The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference

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Article

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

Kristin E. Hickman†

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

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

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5. 533 U.S. 218, 226–27 (2001). As the sole dissenter from *Mead*, Justice Scalia described the Court’s decision as “one of the most significant opinions ever rendered by the Court dealing with the judicial review of administrative action.” Id. at 261 (Scalia, J., dissenting).
6. *Id.* at 226–27 (majority opinion).
Mead whether Treasury regulations are entitled to Chevron deference, the Mead inquiry should easily resolve the issue. Yet the post-Mead scholarship and jurisprudence continues to avoid that straight-forward conclusion.

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


10. A small number of lower court judges have extensive tax expertise. The United States Tax Court, an Article I court, specializes in and handles only tax matters, and most tax cases are brought before this court. See I.R.C. § 7442 (2000) (establishing Tax Court jurisdiction); BITTKER, supra note 1, ¶ 51.03[1] (discussing Tax Court history and jurisdiction). The Tax Court’s decisions, and particularly its legal interpretations, are reviewable by the generalist circuit courts of appeals and the United States Supreme Court, however. See I.R.C. § 7482(a)(1) (2000) (providing for appellate review of Tax Court decisions); BITTKER, supra note 1, ¶ 51.07 (summarizing appellate review of Tax Court decisions). Tax refund claims are also included within the comparatively limited subject matter jurisdiction of the Court of Federal Claims, another Article I court, and the Court of Appeals for the Federal Circuit. Judges on these courts are not necessarily tax specialists, either. See BITTKER, supra note 1, ¶ 51.08.
second-guess Treasury’s interpretive choices increases the incidence of like taxpayers not being treated alike, as circuits split and Treasury’s ability to resolve interpretive issues is hampered by stare decisis. Congressional preference aside, these factors represent powerful normative arguments in favor of Chevron deference for Treasury regulations.

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

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

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

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

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

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


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

\textsuperscript{16} See id. at 518–19.


\textsuperscript{18} See Caron, supra note 15, at 518, 531–36.
traditions and practices and the resulting case against *Chevron* deference toward Treasury regulations. This Article fills that void in the literature and explains why the more straightforward conclusion of *Chevron* deference for Treasury regulations really is the right one, despite previous scholarly and judicial efforts to complicate the matter. More broadly, however, the Article debunks the perception of tax exceptionalism that, I believe, is the primary reason why the issue of *Chevron* deference for tax regulations continues to be so thorny.

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

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

I. DUELING DEFERENCE STANDARDS

Underlying the argument against judicial deference toward Treasury regulations is a certain degree of hostility toward *Chevron* that is not limited to tax scholars and practitioners.
Many critics of *Chevron* generally are wary of agency authority absent strong judicial oversight;¹⁹ and many in the tax community regard Treasury’s authority over the Code absent strong judicial oversight with similar misgiving.²⁰ Given *Chevron*’s dominance in other areas of administrative law, it is to be expected that those with such concerns might argue in favor of carving out an exception for tax cases. The question is whether there is a case for doing so.

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

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


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

²². See id. § 553(b).

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

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


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

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

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28. See, e.g., LEDERMAN & MAZZA, supra note 24, § 9.02[A][1]; SALTZMAN, supra note 1, ¶ 3.02[3][a]–[b] (2d ed. 2002); Aprill, supra note 27, at 56–57; Coverdale, supra note 14, at 35; Salem et al., supra note 20, at 728.
29. See LEDERMAN & MAZZA, supra note 24, § 9.02[A][1]; Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 Mich. L. Rev. 520, 524 (1977); Peter A. Lowy & Juan F. Vasquez, Jr., 101 J. Tax’n 230, 231 (2004). My own sense from reviewing the Treasury’s notices and final Treasury Decisions is that the Treasury’s adherence to APA rulemaking requirements is sufficiently spotty to be susceptible to legal challenge. More substantial analysis of this perception is beyond the scope of this Article.
30. See INTERNAL REVENUE MANUAL, supra note 24, § 32.1.2.3 (2004); Salem et al., supra note 20, at 728.
the courts would only reject such regulations if they were plainly inconsistent with the statute. Meanwhile, general authority Treasury regulations were accorded some lesser degree of “weight” to the extent they satisfied various factors articulated in National Muffler and its predecessors.32 In practice, the Court has not always been so consistent.33

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

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

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


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

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

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

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

\(^{38}\) See *id.* at 843–45.

\(^{39}\) See *id.* at 843–44.

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

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

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

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

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

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

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

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

\begin{footnotesize}
\begin{itemize}
\item 46. In the \textit{Chevron} opinion alone, the Court's willingness to permit an agency to change its mind is apparent. First, the Court disregarded the fact that the EPA initially adopted one regulatory definition but then, upon a change of presidential administrations, reconsidered the issue and adopted the definition at issue through a second round of notice-and-comment rulemaking. Second, the Court criticized the D.C. Circuit for adopting a “static” definition of stationary source even though the statute was more flexible. \textit{Chevron}, 467 U.S. at 842, 857–58; see also \textit{Brand X}, 125 S. Ct. at 2699–2700 (describing “the whole point of \textit{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”).
\item 49. See Merrill & Hickman, \textit{supra} note 43, at 848–52.
\item 51. See \textit{Chevron}, 467 U.S. at 843–44, 865; see also, e.g., Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 703 (1995) (emphasiz-
Scholars posited a variety of legal foundations for *Chevron* including not only congressional delegation but others ranging from constitutional requirement to mere judicial policy. Changing *Chevron*’s underlying premise alters the scope of the doctrine’s applicability. Complicating the issue further still was the conception that the choice for the courts would be *Chevron*’s strong, mandatory deference or no deference at all, notwithstanding clear policy arguments in favor of some deference even where strong *Chevron* deference might seem inappropriate.

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

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


57. See United States v. Mead Corp., 533 U.S. 218, 234–35 (2001) (indicating that in the absence of *Chevron* deference, there are still viable policy reasons for granting a lesser degree of deference); see also Merrill & Hickman, supra note 43, at 858–63 (discussing same).
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law”; and if so, whether the agency has “exercised that authority.”58 As part of that scheme, Mead and its foreshadowing predecessor, Christensen v. Harris County,59 clearly establish that the choice for the courts is not between Chevron or no deference at all by revitalizing the classic, pre-Chevron deference case of Skidmore v. Swift & Co.60 as an intermediate differential alternative.61

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

60. 323 U.S. 134 (1944).
61. See Mead, 533 U.S. at 234–35; Christensen, 529 U.S. at 587.
62. The FLSA requires employers to pay one and one-half times an employee’s regular wages for hours worked in excess of forty per week. See 29 U.S.C. § 207(a)(1) (2000). The question before the Court in Skidmore was whether firefighters were working for purposes of the FLSA overtime provision during the time they were required to be on duty at or near the firehouse to respond to incoming fire alarms, even though the firefighters typically spent such waiting time sleeping or engaged in other amusement activities like pool or dominos. 323 U.S. at 136. In a companion case, Armour & Co. v. Wantock, 323 U.S. 126 (1944), the Court analyzed the relevant statutory provisions and found the question dependent upon the interpretation of the statutory definition of “employ” as “to suffer or permit work,” which definition the Court found not to be dispositive of the Skidmore question. See Skidmore, 323 U.S. at 136 (discussing Armour); see also Armour, 323 U.S. at 133–34.
64. See id. at 139.
65. See id. at 137 (citing Kirschbaum v. Walling, 316 U.S. 517, 523 (1942)).
66. See id. at 140.
circumstances:
The weight of such a judgment in a particular case will depend upon
the thoroughness evident in its consideration, the validity of its rea-
soning, its consistency with earlier and later pronouncements, and all
those factors which give it power to persuade, if lacking power to con-
trol.67

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

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

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67. Id. Citing Skidmore, the Mead Court paraphrased these factors in say-
ing that agency interpretations not entitled to Chevron deference should be
evaluated based upon “the degree of the agency’s care, its consistency, formal-
ity, and relative expertness, and to the persuasiveness of the agency’s posi-

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

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

70. See Anthony, supra note 47, at 14; Thomas W. Merrill, Judicial Defer-

71. See, e.g., Colin S. Diver, Statutory Interpretation in the Administrative
State, 133 U. PA. L. REV. 549, 565–66 (1985) (recognizing the pre-Chevron defer-
ence doctrine as reflecting degrees of deference and discussing relevant fac-
tors); Rossi, supra note 68, at 1125–29 (analyzing Christensen v. Harris
County, 529 U.S. 576 (2000), as reflecting three different views of Skidmore
respect).
different purposes. As the Supreme Court in *Mead* affirmed, *Chevron* “rests on a presumption about congressional intent” that Congress, at least implicitly, wanted an agency rather than the courts to be the primary interpreter of a particular statutory scheme.\(^{72}\) *Chevron*’s scope is limited, with *Chevron* only applying where a court affirmatively finds that Congress implicitly delegated primary interpretive power and the agency at least exercised that power with the action in question.\(^{73}\) Moreover, *Chevron* does not call on the courts to abdicate their responsibility for interpreting the law altogether. The APA clearly contemplates judicial oversight of agency action;\(^{74}\) and *Chevron* has never been a blank check.\(^{75}\) But where the reviewing court finds the requisite delegation and exercise thereof, and where Congress either declined or failed to resolve the question at issue, *Chevron* deference is required.

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

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73. *Id.* at 226–27; see also Merrill, *supra* note 8, at 813 (describing *Mead*’s holding).
77. See id.
cusing as much on the agency’s thoroughness and consistency as on the interpretation itself, the Skidmore factors allow a reviewing court leeway to police and defer to an agency simultaneously. And by bringing Skidmore back into the deference lexicon, Mead appropriately precludes Chevron deference from impermissibly encroaching upon the function that Congress, through the APA, intended courts to serve.

B. THE NATIONAL MUFFLER “ALTERNATIVE”

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

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

79. Section 501(c)(6) of the I.R.C. has long exempted from federal income taxation any organization that is a business league. See I.R.C. § 501(c)(6) (2000).
82. The current definition was adopted in 1925. See Nat’l Muffler, 440 U.S. at 481.
84. See Nat’l Muffler, 440 U.S. at 488–89.
the taxpayer was not a business league. The latter question arguably implicates a wholly separate pre-Chevron deference doctrine, known as Seminole Rock deference, which counsels deference to an agency’s interpretation of its own regulation so long as not “plainly erroneous or inconsistent with the regulation.”85

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

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

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

86. See Nat’l Muffler, 440 U.S. at 475–77.
87. See id. at 477.
of the Commissioner’s interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.\textsuperscript{88}

The Court then applied these factors to evaluate the regulation at issue, discussing at length the relevant statutory and regulatory history, and also noting that the regulation was of substantial duration and had been consistently applied by the IRS in its series of revenue rulings.\textsuperscript{89} Ignoring its own earlier inclusion of contemporaneity as a relevant factor, and perhaps foreshadowing a bit \textit{Chevron’s} emphasis on regulatory flexibility and policy choice, the Court dismissed the observation that the Treasury’s current definition was not its first: “We would be reluctant to adopt the rigid view that an agency may not alter its interpretation in light of administrative experience.”\textsuperscript{90}

Without distinguishing between the regulation and the revenue rulings in its holding, the Court acknowledged that the government’s interpretation was not “the only possible one,” but concluded that “it does bear a fair relationship to the language of the statute, it reflects the views of those who sought its enactment, and it matches the purpose they articulated.”\textsuperscript{91} Accordingly, the Court upheld that interpretation as meriting “serious deference” and “implement[ing] the congressional mandate” in a “reasonable manner.”\textsuperscript{92}

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

C. CONFLICTING JURISPRUDENCE

Interpreting \textit{National Muffler} in the post-\textit{Chevron} era has confounded the lower courts. The circuit courts of appeal and

\begin{itemize}
\item \textsuperscript{88} Id. (internal citations omitted).
\item \textsuperscript{89} Id. at 484.
\item \textsuperscript{90} Id. at 485.
\item \textsuperscript{91} Id. at 484.
\item \textsuperscript{92} Id. at 476 (citing United States v. Cartwright, 441 U.S. 546, 550 (1973) and quoting United States v. Correll, 389 U.S. 299, 307 (1967)).
\end{itemize}
the Tax Court are divided on the relationship between the two cases.93

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

93. See, e.g., Boeing Co. v. United States, 258 F.3d 958, 963 (9th Cir. 2001) (acknowledging a split and reserving the question); Gen. Elec. Co. v. Comm’r, 245 F.3d 149, 154 n.8 (2d Cir. 2001) (same).
95. See Bankers Life & Cas. Co. v. United States, 142 F.3d 973, 978–83 (7th Cir. 1998) (acknowledging some differences between the two cases but concluding that they are practically indistinguishable); Tate & Lyle, Inc. v. Comm’r, 87 F.3d 99, 106 n.13 (3d Cir. 1996) (equating the two doctrines implicitly by citation); Norwest Corp. v. Comm’r, 69 F.3d 1404, 1408–09 (8th Cir. 1995) (citing both *Chevron* and *National Muffler* for substantial deference to reasonable Treasury regulations); Cent. Pa. Sav. Ass’n v. Comm’r, 104 T.C. 384, 390–92 (1995) (seeing a negligible difference between the two doctrines). The Eighth Circuit seems to follow this approach as well, but its precedents are mixed. Compare Walshire v. United States, 288 F.3d 342, 345–46 (8th Cir. 2002) (citing *Chevron* for controlling deference toward general authority regulation), and Norwest, 69 F.3d at 1408–09 (citing both *Chevron* and *National Muffler* for substantial deference to reasonable Treasury regulation), with St. Jude Med. Ctr., Inc. v. Comm’r, 34 F.3d 1394, 1402 (8th Cir. 1994) (applying less deferential *National Muffler* standard to general authority regulation).
96. *Bankers Life*, 142 F.3d at 981 (quoting Bell Fed. Sav. & Loan Ass’n v. Comm’r, 40 F.3d 224, 227 (7th Cir. 1994)).
97. See Snowa v. Comm’r, 123 F.3d 190, 197 (4th Cir. 1997); see also Schuler Indus., Inc. v. United States, 109 F.3d 753, 754–55 (Fed. Cir. 1997) (saying that *Chevron* is more deferential than *National Muffler*).
The Tax Court seems to be particularly divided and even more confused. In *Robinson v. Commissioner*, a post-*Mead* case decided by the Tax Court en banc regarding general authority Treasury regulations, the majority opinion stated that, “[a]lthough interpretative regulations are entitled to considerable weight, they are accorded less deference than legislative regulations, which are issued under a specific grant of authority to address a matter raised by the relevant statute.” Yet the court then went on, in the very next paragraph, to prescribe *Chevron*’s two-step analysis, citing *Chevron* and admonishing that, “[i]f the administrator’s reading fills a gap or defines a term in a way that is reasonable in light of the legislature’s revealed design, we give the administrator’s judgment ‘controlling weight.’” Moreover, despite extensive cites to *National Muffler* and other pre-*Chevron* tax deference cases describing the nature of its inquiry, the Tax Court’s evaluation of the regulation is indistinguishable from an opinion issued a few months earlier by Judge Gale in *Square D. Co. & Subs. v. Commissioner*, in which he applied *Chevron* to a specific authority Treasury regulation. Judge Gale concurred in Robinson by joining an opinion that did not discuss the *Chevron* issue, even though in *Square D.* he indicated that *Chevron* would be appropriate for all Treasury regulations, whether issued pursuant to general or specific authority. Meanwhile, two of the three dissenting opinions in Robinson, representing five of


101. See *Square D.*, 118 T.C. at 307 (citing *Bankers Life*, 142 F.3d 973).
the sixteen judges participating, concluded that *Skidmore*, not *Chevron*, provided the appropriate standard of review and that the majority’s opinion was inconsistent with that standard. 102 The Tax Court continued its inter-court disagreement over the applicability of the various standards more recently in *Swallows Holding Ltd. v. Commissioner.* 103 There the majority rejected *Chevron* deference and declined to defer to general authority Treasury regulations based on a less deferential *National Muffler* analysis notwithstanding strong, separate dissenting opinions by Judges Swift and Halpern advocating *Chevron* deference. 104

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

D. SCHOLARLY SUGGESTIONS

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

102. See Robinson, 119 T.C. at 107–08 (Swift, J., dissenting); id. at 113–21 (Vasquez, J., dissenting).
104. Id.
106. See Salem et al., supra note 20.
Salem, Ellen Aprill, and Linda Galler. The Task Force recommends Chevron deference for specific authority Treasury regulations; but for general authority Treasury regulations, the Task Force prescribed what they label as Chevron deference but which closer inspection of their analysis reveals is really a blended approach that incorporates National Muffler’s multi-factor analysis as the standard for reasonableness at Chevron step two. In other words, the Task Force said, the Treasury’s interpretations would still be “controlling” on the courts, just like under Chevron proper; but the range of reasonableness for a general authority Treasury regulation would be narrower than that for a specific authority Treasury regulation.

Although the Task Force acknowledged that general authority Treasury regulations are properly categorized as “legislative” for APA purposes, the Task Force emphasized the “traditional and well-entrenched use of the term ‘interpretive’” for such regulations as the primary justification for this hybrid ap-
proach.112 The Task Force stated that National Muffler provides “considerable guidance” for its methodology, of course;113 but the Task Force also carefully parsed Chevron and Mead to find support for its hybrid model114 and raised several normative justifications for taking “a cautious approach to a grant of broad deference” in tax cases.115

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

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

112. Salem et al., supra note 20, at 739.
113. Id. at 740.
114. Id. at 738–41; see also discussion infra notes 256–59 and accompanying text.
115. Id. at 723–26.
116. A common description of Chevron step one allows a reviewing court to utilize the traditional tools of statutory construction to ascertain the statute’s plain meaning, which would include considering the statute’s origin and purpose at that stage. See, e.g., INS v. St. Cyr, 533 U.S. 289, 320 nn.44–45 (2001) (considering the statute’s original purpose at Chevron step one); Brown & Williamson, 529 U.S. at 133–34; Regions Hosp., 522 U.S. at 457. Even contemporaneity may enter into Chevron analysis to the extent that an agency’s contemporaneous construction of a statute may offer insight into congressional intent. See, e.g., Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933) (recognizing these methodologies).
117. National Muffler involved the agency’s second attempt to define business league, but that second interpretation survived in part by not being challenged for fifty years. See supra notes 80–83 and accompanying text. Presumably the Task Force’s standard would allow that regulatory interpretation to stand; however, the Task Force offers no guidance for discerning at what point longevity and contemporaneity would trump the sort of statutorily permissible but politically inspired policy change generally sanctioned by Chevron.
text. Like the Task Force, Schnee and Seago concede *Chevron*’s applicability to specific authority Treasury regulations; but they believe that general authority Treasury regulations should only be given what they describe as a lesser degree of deference premised on “reasonableness.”118 Whereas the Court generally uses that term interchangeably with permissibility in the *Chevron* context,119 Schnee and Seago define their reasonableness standard as whatever produces “the better answer for the majority of taxpayers.”120 Yet Schnee and Seago fail to articulate what makes one interpretation better than another. Consequently, their proposed standard would seem to require a reviewing court to make an independent judgment as to whether the better interpretation is one that reduces (or increases) taxes, imposes less paperwork, or appeals to more abstract notions of fairness or efficiency, even if the court’s preferred policy goals differ from those of Treasury. Indeed, it is difficult to see how the standard Schnee and Seago propose defers to Treasury at all.

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

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

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

121. See Gans, *supra* note 20, at 792–93. Peter Lowy and Juan Vasquez, Jr., similarly imply in their analysis of deference and revenue rulings that Treasury regulations would be entitled to *Chevron* deference under *Mead*, but they do not discuss the issue outright. See Lowy & Vasquez, *supra* note 29, at
work of *Chevron*, *Skidmore*, and *Mead* to conclude that specific authority Treasury regulations warrant *Chevron* deference while general authority Treasury regulations qualify only for *Skidmore* respect.\textsuperscript{122} Coverdale also has expressed his preference for what he identifies as traditional tax deference principles for both types of regulations: controlling deference through an inquiry that collapses *Chevron*’s two steps into one for specific authority Treasury regulations, and *National Muffler* or *Skidmore* respect (which Coverdale equates) for general authority ones.\textsuperscript{123}

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

II. THE CASE AGAINST THE NATIONAL MUFFLER “ALTERNATIVE”

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

A. COMPARING THE DOCTRINAL HISTORY

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


\textsuperscript{123} See Coverdale, supra note 14, at 54–55, 67–68.

\textsuperscript{124} Cf. supra notes 50–57 and accompanying text.
agency legal interpretations generally. The questions as-yet unexamined are whether and how these conventions are related. Tracing the history of judicial deference in both tax and non-tax cases turns up more similarities than differences.

1. Early Assumptions

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

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


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

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

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

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

During this early period of regulatory expansion, non-tax commentators discussed at length the extent to which the Constitution permitted Congress to delegate the authority to promulgate binding, substantive regulations without violating the nondelegation doctrine.133 In cases addressing a wide range of administrative actions, such as Buttfield v. Stranahan134 and United States v. Grimaud,135 the Supreme Court repeatedly de-
clined to characterize even broad delegations of authority to adopt binding regulations as unconstitutional delegations of legislative power. Yet the New Deal cases of *Panama Refining Co. v. Ryan* and *A.L.A. Schechter Poultry Corp. v. United States*, which in 1935 struck down provisions of the National Industrial Recovery Act, offered proof that at least some delegations of legislative authority were unconstitutional.

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

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


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

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


142. See, e.g., Md. Cas. Co. v. United States, 251 U.S. 342, 349 (1920) (describing such regulations as having “the force and effect of law if [they] be not in conflict with express statutory provision”). Both tax and non-tax commentators recognized this definition of legislative regulations. See Alvord, supra note 131, at 259–60; Brown, supra note 23, at 384–85; Davis, supra note 23, at 928–29; Lee, supra note 23, at 2–3; see also Columbia Broad. Sys. v. United States, 316 U.S. 407, 416–22 (1942) (recognizing the legal force of specific authority regulations). In their analysis of congressional intent and the force of law, Thomas Merrill and Kathryn Tongue Watts downplay the role of the nondelegation doctrine and emphasize the importance of penalties as evidence of congressional intent that regulations carry the force and effect of law. See Merrill
By contrast, so-called interpretative regulations adopted pursuant to more general rulemaking grants of the “all necessary rules and regulations” variety merely interpreted existing law, so could not carry such legal effect. A general rulemaking grant that authorized binding regulations carrying the force and effect of law would be inconsistent with the nondelegation doctrine and thus constitutionally invalid. By contrast, non-binding regulations reflecting administrative officials’ best guess of a statute’s meaning were merely exercises of executive power and did not require congressionally delegated authority. The Administrative Procedure Act, adopted in 1946 to reform and bring uniformity to federal administrative process, implicitly incorporated these general principles in requiring procedures including public notice and opportunity for comment for legislative regulations but not for interpretative ones.

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

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


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

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

146. The Attorney General’s Manual on the Administrative Procedure Act, generally considered the authoritative history of that statute, is consistent with this understanding. The Manual defines legislative regulations (which it calls “substantive rules”) as “rules, other than organizational or procedural . . . , issued by an agency pursuant to statutory authority and which implement the statute.” U.S. DEPT OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 23, 30 n.3 (1947). The Manual offers as examples of such regulations the Federal Power Commission’s rules prescribing uniform systems of accounts and the SEC’s proxy rules, both of which, the Manual notes, carry the force and effect of law. See id. By contrast, the Manual defines as interpretative regulations (which it and the APA both call “interpretative rules”) as “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.” See id.
merely interpretative and nonbinding on nondelegation grounds. As observed by Kenneth Culp Davis, however, “although the theoretical distinction between legislative and interpretative rules is often clear, the practice does not always follow the theory, and in the borderland between the two kinds of rules, the differences, if any, are sometimes obscured or ignored.” Davis offered as one example certain general authority Treasury regulations interpreting the vague, one-sentence definition of “gross income” in what is now I.R.C. § 61.

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

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

148. Davis, supra note 23, at 932.

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

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


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

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

154. See, e.g., Comm’r v. S. Tex. Lumber Co., 333 U.S. 496, 503 (1948) (con-
In both non-tax and tax cases involving interpretative regulations, by contrast, the strong deference applicable to legislative regulations did not apply. Instead, the Court reviewed interpretative regulations independently, but offered a variety of factors such as contemporaneity, longevity, and consistency that, where present, justified giving agency interpretations respect. Subject-matter complexity and comparative institutional expertise also played a role. Ultimately, the Court wrote the oft-quoted passage in *Skidmore* that has become the dominant articulation of this multifactor standard. Although *Skidmore*, like *Chevron*, was not a tax case, the Court in *Skidmore* analogized the Wage and Hour Division rulings at issue to general authority Treasury regulations, signaling that the same standard should apply to both.

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

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

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

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

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


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

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

In tax and non-tax cases both, the Court’s adherence to its own standards for reviewing legislative and interpretative
regulations was frequently inconsistent.\textsuperscript{170} Reviewing the Court’s jurisprudence from the first half of the twentieth century, one can find references to contemporaneity, longevity, and reenactment in cases involving specific authority regulations\textsuperscript{171} and reliance on specific authority precedents in cases involving general authority regulations.\textsuperscript{172} The excessive intrusion of the reenactment doctrine in tax cases only makes those cases even more difficult to reconcile coherently. Regardless, the jurisprudence from this period does not distinguish between tax and non-tax on the issue of judicial deference; and the scholarship likewise is remarkably consistent regarding the distinction between specific and general authority regulations and the theoretical ramifications for judicial review. In sum, the comparative analysis of this period does not support the existence of a unique tax deference tradition.

2. The Road to \textit{Chevron}

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

\textsuperscript{170} See Davis, supra note 23, at 934 (“Courts frequently give as much effect to interpretative rules as to legislative rules, and courts frequently find ways to set aside legislative rules.”).


\textsuperscript{172} See, e.g., Comm’r v. Wheeler, 324 U.S. 542, 547 n.10 (1945) (citing \textit{Fawcus Mach.}, 282 U.S. 375).

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


\textsuperscript{175} Id. at 425.
contrast, a court is not required to give effect to an interpretative regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise."

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

178. Id. at 302.
179. Id. at 308–09 (citing the housekeeping statute, 5 U.S.C. § 301 (2000)). The OFCCP also offered as authority for its regulations another Department of Labor regulation and a presidential Executive Order, neither of which the Court considered representative of congressional delegation. See Chrysler, 441 U.S. at 303–08.
180. See id. at 314–16. The Court left open the possibility that some general authority grants might support legislative regulations, but then said without elaboration that the statute must show at least that Congress contemplated the regulations at issue. Id. at 308. Separately, the Court considered relevant the agency's failure to utilize notice-and-comment rulemaking in promulgating the regulations at issue. See id. at 313–15.
181. Id. at 315.
Other non-tax opinions issued by the Court during this period similarly emphasized the legislative or interpretative character of the source of the agency authority behind the regulations under consideration. Likewise in the tax area. In *Rowan Companies, Inc. v. United States*, the Court considered the validity of general authority Treasury regulations interpreting the Federal Insurance Contributions Act (FICA) and Federal Unemployment Tax Act (FUTA) provisions of the Code. Citing *Batterton v. Francis* among other cases, the Court made clear that it was applying a less deferential review standard because Treasury relied on the general authority grant of I.R.C. § 7805(a) rather than more specific authority in promulgating the regulation. By contrast, “[w]here the Commissioner acts under specific authority, our primary inquiry is whether the interpretation or method is within the delegation of authority.”

Despite the Court’s expressions of continued commitment to these long-standing principles, it was during this period that weaknesses in the old approach became more problematic. The 1960s and 1970s saw a virtual explosion of agency rulemaking, with agencies seeking to achieve more policy objectives through general authority regulations. Traditional doctrine treated...
general authority rulemaking as interpretative, nonbinding, and not entitled to controlling deference. Modern practice, however, involved agencies increasingly utilizing general rulemaking grants to choose among alternative reasonable interpretations of ambiguous statutes and defending their interpretive choices in such terms. Meanwhile, since the Court never again invalidated a delegation of power to an agency on nondelegation grounds after Panama Refining and Schechter Poultry, that doctrine faded as a limitation on congressional delegation of rulemaking authority.

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

187. See supra Part II.A.1.
188. See, e.g., BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 4.3 (3d ed. 1991) (noting a rise in rulemaking); Merrill & Watts, supra note 48, at 549–70 (documenting efforts by the Federal Trade Commission, Food and Drug Administration, and National Labor Relations Board to claim previously unasserted legislative authority).
189. See PIERCE, supra note 186, § 2.6, at 91–93; see also 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 3.2 (2d ed. 1978) (describing nondelegation as a failed legal doctrine); BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 12 (1976) (opining that the nondelegation doctrine “can not be taken literally”).
190. See, e.g., Nat’l Nutritional Foods Ass’n v. Weinberger, 512 F.2d 688, 697 (2d Cir. 1975) (concluding that FDA regulations issued pursuant to general authority were nonetheless legislative because they were legally binding); see also 2 DAVIS, supra note 173, §§ 7.13, 7.15 (reflecting the change from prior understanding by noting that “[i]nterpretative rules sometimes have force of law and sometimes [do] not,” and documenting lower court blurring of the distinction between legislative and interpretative regulations); Michael Asimow, Nonlegislative Rulemaking and Regulatory Reform, 1985 DUKE L.J. 381, 393–401 (discussing various tests for distinguishing legislative and interpretative regulations, and noting the declining relevance of the specific versus general authority distinction).
than legislative, and thus using the *Skidmore*-type multifactor review standard, at the insistence of the parties.192 Oral argument transcripts in such cases include passages in which the Justices suggest to the litigants that the regulations at issue might be legislative instead, only to be rebuffed by attorneys relying on the traditional definitions of those categories.193 Notwithstanding fairly evident interest by the Court, the parties before it simply would not take the hint.

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


194. 451 U.S. 504.

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

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


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

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

The Court’s articulation of its deference principles in the years leading up to Chevron was often similarly muddled in non-tax cases as well. For example, in Whirlpool Corp. v. Marshall, a case involving an Occupational Safety and Health Act regulation adopted pursuant to a general rulemaking grant similar to I.R.C. § 7805(a), the Court identified the regulation as interpretative according to the Secretary of Labor’s characterization, said that the Skidmore standard governed, but described that standard as whether the regulation constitutes a permissible gloss on the Act by the Secretary, in light of the Act’s language, structure, and legislative history. Our inquiry is informed by an awareness that the regulation is entitled to deference.

199. See Alessi, 451 U.S. at 517–18 n.13 (citing Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977), and other sources).
200. See supra notes 85–92 and accompanying text.
unless it can be said not to be a reasoned and supportable inter-pretation of the Act.205

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

3. Post-*Chevron* Considerations

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

206. See supra note 89 and accompanying text.
208. See Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 ENVTL. L. REP. (ENVTL. LAW INST.) 10,606, 10,613 (1993) (analyzing Justice Thurgood Marshall’s papers to conclude that the Justices did not focus on the broader implications of the *Chevron* opinion); see also Merrill & Hickman, supra note 43, at 838 (discussing how *Chevron* first achieved prominence in the lower courts).
209. See, e.g., Merrill, supra note 70, at 980–85 (reviewing and performing empirical surveys and arguing that *Chevron* did not actually result in increased Supreme Court deference to agency interpretations); Russell L. Weaver, *Some Realism About* *Chevron*, 58 Mo. L. REV. 129, 131 (1993) (suggesting that “*Chevron*'s importance has been exaggerated”).
trine’s second decade than in the first.\textsuperscript{210} Nevertheless, the lower courts rely heavily on \textit{Chevron},\textsuperscript{211} and when the Court acts in a deferential mode, it typically speaks in terms of \textit{Chevron} and, in the last few years, \textit{Mead} and \textit{Skidmore}.\textsuperscript{212}

But not always. In the tax context, as noted above, the Court has been woefully inconsistent in what, if any, deference doctrine it intends to apply. Since deciding \textit{Chevron}, the Court has cited \textit{National Muffler} and \textit{Chevron} each twice in majority opinions, and it has cited \textit{National Muffler} three times to \textit{Chevron’s} two in separate concurring or dissenting opinions.\textsuperscript{213}

Once, in \textit{Newark Morning Ledger Co. v. Commissioner}, Justice Souter, writing in dissent, cited both \textit{Chevron} and \textit{National Muffler} in the same passage for general deference propositions.\textsuperscript{214}

Post-\textit{Chevron}, the Court cites \textit{National Muffler} most routinely for the proposition that courts should defer to Treasury regulations that reasonably interpret the Code,\textsuperscript{215} an unre-
markable pronouncement under any of *Mead*, *Chevron*, or *Skidmore*. The Court similarly cites *Chevron* regularly in non-tax cases for the mere point that courts should defer to reasonable agency interpretations of the statutes they administer. In one non-tax case, *Meyer v. Holley*, the Court even cited both *Chevron* and *Skidmore* for the statement that “the Court ordinarily defers to an administering agency's reasonable statutory interpretation.” Carefully reading the Court's language can be illuminating at times, but in post-*Chevron* tax cases, the Court's reliance on *National Muffler* for this point is best characterized as deference boilerplate. By way of comparison, the Court regularly cites non-tax pre-*Chevron* cases like *Batterton v. Francis* and *Schweiker v. Gray Panthers* to support similar deference rhetoric, either in conjunction with *Chevron* or not.

Citation counts and the Court's rhetoric in citing *National Muffler* therefore say little or nothing about *National Muffler*'s continuing significance. The real question is whether the Court's analysis of the issues before it suggests that the Court is applying a less deferential multifactor or hybrid analysis
rather than *Chevron*’s two steps and controlling deference. The *Cottage Savings*\(^{220}\) and *Cleveland Indians Baseball*\(^{221}\) cases are most substantive examples of the Court’s reliance on *National Muffler*.

The issue in *Cottage Savings* was whether exchanging one portfolio of residential mortgage loans for another represented a “disposition of property” under I.R.C. § 1001.\(^{222}\) No regulation or pre-litigation ruling addressed the issue precisely; but Treasury Regulation § 1.1001-1 treated an exchange of “properly differing materially” as a disposition, and, as in *National Muffler*, the Court characterized the case as challenging both the validity and the meaning of that regulatory language.\(^{223}\) Concerning the former question, the Court cited *National Muffler* principally in favor of deference to reasonable interpretations.\(^{224}\) Nevertheless, the Court employed the reenactment doctrine in assessing reasonableness.\(^{225}\) The Court noted that its own jurisprudence had incorporated the “materially” or ‘essentially’ different” standard in the 1920s, that the regulation had employed that standard since 1934, and that Congress had reenacted the Code several times since.\(^{226}\) In discussing deference, except when citing the case in deference boilerplate,\(^{227}\) the Court typically cites *Cottage Savings* as support for reenactment doctrine applicability, in both tax and non-tax cases.\(^{228}\)

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

\(^{222}\) *Cottage Sav.*, 499 U.S. at 559.
\(^{223}\) Id. at 560 (“We must therefore determine whether the realization principle in § 1001(a) incorporates a ‘material difference’ requirement. If it does, we must further decide what that requirement amounts to and how it applies in this case.”).
\(^{224}\) Id. at 560 (“Because Congress has delegated to the Commissioner the power to promulgate ‘all needful rules and regulations for the enforcement of [the Internal Revenue Code],’ 26 U.S.C. § 7805(a), we must defer to his regulatory interpretations of the Code so long as they are reasonable.”).
\(^{225}\) See id. at 561–62.
\(^{226}\) Id.
\(^{227}\) See Boeing Co. v. United States, 537 U.S. 437, 448 (2003) (stating that general authority regulations must be treated with “deference”); Comm’r v. Estate of Hubert, 520 U.S. 93, 120, 123 (1997) (noting that the Court defers to reasonable interpretative Treasury regulations).
larly in tax cases but also in non-tax ones. That does not necessarily mean that reenactment doctrine is inconsistent with *Chevron*.\(^{229}\) To the extent that the Court often considers legislative history in ascertaining plain meaning at *Chevron* step one,\(^{230}\) reenactment doctrine may be of use in that task. In *FDA v. Brown & Williamson Tobacco Corp.*, for example, the Court employed the reenactment doctrine heavily in *Chevron* step-one analysis to conclude that Congress clearly did not intend with the Food, Drug, and Cosmetics Act to give the FDA authority to regulate tobacco.\(^{231}\) Although the reenactment doctrine is inconsistent with *Chevron*’s emphasis on interpretive flexibility, the Court has also acknowledged the doctrine in connection with *Chevron* step-two analysis.\(^{232}\) Consequently, the analysis of *Cottage Savings* sheds little light on the *Chevron* versus *National Muffler* debate.

*Cleveland Indians Baseball* offers even less to clarify the question of deference toward Treasury regulations, notwithstanding its more extended deference discussion. The issue raised by *Cleveland Indians Baseball* was whether backpay awards are “wages” for purposes of FICA and FUTA, the relevant portions of which are incorporated in the Internal Revenue Code and within the interpretive authority of I.R.C. § 7805(a).\(^{233}\) In analyzing the issue, the Court cited *National Muffler* for the proposition that deference is appropriate for reasonable Treasury regulations promulgated under I.R.C. § 7805.\(^{234}\) The Court acknowledged that the regulations are ambiguous as to the question at hand, noted a long-standing revenue ruling that was on point, and cited a case from the *Seminole Rock* line in favor of substantial deference for an


\(^{231}\) See *Brown & Williamson*, 529 U.S. at 143–59.


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

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

By contrast, the Court was significantly clearer in Atlantic Mutual Insurance Co. v. Commissioner, another case that post-dates Cottage Savings. That case involved a general authority Treasury regulation interpreting the phrase “reserve strengthening” used in I.R.C. § 1023. In this opinion, the Court cited Chevron and expressly and unequivocally employed Chevron’s two-step analysis, concluding first that the statute is ambiguous, then continued to consider the regulation’s reasonableness. The Court did not cite National Muffler, but did cite Cottage Savings for the proposition that the Court’s task at step two “is to decide, not whether the Treasury Regulation represents the best interpretation of the statute, but whether it represents a reasonable one.” The Court’s Chevron step-two analysis in Atlantic Mutual does not mention reenactment, lon-

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


238. Id. at 385–86.

239. See id. at 387–89.

240. See id. at 389–91.

241. Id. at 389.
gevity, or contemporaneity, but rather Treasury’s reasonableness in balancing competing policy goals.  

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

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

242. See id.


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

249. Id. at 445–46.
250. See Brief for the Respondent-Appellee at 20–21, Boeing, 537 U.S. 437 (Nos. 01–1209, 01–1382).
251. See id.
253. In its reply brief, the taxpayer cited United States v. Vogel Fertilizer, Co., 455 U.S. 16, 26 (1982), for the proposition that the regulation, “whether or not . . . thought to be ‘legislative’ in character,” was not entitled to deference because it was inconsistent with the statute. Reply Brief for the Petitioner-Appellant at 18, Boeing, 537 U.S. 437 (No. 01–1209).
254. Transcript of Oral Argument at 13–14, 27, Boeing, 537 U.S. 437 (Nos. 01-1209, 01-1382).
255. See Boeing, 537 U.S. at 448.
256. See id.
It was consistent with the Court’s post-*Chevron* jurisprudence up until *Christensen* and *Mead* for the Court to have ignored or glossed through an issue like the level of deference appropriate for Treasury regulations.\(^{257}\) Although the post-*Mead* Court now is more focused on questions of *Chevron*’s scope, it would nevertheless be typical for the Court to defer making a definitive statement until the issue is squarely presented and adequately briefed.

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

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

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

\(^{258}\) See Salem et al., supra note 20, at 739.

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


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

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

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

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

\(^{263}\) Id. at 222.

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

\(^{265}\) Salem et al., *supra* note 20, at 755.


\(^{267}\) Christensen, 529 U.S. at 596 (Breyer, J., dissenting).

\(^{268}\) See, e.g., Evans, 536 U.S. at 487 (2002) (O’Connor, J., concurring) (criticizing Justice Breyer’s discussion of *Chevron* as unnecessary dicta and
Recently in *Alaska Department of Environmental Conservation v. EPA*, the Court noted *Barnhart*'s mention of longevity before expressly rejecting that factor as relevant to *Chevron* analysis.269 Ultimately, therefore, *Barnhart* offers little to inform the debate over deference to Treasury regulations.

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

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

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

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

B. THE NORMATIVE CASE

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

Because Mead suggests the potential for differences between agencies and statutes, however, and because tax scholars and practitioners have used that hook and the previously noted minor rhetorical deviations from Chevron to open a door for a tax-specific deference approach, the argument against such an alternative must address the normative as well as the doctrinal. Moreover, Skidmore is permissive and prudential, not mandatory, and gives the courts flexibility to grant more or less deference to an agency’s interpretation of a statute only sets the framework for judicial analysis; it does not displace it.” 468 U.S. 137, 143 (1984) (internal quotation marks omitted). The Court has not cited either Vogel Fertilizer or Rowan Cos. in any post-Chevron tax case for any proposition whatsoever.

272. See, e.g., Coverdale, supra note 122, at 54–55, 67–68; Salem et al., supra note 20, at 737–50.
deference where it applies. Consequently, normative arguments for or against deference carry greater weight to the extent *Skidmore* provides the appropriate standard.

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

1. Tradition as Normative Argument

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

277. See Coverdale, supra note 122, at 86.
unique tax deference tradition that requires less deference in tax cases than in those from other areas of administrative law, then one could argue that Congress drafts the tax laws with that same tradition in mind.279

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

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

interpretations, which suggests some congressional recognition of deference principles.

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

280. See *supra* Parts I.C–D.

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

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

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

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

Moreover, the penalties imposed on straying taxpayers

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

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

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


287. See Crandon, 494 U.S. at 177–78 (Scalia, J., concurring); see also Kahan, supra note 284, at 490.
simply are not so onerous comparatively. Admittedly, the penalties and interest charges that may be levied against a taxpayer who underreports his or her income tax liability can be burdensome. I.R.C. § 6662 imposes a penalty of twenty percent on any underpayment of taxes resulting from taxpayer negligence as well as intentional disregard of tax rules and regulations.288 and I.R.C. § 6662 and related Treasury regulations construe negligence broadly.289 Separately, the Code requires taxpayers who underpay their taxes to pay interest on assessed and unpaid taxes.290 With daily compounding, it is not unusual for such penalties and interest to exceed the amount of tax due.

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

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


292. See id. § 300g-3(3)(A).
courts have applied Chevron deference to EPA’s safe drinking water regulations.293

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

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

293. See City of Waukesha v. EPA, 320 F.3d 228, 238 (D.C. Cir. 2003).
297. See Boutilier v. INS, 387 U.S. 118, 132 (1967) (Douglas, J., dissenting) (“Deportation is the equivalent of banishment or exile. Though technically not criminal, it practically may be.” (internal citations omitted)); see also Reid v. INS, 420 U.S. 619, 633–34 (1975) (Brennan, J., dissenting) (acknowledging same); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (originating this view).
UTES, and occasionally that doctrine may trump *Chevron.* Nevertheless, because it is clear that Congress has delegated to the executive branch the primary responsibility for administering the immigration laws, the Court also extends *Chevron* deference to interpretations rendered through adjudication before the Board of Immigration Appeals.

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

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

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

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

3. IRS Overreach

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

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

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

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are widely hailed as surprisingly taxpayer friendly.\footnote{See Treas. Reg. \S 1.263(a)-4, 1.263(a)-5 (as amended in 2004); \textit{see also} Sharon Burnett & Darlene Pulliam, \textit{IRS Provides Much-Needed Guidance on Capitalization of Intangibles}, \textit{P RAC. TAX STRATEGIES}, Aug, 2004, at 68, 80 ("The release of these final regulations places taxpayers in a better position concerning the capitalization of intangibles than they have ever been.").} The check-the-box entity classification regulations for distinguishing "partnerships" from "associations" for purposes of I.R.C. \textsection 7701.\footnote{See Treas. Reg. \S\S 301.7701–1 to –3 (as amended in 2006).}

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

Moreover, allegations of this sort of jurisdictional boundary testing are not limited to the tax context. Many agencies other than the IRS have been known to test the boundaries of the statutes they administer, whether in the pursuit of policy goals agency officials deem wise if perhaps beyond the range of their mandate,\footnote{See, \textit{e.g.}, Solid Waste Agency of N. Cook County v. U.S. Army Corps. of Eng'rs, 531 U.S. 159 (2001) (seeking jurisdiction over abandoned sand and gravel pit as "navigable waters" under the Clean Water Act); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (seeking jurisdiction to regulate tobacco as a drug).} or for reasons as base as financial self-interest.\footnote{See, \textit{e.g.}, Ind. Mich. Power Co. v. Dep't of Energy, 88 F.3d 1272 (D.C. Cir. 1996) (considering an agency interpretation of a contract to which the agency was a party); Mesa Air Group, Inc. v. Dep't of Transp., 87 F.3d 498 (D.C. Cir. 1996) (same); \textit{see also} Timothy K. Armstrong, \textit{Chevron Deference and Agency Self-Interest}, 13 \textit{CORNELL J.L. & PUB. POLY} 203 (2004) (categorizing and discussing the cases).}

"The desire of power in excess, caused the angels to fall."\footnote{\textit{SIR FRANCIS BACON}, \textit{Of Goodness & Goodness of Nature}, in \textit{THE ESSAYS OR COUNSELS, CIVIL AND MORAL, OF FRANCIS LD. VERULAM} 51, 51 (1944).}
the other hand, it is not unheard of for agencies to decline to regulate subject matter arguably within their jurisdiction, which may be equally problematic depending upon one’s perspective.311

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

4. Expertise

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


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

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

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

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

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

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

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

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

5. Summary

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

III. APPLYING THE MEAD FRAMEWORK

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

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

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


320. Id.

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

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

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


325. See Elhauge, supra note 50, at 2139; Merrill, supra note 8, at 826–27; Sunstein, supra note 266, at 222–25.
Whatever the ambiguities of the force of law concept, and the related uncertainties in truly marginal cases, applying *Mead* to Treasury regulations is comparatively simple. Treasury regulations promulgated pursuant to the Code’s specific and general rulemaking grants bind both taxpayers and the government with the same legal force as the Code itself. This simple reality is enough to satisfy *Mead* and compel *Chevron* deference to Treasury regulations.

A. EVIDENCE OF CONGRESSIONAL INTENT

The *Mead* Court was quite explicit that a specific grant of rulemaking authority and exercise thereof will satisfy the force of law requirement: “We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”

Congress has clearly delegated to the Secretary of the Treasury the specific authority to promulgate legislative regulations in a variety of areas throughout the Code. Even before *Chevron*, the Court extended strong judicial deference to such regulations. Thus it is not surprising that even those who support alternative tax-deference standards concede *Chevron*’s applicability to specific authority regulations.

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

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327. See supra note 25 and accompanying text (identifying specific authority grants).
328. See *Rowan Cos.*, Inc. v. United States, 452 U.S. 247, 253 (1981) (acknowledging the standard); see also supra notes 150–54 and accompanying text.
330. See *INTERNAL REVENUE MANUAL*, supra note 24, § 32.1.2.3; Salem et al., supra note 20, at 728; see also discussion supra note 30 (discussing Treasury’s overreliance on its I.R.C. § 7805 authority).
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2006] taxpayers and the government; and, as discussed at length above, I.R.C. § 6662 imposes financial penalties on taxpayers who fail to follow Treasury’s interpretations of the Code as advanced through general as well as specific authority regulations.

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

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

331. See Merrill & Watts, supra note 48, at 471–72.
332. See id. at 493–528.
334. See Merrill & Watts, supra note 48, at 570–73.
335. See id.
336. See id. Merrill and Watts also premise their argument on their characterization of early income tax penalties as applying only to specific authority grants in the I.R.C. See id. at 571–73. I believe that Merrill and Watts have misconstrued the early tax penalty provisions. Merrill and Watts focus their analysis largely on the rulemaking grants and penalty provisions in sections 1001 through 1005 of the War Revenue Act of 1917, although they correctly note similar rulemaking grants in subsequent Revenue Acts and ascribe the same penalty structure to the Internal Revenue Codes of 1939 and 1954. See id. Sections 1001 and 1002 of the War Revenue Act of 1917 give Treasury the authority to promulgate regulations governing the keeping of records, filing of returns, and payment of taxes. See War Revenue Act of 1917, Pub. L. No. 64-271, sections 1001, 1002, 40 Stat. 300, 325 (codified as amended at 15 U.S.C. §§ 71–77). Merrill and Watts characterize regulations under sections 1001 and
Merrill and Watts link this history to the tax community’s practice of applying the interpretative label to such regulations. When considered in conjunction with the understanding of the nondelegation doctrine common to that era, their speculation seems quite plausible.

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

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

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

338. Prior to 1986, the negligence penalty only applied to "intentional disregard of rules and regulations." Winslow, *supra* note 336, at 838. Many courts have interpreted this language as requiring actual knowledge of and intent to ignore the relevant Treasury regulations before penalties would apply. See, e.g., *Hill v. Comm’r*, 63 T.C. 225, 251–52 (1974); see also Hoffman, *supra* note 336, at 112–13 (documenting early cases). In 1986, Congress expanded the negligence penalty to cover “any failure to make a reasonable attempt to comply with” or “any careless, reckless, or intentional disregard” for the Code and Treasury regulations. I.R.C. § 6653(a)(3) (1986) (repealed 1989); see also Winslow, *supra* note 336, at 838.
in 1989, Congress revisited and entirely restructured the I.R.C.’s penalty provisions but left the expanded language of the negligence penalty—now called the “accuracy-related penalty”—substantially unaltered.\footnote{\textit{\textsuperscript{339}}} It may or may not be fair to presume that Congress appreciated the potential consequences to judicial deference of using the “rules and regulations” terminology in the penalty provision. It is notable, however, that Congress used the same “rules and regulations” language in both I.R.C. § 6662 and I.R.C. § 7805(a); and Treasury’s regulations interpreting § 6662 do not distinguish between specific authority and general authority Treasury regulations in prescribing § 6662’s applicability.\footnote{\textit{\textsuperscript{340}}}

Separately, Congress has had the opportunity to consider Treasury’s position that its general authority regulations are interpretative for APA purposes. In 1980, Congress adopted the Regulatory Flexibility Act\footnote{\textit{\textsuperscript{341}}} (RFA), mandating that agencies analyze the burdens imposed on small businesses by their proposed regulations and explain the reasons for not adopting less onerous alternatives.\footnote{\textit{\textsuperscript{342}}} The RFA’s requirements generally only apply to informal agency rulemaking subject to the notice and comment requirements of APA § 553(b).\footnote{\textit{\textsuperscript{343}}} Thus, since interpretative rules are exempt from the APA’s notice and comment requirements, the RFA generally does not apply to them.\footnote{\textit{\textsuperscript{344}}} Based upon its historical categorization of its general authority regulations as interpretative, Treasury initially claimed that virtually all of its regulations were likewise excused from the regulatory flexibility analysis.\footnote{\textit{\textsuperscript{345}}} After hearing numerous com-

plaints from the Small Business Administration and others over Treasury’s excuse for ignoring the RFA’s mandate.\textsuperscript{346} Congress amended the RFA in 1996 to require regulatory flexibility analysis for all Treasury regulations published in the Code of Federal Regulations, which includes those promulgated pursuant to Code § 7805.\textsuperscript{347}

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

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

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

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


\textsuperscript{348} 5 U.S.C. § 603(a).


\textsuperscript{350} See Salem et al., \textit{supra} note 20, at 739.
legislative-versus-interpretative distinction to the courts, and instead simply wants the desired regulatory flexibility analysis to be performed where necessary to accomplish the RFA's goals, and so chose language more precise to that purpose.\footnote{Notably, summary statements entered into the record to guide agency officials as to the amendment's meaning describe the affected regulations as "interpretative rules' that IRS contends need not be promulgated pursuant to section 553 of the Administrative Procedure Act." 142 CONG. REC. E571-01, E573 (daily ed. Apr. 19, 1996); 142 CONG. REC. S3242, S3244–45 (daily ed. Mar. 29, 1996). Both the use of quotation marks to describe the regulations as interpretative and the phrase "the IRS contends" support the conclusion that Congress did not intend to render judgment as to the proper characterization of such regulations.}

Nevertheless, to be burdensome on small businesses and thus implicate the concerns Congress intended to address with the RFA, the qualifying general authority Treasury regulations would have to be binding. In other words, they would have to carry the force and effect of law.\footnote{See, e.g., 142 CONG. REC. S2148, S2156 (daily ed. Mar. 15, 1996) (statement of Sen. Bumpers, noting that such regulations "must be observed if the business owner wants to avoid a confrontation with the Government").} If they did not, then Congress's insistence upon the regulatory flexibility analysis for such regulations would be odd. Considered together, the new I.R.C. § 6662 penalty provisions and the RFA amendments seem to signal clearly that, whatever its reasoning in the 1920s, Congress now intends for general authority Treasury regulations promulgated pursuant to I.R.C. § 7805(a) to carry the force and effect of law.

B. LEGISLATIVE VERSUS INTERPRETATIVE ANALYSIS

As discussed above, while the Court once relied on the legislative- and interpretative-rule categories in deciding which deference standard to apply, the Court's post-

\textit{Chevron} jurisprudence disregards that distinction in determining whether or not \textit{Chevron} applies. Yet much of the ongoing debate over \textit{Chevron} deference for general authority Treasury regulations hinges on the interpretative label that the tax community applies to such regulations.

The interpretative-rule category as historically defined included regulations promulgated pursuant to general authority grants. Yet while nondelegation doctrine principles rendered such regulations nonbinding in the first part of the twentieth century, the nondelegation doctrine waned as decades passed. The years immediately preceding \textit{Chevron} saw a dramatic in-
crease in legally binding regulations adopted under general authority. Hence, the interpretative-rule category as historically understood now incorporates both legally binding regulations published in the Code of Federal Regulations and nonbinding agency guidelines and rulings.353

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

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

356. See United States v. Mead Corp., 533 U.S. 218, 230–31 (2001) (“[A]s significant as notice-and-comment is in pointing to Chevron authority, the want of that procedure here does not decide the case . . . .”).
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The Court’s analysis makes equally clear that legislative regulations developed through notice-and-comment rulemaking are entitled to *Chevron* deference. It stands to reason, therefore, that if Treasury regulations are properly subject to APA’s notice and comment requirements, then notwithstanding Treasury’s protestations to the contrary, *Chevron* would provide the appropriate standard for judicial review.

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

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

357. See id. at 230 n.12 (making the point and citing nineteen such cases); see also *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 45 (2002) (emphasizing the agency’s use of notice-and-comment rulemaking to adopt a challenged regulatory provision).
358. See *Merrill*, supra note 8, at 827–33 (linking legislative rulemaking authority and *Chevron* eligibility).
359. See discussion supra note 27 and accompanying text.
360. See, e.g., *Hemp Indus. Ass’n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003); *Mejia-Ruiz v. INS*, 51 F.3d 358, 365 (2d Cir. 1995); see also Richard J. Pierce Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 ADMIN. L. REV. 547, 555 (2000); discussion supra note 29.
itly invoked its general legislative authority; and finally, (4) whether the rule in question repudiates or amends another legislative rule. Although the D.C. Circuit has since modified this standard by making publication in the C.F.R. merely nondispositive evidence of agency intent, the fact that Treasury so publishes its general authority regulations would at least mitigate if not outweigh its claim that the regulations are interpretative. Certainly many Treasury regulations are sufficiently extensive to be essential for the enforcement actions being litigated, even if they only purport to clarify undefined statutory terms. More importantly, given the nondelegation doctrine’s decline and prevalent agency reliance on provisions like I.R.C. § 7805(a) to adopt legally binding regulations, express reliance on I.R.C. § 7805(a) would seem inadequate to trigger the third American Mining Congress test.

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

361. Am. Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1109–11 (D.C. Cir. 1993); see also Hemp Indus., 333 F.3d at 1087 (applying this standard); N.Y. City Employees’ Ret. Sys. v. SEC, 45 F.3d 7, 15 (2d Cir. 1995) (same); Pierce, supra note 360, at 556–57 (discussing this standard).


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

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


366. See, e.g., First Nat’l Bank of Lexington, Tenn. v. Sanders, 946 F.2d 1185, 1189 n.2 (6th Cir. 1991) (acknowledging the questionability of the substantial impact test but applying it as appropriate for the case at bar); see also Funk, supra note 353, at 1326.
asked whether the rule at issue was binding in that it imposed “rights and obligations” on regulated parties and also whether the rule “leaves the agency and its decisionmakers free to exercise discretion” or, conversely, binds the agency as well as regulated parties. Treasury regulations have always been binding on government officials, even when most tax scholars agreed that such regulations could not bind taxpayers or the courts. Now that I.R.C. § 6662 and the regulations thereunder clearly impose penalties for disregarding general authority Treasury regulations in filing tax return, such regulations impose rights and obligations and are binding on taxpayers and the government alike.

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

C. COUNTERARGUMENTS

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

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

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

371. See id.; see also Surrey, supra note 143, at 576–77 (making a similar argument, though for different reasons).
372. See Coverdale, supra note 122, at 85–86.
374. See Lee, supra note 23, at 24. Some scholars would suggest that such interpretive power is inherent in the executive, while others maintain that congressionally delegated enforcement power must be present. See generally Saikrishna Prakash, The Essential Meaning of Executive Power, 2003 U. ILL. L. REV. 701, 704–13 (summarizing different views of the Constitution’s Article II Vesting Clause). Regardless of one’s view of what is required for an executive department to have the power to interpret a statute within its jurisdiction, it seems clear that Treasury possesses such authority.
375. See discussion supra notes 25, 130–31 and accompanying text (identifying specific authority grants).
Coverdale also identifies the existence of the Tax Court as evidence that Congress clearly desires independent rather than deferential review for general authority Treasury regulations. To support this position, Coverdale cites congressional action in 1924 creating the Board of Tax Appeals (the “BTA” or “Board”), the predecessor to the modern Tax Court, for the purpose of providing “an independent review of the Commissioner of Internal Revenue’s determination of additional income and estate taxes’ before the additional tax could be collected.” Coverdale maintains that the existence of the Tax Court and the tax deference standard of National Muffler (which Coverdale equates with Skidmore) represent a delicate balance between respect for Treasury’s role in interpreting the Code and the need for independent review of IRS enforcement actions, including Treasury interpretations of law.

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

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

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

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

378. Id.

379. See id. at 81–82.

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

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

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381. See id.
382. See id. at 42–43 (describing the Committee on Appeals and Review).
383. See id. Whereas the Committee on Appeals and Review was located organizationally within the Bureau of Internal Revenue, under Treasury’s proposal, the BTA would have been located within the Treasury Department but separate from the Bureau, and the Secretary would have had the authority to appoint members and to approve the Board’s procedural rules. See id. at 52–53. The proposal at least implicitly gave the Secretary the power to remove Board members as well. See id. at 55.
385. See Charles D. Hamel, United States Board of Tax Appeals, 13 GEO. L.J. 20, 24 (1924). In discussing the BTA’s role, Hamel particularly noted the Interstate Commerce Commission and the Federal Trade Commission as examples of other special tribunals within the federal government, but described them as having “a composite function to perform, both judicial and legislative,” as opposed to the BTA’s “purely judicial duty.” Id.
386. See id.
BTA's adherence to the same deference principles applied by the Article III courts.\textsuperscript{387}

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

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

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


\textsuperscript{389} See discussion supra notes 30, 33 and accompanying text.

\textsuperscript{390} See discussion supra note 30 and accompanying text.

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

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

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

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


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

D. SUMMARY


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

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

For example, I.R.C. § 61 (2000) defines gross income by listing several obvious sources but also stating the list is not exclusive and that gross income is "from whatever source derived." Currently, Treasury has promulgated sixteen final, five proposed, and one temporary regulation elaborating this section.
is plausible that Congress originally intended that at least general authority Treasury regulations should not be legally binding, particularly when one considers the understanding of the nondelegation doctrine common in the era in which Congress adopted the Code. Nevertheless, the nondelegation doctrine has long since passed as a serious obstacle to viewing general authority Treasury regulations as legally binding. More recent, post-*Chevron* congressional action particularly with respect to the Code’s penalty provisions, but also regarding the Regulatory Flexibility Act, strongly support a conclusion that Congress intends for all Treasury regulations—general and specific authority—to carry the force and effect of law. While Treasury continues to maintain its position that the general authority regulations are interpretative and not subject to APA notice and comment requirements, Treasury’s actions speak louder than its words: Treasury utilizes notice and comment procedures in promulgating all of its regulations, considers itself bound by the interpretations advanced in those regulations, and asserts the applicability of *Chevron* deference in litigation. Should any taxpayer actually challenge even a general authority Treasury regulation on grounds that Treasury failed properly to satisfy the APA’s notice and comment requirements, it seems a virtual certainty that the courts would conclude that all Treasury regulations are in fact legislative in character. To the extent that the Court has made clear the *Chevron*-eligibility of legislative regulations promulgated through notice-and-comment rulemaking, such a characterization should be dispositive for the question of *Chevron*’s applicability. Once one strips away the tax-exceptionalist strain of the argument, the case for *Chevron* deference for Treasury regulations is quite straight-forward.

CONCLUSION

Interpreting statutory ambiguity, at least as often as not, requires making policy choices. Where the Code is susceptible of more than one reasonable alternative answer, either Treasury or the courts will be primarily responsible for choosing among them. Judicial deference principles ultimately attempt to strike a balance on that score between agencies like Treasury and the courts. *Chevron* allows the courts to avoid interfering in policy matters and still police agency adherence to established processes and keep agencies from going beyond the boundaries of congressionally delegated authority.
Skepticism of the motivations and abilities of regulatory agencies like Treasury in making such choices is not a new phenomenon. *Chevron* has its critics, as do *Mead* and *Skidmore*, on both doctrinal and normative grounds. *Chevron* reflects a very powerful pro-agency bias; and perhaps some opponents are simply more trusting of the courts’ ability to choose between competing policies rendered permissible by ambiguous statutes. Ironically, notwithstanding the tax community’s resistance to *Chevron* deference for Treasury regulations, few tax scholars or practitioners would assert that the courts do a very good job of interpreting the Code, particularly in more complicated tax cases. Meanwhile, the fluidity of *Skidmore*’s multifactor analysis renders that standard difficult to apply with consistency, while ambiguities in the Court’s analysis in *Mead* leave the particulars of its application uncertain.

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