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Of Lenity, Chevron, and KPMG

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OF LENITY, *CHEVRON*, AND KPMG

*Kristin E. Hickman**

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I. INTRODUCTION

Despite a mixed track record in challenging tax shelters in civil enforcement actions, the federal government has started prosecuting tax shelter cases criminally.¹ One of the top accounting firms, KPMG, and several of its partners and managers have come under scrutiny for developing and promoting certain tax shelters known colloquially as BLIPS, FLIP, OPIS, and SOS.² Under threat of criminal indictment, KPMG decided to save itself. KPMG admitted criminal culpability, paid a fine, and agreed to implement a compliance and ethics program and submit to several years of government monitoring in exchange for deferred prosecution.³ Meanwhile, the government's criminal prosecution of several former KPMG tax professionals continues to work its way through the federal district courts.⁴ Yet some believe that the tax shelters promoted by KPMG were not clearly abusive, or at least not criminally so.⁵ One federal district court has decided that a key statutory element of the BLIPS structure was consistent with then-existing interpretations of the Internal Revenue Code (Code).⁶

¹ See, e.g., Sheryl Stratton, *Criminal Tax Enforcement of Legal-Source Income Cases Is Up*, 113 TAX NOTES 392 (Oct. 30, 2006) (noting DOJ Tax Division's current emphasis on tax shelter prosecutions); Armando Gomez & Brian Duncan, *Detection & Dissection: How the IRS Identifies and Combats Tax Shelters and Regulates Those Who Advise On Aggressive Transactions*, 736 PLI/TAX 951, 1009–10 (2006) (noting a shift in criminal prosecutions from nonfilers, drug dealers, and tax protesters to more mainstream tax matters).

² BLIPS, FLIP, OPIS, and SOS are acronyms for Bond Linked Issue Premium Structures, Foreign Leveraged Investment Program, Offshore Portfolio Investment Strategy, and Short Option Strategy, respectively. See discussion *infra* notes 94–127 and accompanying text (discussing the BLIPS, FLIP, and OPIS transactions).

³ See *KPMG Deferred Prosecution Agreement Dated August 26, 2005*, reprinted in 1571 PLI/CORP. 659 (2006).

⁴ See, e.g., *United States v. Stein*, 463 F. Supp. 2d 459 (S.D.N.Y. 2006) (holding that defendant's conversations with firm counsel were not privileged); *United States v. Stein*, 461 F. Supp. 2d 459 (S.D.N.Y. 2006) (adjourning trial *sine die* due to late production of discovery and pending resolution of legal fee issues); *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006) (holding that government violated defendants' right to counsel); *Superseding Indictment, United States v. Stein*, N. S1 05 Crim. 0888(LAK), 2005 WL 4168176 (Oct. 17, 2005).

⁵ See, e.g., Robert Weisberg & David Mills, *A Very Strange Indictment*, WALL ST. J., Oct. 12, 2005 at A16 (criticizing the government's case against KPMG).

⁶ See *Klamath Strategic Inv. Fund, LLC v. United States*, 440 F. Supp. 2d 608, 615–19, 625–26 (E.D. Tex. 2006) (ruling for the taxpayer on the BLIPS structure's interpretation of the term "liabilities" under Internal Revenue Code (Code) section 752). The *Klamath* opinion arose in a civil action, not a criminal prosecution, and did not conclusively resolve the case in favor of the taxpayer. See discussion *infra* notes

Many who are more skeptical of the KPMG shelters nevertheless are concerned about distinguishing the actions of the defendant tax professionals from those of ordinary tax planners under the specter of criminal enforcement.⁷

Tax shelters have a bad reputation, for good and obvious reasons. Among other things, abusive tax shelters illegitimately deprive the government of much-needed revenue and generally breed disrespect for the tax system. Note that in that last sentence I added the word “abusive.” Not all tax shelters fall into that category, at least in the eyes of the law.⁸ While most tax experts agree that abusive tax

107–10 (discussing the *Klamath* opinion further). The *Klamath* court has since decided the case in favor of the government on economic substance grounds, though the court also found various civil penalties assessed by the government to be inapplicable. See *Klamath Strategic Inv. Fund, LLC v. United States*, ___ F. Supp. 2d ___, 2007 WL 283790 (E.D. Tex. 2007).

⁷ See, e.g., Lee A. Sheppard, *KPMG: Has the Prosecution Overcharged the Crime?*, 112 TAX NOTES 405 (July 31, 2006) (noting concerns of many practitioners, analyzing the government’s case in *United States v. Stein*, and suggesting that the government may have overreached); Editorial, *KPMG In Wonderland*, WALL ST. J. Oct. 6, 2005, at A14 (describing prosecutions as “troubling”); John Klotsche, *Text of Klotsche Remarks at Tax Controversy Seminar*, 2006 TNT 30–31 (Feb. 14, 2006) (attempting to justify tax shelter prosecutions and distinguish actions prosecuted from permissible tax planning from Internal Revenue Service (Service) perspective); see also Daniel N. Shaviro, *Economic Substance, Corporate Tax Shelters, and the Compaq Case*, 88 TAX NOTES 221, 230 (July 10, 2000) (noting the general discomfort of many leading tax practitioners with the government’s emphasis on penalties and case-by-case discretion to define tax abuse and combat tax shelters). Not everyone is dismayed by the government’s aggressive posture. See, e.g., Darryll K. Jones, *Criminalizing Tax Shelters and the “Damn-Well” Reflex*, 110 TAX NOTES 285 (Jan. 16, 2006) (defending criminal prosecutions of tax shelter promoters generally).

⁸ Code section 6662 defines a “tax shelter” as “a partnership or other entity, an investment plan or arrangement, or any other plan or arrangement, if a significant purpose of such partnership, entity, plan, or arrangement is the avoidance or evasion of Federal income tax.” I.R.C. § 6662(d)(2)(C)(ii). Other provisions of the Code offer definitions of the same term. See, e.g., I.R.C. § 461(i)(3) (adopting a broader definition inclusive of that of Code § 6662); I.R.C. § 4965(e) (defining “prohibited tax shelter transaction” by cross reference to other terms defined in Code section 6707A). None of these definitions has proven particularly useful in combating abusing tax shelters; and some transactions that the government labels as tax shelters have “worked,” meaning at the very least that the courts recognized their consistency with existing law, even if Congress subsequently amends the tax laws to alter the consequences of such transactions. See *infra* note 12 and related text. Hence, Treas. Reg. § 1.6011-4 more broadly identifies several categories of transactions that participating taxpayers must report to assist the Service in ferreting out abusive tax shelters, only one of which is listed transactions. See Treas. Reg. § 1.6011-4(a), (b) (2006). Yet while the reportable transaction regulations are targeted at tax shelter

shelters are a big problem,⁹ they disagree over precisely how to distinguish ordinary non-shelter tax planning from tax shelters, and legitimate from abusive tax shelters.¹⁰ The federal tax laws are enormously complex. Reasonable people disagree all the time over their meaning. The Internal Revenue Service's (Service's) win/loss record in recent civil tax shelter cases is not great.¹¹ Drawing the line between the use of shelters in legitimate tax planning and abusive tax shelters is just plain hard.

A significant contributor to the problem of tax shelters, of course, is a tax code rife with ambiguity. Tax shelters in general are designed to take advantage of a lack of clarity in the law. There is always a possibility in litigating a tax shelter case that a court will find the Code to be clear on the issue in question. In many if not most such cases, however, it seems safe to assume that a reviewing court would find the

activity, tax advisors generally recognize that many ordinary business transactions fall within the scope of these disclosure requirements. *See, e.g.*, Michael Schler, *Effects of Anti-Tax Shelter Rules on Nonshelter Tax Practice*, 109 TAX NOTES 915, 916–17 (Nov. 14, 2005) (concluding that “for most tax advisers, the vast majority (if not all) of the transactions that fall in those categories are normal business transactions, not tax shelters”).

⁹ For example, Shaviro states:

The Treasury has argued, and many practitioners agree, that at present we face a crisis in which undesirable transactions that would undoubtedly be shut down on detection (even if they work under current law) are compromising the entire corporate income tax, and perhaps generating broader disrespect for the tax system.

Shaviro, *supra* note 7, at 230.

¹⁰ *See, e.g.*, Susan Cleary Morse, *The How and Why of the New Public Corporation Tax Shelter Compliance Norm*, 75 FORDHAM L. REV. 961, 1000–02 (2006) (summarizing academic efforts to define “tax shelter”); Michael S. Powlen & Raj Tanden, *Corporate Tax Shelters or Plus Ça Change, Plus C'est La Même Chose*, 736 PLI/TAX 11, 19–21 (2006) (discussing the difficulties in defining “tax shelter”).

¹¹ *Compare, e.g.*, Coltec Indus., Inc. v. United States, 454 F.3d 1340 (Fed. Cir. 2006) (rejecting contingent liability transaction), and Boca Investering's P'ship v. United States, 314 F.3d 625 (D.C. Cir. 2003) (rejecting contingent installment sale tax shelter), and BB&T Corp. v. United States, No. 1: 04CV00941 (M.D.N.C. Jan. 4, 2007), slip opinion available at 2007 WL 37798 (disallowing deductions associated with Lease-In/Lease-Out tax shelter), with Compaq Computer Corp. v. Commissioner, 277 F.3d 778, 788 (5th Cir. 2001) (upholding shelter against government challenge), and United Parcel Serv. of Am., Inc. v. Commissioner, 254 F.3d 1014 (11th Cir. 2001) (upholding captive insurance program). *See also* Marvin A. Chirelstein & Lawrence A. Zelenak, *Tax Shelters and the Search for a Silver Bullet*, 105 COLUM. L. REV. 1939, 1940 (2005) (noting the Service's mixed record in litigating tax shelters).

Code susceptible of more than one reasonable interpretation.¹²

In the civil context, depending upon the format of the Service's interpretation, a finding of statutory ambiguity typically means that the reviewing court should apply one or another doctrine of judicial deference in evaluating the government's interpretation: either the strong, mandatory *Chevron* deference,¹³ the slightly less deferential *Skidmore* deference standard,¹⁴ or perhaps the tax-specific *National Muffler* deference.¹⁵ Whichever of these review standards applies, the resulting judicial deference gives the government a distinct advantage over the taxpayer in persuading the courts to adopt the government's interpretations of the Code.¹⁶ Consequently, these deference doctrines are useful tools in the Service's effort to maintain the integrity of the tax laws.

In criminal cases, by contrast, the rule of lenity applies to resolve disputes over interpreting ambiguous statutes.¹⁷ This canon of construction generally requires courts reviewing ambiguous statutes in the context of criminal cases to construe those statutes in the

¹² To be clear, the variety of statutory ambiguity giving rise to the issues discussed herein should not be mistaken for the lack of statutory clarity that raises vagueness doctrine concerns. Although related to the rule of lenity, vagueness doctrine precludes altogether the enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Lanier*, 520 U.S. 259, 266 (1997). Uncertainty over whether the use of the term "liabilities" in Code section 752 includes contingent in addition to fixed liabilities, for example, may reflect statutory ambiguity but simply does not present a vagueness doctrine concern. Of course, in application, the line between lenity and the vagueness doctrine is not always so clear. See WAYNE LAFAYE, 1 SUBSTANTIVE CRIMINAL LAW § 2.2 (2d ed.) (noting that "there is no exact borderline which can be drawn between a statute which is merely ambiguous and one which is unconstitutionally vague."). Nevertheless, whatever the Code's limitations, vagueness is unlikely to be one of them.

¹³ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

¹⁴ See *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

¹⁵ See *Nat'l Muffler Dealers Ass'n v. Commissioner*, 440 U.S. 472, 476–77 (1979). See generally, e.g., Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1542–55 (2006) (discussing the applicability of these doctrines to Treasury regulations).

¹⁶ See, e.g., Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Court of Appeals*, 15 YALE J. ON REG. 1, 30 (1998) (documenting study finding that 73% of appellate court applications of the *Chevron* deference standard accepted the agency's interpretation).

¹⁷ See, e.g., *Cleveland v. United States*, 531 U.S. 12, 25 (2000); *United States v. Bass*, 404 U.S. 336, 347–48 (1971); *Bell v. United States*, 349 U.S. 81, 83–84 (1955).

defendant's favor.¹⁸ Yet, the Supreme Court has applied the rule of lenity to resolve not only criminal cases but also civil cases where the statute in question could be used as a basis for criminal prosecution.¹⁹

Several scholars have recognized tension between doctrines of judicial deference and the rule of lenity.²⁰ Some of the Supreme Court's opinions hint that lenity may well "trump" deference principles in civil cases involving regulatory statutes, like the Code, that provide for both criminal and civil enforcement mechanisms. Other opinions of the Court hint the opposite. By pursuing tax lawyers and accountants criminally for planning and promoting tax shelters, the executive branch is plunging headlong into this bramble bush and may actually push the courts to decide between lenity and deference. The question that arises, therefore, is whether the courts could really choose the taxpayer-friendly rule of lenity over the pro-government deference doctrines for Code interpretation in civil as well as criminal enforcement actions. Such a choice could substantially undermine the government's efforts to protect the integrity of the Code far beyond the narrow scope of abusive tax shelters.

My purpose here is not to defend KPMG, the tax shelters it promoted, or indeed the merits of any particular transaction. Rather, my intent is to sound a note of caution: criminalizing tax shelter activities may have unforeseen consequences for more mundane tax enforcement efforts. To elaborate my concern, this essay proceeds in three parts. Part II presents the tension between the rule of lenity and deference to agency interpretations of statutes in greater depth, surveying the relevant judicial doctrines and their intersection and

¹⁸ See, e.g., *Bass*, 404 U.S. at 347–48; *Bell*, 349 U.S. at 83–84; *LAFAVE*, *supra* note 12; NORMAN J. SINGER, 3 SUTHERLAND STATUTORY CONSTRUCTION § 59.3 (6th ed. 2001).

¹⁹ See *Clark v. Martinez*, 543 U.S. 371 (2005); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992); *Crandon v. United States*, 494 U.S. 152 (1990); see also discussion *infra* notes 64–87 and accompanying text (discussing these cases).

²⁰ See, e.g., Elliot Greenfield, *A Lenity Exception to Chevron Deference*, 58 BAYLOR L. REV. 1, 38–47 (2006); Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 128–34 (1998); Cass Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2115–16 (1990). But see Dan Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 507–11 (1996) (suggesting that lenity and deference do not have to be mutually exclusive); Patricia G. Chapman, *Has the Chevron Doctrine Run Out of Gas? Senza Ripieni Use of Chevron Deference or The Rule of Lenity*, 19 MISS. C. L. REV. 115, 165–67 (1998) (proposing an approach for reconciling the two doctrines).

implications. Space limitations preclude a thorough exploration of how the Supreme Court should address the concerns raised herein. Nevertheless, Part III considers briefly various ways the Court might resolve a direct clash between lenity and deference. Finally, Part IV raises the possibility that the greater exercise of prosecutorial discretion might either avoid forcing the Court's hand or potentially influence the Court toward an outcome favorable to the government and the integrity of the Code.

II. THE PROBLEM

The Code includes many delegations of authority to the Treasury Department more or less to make regulatory law out of whole cloth. Section 1502 represents a classic example, giving the Secretary of the Treasury the authority to develop whatever regulations he deems necessary to reflect clearly the income tax liability of a group of affiliated corporations filing a single return, whether or not such regulations differ from those that apply to corporations filing separately.²¹ There can be no clash between the rule of lenity and judicial deference doctrines under such circumstances. Rather, the courts must defer to Treasury's regulations, because Congress has given Treasury and the courts nothing to interpret, and the only law to apply is that promulgated by Treasury.

On the other hand, occasionally Congress enacts a criminal statute with "terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."²² The Supreme Court holds such statutes unconstitutional and void for vagueness on due process grounds.²³ Of course, distinguishing between unconstitutional vagueness and ordinary ambiguity is often difficult.²⁴ Nevertheless, whatever the Code's limitations, unconstitutional vagueness is not likely to be among them.

To be clear, the variety of statutory ambiguity that implicates the tension between lenity and deference should not be mistaken either for radical statutory indeterminacy or the utter lack of statutory

²¹ See I.R.C. § 1502.

²² *United States v. Lanier*, 520 U.S. 259, 266 (1997).

²³ See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 51 (1999) (rejecting criminal statute as unconstitutionally vague); *Kolender v. Lawson*, 461 U.S. 352, 357-61 (1983) (invalidating penal statute on vagueness grounds).

²⁴ See LAFAVE, *supra* note 12, at § 2.2 (noting that "there is no exact borderline which can be drawn between a statute which is merely ambiguous and one which is unconstitutionally vague.").

clarity that raises vagueness doctrine concerns. Instead, the problem at hand arises when a provision in the Code, or any other regulatory statute with both criminal and civil enforcement mechanisms, is susceptible of two or more identifiable and equally defensible alternative interpretations. The question in such cases is whether the courts will automatically choose the more lenient or taxpayer-friendly of those options or defer to the government's preference for a different choice. This Part II explores this problem.

A. *Competing Doctrines: Lenity Versus Deference*

To understand the dilemma fully, one first must appreciate the competing legal doctrines governing statutory interpretation and judicial review. In the criminal context, the doctrine at issue is the rule of lenity, one of the classic canons of statutory construction. The civil context is more complicated, particularly in the tax area.

The doctrine or rule of lenity provides generally that criminal statutes should be strictly construed in favor of the defendant.²⁵ Hence, the courts commonly mention two rationales as supporting lenity as a canon of statutory construction. The first is that people deserve fair warning that particular activities will subject them to criminal penalties.²⁶ The second is that legislatures, rather than courts, should be responsible for defining precisely which actions are crimes.²⁷

Lenity is an old rule. In earlier centuries, the courts applied the doctrine quite broadly, largely because the sentence for most crimes was death.²⁸ That no longer being the case, the courts unsurprisingly have narrowed the scope of the doctrine's applicability.²⁹ The courts will not apply the rule of lenity in the context of a criminal prosecution merely because statutory ambiguity exists.³⁰ The courts will employ first their myriad interpretive tools to discern clear

²⁵ See, e.g., *Cleveland v. United States*, 531 U.S. 12, 25 (2000); *United States v. Bass*, 404 U.S. 336, 347–48 (1971); *Bell v. United States*, 349 U.S. 81, 83–84 (1955); see also *LAFAYETTE*, *supra* note 12, at § 2.2; *SINGER*, *supra* note 18, at § 59.3.

²⁶ See, e.g., *Crandon v. United States*, 494 U.S. 152, 158 (1990); *Liparota v. United States*, 471 U.S. 419, 427 (1985); *Bass*, 404 U.S. at 348; *McBoyle v. United States*, 283 U.S. 25 (1931).

²⁷ See, e.g., *Muscarello v. United States*, 524 U.S. 125, 150 (1998); *Crandon*, 494 U.S. at 158; *Moskal v. United States*, 498 U.S. 103, 131 (1990); *Bass*, 404 U.S. at 348.

²⁸ See *Livingston Hall, Strict or Liberal Construction of Criminal Statutes*, 48 HARV. L. REV. 748, 749–51 (1935) (detailing origins of the rule of lenity).

²⁹ See *Solan*, *supra* note 20, at 102–08 (identifying Justice Frankfurter as originating a narrower approach to lenity).

³⁰ See *Muscarello v. United States*, 524 U.S. 125, 138–39 (1998).

congressional intent.³¹ In so doing, they will not necessarily adopt the narrowest interpretation of a statute where clearly articulated legislative goals suggest a broader meaning.³² Thus, “[t]he rule of lenity applies only if, ‘after seizing everything from which aid can be derived,’ . . . [the reviewing court] can make ‘no more than a guess as to what Congress intended.’”³³ Nevertheless, the courts have an “instinctive distaste against men languishing in prison unless the lawmaker has clearly said that they should.”³⁴ If a court cannot ascertain that Congress clearly intended the defendant’s actions to be criminally sanctionable, then the doctrine of lenity requires the court to interpret the statute in the defendant’s favor.

Judicial review of agency interpretations of law in the civil context follows an entirely different, almost opposite, path from the rule of lenity. In this context, where Congress’s intent is not clear and a statute is ambiguous, judicial review emphasizes deference to the government to one degree or another, although there is some debate over precisely which deference standard applies in the tax context.³⁵

The most widely known deference doctrine is that of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,³⁶ with its two-part inquiry for evaluating agency interpretations of law: first, whether the statute being interpreted clearly and unambiguously resolves the issue; and if not, whether the administering agency’s interpretation of

³¹ See *Moskal v. United States*, 498 U.S. 103, 108 (1990) (“Instead, we have always reserved lenity for those situations in which a reasonable doubt persists about a statute’s intended scope even *after* resort to ‘the language and structure, legislative history, and motivating policies’ of the statute.”); see also *Muscarello*, 524 U.S. at 134–37 (considering related statutes, dictionary definitions, analogous cases, and legislative history); *United States v. Wells*, 519 U.S. 482, 490–95 (1997) (evaluating statutory text, common law use, and statutory history); *Smith v. United States*, 508 U.S. 223, 228–35 (1993) (weighing statutory scheme and context, dictionary definitions, and common use); see also SINGER, *supra* note 18, at § 59.8 (listing relevant considerations).

³² See, e.g., *United States v. R.L.C.*, 503 U.S. 291, 306 n.6 (1992); *Dixon v. United States*, 465 U.S. 482, 500 n.19 (1984); see also SINGER, *supra* note 18, at § 59.6 (listing relevant considerations).

³³ *Muscarello*, 524 U.S. at 138 (quoting several cases); see also *Callanan v. United States*, 364 U.S. 587, 596 (1961) (“The rule [of lenity] comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.”).

³⁴ HENRY J. FRIENDLY, BENCHMARKS 209 (1967).

³⁵ See generally, e.g., *Swallows Holding, Ltd. v. Commissioner*, 126 T.C. 96, 172–81 (2006) (Holmes, J. dissenting) (analyzing the disagreement over judicial deference in tax cases); *Hickman*, *supra* note 15, at 1556–63 (discussing the debate).

³⁶ 467 U.S. 837 (1984).

the statute is a permissible one.³⁷ The Court's more recent decision in *United States v. Mead Corp.* instructs that *Chevron* deference only applies if Congress has given the agency in question the authority to bind regulated parties with "the force of law" and if the agency has in fact "exercised that authority."³⁸

According to *Mead*, where *Chevron* deference does not apply, the courts are still required to employ the only somewhat less deferential standard of *Skidmore v. Swift*.³⁹ Under *Skidmore*, a reviewing court should evaluate for itself the appropriate level of judicial deference to extend toward an agency's interpretation of the law by considering several factors, including but not limited to "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 the power to persuade, if lacking power to control."⁴⁰

The *Chevron* and *Skidmore* deference doctrines have divergent justifications and serve 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.⁴¹ Thus, *Chevron* deference is both comparatively limited in scope and yet mandatory where a court finds the requisite delegation and exercise thereof. By contrast, *Skidmore* is a doctrine of judicial prudence, acknowledging that the courts often lack the resources and expertise to evaluate and appreciate fully the consequences of complex statutory schemes, and that agencies sometimes are simply better positioned to assess and apply alternative statutory

³⁷ See *id.* at 843–44.

³⁸ See *United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001).

³⁹ See *id.* at 234–35; see also *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980–82 (2005) (reiterating this aspect of *Mead*'s analysis); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (foreshadowing *Mead*'s application of *Skidmore*).

⁴⁰ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). 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." *Mead Corp.*, 533 U.S. at 228. See generally Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PENN. L. REV. 549 (1985) (analyzing at length the state of judicial review pre-*Chevron* under the *Skidmore* regime).

⁴¹ *Mead Corp.*, 533 U.S. at 231 n.11 (citing Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 872 (2001)).

interpretations.⁴² A court satisfied that an agency is not otherwise behaving arbitrarily or unreasonably is often sensible to defer to the agency's greater expertise and, sometimes, extensive interpretive efforts.⁴³ Nevertheless, *Skidmore* leaves the degree of deference to the reviewing court's judgment and discretion.

There is some debate over the applicability of *Mead*, *Chevron*, and *Skidmore* in the tax area. A few years prior to deciding *Chevron*, in *National Muffler Dealers Ass'n v. Commissioner*, the Supreme Court articulated a standard for deference in tax cases that seems to incorporate elements of both *Chevron* and *Skidmore*.⁴⁴ *National Muffler* speaks in terms of delegation and "serious deference" yet simultaneously appears to leave the degree of deference to the court's evaluation of various factors.⁴⁵ The circuit courts of appeal and the Tax Court are divided on the relationship between *Chevron* and *National Muffler*,⁴⁶ and scholarly attempts to resolve the jurisprudential mess have failed similarly to achieve consensus.⁴⁷

So long as the meaning and role of *National Muffler* in the broader deference doctrine scheme remains unclear, the relationship between lenity and *National Muffler* is even more indeterminate. Nevertheless, nothing about the *National Muffler* approach to deference suggests that reconciling lenity with that deference doctrine

⁴² See *Skidmore*, 323 U.S. at 139–40.

⁴³ 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 section 706(2)(A) and the hard look doctrine. *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983) (internal citations omitted); see also *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980–82 (2005) (discussing relationship between *Chevron* and hard look review); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157–58 (1991) (noting applicability of both *Skidmore* and hard look review).

⁴⁴ See *Nat'l Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 475–77 (1979).

⁴⁵ *Id.* at 476.

⁴⁶ 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. Commissioner*, 245 F.3d 149, 154 n.8 (2d Cir. 2001) (same).

⁴⁷ See, e.g., 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); Mitchell M. Gans, *Deference and the End of Tax Practice*, 36 REAL PROP. PROB. & TR. J. 731, 758 (2002); Irving Salem et al., *Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717, 724–26 (2004); 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).

would deviate significantly from doing so with *Chevron* or *Skidmore*.⁴⁸ I have argued elsewhere, moreover, that *National Muffler* represents nothing more than a particularly articulate expression of the Court's more general views about *Skidmore* and judicial deference in the years leading up to its decision in *Chevron* and, thus, that *National Muffler* retains no significance independent of the *Mead/Chevron/Skidmore* framework.⁴⁹ Accordingly, in my view, the following analysis of the relationship between *Chevron*, *Skidmore*, and the rule of lenity incorporates *National Muffler* deference as well.

The difference between the lenity and deference doctrines is not merely in how they resolve statutory ambiguity, but more fundamentally how courts applying them perceive the task at hand. In its lenity jurisprudence, the Court emphasizes conclusive resolution of statutory meaning.⁵⁰ If a statute is susceptible of more than one interpretation, and thus ambiguous, the reviewing court must choose between the potential options. The rule of lenity operates as a tie breaker, guiding the court's interpretive choice; but the Court's goal in applying the doctrine is "to help give authoritative meaning to statutory language."⁵¹ Thus, to a court thinking in lenity terms, an

⁴⁸ It is possible, however, that an argument may exist for treating tax differently than other regulatory contexts with respect to this particular issue. The courts have on occasion recognized a canon of construing ambiguous tax provisions against the drafter. *See, e.g.*, *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 839 (2001) (Thomas, J. concurring and Stevens, J. dissenting) (noting the canon and citing several cases). Many question the ongoing vitality of this canon. *See* Steve R. Johnson, *Should Ambiguous Revenue Laws Be Construed In Favor of Taxpayers?*, 10 APR NEV. LAW. 15, 15–16 (2002) (surveying the canon's history). Moreover, like lenity, such a rule is arguably inconsistent with the notion of judicial deference toward Treasury or Service interpretations of the Code regularly counseled by the courts. The Court expressly relied on *Chevron* twice in post-*Chevron* tax cases. *See, e.g.*, *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 219 (2001); *Atl. Mut. Ins. Co. v. Commissioner*, 523 U.S. 382, 387 (1998); *Cottage Sav. Ass'n v. Commissioner*, 499 U.S. 554, 562–63 (1991); *United States v. Boyle*, 469 U.S. 241, 246 n.4 (1985). Nevertheless, the potential for combining this doctrine with that of lenity remains an interesting proposition to consider.

⁴⁹ *See Hickman, supra* note 15, at 1589.

⁵⁰ *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005) (describing the Court's task as choosing between two plausible interpretations); *Chapman v. United States*, 500 U.S. 453, 463–64 (1991) (emphasizing that lenity is a rule of statutory construction and not a general policy of leniency toward defendants).

⁵¹ *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 n.10 (1992); *see also* *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (emphasizing consistency of interpretation); *Bryan v. United States*, 524 U.S. 184, 205 (1998) (stressing "uniformity in the interpretation of criminal statutes").

ambiguous statute ultimately can only have one meaning: the more lenient one.⁵²

By contrast, the *Chevron* doctrine in particular is premised on an assumption of interpretive flexibility on the part of executive branch or agency officials.⁵³ By this thinking, statutory ambiguity reflects the opportunity for agency policy choice.⁵⁴ If a statute supports more than one interpretation and *Chevron* applies, then a reviewing court must defer to the government's preference among the permissible alternatives, even if the court thinks another interpretation might be better. If *Skidmore* applies, then a court has more flexibility to overrule an agency's choice. Regardless, both doctrines leave room for an agency to change its mind and pick a different interpretation, so long as it explains its basis for doing so.⁵⁵ Moreover, after the Supreme Court's recent decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, an agency can even replace an interpretation adopted previously by the courts.⁵⁶ Thus, interpreting ambiguous statutes in the civil, regulatory context is much more focused on policy choice and flexibility, with agencies making the interpretive decisions and courts primarily policing agencies for arbitrariness rather than intruding into the policy-making arena. In short, even under *Skidmore*, consistency of interpretation is only relevant as a factor in evaluating the reasonableness of agency action rather than as an end in itself.

⁵² Of course, one lower court's interpretation does not necessarily bind another lower court. Nevertheless, a lower court thinking in lenity terms presumably endeavors to discern the one meaning it believes a higher court applying the same rule would find to be the "correct" one.

⁵³ See, e.g., *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980–82 (2005) (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").

⁵⁴ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984) (linking statutory ambiguity to policy choice).

⁵⁵ Although *Skidmore* includes consistency of agency interpretation among its evaluative factors, no one *Skidmore* factor is determinative, and the courts do defer under *Skidmore* to thoroughly considered and well reasoned changes in interpretation. See, e.g., *Warner-Lambert Co. v. United States*, 425 F.3d 1381, 1385–86 (Fed. Cir. 2005) (deferring to agency's reclassification of imported merchandise under *Skidmore*); *Heartland By-Products, Inc. v. United States*, 264 F.3d 1126, 1136 (Fed. Cir. 2001); see also RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE § 6.4 (4th ed. 2002) (noting that "no single factor is dispositive" in *Skidmore* analysis).

⁵⁶ 545 U.S. 967, 980–83 (2005) (holding that *Chevron* applied and that the courts must defer to a reasonable FCC construction of the Communications Act that differed from an earlier appellate court interpretation).

B. Case Law at the Crossroads

Although the courts have barely touched on the relationship between *Skidmore* deference and lenity,⁵⁷ they have clearly rejected the applicability of *Chevron* deference in criminal cases, for two reasons.⁵⁸ First, the Department of Justice, which handles criminal prosecutions for the federal government and in so doing interprets criminal statutes, nevertheless does not “administer” the criminal code.⁵⁹ Justice Scalia made this observation more than a decade before the Court decided *Mead*; but *Mead*’s emphasis on congressional delegation of administrative authority as a prerequisite for *Chevron* deference merely adds weight to this rationale.⁶⁰ Second, in enforcing criminal statutes, government prosecutors have an incentive to construe them broadly, meaning that to defer to such interpretations would “replac[e] the doctrine of lenity with a doctrine of severity.”⁶¹ While he did not mention *Skidmore* deference by name, Justice Scalia identified just this reason for denying “any persuasive effect” to the Justice Department’s interpretations of the criminal code.⁶² It is well known that Justice Scalia regards *Skidmore* deference as anachronistic;⁶³ but his second reason for denying

⁵⁷ The Supreme Court has never discussed this relationship, and the courts of appeals have barely mentioned it as well. See *United States v. One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416, 419–20 & n.3 (6th Cir. 2006) (recognizing the issue implicitly, but finding all of *Chevron*, *Skidmore*, and lenity to be inapplicable).

⁵⁸ See, e.g., *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) (concluding inappropriateness of deference in criminal cases); see also Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 490 (1996) (acknowledging the proposition despite arguing for *Chevron*’s application in the criminal context).

⁵⁹ *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring); see also *United States v. Welch*, 327 F.3d 1081, 1092–93 (10th Cir. 2003) (quoting Justice Scalia’s concurrence in *Crandon*); *Dolfi v. Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998) (same).

⁶⁰ See *United States v. Mead Corp.*, 533 U.S. 218, 227–31 (2001).

⁶¹ *Crandon*, 494 U.S. at 177.

⁶² *Id.*

⁶³ See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 250 (2001) (Scalia, J. dissenting); *Christensen v. Harris County*, 529 U.S. 576, 589 (2000) (Scalia, J. concurring); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 259–60 (1991) (Scalia, J.

Chevron deference in criminal cases logically extends to the *Skidmore* deference doctrine as well.

In *Crandon v. United States*, the Supreme Court went a small step further than merely applying lenity instead of *Chevron* deference in criminal cases.⁶⁴ *Crandon* concerned severance compensation paid by Boeing, Inc. to several employees who were resigning to take positions with the federal government.⁶⁵ A provision in the criminal code precludes anyone outside the government from paying and any federal government employee from receiving “any contribution to or supplementation of salary, as compensation for” services rendered as a government employee.⁶⁶ The government contended that Boeing’s severance payments to its outgoing employees fell within the scope of this prohibition.⁶⁷ Rather than criminally prosecuting Boeing and the employees, however, the government instead pursued a civil action for monetary relief and impoundment of the compensation paid.⁶⁸ Resolving the case required evaluating the government’s interpretation of the criminal code.⁶⁹ In so doing, the Court noted that both the government’s reading of the statute and Boeing’s were consistent with statutory language, history, and goals.⁷⁰ Accordingly, the Court concluded that “because the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute’s coverage.”⁷¹ Thus, the Court rejected the government’s broader interpretation of the statute and held in favor of Boeing and its former employees.⁷²

The Court broadened the scope of lenity’s applicability a bit further still in *United States v. Thompson/Center Arms Co.*⁷³ Like *Crandon*, *Thompson/Center Arms* was a civil case.⁷⁴ Yet whereas

concurring).

⁶⁴ *Crandon v. United States*, 494 U.S. 152 (1990).

⁶⁵ *See id.* at 154–55.

⁶⁶ 18 U.S.C. § 209(a) (1990); *see also Crandon*, 494 U.S. at 154 & n.1 (quoting statutory language).

⁶⁷ *See Crandon*, 494 U.S. at 156.

⁶⁸ *See id.*

⁶⁹ *See id.* at 158 (defining the question as “whether [section] 209(a) applies to a severance payment that is made to encourage the payee to accept Government employment, but that is made before the payee becomes a Government employee”).

⁷⁰ *See id.* at 159–68.

⁷¹ *Id.* at 158.

⁷² *See id.* at 168.

⁷³ 504 U.S. 505 (1992).

⁷⁴ *Thompson/Center Arms Co.*, 504 U.S. at 506–07.

Crandon required interpreting the criminal code, *Thompson/Center Arms* concerned an interpretation of a regulatory statute — the National Firearms Act.⁷⁵ In fact, though not involving the income tax laws, *Thompson/Center Arms* was a tax case involving an excise tax provision in the Code.⁷⁶

Among other things, the National Firearms Act imposes a per-unit tax upon manufacturers of “firearms” and for this purpose defines that term to include short-barreled rifles but not long-barreled rifles. *Thompson/Center Arms* packaged and sold together a pistol, shoulder stock, and 21-inch barrel that a purchaser could assemble to create either a short- or long-barreled rifle. The Bureau of Alcohol, Tobacco and Firearms concluded that, in packaging and selling such a kit, *Thompson/Center Arms* “made” a “firearm” subject to the per-unit tax. *Thompson/Center Arms* paid the tax and sued for a refund, challenging the Bureau’s interpretation of the statute.

The National Firearms Act provides for both civil and criminal enforcement of its provisions.⁷⁷ The National Firearms Act also requires a manufacturer of firearms to register with the Secretary of the Treasury each “firearm” that it “makes,” with failure to do so punishable by imprisonment and a fine.⁷⁸ Thus, while the case before the Court was a civil action involving the respondent’s tax liability, the Court observed that the government could, in the future, rely upon the exact same statutory term in question as the basis for criminal prosecution. Citing *Crandon*, the Court deemed it “proper, therefore, to apply the rule of lenity and resolve the ambiguity in *Thompson/Center’s* favor.”⁷⁹

Since deciding *Thompson/Center Arms*, the Court has reiterated its holding with respect to lenity’s scope. In *Leocal v. Ashcroft*, an immigrant deportation case, the Court found that the relevant provision of the Immigration and Nationalization Act unambiguously supported the immigrant *Leocal’s* claim.⁸⁰ The Court further observed that lenity would require it to interpret the statute in the petitioner’s favor regardless because the provision in question had “both criminal and noncriminal applications.”⁸¹ Citing

⁷⁵ See *id.*; I.R.C. § 5801.

⁷⁶ *Thompson/Center Arms Co.*, 504 U.S. at 506–07.

⁷⁷ *Id.* at 517.

⁷⁸ *Id.* at 507–08.

⁷⁹ *Id.* at 518; see also *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005) (noting same); *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (noting same).

⁸⁰ *Leocal*, 543 U.S. at 11.

⁸¹ See *id.* at 11–12 n.8.

Thompson/Center Arms, the Court declared that, “[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.”⁸² In *Clark v. Martinez*, the Court made a similar point. “It is not at all unusual to give a statute’s ambiguous language a limiting construction called for by one of the statute’s applications, even though other of the statute’s applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern.”⁸³

Nevertheless, the Court’s trek down the slippery slope of lenity’s applicability is not unidirectional. In *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, the Court was faced with yet another civil case involving a hybrid regulatory statute with both civil and criminal enforcement potential — the Endangered Species Act.⁸⁴ The regulated parties against whom the government sought to apply the Act cited *Thompson/Center Arms* and lenity as requiring a narrower interpretation of the statute.⁸⁵ Here, however, the government’s position was articulated in a longstanding regulation, promulgated through notice-and-comment rulemaking and published in the Code of Federal Regulations.⁸⁶ The Court rejected the rule of lenity, employed *Chevron* deference, and distinguished from *Thompson/Center Arms* on the ground that the EPA’s regulation provided regulated parties the desired notice that their actions would subject them to criminal penalties.⁸⁷

In summary, it is clear that the Court does not limit lenity’s scope to criminal cases involving interpretations of the criminal code. With *Crandon*, the Court concluded that the rule of lenity is properly applied in civil cases interpreting the criminal code; and in *Thompson/Center Arms Co.*, the Court extended the doctrine even further to a civil case interpreting a regulatory statute that could also support criminal prosecution. However, in *Sweet Home*, another civil case involving a hybrid regulatory statute, the Court expressly rejected the rule of lenity in favor of *Chevron* deference, distinguishing from *Thompson/Center Arms* on the ground that the EPA’s interpretation was communicated in a longstanding regulation.

⁸² *Id.*

⁸³ 543 U.S. 371, 380 (2005) (citing both *Leocal* and *Thompson/Center Arms*).

⁸⁴ 515 U.S. 687, 690, 721 (1995).

⁸⁵ *See id.* at 704 n.18.

⁸⁶ *See id.* at 703–04.

⁸⁷ *See id.* at 704 n.18.

The Court's approach in these cases, and particularly in *Sweet Home*, reveals a tension between the fair warning and legislative function policies driving the rule of lenity. If fair warning is the Court's primary concern in deciding when to apply the rule of lenity, then the line the Court drew between lenity and deference in *Sweet Home* is a logical one. In the modern era, the courts have supported congressional power to delegate to administrative agencies what is essentially legislative authority to make the law, albeit within the parameters of the relevant statutory language.⁸⁸ Thus, when an agency promulgates regulatory language interpreting a statute it administers, then unless the regulation exceeds the scope of the agency's mandate or is procedurally flawed, the regulation will carry the same legal force as the statute.⁸⁹ In other words, while the *statute* may be ambiguous, the *law* is not, and fair warning concerns are satisfied.⁹⁰

The Court's *Sweet Home* reasoning is much less consistent with lenity's policy of requiring the legislature to decide which actions are criminally punishable, however. Most regulatory matters are susceptible to good-faith disagreements over how best to accomplish legislative objectives. Congress adopts broad regulatory statutes and delegates the responsibility for administering them to agencies in part because agencies have more expertise and are thus better positioned to evaluate alternative methods for accomplishing statutory goals.⁹¹

⁸⁸ See *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 488–89 (2001) (Stevens, J. concurring in part and concurring in the judgment) (accusing the majority of disingenuousness for declining to recognize such delegations as of legislative authority); *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”); see also Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2099–100, 2103–09 (2004) (discussing congressional delegation of legislative power and the untenability of the nondelegation doctrine).

⁸⁹ See, e.g., RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE § 6.1 (4th ed. 2002) (describing agency legislative rules as having “the same binding effect as statutes”).

⁹⁰ See Sanford N. Greenberg, *Who Says It's a Crime?: Chevron Deference to Agency Interpretations of Regulatory Statutes that Create Criminal Liability*, 58 U. PITT. L. REV. 1, 42–60 (1996) (arguing that judicial deference can be employed to satisfy fair warning concerns).

⁹¹ See, e.g., *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (discussing agency expertise as a reason for delegating administrative authority).

Hence, except to the most committed ideologues, an agency's choice among reasonable statutory interpretations merely reflects the agency's judgment as to which of the available alternatives will best serve congressional intent. By contrast, deciding that particular actions should be criminally punishable is an act of collective moral judgment and condemnation.⁹² As designated representatives of the people, members of Congress are both more in touch with communal perceptions of "right" and "wrong" and more accountable to the public for the moral judgments they make than agencies are. While the Supreme Court has not explicitly made this link, other courts and scholars have highlighted the moral element of criminalization as a further reason for not extending judicial deference to Justice Department interpretations of the criminal code.⁹³ Yet by deferring to the EPA's interpretation of the Endangered Species Act, the Court in *Sweet Home* arguably allowed the EPA to step directly into that role of moral arbiter.

In addition, *Sweet Home* leaves open the question of what happens when a regulated party finds itself in a situation with an ambiguous statute and without such clear and legally-binding regulatory guidance. Agencies often interpret statutes for the first time in the process of enforcing them. Alternatively, case law from one or more lower courts may offer guidance but not bind taxpayers

⁹² See, e.g., *Muscarello v. United States*, 524 U.S. 125, 149–50 (1998) (raising this concern); *Evans v. United States*, 504 U.S. 255, 259 (1992) (same); *United States v. Bass*, 404 U.S. 336, 348 (1971) (same); see also *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J. dissenting) (objecting even to the use of legislative history to determine statutory meaning before applying the rule of lenity for similar reasons).

⁹³ See, e.g., *United States v. McGoff*, 831 F.2d 1071, 1077 (D.C. Cir. 1987) (observing that the interpretation of criminal statutes is "far outside *Chevron* territory"); Elliot Greenfield, *A Lenity Exception to Chevron Deference*, 58 BAYLOR L. REV. 1, 60 (2006) (observing that "the agency has no particular expertise in determining community values"); Lisa Sachs, *Strict Construction of the Rule of Lenity in the Interpretation of Environmental Crimes*, 5 N.Y.U. ENVTL. L.J. 600, 631–34 (1996) (contending that the "special judgments" involved in defining criminal acts are outside the scope of agency expertise); Brian Slocum, *RICO and the Legislative Supremacy Approach to Federal Criminal Lawmaking*, 31 LOY. U. CHI. L.J. 639, 651 n.71 (2000) (arguing that, "in situations involving the moral condemnation of the community and the loss of liberty," legislatures rather than agencies should decide which actions are criminal). But see Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997) (arguing generally that regulatory matters are not so morally neutral); Dan M. Kahan, *Reallocating Interpretive Criminal-Lawmaking Power Within the Executive Branch*, 61 LAW & CONTEMP. PROBS. 47 (1998) (reasoning that the executive branch is better suited to shaping the contours of federal criminal law).

from other jurisdictions. In still other instances, agencies resolve statutory ambiguity through less formal, legally non-binding formats. In the tax context, revenue rulings and notices particularly serve this purpose.

In light of *Sweet Home*, where Treasury has promulgated a regulation that pre-dates and clearly negates a given tax shelter, it seems unlikely that a court would apply the rule of lenity to disregard that regulation. Whether abusive or not, cutting-edge tax transactions and shelters tend not to ignore established regulations, however. Instead, they target ambiguities in the regulations themselves, or provisions in the Code for which there are no established regulations. Thus, statutory interpretation in the tax shelter area falls squarely within the realm of the open question created by *Thompson/Center Arms Co.*

Post-*Mead*, it is apparent that the Court's post-*Chevron* perceptions regarding congressional delegation do not extend to agency interpretations lacking the force and effect of law. An agency employing such interpretive formats is not exercising congressionally-delegated authority to make the law, but rather is merely interpreting the law in its executive enforcement capacity. Hence, while *Skidmore* or, in tax cases, *National Muffler* may apply to grant the agency some degree of deference, any claim that such formats render the law unambiguous is substantially weaker.

In short, the limited reasoning of *Sweet Home* — that a long-standing regulation renders the law clear even if the statute is not — simply does not extend to nonbinding agency interpretations like revenue rulings, notices, and chief counsel advice. Moreover, where the Service first advances its interpretation of the tax laws either through or simultaneously with enforcement efforts, as is often the case with respect to tax shelters, the rationale of *Sweet Home* would be wholly inapplicable.

C. KPMG: A Case in Point

The KPMG case potentially brings this issue to the forefront. Known officially in the United States District Court for the Southern District of New York as *United States v. Stein*, this case involves the criminal prosecution of several former partners and managers of the KPMG accounting firm as well as attorney R.J. Ruble, a former partner in the New York law firm of Sidley, Austin, Brown & Wood, for conspiracy to defraud the Service in connection with the BLIPS,

FLIP, OPIS, and SOS tax shelters.⁹⁴

It is beyond the scope of this essay to explore the legal validity of these tax shelters, whether in template form or as executed with respect to individual taxpayers. The KPMG shelters are quite complicated. There are many factual and legal bases on which they could be declared legally invalid. Among other things, however, the BLIPS, FLIP, and OPIS shelters all are premised upon at least one interpretation of arguably ambiguous statutory language that, in turn, lacks regulatory clarification.⁹⁵

1. BLIPS

The BLIPS, or Bond Linked Issue Premium Structures, tax shelter was designed to create a sizeable capital loss for a U.S. taxpayer with a substantial existing or anticipated capital gain to offset.⁹⁶ To accomplish this goal, parties to the transaction would

⁹⁴ The indictment also alleges violations of Code section 7201, which makes a felony any “willful[] attempt[] in any manner to evade or defeat any tax” under the Code, and Code section 7206(1) and (2), which criminalize both willfully making false statements in connection with a tax return and willfully aiding in the preparation of a false tax return. Superseding Indictment, *United States v. Stein*, N. S1 05 Crim. 0888(LAK), 2005 WL 4168176 (Oct. 17, 2005).

⁹⁵ The SOS shelter addressed in the KPMG indictment actually represents several different tax shelters, all of which generated tax losses through pre-arranged steps, but under different names and agreements rather than the template approach of BLIPS, FLIP, and OPIS. *See, e.g.*, Memorandum of Law in Support of Defendants’ Joint Motion to Strike References to the “SOS” Strategies in the Indictment, *United States v. Stein*, No. 05 Cr. 888(LAK), 2005 WL 4156215 (2005) (arguing that SOS is not one but several different transaction structures); Superseding Indictment, *United States v. Stein*, N. S1 05 Crim. 0888(LAK), 2005 WL 4168176 (Oct. 17, 2005) (including under the SOS indictment transactions labeled Short Option Strategy, Spread Option Strategy, Split Option Strategy, SOS, Binary Option, Digital Option, Gain Mitigator, Loss Generator, COINS, BEST, and FX Transaction). Space constraints and comparative lack of readily available in-depth legal analysis preclude discussion of all of the transaction structures that fall under the SOS label.

⁹⁶ *See* MINORITY STAFF OF THE PERMANENT SUBCOMM. ON INVESTIGATIONS, U.S. SENATE COMM. ON GOV’T AFFAIRS, U.S. TAX SHELTER INDUSTRY: THE ROLE OF ACCOUNTANTS, LAWYERS, AND FINANCIAL PROFESSIONALS, FOUR KPMG CASE STUDIES: FLIP, OPIS, BLIPS, AND SC2, at Appendix A, 120, available at 2003 TNT 223–20 (Nov. 19, 2003) (hereinafter PSI TAX SHELTER REPORT). The Subcommittee derived this report from hearings held in 2003. *See U.S. Tax Shelter Industry: The Role of Accountants, Lawyers, and Financial Professionals: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs.*, 108th Cong. (2003) (four vols.) (hereinafter *PSI Tax Shelter Hearings*).

follow a series of pre-established steps.⁹⁷

First, a U.S. taxpayer would establish a single-member limited liability company (LLC) to obtain a fixed-rate, non-recourse loan of \$100 with a seven-year term. In exchange for agreeing to pay a substantially above-market rate of interest on that loan, the LLC would receive from the bank an additional "loan premium" of \$50, equal to the net present value of all of the interest payments in excess of a market rate of interest over the life of the loan. The LLC would agree to pay a penalty equal to the unamortized loan premium if it repaid the loan prior to the end of its term and would also accept various restrictions on its use of the loan funds (intended to reduce the bank's credit risk). After the LLC and the bank entered into the loan, the LLC and two affiliates of the tax shelter promoter would form a partnership. The LLC would contribute the loan proceeds and loan premium totaling \$150 in exchange for a 90% interest in the partnership, and the partnership would assume the LLC's obligations under the loan. The partnership would invest the loan proceeds in low-risk investments. The partnership additionally would enter into a swap transaction with the bank in which the partnership agreed to pay a floating market rate on the loan and the bank agreed to pay the original, above-market rate on the face amount of the loan. From the perspective of the partnership, the swap would effectively reduce the interest rate on the loan to a market-based rate. Finally, after several weeks the partnership would unwind, repaying the loan plus the prepayment penalty and distributing any remaining assets to its partners, including the LLC.

Among other legal gray areas, the BLIPS transaction is designed to exploit ambiguity in the meaning of the word "liabilities" as it is used in section 752.⁹⁸ Pursuant to sections 722 and 752, the U.S. taxpayer (through the LLC) takes its partnership interest with a basis equal to the cash contributed of \$150 less the amount of liabilities assumed by the partnership.⁹⁹ The interpretive question is whether, for purposes of section 752, the amount of liabilities assumed is the stated loan principal amount of \$100 or the stated principal plus loan

⁹⁷ See, e.g., I.R.S. Notice 2000-44, 2000-2 C.B. (describing the structure and declaring it abusive); PSI TAX SHELTER REPORT, *supra* note 96, at 111-21 (summarizing the BLIPS structure by name).

⁹⁸ See KPMG Tax Opinion Letter Template Dated Dec. 31, 1999, 1 *PSI Tax Shelter Hearings*, *supra* note 96, at 684, 705-09 (citing and discussing cases and revenue rulings relevant to the BLIPS shelter).

⁹⁹ See I.R.C. § 752(b).

premium totaling \$150.¹⁰⁰ In other words, is the loan premium a liability as that term is used by section 752? If so, then the transaction is more or less a wash for the U.S. taxpayer, as the liabilities assumed by the partnership would equal the cash contributed to the partnership, leaving the U.S. taxpayer at or near zero basis in its partnership interest. If the premium is not a liability, however, the U.S. taxpayer's basis in the partnership interest will be \$50. When the partnership unwinds and uses all of its cash to pay the premium as a prepayment penalty in addition to the loan principal, the U.S. taxpayer will realize a "loss" on its "investment" in the partnership of \$50. The Service maintains that the loan premium represents additional debt and thus a liability for purposes of section 752.¹⁰¹ Proponents of the BLIPS shelter contend that the premium is at best a contingent liability and point to cases and rulings in force at the time that KPMG sold the shelters holding that contingent liabilities are not liabilities under section 752.¹⁰²

One problem for the government, however, is that section 752 does not define "liabilities," and the Treasury Department failed to propose clarifying regulatory language until 2003, when it was already battling the BLIPS shelter.¹⁰³ At the time that KPMG actively promoted the BLIPS structure, legal guidance concerning the meaning of "liabilities" under section 752 consisted of case law and a few revenue rulings that arguably support KPMG's interpretation.¹⁰⁴ In prosecuting the BLIPS shelter, the government relies heavily on the retroactive application of Treas. Reg. section 1.752-6, which

¹⁰⁰ See KPMG Tax Opinion Letter Template Dated Dec. 31, 1999, 1 *PSI Tax Shelter Hearings*, *supra* note 96, at 684, 708–10 (applying law to BLIPS shelter facts).

¹⁰¹ See I.R.S. Notice 2000-44, 2000-2 C.B. 255 (explaining Service objections to BLIPS shelter).

¹⁰² See KPMG Tax Opinion Letter Template Dated Dec. 31, 1999, 1 *PSI Tax Shelter Hearings*, *supra* note 96, at 684, 708–10 (applying law to BLIPS shelter facts); Memorandum of Law in Support of Defendants' Motion to Strike Allegations in Counts One Through Forty of the Indictment, Pursuant to Rule 7(D) of the Federal Rules of Criminal Procedure, *United States v. Stein*, 1:05-cr-00888-LAK at 18–24 (S.D.N.Y. Jan. 12, 2006), 2006 WL 1868180; Plaintiffs Motion for Partial Summary Judgment and Memorandum In Support, *Klamath Strategic Investment Fund, LLC v. United States*, 440 F. Supp. 2d 608 (E.D. Tex. 2006) (No. 5:04-cv-00278-TJW), 2006 WL 2785819.

¹⁰³ See T.D. 9062, 2003-2 C.B. 46 (adopting Temp. Treas. Reg. § 1.752-6T (2003)); Assumption of Partner Liabilities, 68 Fed. Reg. 37434 (proposed June 23, 2003) (proposing regulations).

¹⁰⁴ See *Klamath Strategic Inv. Fund, LLC v. United States*, 440 F. Supp. 2d 608, 615–17 (E.D. Tex. 2006).

Treasury both proposed and finalized years after KPMG sold the BLIPS shelter.¹⁰⁵

The BLIPS shelter is susceptible to challenge on a variety of grounds beyond the meaning of section 752, including a lack of economic substance.¹⁰⁶ In *Klamath Strategic Investment Fund, LLC v. United States*, the only federal district court to issue a substantive opinion to date on the BLIPS structure resolved the interpretation of section 752 in favor of the taxpayers.¹⁰⁷ *Klamath* is a civil case, not a criminal one, and the *Klamath* court did not address the question of lenity versus deference in reaching its conclusion.¹⁰⁸ Instead, the court's analysis focused primarily upon whether retroactively applying the regulation interpreting section 752 represented an abuse of discretion.¹⁰⁹ In addition, the *Klamath* court made its determination only in considering a motion for partial summary judgment.¹¹⁰ The court ultimately decided the case in favor of the government on the basis that the transactions as executed lacked economic substance, though the court also found various civil penalties assessed by the government to be inapplicable.¹¹¹

In short, no court has yet employed lenity or deference to resolve the interpretive question at the heart of the BLIPS transaction; and the courts may be able to avoid doing so because of other issues the shelter raises. Nevertheless, if one accepts the *Klamath* court's holding that the government abused its discretion in retroactively

¹⁰⁵ See Treas. Reg. § 1.752-6 (2005); T.D. 9207, 2005-1 C.B. 1344 (finalizing temporary regulation and applying it retroactively to liabilities assumed after October 18, 1999); T.D. 9062, 2003-2 C.B. 46 (adopting temporary regulation); see also United States' Response to Plaintiffs' Motion for Partial Summary Judgment and Brief in Support of United States' Cross-Motion for Partial Summary Judgment, *Klamath Strategic Inv. Fund, LLC v. United States*, 440 F. Supp. 2d 608 (E.D. Tex. 2006) (No. 5:04-cv-00278-TJW), at 23–25, 2006 WL 2785819 (relying on same regulation in civil enforcement action).

¹⁰⁶ See, e.g., Justice Department Bill of Particulars, *United States v. Stein*, 1:05-cr-00888-LAK (S.D.N.Y. Apr. 21, 2006) (elaborating government allegations that BLIPS was fraudulent as designed).

¹⁰⁷ See *Klamath Strategic Inv. Fund, LLC v. United States*, 440 F. Supp. 2d 608, 625–26 (E.D. Tex. 2006).

¹⁰⁸ The *Klamath* court did discuss the deference due to Treasury regulations promulgated after the transaction in question took place, but instead applied an abuse of discretion standard to invalidate the retroactive application of the regulation. See *id.* at 625.

¹⁰⁹ See *id.* at 625.

¹¹⁰ See *id.* at 610.

¹¹¹ See *Klamath Strategic Inv. Fund, LLC v. United States*, __ F. Supp. 2d __, 2007 WL 283790 (E.D. Tex. 2007).

applying Treas. Reg. section 1.752-6, and if taxpayers manage to prevail on the economic substance and other issues, then liability — whether criminal or civil — rests on how a court evaluates the meaning of liabilities under section 752.

2. FLIP and OPIS

FLIP, or Foreign Leveraged Investment Program, and OPIS, or Offshore Portfolio Investment Strategy, are two names for what is essentially the same transaction structure.¹¹² The purpose of this tax shelter, much like BLIPS, was to generate a sizeable capital loss for a U.S. taxpayer with a substantial existing or anticipated capital gain to offset.¹¹³ The FLIP and OPIS transactions employ nominally different steps, but both rely on the same strategy of shifting asset basis to the U.S. taxpayer from an offshore entity.¹¹⁴

The basic transaction structure is as follows.¹¹⁵ KPMG would establish an Offshore Shell Company in the Cayman Islands or another tax haven with no corporate or income tax.¹¹⁶ Offshore Shell would borrow funds on a nonrecourse basis from Foreign Bank and use those funds to acquire Foreign Bank stock. Some weeks later, the U.S. taxpayer would acquire an option to purchase an 85% ownership

¹¹² See PSI TAX SHELTER REPORT, *supra* note 96, at 2–3, 43; Email from Jeff Stein Dated Mar. 14, 1998, 2 *PSI Tax Shelter Hearings*, *supra* note 96, at 910–14 (comparing FLIP and OPIS shelters); Memorandum from Robert D. Simon Dated Feb. 23, 1998, 2 *PSI Tax Shelter Hearings*, *supra* note 96, at 891, 893 (noting that “[t]he only thing that really distinguishes OPIS (from FLIPS) from a tax perspective is the use of an instrument that is purported to be a swap.”).

¹¹³ See PSI TAX SHELTER REPORT, *supra* note 96, at 2–3, 42; Reasonable Basis Analysis of the IRC Section 6111(c) Tax Shelter Registration Requirements for “OPIS,” 3 *PSI Tax Shelter Hearings*, *supra* note 96, at 2238 (providing overview of the OPIS strategy).

¹¹⁴ See, e.g., Email from Jeff Stein Dated Mar. 14, 1998, 2 *PSI Tax Shelter Hearings*, *supra* note 96, at 910, 911 (noting basis-shift focus of both FLIP and OPIS); see also Calvin H. Johnson, *Tales from the KPMG Skunk Works: The Basis-Shift or Defective-Redemption Shelter*, 108 TAX NOTES 431, 433 (July 25, 2005) (noting that the FLIP and OPIS shelters share the same basis-shifting goal).

¹¹⁵ See KPMG Tax Opinion Letter Template Dated July 2, 1998, 2 *PSI Tax Shelter Hearings*, *supra* note 96, at 990, 990–93 (summarizing FLIP/OPIS transaction steps); see also Johnson, *supra* note 114, at 434–35 (same).

¹¹⁶ Planning documents for FLIP/OPIS and scholarly analysis of these shelters assume the use of a Cayman entity. See, e.g., Memorandum from Bob Simon and John Harris Dated Nov. 6, 1997, 2 *PSI Tax Shelter Hearings*, *supra* note 96, at 901; KPMG Tax Opinion Letter Template Dated July 2, 1998, 2 *PSI Tax Shelter Hearings*, *supra* note 96, at 990; Johnson, *supra* note 114, at 433–34.

interest in Offshore Shell. The U.S. taxpayer separately would acquire a small number of shares in Foreign Bank. Foreign Bank would then redeem the shares held by Offshore Shell at the same time that the U.S. taxpayer would purchase an option to acquire the exact same number of Foreign Bank shares. Subsequently, the U.S. taxpayer would sell both its Foreign Bank shares and its option to acquire Foreign Bank shares.

A technical goal of this transaction was to treat the redemption of the Foreign Bank shares as a dividend rather than a redemption for tax purposes.¹¹⁷ Ordinarily, under sections 302(a) and (b), a “complete redemption” of shares such as seemingly occurred between Foreign Bank and Offshore Shell would cause Offshore Shell to recognize, from a U.S. tax perspective, a gain or loss equal to the difference between the amount received and the shell entity’s basis in the stock, unless the redemption is “essentially equivalent to a dividend.”¹¹⁸ Otherwise, the amount received by Offshore Shell in exchange for its stock would be considered a dividend for U.S. tax purposes.¹¹⁹ In evaluating whether a “complete redemption” has occurred, however, section 302(c) requires that the transaction be evaluated on the basis of constructive as well as actual stock ownership.¹²⁰ Under the ownership attribution rules of section 318, the Offshore Shell is treated as constructively owning the Foreign Bank shares owned and optioned by the U.S. taxpayer because the U.S. taxpayer holds the option to acquire an 85% ownership interest in the Offshore Shell.¹²¹ Thus, Offshore Shell cannot be said under section 302(b) to have completely redeemed its interest in Foreign Bank.

In other words, unless the Service could demonstrate on some other basis that the redemption was not essentially equivalent to a dividend under section 302(b)(1), which is a murky standard at best, Offshore Shell would be treated for U.S. tax purposes as though it received dividend income rather than redemption proceeds from Foreign Bank. Of course, Offshore Shell is domiciled in a tax haven jurisdiction that imposes no corporate or income tax and is beyond the range of U.S. tax jurisdiction. Meanwhile, the U.S. taxpayer could

¹¹⁷ See KPMG Tax Opinion Letter Template Dated July 2, 1998, 2 *PSI Tax Shelter Hearings*, *supra* note 96, at 990, 993; see also Johnson, *supra* note 114, at 433–37.

¹¹⁸ I.R.C. § 302(a), (b)(1), (b)(3).

¹¹⁹ See I.R.C. § 302(a), (b).

¹²⁰ I.R.C. § 302(c).

¹²¹ See *id.*; I.R.C. § 318.

argue that since the redemption of shares represents dividend income for Offshore Shell, the Cayman entity's basis in the redeemed shares should be shifted to the U.S. taxpayer as a "proper adjustment" under Treas. Reg. section 1.302-2(c).¹²² As a consequence, when the U.S. taxpayer sells its small number of Foreign Bank shares and its own option, the U.S. taxpayer would realize a sizeable capital loss that could be used to offset existing gains.

Among other things, therefore, the FLIP and OPIS tax shelter structures are premised on the definition of "redemption" under section 302, the definition of "proper adjustment" under Treas. Reg. section 1.302-2(c), and a particular interpretation of the stock ownership attribution rules of section 318.¹²³ The template opinion letters for these structures cite various revenue rulings and cases as supporting KPMG's interpretation of these provisions.¹²⁴ In Notice 2001-45, the Service announced that, in its view, the above-described transaction represented a redemption under section 302 rather than a dividend and that the shift in basis from Offshore Shell to the U.S. taxpayer was not a proper adjustment as that term is used in Treas. Reg. section 1.302-2(c).¹²⁵ Both are technical concepts as reflected in the Code and related regulations. Both interpretations seem supportable. To further demonstrate the interpretive difficulty, Treasury at one point issued proposed regulations intended to clarify both section 302 and Treas. Reg. section 1.302-2(c) as precluding the FLIP/OPIS transaction structure,¹²⁶ but subsequently withdrew the proposed regulations in the face of numerous critical comments.¹²⁷

As with BLIPS, the FLIP and OPIS shelters face numerous issues beyond the proper interpretation of section 302, including an economic substance challenge. Thus, the courts could find taxpayers participating in the FLIP and OPIS shelters to be liable — and the government could successfully prosecute the KPMG defendants —

¹²² See Treas. Reg. § 1.302-2(c) (2006).

¹²³ See KPMG Tax Opinion Letter Template Dated July 2, 1998, 2 *PSI Tax Shelter Hearings*, *supra* note 96, at 990, 994-97 (analyzing sections 302 and 318 in connection with the FLIP/OPIS shelter).

¹²⁴ See *id.* (citing and discussing cases and revenue rulings).

¹²⁵ I.R.S. Notice 2001-45, 2001-2 C.B. 129.

¹²⁶ See Redemptions Taxable as Dividends, 67 Fed. Reg. 64331 (proposed Oct. 18, 2002).

¹²⁷ See Withdrawal of Proposed Regulations Relating to Redemptions Taxable as Dividends, 71 Fed. Reg. 20044 (Apr. 19, 2006) (withdrawing earlier proposed regulations and indicating that Treasury and the Service will continue to study the issue).

without ever resolving the application of lenity or deference in interpreting section 302. It is also possible, however, for the outcome of these cases to turn on the interpretation of section 302.

D. Implications

The interpretational elements of the BLIPS, FLIP, and OPIS shelters demonstrate the role that statutory ambiguity plays in many, if not most, tax shelters. The possibility that courts might apply lenity more often in addressing those ambiguities is hugely problematic for tax law administration even beyond the tax shelter context. The Code is littered with ambiguity. Sometimes, Congress expressly leaves statutory gaps for Treasury to fill.¹²⁸ Other times, ambiguities only become noticeable through taxpayer application. Thus, Congress has designated Treasury and the Service as primarily responsible for administering the Code in general.¹²⁹ Where the Code is susceptible of more than one reasonable interpretation, Treasury and the Service have to choose, and in so doing take into account a range of tax policy concerns including but not limited to revenue raising and administrability.

Treasury and the Service play a critical role in preserving the integrity of the Code and protecting the tax base through both administrative interpretation and enforcement. The primary virtue of the *Chevron* revolution has been the resultant shift of policymaking inherent in statutory interpretation from the courts to administrative agencies like Treasury and the Service.¹³⁰ In the civil context, the *Chevron* and *Skidmore* deference doctrines allow the courts to avoid interfering in tax policy decision making but still act as a check against arbitrary and capricious agency actions.

Treasury and the Service depend heavily on regulations, rulings, and other less formal guidance to administer the Code and protect tax system integrity, but they simply cannot anticipate every potential

¹²⁸ See, e.g., I.R.C. §§ 163(i)(5), 167(e)(6), 357(d)(3), 453(j)(1), 952(d), 1502; see also N.Y. STATE BAR ASS'N TAX SECTION, REPORT ON LEGISLATIVE GRANTS OF REGULATORY AUTHORITY 2–6 (Nov. 3, 2006), available at http://www.nysba.org/Content/ContentGroups/Section_Information1/Tax_Section_Reports/1121rpt.PDF (claiming and categorizing more than 550 specific authority grants).

¹²⁹ See I.R.C. § 7805(a) (giving Treasury the authority to promulgate “all necessary rules and regulations for the enforcement” of the Code).

¹³⁰ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984) (emphasizing that policy choices are inherent in interpreting ambiguous statutes); see also discussion, *supra* notes 53–56 and accompanying text (elaborating).

scenario that might test the Code. Often, statutory ambiguity becomes apparent merely as taxpayers attempt to apply the Code to real-world facts. Transactional goals drive most tax planning, albeit with ample room for minimizing the related tax burden. In the context particularly of the most recent generation of tax shelters, however, those real-world facts are often specially contrived. In battling abusive tax shelters, Treasury and the Service need all the help that they can get. Given the government's reliance on less formal guidance like notices as the first line of defense against abusive transactions, *Skidmore* deference in particular represents an important weapon in the government's arsenal.

To the extent that ordinary transactional tax planning and abusive tax shelters involve the same Code sections, however, the criminal prosecution of tax shelters may lead the courts to apply lenity rather than *Chevron* or *Skidmore* deference in resolving civil as well as criminal cases involving those provisions. At that point, not only would the courts take the place of Treasury as the primary interpreter of the Code in more cases, but the operative interpretational standards would shift from the pro-government *Chevron* and *Skidmore* to the pro-taxpayer rule of lenity.

III. POTENTIAL RESOLUTIONS

As already noted, while the Supreme Court in *Sweet Home* came down on the side of *Chevron* deference instead of lenity for a longstanding, legally-binding regulation, the Court's analysis in that case exposed a tension in the Court's jurisprudence between the legislative function and fair warning justifications for the rule of lenity. Moreover, the Court's jurisprudence to date has not addressed the question of lenity versus deference for guidance formats that are less formal than binding regulations published in the Code of Federal Regulations, such as revenue rulings and notices. The Court could pursue any of several different approaches to resolve these issues in future cases. Although space considerations preclude a full exploration of the topic, this Part of the essay will briefly outline the alternatives and some of the issues raised by each.

A. Supreme Court Signals: Lenity Trumps

The Court's analysis in several cases suggests a few theories under which the rule of lenity might trump the various deference doctrines outright. First, the deference models articulated in *Chevron*, *Skidmore*, and *National Muffler* apply only in the absence of clear

statutory meaning. In other words, a court has to decide that the relevant statutory provision is ambiguous before any doctrine requires the court to defer to the government's interpretation. Lenity also applies only where ambiguity exists. In discussing the circumstances in which all of the *Chevron*, *Skidmore*, and *National Muffler* deference doctrines will apply, the Court has called for employing traditional canons of statutory construction in evaluating whether a statute's meaning is clear.¹³¹ In other words, as a canon of construction, the rule of lenity may operate as a tie-breaker between competing statutory interpretations to establish a statute's supposed plain meaning. A court applying the rule of lenity thus never gets past that first-level inquiry and, consequently, does not have the opportunity to defer to the government.¹³² In the recent case of *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, the Court explicitly referred to the rule of lenity as a canon of interpretation that might be applied to conclude that a statute is unambiguous, such that deference to the agency would be inappropriate.¹³³

Elevating the rule of lenity over judicial deference best effectuates the policy that the legislatures rather than courts or agencies should make the moral judgments that underlie the criminalization of primary behavior.¹³⁴ Courts satisfied with deferring to agency experts as they make the technocratic policy choices inherent in resolving statutory ambiguities may and probably should feel less comfortable with deferring to the same unelected bureaucrats in matters of morality.

Another possible reason for allowing the rule of lenity to trump even *Chevron* deference in this manner arises from the theoretical premises of the different doctrines. The rule of lenity bears at least a tangential relationship to the Due Process Clauses of the Fifth and Fourteenth Amendments.¹³⁵ By comparison, according to the Court in

¹³¹ See, e.g., *Rapanos v. United States*, 126 S.Ct. 2208, 2224–25 (2006) (applying the canons of construction in a *Chevron* analysis); *Clark v. Martinez*, 543 U.S. 371, 402–03 (2005) (Thomas, J. dissenting) (discussing the role of canons of construction in *Chevron* step one analysis).

¹³² See *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983–85 (2005); *United States v. R.L.C.*, 503 U.S. 291, 311–12 (1992) (Thomas, J. concurring).

¹³³ See *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983–85 (2005).

¹³⁴ See discussion *supra* notes 91–93 and accompanying text (comparing the moral aspects of criminalization with the more technocratic policy choices inherent in most regulatory interpretations).

¹³⁵ See *United States v. Lanier*, 520 U.S. 259, 266 (1997) (discussing the

Mead, the *Chevron* deference doctrine is premised on a presumption that Congress has delegated primary interpretive responsibility to a particular agency rather than the courts.¹³⁶ *Skidmore* and *National Muffler* deference, meanwhile, merely reflect judicial policy based on comparative institutional capacities.¹³⁷

Lenity's status as an absolute constitutional requirement rather than a quasi-constitutional canon of construction is questionable.¹³⁸ Several state legislatures have rejected the rule of lenity in drafting their own criminal statutes.¹³⁹ Yet state legislative rejections of the rule of lenity have been explicit, while the purported legislative command underlying the *Chevron* doctrine is at best implied, if not entirely fictional,¹⁴⁰ and *Skidmore* and *National Muffler* deference possess no such legislative support. It would be rather circular to

relationship between lenity and Due Process); *United States v. Velastegui*, 199 F.3d 590, 593 (2d Cir. 1999) (describing lenity as “a manifestation of the fair warning requirement” of the Due Process Clause).

¹³⁶ See *United States v. Mead Corp.*, 533 U.S. 218, 229–30 & n.11 (2001); see also *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (articulating same understanding of *Chevron*); discussion, *supra* note 41 and accompanying text (discussing *Chevron's* premise).

¹³⁷ See *Nat'l Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 475–77 (1979); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944); see also discussion, *supra* notes 42–49 and accompanying text (discussing *Skidmore* and *National Muffler* premises).

¹³⁸ See Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 525–26 (2003) (discussing the constitutional status of the rule of lenity in criminal cases). *But see* Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. LAW REV. 1043, 1067 (2006) (describing lenity as a “common law tradition”); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 346–47 (1994) (describing lenity as a “quasi-constitutional” doctrine best understood as a form of the nondelegation doctrine).

¹³⁹ See, e.g., N.Y. Penal Law § 5.00 (McKinney) (“The general rule that a penal statute is to be strictly construed does not apply to this chapter, but the provisions herein must be construed according to the fair import of their terms to promote justice and effect the objects of the law.”); Idaho Code § 73-102 (“The compiled laws establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed, with a view to effect their objects and to promote justice.”); see also SINGER, *supra* note 18, at §59.7 (discussing legislative modification of the rule of lenity).

¹⁴⁰ See, e.g., Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2132 (2002) (noting “even adherents to [*Chevron*] theory . . . acknowledge that the evidence of such enacting congressional intent is ‘weak’ and even ‘fictional’”); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (acknowledging that “any rule adopted in this field represents merely a fictional, presumed intent”).

suggest that the mere existence of statutory ambiguity in a hybrid regulatory statute reflects Congress's intent that lenity should not be applied to resolve that ambiguity. In light of lenity's pedigree, the Court could conceivably adopt a rule that requires Congress to be explicit in overriding the rule of lenity in favor of agency primacy and judicial deference.

Nevertheless, despite the Court's reference to lenity in its *Brand X* opinion, it is difficult to reconcile the Court's holding in that case with giving lenity precedence over *Chevron* deference. *Brand X* involved an agency interpretation of the Communications Act, advanced through a *Chevron*-eligible format, that in effect overturned an earlier reading of that statute adopted by the Ninth Circuit.¹⁴¹ The Court held that, notwithstanding the appellate court's earlier resolution of the statute's meaning, because the statutory language was itself ambiguous, the agency's subsequent contrary interpretation was entitled to *Chevron* deference.¹⁴² The primary rationale behind the Court's decision to apply *Chevron* under such circumstances was "to leave the discretion provided by the ambiguities of a statute with the implementing agency" so that the agency could "consider varying interpretations and the wisdom of its policy on a continuing basis."¹⁴³ Utilizing the rule of lenity as a tie-breaker between clarity and ambiguity at the step one stage would foreclose the opportunity for the agency subsequently to adopt an alternative interpretation, even through the notice-and-comment process, and thus would put the courts rather than the agency in the position of resolving statutory meaning. Not all regulatory statutes include hybrid enforcement mechanisms, so perhaps this trade off is the price that Congress pays for adopting such provisions. Nevertheless, such an approach would represent a dramatic curtailing of the judicial deference doctrines' scope.

B. Academic Theory: Lenity as a Third Step

Two scholars have offered alternative proposals for incorporating the rule of lenity into the standard deference model as a third step to *Chevron*'s (or *Skidmore*'s) two, although with different variations on the theme.

Patricia Chapman suggests that after a reviewing court has

¹⁴¹ See *Nat'l Cable & Telecomm. Ass'n*, 545 U.S. at 981–83.

¹⁴² See *id.*

¹⁴³ *Id.* at 981 (internal citations omitted).

determined first that a statute is ambiguous and second that the agency's interpretation is reasonable, the court could then undertake a third inquiry evaluating both the agency's efforts to publicize its interpretations of the statute and likelihood that the regulated party actually received notice of those interpretations.¹⁴⁴ Particularly if the agency's interpretations are informal in nature, as in the *Skidmore* context, there may be some question whether potential violators had adequate notice. Under such circumstances, the rule of lenity would apply and could potentially invalidate an otherwise reasonable interpretation of the statute.

Chapman's approach presents a similar, though slightly lesser, difficulty to the Court's passing suggestion of incorporating lenity into *Chevron* step one. As Chapman correctly notes, the typical notice-and-comment regulation surely would satisfy her proposed third-step inquiry, but more informal interpretations may not.¹⁴⁵ If the courts then use the rule of lenity to impose an interpretation, however, the *Brand X* concern of freezing the statute's meaning and denying the agency's subsequent interpretive flexibility arises anew.

In a slightly different context, arguing for the "Chevronization" of federal criminal law, Dan Kahan has suggested limiting lenity's applicability to those cases in which "the Department of Justice has failed to give a reasoned justification for a broad reading in advance of prosecution."¹⁴⁶ Kahan offered his proposal for purposes of interpreting the criminal code, not hybrid regulatory statutes. Nevertheless, one could translate his model to the regulatory context by requiring the reviewing court to apply *Chevron* or *Skidmore* first to evaluate the reasonableness of the agency's interpretation, and contemplate the rule of lenity only in the face of a conclusion that the agency's interpretation is not a reasonable one. One potential obstacle to applying such an approach in the context of hybrid regulatory statutes is its elevation of the judicial deference doctrines over the rule of lenity. While, as noted above, the rule of lenity is arguably a quasi-constitutional canon subject to legislative override rather than a constitutional requirement, the legislative command underlying the *Chevron* doctrine is more assumed than real, and *Skidmore* lacks even that degree of legislative support.¹⁴⁷ Accordingly, the Court may be reluctant to relegate lenity to the status of a third-

¹⁴⁴ See Chapman, *supra* note 20, at 165–67.

¹⁴⁵ See *id.* at 167.

¹⁴⁶ Kahan, *supra* note 20, at 510.

¹⁴⁷ See discussion *supra* notes 135–140 and accompanying text.

tier inquiry.

Chapman and Kahan both strongly emphasize the fair warning justification for the rule of lenity. Their suggestions are less supportive of the legislative function concern that Congress should be the one to decide which actions are criminal.¹⁴⁸ Nevertheless, the willingness of contemporary courts to draw from legislative history and other extra-textual sources to discern statutory meaning before applying the rule of lenity suggests that the legislative function rationale has trumped fair warning in dictating lenity's scope.¹⁴⁹

C. A Willfulness Exception

At least in the context of interpreting the Code, and perhaps in some other areas of regulation as well, a court inclined to curtail the applicability of the rule of lenity might choose to hang its hat on willfulness as a requirement for criminal culpability. For all criminal tax cases, section 7201 requires the prosecution to demonstrate that the defendant "willfully attempt[ed] to evade or defeat any tax imposed by this title or the payment thereof."¹⁵⁰ In *Cheek v. United States*, a tax protester case, the Court interpreted the willfulness element of section 7201 as requiring proof of a "voluntary, intentional violation of a known legal duty" to sustain a criminal conviction.¹⁵¹ In *Thompson/Center Arms*, by contrast, the Court expressly observed that the National Firearms Act does not impose a willfulness requirement for criminal liability.¹⁵² In fact, in invoking the rule of lenity, the *Thompson/Center Arms* Court expressly contrasted the case before it with the circumstances of *Cheek*.¹⁵³

Moreover, the Court's reasoning in *O'Hagan v. United States* potentially bolsters the notion that the presence of a willfulness requirement for criminal liability could negate the applicability of the

¹⁴⁸ Because the *Chevron* deference doctrine assumes an affirmative congressional decision that an agency, rather than the courts, should assume primary interpretive authority over a statute, one could argue that giving precedence to *Chevron* over lenity better respects that legislative choice. Such respect is not necessarily synonymous with consigning the responsibility for defining criminal behavior to the legislative branch, however.

¹⁴⁹ *But see* *United States v. R.L.C.*, 503 U.S. 291, 307–09 (1992) (Scalia, J. dissenting) (questioning whether employing legislative history over the rule of lenity raises fair warning concerns).

¹⁵⁰ I.R.C. § 7201.

¹⁵¹ 498 U.S. 192, 200–01 (1991).

¹⁵² *See* *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517 (1992).

¹⁵³ *See id.* at 517–18.

rule of lenity.¹⁵⁴ *O'Hagan* involved a defendant convicted of multiple counts of mail fraud, money laundering, securities fraud, and other securities violations.¹⁵⁵ One of the issues considered by the Court was whether the so-called "misappropriation theory" upon which the prosecution based its case represented an appropriate interpretation of section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.¹⁵⁶ Despite obvious ambiguity on the issue, the Court upheld as "consistent with the statute" the government's interpretation of section 10(b) and Rule 10b-5 as accommodating misappropriation theory. In response to *O'Hagan's* brief and a strong dissent from Justice Thomas, both of which urged applying the rule of lenity, the Court noted the statute's willfulness requirement as a "sturdy safeguard."¹⁵⁷

O'Hagan alone seems inadequate to support the conclusion that the Court has explicitly adopted the willfulness approach to the rule of lenity. In the subsequent, non-tax case of *United States v. Lanier*, the Court applied the vagueness doctrine to interpret the substantive intent of a statutory prohibition notwithstanding a separate willfulness element in the same provision.¹⁵⁸ Nevertheless, a recent note in the *Harvard Law Review* elegantly interprets several other recent Supreme Court cases to support limiting the scope of the rule of lenity to statutes lacking a willfulness requirement;¹⁵⁹ and the *O'Hagan* approach has its strength and weaknesses.

Relying upon the willfulness aspect of section 7201 to distinguish tax code interpretation from *Thompson/Center Arms* and its progeny would to some degree give effect both to lenity and to deference. There can be no question of notice or fair warning where the government must demonstrate actual subjective knowledge of a legal obligation, even if the reviewing court also defers to Treasury's interpretation of the Code. Indeed, employing willfulness in this manner seems analogous to the *Sweet Home* Court's rationale for allowing *Chevron* deference where a long-standing regulation clarified the ambiguous statute. Recall that the Court's analysis in *Sweet Home* comes down to recognizing that legally-binding agency regulations can make a regulated party's obligations under the law clear even if the

¹⁵⁴ 521 U.S. 642, 644 (1997).

¹⁵⁵ *See id.* at 648-49.

¹⁵⁶ *See id.* at 649.

¹⁵⁷ *Id.* at 665-66.

¹⁵⁸ 520 U.S. 259, 266-67 (1997); *see also* discussion, *supra* notes 22-24 and accompanying text (comparing vagueness doctrine with rule of lenity).

¹⁵⁹ *See Note, The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2436-37 (2006).

statute is not, and thus alleviate lenity's fair warning concern.¹⁶⁰ The willfulness element of section 7201 and similar statutes accomplishes the same goal, though such an approach deemphasizes the legislative function policy behind lenity much in the same way as the Court's analysis in *Sweet Home*. Moreover, while not an explicit legislative command to disregard the rule of lenity in tax law interpretation, the Court could reasonably conclude that section 7201 is close enough to count.¹⁶¹

Nevertheless, the willfulness solution for resolving the impasse between lenity and deference relies heavily on the Court's interpretation of section 7201 in *Cheek*. There is some debate over the extent to which *Cheek* applies outside the tax context.¹⁶² Moreover, not all regulatory statutes include a willfulness element, so this approach to reconciling lenity and deference is not universally applicable. Still, the Court could reasonably utilize the willfulness requirement of section 7201 to resolve the dilemma of lenity versus deference in tax cases in favor of deference without a great doctrinal shift.

IV. THE ROLE OF PROSECUTORIAL DISCRETION

Circling back to the Justice Department's decision to add criminal prosecution to its arsenal in the battle against tax shelters, while the reconciliation of lenity and *Skidmore* deference ultimately falls to the courts, the Justice Department's prosecution of the KPMG case and others like it may represent a tipping point. Although space limitations again preclude full consideration of the idea, this Part of the essay will briefly elaborate this suggestion.

John Shepard Wiley, Jr. has explored another, related line of jurisprudence, including the *Cheek* case, in which the Court has increasingly demanded proof of knowledge of the law to support a criminal conviction.¹⁶³ From the Court's opinions, Wiley identifies as

¹⁶⁰ See discussion, *supra* notes 89–90 and accompanying text.

¹⁶¹ See discussion, *supra* notes 135–140 and accompanying text.

¹⁶² Compare *Ratzlaf v. United States*, 510 U.S. 135, 142, 149 (1994) (applying *Cheek* outside the tax context), with *Bryan v. United States*, 524 U.S. 184, 194–95 (1998) (distinguishing *Cheek* and *Ratzlaf* as applicable only to highly technical statutes like the tax code); see also Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 369–87 (1998) (dissecting the Court's jurisprudence on the issue).

¹⁶³ See John Shepard Wiley Jr., *Not Guilty By Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999).

the basis for this trend a decline in the Court's faith in prosecutorial discretion.¹⁶⁴ Wiley suggests several reasons for this loss of faith, including the increased number of federal crimes as well as civil penalties and sentencing changes that transferred power from judges to federal prosecutors.¹⁶⁵ Although Wiley does not say so explicitly, many of the cases that Wiley highlights resemble those discussed above in which the Court has brought lenity into the civil context in that they involve areas of the law that have received particular prosecutorial attention in the last few decades, such as firearms¹⁶⁶ or financial transactions.¹⁶⁷

It seems reasonable, therefore, to hypothesize that a combination of aggressive prosecutions and increased judicial skepticism toward prosecutorial discretion may influence the Court toward a more cautious posture particularly when dealing with technical statutory crimes. If the government's argument, while technically colorable, nevertheless seems to overreach, then the Court may be more likely to extend a rule such as lenity or willfulness as a signal of its discomfort with the prosecution.¹⁶⁸ Given the queasiness with which many lawyers view the KPMG case and other tax shelter prosecutions, pursuing criminal penalties in tax shelter cases may represent the sort of scenario that could push the Court to expand its application of the rule of lenity in the civil context.

Wiley lauds the Court's newfound skepticism toward prosecutorial discretion and seeks to push it further in the criminal context.¹⁶⁹ In the civil regulatory arena, however, as discussed above, the application of such rules could substantially undermine agency flexibility and thrust the courts back into the policy-making role that the deference doctrines allow them to avoid. Some agencies act

¹⁶⁴ See *id.* at 1058–61.

¹⁶⁵ See *id.* at 1061–65.

¹⁶⁶ See discussion, *supra* notes 73–79 (discussing *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992)); see also Wiley, *supra* note 163, at 1042–43 (discussing *Staples v. United States*, 511 U.S. 600 (1994), also a firearms case).

¹⁶⁷ See discussion, *supra* notes 64–72 (discussing *Crandon v. United States*, 494 U.S. 152 (1990)); see also Wiley, *supra* note 163, at 1037–38 (discussing *Liparota v. United States*, 471 U.S. 419 (1985), which involved food stamp fraud); Wiley, *supra* note 163, at 1039–41 (discussing *Ratzlaf v. United States*, 510 U.S. 135 (1994), in which the defendant structured repayment of a gambling debt to avoid cash transaction reporting requirements).

¹⁶⁸ Compare *Ratzlaf v. United States*, 510 U.S. 135, 142 (1994), and *Cheek v. United States*, 498 U.S. 192, 201–02 (1991), with *Bryan v. United States*, 524 U.S. 184, 193–94 (1998).

¹⁶⁹ See Wiley, *supra* note 163, at 1057.

primarily through regulations entitled to *Chevron* deference, so given the Court's unwillingness thus far to allow lenity to trump *Chevron*, perhaps the issue of lenity versus *Skidmore* deference makes little difference. By contrast, the Treasury Department and the Service rely heavily on informal, nonbinding guidance in their enforcement efforts. Thus, in the tax context, a shift of the standard of review of such interpretations from *Skidmore* deference to the rule of lenity could have significant implications for enforcement efforts beyond tax shelters.

If this trend toward lenity is in fact due to a mixture of aggressive prosecution and declining judicial confidence in prosecutorial judgment as to which cases to prosecute, perhaps Justice Department prosecutors themselves can avoid the mess entirely by exercising greater discretion. In other words, at least in the tax context, maybe the government can avoid the encroachment of lenity into the civil enforcement context by limiting criminal prosecution to tax protesters and their ilk while leaving tax shelters to the Code's civil enforcement mechanisms. If the Court does not perceive that tax is an area where prosecutors are inclined to pursue novel and creative criminal cases, the Court may be less likely to see a problem with judicial deference, particularly given the willfulness element of section 7201. At a minimum, the government should deliberate carefully just how aggressive it wants to be in pursuing criminal prosecutions in the tax shelter area. It might not like the end result.

V. CONCLUSION

Abusive tax shelters are a problem. It is easy to sympathize with and even cheer for the government as it employs more creative and aggressive tactics in combating the scourge. Yet zealous efforts often yield unintended consequences.

I do not believe that the Supreme Court is actively seeking to impose the rule of lenity upon the federal income tax system. In responding to the essay, Steven Dean and Lawrence Solan argue that such a result is unlikely.¹⁷⁰ Perhaps they are right. Nevertheless, recent case law suggests that such a move is possible; and aggressive criminal prosecution of tax shelters could just inspire the Court to move precisely in that direction. The government should consider carefully whether that is a path they are willing to tread; for once we are on that path, it may be difficult to turn back.

¹⁷⁰ See Steven A. Dean & Lawrence M. Solan, *Tax Shelters and the Code: Navigating Between Text and Intent*, 26 VA. TAX REV. 879, 892 (2007).