2011

Agency-Specific Precedents: Rational Ignorance or Deliberate Strategy

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Texas Law Review
See Also

Response

Agency-Specific Precedents: Rational Ignorance or Deliberate Strategy?

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In an interesting paradox, administrative law scholars have long debated the extent to which their field really exists. On the one hand, we identify a body of general principles—some statutory, some not—that we try to apply consistently across a collection of administrative agencies. On the other hand, we acknowledge that these myriad agencies often have little in common beyond their connection with the federal government. Given the diversity of organizational structures, practices, and goals among federal government agencies, is there or should there be a body of general principles labeled administrative law?

In 1960, Walter Gellhorn and Clark Byse concluded that administrative law had evolved substantially from a focus almost exclusively upon separation of powers and judicial review to one that increasingly emphasized administrative procedure and organic statutes—in other words, from generally applicable doctrines to potentially more variable procedures and obviously more agency-specific statutes.[1] In 1975, Ernest Gellhorn and Glen O. Robinson recognized the continued splintering of administrative law as courts and scholars struggled to maintain a collection of general principles for agencies as diverse as the Federal Communications Commission, the Food and Drug Administration, and the U.S. Forest Service.[2] Yet, administrative law scholars persisted and doggedly continued the effort, and

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1. WALTER GELLHORN & CLARK BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS ix–x (4th ed. 1960).

2. Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 783–84 (1975)

still do, to bring order to chaos under the heading of administrative law. The Supreme Court seems supportive of this effort, for example, by emphasizing "the importance of maintaining a uniform approach to judicial review of administrative action."[3]

Professors Richard Levy and Robert Glicksman recently published an administrative law casebook that endeavors to teach basic administrative law principles through the lens of only five agencies.[4] In *Agency-Specific Precedents*,[5] Levy and Glicksman draw from that experience and, in some sense, return to the old question of whether administrative law is a real field of legal study and practice. They observe that judges evaluating agency action tend to draw principally from prior cases concerning the same agency, even when discussing more generally applicable administrative law principles.[6] As a result, judicial application of doctrines that ought to be applied consistently across agencies instead varies meaningfully depending upon the agency under review.[7] Contra Gellhorn and Robinson, Levy and Glicksman clearly believe that at least some of these deviations are problematic.[8] The question then becomes how to solve the problem.

Of course, to solve a problem, one generally must identify its cause. Leaving aside deviations that are congressionally or statutorily mandated, Levy and Glicksman theorize that agency-specific precedents arise in substantial part from a "silo effect" caused by attorney specialization,[9] a refusal of attorneys to bear the costs of expanding their knowledge base beyond their areas of specialty,[10] and the inability of judges to compensate for the resultant agency-specific briefing.[11] This theory of rational ignorance

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3. Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 707 (2011) (internal quotations omitted) (quoting Dickinson v. Zurko, 527 U.S. 150, 154 (1999)) (internal quotation marks omitted).

4. *See* ROBERT L. GLICKSMAN & RICHARD E. LEVY, ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT v (2010) (explaining reliance on the Environmental Protection Agency, the National Labor Relations Board, the Social Security Administration, the Internal Revenue Service, and the Federal Communications Commission to elucidate administrative law principles).

5. Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEXAS L. REV. 499 (2011).

6. *Id.* at 500.

7. *Id*.

8. *Id.* at 571–77.

9. *Id.* at 558–59.

10. *See id.* at 559 (describing attorney cost–benefit analysis).

11. *Id.* at 561–62. Levy and Glicksman acknowledge that some disparities between agency-specific precedents and general administrative law norms derive from distinctive statutory provisions or programmatic features. *Id.* at 572. Such deviations may be normatively troubling but cannot be legally problematic. The *Chevron* and *Skidmore* standards of review are judicial policy, not constitutional mandates; the Supreme Court can limit the scope of their applicability as it finds good reasons to do so. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); Skidmore v. Swift & Co., 323 U.S. 134 (1944). Congress enacted the procedural requirements and standards of the Administrative Procedure Act and can alter that general scheme as much as it likes in specific statutes; within constitutional limits, judges ought to respect the

is entirely plausible. Regulatory lawyers in contemporary legal practice tend to be highly specialized and are more likely to be familiar with and rely upon cases in their specific areas of regulation, potentially ignoring nuances of general administrative law doctrine developed in cases outside those areas. Generalist judges necessarily depend heavily on the briefs prepared by those specialist lawyers and, absent clear direction from the parties or their own knowledge of administrative law,[12] are liable to gloss over agency-specific deviations in doctrinal evolution even as minor differences become major ones. From my own anecdotal experience of delivering continuing education lectures to tax attorneys regarding administrative law doctrine, the theory that Levy and Glicksman advance is absolutely correct in many instances. Against this backdrop of rational ignorance on the part of lawyers and judges, Levy and Glicksman propose a solution that emphasizes practitioner awareness of the problem,[13] with special emphasis on the Office of the Solicitor General as the "gatekeeper" for Supreme Court litigation,[14] so that all might be persuaded to emerge at least a little from their silos.

Yet, while Levy and Glicksman's explanation is undoubtedly true in some cases, they do not claim it as the whole story. Indeed, it cannot be. Highly specialized attorneys may not track every doctrinal nuance in administrative law, but particularly in an era of large law firms with multiple specialties, the silos of specialization cannot possibly be so wholly impermeable. Every agency-specific deviation from administrative law doctrine presumably offers an advantage to one side in litigation while an appeal to general norms would aid the other. The significant dollars at stake in many regulatory cases generally inspire highly sophisticated and high-priced attorneys to scour the law in search of arguments supporting their clients' preferred outcomes. While government lawyers may lack comparable resources, they are equally smart and capable of creative and aggressive lawyering in defending government policies. Finally, it is highly unlikely that the Solicitor General's office remains perpetually unaware that agency-specific precedents might vary somewhat from general administrative law norms. Rather, it seems reasonable to conclude that at least some of

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choices of Congress. Levy & Glicksman, *supra* note 5, at 572–73. By contrast, given Supreme Court admonitions in favor of uniformity in the application of administrative law norms, agency-specific divergences that are solely the result of uneven precedential evolution are legally suspect, even where some lawyers or judges might find them normatively desirable. *See id.* at 575–76 (observing same).

12. The judges of the United States Court of Appeals for the District of Columbia Circuit are notorious for their comparative expertise in administrative law, which comprises a substantial percentage of the cases before that court. *E.g.*, John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 376–77, 388–89 (2006). One wonders whether that court's heightened knowledge of administrative law results in fewer instances of agency-specific deviations from administrative law norms.

13. Levy & Glicksman, *supra* note 5, at 577–79.

14. *Id.* at 577.

these attorneys are aware of the differences between general and agency-specific precedents yet decline to bring them to the attention of the courts. Instead, one might theorize that deliberate strategy rather than rational ignorance explains why attorneys in at least some cases ignore general administrative law doctrine in favor of agency-specific precedents in formulating their arguments.

For that matter, assuming that at some point general and agency-specific precedents followed parallel tracks, we also have to ask how differences between general and agency-specific norms evolve. One can imagine that some divergences occur gradually, perhaps as a result of an awkward turn of phrase that takes on a life of its own in later cases involving the same agency. In other instances, one might anticipate a more sudden break, such as when general doctrine takes a sharp turn and various areas of administrative law are slow to align with the shift. Rational ignorance may apply in either case, but so may deliberate strategy as clever attorneys utilize the precedents most favorable to their clients' positions. In short, deviations between agency-specific precedents and general administrative law norms likely arise from many sources and develop in multiple ways.

If the cause varies, then so must the solution. Unfortunately, discerning the most likely explanation for any given deviation requires delving more deeply into the nuances of individual areas of governmental regulation—turning to the very specialists who contribute to the problem in the first place. To illustrate the problem of agency-specific precedents, Levy and Glicksman include among their many examples two from my own primary field of tax law.[15] Both concern the tax community's (and thus the judiciary's) longstanding habit of labeling general authority Treasury regulations as interpretative rules, even though the regulations are legally binding and thus clearly legislative in general administrative law parlance.[16] This terminological dissonance has generated tremendous confusion regarding whether general authority Treasury regulations are subject to Administrative Procedure Act (APA) requirements for notice-and-comment rulemaking. Separately, at least until a few weeks ago, many tax practitioners and several courts, including the United States Tax Court, insisted that the tax-specific *National Muffler Dealers Ass'n v. United States*[17] rather than the arguably more deferential *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* provided the appropriate standard

15. *See* Levy & Glicksman, *supra* note 5, at 521 (stating that the IRS's practice of labeling certain regulations interpretive "raises two important issues for the courts: (1) the validity of some IRS general authority regulations that have not been adopted using the procedures required by § 553 of the APA and (2) the appropriate standard of review of the substantive validity of those rules").

16. *Id.* at 520.

17. 440 U.S. 472 (1979).

of review for legal interpretations advanced in general authority Treasury regulations.

The tax bar is notoriously insular, lending support to Levy and Glicksman's theory of rational ignorance.[18] Nevertheless, in this Response, I argue that deliberate strategy, at least as much as rational ignorance, explains the persistence of these particular tax-specific departures from administrative law norms. In doing so, I will offer some of the history and context of Levy and Glicksman's tax-specific examples. But times are changing; attorneys in some cases are arguing in favor of reuniting tax and administrative law norms, and courts are listening. Thus, I will also highlight a few high-profile tax cases that are presently moving tax in the direction of Levy and Glicksman's preferred end of administrative law uniformity. Part I will discuss the history of Treasury regulation labeling. Part II will consider the resulting confusion over the applicability of APA notice-and-comment rulemaking requirements to general authority Treasury regulations. Part III will elaborate on the *National Muffler* kerfuffle.

I. Labeling Treasury Regulations

Like many statutes, the Internal Revenue Code (IRC) delegates rulemaking authority using two types of delegation provisions: specific authorizations, which are mandates to adopt regulations that resolve particular, congressionally identified issues;[19] and a more general grant of power contained in IRC § 7805(a) to develop "all needful rules and regulations for the enforcement" of the tax laws.[20] Tax practitioners, courts (particularly the United States Tax Court), and scholars habitually label Treasury regulations promulgated pursuant to specific authority as "legislative" and those issued under the general authority of IRC § 7805(a) as

18. *See, e.g.*, Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 518 (1994) ("[T]ax law too often is mistakenly viewed by lawyers, judges, and law professors as a self-contained body of law . . . . [T]his misperception has impaired the development of tax law by shielding it from other areas of law that should inform the tax debate."); Leandra Lederman, *"Civil"izing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency*, 30 U.C. DAVIS L. REV. 183, 183 (1996) ("Tax law tends to be uninformed by other areas of law. This insularity has the unfortunate consequence of depriving tax and other fields of cross-fertilization.").

19. The paradigmatic example of a specific authority grant is I.R.C. § 1502, which gives the Secretary the power to adopt whatever regulations he "deem[s] necessary" for affiliated corporate groups to prepare and file consolidated income tax returns "in such manner as clearly to reflect" their tax liabilities and "to prevent avoidance" of the same. I.R.C. § 1502 (2006). The New York State Bar Association Tax Section has issued a report claiming and categorizing more than 550 specific authority delegations in the I.R.C. N.Y. State Bar Ass'n Tax Section, Report on Legislative Grants of Regulatory Authority 2–6 (Nov. 3, 2006) [hereinafter NYSBA Report], *available at* http://www.nysba.org/Content/ContentFolders20/TaxLawSection/TaxReports/1121Report.pdf.

20. I.R.C. § 7805(a) (2006).

"interpretative."[21] Yet, general authority Treasury regulations carry the same legal force as the specific authority ones. Penalty provisions in the IRC speak inclusively of compliance with tax rules and regulations.[22] The Treasury Department has consistently interpreted that phrase as including all "temporary or final Treasury regulations issued under the [IRC]."[23] General administrative law doctrine holds that legally binding agency rules are legislative for APA purposes.[24] Given the legal force of general authority Treasury regulations, routinely labeling them as interpretative rules represents a departure from administrative law more generally.[25]

It is important to recognize, however, that the tax community's characterization of general authority Treasury regulations has its origins in historical administrative law practice and doctrine. The IRC has included grants of specific rulemaking authority since the Revenue Act of 1916,[26] and Congress enacted the predecessor to IRC § 7805(a) as part of the War Revenue Act of 1917.[27] The IRC is not the only regulatory statute containing both specific and general authority grants. For at least a hundred years, Congress has been enacting statutes that speak in terms of both specific and general rulemaking authority. The Communications Act of 1934[28] and the

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21. *E.g.*, Irving Salem et al., *ABA Section of Taxation Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717, 728 (2004); NYSBA Report, *supra* note 19, at 10–11.

22. *See, e.g.*, I.R.C. § 6662(b)(1) (2006) (penalizing taxpayers for "[n]egligence or disregard of rules or regulations"); *id.* § 6694(b) (1)-(2) (2006) (penalizing tax return preparers for "any reckless or intentional disregard of rules or regulations").

23. Treas. Reg. § 1.6694-3(e) (as amended in 2009); Treas. Reg. 1.6662-3(b)(2) (as amended in 2003).

24. *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979) (describing legislative rules as carrying "the 'force and effect of law'"); Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993) (observing that legislative rules carry "the force of law" while interpretative rules do not); Robert A. Anthony, *A Taxonomy of Federal Agency Rules*, 52 ADMIN. L. REV. 1045, 1046 (2000) (describing legislative rules as "legally binding").

25. *See* Bankers Life & Cas. Co. v. United States, 142 F.3d 973, 978–79 (7th Cir. 1998) (recognizing the incongruity between the characteristics of general authority Treasury regulations and the interpretative label assigned to them by the tax community).

26. *See, e.g.*, Revenue Act of 1916, Pub. L. No. 64-271, §§ 5(a)(8), 6(a)(7), 12(a)(2), 12(b)(2), 39 Stat. 756, 759, 760, 768, 769 (codified as amended in scattered sections of 26 U.S.C.) (authorizing regulations providing reasonable depletion allowances for oil and gas wells and mines); *id.* §§ 8(g), 13(d) (codified as amended in scattered sections of 26 U.S.C.) (authorizing regulations establishing permissible accounting methods other than that of "actual receipts and disbursements").

27. War Revenue Act, Pub. L. No. 65-50, 40 Stat. 300 (1917) (codified at 15 U.S.C. §§ 71–77 (2000)); Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Review*, 90 MINN. L. REV. 1537, 1565 (2006) ("The War Revenue Act of 1917 . . . introduced the predecessor to I.R.C. § 7805(a).").

28. *See* Communications Act of 1934, Pub. L. No. 73-416, § 220, 48 Stat. 1064, 1078–80 (codified as amended at 47 U.S.C. § 220) (granting specific authority to the Federal Communications Commission to impose uniform accounting rules for regulated parties); *id.* at § 4(i), 48 Stat. at 1068 (giving the Federal Communications Commission general authority to "make such rules and regulations, . . . not inconsistent with this Act, as may be necessary in the execution of its functions").

Securities Act of 1933[29] are both examples of statutes including general as well as specific rulemaking provisions.

At the time Congress adopted the APA in 1946, the consensus view of both tax and non-tax legal scholars and practitioners held that general authority regulations and rules had to be nonbinding or the statutes under which they were promulgated would be unconstitutional. In the preceding decades, the Supreme Court had generally declined to characterize even broad statutory extensions of rulemaking authority as unconstitutional delegations of legislative power.[30] Nevertheless, the Court's invalidation of congressional delegations of regulatory authority in *Panama Refining Co. v. Ryan*[31] and *A.L.A. Schechter Poultry Corp. v. United States*[32] showed that at least some grants of rulemaking power were constitutionally problematic.[33] In the 1940s, tax and non-tax scholars and practitioners agreed that narrow, specific grants of rulemaking authority passed constitutional muster and that the resulting "legislative" regulations or rules issued under such authority could carry legal force.[34] By contrast, scholars and practitioners believed

29. *See* Securities Act of 1933, Pub. L. No. 73-22, § 10(b)(4), 48 Stat. 74, 81 (authorizing the SEC to promulgate rules and regulations classifying prospectuses and establishing form and content requirements for each class); *id.* § 19(a), 48 Stat. at 85 (giving the SEC the power to "make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this title").

30. *See, e.g.*, United States v. Grimaud, 220 U.S. 506, 514, 522–23 (1911) (upholding the Forest Reserve Act's delegation of power to the Secretary of Agriculture to protect national forests and to impose criminal penalties for violating such regulations); Buttfield v. Stranahan, 192 U.S. 470, 494 (1904) (upholding a statute delegating to the Secretary of the Treasury the authority to "fix and establish uniform standards of purity, quality and fitness for consumption of all kinds of teas imported into the United States").

31. 293 U.S. 388 (1935).

32. 295 U.S. 495 (1935).

33. *See id.* at 541–42 (invalidating a provision of the National Industrial Recovery Act because it was "an unconstitutional delegation of legislative power"); *Panama Refining*, 293 U.S. at 431–32, 432–33 (declaring another provision of the National Industrial Recovery Act unconstitutional under the nondelegation doctrine). *Panama Refining* and *Schechter Poultry* are the only two cases in which the Court has invalidated congressional delegations of power to executive officials or independent agencies as unconstitutional on nondelegation grounds. 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.6, at 104 (5th ed. 2010).

34. *See* 1 F. TROWBRIDGE VOM BAUER, FEDERAL ADMINISTRATIVE LAW § 489, at 487–88 (1942) (recognizing that administrative rules arising from specific authority delegated by Congress have the "force of law" and that the legal underpinnings of interpretive regulations are more tenuous); Ellsworth C. Alvord, *Treasury Regulations and the* Wilshire Oil *Case*, 40 COLUM. L. REV. 252, 259–60 (1940) (indicating that a legislative regulation "has the force and effect of law" and that "[t]he constitutionality of delegations of legislative power of this kind has long since been recognized"); Kenneth Culp Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive*, 57 YALE L.J. 919, 929 (1948) ("Valid legislative rules have the same force and effect as valid statutes . . . ."); Frederic P. Lee, *Legislative and Interpretive Regulations*, 29 GEO. L.J. 1, 2 (1940) ("[L]egislative regulations prescribe what the law shall be and have the force and effect of law . . . ."); *see also* Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 417–19 (1942) (recognizing the legal force of specific authority regulations promulgated by order of the Federal Communications Commission); Md. Cas. Co. v. United States, 251 U.S. 342, 349 (1920) (describing specific authority regulations as having "the force and effect of law").

that general rulemaking grants of the "necessary rules and regulations" variety that authorized legally binding regulations would be constitutionally problematic in light of the Court's nondelegation jurisprudence.[35] Accordingly, "interpretative" regulations or rules issued under general authority merely reflected agencies' best guesses as to a statute's meaning and were not binding on regulated parties.[36] Although Kenneth Culp Davis observed that the theory was not always so easily applied in practice,[37] the tax community's characterization of general authority Treasury regulations as interpretative rules originated during this period and, at that time, was completely consistent with general administrative law principles.

Beginning in the 1960s, however, the traditional understanding of specific authority regulations as legislative and general authority regulations as interpretative slowly started to break down. The 1960s and 1970s saw a substantial rise of agency rulemaking, with agencies increasingly seeking to achieve policy objectives through general authority regulations that they treated as legally binding on regulated parties.[38] As the incidence of agency rulemaking increased, regulated parties brought more challenges against agency rules for their failure to satisfy APA procedural requirements. By that time, the nondelegation premise previously employed by legal scholars and practitioners to deny general authority regulations legally binding effect

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35. *See, e.g.*, Alvord, *supra* note 34, at 260 (indicating that "the courts have uniformly regarded the general Treasury regulations as merely stating the Treasury Department's construction of the statute" because if the section under which the regulations are promulgated "were to be construed as conferring on the Commissioner an unlimited power to make rules having the force and effect of law, it would be a plainly unconstitutional delegation of power"); Stanley S. Surrey, *The Scope and Effect of Treasury Regulations Under the Income, Estate, and Gift Taxes*, 88 U. PA. L. REV. 556, 557 (1940) (clarifying that the "'all needful rules and regulations'" language "does not invest interpretative regulations with the force of law").

36. *See, e.g.*, VOM BAUER, *supra* note 34, § 489, at 488 (arguing that interpretive regulations are "administrative guess[es] at a judicial question" that lack the force of law); Alvord, *supra* note 34, at 261 (stating that the Treasury Department's construction of the statute "is not binding upon taxpayers" and is "the Treasury's guess as to what the law means"); Davis, *supra* note 34, at 929 ("Since interpretative rules theoretically do not embody new law but merely interpret previous law, they are valid only if the reviewing court finds the interpretation a permissible one."); Surrey, *supra* note 35, at 557–58 (explaining that interpretative regulations are "no more than the Department's construction of the Revenue Act" and are only binding upon the IRS's personnel).

37. Davis, *supra* note 34, at 932. Interestingly, Davis identified general authority Treasury regulations interpreting a short and vague definition of gross income in the I.R.C. as one example of practice blurring the theoretical distinction between legislative and interpretative rules. *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.").

38. *See, e.g.*, PIERCE, *supra* note 33, at 25–26 (describing increases in agency rulemaking after passage of new federal statutes, such as the Occupational Safety and Health Act, and in agency policy making through rulemaking); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 549–70 (2002) (chronicling successful efforts by the Federal Trade Commission, Federal Drug Administration, and the National Labor Relations Board in the 1960s to "acquire[] legislative rulemaking powers that Congress had not originally granted to them").

had ceased to be persuasive.[39] Courts and legal scholars started to define legislative and interpretative rules by what they do rather than by the source of their authority.[40]

The Supreme Court has never squarely addressed the scope of the APA's interpretative rule exception; its characterizations of specific authority regulations as legislative rules and general authority regulations as interpretative rules were made in the context of statements regarding judicial review and deference for agency interpretations of law. In the 1970s and early 1980s, several opinions by the Court addressing deference to tax[41] and non-tax[42] agency legal interpretations contained statements distinguishing between specific and general authority. The Supreme Court's opinion in *Chevron* brought that consistency to a halt with its discussion of implicit delegations of rulemaking power[43] and its determination that a general authority regulation issued by the Environmental Protection Agency was entitled to the level of deference previously afforded only to legislative regulations.[44] By eliminating the distinction between specific and general

39. *See, e.g.*, 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 3.2, at 150 (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").

40. *See, e.g.*, Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 390 ("[M]any courts have declared that [agency-chosen] labels are entitled to judicial deference, but cannot be dispositive of the issue of the proper characterization of a rule."); *id.* at 394 (remarking that "[t]he prevailing standard for distinguishing legislative and interpretive rules can be described as the 'legal effect' test," which considered whether the rule "makes 'new law,' as opposed to merely interpreting 'existing law'"); William T. Mayton, *A Concept of a Rule and the "Substantial Impact" Test in Rulemaking*, 33 EMORY L.J. 889, 894–95, 896–99 (1984) (relating that the substantial impact test, applied by some courts in lieu of the legal effects test, "look[s] to the substance of an agency action that has created a rule").

41. *See, e.g.*, United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982) (indicating that Treasury regulations issued under general rather than specific authority require less deference); Rowan Cos. v. United States, 452 U.S. 247, 253 (1981) ("[W]e owe the interpretation [embodied in a general authority Treasury Regulation] less deference than a regulation issued under a specific grant of authority . . . .").

42. *See, e.g.*, Batterton v. Francis, 432 U.S. 416, 425 & n.9 (1977) (counseling greater deference in regulations issued pursuant to express congressional delegations than to interpretative regulations); *see also* Chrysler Corp. v. Brown, 441 U.S. 281, 307–08 (1979) (denying legislative effect to regulations promulgated by the Secretary of Labor under general authority, but leaving open the possibility that some general authority grants would support legislative regulations).

43. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

44. At least, the consensus among administrative law scholars seems to be that the regulations at issue in *Chevron* were adopted pursuant to general authority. *See, e.g.*, John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEXAS L. REV. 113, 199–200 (1998) (observing that the Solicitor General began his argument in the *Chevron* case by quoting in full the Clean Air Act's general authority provision); Merrill & Watts, *supra* note 38, at 473 ("[T]he Supreme Court's *Chevron* decision treated as legally binding a rule adopted by the [EPA] pursuant to its general rulemaking powers under the Clean Air Act."). The preamble to those regulations cited four sections of the Clean Air Act, only one of which was the general authority provision.

authority in judicial deference doctrine, the *Chevron* Court removed any residual basis for preserving the same distinction in evaluating APA procedural requirements.[45]

In short, the tax community's habit of labeling specific authority Treasury regulations as legislative rules and general authority Treasury regulations as interpretative rules represents an instance of general administrative law shifting direction while agency-specific understandings maintain course. The consequences of this split have been substantial.

II. The Applicability of APA Rulemaking Requirements

In promulgating specific and general authority regulations, the Treasury Department issues notices of proposed rulemaking and seeks public comment.[46] Nevertheless, because of the interpretative rule label, the Treasury Department claims that its general authority regulations are exempt from the APA's notice-and-comment rulemaking procedures.[47] It also contends that most of its regulations are promulgated pursuant to general authority.[48] Hence, the preambles of virtually all contemporary Treasury regulations contain a statement that APA procedural requirements do not

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Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50,766, 50,771 (Oct.14, 1981) (citing, inter alia, 42 U.S.C. § 7601(a) (1976)).

45. The Court's opinion in *Chevron* was not the only case contributing to the demise of relying on the source of a rule's authority to ascertain its legal force. For example, Thomas Merrill and Kathryn Watts assign a major role in that doctrinal evolution to Judge J. Skelly Wright's earlier opinion in *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973). *See* Merrill & Watts, *supra* note 38, at 554–57 (summarizing Judge Wright's opinion recognizing the power of the Federal Trade Commission to issue legally binding rules under general authority, and describing it as "short-lived" but as an invitation for "other agencies . . . to assert generalized legislative rulemaking powers that Congress had not expressly granted").

46. *See* INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 32.1.2.3(3) (2004), *available at* http://www.irs.gov/irm ("The Administrative Procedure Act . . . requires agencies to publish Notices of Proposed Rulemaking (NPRMs) in the Federal Register and permit the public to submit comments."); Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1748–49 (2007) (documenting that the Treasury Department issued a notice of proposed rulemaking seeking public comments in 221 of 232 regulation projects over a three-year period but that, in many of those projects, it sought public comments only after promulgating temporary, legally binding regulations).

47. *See* INTERNAL REVENUE SERV., *supra* note 46, § 32.1.2.3(3) ("Interpretative regulations are generally not subject to the APA provisions on rulemaking, including its notice and comment requirements. However, although most IRS/Treasury regulations are interpretative, the IRS usually publishes its NPRMs in the Federal Register and solicits public comments."); *id.* § 32.1.5.4.7.5.1(5) ("Interpretative rules are not subject to the provisions of [the Administrative Procedure Act]. Although most IRS/Treasury regulations are interpretative, and therefore not subject to these provisions of the APA, the IRS usually solicits public comment on all NPRMs.").

48. *See* Hickman, *supra* note 46, at 1751 (observing that the Treasury Department cited I.R.C. § 7805 as authority on which it relied in all 232 of the regulation projects studied).

apply,[49] and a substantial number of Treasury regulations present fairly straightforward APA compliance problems.[50]

The question remains, however, why tax law has failed to follow the rest of administrative law in its trajectory away from the specific versus general authority dichotomy. As Levy and Glicksman observe, few contemporary tax cases actually address the applicability of APA procedural requirements to Treasury regulations.[51] In fact, while taxpayers routinely challenge the validity of Treasury regulations in court, they rarely raise claims of APA procedural violations. It is unlikely that any theory can fully explain this failure to seek judicial review of the Treasury Department's procedural failings. Rational ignorance is certainly a contributing factor. Nevertheless, a few tax-specific statutory and doctrinal limitations on pre-enforcement judicial review in the tax context substantially reduce the strategic value of bringing APA procedural claims at all.

Since *Abbott Laboratories v. Gardner*,[52] general administrative law doctrine has read the APA's judicial review provisions as adopting a presumption in favor of pre-enforcement judicial review of legislative rules.[53] In the tax context, however, the IRC includes a section known as the Anti-Injunction Act providing that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person."[54] Correspondingly, the Declaratory Judgment Act contains a tax exception that prevents courts from providing declaratory relief for controversies "with respect to Federal taxes."[55] In a series of cases in the 1960s and 1970s, the Supreme Court interpreted these provisions as precluding judicial review of virtually all tax cases until either the IRS had issued a notice of deficiency to a taxpayer or a taxpayer had been denied a refund by the IRS.[56] Although the Court has never interpreted either the

49. *See id.* at 1749–50 (documenting that the Treasury Department routinely includes statements in its regulatory preambles disclaiming the applicability of APA procedural requirements).

50. *See id.* at 1748 (explaining that 40.9% of Treasury regulations in the study presented APA compliance problems under existing administrative law norms).

51. Levy & Glicksman, *supra* note 5, at 522–23.

52. 387 U.S. 136 (1967).

53. *See id.* at 140 (stating that the APA "embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action'").

54. I.R.C. § 7421(a) (2006).

55. 28 U.S.C. § 2201(a) (2006).

56. *See, e.g.*, United States v. Am. Friends Serv. Comm., 419 U.S. 7, 8, 12 (1974) (per curiam) (holding that the Anti-Injunction Act barred conscientious objectors from suing to enjoin the withholding of taxes from their wages, even though they claimed such withholding deprived them of their First Amendment rights); Alexander v. "Ams. United" Inc., 416 U.S. 752, 756–57, 763 (1974) (prohibiting a nonprofit from seeking declaratory and injunctive relief concerning the reinstatement of its tax-exempt status on the basis that the IRS's administration of IRC provisions was erroneous or unconstitutional); Bob Jones Univ. v. Simon, 416 U.S. 725, 727, 735–36 (1974) (forbidding a university from suing to prevent revocation of its tax-exempt status, even though it

Anti-Injunction Act or the Declaratory Judgment Act as precluding pre-enforcement judicial review of APA procedural challenges against Treasury regulations, a few lower courts have interpreted its precedents as requiring that conclusion.[57] Regardless, standing represents a substantial obstacle to pre-enforcement judicial review for taxpayers in many if not most cases. Some Treasury regulations impact a given taxpayer's liability or reporting requirements on an immediate and recurring basis. But many if not most Treasury regulations are highly situational, such that any single taxpayer might only confront them once in a lifetime. Alternatively, a Treasury regulation may be sufficiently ambiguous in its own right that a taxpayer would prefer to adopt the plausible-but-favorable interpretation and chance an audit rather than conceding the more-likely-but-unfavorable approach that would enable the taxpayer to assert the injury in fact necessary to establish standing.[58]

Against this backdrop, most taxpayers are faced with two options: deliberately disobeying a Treasury regulation and facing potential penalties for doing so, or paying taxes that they believe are not owed and seeking a refund solely for the purpose of challenging the regulation. For a taxpayer facing third-party reporting requirements that do not affect its own tax liability as a result of a Treasury regulation, disobedience is the only option. A taxpayer that disagrees with a Treasury regulation can avoid penalties by disclosing its noncompliance with its tax return,[59] but such a taxpayer thus

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claimed the revocation would cause it to suffer "irreparable injury" and would violate its constitutional rights); Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 5–6 (1962) (concluding that the Anti-Injunction Act barred a corporation from suing to enjoin the collection of taxes, even when payment of such taxes allegedly would bankrupt the corporation).

57. *See e.g.*, Stephenson v. Brady, 927 F.2d 596, 1991 WL 22835, at *2, *4–5 (4th Cir. 1991) (per curiam) (unpublished table decision) (holding that the Declaratory Judgment Act and Anti-Injunction Act precluded taxpayer from challenging regulation and related annual informational return forms on APA procedural grounds); Reimer v. United States, 919 F.2d 145, 1990 WL 186825, at *1–3 (9th Cir. 1990) (unpublished table decision) (affirming dismissal of taxpayers' request for declaratory and injunctive relief against an IRS tax claim on APA grounds under the Declaratory Judgment Act and Anti-Injunction Act)*; cf.* Inv. Annuity, Inc. v. Blumenthal, 609 F.2d 1, 8–9 (D.C. Cir. 1979) (reading the Anti-Injunction Act and the Declaratory Judgment Act as statutory limitations on pre-enforcement judicial review in the tax context, notwithstanding the APA presumption in favor thereof). *But see* E. Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278, 1285–86 (D.C. Cir. 1974), *vacated*, 426 U.S. 26 (1976) (concluding before vacatur that the Anti-Injunction Act, the Declaratory Judgment Act, and the APA do not operate to preclude judicial review of all pre-enforcement tax claims—an issue not reached in the Supreme Court's decision to vacate).

58. Audit rates for most taxpayers are strikingly low. For example, in 2006, fewer than one percent of all income tax returns were audited by the IRS. *See* TREASURY INSPECTOR GEN. FOR TAX ADMIN., REF. NO. 2007-30-056, TRENDS IN COMPLIANCE ACTIVITIES THROUGH FISCAL YEAR 2006, at 8 (2007) (explaining that 1,283,950 (1 in 103) individual income tax returns were examined in fiscal year 2006). The audit rate for corporate returns was slightly higher at 1.25%. *See id.* at 9–10 (indicating that 28,427 (1 in 80) corporate income tax returns were examined in fiscal year 2006).

59. Treas. Reg. § 1.6662-3(c) (as amended in 2003).

exposes itself to a more comprehensive IRS audit. For these reasons, a Treasury regulation may be on the books for years or even decades before a naturally-occurring deficiency or refund action arises to challenge its validity. Furthermore, the Treasury Department's most frequent procedural failing is its promulgation of legally binding temporary regulations with only post-promulgation notice and comment and without a contemporaneous assertion of good cause. By the time a taxpayer is able to challenge a temporary regulation in a deficiency or refund action, the Treasury Department has usually finalized the regulation or can quickly do so if challenged on that basis. General administrative law doctrine is unclear as to whether post-promulgation notice and comment can "cure" a procedurally flawed temporary regulation.[60]

In sum, given all of these legal and practical obstacles to raising APA procedural challenges, most taxpayers simply comply with and complain about questionable Treasury regulations. When taxpayers nevertheless find their positions challenged by the IRS, taxpayer representatives reasonably conclude that procedural claims are quixotic and choose instead to focus solely on substantive challenges.

Two litigation events, however—one a series of appeals pending before several federal circuit courts, the other an en banc rehearing before the D.C. Circuit—may alter this landscape. In both, taxpayers are challenging actions by the Treasury Department and the IRS for their noncompliance with APA rulemaking procedures. Yet, the background of these cases makes clear that the taxpayers have raised the APA procedural challenges as a last resort rather than as first-choice litigating positions.

The tax world currently is abuzz over a series of federal circuit court appeals challenging the validity of Treasury Regulation § 301.6501(e)-1 on both substantive and APA procedural grounds. This general authority regulation broadens the applicability of a provision extending the limitations period for assessing tax deficiencies from three to six years in certain cases.[61] The Treasury Department initially issued the regulation in temporary but

60. *Compare, e.g.*, Air Transp. Ass'n of Am. v. Dep't of Transp., 900 F.2d 369, 379–80 (D.C. Cir. 1990) (holding final regulations invalid due to procedural failings of interim-final regulations), *vacated*, 498 U.S. 1077 (1991), *vacating as moot*, 933 F.2d 1043 (D.C. Cir. 1991), *and* Natural Res. Def. Council, Inc. v. EPA, 683 F.2d 752, 767–68 (3d Cir. 1982) (rejecting post-promulgation notice and comment as inadequate and invalidating regulatory amendments so adopted), *with* Fed. Express Corp. v. Mineta, 373 F.3d 112, 120 (D.C. Cir. 2004) (holding post-promulgation opportunity for comment sufficient), *and* Levesque v. Bloc, 723 F.2d 175, 188 (1st Cir. 1983) ("When the response suggests that the agency has been open-minded, the presumption against a late comment period can be overcome and a rule upheld."). For an acknowledgment of the difficulty in fashioning a remedy under such circumstances, see Petry v. Block, 737 F.2d 1193, 1203–05 (D.C. Cir. 1984).

61. *See* I.R.C. § 6501(a), (e) (2006) (setting the limitations period at three years for assessing most tax deficiencies but at six years where the taxpayer omits from gross income amounts that are properly includible); Treas. Reg. § 301.6501(e)-1T(a) (2009) (interpreting IRC § 6501 omissions to include basis overstatement).

legally binding form—without a contemporaneous assertion of good cause and only post-promulgation notice and comment—in the midst of litigation over a popular tax shelter transaction known as Son-of-BOSS that was executed by a number of taxpayers.[62] The United States Tax Court rejected the temporary regulation as inconsistent with the plain meaning of the relevant statute as interpreted by the Supreme Court fifty years ago,[63] but two concurring judges would have invalidated the regulation instead for failing to comply with APA notice-and-comment rulemaking requirements.[64] The Treasury Department has since finalized the regulation with only minimal changes.[65] Because Tax Court decisions are appealable to the taxpayer's home circuit, and the government is simultaneously pursuing similar cases against several taxpayers, appeals of the Tax Court's decision are currently pending before several circuits.[66] As they did before the Tax Court, in each of these cases, parties and amici have continued to argue that the regulation is a legislative rule and that the Treasury Department's failure to pursue pre-promulgation notice and comment renders the regulation procedurally invalid under the APA.[67] Given the number of circuits considering these issues, and the perceived inevitability of a circuit split, the Supreme Court will likely be petitioned to resolve the matter.

In an unrelated case, *Cohen v. United States*,[68] taxpayers have challenged the validity of Notice 2006-50, a comparatively informal IRS pronouncement, for its lack of APA notice-and-comment procedures.[69] While the government claims that Notice 2006-50 was both exempt from

62. *See* T.D. 9466, 74 Fed. Reg. 49321, 2009-43 I.R.B. 551 (2009) (setting forth "temporary regulations . . . defining an omission from gross income for purposes of the six-year minimum period for assessment of tax attributable to partnership items and the six-year period for assessing tax"); Notice of Proposed Rulemaking, 2009-43 C.B. 557 (2009) (cross-referencing T.D. 9466 and requesting public comments).

63. Intermountain Ins. Serv. of Vail, L.L.C. v. Comm'r, 134 T.C. No. 11, 2010 WL 1838297, at *7–8 (T.C. May 6, 2010).

64. *Id.* at *17–22 (Halpern & Holmes, J.J., concurring).

65. *See* T.D. 9511, 75 Fed. Reg. 78897, 2011-6 I.R.B. 455 (2010) (setting forth "final regulations defining an omission from gross income for purposes of the six-year minimum period for assessment of tax attributable to partnership items and the six-year period for assessing tax").

66. *See* alanhorowitz, *Son-of-BOSS Statute of Limitations Issue Inundates the Courts of Appeals*, TAX APP. BLOG (Nov. 30, 2010), http://appellatetax.com/2010/11/30/son-of-boss-statute-of-limitations-issue-inundates-the-courts-of-appeals/ (summarizing the status of challenges before seven circuit courts of appeals).

67. *E.g.*, Brief of Appellees at 43–52, Grapevine Imps., Ltd. v. United States, 2011 WL 832915 (Fed. Cir. Mar. 11, 2011) (No. 2008-5090), 2010 WL 2968050; Brief of *Amicus Curiae* Bausch & Lomb Inc. in Support of Appellees and Affirmance at 7–12, Salman Ranch, Ltd. v. Comm'r (10th Cir. 2010) (No. 09-9015), 2010 WL 2397311; Brief of *Amicus Curiae* Bausch & Lomb Inc. in Support of Appellees and Affirmance at 10–14, Comm'r v. M.I.T.A. Partners (5th Cir. 2010) (No. 09-60827), 2010 WL 5162780 (consolidated with Burks v. United States, 633 F.3d 347 (5th Cir. 2011).

68. 578 F.3d 1 (D.C. Cir. 2009), *vacated in part*, 599 F.3d 652 (D.C. Cir. 2010).

69. 578 F.3d at 16 (Kavanaugh, J., dissenting in part).

notice-and-comment rulemaking and nonjusticiable as a nonbinding policy statement,[70] a divided panel of the D.C. Circuit applied general administrative law doctrine to conclude that the Notice was in fact a legislative rule and final agency action because it affected the legal rights and obligations of taxpayers and reflected the IRS's intention to bind itself to a particular legal position.[71] The court subsequently granted the government's petition for rehearing en banc and asked the parties to brief several questions regarding the proper interpretation of the Anti-Injunction Act, the Declaratory Judgment Act, and the APA.[72] The IRS action at issue in *Cohen* is not a Treasury regulation, and the panel majority's analysis did not address whether general authority Treasury regulations are legislative or interpretative. Nevertheless, it is difficult to reconcile the panel's evaluation of the Notice's legal force with any conclusion but that general authority Treasury regulations are legislative rules as well. Moreover, the en banc court's willingness to consider thoroughly the relationship between the APA, the Anti-Injunction Act, and the Declaratory Judgment Act could have substantial ramifications for the availability of pre-enforcement judicial review of APA procedural challenges against Treasury regulations.

In these litigations, however, it is apparent that the taxpayers are challenging Treasury regulations on APA procedural grounds not because they have suddenly discovered administrative law doctrine but because the strategic landscape has changed. Several courts have already adjudicated the merits of the Son-of-BOSS tax shelter, and the government has prevailed overwhelmingly.[73] The government is no longer willing to settle any of those cases. The only way that the taxpayers in the pending cases can avoid paying millions of dollars of back taxes is to invalidate the Treasury Department's extension of the statute of limitations. In short, the usual strategic considerations in tax cases no longer apply to these taxpayers; they have run out of other options and have nothing to lose and everything to gain by pursuing an APA procedural challenge. Likewise, the *Cohen* litigation possesses an unusual posture. The taxpayers are not seeking ordinary pre-enforcement judicial review; they have paid their taxes.[74] The case originated as a class action contesting the IRS's continued imposition of a

70. *See id.* at 3 (majority opinion) ("Now the IRS seeks to avoid judicial review by insisting the notice it issued, acknowledging its error and announcing the refund process, is not a binding rule but only a general policy statement.").

71. *Id.* at 6–9.

72. Cohen v. United States, 599 F.3d 652, 652 (D.C. Cir. 2010).

73. *E.g.*, Sala v. United States, 613 F.3d 1249, 1250 (10th Cir. 2010); Jade Trading, L.L.C. v. United States, 598 F.3d 1372, 1374 (Fed. Cir. 2010); Kornman & Assocs., Inc. v. United States, 527 F.3d 443, 447 (5th Cir. 2008); Fidelity Int'l Currency Advisor A Fund, L.L.C. v. United States, Nos. 05-40151-FDS, 06-40130-FDS, 06-40243-FDS, 06-40244-FDS, 2010 WL 4116469, at *1 (D. Mass. Oct. 18, 2010); Colm Producer, Inc. v. United States, 460 F. Supp.2d 713, 713–14 (N.D. Tex. 2006).

74. *See Cohen*, 578 F.3d at 3 (identifying the appellant's claim for a tax refund).

telephone excise tax collected from telephone users by their service providers.[75] When the IRS had lost the same issue in several circuits, acquiesced to the taxpayers' position, and issued Notice 2006-50 to provide taxpayers with a streamlined means for seeking refunds, the *Cohen* taxpayers contended that the IRS's refund mechanism was inadequate for their circumstances and challenged the notice.[76] In other words, the usual reasons for complying with even questionable Treasury regulations to avoid controversy with the IRS and uncertainty in the doctrine surrounding judicial review of tax cases simply do not apply to the *Cohen* plaintiffs. They had no reason not to bring the APA procedural claim, so they did. As for government attorneys in these cases, they are actively and aggressively defending both the Treasury Department and IRS actions in question and, thus, the tax status quo. They show absolutely no indication that they are at all interested in reconciling tax practice and jurisprudence with general administrative law norms. If and when it confronts the inevitable petitions for certiorari in these cases, the Solicitor General's office is unlikely to reverse course.

III. The Rise and Fall of *National Muffler*

As noted above, in the years leading up to its decision in *Chevron*, consistent with decades of precedent, the Court defined the level of deference due to an agency's legal interpretations by reference to whether the agency promulgated the regulations at issue under specific or general rulemaking authority. Legislative regulations promulgated pursuant to express congressional command warranted strong, mandatory deference;[77] interpretative rules issued under general rulemaking authority grants were entitled only to what we now call *Skidmore* deference—a certain respect that varies depending upon the relative presence or absence of several factors like "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors

75. *Id.* at 16 (Kavanaugh, J., dissenting).

76. *Id.* at 4 (majority opinion).

77. *See, e.g.*, Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981) (indicating that because the regulation was promulgated under an "explicit delegation of substantive authority," the Court would undertake only a limited review); Batterton v. Francis, 432 U.S. 416, 425–26 (1977) (stating that because Congress expressly delegated power to the Secretary to prescribe the standards at issue, "Congress entrust[ed] to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term"); Atchison, Topeka & Santa Fe Ry. Co. v. Scarlett, 300 U.S. 471, 474 (1937) ("The regulation having been made by the commission in pursuance of constitutional statutory authority, it has the same force as though prescribed in terms by the statute."); Am. Tel. & Tel. Corp. v. United States, 299 US. 232, 236–37 (1936) ("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.").

which give it power to persuade, if lacking power to control."[78] In 1979, in *National Muffler*, the Court considered a challenge to a general authority Treasury regulation. In upholding the regulation's validity, the Court justified deference to Treasury regulations generally based on Congress's delegation of rulemaking authority, Treasury's expertise in the field, and the need for consistent treatment of taxpayers.[79] The Court articulated the following standard as governing its review:

> 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 of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.[80]

The *National Muffler* Court's emphasis on delegation and "serious deference" toward reasonable regulations foreshadowed its later opinion in *Chevron*.[81] At the same time, *National Muffler* closely resembles the multifactor inquiry of the *Skidmore* standard by which the Court at that time typically evaluated general authority regulations.[82] A few years later, but still before deciding *Chevron*, in *Rowan Cos. v. United States*,[83] the Court again reiterated the significance of the distinction between specific and

78. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *see also, e.g.*, Fed. Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981) ("We agree that the thoroughness, validity, and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling."); *Batterton*, 432 U.S. at 425 n.9 ("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."). Other factors typically associated with *Skidmore* review include formality, longevity, contemporaneity, and agency expertise. *See, e.g.*, Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 973–74 (1992) (describing and categorizing various factors associated with *Skidmore* and like cases); David R. Woodward & Ronald M. Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 ADMIN. L. REV. 329, 332–35 (1979) (summarizing factors considered by courts in evaluating the degree of appropriate deference prior to *Chevron*).

79. *See* Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979) (summarizing considerations).

80. *Id.*

81. *Id.* at 484.

82. Indeed, prior to deciding *National Muffler*, the Court on some occasions cited *Skidmore* as the appropriate standard for evaluating general authority Treasury regulations. *E.g.*, United States v. Stapf, 375 U.S. 118, 127 & n.11 (1963) (giving deference under *Skidmore* to a general authority Treasury regulation).

83. 452 U.S. 247 (1981).

general authority, citing *National Muffler* and non-tax precedents that supported *Skidmore* review for general authority regulations.[84]

The Court's decision in *Chevron*, five years after *National Muffler*, is considered revolutionary for its pronouncements regarding judicial review of regulations promulgated pursuant to implicit in addition to delegated rulemaking authority. Yet, *Chevron* was not a tax case, and the decision's significance for administrative law was not immediately apparent. Rather, the pervasiveness of the strong form of *Chevron* deference developed gradually, with some areas of the law (including, but not limited to, tax law) slow to feel its influence. Tax law has certainly been on the tail end of the *Chevron* revolution,[85] but the courts' reliance on *National Muffler* rather than *Chevron* in reviewing general authority Treasury regulations has been anything but monolithic.

In the 1990s, disagreement among the circuit courts of appeal emerged over the relevance of the *Chevron* standard for judicial review of general authority Treasury regulations. At least one circuit—the Sixth—declared outright that *Chevron* rather than a less deferential *National Muffler* provided the appropriate standard for evaluating general authority Treasury regulations.[86] Some circuit courts, along with the United States Tax Court, agreed that *National Muffler* required a lesser degree of deference than *Chevron* but believed that the former controlled judicial review of general authority Treasury regulations.[87] Still other circuit courts decided that *Chevron* and *National Muffler* were indistinguishable.[88] Confusing the issue further, some courts cited both *Chevron* and *National Muffler* as supporting

84. *Id.* at 253 (citing National Muffler, 440 U.S. at 477, and Batterton v. Francis, 432 U.S. 416, 424–25 & nn.8–9 (1977)).

85. *See, e.g.*, Ellen P. Aprill, *Muffled* Chevron*: Judicial Review of Tax Regulations*, 3 FLA. TAX REV. 51, 54 (1996) ("*Chevron* has been cited in tax cases only since 1989 and by the Tax Court only since 1992.").

86. Peoples Fed. Sav. & Loan Ass'n of Sidney v. Comm'r, 948 F.2d 289, 304–05 (6th Cir. 1991).

87. *See, e.g.*, Snowa v. Comm'r, 123 F.3d 190, 197 (4th Cir. 1997) (indicating that legislative regulations, governed by *Chevron*, should be given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute" and that interpretive regulations, governed by *National Muffler*, "should be upheld if they implement the congressional mandate in a reasonable manner"); Dresser Indus., Inc. v. Comm'r, 911 F.2d 1128, 1137–38 (5th Cir. 1990) (stating that specific authority Treasury regulations should be given "controlling weight" and "more weight" than general authority Treasury regulations, and citing *Chevron* for the former and *National Muffler* in connection with the latter); *see also* Schuler Indus., Inc. v. United States, 109 F.3d 753, 754–55 (Fed. Cir. 1997) (citing *National Muffler* and *Chevron* while advocating less deference for general authority Treasury regulations).

88. *See, e.g.*, St. Jude Med., Inc. v. Comm'r, 34 F.3d 1394, 1400 n.11 (8th Cir. 1994) ("We believe that the standard enunciated in *National Muffler* for reviewing such interpretive regulations is consistent with the standard enunciated in *Chevron*."). *But see* Bankers Life & Cas. Co. v. United States, 142 F.3d 973, 978–83 (7th Cir. 1998) (remarking that while the *National Muffler* "deference test walks like *Chevron* and talks like *Chevron*," "there are some important differences" between the tests).

deference to reasonable Treasury regulations, even as they seemingly applied one standard or the other.[89]

The Supreme Court contributed to the confusion with its own inconsistency. In 1985, in *United States v. Boyle*,[90] the Court rejected a taxpayer's challenge to the validity of a general authority Treasury regulation and stated expressly that the regulation was entitled to deference under *Chevron*.[91] Then, in 1991, in *Cottage Savings Ass'n v. Commissioner*,[92] the Court clearly cited and applied *National Muffler*'s multiple factors in evaluating a general authority Treasury regulation.[93] In 1992, in *United States v. Burke*,[94] the Court's majority resolved the case without employing either standard, but Justice Scalia writing in concurrence cited and applied *Chevron* in concluding that the IRS's interpretation of the statute was unreasonable.[95] Nevertheless, in 1997, in *Commissioner v. Estate of Hubert*,[96] Justice Scalia writing in dissent cited *National Muffler* as supporting judicial deference to a general authority Treasury regulation that he described as a "reasonable interpretation of" the statute.[97] In 1998, in *Atlantic Mutual Insurance Co. v. Commissioner*,[98] Justice Scalia writing for a unanimous Court cited and clearly applied *Chevron*'s two steps in deferring to a Treasury regulation[99] that both parties described on brief as "interpretive."[100] Finally, in 2003, in *Boeing Co. v. United States*,[101] the Court cited *Cottage Savings*—which, recall, employed the *National Muffler*

89. *See, e.g.*, Redlark v. Comm'r, 141 F.3d 936, 941 (9th Cir. 1998) (citing *Chevron* and *National Muffler* for the proposition that "the fact that the reasonable construction that an agency adopts in interpreting an ambiguous statute is inconsistent with past interpretations or the past practice of the agency does not without more call into question the propriety or the reasonableness of the new construction"); Norwest Corp. v. Comm'r, 69 F.3d 1404, 1408 (8th Cir. 1995) (citing *National Muffler* and *Chevron* as indicating that "[c]ourts customarily defer to a treasury regulation that implements the congressional mandate in some reasonable manner"); RJR Nabisco, Inc. v. United States, 955 F.2d 1457, 1464 (11th Cir. 1992) (indicating that *Chevron* and *National Muffler* mandate the court to "defer to a regulation that implements a Congressional mandate in a reasonable manner").

90. 469 U.S. 241 (1985).

91. *Id. at* 246 n.4.

92. 499 U.S. 554 (1991).

93. *Id.* at 560–62.

94. 504 U.S. 229 (1992).

95. *Id.* at 242 (Scalia, J., concurring).

96. 520 U.S. 93 (1997).

97. *Id.* at 127–28, 138 (Scalia, J., dissenting).

98. 523 U.S. 382 (1998).

99. *Id.* at 389–91.

100. Brief for Petitioner at 4, Atlantic Mut. Ins. Co. v. Comm'r, 523 U.S. 382 (1994) (No. 97-147), 1997 WL 748712; Brief for the Respondent at 4, 20, 21, Atlantic Mut. Ins. Co. v. Comm'r, 523 U.S. 382 (1998) (No. 97-147), 1998 WL 3221.

101. 537 U.S. 437 (2003).

standard—as supporting deference toward a Treasury regulation it identified as issued under general authority.[102]

In accord with Levy and Glicksman's rational ignorance theory, the Court's inconsistency can be traced to the parties' failure to bring the question of *Chevron* versus *National Muffler* to its attention. In *Boyle* and *Boeing*, the taxpayers' briefs cited *National Muffler*,[103] and in *Atlantic Mutual Insurance*, they noted without question the Third Circuit's reliance on *Chevron*.[104] The rest were silent regarding the standard of review. The government's brief in *Boeing* claimed *Chevron* deference.[105] But its briefs in *Atlantic Mutual Insurance* and *Cottage Savings* cite *Chevron* and *National Muffler* as supporting deference to reasonable regulations generally;[106] its brief in *Estate of Hubert* cited *Skidmore* along with *National Muffler*;[107] its brief in *Burke* cited only *National Muffler* and its progeny, *Cottage Savings*.[108] In short, at least before the Supreme Court, neither taxpayers nor the government have consistently advocated for *National Muffler* or *Chevron* as the standard for judicial evaluation of general authority Treasury regulations. The briefs in *Boeing* hinted at the issue, with taxpayers citing *National Muffler* and the government claiming *Chevron* deference, but those documents neither recognized that the standards might conflict nor acknowledged the circuit split. Until the present term, no tax case before the Supreme Court offered anything remotely approximating clear briefing of the *Chevron* versus *National Muffler* issue with regard to general authority Treasury regulations. Hence, *National Muffler* continued to play a starring role in many lower court cases examining the substantive validity of general authority Treasury regulations.[109]

Law review articles in the late 1990s documented and debated the uncertainty surrounding the relationship between *National Muffler* and

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102. *Id.* at 448.

103. Brief for the Petitioners at 22–23, Boeing Co. v. United States, 537 U.S. 437 (2002) (No. 01-1209), 2002 WL 1886160; Brief of Respondent at 19, United States v. Boyle, 469 U.S. 241 (1984) (No. 83-1266), 1984 WL 565869.

104. Brief for the Petitioner, *supra* note 100, at 13–14.

105. Brief for the United States at 20–21, Boeing Co. v. United States, 537 U.S. 437 (2002) (Nos. 01-1209, 01-1382), 2002 WL 31557669.

106. Brief for the Respondent at 7, 14–15, 19, Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554 (1990) (No. 89-1965), 1990 WL 10012939; Brief for the Respondent, *supra* note 100, at 7–8, 16–17.

107. Brief for the Petitioner at 33–34, Comm'r v. Estate of Hubert, 520 U.S. 93 (1996) (No. 95-1402), 1996 WL 325327.

108. Brief for the United States at 19–20, United States v. Burke, 504 U.S. 229 (1991) (No. 91-42), 1992 WL 526129.

109. *See, e.g.*, Swallows Holding, Ltd. v. Comm'r, 126 T.C. 96, 172–82 (2006) (Holmes, J., dissenting) (documenting the circuit split and summarizing differences between *Chevron* and *National Muffler*); Hickman, *supra* note 27, at 1556–63 (reviewing the status of the circuit split and broader tax community disagreement over *National Muffler*'s continued role in judicial review of general authority Treasury regulations).

Chevron.[110] After the Supreme Court offered additional guidance regarding the scope of *Chevron*'s applicability in *United States v. Mead Corp.*,[111] the question of judicial deference for general authority Treasury regulations received even greater attention in the tax community. In 2004, an ABA Section on Taxation Task Force on Judicial Deference issued a report advocating a variant of *Chevron* review incorporating *National Muffler* factors for general authority Treasury regulations.[112] Law professors and tax practitioners wrote articles debating the issue.[113] A couple of circuit courts shifted toward *Chevron* review for general authority Treasury regulations,[114] while the Tax Court continued to assert its preference for the *National Muffler* standard.[115] Finally, the current term brought the issue before the Supreme Court. In *Mayo Foundation for Medical Education & Research v. United States*,[116] the Court was confronted with a challenge to the validity of a general authority Treasury regulation.[117] Briefs filed by the parties and by dueling amicus briefs thoroughly articulated the continued disagreement among the lower courts and the competing doctrinal options.[118] In an opinion

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110. *See, e.g.*, Aprill, *supra* note 85, at 75–81 (reviewing the inconsistency with which courts applied *Chevron* and *National Muffler*); John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the* Chevron *Era*, 64 GEO. WASH. L. REV. 35, 57–63 (1995) (explaining that because the Supreme Court had not provided lower courts clear guidance on *Chevron*'s applicability, both *Chevron* and *National Muffler* were cited).

111. 533 U.S. 218 (2001).

112. Salem et al., *supra* note 21, at 737–44. Professor Ellen Aprill, a member of the task force, made a similar pre-*Mead* suggestion of combining the *Chevron* and *National Muffler* standards. Aprill, *supra* note 85, at 81–84.

113. *See, e.g.*, John F. Coverdale, Chevron*'s Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings after* Mead, 55 ADMIN. L. REV. 39, 81–83 (2003) (chronicling the inconsistent treatment of Revenue Rulings by the courts); Mitchell M. Gans, *Deference and the End of Tax Practice*, 36 REAL PROP. PROB. & TR. J. 731, 792–93 (2002) (advocating the framework of *Skidmore* instead of *Chevron* for both interpretive and legislative regulations); Hickman, *supra* note 27, at 1541–42 (explaining "why the more straightforward conclusion of *Chevron* deference [rather than *National Muffler* deference] for Treasury regulations really is the right one"); Edward J. Schnee & W. Eugene Seago, *Deference Issues in the Tax Law,* Mead *Clarifies the* Chevron *Rule—Or Does It?*, 96 J. TAX'N 366, 371–72 (2002) (proposing "less than *Chevron* deference" for interpretive regulations).

114. *See, e.g.*, Swallows Holding, Ltd. v. Comm'r, 515 F.3d 162, 167–68 (3d Cir. 2008) (expressly rejecting *National Muffler* in favor of *Chevron* review, reflecting a shift from pre-*Mead* case law); McNamee v. Dep't of the Treasury, 488 F.3d 100, 105, 106 (2d Cir. 2007) (identifying *Chevron* as the standard of review but citing *National Muffler* as supporting deference to reasonable regulations generally).

115. *See, e.g.*, Swallows Holding, Ltd. v. Comm'r, 126 T.C. 96, 129–31 (2006), *rev'd*, 515 F.3d 162, 172 (3d Cir. 2008) (acknowledging "possibly subtle distinctions" between *Chevron* and *National Muffler*, and applying *National Muffler*, but indicating that employing *Chevron* would not yield a different result in the matter).

116. Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704 (2011).

117. *Id.* at 710.

118. *See* Brief for Petitioners at 17-19, 36–44, Mayo Found. for Med. Educ. & Research, 131 S. Ct. 704 (No. 09-837), 2010 WL 4111636 (applying *National Muffler* as part of *Chevron* analysis to argue that the regulation is unreasonable); Brief for the United States at 50–53, Mayo Found. for

issued just a few weeks ago, a unanimous Supreme Court expressly and unequivocally rejected the continued vitality of *National Muffler* in favor of *Chevron* review for general authority Treasury regulations and uniformity in the application of administrative law principles.[119]

Undoubtedly, the resilience of *National Muffler* despite *Chevron* can be attributed at least partly to the rational ignorance theory advanced by Levy and Glicksman. Indeed, the motley state of the briefing in Supreme Court tax cases from *Boyle* in 1985 to *Boeing* in 2003 is inexplicable without admitting at least some role for attorney ignorance bred by the silo effect. The absolute silence of many taxpayer briefs regarding the applicable standard of review could also be interpreted as a strategic response to doctrinal uncertainty. Regardless, at some point between *Chevron* and *Mayo*—given the disagreement among several circuits that emerged in the 1990s, the widely-publicized ABA Task Force Report in 2004, a decade's worth of articles in law reviews and practitioner journals, plus attendant bar association panels and discussions—rational ignorance ceased to be a plausible explanation for *National Muffler*'s continued vitality.

For taxpayers, the strategic value of continuing to cite *National Muffler* is obvious: the *National Muffler* standard was arguably less deferential toward the government than *Chevron* review, thus offering taxpayers a better chance of persuading courts to invalidate unfavorable Treasury regulations. For the government, the strategic justification for citing *National Muffler* as late as 1998 in *Atlantic Mutual Insurance* is less obvious. One might theorize that government attorneys ought to have preferred the more deferential *Chevron* standard and argued vigorously for courts to employ it rather than *National Muffler* review. The government's failure to do so would seem to support the rational ignorance theory advanced by Levy and Glicksman. At least before the Supreme Court, however, briefs were prepared by the Office of the Solicitor General, which of course knew all about the *Chevron* standard. Yet, as Thomas Merrill has explained, at least in the late 1980s, that office was convinced of *Chevron*'s value to the

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Med. Educ. & Research, 131 S. Ct. 704 (No. 09-837), 2010 WL 3761871 (criticizing petitioners for relying upon *National Muffler* instead of *Chevron*); Brief of Tax Professor Carlton M. Smith as *Amicus Curiae* in Support of the Petitioners at 2–3, Mayo Found. for Med. Educ. & Research, 131 S. Ct. 704 (No. 09-837), 2010 WL 3334503 ("urg[ing] the Court to clarify that the [*National Muffler*] standard . . . remains the applicable standard for assessing . . . interpretive tax regulations," and "ask[ing] the Court to clarify that [the *Chevron* standard] is applicable to tax regulations only when Congress specifically delegates to the Treasury Department regulatory authority regarding a particular tax matter" (internal citations omitted)); Brief of *Amicus Curiae* Professor Kristin E. Hickman in Support of Respondent at 14–31, Mayo Found. for Med. Educ. & Research, 131 S. Ct. 704 (No. 09-837), 2010 WL 3934618 (counseling the Court not to disregard the *Chevron* standard in favor of *National Muffler* review in evaluating the validity of general authority Treasury regulations and not to specially incorporate *National Muffler* factors into *Chevron* analysis in tax cases).

119. Mayo Found. for Med. Educ. & Research, 131 S. Ct. at 714.

Executive Branch but uncertain of the precise parameters of *Chevron*'s scope and doubtful of the Court's commitment to the standard.[120] Accordingly, briefs filed by the government before the Supreme Court during that period "tip-toe[d]" around *Chevron* issues to avoid provoking adverse precedents that could limit *Chevron*'s applicability.[121] Such a policy would explain the government's simultaneous citation of both *Chevron* and *National Muffler* in *Atlantic Mutual Insurance* and in *Cottage Savings*. The Court's subsequent clarification of *Chevron*'s scope in *Mead*, in which the Court expressly linked most instances of notice-and-comment rulemaking with *Chevron* review, likewise explains the government's more vehement claim to *Chevron* deference in *Boeing*.

IV. Conclusion

The agency-specific precedent phenomenon that Levy and Glicksman have identified is a real and meaningful problem for those interested in preserving some uniformity in the application of administrative law principles. To the extent that rational ignorance contributes to the difficulty, educating practicing attorneys regarding general administrative law norms is a worthwhile endeavor that may offer a partial solution.

Yet rational ignorance is only one likely cause of the agency-specific precedent problem. Indeed, further examination of the tax examples that Levy and Glicksman offer suggests that rational ignorance may not even be the main contributor to the problem of agency-specific precedents in those particular instances. Ongoing battles over the labeling of general authority Treasury regulations, the applicability of APA notice-and-comment rulemaking requirements to those pronouncements, and the just-resolved disagreement concerning the standard of review for general authority Treasury regulations, offer substantial evidence that deliberate strategy sometimes contributes to the problem of agency-specific precedents.

In some cases, educating practicing attorneys regarding general administrative law norms may in fact perpetuate or even exacerbate rather than alleviate the difficulty by enabling more attorneys to strategize when and how to cite different precedents to their advantage rather than to help courts identify and rationalize the divergences. Administrative law doctrine includes many mushy and malleable standards. Some degree of differentiation, certainly case-by-case and likely agency-by-agency as well, will be inevitable. With greater understanding of the options between agency-specific precedents and administrative law norms, parties may simply adjust their litigation strategies to avoid, hedge, or exploit minor variations

120. Thomas W. Merrill, *Confessions of a* Chevron *Apostate*, 19 ADMIN. & REG. L. NEWS, Winter 1994, at 1, 14.

121. *Id.*

among judicial opinions to achieve their desired outcomes and to preserve future arguments.

Unless and until litigants see a benefit to highlighting particular deviations for judicial consideration, they likely will decline to do so. The courts will always lack the resources to counteract such strategic behavior by the parties before them. Hence, while I tip my hat to Levy and Glicksman's systematic identification of the problem, and agree that their proposals may help in some cases, I fear that agency-specific precedents are here to stay.