliberately avoided any "direct showdown" over the *Chevron* doctrine's applicability.²⁴⁷ This disclosure goes a long way toward explaining both the government's briefing and the Court's inconsistency on deference to Treasury regulations thus far.

The best interpretation of the Court's post-*Chevron* citation of both *Chevron* and *National Muffler* is that the Court simply has not decided what standard to apply in reviewing Treasury regulations. The more recent *Boeing Co. v. United States*²⁴⁸ at

242. *See id.*

243. *See* Brief of Petitioner-Appellant at 13, *Atl. Mut. Ins. Co. v. Comm'r*, 523 U.S. 382 (1998) (No. 97-147) 1997 WL 748712.

244. *See* Brief of Respondent-Appellee at 10, *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001) (No. 00-203) 2001 WL 43587 (citing *Christensen v. Harris County*, 529 U.S. 576, 585-86 (2000)).

245. *See* Brief of Petitioner-Appellant, *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554 (1990) (No. 89-1965) 1990 WL 505730; Reply Brief of Petitioner-Appellant, *Cottage Sav.*, 499 U.S. 544 (No. 89-1965) 1991 WL 521608.

246. *See* Brief of Petitioner-Appellant at 20, *Cleveland Indians Baseball*, 532 U.S. 200 (No. 00-203) 2001 WL 167410; Brief of Respondent-Appellee at 7, 17, *Atlantic Mut. Ins. Co.*, 523 U.S. 382 (No. 97-147) 1998 WL 3221; Brief of Respondent-Appellee at 13-14, *Cottage Sav.*, 499 U.S. 554 (1990) (No. 89-1965) 1990 WL 505732. *But see* Reply Brief of Petitioner-Appellant, *supra* note 244, at 19-20 (citing *Mead* briefs and seeming to argue for strong deference for revenue rulings, but not citing *Chevron*).

247. Thomas W. Merrill, *Confessions of a Chevron Apostate*, 19 ADMIN. & REG. L. NEWS 1 (1994).

248. 537 U.S. 437 (2003).

least implicitly supports this conclusion. *Boeing* concerned the validity of a Treasury regulation addressing the accounting for research and development expenditures in computing “combined taxable income” for “domestic international sales corporations” or “DISCs.”²⁴⁹ The government in *Boeing* argued at some length that the regulation was a specific authority regulation and thus legislative in character and entitled to *Chevron* deference.²⁵⁰ In the process, the government cited *Chevron* and *Mead* as well as *Batterton v. Francis*.²⁵¹ Even if the regulation were not legislative, however, the government contended that the Court’s level of deference would be “extremely high” because Congress had delegated the primary interpretive authority “to the Commissioner, not to the Courts” and Treasury’s interpretation was a reasonable one.²⁵² The taxpayer and various amici curiae all but ignored the government’s argument on that point,²⁵³ but when pressed by Justices Souter and O’Connor at oral argument, the taxpayer asserted that the regulation was a general authority regulation and conceded only that the regulation was entitled to some unspecified degree of deference or respect if it was reasonable.²⁵⁴ In the end, the Court acknowledged the specific authority grant, observed that Treasury cited Code § 7805 in promulgating the regulation, and opined cryptically that “[e]ven if we regard the challenged regulation as interpretative because it was promulgated under § 7805(a)’s general rulemaking grant rather than pursuant to a specific grant of authority, we must still treat the regulation with deference.”²⁵⁵ For this proposition, the Court cited *Cottage Savings*, which, as already noted, is hardly the picture of clarity on the point.²⁵⁶

249. *Id.* at 445–46.

250. See Brief for the Respondent-Appellee at 20–21, *Boeing*, 537 U.S. 437 (Nos. 01–1209, 01–1382).

251. See *id.*

252. See *id.* at 20 (quoting *United States v. Correll*, 389 U.S. 299, 307 (1967)).

253. In its reply brief, the taxpayer cited *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982), for the proposition that the regulation, “whether or not . . . thought to be ‘legislative’ in character,” was not entitled to deference because it was inconsistent with the statute. Reply Brief for the Petitioner-Appellant at 18, *Boeing*, 537 U.S. 437 (No. 01–1209).

254. Transcript of Oral Argument at 13–14, 27, *Boeing*, 537 U.S. 437 (Nos. 01–1209, 01–1382).

255. See *Boeing*, 537 U.S. at 448.

256. See *id.*

It was consistent with the Court's post-*Chevron* jurisprudence up until *Christensen* and *Mead* for the Court to have ignored or glossed through an issue like the level of deference appropriate for Treasury regulations.²⁵⁷ Although the post-*Mead* Court now is more focused on questions of *Chevron*'s scope, it would nevertheless be typical for the Court to defer making a definitive statement until the issue is squarely presented and adequately briefed.

Beyond the muddle of the Court's citation of *Chevron* and *National Muffler* in tax cases, the ABA Task Force Report particularly relies heavily on language in *Chevron* and *Mead* as supporting its bifurcation of deference doctrine between specific and general authority Treasury regulations.²⁵⁸ For example, the Task Force Report reads *Chevron* and *Mead* as requiring different degrees of deference for specific authority versus general authority regulations because, in the words of the Court, exercises of "explicit" delegations are given *Chevron*-level "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute" but those of "implicit" delegations are subject to a more intrusive reasonableness inquiry.²⁵⁹ Although a creative reading of *Chevron*, the Court has not followed this distinction in non-tax cases. Instead, the Court regularly uses the arbitrary and capricious language in discussing *Chevron* and general authority regulations,²⁶⁰ and the Court likewise defers to specific authority regulations as reasonable.²⁶¹

The ABA Task Force also discusses at some length the Court's post-*Mead* opinion in *Barnhart v. Walton*, a non-tax case involving Social Security Administration regulations promulgated through notice and comment.²⁶² In an opinion au-

257. See, e.g., Merrill & Hickman, *supra* note 43, at 848–52 (identifying numerous circuit splits and open questions concerning *Chevron*'s scope that developed through the 1980s and 1990s).

258. See Salem et al., *supra* note 20, at 739.

259. See *id.* at 739 n.59 (quoting and interpreting *Chevron* and *Mead*); see also Galler, *Chevron and Administrative Regulation*, *supra* note 109, at 1795–96 (reading *Chevron* step two similarly).

260. See, e.g., *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86 (2002); *Id.* at 97 (O'Connor, J., dissenting); *Smiley v. Citibank, N. A.*, 517 U.S. 735, 742 (1996); *Sullivan v. Zebley*, 493 U.S. 521, 528 (1990).

261. See, e.g., *Household Credit Servs. v. Pfennig*, 541 U.S. 232, 242–43 (2004); *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 501–02, 523 (2002); *Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 333 (2002).

262. *Barnhart v. Wilson*, 535 U.S. 212 (2002).

thored by Justice Breyer, the Court applied *Chevron* deference to uphold the regulations, but in so doing meandered into dicta observing that

[T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.²⁶³

Judges and non-tax scholars have debated whether Justice Breyer's rhetoric signals the relevance of such *Skidmore*-like factors as agency expertise, consistency, and longevity for *Chevron* analysis.²⁶⁴ The ABA Task Force concludes that, under *Mead*, *Chevron* and *Skidmore* clearly espouse different doctrines and ultimately describes *Barnhart*'s significance merely as "confusing."²⁶⁵

The best explanation for *Barnhart*'s discussion of *Chevron* is that, even though Justice Breyer joined the majority's opinion in *Mead*, he has long articulated a different vision of *Chevron* that is not wholly consistent with *Mead* as understood by the Court's majority.²⁶⁶ For Justice Breyer, *Chevron* and *Skidmore* do not represent two distinguishable standards of review; instead, *Chevron* merely adds to traditional *Skidmore* deference "an additional, separate legal reason for deferring to certain agency determinations."²⁶⁷ Other post-*Mead* opinions of the Court demonstrate that the majority of the Court does not share Justice Breyer's view, however.²⁶⁸ In particular, more re-

263. *Id.* at 222.

264. *Compare, e.g.,* Krzalic v. Republic Title Co., 314 F.3d 875, 879 (7th Cir. 2002) (describing *Barnhart* as "suggest[ing] a merger between *Chevron* deference and *Skidmore*'s"), *with id.* at 882 (Easterbrook, J., concurring) ("I do not perceive in [*Barnhart v. Walton*] any 'merger' between *Chevron* and *Skidmore*, which *Mead* took such pains to distinguish."); *see also* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 939 n.227 (2004) (recognizing *Barnhart*'s blurring of *Chevron* and *Skidmore* as inconsistent with *Mead*).

265. Salem et al., *supra* note 20, at 755.

266. *See* Utah v. Evans, 536 U.S. 452, 472 (2002); Christensen v. Harris County, 529 U.S. 576, 596 (2000) (Breyer, J., dissenting). *See generally* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); Cass Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 198-202 (2006) (discussing Justice Breyer's view of *Chevron*).

267. *Christensen*, 529 U.S. at 596 (Breyer, J., dissenting).

268. *See, e.g.,* Evans, 536 U.S. at 487 (2002) (O'Connor, J., concurring) (criticizing Justice Breyer's discussion of *Chevron* as unnecessary dicta and

cently in *Alaska Department of Environmental Conservation v. EPA*, the Court noted *Barnhart's* mention of longevity before expressly rejecting that factor as relevant to *Chevron* analysis.²⁶⁹ Ultimately, therefore, *Barnhart* offers little to inform the debate over deference to Treasury regulations.

In sum, while the Court's rhetoric is sufficiently vague to permit multiple outcomes on the question of deference in this area, the best reading of the Court's case law is that it has not yet decided the question. In any event, the Court's post-*Chevron* analysis in both tax and non-tax deference cases is devoid of any hint that the legislative/interpretative distinction governs the assessment of *Chevron's* applicability. While the courts continue to use the legislative and interpretative categories to describe regulations and assess the applicability of the APA's notice and comment requirements, those categories should not be particularly relevant for a *Chevron* inquiry that emphasizes delegation and force of law.²⁷⁰ Yet much of the ongoing debate over *Chevron* deference for Treasury regulations hinges on the interpretative label applied to such regulations by the tax community. In particular, those who wish to deny *Chevron* deference to general authority Treasury regulations often rely heavily on the Court's emphasis on the legislative versus interpretative distinction in the *Vogel Fertilizer* and *Rowan Cos.* cases, even though the Court has never cited those cases since *Chevron* except for wholly unrelated propositions.²⁷¹

inconsistent with *Mead*); *Barnhart*, 535 U.S. at 226–27 (Scalia, J., concurring in part and concurring in the judgment) (criticizing Justice Breyer's dicta as incompatible with *Mead*); see also Anthony, *supra* note 232, at 373–74 (noting the irreconcilability of *Mead* and Justice Breyer's conception of *Chevron*).

269. See *Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461, 487–88 (2004) (counseling *Skidmore* rather than *Chevron* deference for internal EPA guidelines notwithstanding its acknowledged longevity).

270. It is possible, however, that there is some overlap in the standards applied to evaluate whether a particular regulatory effort is subject to the notice and comment requirements of APA § 553 and whether the resulting regulation carries the force of law. See *infra* Part III.B.

271. *Vogel Fertilizer* is the only case in which the Supreme Court has cited *Rowan Cos.* See *United States v. Vogel Fertilizer*, 455 U.S. 16, 24 (1982). The Court cited *Vogel Fertilizer* twice shortly after deciding *Chevron*, both times in non-tax cases. In *Lindahl v. Office of Personnel Management*, the Court quoted *Vogel Fertilizer* to counsel “attach[ing] great weight to agency representations to Congress” as to statutory meaning where the agency assisted in drafting the statute and clearly expressed its interpretation of the law in testimony before responsible congressional committees. 470 U.S. 768, 788 (1985) (internal quotation marks omitted). In *Securities Industry Ass'n v. Board of Governors*, the Court quoted *Vogel Fertilizer* solely for the proposition that “[j]udicial def-

4. Summary

The common understanding of a unique tax deference tradition simply does not accord with the Court's jurisprudence or the pre-*Chevron* scholarship. The evolution of judicial deference principles in the tax and non-tax contexts follows the same general path, with significant scholarly comparison and citation overlap. Moreover, *National Muffler* is entirely consistent with the Court's other pre-*Chevron* jurisprudence, particularly as the Court grappled with the explosion in policy making through regulation in the years immediately preceding *Chevron*. While it seems clear that the Court is avoiding conclusively resolving the issue of judicial deference toward Treasury regulations until clearly asked to do so, the Court's post-*Chevron* jurisprudence does not particularly suggest that the Court is inclined to apply any standard other than *Chevron* or *Skidmore* in the tax context.

B. THE NORMATIVE CASE

Irrespective of the merits of the doctrinal case for a tax-specific approach to judicial deference, tax scholars and practitioners have offered a variety of normative reasons for utilizing different deference standards in the tax context.²⁷² Of course, if the *Chevron* doctrine is premised on an assumption that Congress has delegated primary interpretive authority over a statute to an agency rather than the courts, the normative case for *Chevron* matters little except to persuade Congress to provide affirmatively for an alternative standard of review for tax cases.

Because *Mead* suggests the potential for differences between agencies and statutes, however, and because tax scholars and practitioners have used that hook and the previously noted minor rhetorical deviations from *Chevron* to open a door for a tax-specific deference approach, the argument against such an alternative must address the normative as well as the doctrinal. Moreover, *Skidmore* is permissive and prudential, not mandatory, and gives the courts flexibility to grant more or less

erence to an agency's interpretation of a statute only sets the framework for judicial analysis; it does not displace it." 468 U.S. 137, 143 (1984) (internal quotation marks omitted). The Court has not cited either *Vogel Fertilizer* or *Rowan Cos.* in any post-*Chevron* tax case for any proposition whatsoever.

272. See, e.g., Coverdale, *supra* note 122, at 54-55, 67-68; Salem et al., *supra* note 20, at 737-50.

deference where it applies. Consequently, normative arguments for or against deference carry greater weight to the extent *Skidmore* provides the appropriate standard.

Normative justifications abound for judicial deference in administrative law cases generally and for *Chevron* particularly, whether tax or otherwise. The *Chevron* opinion speaks of the greater substantive expertise and political accountability of agencies over courts.²⁷³ *Skidmore* and *National Muffler* express similar sentiments, although their standards necessarily pay less heed to these goals by shifting more interpretive power to the courts.²⁷⁴ Given that the Supreme Court hears fewer than 100 cases per year, respecting agencies as primary statutory interpreters, as *Chevron* does, should yield greater uniformity of interpretation.²⁷⁵ On the other hand, *Chevron* represents a certain pro-agency bias in judicial review that makes many people uncomfortable absent robust judicial review.²⁷⁶ The virtues and vices of the *Chevron* regime apply universally, however, and alone are inadequate support for a separate tax deference standard. When comparing tax and non-tax practices, the normative case for applying different deferent standards in the tax context finds little support.

1. Tradition as Normative Argument

The emphasis of so many of the players in this debate on tradition to some degree renders that argument normative as well as doctrinal.²⁷⁷ The notion of implicit congressional delegation is admittedly a fictional one, as Congress most likely gives little if any consideration to deference doctrine in drafting statutes.²⁷⁸ If the tax community generally perceives there to be a

273. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

274. See *Nat'l Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 476–77 (1979); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

275. See, e.g., Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1118–29 (1987).

276. See discussion *supra* notes 13, 19–20.

277. See Coverdale, *supra* note 122, at 86.

278. See, e.g., Elhauge, *supra* note 50, at 2132; Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 320 (2004) (criticizing the congressional delegation theory of deference on several grounds); Scalia, *supra* note 52, at 516. *But see* James T. O'Reilly, *Deference Makes a Difference: A Study of Impacts of the Bumpers Judicial Review Amendment*, 49 U. CIN. L. REV. 739 (1980) (discussing the failed attempt pre-*Chevron* to amend the APA to curtail judicial deference toward agency legal

unique tax deference tradition that requires less deference in tax cases than in those from other areas of administrative law, then one could argue that Congress drafts the tax laws with that same tradition in mind.²⁷⁹

The problem with this argument is that it assumes that a clear, universally recognized tax tradition exists, when in fact that is not the case. Putting aside the doctrinal history outlined above, scholars and the courts are divided over the appropriate level of deference to Treasury regulations as well as the extent and significance of any independent tax deference tradition.²⁸⁰ The circuit split alone should be *prima facie* evidence against relying on tradition as a basis for denying *Chevron* deference to Treasury regulations. Moreover, while Treasury characterizes most of its regulations as interpretative with respect to APA notice and comment procedures, among other things,²⁸¹ Treasury also characterizes even regulations promulgated pursuant to Code § 7805 as legislative for purposes of claiming *Chevron* deference in briefs to the Court.²⁸²

The only tradition that the tax community truly seems to embrace is labeling specific authority Treasury regulations “legislative” and general authority ones “interpretative.” Beyond that, there is no agreement as to the significance of those labels. Absent a more meaningful consensus, tradition alone is an inadequate basis for a different tax deference standard.

interpretations, which suggests some congressional recognition of deference principles).

279. See Coverdale, *supra* note 122, at 86.

280. See *supra* Parts I.C–D.

281. Treasury also has employed the interpretative rule characterization to avoid Regulatory Flexibility Act requirements for legislative regulations. The Regulatory Flexibility Act requires, among other things, that agencies engaging in notice-and-comment rulemaking under APA, § 553, evaluate their regulations for their consequences to small businesses and explain their reasons for rejecting less burdensome alternatives. See Paul R. Verkuil, *A Critical Guide to the Regulatory Flexibility Act*, 1982 DUKE L.J. 213 (analyzing the Act); see also *infra* Part III.A (discussing tax context history and application of the Regulatory Flexibility Act).

282. For example, in *Boeing Co. v. United States*, 537 U.S. 437 (2003), the Court observed that the Treasury promulgated the regulation at issue, 26 C.F.R. § 1.861-8(e)(3) (1979), pursuant to its authority under I.R.C. § 7805(a) (2000). See 537 U.S. at 447–48 (citing Proposed Rules, Dep’t of Treasury, 41 Fed. Reg. 49,160 (Nov. 1976)). In its brief before the Court, however, Treasury claimed that the regulation was legislative and thus entitled to *Chevron* deference. See Brief of Respondent-Appellee at 20–21, *Boeing*, 537 U.S. 437 (Nos. 01-1209, 01-1382).

2. Penalty Severity

Some who support different deference standards in the tax context suggest that the severity of the penalties imposed for taking a tax position contrary to that of a Treasury regulation makes civil tax enforcement comparable to criminal cases,²⁸³ where *Chevron* deference is considered inappropriate.²⁸⁴ Given the harshness of these potential civil penalties, the exceptionalists contend that, at most, a diluted version of *Chevron* should apply to general authority Treasury regulations.²⁸⁵

Chevron's inapplicability in criminal cases has little if anything to do with the potential penalties imposed upon conviction, however. Certainly, the severity of criminal sanctions is relevant to the interpretation of criminal statutes. Recognizing the stakes in criminal cases, the Court has long applied the rule of lenity, construing criminal statutes narrowly in favor of the alleged violator.²⁸⁶ The decision not to apply *Chevron* in the criminal context, however, is due more to the perception that the courts, and not the Justice Department, are responsible for administering the criminal code rather than concerns over the severity of criminal punishment.²⁸⁷ By contrast, with *Chevron*, the Court has accepted congressional delegation of primary administrative authority over complex regulatory structures to the agencies rather than the courts.

Moreover, the penalties imposed on straying taxpayers

283. See Salem et al., *supra* note 20, at 724 & n.17. To be clear, neither the ABA Task Force Report nor this Article addresses *Chevron* in the context of criminal tax evasion or fraud cases. Both consider only *Chevron* in the civil tax context.

284. See *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (“[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.”); *Seneca-Cayuga Tribe of Okla. v. Nat’l Indian Gaming Comm’n*, 327 F.3d 1019, 1031 (10th Cir. 2003) (“Because the Johnson Act is a federal criminal statute enforced by the United States Department of Justice, we owe no deference to the NIGC’s construction.”); *United States v. McGoff*, 831 F.2d 1071, 1077 (D.C. Cir. 1987) (supporting same); see also Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996) (acknowledging the proposition despite arguing in favor of *Chevron's* application in the criminal context).

285. See Salem et al., *supra* note 20, at 724 & n.17.

286. See, e.g., *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 (1992); *Dowling v. United States*, 473 U.S. 207, 213 (1985); see also Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 885–86 (2004); Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 58 (1998).

287. See *Crandon*, 494 U.S. at 177–78 (Scalia, J., concurring); see also Kahan, *supra* note 284, at 490.

simply are not so onerous comparatively. Admittedly, the penalties and interest charges that may be levied against a taxpayer who underreports his or her income tax liability can be burdensome. I.R.C. § 6662 imposes a penalty of twenty percent on any underpayment of taxes resulting from taxpayer negligence as well as intentional disregard of tax rules and regulations,²⁸⁸ and I.R.C. § 6662 and related Treasury regulations construe negligence broadly.²⁸⁹ Separately, the Code requires taxpayers who underpay their taxes to pay interest on assessed and unpaid taxes.²⁹⁰ With daily compounding, it is not unusual for such penalties and interest to exceed the amount of tax due.

Burdensome as the Code's civil penalties may be, across the administrative law spectrum, there are many instances of agencies administering statutes carrying severe financial penalties and receiving *Chevron* deference for their interpretations of those statutes. In the environmental context, for example, the Safe Drinking Water Act gives the Environmental Protection Agency significant rulemaking authority to establish safe thresholds for drinking water contaminants.²⁹¹ Violators of the EPA's regulations are subject to civil penalties of up to \$25,000 per day until the violation is remedied.²⁹² Nevertheless, the

288. See I.R.C. §§ 6662(a)–(b) (2000).

289. "Negligence" for these purposes includes "any failure to make a reasonable attempt to comply with the provisions of" the Code. I.R.C. § 6662(c). A taxpayer will not be assessed an underpayment penalty for taking a position on his or her tax return that has a "reasonable basis"; but where the government's contrary interpretation of the Code is advanced by a Treasury regulation, "[t]he reasonable basis standard is not satisfied by a return position that is merely arguable or that is merely a colorable claim." Treas. Reg. § 1.6662-3(b)(1), (3) (as amended in 2003). For a return position contrary to a Treasury regulation to have a reasonable basis, the position must be supported by some other Treasury or IRS regulation, ruling, or pronouncement. See Treas. Reg. §§ 1.6662-3(b)(3), 1.6662-4(d) (as amended in 2003). In short, unless the government has issued contradictory interpretations of the Code, a taxpayer who disagreed with a Treasury regulation's interpretation of the Code, and takes a contrary but colorable position on a tax return, is subject to the twenty percent underpayment penalty in the event that the taxpayer either elects not to contest a deficiency assessment or has his or her position rejected by the courts. Notably, the reasonable basis standard is provided only by the Treasury Department itself through regulation and not by Congress or the Code. Theoretically, therefore, the reasonable basis standard is itself subject to judicial review. That said, to date, it appears that no one has raised such a challenge.

290. See I.R.C. §§ 6601(a), 6621(a)(2), 6622 (2000). The Code also imposes interest on the twenty percent underpayment penalty from the date of assessment until payment. See *id.* § 6601(e)(2) (2000).

291. See 42 U.S.C. § 300f (2000).

292. See *id.* § 300g-3(3)(A).

courts have applied *Chevron* deference to EPA's safe drinking water regulations.²⁹³

The severity of financial penalties in any sort of enforcement action is entirely relative, depending upon one's financial status; but in the civil context, financial penalties in enforcement actions may be the least bad consequence of regulations. Agency rulemakings regularly entitled to *Chevron* deference can alter the structure of entire industry segments, resulting in substantial and potentially negative economic implications for at least some regulated parties.²⁹⁴ The Court has applied *Chevron* deference to EEOC regulations interpreting the Americans with Disabilities Act that operate to deny employment to workers.²⁹⁵ Agencies adopt regulations that interpret statutes to deny welfare or disability or retirement benefits—basic subsistence means—to arguably eligible recipients, yet the Court does not hesitate to apply *Chevron* in evaluating such regulations.²⁹⁶

Finally, the Court regularly applies *Chevron* deference in immigrant deportation cases. Having compared deportation to criminal sanction,²⁹⁷ the Court employs the rule of lenity in evaluating the deportation provisions of immigration stat-

293. See *City of Waukesha v. EPA*, 320 F.3d 228, 238 (D.C. Cir. 2003).

294. See, e.g., *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2712 (2005) (upholding the FCC determination that cable modem services are not subject to regulation under the Telecommunications Act); *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 539 (2002) (upholding local competition regulations promulgated by the FCC under the Telecommunications Act of 1996); *New York v. FERC*, 535 U.S. 1, 15–16, 28 (2002) (upholding FERC regulations imposing open access requirements on owners of electricity transmission lines).

295. See *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 84–85 (2002) (upholding an EEOC regulation interpreting the Americans with Disabilities Act as allowing employers to refuse to hire someone where the employment in question would endanger the worker's health).

296. See, e.g., *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (upholding Social Security Administration regulations and denying benefits); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 831 (2003) (recognizing that Labor Department regulations interpreting the Employment Retirement Income Security Act of 1974 are entitled to *Chevron* deference); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991) (deferring under *Chevron* to an agency interpretation denying Black Lung benefits); *Lukhard v. Reed*, 481 U.S. 368, 377 n.3 (1987) (applying *Chevron* to the denial of AFDC benefits).

297. See *Boutilier v. INS*, 387 U.S. 118, 132 (1967) (Douglas, J., dissenting) ("Deportation is the equivalent of banishment or exile. Though technically not criminal, it practically may be." (internal citations omitted)); see also *Reid v. INS*, 420 U.S. 619, 633–34 (1975) (Brennan, J., dissenting) (acknowledging same); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (originating this view).

utes,²⁹⁸ and occasionally that doctrine may trump *Chevron*.²⁹⁹ Nevertheless, because it is clear that Congress has delegated to the executive branch the primary responsibility for administering the immigration laws, the Court also extends *Chevron* deference to interpretations rendered through adjudication before the Board of Immigration Appeals.³⁰⁰

Perhaps the concern is not so much the economic impact of the Code's penalties as the perception that the tax laws are uniquely individual in their application. While immigrant deportation cases are similarly individual in nature, one could argue that areas like environmental law, energy, or telecommunications are less personal and more neutral, pursued for the broader public good, and not necessarily adverse to regulated parties.

It is possible to characterize tax in such a broad, neutral manner as well. Taxes are not imposed for their own sake but rather to pay for government programs. Taxpayers may disagree over whether one program or another is worth the price paid; but as Justice Oliver Wendell Holmes notoriously observed, "taxes are what we pay for civilized society."³⁰¹ Conversely, other areas that strike some people as neutrally pursuing the public good may be strikingly individualistic in application. The farmer who is denied access to the water supply for his crops in order to protect an endangered species of fish is likely to consider the Secretary of the Interior's interpretation of the Endangered Species Act highly personal,³⁰² regardless of the benefits to the general public.

In short, in both absolute and relative terms, as bad as penalties and interest for underpayment of taxes may be, the Court applies *Chevron* to agency interpretations with far worse potential consequences. Whether or not an argument can be made generally for denying *Chevron* deference where the same agency is charged both with primary interpretation and enforcement responsibilities, the potential severity of tax penal-

298. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *Reid*, 420 U.S. at 633-34; *Fong Haw Tan*, 333 U.S. at 10; see also Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 519-21 (2003).

299. See *INS v. St. Cyr*, 533 U.S. 289, 320 & n.45 (2001).

300. See, e.g., *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999); *Cardoza-Fonseca*, 480 U.S. at 448-49.

301. *Compañía General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting).

302. See generally *Bennett v. Spear*, 520 U.S. 154 (1997).

ties is simply inadequate justification for employing a diluted version of *Chevron* or other alternative deference standard in the tax context.

3. IRS Overreach

Yet another argument raised by those in favor of a different judicial deference approach in tax cases emphasizes the nature of the tax-collection function.³⁰³ The primary function of Treasury tax personnel and the IRS is to collect government revenues; and in light of this goal, Treasury and the IRS may be biased toward revenue maximization and may adopt regulations and rulings that test the boundaries of reasonableness in pursuit of that goal.³⁰⁴

The perception of antitaxpayer, revenue-maximizing bias in the drafting of rules and regulations, while common, is largely inaccurate. Although Treasury inevitably adopts some regulations that lean toward greater revenue collection, other regulations are strikingly pro-taxpayer. The recently-adopted intangibles capitalization regulations interpreting Code § 263 and the Court's decision in *INDOPCO, Inc. v. Commissioner*³⁰⁵

303. See, e.g., Salem et al., *supra* note 20, at 724–25.

304. Mitchell Gans raises a similar but slightly different argument, suggesting that the Treasury's "position as the taxpayer's adversary in tax litigation" will produce anti-taxpayer bias in the Treasury's legal interpretation. Gans, *supra* note 20, at 758. As others have done with respect to penalties, as discussed *supra* Part II.B.2. Gans compares tax litigation to criminal prosecution on this point. See Gans, *supra* note 20, at 758. The analysis offered in Part II.B.2 applies with equal force to Gans's assertion here. Many, if not most, agencies engage in both rulemaking and civil enforcement functions while enjoying *Chevron* deference for their regulations. As in most such agencies, the IRS is organized so that the lawyers responsible for drafting regulations and those responsible for enforcement and litigation report to different people, although the Chief Counsel is ultimately responsible for both. See SALTZMAN, *supra* note 1, ¶ 1.02[4][a]; INTERNAL REVENUE MANUAL, *supra* note 24, § 1.1.6 (Feb. 1999) If anything, the tax area offers an additional built-in check against such alleged interpretive bias in that the IRS coordinates tax litigation with the Department of Justice's Tax Division as well as with the Treasury Department, although the IRS plays a prominent role in both regulation drafting and enforcement. See SALTZMAN, *supra* note 1, ¶ 1.02[4][a]; INTERNAL REVENUE MANUAL, *supra* note 24, § 34.2.1 (May 1990). Regardless, the courts have long refused to find bias inherent in the performance of both rulemaking and enforcement tasks by agencies; and it is more likely that Treasury and IRS officials would draft regulations with an eye toward avoiding litigation rather than inviting litigation by exceeding their authority. See generally Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759 (1981).

305. 503 U.S. 79 (1992).

are widely hailed as surprisingly taxpayer friendly.³⁰⁶ The check-the-box entity classification regulations for distinguishing “partnerships” from “associations” for purposes of I.R.C. § 7701.³⁰⁷

Even if suspicions of revenue-maximizing behavior were valid, there can be no question that generating revenue for government use is a primary function of the Internal Revenue Code. Revenue maximization is not Congress’s only goal with the Code, to be sure; and reasonable people can, and do, disagree over how to balance the Code’s competing objectives. It is far from clear, therefore, that interpreting ambiguities in the Code with an eye toward generating more revenue is per se illegitimate—so long as Treasury keeps its regulatory interpretations within the range of statutorily permissible alternatives. *Chevron’s* two steps operate to constrain Treasury at least that much; and within that spectrum of permissibility, it seems more appropriate for Treasury rather than the courts to decide whether or not revenue maximization should be the policy emphasis.

Moreover, allegations of this sort of jurisdictional boundary testing are not limited to the tax context. Many agencies other than the IRS have been known to test the boundaries of the statutes they administer, whether in the pursuit of policy goals agency officials deem wise if perhaps beyond the range of their mandate,³⁰⁸ or for reasons as base as financial self-interest.³⁰⁹ “The desire of power in excess, caused the angels to fall.”³¹⁰ On

306. See Treas. Reg. §§ 1.263(a)-4, 1.263(a)-5 (as amended in 2004); see also Sharon Burnett & Darlene Pulliam, *IRS Provides Much-Needed Guidance on Capitalization of Intangibles*, PRAC. TAX STRATEGIES, Aug. 2004, at 68, 80 (“The release of these final regulations places taxpayers in a better position concerning the capitalization of intangibles than they have ever been.”).

307. See Treas. Reg. §§ 301.7701-1 to -3 (as amended in 2006).

308. See, e.g., *Solid Waste Agency of N. Cook County v. U.S. Army Corps. of Eng’rs*, 531 U.S. 159 (2001) (seeking jurisdiction over abandoned sand and gravel pit as “navigable waters” under the Clean Water Act); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (seeking jurisdiction to regulate tobacco as a drug).

309. See, e.g., *Ind. Mich. Power Co. v. Dep’t of Energy*, 88 F.3d 1272 (D.C. Cir. 1996) (considering an agency interpretation of a contract to which the agency was a party); *Mesa Air Group, Inc. v. Dep’t of Transp.*, 87 F.3d 498 (D.C. Cir. 1996) (same); see also Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL’Y 203 (2004) (categorizing and discussing the cases).

310. SIR FRANCIS BACON, *Of Goodness & Goodness of Nature*, in THE ESSAYS OR COUNSELS, CIVIL AND MORAL, OF FRANCIS LD. VERULAM 51, 51 (1944).

the other hand, it is not unheard of for agencies to decline to regulate subject matter arguably within their jurisdiction, which may be equally problematic depending upon one's perspective.³¹¹

At times the Court has recognized in non-tax cases the dilemma of applying *Chevron* deference to agency interpretations that raise questions about the scope of, and limitations on, an agency's congressionally delegated authority.³¹² However the courts ultimately resolve the issue of *Chevron* in the context of agency jurisdiction questions, at a minimum, the potential for Treasury and the IRS to push statutory limits and behave in a self-interested fashion is not unique and thus should not be relied upon to justify an alternative deference standard in the tax context. As with any other agency, the *Chevron* standard by its own terms allows courts to restrain Treasury within the boundaries of its delegated authority and reject arbitrary action by Treasury. The revenue-maximizing effect of Treasury regulations within the scope of delegated authority is a policy matter better addressed through the political process.

4. Expertise

Courts and tax scholars would never suggest that Internal Revenue Code interpretation requires no special expertise. Indeed, the Court's own cases are littered with references to Treasury and IRS expertise when it comes to interpreting the tax laws.³¹³ In discussing this Article with a non-tax colleague,

311. See, e.g., *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005) (involving FCC declining jurisdiction to regulate cable modem services).

312. In *Mississippi Power & Light v. Mississippi ex rel. Moore*, for example, Justice Brennan argued in his dissent that "[a]gencies do not 'administer' statutes confining the scope of their jurisdiction, and such statutes are not 'entrusted' to agencies." 487 U.S. 354, 386-87 (1988) (Brennan, J., dissenting). Justice Scalia responded in a concurring opinion that many, if not most, agency interpretations raise questions regarding the scope of the agency's authority. See *id.* at 377-81 (Scalia, J., concurring in the judgment). Thus, he concluded, it may be difficult, if not impossible, to distinguish garden-variety statutory interpretations from those with jurisdictional implications. See *id.* at 381-82. More recently, in *FDA v. Brown & Williamson Tobacco Corp.*, after rejecting the FDA's effort to interpret the Food, Drug, and Cosmetic Act as giving it unprecedented jurisdiction over the tobacco industry on *Chevron* step-one grounds, the Court in dicta suggested drawing such a line at "extraordinary cases." 529 U.S. at 159.

313. See, e.g., *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 219 (2001); *Comm'r v. Estate of Hubert*, 520 U.S. 93, 127 (1997) (Scalia, J., dissenting); *Nat'l Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477

however, an interesting question arose concerning whether in fact Treasury and the IRS possess superior expertise over the courts in interpreting the Code.

In some complex regulatory areas, making policy choices requires an evaluation of scientific, engineering, or other technical data that are beyond the experience and understanding of the average Article III judge. The Environmental Protection Agency, the Food and Drug Administration, the Federal Energy Regulatory Commission, for example, are all agencies whose responsibilities fuse the law with more scientific disciplines. Given the agencies' comparatively greater expertise in these cross-disciplinary areas, it makes sense both that Congress would delegate substantial policy authority to the agencies and, consequently, would prefer the agencies to be the primary interpreters of the statutes under their administration. Generalist courts lacking scientific or technical training likewise should be more inclined to defer to the agencies' interpretations of such statutes.

Interpreting the Internal Revenue Code, by contrast, rarely, if ever, requires cross-disciplinary scientific or technical expertise. Meanwhile, as James Landis famously argued, despite their generalist profile, appellate courts are particularly adept at interpreting statutes.³¹⁴ So if statutory interpretation does not implicate issues informed by special non-legal training and expertise, then are judges not just as capable as any other attorney to interpret the statute, and is *Chevron* appropriate in such a context?

Of course, it is common knowledge that, for many attorneys (and thus many judges), the financial and economic matters that dominate the Internal Revenue Code are as incomprehensible as the scientific aspects inherent in many environmental, food and drug, or energy law issues. Moreover, other areas of administrative law where *Chevron* regularly applies, such as immigration or securities law, do not require scientific or other technical training; and not every interpretation of the Endangered Species Act or the Food, Drug, and Cosmetics Act requires scientific expertise.

Regardless, emphasizing only the scientific or technical aspect of some fields ignores the sometimes overwhelming complexity inherent in most modern regulatory structures like the

(1979); *United States v. Moore*, 95 U.S. 760, 763 (1877).

314. JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 154–55 (1938).

Internal Revenue Code. Many tax cases require expertise in understanding the relationships between several or even dozens of Code provisions and their implications for complex transactional settings and structures. For example, it takes the average tax attorney years to understand the relationships between the consolidated return regulations under I.R.C. § 1502 and I.R.C. § 382 and the reorganization provisions and their regulations, or the regulations governing the allocation of items of income and deduction among partners in Subchapter K of the Code.³¹⁵ Even more discrete issues may reflect significant theoretical complexity, as evidenced by the number of Supreme Court cases in the 1990s dealing with the exclusion from gross income of personal injury damages³¹⁶ or the Court's consideration of how to treat nonrecourse debt upon the disposition of the property it encumbers.³¹⁷ If anything, following the delegation premise for *Chevron* articulated in *Mead*, the expertise necessary in interpreting the Code merely justifies imputing to Congress the decision to grant Treasury such broad, primary interpretative authority.

5. Summary

As with the doctrinal case, the normative claims of tax exceptionalism have limited persuasive value when tax practices are compared with the practices and jurisprudence involving other areas of administrative law. When examined in broader context, the claims that "tax is different" simply ring hollow. Whatever the criticisms and potentially negative implications of the deference model articulated by *Chevron*, *Skidmore*, and *Mead*, those ramifications are not limited to nor exacerbated in the tax context. For all of these reasons, tax does not warrant its own, unique deference regime, whether based on *National Muffler* or otherwise.

III. APPLYING THE *MEAD* FRAMEWORK

Once one accepts that *Chevron* and *Skidmore* are the only two deference alternatives and that *Mead* offers the appropri-

315. See I.R.C., § 1502 (2000); *id.* § 382; *id.* §§ 701–77.

316. See, e.g., *O'Gilvie v. United States*, 519 U.S. 79, 82 (1996); *Comm'r v. Schleier*, 515 U.S. 323, 327 (1995); *United States v. Burke*, 504 U.S. 229 (1992).

317. See *Comm'r v. Tufts*, 461 U.S. 300, 308–12 (1983); *Crane v. Comm'r*, 331 U.S. 1, 3–16 (1947). See generally Daniel N. Shaviro, *Risk and Accrual: the Tax Treatment of Nonrecourse Debt*, 44 TAX L. REV. 401 (1989).

ate framework for choosing between them, resolving the appropriate standard for Treasury regulations should be fairly simple. As noted previously, *Mead's* holding clearly articulates a two-part test for evaluating whether a particular agency interpretation is entitled to *Chevron* deference or only *Skidmore* respect.³¹⁸ The first inquiry is whether "Congress delegated authority to the agency generally to make rules carrying the force of law."³¹⁹ The second question is whether "the agency interpretation claiming deference was promulgated in the exercise of that authority."³²⁰ A particular agency action only qualifies for *Chevron* deference if the answer to both questions is affirmative.³²¹ Otherwise, *Skidmore* offers the appropriate evaluative standard.

While *Mead* clearly attempts to add structure to the question of *Chevron's* scope, *Mead's* holding nevertheless contains its own analytical holes.³²² At a minimum, the framework articulated in *Mead* leaves open for further consideration two major questions: how should the courts determine whether Congress has delegated to an agency the requisite administrative authority;³²³ and even if the requisite delegation exists, which interpretive processes represent exercises of such congressionally delegated authority?³²⁴ Both questions turn on the "force of law" concept, a vague concept for which the Court has provided only minimal guidance.³²⁵

318. See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); see also *supra* notes 7, 58 and accompanying text.

319. *Mead*, 533 U.S. at 226–27.

320. *Id.*

321. See *id.*; see also Merrill, *supra* note 8, at 813 (describing the *Mead* test).

322. As with *Chevron*, *Mead* has been the subject of extensive scholarly criticism. See, e.g., David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 225–34 (describing the harms threatened by *Mead's* framework); Jordan, *supra* note 7, at 725–26 (noting that *Mead* fails to identify which types of agency decisions are implicated); John Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 939 n.229 (2004) (describing several criticisms of *Mead*); Vermeule, *supra* note 7, at 355 (speculating about the heavy burdens of implementing *Mead*).

323. See Merrill & Watts, *supra* note 48, at 470, 576–90 (noting and attempting to address this issue); Vermeule, *supra* note 7, at 349–55 (examining the D.C. Circuit's reaction to this ambiguity).

324. See, e.g., Robert A. Anthony, *Three Settings in Which Nonlegislative Rules Should Not Bind*, 53 ADMIN. L. REV. 1313, 1316 (2001) (discussing types of agency action); Merrill, *supra* note 8, at 830–32 (same).

325. See Elhauge, *supra* note 50, at 2139; Merrill, *supra* note 8, at 826–27; Sunstein, *supra* note 266, at 222–25.

Whatever the ambiguities of the force of law concept, and the related uncertainties in truly marginal cases, applying *Mead* to Treasury regulations is comparatively simple. Treasury regulations promulgated pursuant to the Code's specific and general rulemaking grants bind both taxpayers and the government with the same legal force as the Code itself. This simple reality is enough to satisfy *Mead* and compel *Chevron* deference to Treasury regulations.

A. EVIDENCE OF CONGRESSIONAL INTENT

The *Mead* Court was quite explicit that a specific grant of rulemaking authority and exercise thereof will satisfy the force of law requirement: "We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed."³²⁶ Congress has clearly delegated to the Secretary of the Treasury the specific authority to promulgate legislative regulations in a variety of areas throughout the Code.³²⁷ Even before *Chevron*, the Court extended strong judicial deference to such regulations.³²⁸ Thus it is not surprising that even those who support alternative tax-deference standards concede *Chevron's* applicability to specific authority regulations.³²⁹

The remaining question is whether general authority Treasury regulations promulgated pursuant to I.R.C. § 7805(a) are entitled to *Chevron* deference as well or only *Skidmore* respect. As already noted, Treasury routinely utilizes APA notice-and-comment rulemaking in promulgating these regulations, but insists that such regulations are interpretative and that notice and comment are not required.³³⁰ Nevertheless, Treasury treats general authority regulations as legally binding both

326. See *Mead*, 533 U.S. at 229–30.

327. See *supra* note 25 and accompanying text (identifying specific authority grants).

328. See *Rowan Cos., Inc. v. United States*, 452 U.S. 247, 253 (1981) (acknowledging the standard); see also *supra* notes 150–54 and accompanying text.

329. See *Coverdale*, *supra* note 122, at 81–82; *Salem et al.*, *supra* note 20, at 737–38. But see *Gans*, *supra* note 20, at 792–93 (calling for legislation to mandate *Skidmore* deference for specific authority Treasury regulations).

330. See INTERNAL REVENUE MANUAL, *supra* note 24, § 32.1.2.3; *Salem et al.*, *supra* note 20, at 728; see also discussion *supra* note 30 (discussing Treasury's overreliance on its I.R.C. § 7805 authority).

taxpayers and the government; and, as discussed at length above, I.R.C. § 6662 imposes financial penalties on taxpayers who fail to follow Treasury's interpretations of the Code as advanced through general as well as specific authority regulations.

Thomas Merrill and Kathryn Tongue Watts have argued in favor of equating *Mead's* force of law requirement with the general authority to promulgate binding "rules and regulations" and sanctions for the violation of such rules and regulations by the regulated party.³³¹ Merrill and Watts offer extensive historical justification for such a rule as representing the best across-the-board indicator of the congressional delegation necessary for *Chevron* deference.³³² The delegation to the Secretary of the Treasury of the authority to "prescribe all needful rules and regulations," coupled with the sanctions imposed by I.R.C. § 6662, seems quite to fit that bill.³³³

Interestingly, however, Merrill and Watts present a survey of historical evidence against applying their convention to general authority Treasury regulations adopted pursuant to I.R.C. § 7805(a).³³⁴ They catalogue early debates over whether the general authority grant of § 7805(a)'s predecessor would be binding upon taxpayers and the repeated rejection of an amendment by Senator Deal denying such weight to regulations promulgated under § 7805(a).³³⁵ Merrill and Watts speculate that the rejection could mean that most legislators understood that general authority Treasury regulations promulgated under § 7805(a) would not carry the force and effect of law.³³⁶

331. See Merrill & Watts, *supra* note 48, at 471–72.

332. See *id.* at 493–528.

333. I.R.C. §§ 6662, 7805(a) (2000).

334. See Merrill & Watts, *supra* note 48, at 570–73.

335. See *id.*

336. See *id.* Merrill and Watts also premise their argument on their characterization of early income tax penalties as applying only to specific authority grants in the I.R.C. See *id.* at 571–73. I believe that Merrill and Watts have misconstrued the early tax penalty provisions. Merrill and Watts focus their analysis largely on the rulemaking grants and penalty provisions in sections 1001 through 1005 of the War Revenue Act of 1917, although they correctly note similar rulemaking grants in subsequent Revenue Acts and ascribe the same penalty structure to the Internal Revenue Codes of 1939 and 1954. See *id.* Sections 1001 and 1002 of the War Revenue Act of 1917 give Treasury the authority to promulgate regulations governing the keeping of records, filing of returns, and payment of taxes. See War Revenue Act of 1917, Pub. L. No. 64-271, sections 1001, 1002, 40 Stat. 300, 325 (codified as amended at 15 U.S.C. §§ 71–77). Merrill and Watts characterize regulations under sections 1001 and

Merrill and Watts link this history to the tax community's practice of applying the interpretative label to such regulations.³³⁷ When considered in conjunction with the understanding of the nondelegation doctrine common to that era, their speculation seems quite plausible.

Whatever the original understanding, however, more recent events speak to the contrary. Since the Court decided *Chevron*, Congress has repeatedly broadened and increased the penalties for failure to adhere to Treasury regulations in filing a tax return. In 1986, Congress rephrased and expanded the scope of the negligence penalty provision to make clear that even an unintentional failure to adhere to Treasury's "rules and regulations" would be subject to penalties.³³⁸ Subsequently,

1002 as specific authority regulations, see Merrill & Watts, *supra* note 48, at 571; but while the early Revenue Acts included several specific grants of authority to issue substantive regulations, see *supra* notes 131-32 and accompanying text, the regulations under sections 1001 and 1002 are regarded generally as procedural rather than legislative in character. Meanwhile, section 1004 imposes penalties only for intentional fraud and for failure to file a return, but not for failure to adhere to regulations, whether specific or general, in computing taxes owed. See War Revenue Act of 1917, Pub. L. No. 64-271, § 1004, 40 Stat. 300, 325 (codified as amended at 15 U.S.C. §§ 71-77); see also Donald Arthur Winslow, *Tax Penalties—"They Shoot Dogs, Don't They?"*, 43 FLA. L. REV. 811, 830-31, 837 (1991) (detailing penalty provision history). By contrast, § 250(b) of the Revenue Act of 1918 specifically adopted an admittedly minimal and rarely imposed five percent civil penalty for "negligence," which was expanded by the Revenue Act of 1921 to "negligence or intentional disregard of authorized rules and regulations," where a taxpayer is subsequently assessed additional taxes. Revenue Act of 1918, Pub. L. No. 65-254, § 250(b), 40 Stat. 1057, 1083 (codified as amended at 15 U.S.C. §§ 71-77); Revenue Act of 1921, Pub. L. No. 67-98, § 250(b), 42 Stat. 227, 264-65 (codified as amended at 15 U.S.C. §§ 71-77); see also Arnold Hoffman, *Intentional Disregard of Rules and Regulations*, 28 TAXES 111, 111 (1950) (discussing penalty exposure); Winslow, *supra*, at 837-38. While the negligence provision is not textually limited to specific authority regulations, given the common understanding of the relationship between general authority regulations and the nondelegation doctrine, it is possible that Congress in 1918 and 1921 did not intend for the negligence penalty to apply to general authority Treasury regulations. See discussion *supra* notes 140-49 and accompanying text.

337. See Merrill & Watts, *supra* note 48, at 570-73.

338. Prior to 1986, the negligence penalty only applied to "intentional disregard of rules and regulations." Winslow, *supra* note 336, at 838. Many courts have interpreted this language as requiring actual knowledge of and intent to ignore the relevant Treasury regulations before penalties would apply. See, e.g., *Hill v. Comm'r*, 63 T.C. 225, 251-52 (1974); see also Hoffman, *supra* note 336, at 112-13 (documenting early cases). In 1986, Congress expanded the negligence penalty to cover "any failure to make a reasonable attempt to comply with" or "any careless, reckless, or intentional disregard" for the Code and Treasury regulations. I.R.C. § 6653(a)(3) (1986) (repealed 1989); see also Winslow, *supra* note 336, at 838.

in 1989, Congress revisited and entirely restructured the I.R.C.'s penalty provisions but left the expanded language of the negligence penalty—now called the “accuracy-related penalty”—substantially unaltered.³³⁹ It may or may not be fair to presume that Congress appreciated the potential consequences to judicial deference of using the “rules and regulations” terminology in the penalty provision. It is notable, however, that Congress used the same “rules and regulations” language in both I.R.C. § 6662 and I.R.C. § 7805(a); and Treasury's regulations interpreting § 6662 do not distinguish between specific authority and general authority Treasury regulations in prescribing § 6662's applicability.³⁴⁰

Separately, Congress has had the opportunity to consider Treasury's position that its general authority regulations are interpretative for APA purposes. In 1980, Congress adopted the Regulatory Flexibility Act³⁴¹ (RFA), mandating that agencies analyze the burdens imposed on small businesses by their proposed regulations and explain the reasons for not adopting less onerous alternatives.³⁴² The RFA's requirements generally only apply to informal agency rulemaking subject to the notice and comment requirements of APA § 553(b).³⁴³ Thus, since interpretative rules are exempt from the APA's notice and comment requirements, the RFA generally does not apply to them.³⁴⁴ Based upon its historical categorization of its general authority regulations as interpretative, Treasury initially claimed that virtually all of its regulations were likewise excused from the regulatory flexibility analysis.³⁴⁵ After hearing numerous com-

339. See I.R.C. § 6662(a)–(b) (2000).

340. See *id.* §§ 6662, 7805(a); Treas. Reg. § 1.6662-3 (2000). While Treasury also asserts applicability of these penalties for failure to follow less formal (and non-legally binding) revenue rulings, Treasury distinguishes revenue rulings from general authority regulations and is more lenient in allowing taxpayers to avoid penalties in declining to follow revenue rulings. See Treas. Reg. § 1.6662-3(b)(2).

341. Pub. L. No. 96-354, § 3(a), 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601–12 (2000)).

342. See Verkuil, *supra* note 281, at 219, 229–30.

343. See 5 U.S.C. § 603(a); see also *id.* § 603(a) (1994) (showing original statutory language).

344. *Id.* § 553(b)(3)(A) (2000).

345. See 142 CONG. REC. E571, E573 (daily ed. Apr. 19, 1996) (Extensions of Remarks by Rep. Henry J. Hyde) (“Many IRS rulemakings involve ‘interpretative rules’ that IRS contends need not be promulgated pursuant to section 553 of the Administrative Procedures Act.”); 142 CONG. REC. S2148, S2156 (Mar. 15, 1996) (statement of Sen. Bumpers).

plaints from the Small Business Administration and others over Treasury's excuse for ignoring the RFA's mandate,³⁴⁶ Congress amended the RFA in 1996 to require regulatory flexibility analysis for all Treasury regulations published in the Code of Federal Regulations, which includes those promulgated pursuant to Code § 7805.³⁴⁷

The revised RFA and its legislative history are not determinative of the question whether general authority Treasury regulations are legislative or interpretative for APA purposes. In fact, quite the opposite is the case. The statute does not declare all Treasury regulations to be legislative, but rather provides:

In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies to interpretative rules published in the Federal Register for codification in the Code of Federal Regulations, but only to the extent that such interpretative rules impose on small entities a collection of information requirement.³⁴⁸

The legislative history to the amendments similarly offers no opinions on whether these regulations are in fact interpretative, but merely acknowledges Treasury's claim to that effect.³⁴⁹

The ABA Task Force on Judicial Deference suggests that Congress's choice of approach in amending the RFA is indicative of its view that general authority Treasury regulations are in fact interpretative and thus exempt from the Act's analysis absent specific language to the contrary.³⁵⁰ A more plausible view is that Congress is content to leave the finer points of the

346. See, e.g., 142 CONG. REC. S2148, S2151-53 (Mar. 15, 1996) (statement of Sen. Bond) (offering letters from small business organizations extending support for amendments); *Hearing Before the S. Comm. on Small Business*, 1995 WL 93626 (Mar. 8, 1995) (statement of Johnny C. Finch, Assistant Comptroller General, General Government Division).

347. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 241(a)(1), 110 Stat. 847, 864 (current version at 5 U.S.C. §§ 801-808) (2000)); 142 CONG. REC. E571-01, E573 (daily ed. Apr. 19, 1996) (providing as guidance to agency officials that "[t]he amendment applies to those IRS interpretative rulemakings that are published in the Federal Register for notice and comment and that will be codified in the Code of Federal Regulations" but not "less formal IRS publications such as revenue rulings, revenue procedures, announcements, publications or private letter rulings."); 142 CONG. REC. S3242-02, S3244-45 (daily ed. Mar. 29, 1996) (same); see also discussion *supra* note 29 and accompanying text (noting Treasury's utilization of notice-and-comment rulemaking even for its general authority regulations).

348. 5 U.S.C. § 603(a).

349. See 142 CONG. REC. E571, E573 (Mar. 28, 1996); 142 CONG. REC. S3242-02, S3244-45 (daily ed. Mar. 29, 1996).

350. See Salem et al., *supra* note 20, at 739.

legislative-versus-interpretative distinction to the courts, and instead simply wants the desired regulatory flexibility analysis to be performed where necessary to accomplish the RFA's goals, and so chose language more precise to that purpose.³⁵¹

Nevertheless, to be burdensome on small businesses and thus implicate the concerns Congress intended to address with the RFA, the qualifying general authority Treasury regulations would have to be binding. In other words, they would have to carry the force and effect of law.³⁵² If they did not, then Congress's insistence upon the regulatory flexibility analysis for such regulations would be odd. Considered together, the new I.R.C. § 6662 penalty provisions and the RFA amendments seem to signal clearly that, whatever its reasoning in the 1920s, Congress now intends for general authority Treasury regulations promulgated pursuant to I.R.C. § 7805(a) to carry the force and effect of law.

B. LEGISLATIVE VERSUS INTERPRETATIVE ANALYSIS

As discussed above, while the Court once relied on the legislative- and interpretative-rule categories in deciding which deference standard to apply, the Court's post-*Chevron* jurisprudence disregards that distinction in determining whether or not *Chevron* applies. Yet much of the ongoing debate over *Chevron* deference for general authority Treasury regulations hinges on the interpretative label that the tax community applies to such regulations.

The interpretative-rule category as historically defined included regulations promulgated pursuant to general authority grants. Yet while nondelegation doctrine principles rendered such regulations nonbinding in the first part of the twentieth century, the nondelegation doctrine waned as decades passed. The years immediately preceding *Chevron* saw a dramatic in-

351. Notably, summary statements entered into the record to guide agency officials as to the amendment's meaning describe the affected regulations as "interpretative rules' that IRS contends need not be promulgated pursuant to section 553 of the Administrative Procedure Act." 142 CONG. REC. E571-01, E573 (daily ed. Apr. 19, 1996); 142 CONG. REC. S3242, S3244-45 (daily ed. Mar. 29, 1996). Both the use of quotation marks to describe the regulations as interpretative and the phrase "the IRS contends" support the conclusion that Congress did not intend to render judgment as to the proper characterization of such regulations.

352. See, e.g., 142 CONG. REC. S2148, S2156 (daily ed. Mar. 15, 1996) (statement of Sen. Bumpers, noting that such regulations "must be observed if the business owner wants to avoid a confrontation with the Government").

crease in legally binding regulations adopted under general authority. Hence, the interpretative-rule category as historically understood now incorporates both legally binding regulations published in the Code of Federal Regulations and nonbinding agency guidelines and rulings.³⁵³

Moreover, it was far from obvious even before *Mead* that interpretative rules could not be *Chevron*-eligible. *Chevron* itself involved an interpretative regulation, or at least a general authority regulation, promulgated using notice-and-comment rulemaking,³⁵⁴ and the resemblance of general authority Treasury regulations to the interpretative regulation at issue in *Chevron* strongly suggests that *Chevron* deference should apply to them, too. Still, pre-*Mead*, the circuit courts of appeal were divided over the question of *Chevron* deference to interpretative rules, in part as a consequence of the breadth of that category.³⁵⁵ *Mead*'s more specific inquiry into delegated authority should go a long way toward resolving this circuit split by refocusing the inquiry away from the legislative and interpretative labels.

The courts continue to use the legislative and interpretative categories to describe regulations and assess the applicability of the APA's notice and comment requirements, however. As the *Mead* Court indicated, agency action can be *Chevron*-eligible even without notice and comment, which suggests that classifying a regulation as interpretative and thus exempting it from the notice-and-comment process is not dispositive for a *Chevron* inquiry that emphasizes delegation and force of law.³⁵⁶

353. See Robert A. Anthony, "Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog, 8 ADMIN. L.J. AM. U. 1, 6-15 (1994); William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1322-23, 1323 (2001).

354. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 840-41 (1984) (citing Rules & Regulations, EPA, 46 Fed. Reg. 50,766 (Oct. 14, 1981)); see also 42 U.S.C. § 7601(a)(1) (2000) (providing authority).

355. See, e.g., *Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997); *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 181-82 (3d Cir. 1995); *Johnson City Med. Ctr. v. United States*, 999 F.2d 973, 975-76 (6th Cir. 1993). Others courts have declined to do so. See, e.g., *S. Ute Indian Tribe v. Amoco Prod.*, 119 F.3d 816, 832-33 (10th Cir. 1997); *Jacks v. Crabtree*, 114 F.3d 983, 985 n.1 (9th Cir. 1997); *Massachusetts v. FDIC*, 102 F.3d 615, 621 (1st Cir. 1996); *Atchison, Topeka & Santa Fe Ry. v. Pena*, 44 F.3d 437, 442 (7th Cir. 1994).

356. See *United States v. Mead Corp.*, 533 U.S. 218, 230-31 (2001) ("[A]s significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case . . .").

The Court's analysis makes equally clear that legislative regulations developed through notice-and-comment rulemaking are entitled to *Chevron* deference.³⁵⁷ It stands to reason, therefore, that if Treasury regulations are properly subject to APA's notice and comment requirements, then notwithstanding Treasury's protestations to the contrary, *Chevron* would provide the appropriate standard for judicial review.³⁵⁸

Of course, Treasury insists that its general authority regulations are interpretative and, thus, that public notice and comment are not required under APA § 553. Treasury's position seems at least overbroad. As noted above, Treasury regularly cites I.R.C. § 7805(a) as its primary source of authority even where a specific authority grant exists; so Treasury's characterization of such regulations would seem to encompass virtually all of its regulations, even where a specific grant of authority arguably supports a particular regulatory action.³⁵⁹ Regardless, despite Treasury's insistence that its general authority regulations are interpretative, the agency's characterization of its own regulations is at most only a "starting point" for analyzing their categorization.³⁶⁰

The Court has been conspicuously silent in elaborating the difference between legislative and interpretative rules for APA purposes; but the lower courts have developed standards for distinguishing the two. The dominant standard, developed by the D.C. Circuit in *American Mining Congress v. Mine Safety & Health Administration*, emphasizes much like *Mead* that the question is whether the rule at issue carries "the force of law." The court in *American Mining Congress* offered a four-part inquiry for determining whether a rule has a legal effect, considering (1) whether "in the absence of a legislative rule by the agency, the legislative basis for agency enforcement would be inadequate"; (2) whether the agency publishes the rule in the Code of Federal Regulations; (3) whether the agency has explic-

357. See *id.* at 230 n.12 (making the point and citing nineteen such cases); see also *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 45 (2002) (emphasizing the agency's use of notice-and-comment rulemaking to adopt a challenged regulatory provision).

358. See *Merrill*, *supra* note 8, at 827-33 (linking legislative rulemaking authority and *Chevron* eligibility).

359. See discussion *supra* note 27 and accompanying text.

360. See, e.g., *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003); *Mejia-Ruiz v. INS*, 51 F.3d 358, 365 (2d Cir. 1995); see also Richard J. Pierce Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 ADMIN. L. REV. 547, 555 (2000); discussion *supra* note 23.

itly invoked its general legislative authority; and finally, (4) whether the rule in question repudiates or amends another legislative rule.³⁶¹ Although the D.C. Circuit has since modified this standard by making publication in the C.F.R. merely non-dispositive evidence of agency intent,³⁶² the fact that Treasury so publishes its general authority regulations would at least mitigate if not outweigh its claim that the regulations are interpretative. Certainly many Treasury regulations are sufficiently extensive to be essential for the enforcement actions being litigated, even if they only purport to clarify undefined statutory terms.³⁶³ More importantly, given the nondelegation doctrine's decline and prevalent agency reliance on provisions like I.R.C. § 7805(a) to adopt legally binding regulations, express reliance on I.R.C. § 7805(a) would seem inadequate to trigger the third *American Mining Congress* test.³⁶⁴

At least one circuit uses an older standard known as the substantial impact test. The substantial impact test provides that a regulation is legislative rather than interpretative if it has a substantial impact on regulated parties.³⁶⁵ The test has been criticized as overly inclusive.³⁶⁶ Yet the Fifth Circuit still applies a variation of the substantial impact test. In *Professionals & Patients for Customized Care v. Shalala*, that court

361. *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109–11 (D.C. Cir. 1993); *see also Hemp Indus.*, 333 F.3d at 1087 (applying this standard); *N.Y. City Employees' Ret. Sys. v. SEC*, 45 F.3d 7, 13 (2d Cir. 1995) (same); *Pierce*, *supra* note 360, at 556–57 (discussing this standard).

362. *See Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994).

363. *See, e.g.*, *Treas Reg. § 1.702-1* (2005) (interpreting the intent of subchapter K—the partnership anti-abuse regulations); *Treas. Reg. § 301.7701-1 to -3* (2000) (interpreting “corporation”—the so-called “check-the-box regulations”); *see also Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 588 (D.C. Cir. 1997) (“If the statute or rule to be interpreted is very general . . . and the ‘interpretation’ really provides all the guidance, then the latter will more likely be a [legislative] regulation.”). Treasury’s propensity for relying on I.R.C. § 7805(a) (2000) even for regulations that arguably are specifically authorized only reinforces this point. *See discussion, supra* note 30. *But see Health Ins. Ass’n*, 23 F.3d at 423 (“The dividing line . . . is whether implementing regulations are necessary in order to make a statutory scheme fully operative.”).

364. *See, e.g.*, *Erringer v. Thompson*, 371 F.3d 625, 631 (9th Cir. 2004) (citing *United Techs. Corp. v. EPA*, 821 F.2d 714, 719–20 (D.C. Cir. 1987)).

365. *See Funk, supra* note 353, at 1325–26.

366. *See, e.g.*, *First Nat’l Bank of Lexington, Tenn. v. Sanders*, 946 F.2d 1185, 1189 n.2 (6th Cir. 1991) (acknowledging the questionability of the substantial impact test but applying it as appropriate for the case at bar); *see also Funk, supra* note 353, at 1326.

asked whether the rule at issue was binding in that it imposed "rights and obligations" on regulated parties and also whether the rule "leaves the agency and its decisionmakers free to exercise discretion" or, conversely, binds the agency as well as regulated parties."³⁶⁷ Treasury regulations have always been binding on government officials, even when most tax scholars agreed that such regulations could not bind taxpayers or the courts.³⁶⁸ Now that I.R.C. § 6662 and the regulations thereunder clearly impose penalties for disregarding general authority Treasury regulations in filing tax return, such regulations impose rights and obligations and are binding on taxpayers and the government alike.

Even some in the tax community who advocate in favor of tax exceptionalism nevertheless acknowledge that general authority Treasury regulations are most likely legislative in character.³⁶⁹ To the extent this is the case, the applicability of *Chevron* deference should be clear. Post-*Mead*, it makes no difference for purposes of assessing the applicability of *Chevron* deference whether Treasury regulations are legislative or interpretative in character. The relevant inquiry now is whether they carry the force and effect of law.

C. COUNTERARGUMENTS

Arguing in favor of *Skidmore* respect rather than *Chevron* deference, John Coverdale offers several indicators that Congress would want general authority Treasury regulations to receive a lesser degree of deference. First, Coverdale emphasizes the text and structure of the Code.³⁷⁰ Coverdale argues that, if both specific authority and general authority Treasury regulations carry the force of law, and Treasury can achieve the same legal result with general authority regulations that it can with specific authority regulations, then Congress would not need to

367. *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995) (quoting *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 & n.4 (D.C. Cir. 1987)); see also *Tex. Sav. & Cmty. Bankers Ass'n v. Fed. Hous. Fin. Bd.*, 201 F.3d 551, 556 (5th Cir. 2000) (applying the test).

368. See, e.g., *Alvord*, *supra* note 131, at 261; *Surrey*, *supra* note 143, at 557.

369. See, e.g., *Salem et. al.*, *supra* note 20, at 738-39; see also *Cunningham & Repetti*, *supra* note 3, at 45 (acknowledging that general authority Treasury regulations are legislative under general standards but that the tax community does not follow this norm).

370. See *Coverdale*, *supra* note 122, at 85-86.

enact specific authority grants.³⁷¹ In other words, giving specific authority and general authority Treasury regulations the same legal weight renders the specific authority grants redundant, according to Coverdale.³⁷²

Coverdale's argument denies the significance of several other provisions of the Code. With I.R.C. § 7801(a), Congress assigned to Treasury the responsibility for administering and enforcing the tax laws.³⁷³ Administration and enforcement necessarily entail interpretation.³⁷⁴ I.R.C. § 7801(a) thus gives Treasury sufficient power to issue nonbinding interpretive guidance representing its view of the Code's meaning. Consequently, general authority Treasury regulations issued pursuant to I.R.C. § 7805(a) must represent something more. With I.R.C. § 7805(a), Congress expressly gave Treasury the authority to promulgate regulations as needed to enforce the tax laws. With I.R.C. § 6662, Congress signaled its intent that such regulations bind taxpayers as well as Treasury. To deny general authority Treasury regulations *Chevron* deference ignores the signal of I.R.C. § 6662 and renders the general authority grant of I.R.C. § 7805(a) superfluous.

Moreover, Coverdale's argument assumes that Congress recognizes all the ambiguities inherent in the Code at the time of enactment. Clearly, where Congress intentionally leaves statutory gaps for Treasury to fill, it utilizes specific authority grants to indicate such intent.³⁷⁵ It is unrealistic to expect Congress to anticipate every ambiguity, however. A better reading of I.R.C. § 7805(a)'s general authority grant is as an acknowledgment that unanticipated uncertainties of statutory meaning will arise and as a clear statement that Congress prefers Treasury, rather than the courts, to be the institution to resolve such questions.

371. See *id.*; see also Surrey, *supra* note 143, at 576–77 (making a similar argument, though for different reasons).

372. See Coverdale, *supra* note 122, at 85–86.

373. See I.R.C. § 7801(a) (2000).

374. See Lee, *supra* note 23, at 24. Some scholars would suggest that such interpretive power is inherent in the executive, while others maintain that congressionally delegated enforcement power must be present. See generally Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 704–13 (summarizing different views of the Constitution's Article II Vesting Clause). Regardless of one's view of what is required for an executive department to have the power to interpret a statute within its jurisdiction, it seems clear that Treasury possesses such authority.

375. See discussion *supra* notes 25, 130–31 and accompanying text (identifying specific authority grants).

Coverdale also identifies the existence of the Tax Court as evidence that Congress clearly desires independent rather than deferential review for general authority Treasury regulations.³⁷⁶ To support this position, Coverdale cites congressional action in 1924 creating the Board of Tax Appeals (the "BTA" or "Board"), the predecessor to the modern Tax Court, for the purpose of providing "an independent review of the Commissioner of Internal Revenue's determination of additional income and estate taxes' before the additional tax could be collected."³⁷⁷ Coverdale maintains that the existence of the Tax Court and the tax deference standard of *National Muffler* (which Coverdale equates with *Skidmore*) represent a delicate balance between respect for Treasury's role in interpreting the Code and the need for independent review of IRS enforcement actions, including Treasury interpretations of law.³⁷⁸

Coverdale's argument on this point should apply equally to specific authority Treasury regulations, yet he acknowledges the appropriateness of *Chevron* deference in such cases.³⁷⁹ Even if Coverdale were correct in his assessment that Congress was concerned with judicial review of general authority Treasury regulations when it created the Tax Court in 1924, its subsequent post-*Chevron* actions equating specific and general authority Treasury regulations for penalty and Regulatory Flexibility Act purposes suggest that Congress now feels differently. Regardless, a more thorough review of the Tax Court's origins renders Coverdale's assertion on this point doubtful.

The BTA's creation was not the genesis of judicial review of tax cases. Before Congress established the Board in 1924, aggrieved taxpayers could and did challenge IRS determinations in both the United States Court of Federal Claims and in the federal district courts.³⁸⁰ Without first paying the tax and suing

376. Unlike most areas of administrative law, tax has its own Article I court—the Tax Court. See 32 AM. JUR. 2D *Federal Courts* § 6 (1995) (listing the Article I courts). Taxpayers seeking to challenge IRS assessments may choose to pursue their cases in the Tax Court, in the United States Court of Federal Claims, which is another Article I court, or in United States Federal District Court, which is an Article III court. See SALTZMAN, *supra* note 1, ¶¶ 1.05–06.

377. Coverdale, *supra* note 122, at 86 (quoting *Old Colony Trust v. Comm'r*, 279 U.S. 716, 721 (1929)).

378. *Id.*

379. See *id.* at 81–82.

380. See HAROLD DUBROFF, *THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS* 28–35 (1979) (detailing pre-BTA judicial review).

for a refund,³⁸¹ aggrieved taxpayers were limited to seeking nonadversarial, informal review of their tax assessments before the Committee on Appeals and Review. More often than not, this Committee merely negotiated settlements rather than resolving disputed issues; and its decisions were subject to review and amendment by the Solicitor of Internal Revenue as representative of the Commissioner of Internal Revenue.³⁸² Recognizing the suboptimality of this arrangement, Treasury proposed establishing the BTA, outside the Bureau of Internal Revenue but still within the Treasury Department and under the direct supervision and control of the Secretary of the Treasury.³⁸³ Responding to complaints that Treasury's proposal did not go far enough in separating administration and enforcement from the review function, Congress went a step further and removed the BTA from Treasury altogether by giving the power to appoint the BTA's members to the President with Senate advice and consent and by limiting their removal to cause.³⁸⁴

In context, references to the BTA's "independence" more likely refer to its organizational removal from the Department of Treasury rather than to the standard of review for legal questions before it. Noting the context and legislative history behind the BTA's creation, Charles Hamel, the first Chairman, characterized the BTA's role as judicial rather than legislative.³⁸⁵ The Board accordingly used the courts rather than other, more policy-oriented special tribunals as the model for the BTA's procedural rules.³⁸⁶ Early BTA opinions convey the

381. *See id.*

382. *See id.* at 42-43 (describing the Committee on Appeals and Review).

383. *See id.* Whereas the Committee on Appeals and Review was located organizationally within the Bureau of Internal Revenue, under Treasury's proposal, the BTA would have been located within the Treasury Department but separate from the Bureau, and the Secretary would have had the authority to appoint members and to approve the Board's procedural rules. *See id.* at 52-53. The proposal at least implicitly gave the Secretary the power to remove Board members as well. *See id.* at 55.

384. *See* Revenue Act of 1924, Pub. L. No. 68-176, § 900(b), 43 Stat. 336, 337 (codified at 15 U.S.C. §§ 71-77 (2000)); *see also* DUBROFF, *supra* note 380, at 56-58, 66-67.

385. *See* Charles D. Hamel, *United States Board of Tax Appeals*, 13 GEO. L.J. 20, 24 (1924). In discussing the BTA's role, Hamel particularly noted the Interstate Commerce Commission and the Federal Trade Commission as examples of other special tribunals within the federal government, but described them as having "a composite function to perform, both judicial and legislative," as opposed to the BTA's "purely judicial duty." *Id.*

386. *See id.*

BTA's adherence to the same deference principles applied by the Article III courts.³⁸⁷

Additionally, Coverdale notes Treasury's consistent position that its general authority regulations are interpretative and thus exempt from the APA's notice and comment procedures. Although Coverdale takes at face value that Treasury in practice uses notice and comment because it wants to and not because it must, one could just as easily speculate that Treasury follows the APA process because it recognizes that its position is a dubious one.

Many other agencies face challenges to their adherence to the APA's procedural requirements.³⁸⁸ It is in Treasury's interest to assert the interpretative rule exemption as a potential legal argument against such challenges. Moreover, Treasury is inconsistent in distinguishing between its specific and general authority regulations where its institutional interests support a contrary position. Treasury blurs the distinction between the two regulation types by citing I.R.C. § 7805(a) as the primary authority for even regulations with arguable specific authority, then asserts the interpretative rule exemption for them all.³⁸⁹ By claiming that exemption, Treasury theoretically concedes that its general authority regulations are not legally binding.³⁹⁰ Yet Treasury treats specific and general authority regulations equally for underpayment penalty purposes while taking a more lenient position for less formal revenue rulings and notices.³⁹¹ Also at least post-*Mead*, the government regularly

387. See, e.g., *Ramsey v. Comm'r*, 26 BTA 277, 279 (1932) (describing specific authority Treasury regulations as, "if reasonable, hav[ing] the full force and effect of law" and citing Supreme Court cases for that proposition); *Green River Distilling Co. v. Comm'r*, 16 BTA 395, 399 (1929) (same); *Appeal of Unif. Printing & Supply Co.*, 9 BTA 251, 254 (1927) (deferring to a regulatory definition of "business league" as "reasonable" particularly in light of legislative re-enactment); *Appeal of Gottlieb Bros.*, 1 BTA 684, 686-87 (1925) (noting the reasonableness and consistency of general authority Treasury regulation); see also *Cronin v. Comm'r*, 37 BTA 914, 920 (1938) (recognizing the applicability of Article III court deference principles); *L.S. Donaldson Co., Inc. v. Comm'r*, 12 BTA 271, 280 (1928) (same).

388. See, e.g., *Transmission Access Policy Group v. FERC*, 225 F.3d 667, 729 (D.C. Cir. 2000) (challenging the adequacy of a notice-of-proposed rule-making); *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1083 (D.C. Cir. 1996) (same); *Pers. Watercraft Indus. Ass'n v. Dep't of Commerce*, 48 F.3d 540, 542-43 (D.C. Cir. 1995) (challenging an agency rule for failure to respond to comments).

389. See discussion *supra* notes 30, 33 and accompanying text.

390. See discussion *supra* note 30 and accompanying text.

391. See *Treas. Reg.* 1.6662-3 (2005).

claims in litigation that general authority Treasury regulations are *Chevron*-eligible, and thus asserts that such regulations carry the force and effect of law.³⁹²

Treasury's inconsistent and self-serving positions on the characterization and effect of its own regulations render its representations suspect. Accordingly, Treasury's characterization of its regulations should be heavily discounted for purposes of assessing *Chevron's* applicability.

Finally, Coverdale observes that Congress's frequent tax legislation and the detail thereof suggest Congress's preference for making tax policy itself rather than leaving such matters to Treasury.³⁹³ Of course, such a sentiment, if true, would eliminate the need for I.R.C. § 7805(a). In fact, while Congress frequently revisits some sections of the Code,³⁹⁴ it leaves others

392. See, e.g., Brief for the Appellee at 16, *Cansino v. Comm'r*, 94 A.F.T.R.2d 2004-7256 (9th Cir. 2004) (No. 03-73858); Brief for the Appellee at 34, *Gorospe v. Comm'r*, 2003 WL 22754007 (9th Cir.) (No. 03-70250); Brief for Respondent at 46, *Fowler v. Comm'r*, 84 T.C.M. (CCH) 281 (2002) (No. 11885-98); see also Reply Brief for Respondent at 301, *Santa Monica Pictures, LLC v. Comm'r*, 89 T.C.M. (CCH) 1157 (2005) (Nos. 6163-03, 6164-03) (claiming both *Chevron* and *National Muffler* deference). But see Corrected Brief for the Appellee at 74-76, *Microsoft Corp. v. Comm'r*, 311 F.3d 1178 (9th Cir. 2002) (No. 01-71584) (arguing for *National Muffler* deference only where appellant had conceded its applicability in the court below).

393. See Coverdale, *supra* note 122, at 87.

394. For example, Congress has amended I.R.C. § 1 (2000), which establishes various tax rates, in eight of the last ten years, more often than not extensively, and in one year more than once. See Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, §§ 101, 105, 402, 408, 118 Stat. 1166, 1167-69, 1184-86, 1190-91 (codified at 26 U.S.C. § 1 (2005)); Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, §§ 102-105, 107, 301-303, 117 Stat. 752, 754-55, 758-64 (codified at 26 U.S.C. § 1 (2005)); Holocaust Restitution Tax Fairness Act of 2002, Pub. L. No. 107-358, 116 Stat. 3015, 3015 (codified at 26 U.S.C. § 1 (2005)); Economic Growth & Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 101, 302, 901, 115 Stat. 38, 41-44, 54, 150 (codified at 26 U.S.C. § 1 (2005)); Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 1, 114 Stat. 2763, 2763 (codified as amended in scattered sections of 26 U.S.C. § 1 (2005)); Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, §§ 4002-03, 112 Stat. 2681, 2681-906 to 2681-910 (1998) (codified as amended in scattered sections of 26 U.S.C. § 1 (2005)); Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, §§ 6005, 6007, 112 Stat. 685, 796-811 (codified as amended in scattered sections of 26 U.S.C. § 1 (2005)); Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 311, 118 Stat. 788, 831-36 (codified as amended in scattered sections of 26 U.S.C. § 1 (2005)); Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1704, 110 Stat. 1755, 1878-91 (codified as amended in scattered sections of 26 U.S.C. § 1 (2005)). Congress revisited another provision, I.R.C. § 179 (2000), which allows certain taxpayers to deduct the cost of certain depreciable assets

untouched for years or even decades.³⁹⁵ In some Code sections, Congress provides great detail;³⁹⁶ but other Code sections are astonishingly vague, prompting extensive Treasury regulations to fill in the gaps.³⁹⁷ Congress changes some of the tax laws often in response to political and economic trends and events; but in areas that rouse less political interest, Congress clearly relies upon Treasury to exercise its authority under I.R.C. § 7805(a) to respond to changing circumstances and to fill unanticipated ambiguities.

D. SUMMARY

As per *Mead*, whether *Chevron* deference applies to Treasury regulations depends upon whether Congress and the agency intended for them to carry the force and effect of law. It

immediately rather than over time, three times during the same period. See American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 201, 118 Stat. 1418, 1429 (codified at 26 U.S.C. § 1 (2005)); Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, § 202, 117 Stat. 752, 757-58 (codified at 26 U.S.C. § 1 (2005)); Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1111, 110 Stat. 1755, 1758 (codified as amended in scattered sections of 26 U.S.C. § 1 (2005)).

395. Randolph Paul observed as early as 1939 that “Congress in tax legislation usually hits only the high spots which are forced upon its attention by conspicuous judicial decisions or which are called to its attention by the Treasury and diligent taxpayers.” Paul, *supra* note 164, at 665. The Code has only grown in both size and complexity since Paul’s observation, rendering his observation even more accurate today. The rules governing “passive foreign investment companies” (PFICs) are illustrative of the problem. Congress adopted a complicated set of rules for taxing PFICs in 1986 and gave Treasury broad, specific authority to promulgate regulations interpreting the PFIC provisions. See Tax Reform Act of 1986, Pub. L. No. 99-514, § 1235, 100 Stat. 2085, 2566-76; see also I.R.C. § 1298(f) (2000) (redesignated from former I.R.C. § 1297(d)). The PFIC rules contained many unanswered questions, gaps, and ambiguities; and while Treasury started to elaborate and clarify the PFIC rules with proposed regulations in 1992, those proposed regulations have been sharply criticized, and Treasury has never finalized them. See generally Kevin M. Cunningham, *The PFIC Rules: The Case of Throwing the Baby Out With the Bathwater*, 21 VA. TAX REV. 387 (2002). Notwithstanding these problems as well as dramatic increases in cross-border transactions and innovations in multinational business structures, Congress has made only a few, minor technical amendments to the PFIC regulations in the last twenty years.

396. See, e.g., I.R.C. § 163 (2000) (providing for the deductibility of interest expense); *id.* §§ 901-908 (providing for foreign tax credit); *id.* §§ 1271-1275 (covering original issue discount).

397. For example, I.R.C. § 61 (2000) defines gross income by listing several obvious sources but also stating the list is not exclusive and that gross income is “from whatever source derived.” Currently, Treasury has promulgated sixteen final, five proposed, and one temporary regulation elaborating this section.

is plausible that Congress originally intended that at least general authority Treasury regulations should not be legally binding, particularly when one considers the understanding of the nondelegation doctrine common in the era in which Congress adopted the Code. Nevertheless, the nondelegation doctrine has long since passed as a serious obstacle to viewing general authority Treasury regulations as legally binding. More recent, post-*Chevron* congressional action particularly with respect to the Code's penalty provisions, but also regarding the Regulatory Flexibility Act, strongly support a conclusion that Congress intends for all Treasury regulations—general and specific authority—to carry the force and effect of law.

While Treasury continues to maintain its position that the general authority regulations are interpretative and not subject to APA notice and comment requirements, Treasury's actions speak louder than its words: Treasury utilizes notice and comment procedures in promulgating all of its regulations, considers itself bound by the interpretations advanced in those regulations, and asserts the applicability of *Chevron* deference in litigation. Should any taxpayer actually challenge even a general authority Treasury regulation on grounds that Treasury failed properly to satisfy the APA's notice and comment requirements, it seems a virtual certainty that the courts would conclude that all Treasury regulations are in fact legislative in character. To the extent that the Court has made clear the *Chevron*-eligibility of legislative regulations promulgated through notice-and-comment rulemaking, such a characterization should be dispositive for the question of *Chevron*'s applicability. Once one strips away the tax-exceptionalist strain of the argument, the case for *Chevron* deference for Treasury regulations is quite straight-forward.

CONCLUSION

Interpreting statutory ambiguity, at least as often as not, requires making policy choices. Where the Code is susceptible of more than one reasonable alternative answer, either Treasury or the courts will be primarily responsible for choosing among them. Judicial deference principles ultimately attempt to strike a balance on that score between agencies like Treasury and the courts. *Chevron* allows the courts to avoid interfering in policy matters and still police agency adherence to established processes and keep agencies from going beyond the boundaries of congressionally delegated authority.

Skepticism of the motivations and abilities of regulatory agencies like Treasury in making such choices is not a new phenomenon. *Chevron* has its critics, as do *Mead* and *Skidmore*, on both doctrinal and normative grounds. *Chevron* reflects a very powerful pro-agency bias; and perhaps some opponents are simply more trusting of the courts' ability to choose between competing policies rendered permissible by ambiguous statutes. Ironically, notwithstanding the tax community's resistance to *Chevron* deference for Treasury regulations, few tax scholars or practitioners would assert that the courts do a very good job of interpreting the Code, particularly in more complicated tax cases. Meanwhile, the fluidity of *Skidmore's* multifactor analysis renders that standard difficult to apply with consistency, while ambiguities in the Court's analysis in *Mead* leave the particulars of its application uncertain.

Whatever the failings and pitfalls of *Chevron*, *Mead*, and *Skidmore*, acknowledging them is not the same thing as supporting tax exceptionalism. There can be no doubt that *Chevron*, *Mead*, and *Skidmore* today represent the dominant standard for evaluating agency interpretations of the statutes they administer. The claims of many in the tax community that tax should be different simply do not bear out when examined in the broader, comparative context. Doctrinally, the pre-*Chevron* history of the Court's deference jurisprudence tracks quite closely between tax and non-tax cases, as does the scholarly analysis thereof. It is only in the post-*Chevron* era that the notion of tax exceptionalism really began to take hold, admittedly assisted by muddled and inconclusive rhetoric from the Court. Unsettled as the doctrine may now be, however, the normative case for distinguishing tax from non-tax cases simply fails when tax and non-tax practices are laid side by side. The clear intent of Congress as well as Treasury is that general and specific authority Treasury regulations both are legally binding on taxpayers and the government alike. Whatever *Mead* may mean in more marginal cases, Treasury regulations present an easy case for *Chevron* deference.