

2013

Unpacking the Force of Law

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Unpacking the Force of Law

*Kristin E. Hickman**

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INTRODUCTION

In its 2011 decision in *Mayo Foundation for Education and Research v. United States*,¹ the Supreme Court rejected tax exceptionalism, holding that the general administrative law standards articulated in *United States v. Mead Corp.*² and *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*³ govern judicial review of U.S. Department of the Treasury (“Treasury”) regulations.⁴ In so doing, the Court admonished, “[W]e are not inclined to carve out an approach to administrative review good for tax law only.”⁵ A few months later, the D.C. Circuit, sitting *en banc* in *Cohen v. United States*, reinforced the policy of administrative law uniformity in applying Administrative Procedure Act (“APA”) provisions to Internal Revenue Service (“IRS”) guidance: “The IRS is not special in this regard; no exception exists shielding it—unlike the rest of the Federal government—from suit under the APA.”⁶ Most recently, in *United States v. Home Concrete & Supply, LLC*, the Supreme Court considered the validity of a Treasury regulation that contradicted an earlier Supreme Court interpretation of the Internal Revenue Code (“I.R.C.”) and that was issued initially in temporary form, in the midst of ongoing litigation, with only postpromulgation notice and comment.⁷ While the Court decided that the meaning of the statute was clear, and thus avoided several administrative law questions raised by the briefs and the courts below,⁸ the *Home Concrete* litigation and its many administrative law issues were closely followed by members of the tax bar.

Taken together, these cases have given tax lawyers a fresh awareness of administrative law doctrine as relevant to their field.⁹

1. 131 S. Ct. 704 (2011).

2. 533 U.S. 218 (2001).

3. 467 U.S. 837 (1984).

4. *Mayo Found.*, 131 S. Ct. at 714.

5. *Id.* at 713.

6. *Cohen v. United States*, 650 F.3d 717, 723 (D.C. Cir. 2011) (*en banc*).

7. 132 S.Ct. 1836, 1841–42 (2012); Kristin E. Hickman, *Home Concrete: Impressions from the Oral Argument*, 134 TAX NOTES 579, 579–80 (2012).

8. *Home Concrete*, 132 S. Ct. at 1839–41 (concluding that the Court’s decision in *Colony, Inc. v. Comm’r*, 357 U.S. 28 (1958), found the meaning of the statute clear and that *stare decisis* thus precluded the Court from adopting an alternative interpretation).

9. See, e.g., Steve R. Johnson, *Intermountain and the Importance of Administrative Law in Tax Law*, 128 TAX NOTES 837, 838 (2010) (“Events in recent decades have brought into greater prominence the intersection of tax law and administrative law.”); Patrick J. Smith, *Life After Mayo: Silver Linings*, 131 TAX NOTES 1251, 1256 (2011) (“[B]y far the most important aspect of *Mayo*, apart from the holding that *Chevron* applies to tax regulations, was the Supreme Court’s emphasis on the principle that tax law is subject to the same administrative law rules that apply

The tax bar's new attention to administrative law doctrine has potential implications for administrative law as well. Every area of federal government administration is at least a little different from the others, sometimes because provisions and requirements of organic statutes vary, but just as often simply because each agency develops its own habits and norms in administering the statutes within its jurisdiction. Challenges to agency actions that derive from those variations in turn explore and test the nuances and boundaries of administrative law doctrine. Such is the case with tax. As the tax community attempts to reconcile unique elements of tax administration with existing administrative law doctrine, unanswered questions regarding the latter are coming to the fore.

Perhaps the single most challenging administrative law question for the tax community is an old perennial: what does it mean for agency action to carry the "force of law"?¹⁰ Whether a particular rule is legislative in character, and thus must satisfy the notice-and-comment rulemaking procedures imposed by the APA, depends upon whether the rule carries the force of law.¹¹ Also, whether agency action is eligible for *Chevron* deference or only the ostensibly lesser *Skidmore* respect turns upon whether the action carries the force of law.¹² In resolving these questions, it is not at all clear whether the force of law occupies precisely the same conceptual space.

Contemporary tax administration practices step right into this gray area of administrative law doctrine. The *Mayo* Court declared clearly and unequivocally that Treasury regulations promulgated

in all other areas of federal law . . ."); Thomas Greenway, *Mayo Foundation Cures Tax Myopia*, TAXPROF BLOG 1 (Jan. 18, 2011), <http://taxprof.typepad.com/files/mayo-kpmg.pdf> (observing that the Supreme Court's *Mayo* decision "cured decades of 'tax myopia' . . . afflict[ing] tax practitioners who cannot see beyond the self-contained world of tax"); cf. Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 554–57 (1994) (criticizing the tax bar for its insularity, including its neglect of administrative law insights); Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 516–26 (2011) (documenting tax deviations from administrative law norms that evolved prior to *Mayo*).

10. *E.g.*, Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can't Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 23 (2009) (describing the "force of law" as "one of the more pernicious phrases in American administrative law").

11. *See, e.g.*, *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979) ("It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the 'force and effect of law.'"); *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (describing notice and comment requirements as depending upon "whether the disputed rule has 'the force of law'"); U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 22, 30 n.3 (1947) (defining "substantive rules" subject to notice-and-comment rulemaking requirements as "hav[ing] the force and effect of law").

12. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

using notice-and-comment rulemaking carry the force of law for the purpose of *Mead* and *Chevron*, irrespective of whether Treasury issues those regulations under specific grants of rulemaking power expressed in individual I.R.C. provisions or through the general rulemaking authority of I.R.C. § 7805(a).¹³ Yet, Treasury and the IRS continue to claim that most Treasury regulations are interpretative rules exempt from APA notice and comment procedures.¹⁴ Treasury also still regularly issues temporary regulations with only postpromulgation notice and comment and without a contemporaneous good cause claim—arguably violating APA procedural requirements.¹⁵ Does the Court's conclusion in *Mayo* regarding the legal force of Treasury regulations for *Chevron* purposes compel a conclusion that Treasury regulations carry the force of law for APA purposes, are legislative rules, and thus are procedurally invalid for their lack of notice and comment? And, if Treasury does not comply with APA notice and comment requirements in issuing its regulations, then can those regulations carry the force of law for purposes of *Chevron* deference? Judicial conclusions regarding these questions are mixed thus far.¹⁶

Beyond Treasury regulations, the IRS relies heavily on informal guidance documents published in the Internal Revenue Bulletin ("IRB"), particularly revenue rulings, revenue procedures, and notices (sometimes described collectively as IRB guidance).¹⁷ The IRS has always maintained that IRB guidance documents "do not have the force of Treasury regulations," and the IRS does not subject these formats to notice-and-comment rulemaking.¹⁸ Yet, according to Treasury regulations, failure to comply with IRB guidance may result

13. See *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 714 (2011).

14. See INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 32.1.1.2.6 [hereinafter INTERNAL REVENUE MANUAL] (declaring that most Treasury regulations are exempt from APA notice and comment requirements as interpretative rules "because the underlying statute implemented by the regulation contains the necessary legal authority for the action taken and any effect of the regulation flows directly from the statute"); see also 5 U.S.C. § 553(b)(A) (2006) (exempting interpretative rules from public notice and comment requirements).

15. See 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, 1759–73 (2007) (documenting this problem at length). Treasury has not demonstrably altered its practices since the Supreme Court decided the *Mayo* case and continues to defend the validity of its temporary regulations in federal court.

16. See *infra* notes 184–196 and accompanying text (summarizing the jurisprudence).

17. See Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Interpretation*, 2009 MICH. ST. L. REV. 239, 242–52 (analyzing contemporary IRS use of IRB guidance formats).

18. *E.g.*, Introduction, 2012-42 I.R.B.

in civil penalties.¹⁹ Before *Mayo*, the Department of Justice (“DOJ”) routinely argued in tax cases that IRB guidance documents carry the force of law and are entitled to *Chevron* deference.²⁰ Some circuit courts have rejected that claim, concluding that IRB guidance documents lack the force of law and are reviewable under the alternative *Skidmore* standard.²¹ The Ninth Circuit has reserved the question, however, since Judge O’Scannlain opined in a concurring opinion that a revenue procedure was legally binding and thus *Chevron* eligible.²² Meanwhile, in *Cohen v. United States*, the D.C. Circuit held that an IRS notice was final agency action and, therefore, that an APA procedural challenge against it was justiciable.²³ On remand, the federal district court interpreted the *Cohen* court’s analysis of the finality question as requiring a conclusion that the notice was a legislative rule carrying the force of law and, on that basis, invalidated the notice for lack of notice-and-comment rulemaking.²⁴ In short, the lower courts are definitely muddled if not

19. See I.R.C. § 6662(a)–(b)(1) (2006) (imposing penalties for failure to comply with “rules and regulations”); Treas. Reg. § 1.6662-3(b)(2) (2012) (defining “rules or regulations” as including revenue rulings and notices); Accuracy-related Penalty, T.D. 8381, 56 Fed. Reg. 67,492-01, 67,494 (Dec. 31, 1991) (indicating that revenue procedures “may or may not be treated as ‘rules or regulations’ depending on all facts and circumstances”).

20. See, e.g., Brief for the Appellee at 59–60, *Conopco, Inc. v. United States*, 572 F.3d 162 (3d Cir. 2008) (No. 07-3564), 2008 WL 4126843; Brief for the Defendant-Appellant at 42–43, *Fortis, Inc. v. United States*, 447 F.3d 190 (2d Cir. 2005) (No. 05-2518), 2005 WL 5280992, at *21–22; Brief for the Respondent-Appellant at 31, *Aeroquip-Vickers, Inc. v. Comm’r*, 347 F.3d 173 (6th Cir. 2002) (No. 01-2741), 2002 WL 34200821, at *17. In May 2011, a DOJ official announced publicly that the government would no longer seek *Chevron* deference for IRB guidance in litigation. See Marie Sapirie, *ABA Section of Taxation Meeting: DOJ Won’t Argue for Chevron Deference for Revenue Rulings*, 131 TAX NOTES 674 (2011).

21. See, e.g., *Kornman & Assoc., Inc. v. United States*, 527 F.3d 443, 452–55 (5th Cir. 2008) (concluding after full consideration that revenue rulings are not *Chevron* eligible); *Aeroquip-Vickers*, 347 F.3d at 181 (holding that revenue rulings are entitled to *Skidmore* deference only).

22. See *Taproot Admin. Servs., Inc. v. Comm’r*, 679 F.3d 1109, 1115 n.14 (9th Cir. 2012) (recognizing and reserving the question of whether revenue rulings are reviewable under *Chevron* or *Skidmore*); *Tualatin Valley Builders Supply, Inc. v. United States*, 522 F.3d 937, 945–46 (9th Cir. 2008) (O’Scannlain, J., specially concurring) (recognizing circuit confusion regarding the proper standard of review for IRB guidance documents and concluding that IRS revenue procedure is entitled to *Chevron* deference); see also *Bluetooth SIG Inc. v. United States*, 611 F.3d 617, 622 (9th Cir. 2010) (acknowledging Judge O’Scannlain’s opinion without resolving the open question of whether revenue rulings are entitled to *Chevron* deference); *Texaco Inc. v. United States*, 528 F.3d 703, 711 (9th Cir. 2008) (avoiding the *Chevron* question by holding that the revenue ruling at issue was in line with the plain meaning of the statute, but would be worthy of deference under either *Chevron* or *Skidmore* even if the statute was unclear).

23. *Cohen v. United States*, 578 F.3d 1, 6–7 (D.C. Cir. 2009), *aff’d en banc*, 650 F.3d 717, 723 (D.C. Cir. 2011) (“Put simply, ‘Notice 2006-50 binds the IRS.’”).

24. See *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 853 F. Supp. 2d 138, 144–45 (D.D.C. 2012) (concluding on remand that Notice 2006-50 was a legislative rule and invalidating the notice for lack of notice and comment).

split outright over whether IRB guidance documents carry the force of law for purposes of the APA, *Chevron*, or both. And, again the questions arise, what does it mean for these documents to carry the force of law, and can they do so for one purpose but not the other?

In short, common tax administrative practices that developed while the tax community was on a relative hiatus from administrative law doctrine present substantial questions for the force of law concept. Existing standards for identifying legislative rules subject to APA procedural requirements or for ascertaining eligibility for *Chevron* deference do not offer easy or clear answers. For that matter, from conversing with practitioners, reading briefs, and listening to oral arguments in various tax cases, I have developed a distinct if informal impression that tax practitioners, administrative law scholars, and judges often talk past each other—using the same words, but with somewhat different understandings, leading to further doctrinal confusion.

My primary goal with this Article, therefore, is to develop a coherent approach to judicial review of Treasury and IRS rulemaking by sifting through overlapping lines of relevant jurisprudence, considering the basic principles of administrative law that drive them, and analyzing their application in the tax context. Because tax practices are a little different from what most administrative law scholars contemplate in considering the force of law questions that are at the heart of this doctrinal analysis, I hope also to highlight undeveloped aspects and offer new insights to otherwise old doctrinal debates. In pursuing these ends, my analysis is deliberately constrained in two key ways. First, given the complexity of my doctrinal task, I leave in-depth normative and empirical assessment to past and future work. Second, because the tax practices addressed by this Article all fall within the category of rulemaking, I limit my analysis of the relationship between *Chevron* deference and the force of law to the rulemaking sphere and defer considering agency adjudication.

Accordingly, Part I examines the status quo of the intersection between administrative law standards and tax administrative practices. In particular, Parts I.A and I.B summarize existing administrative law standards for distinguishing legislative from nonlegislative rules and for ascertaining the applicability of *Chevron* review. Part I.C then documents the ongoing debate over temporary Treasury regulations and IRB guidance under those standards.

Because current administrative law standards in this area are notoriously murky, it is easy to focus too closely on their details and miss the bigger picture. Therefore, Part II examines theoretical

principles underlying the standards described in Part I. In particular, while recognizing that delegation and procedure are closely connected, this Article rejects the premise that procedure alone ought to determine whether agency rules carry the force of law for either legislative rule characterization or *Chevron* deference. Eligibility for *Chevron* deference should not depend solely upon the presence of notice-and-comment rulemaking, nor should courts cease requiring notice and comment on some occasions where agencies have claimed exemption from such procedures. Rather, according to the Supreme Court, both questions turn on a theory of congressional delegation, which suggests strongly that agency action either does or does not carry the force of law simultaneously for both purposes. Following the Supreme Court's delegation premise, I contend that, at a minimum, statutory penalties for noncompliance with agency rules should serve as a definitive signal that Congress intended those rules to carry the force of law for both the APA and *Chevron* deference. Further, because Treasury has construed penalty provisions in the I.R.C. as extending to taxpayer noncompliance with temporary Treasury regulations and IRB guidance documents, those agency actions carry the force of law. As a general rule, therefore, courts should evaluate the legal interpretations advanced in these formats using the *Chevron* standard and should also generally require Treasury and the IRS to satisfy APA notice-and-comment rulemaking requirements in their promulgation.

As a practical matter, however, these doctrinal conclusions raise significant potential difficulties for the stability of the federal income tax system. Treasury and the IRS have been using temporary regulations to impose controversial interpretations of the tax laws on taxpayers for more than twenty years. Treasury has since "finalized" many if not most of those temporary regulations with postpromulgation notice and comment. But if the temporary regulations were procedurally defective, at least some courts may feel bound to find final regulations with temporary origins to be similarly invalid. Meanwhile, taxpayers have relied upon and organized their primary behavior to comply with these regulations. Further, Treasury is not the only agency guilty of using temporary regulations without the benefit of a valid good cause claim. Reviewing courts would be right to ask whether invalidating so many regulations would do more harm than good. Separately, while the IRS often uses IRB guidance formats to impose controversial interpretations on taxpayers, many other IRB guidance documents involve minor housekeeping matters that are both essential to efficient administration of the I.R.C. and utterly uncontroversial. Requiring notice-and-comment rulemaking for all IRB guidance would waste scarce agency resources and could

dry up this important tool for communicating with taxpayers. On the other hand, extending *Chevron* deference to temporary Treasury regulations and IRB guidance documents that have not gone through notice and comment would be appalling to a tax community already troubled by the degree of agency discretion extended by the *Mayo* decision, and would risk undermining respect for and legitimacy of tax administration as a whole.

My goal with Part III, therefore, is to find a workable path or two out of the thicket. One such avenue is largely administrative. Treasury is the source of the problem, both in its indiscriminate use of temporary Treasury regulations and through its association of penalties with temporary regulations and IRB guidance. The IRS contributes to the problem by using the same formats for substantive guidance and minor housekeeping matters, when it could easily segregate those functions. Treasury and the IRS have the power to change both the penalty regulations and their practices, at least prospectively. Yet, absent judicial action, Treasury and the IRS are unlikely to do so. Moreover, a decision by Treasury to self-limit the use of temporary regulations going forward does not resolve the problem of existing regulations with temporary origins. Returning, then, to existing administrative law doctrine, Part III considers ways in which courts might extend existing administrative law doctrine to avoid giving Treasury and the IRS a complete pass for past noncompliance with APA requirements, and thus hopefully to nudge them to realign their practices with general administrative law norms, while preserving certainty and respecting reliance interests within the tax system.

I. TAX ADMINISTRATION IN THE FORCE OF LAW GRAY ZONE

The force of law concept plays a significant role in at least two major areas of administrative law doctrine. The first is in distinguishing between legislative rules that must comply with APA notice-and-comment rulemaking procedures and nonlegislative rules that are exempt from those requirements. The second involves the *Mead* standard articulated by the Supreme Court for determining which agency rules are eligible for *Chevron* deference.²⁵ The courts

25. Courts also sometimes speak in force of law terms in analyzing whether or not agency action is final and thus justiciable under the APA and other statutes. *See, e.g.,* *Cement Kiln Recycling Coal v. EPA*, 493 F.3d 207, 226 & n.14 (D.C. Cir. 2007) (acknowledging the overlap between jurisprudence concerning finality and legislative rule classification). The leading test for finality uses similar “rights and obligations” language to some of the standards distinguishing

have never precisely linked these two doctrinal lines, however, leaving open whether the force of law means the same thing in both contexts.

Some agency rules are obviously both legislative and reviewable under *Chevron*; other agency rules are clearly neither. But a small subset of agency rules falls somewhere in the middle: possibly but not obviously legislative, and potentially but not clearly within *Chevron*'s scope. Over the years, the courts have employed various standards for designating the rules within that subset as either legislative or not, and *Chevron* eligible or not. To date, however, applying those standards has not resulted in a consensus view of the proper characterization of temporary Treasury regulations and IRB guidance documents.

A. Legislative and Nonlegislative Rules

Distinguishing legislative rules from nonlegislative ones is important.²⁶ APA § 553 imposes several procedural requirements on agencies seeking to promulgate legislative rules.²⁷ These procedures are quite burdensome. First, the agency must publish a notice of proposed rulemaking (“NOPR”) in the Federal Register and offer interested parties the chance to submit written comments in response.²⁸ So that the opportunity to comment may be meaningful, the courts require agencies to provide enough detail of their intentions in the NOPR to sufficiently “foreshadow[]” their final regulations.²⁹ Because final rules must be a “logical outgrowth” of the preceding NOPR,³⁰ an agency that changes its mind about a critical element of a

legislative from nonlegislative rules. *E.g.*, *Bennett v. Spear*, 520 U.S. 154, 178 (1997). Whether nonlegislative rules that are ineligible for *Chevron* deference ought nevertheless to be justiciable as final agency action is a topic for another day.

26. The APA does not actually use the legislative term to describe rules subject to notice and comment requirements. Rather, explanations of APA provisions and both pre- and post-APA literature and jurisprudence use the term for purposes of distinguishing such rules from interpretative rules and policy statements. *See, e.g.*, 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.1 (5th ed. 2010) (using the legislative term to distinguish different kinds of rules); Kenneth Culp Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive*, 57 YALE L.J. 919, 919–31 (1948) (discussing at length the APA's definitions for the different kinds of “rules”); Frederic P. Lee, *Legislative and Interpretive Regulations*, 29 GEO. L.J. 1, 2 (1940) (discussing the difference between “legislative” and “interpretive” regulations).

27. 5 U.S.C. § 553 (2006).

28. § 553(b)–(c).

29. *Natural Res. Def. Council v. EPA*, 279 F.3d 1180, 1187–88 (9th Cir. 2002); *Sw. Bell Tel. Co. v. FCC*, 168 F.3d 1344, 1353 (D.C. Cir. 1999); *see also* 1 PIERCE, *supra* note 26, § 7.3 (discussing the “sufficiently foreshadowed” test).

30. *Shell Oil Co. v. EPA*, 950 F.2d 741, 747 (D.C. Cir. 1991); *see also, e.g.*, *Chem. Waste Mgmt., Inc. v. EPA*, 976 F.2d 2, 28–29 (D.C. Cir. 1992) (quoting *Shell Oil* and using “logical

proposed rule must issue an additional notice so that the public can consider and comment upon the change as well.³¹ The NOPR must also include sufficient information about the data and reasoning upon which the agency relied in developing its proposed rules.³² Final regulations must be accompanied by a “concise general statement of [their] basis and purpose.”³³ Eschewing concision, the courts have insisted that the preamble to final regulations articulate the agency’s response to all significant comments received.³⁴ Finally, the APA requires an agency to publish its final regulations in the Federal Register thirty days before their effective date.³⁵ The standard remedy for regulations that fail to satisfy these requirements is invalidation.³⁶

While contemplating legislative rules as the default categorization for agency rulemaking, the APA recognizes several exceptions from these procedural requirements, including exceptions for “interpretative rules” and “general statements of policy.”³⁷ Given the burdens of notice-and-comment rulemaking, it is perhaps not surprising that agencies might prefer to advance substantive legal interpretations through these nonlegislative formats.³⁸ As a result, the courts generally do not accept agencies’ characterizations at face value, but rather conduct their own inquiry into whether rules are legislative or nonlegislative.³⁹

outgrowth” and “directly foreshadowed” interchangeably); 1 PIERCE, *supra* note 26, § 7.3 (equating the “sufficiently foreshadowed” test and the “logical outgrowth” test).

31. See *Shell Oil*, 950 F.2d at 750–52 (holding that agencies must provide notice of significant changes in a proposed rule, even if such changes are arguably foreseeable).

32. See, e.g., *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008) (“It would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment.”).

33. 5 U.S.C. § 553(c).

34. See, e.g., *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (“It is not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered.”).

35. See 5 U.S.C. § 553(d).

36. See 3 PIERCE, *supra* note 26, § 18.1.

37. 5 U.S.C. § 553(b)(A). Section 553 provides other exemptions from its procedural requirements that are not relevant for the purposes of this Article. See *id.* § 553(a)–(b)(B) (providing exemptions, inter alia, for rules involving military or foreign affairs, for procedural rules, and for circumstances in which an agency makes a particular finding of good cause).

38. See Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 ADMIN. L. REV. 547, 555 (2000) (“[T]he agency has an incentive to mischaracterize a legislative rule as interpretative to circumvent the APA rulemaking procedure.”).

39. See, e.g., *Hemp Indus. Ass’n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003) (“[T]he court need not accept the agency characterization at face value.”); *Zhang v. Slattery*, 55 F.3d 732, 746 (2d Cir. 1995) (“[T]he label that the particular agency puts upon its given exercise of

The Supreme Court has explained that legislative rules carry the “force and effect of law” while nonlegislative rules do not.⁴⁰ The *Attorney General’s Manual on the Administrative Procedure Act*, published shortly after Congress adopted the APA, made the same distinction.⁴¹ The Supreme Court has never offered more precise guidance, however, and explaining operationally what it means for an agency rule to carry legal force has proven difficult.

When Congress enacted the APA, the general consensus among courts and scholars held that the only rules properly characterized as legislative were those promulgated pursuant to a narrow and specific grant of authority to fill an explicitly identified statutory gap⁴²—for example, instructing an agency like the Interstate Commerce Commission or the Federal Power Commission to impose uniform accounting rules for industries whose rates were regulated and whose participants consequently had to file annual reports of their assets, income, and expenses;⁴³ or in the tax context, authorizing Treasury to adopt regulations for the filing of consolidated returns by affiliated corporations.⁴⁴ Many statutes, including the I.R.C., also contained general grants authorizing “all necessary rules and regulations” (or

administrative power is not . . . conclusive.” (quoting *Lewis-Mota v. Sec’y of Labor*, 469 F.2d 478, 481–82 (2d Cir. 1972))).

40. *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979) (“It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the ‘force and effect of law.’ ”); cf. *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977) (quoting U.S. DEPT. OF JUSTICE, *supra* note 11, at 30 n.3); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (distinguishing “EEOC guidelines” from “administrative regulations which Congress has declared shall have the force of law”).

41. U.S. DEPT. OF JUSTICE, *supra* note 11, at 30 n.3.

42. See Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 541 (1977) (making a similar observation).

43. See, e.g., Federal Power Act of 1935, Pub. L. No. 74-333, 49 Stat. 847, 854 (codified at 16 U.S.C. § 825(a) (2006)); Interstate Commerce Act of 1887, Pub. L. No. 49-104, § 20, 24 Stat. 379, amended by Hepburn Act of 1906, ch. 3591, § 7, 34 Stat. 584, 593–95 (codified as amended in scattered sections of 49 U.S.C.).

44. I.R.C. § 1502 (2006). This I.R.C. section consists of two sentences totaling 112 words. Treasury has exercised its authority under this provision to adopt more than 350 pages of temporary and final regulations. See Treas. Reg. § 1.1502-0 *et seq.* Tax commenters have often characterized regulations implementing this provision as a prototypical example of legislative rules. See, e.g., Ellen P. Aprill, *The Interpretive Voice*, 38 LOY. L.A. L. REV. 2081, 2097 n.73 (2005) (describing § 1502 as “perhaps the most famous legislative delegation”); Sheldon I. Banoff, *Dealing with the “Authorities”: Determining Valid Authority in Advising Clients, Rendering Opinions, Preparing Tax Returns and Avoiding Penalties*, 66 TAXES 1072, 1086 (1988) (citing regulations promulgated under § 1502 in his explanation of legislative rules); Don Leatherman, *Why Rite Aid Is Wrong*, 52 AM. U. L. REV. 811, 818 (2003) (citing regulations promulgated under § 1502 as examples of legislative regulations).

something similar),⁴⁵ but rules adopted pursuant to such authority were considered nonbinding on regulated parties and thus interpretative for APA purposes.⁴⁶ The basis for this understanding rested in the constitutionally derived nondelegation doctrine: general authority grants that allowed for rules carrying the force and effect of law would violate the Constitution's prohibition against the delegation of legislative power, so rules promulgated under general authority simply had to be nonbinding.⁴⁷ By the 1970s, however, with the erosion of the nondelegation doctrine,⁴⁸ agencies increasingly exercised general authority grants to adopt regulations through notice-and-comment rulemaking.⁴⁹ The agencies then asserted, and

45. I.R.C. § 7805(a) (2006); *see also, e.g.*, Federal Food, Drug, and Cosmetic Act of 1938, Pub. L. No. 75-717, §701, 52 Stat. 1040, 1055-58 ("The authority to promulgate regulations for the efficient enforcement of this chapter . . . is vested in the Secretary."); Communications Act of 1934, Pub. L. No. 73-416, § 4(i), 48 Stat. 1064, 1066 ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions.").

46. *See, e.g.*, 1 F. TROWBRIDGE VOM BAUR, FEDERAL ADMINISTRATIVE LAW § 489 (1942) ("Interpretive regulations . . . are issued pursuant to a statutory provision of an entirely general nature . . ."); Ellsworth C. Alvord, *Treasury Regulations and the Wilshire Oil Case*, 40 COLUM. L. REV. 252, 260-61 (1940) (stating that courts usually held regulations promulgated under a grant of general authority to be interpretive rather than legislative); Stanley S. Surrey, *The Scope and Effect of Treasury Regulations Under the Income, Estate, and Gift Taxes*, 88 U. PA. L. REV. 556, 557-58 (1940) (dispelling the notion that Treasury regulations promulgated under a revenue act are anything more than interpretive regulations); *see also* Davis, *supra* note 26, at 929-30 (contending that some specific delegations may be implied from a statute's general purposes and framework rather than its express authority, while describing the tax code's general authority grant as a paradigmatic example of express authority to issue interpretive rules).

47. *See, e.g.*, Alvord, *supra* note 46, at 260-61 ("If [Section 62 of the I.R.C.] 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."); John A. Fairlie, *Administrative Legislation*, 18 MICH. L. REV. 181, 189 (1920) (noting the inconsistency between the nondelegation doctrine and agency rulemaking under broad rulemaking grants); Surrey, *supra* note 46, at 557-58 (contending that the phraseology of the I.R.C.'s general rulemaking grant is too vague to be a delegation of legislative power).

48. *See, e.g.*, 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 3.2 (2d ed. 1984) (describing nondelegation as a failed legal doctrine); BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 12 (2d ed. 1976) (opining that the nondelegation doctrine "cannot be taken literally").

49. *See* 1 PIERCE, *supra* note 26, § 1.6. Pierce traces the dramatic rise in rulemaking activity to several factors including the enactment of several new federal statutes in the mid- to late-1960s that delegated rulemaking authority to new or existing agencies. *See id.* Pierce also points to the Supreme Court's decisions in *United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973), and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978), which largely replaced formal rulemaking, including oral hearings with informal rulemaking as the norm, and precluded judges from imposing procedural requirements beyond those expressed in APA § 553 upon informal rulemaking efforts. *Id.*; *see also* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 546-59 (2002) (describing the evolution similarly).

the courts often accepted, that these regulations were legally binding on regulated parties.⁵⁰ The specific-versus-general authority distinction was no longer meaningful. But if some but not all rules historically labeled as interpretative were now going to be legally binding, then courts needed a new standard for deciding which ones should be subject to notice-and-comment rulemaking requirements.

Contemporary efforts to distinguish legislative rules from nonlegislative ones have concentrated on what a rule does rather than the source of its authority. As a matter of rhetoric, the lower courts often say that legislative rules “create law,”⁵¹ “prescribe, modify, or abolish duties, rights, or exemptions,”⁵² or “fill” statutory “gaps.”⁵³ By contrast, interpretative rules “seek only to interpret language” that already exists in statutes or legislative rules,⁵⁴ “merely clarify or explain existing law or regulations,”⁵⁵ or “simply state[] what the administrative agency thinks the statute means.”⁵⁶ Policy statements “[do] not seek to change the normative standards under which [a]

50. *See, e.g.*, Nat’l Ass’n of Pharm. Mfrs. v. FDA, 637 F.2d 877, 879–81 (2d Cir. 1981) (discussing doctrinal shift and characterizing general authority regulations as legislative); Nat’l Petroleum Refiners Ass’n v. FTC, 482 F.2d 672, 678–83 (D.C. Cir. 1973) (analyzing the FTC’s general rulemaking authority as supporting binding regulations and comparing to general authority grants in other statutes); *see also* Merrill & Watts, *supra* note 49, at 473, 546–71 (documenting the evolution in judicial regulation of rulemaking authority).

51. *E.g.*, Prof’ls & Patients for Customized Care v. Shalala, 56 F.3d 592, 602 (5th Cir. 1995) (quoting *Brown Express v. United States*, 607 F.2d 695, 700 (5th Cir. 1979)); *Indiana v. Sullivan*, 934 F.2d 853, 856 (7th Cir. 1991) (quoting *Cabais v. Egger*, 690 F.2d 234, 238 (D.C. Cir. 1982)); *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (quoting *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952)).

52. Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 383; *see also, e.g.*, *Hemp Indus. Ass’n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003) (recognizing that legislative rules “create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress”).

53. *Splane v. West*, 216 F.3d 1058, 1063 (Fed. Cir. 2000) (characterizing legislative rules as those engaged in statutory “gap filling”); *United Techs. Corp. v. EPA*, 821 F.2d 714, 719 (D.C. Cir. 1987) (describing legislative rules as those “in which the agency sought to fill gaps and inconsistencies left by the statutory scheme”).

54. *SBC Inc. v. FCC*, 414 F.3d 486, 498 (3d Cir. 2005) (quoting *Chao v. Rothermel*, 327 F.3d 223, 227 (3d Cir. 2003)); *see also Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997) (declaring a rule legislative because it “does not purport to construe any language in a relevant statute or regulation”); *Sentara-Hampton Gen. Hosp. v. Sullivan*, 980 F.2d 749, 759 (D.C. Cir. 1992) (stating that a rule may be interpretative if it “represents the agency’s explanation of a statutory or regulatory provision”).

55. *Dismas Charities, Inc. v. U.S. Dep’t of Justice*, 401 F.3d 666, 679 (6th Cir. 2005) (quoting *First Nat’l Bank v. Sanders*, 946 F.2d 1185, 1188–89 (6th Cir. 1991)); *Nat’l Org. of Veterans’ Advocates, Inc. v. Sec’y of Veterans Affairs*, 260 F.3d 1365, 1375 (Fed. Cir. 2001) (quoting *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998)).

56. *Ass’n of Am. R.R.s v. U.S. Dep’t of Transp.*, 198 F.3d 944, 947 (D.C. Cir. 1999) (alteration in original) (quoting *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984)).

statute operates.”⁵⁷ Instead, they set forth “the manner in which [an] agency proposes to exercise a discretionary power,”⁵⁸ such as “how the agency plans to exercise its enforcement discretion,”⁵⁹ allowing agencies “to announce their ‘tentative intentions for the future’ without binding themselves.”⁶⁰

These rhetorical descriptions offer little practical guidance. Statutory language is often susceptible of more than one possible meaning. Statutes rarely, if ever, explicitly address every possible application or resolve the full range of circumstances within their scope. While Congress sometimes instructs agencies to fill specific statutory gaps, far more often Congress simply fails to define the statutory terms driving particular legal consequences or adopts open-ended standards rather than bright-line rules. On some level, agency pronouncements that define the undefined or designate the applicability of open-ended standards to particular facts and circumstances merely interpret statutory language, clarify existing law, or describe how the agency proposes to enforce a statute. Yet, courts have held that many such pronouncements are legislative rules subject to APA notice and comment requirements.⁶¹ As Richard Pierce has observed, “A rule that performs an interpretative function is a legislative rule rather than an interpretative rule if the agency has the statutory authority to promulgate a legislative rule and the agency exercises that power.”⁶²

57. *Conn. Dep’t of Children & Youth Servs. v. Dep’t of Health & Human Servs.*, 9 F.3d 871, 984 (D.C. Cir. 1993); *see also Prof’ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 596 (5th Cir. 1995) (“A general statement of policy, on the other hand, does not establish a ‘binding norm.’”).

58. *Conn. Dep’t of Children & Youth Servs.*, 9 F.3d at 984 (quoting U.S. DEP’T OF JUSTICE, *supra* note 11, at 30 n.3).

59. *Animal Legal Def. Fund v. Veneman*, 469 F.3d 826, 839 (9th Cir. 2006); *see also Syncor Int’l Corp.*, 127 F.3d at 96 (suggesting that enforcement discretion is relevant in connection with distinguishing policy statements from legislative rules).

60. *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987) (quoting *Pac. Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 38 (D.C. Cir. 1974)); *see also Veneman*, 469 F.3d at 839 (quoting *Am. Hosp. Ass’n* for the same proposition); *Prof’ls & Patients for Customized Care*, 56 F.3d at 596.

61. *See, e.g., Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494–96 (D.C. Cir. 2010) (describing examples of supposed mere interpretations that are nevertheless legislative rules, and holding a rule elaborating “reasonable costs” to be legislative); *Tunik v. Merit Systems Protection Bd.*, 407 F.3d 1326 (Fed. Cir. 2005) (concluding that an agency’s interpretation of the statutory term “removal” as including constructive removals was a legislative rule); *cf. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (describing EPA regulation defining the statutory term “stationary source” as “legislative”).

62. 1 PIERCE, *supra* note 26, § 6.4; *cf. Cent. Tex. Tel. Coop., Inc. v. FCC*, 402 F.3d 205, 212 (D.C. Cir. 2005) (“The APA’s definition of ‘rule’ contemplates that all types of rules, legislative and interpretive alike, may interpret ‘law.’”).

Moving past the rhetoric, therefore, courts have tried to identify criteria that demonstrate whether a rule operates with the force of law. Early on, courts simply looked to whether a rule, by its own terms, was “an authoritative implementation” under the relevant statute, such that “in an enforcement action an agency need prove only that the defendant’s conduct was contrary to the rule.”⁶³ In other words, did the rule in question “create, by its own force, a legally binding standard of conduct”?⁶⁴ If the rule on its face carried such legal effect, then it was a legislative rule. In practice, courts evaluating a rule’s legal effect relied heavily on agencies’ characterizations of their own rules.⁶⁵ Courts and others realized that agencies could avoid APA procedures and yet substantially influence the actions of regulated parties by labeling rules as nonlegislative while treating them as conclusive.⁶⁶ Hence, contemporary courts typically use an agency’s characterization of its rules and their legal effects as at most a starting point.⁶⁷

63. William T. Mayton, *A Concept of a Rule and the “Substantial Impact” Test in Rulemaking*, 33 EMORY L.J. 889 (1984); *see also, e.g.*, *Pac. Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 38 (D.C. Cir. 1974) (describing the test in similar terms); Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 827 (2002) (same).

64. Asimow, *supra* note 42, at 543; *see also* *Amer. President Lines, Ltd. v. Fed. Mar. Comm’n*, 316 F.2d 419, 421 (D.C. Cir. 1963) (speaking similarly of legislative rules as “independently enforceable”).

65. *See, e.g., Amer. President Lines*, 316 F.2d at 421 (relying on agency’s characterization of its own rule); Asimow, *supra* note 42, at 543; Mayton, *supra* note 63, at 907–08.

66. *See, e.g.,* COMM. ON GOV’T REFORM, 106TH CONG., NON-BINDING LEGAL EFFECT OF AGENCY GUIDANCE DOCUMENTS, H.R. REP. NO. 106-1009, at 9 (2000) (“[A]gencies have sometimes improperly used guidance documents as a backdoor way to bypass the statutory notice-and-comment requirements for agency rulemaking and establish new policy requirements.”); Mayton, *supra* note 63, at 906 (recognizing that relying on agency characterizations makes it easy for agencies to avoid rulemaking). A fairly recent study by Connor Raso suggests that agencies do not strategize their use of nonlegislative rules in this way. Connor Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782 (2010). Even if Raso is correct that agencies do not deliberately set out to circumvent the APA’s procedural requirements in pursuing major policy initiatives, they have little incentive not to over-rely on informal guidance absent careful judicial oversight. Tax administration represents a good example of this phenomenon in action. *See* discussion *infra* Part I.C.2. Raso notably recognizes the IRS for using guidance more often than other agencies. *See* Raso, *supra*, at 822.

67. *See, e.g.,* *Hemp Indus. Ass’n v. DEA*, 333 F.3d 1082, 1088 (9th Cir. 2003) (stating that an agency’s characterization of a rule “does not end the inquiry into whether the rule is legislative”); *Mejia-Ruiz v. INS*, 51 F.3d 358, 363–65 (2d Cir. 1995) (calling an agency’s characterization of a rule a “starting point” but focusing the analysis principally on statutory provisions); *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc) (“First, the agency’s own label, while relevant, is not dispositive.”).

In *Chrysler Corp. v. Brown*, the Court advised that legislative rules that carry the force of law “affect[] individual rights and obligations.”⁶⁸ Drawing from this description, some courts have focused on the practical impact of a rule rather than its facial legal effect, asking whether the rule in question substantially affected the rights and duties of regulated parties.⁶⁹ But if the legal effect test was too narrow and allowed agency action improperly to escape the APA’s notice and comment requirements, the substantial impact test was too broad. Prudent regulated parties scour even the most casual agency statements for clues and hints as to the agency’s interpretations, policy preferences, and goals, and adjust their behavior accordingly.⁷⁰ The courts are rightly wary of characterizing every agency action that might influence regulated party behavior as a legislative rule subject to the requirements of notice-and-comment rulemaking for fear of discouraging agencies from issuing informal guidance.⁷¹ As Judge Stephen Williams noted writing for the D.C. Circuit in *American Mining Congress v. Mine Safety and Health Administration*:

The protection that Congress sought to secure by requiring notice and comment for legislative rules is not advanced by reading the exemption for ‘interpretive rule’ so narrowly as to drive agencies into pure ad hocery—an ad hocery, moreover, that affords less notice, or less convenient notice, to affected parties.⁷²

Seeking a middle ground for legislative rules—more inclusive than legal effect but less expansive than substantial impact—the circuits have settled on two tests that attempt to identify rules that agencies do not freely admit possess legal effect but that carry sufficient weight that notice and comment should be required. The standard used by the Fifth Circuit in particular is a modified

68. 441 U.S. 281, 302 (1979) (quoting *Morton v. Ruiz*, 415 U.S. 199, 232 (1974)).

69. See, e.g., *Reynolds Metals Co. v. Rumsfeld*, 564 F.2d 663, 669 (4th Cir. 1977) (“[N]otice and comment is required if the rule makes a substantive impact on the rights and duties of the person subject to regulation.”); *Lewis-Mota v. Sec’y of Labor*, 469 F.2d 478, 482 (2d Cir. 1972) (rejecting a rule for lack of notice and comment because “it changed existing rights and obligations” and thus had “substantial impact”).

70. See, e.g., *Mayton*, *supra* note 63, at 893 (noting that “the agency can, as it is said, regulate by means of ‘a raised eyebrow’”). *Mayton* distinguishes the substantial impact test from the “force of law” test—a term he uses interchangeably with legal effects.

71. See, e.g., *Energy Reserves Grp., Inc. v. Dep’t of Energy*, 589 F.2d 1082, 1095 (Temp. Emer. Ct. App. 1978) (observing that “under the ‘substantial impact’ test every significant interpretative rule automatically becomes a legislative rule by virtue of its effect”); *Levesque v. Block*, 723 F.2d 175, 182 (1st Cir. 1983) (agreeing “that substantial impact does not make the rule legislative”).

72. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

substantial impact test that asks both whether the rule at issue imposes “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.⁷³ Most circuits, however, utilize a test that derives from the D.C. Circuit’s opinion in *American Mining Congress*.⁷⁴ According to that decision, a rule is legislative “if Congress has delegated legislative power to the agency and if the agency intended to exercise that power in promulgating the rule.”⁷⁵ The D.C. Circuit in *American Mining Congress* and subsequent cases has identified various elements which, if present, indicate the agency’s intent to act legislatively:⁷⁶

- Whether the rule is necessary to provide legislative basis for an enforcement action or conferral of benefits;⁷⁷
- Whether the rule revokes or alters an existing legislative rule;⁷⁸
- Whether the agency has explicitly invoked its general legislative authority;⁷⁹ or
- Whether the rule in question seeks to interpret a legislative rule that is itself too vague or open ended to provide independent support for the alleged interpretative rule.⁸⁰

If the answer to any of the above-listed questions is affirmative, then the court considers the agency to be acting with the intent to bind regulated parties with the force of law, and the rule is legislative in

73. *Tex. Sav. & Cmty. Bankers Ass’n v. Fed. Hous. Fin. Bd.*, 201 F.3d 551, 556 (5th Cir. 2000); *Prof’ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995).

74. *See, e.g., Hemp Indus. Ass’n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003) (applying the *American Mining Congress* test); *New York City Employees’ Ret. Sys. v. SEC*, 45 F.3d 7, 13 (2d Cir. 1995) (same); *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 181 (3d Cir. 1995) (same); *Mission Group Kan., Inc. v. Riley*, 146 F.3d 775, 784 (10th Cir. 1998) (same).

75. *See Am. Mining Cong.*, 995 F.2d at 1109; *see also, e.g., Elizabeth Blackwell Health Ctr.*, 61 F.3d at 187 (recognizing the same definition of legislative rule); 1 PIERCE, *supra* note 26, § 6.4 (characterizing a rule as legislative “if the agency has the statutory authority to promulgate a legislative rule and the agency exercises that power”).

76. *See* 1 PIERCE, *supra* note 26, § 6.4 (summarizing the evolution of the *American Mining Congress* test).

77. *See Am. Mining Cong.*, 995 F.2d at 1112; *see also, e.g., Sweet v. Sheahan*, 235 F.3d 80, 92–93 (2d Cir. 2000) (characterizing a rule as legislative on this basis); *Warder v. Shalala*, 149 F.3d 73, 80–81 (1st Cir. 1998) (applying this factor).

78. *See Am. Mining Cong.*, 995 F.2d at 1112; *see also, e.g., Cent. Tex. Tel. Coop., Inc. v. FCC*, 402 F.3d 205, 211–12 (D.C. Cir. 2005) (considering particularly this factor); *Hemp Indus. Ass’n*, 333 F.3d at 1088 (same).

79. *See Am. Mining Cong.*, 995 F.2d at 1112.

80. *See, e.g., Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494–95 (D.C. Cir. 2010); *Hocort v. U.S. Dep’t of Agric.*, 82 F.3d 165, 169–72 (7th Cir. 1996).

character.⁸¹ Some, but not all, circuits will also treat a rule as legislative and require notice and comment if it alters or revokes an existing interpretative rule, if that existing rule is sufficiently “well-established, definitive, and authoritative.”⁸² Finally, publication of the rule in the Code of Federal Regulations serves as a potential additional indicator that the rule is legislative, but is insufficient on its own to be dispositive.⁸³

For policy statements, the courts typically rely upon a “binding norm” standard that, in its analysis if not its label, strongly resembles the Fifth Circuit’s modified substantial effect test described above.⁸⁴ In *Pacific Gas & Electric Co. v. Federal Power Commission*, the D.C. Circuit stated that, unlike legislative rules, a general statement of policy “does not establish a ‘binding norm.’ It is not finally determinative of the issues or rights to which it is addressed.”⁸⁵ In *American Bus Ass’n v. United States*, the D.C. Circuit elaborated and expanded the binding norm standard by articulating two criteria for identifying a policy statement: first, that the purported policy statement “not impose any rights and obligations on” regulated parties⁸⁶ and, second, that it “leave[] the agency and its decisionmakers free to exercise discretion.”⁸⁷ Courts applying the

81. See *Am. Mining Cong.*, 995 F.2d at 1112.

82. *Warshauer v. Solis*, 577 F.3d 1330, 1338 (11th Cir. 2009) (documenting a circuit split over this approach); see also 1 PIERCE, *supra* note 26, § 6.4 (same). This element was originally advanced by the D.C. Circuit in *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997). See also, e.g., *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1033–36 (D.C. Cir. 1999) (applying this element to characterize a rule as legislative); *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001) (same). But see, e.g., *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1033 (9th Cir. 2008) (rejecting this approach); 1 PIERCE, *supra* note 26, § 6.4 (criticizing this justification for characterizing a rule as legislative).

83. The D.C. Circuit in *American Mining Congress* included this element on its list of dispositive factors, but subsequently recognized that agencies also sometimes publish interpretative rules. See, e.g., *Hemp Indus. Ass'n*, 333 F.3d at 1087 n.5; *Sweet v. Sheahan*, 235 F.3d 80, 91 n.8 (2d Cir. 2000); *Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994).

84. See, e.g., *Sacora v. Thomas*, 628 F.3d 1059, 1069 (9th Cir. 2010) (applying the binding norm standard to evaluate whether agency action qualified for the policy statement exception); *Nat'l Mining Ass'n v. Sec'y of Labor*, 589 F.3d 1368, 1371 (11th Cir. 2009) (quoting *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983)) (same).

85. 506 F.2d 33, 38 (D.C. Cir. 1974).

86. 627 F.2d 525, 529 (D.C. Cir. 1980) (quoting *Texaco v. Fed. Power Comm'n*, 412 F.2d 740, 744 (3d Cir. 1969)); see also *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943 (D.C. Cir. 1987) (recognizing binding norm criteria).

87. *Cnty. Nutrition Inst.*, 818 F.2d at 946; see also, e.g., *Sacora*, 628 F.3d at 1069 (describing policy statements in similar terms); *Nat'l Mining Ass'n*, 589 F.3d at 1371 (quoting *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983)) (applying the binding norm standard).

binding norm standard also sometimes consider whether agency actions alleged to be policy statements operate only prospectively.⁸⁸

As with interpretative rules, even if policy statements lack formal binding effect on regulated parties, they may still have coercive effects on regulated party behavior. In other words, even if an agency cannot rely on an exempt policy statement to bind regulated parties to its policy preferences, an agency may be able to use a policy statement to influence regulated parties strongly in that direction.⁸⁹ Hence, in *Appalachian Power Co. v. EPA*, the D.C. Circuit seemed to extend the binding norm standard to statements that were “practically binding,” meaning that the agency usually acted consistently with its stated policy notwithstanding its supposed discretion to behave otherwise.⁹⁰ And in *Cement Kiln Recycling Coalition v. EPA*, the court indicated that “whether the agency action binds private parties or the agency itself with the ‘force of law,’ ”—that is, whether the agency action is a legislative rule rather than a policy statement—turns on whether “as a practical matter” the agency action “either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding.”⁹¹ Yet, in another recent case, *National Ass’n of Home Builders v. Norton*,⁹² the court seemed to retreat from its focus on practical binding effect, emphasizing instead the lack of legal consequences from the agency action at issue. The court has not repudiated the practical binding iteration of its binding norm standard, but may be attempting to limit its applicability to particularly egregious circumstances.

Whichever of the above standards a court applies in distinguishing legislative rules from nonlegislative ones, since courts acquiesced to the idea that rules issued pursuant to general authority could be legislative rules, there has been no question that agency rules qualify when they carry facial legal effect by binding the actions of regulated parties. The tests that courts employ all operate with the presumption that, whatever the outer boundaries of the legislative rule category, any rule that, on its face and by its own terms, seeks to

88. See, e.g., *Chamber of Commerce of United States v. U.S. Dep’t of Labor*, 174 F.3d 206, 212–13 (D.C. Cir. 1999) (substituting “prospective effect” for the rights and obligations factor of the binding norm standard); *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1016 (9th Cir. 1987) (discussing prospective effect).

89. See, e.g., *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (expressing this concern).

90. *Id.* at 1020 (quoting Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 85 (1995)).

91. 493 F.3d 207, 227 (D.C. Cir. 2007).

92. 415 F.3d 8 (D.C. Cir. 2005).

bind regulated parties carries the force of law. Rather than supplanting the old legal effect test outright, therefore, the jurisprudence has sought merely to expand the legislative category beyond facial legal effect to include an additional subset of legislative rules: those that on their face purport not to be legally binding but that carry a sufficient degree of binding effect as to cross the legislative line.

B. Mead and Chevron

Apart from judicial efforts to classify rules for APA procedural purposes, the force of law concept is also central to the question of which standard of review courts should employ in evaluating agency statutory interpretations. In *Christensen v. Harris County*⁹³ and *United States v. Mead Corp.*,⁹⁴ the Supreme Court identified two primary alternatives.⁹⁵

The first is the highly deferential standard articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, with its two-part test.⁹⁶ Recognizing that “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress,” *Chevron* step one considers whether the statute being interpreted unambiguously resolves the issue at bar.⁹⁷ If, and only if, it does not, then *Chevron* step two asks merely “whether the agency’s answer is based on a permissible construction of the statute,” and mandates judicial deference if the answer is affirmative.⁹⁸

The second, and arguably less deferential, alternative review standard highlighted by *Christensen* and *Mead* is a multifactor

93. 529 U.S. 576 (2000).

94. 533 U.S. 218 (2001).

95. Notwithstanding *Mead*, William Eskridge and Lauren Baer have identified a few others that the Supreme Court, at least, has applied in evaluating agency statutory interpretations in the post-*Chevron* era. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1099–1100 (2008). Yet, Eskridge and Baer also recognize *Mead*’s emphasis on *Chevron* and *Skidmore* as the two primary doctrinal alternatives and also advocate a deference regime focused principally on these two alternatives, with a more limited role for *Gonzales v. Oregon*, 546 U.S. 243 (2006). See *id.* at 1157, 1183–85 (urging the Court to simplify its deference regime by expanding the understanding of *Skidmore* and *Chevron* deference).

96. 467 U.S. 837, 842–43 (1984).

97. *Id.* at 842. The *Chevron* decision frames this step one inquiry variably as “whether Congress has directly spoken to the precise question at issue,” whether “the intent of Congress is clear,” and whether “the statute is silent or ambiguous with respect to the specific issue”—three rhetorical formulations that do not necessarily call for the same analysis. *Id.* at 842–43.

98. *Id.* at 843.

approach exemplified by *Skidmore v. Swift*.⁹⁹ The Court in *Skidmore* allowed a reviewing court to decide for itself the appropriate level of deference, if any, by analyzing various factors including, but not limited to, “the thoroughness evident in [the interpretation’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”¹⁰⁰ Other cases applying *Skidmore* have additionally identified as relevant factors the formality of the agency’s decisionmaking process, the longevity of the agency’s interpretation, the contemporaneity of that interpretation with the enactment of the statute, and the degree of agency expertise required in answering the interpretive question.¹⁰¹

In *Mead*, the Court held that *Chevron* applies only if Congress has given the agency in question the authority to bind regulated parties with “the force of law” and if the agency has in fact acted “in the exercise of that authority.”¹⁰² If either of these conditions is lacking, then *Skidmore* provides the appropriate evaluative standard.¹⁰³

Just as agencies have an incentive to characterize their rules as nonlegislative, and thus avoid the burdens of notice-and-comment rulemaking, they also have good reason to push in the opposite direction at the boundaries of *Mead*: to claim that their rules carry the force of law and thereby obtain the maximum level of judicial deference through the *Chevron* standard. Having pronounced the force of law as the touchstone for *Chevron* deference, however, the Court has again declined to specify precisely what it means by that concept.

Agencies frequently wear multiple hats—as quasi-legislators charged with filling statutory gaps, as executive branch subordinates responsible for administering and enforcing the laws, and as quasi-judicial bodies evaluating the actions and claims of regulated parties.¹⁰⁴ Whether or not they have the authority to adopt legally

99. 323 U.S. 134 (1944).

100. *Id.* at 140.

101. For example, citing *Skidmore*, the *Mead* Court paraphrased these factors in describing the standard as based upon “the degree of the agency’s care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency’s position.” *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001); see also Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1258–59 (2007) (documenting factors articulated by the Supreme Court in applying *Skidmore*).

102. *Mead Corp.*, 533 U.S. at 227.

103. See *id.*

104. See, e.g., *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (“Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as

binding legislative rules, all agencies must interpret statutes in the course of discharging their myriad duties.¹⁰⁵ Private parties subject to statutory requirements or eligible for statutory benefits certainly care what those agency officials think the statute means, whether or not those interpretations carry legal force. But *Chevron* deference “is not accorded merely because the statute is ambiguous and an administrative official is involved.”¹⁰⁶ Rather, the *Chevron* standard requires a delegation from Congress, as expressed in a statute, as well as an exercise of that delegated power.¹⁰⁷

The *Mead* test thus really raises two separate questions regarding the force of law. First, how do we know when an agency possesses the power to act with legal force? Second, if we conclude or assume that an agency enjoys that power, then how do we decide which agency actions are in exercise thereof?

The Court has recognized both express and implied delegations as giving rise to *Chevron* eligibility.¹⁰⁸ Express delegations are straightforward. As discussed above with respect to legislative rules, Congress sometimes specifically tells an agency to adopt rules and regulations to accomplish a specific purpose or fill a statutorily identified gap.¹⁰⁹ Hence, in the *Chevron* opinion itself, the Court described these express or specific delegations as offering the agency the power “to elucidate a specific provision of the statute by regulation.”¹¹⁰ Later, in *Mead*, the Court described express delegations as conveying “the responsibility to implement a particular provision or fill a particular gap.”¹¹¹ In other words, specific grants of rulemaking authority are most obviously within the range of delegations leading to *Chevron* review.

Implied delegations are harder. The Court in *Chevron* did not elaborate the concept explicitly. Nevertheless, the EPA regulation at

the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution.”).

105. See 1 PIERCE, *supra* note 26, § 6.2 (“Any agency has the inherent power to issue an interpretative rule, a policy statement, or a procedural rule to implement a statute it administers.”).

106. *Mead Corp.*, 533 U.S. at 229; see also *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1844 (2012) (quoting *Mead Corp.*, 533 U.S. at 229, for this same proposition).

107. See, e.g., *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984); see also *Mead Corp.*, 533 U.S. at 229–31 & n.11 (discussing the relationship between congressional delegations and *Chevron* review).

108. See *Chevron*, 467 U.S. at 843–44.

109. See discussion *supra* notes 43–45 and accompanying text.

110. 467 U.S. at 844.

111. 533 U.S. at 229.

issue in that case was not issued pursuant to a specific rulemaking grant. Instead, the regulation relied on the EPA's general authority "to prescribe such regulations as are necessary to carry out [its] functions under" the Clean Air Act to elaborate ambiguous statutory language.¹¹² In subsequent cases, the Court has been more explicit in recognizing that general rulemaking grants support regulations with the force of law. For example, in *Household Credit Services, Inc. v. Pfennig*, the Court found the requisite delegation in 15 U.S.C. § 1604(a), which at that time authorized the Federal Reserve Board to "prescribe regulations to carry out the purposes of" the Truth In Lending Act, including "such additional requirements, classifications, differentiations, or other provisions . . . as in the judgment of the Board are necessary or proper to effectuate the purposes of [the Act], to prevent circumvention or evasion thereof, or to facilitate compliance therewith."¹¹³ In *National Cable & Telecommunications Ass'n v. Brand X Internet Services, Inc.*, the Court recognized the statutory authority of the Federal Communications Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Communications Act as a delegation of "the authority to promulgate binding legal rules."¹¹⁴ Finally, the Supreme Court in the *Mayo* case recognized Treasury's authority to adopt "'all needful rules and regulations for the enforcement' of the Internal Revenue Code" to be a sufficient basis for extending *Chevron* deference, and in doing so stated expressly, "Our inquiry in that regard does not turn on whether Congress's delegation of authority was general or specific."¹¹⁵

Still, not every seemingly broad delegation of general authority to adopt rules or regulations qualifies, it seems. *Gonzales v. Oregon*

112. At least, this is the consensus among administrative law scholars. See, e.g., John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 199–200 (1998) (observing that the Solicitor General began his argument in *Chevron* by quoting in full the Clean Air Act's general authority language); Merrill & Watts, *supra* note 49, 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. 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)).

113. 15 U.S.C. § 1604(a) (2006); *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 238 (2004) (quoting parts of 15 U.S.C. § 1604(a) and extending *Chevron* deference accordingly). The statute has since been amended to shift responsibility for Truth in Lending Act to a new agency, but the scope of the delegation otherwise remains the same.

114. 545 U.S. 967, 980–81 (2005).

115. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct 704, 713–14 (2011).

offers an interesting example.¹¹⁶ That case concerned an interpretation of the Controlled Substances Act advanced by the Attorney General through a document labeled an “interpretive rule.”¹¹⁷ The Court agreed with the government that the statute was ambiguous, but declined to evaluate the Attorney General’s interpretation through the *Chevron* lens on the ground that the Attorney General’s rule did not derive from congressionally delegated power to act with the force of law. In reaching that conclusion, the Court identified and considered two particular provisions in the Controlled Substances Act granting rulemaking authority to the Attorney General. The first provision, 21 U.S.C. § 821, contained a specific grant to make rules “relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances and to listed chemicals.”¹¹⁸ The second provision, 21 U.S.C. § 871(b), authorized rules “for the efficient execution of [the Attorney General’s] functions under” the Act.¹¹⁹ The Court implied that the first of these two grants would be adequate to support rules carrying the force of law, but the rule in question fell outside its terms. Meanwhile, according to the Court, in authorizing rules for the “execution” of government “functions,” Congress did not give the Attorney General the general power to construe the Act’s substantive terms. In other words, the delegation contained in 21 U.S.C. § 871(b), while broadly written, was also textually limited, and thus was distinguishable from the general authority grants previously recognized by the Court for *Chevron* purposes.

Even if a court concludes that Congress has delegated the requisite authority to act with the force of law, not every agency pronouncement will qualify as an exercise of that power. The Court has been less than clear, however, in explaining which agency rules are *Chevron* eligible. In *Mead*, the Court recognized notice-and-comment rulemaking along with formal adjudication as evidence that an agency intended to act with the legal force required for *Chevron*

116. 546 U.S. 243 (2006).

117. To be precise, the interpretive rule, which lacked public notice and comment, purported to interpret regulations previously adopted by the Attorney General using notice-and-comment rulemaking. The *Gonzales* Court declined the government’s invitation to characterize the case as concerning an agency’s interpretation of its own regulations, on the ground that the regulations merely parroted the language of the statute. *See id.* at 257. Had the Court framed the case as the government preferred, the appropriate standard of review would have been that described in *Auer v. Robbins*, 519 U.S. 452 (1997).

118. *Gonzales*, 546 U.S. at 259 (quoting 21 U.S.C. § 821).

119. *Id.* (quoting 21 U.S.C. § 871(b)).

deference,¹²⁰ but explicitly declined to limit *Chevron*'s reach to those two formats.¹²¹ The only alternative example offered by the *Mead* Court, however, was a bare citation to *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*,¹²² which concerned an agency adjudication conducted according to procedures contained in the agency's organic statute rather than the APA.¹²³ Similarly, *Mead* itself concerned an informal adjudication—a tariff ruling letter that applied only to the party to whom it was issued. Meanwhile, in *Christensen v. Harris County*, which predates but foreshadowed *Mead*, the Court stated that opinion letters as well as “policy statements, agency manuals, and enforcement guidelines” lack the force of law and are ineligible for *Chevron* deference.¹²⁴

One could read *Christensen* and *Mead* together as suggesting that *Chevron*'s domain extends only to notice-and-comment regulations plus some broader collection of formal and informal adjudications. Since deciding *Mead*, the Court has often linked the agency's use of notice-and-comment rulemaking procedures with a rule's eligibility for *Chevron* deference.¹²⁵ The only instances not involving notice-and-comment regulations in which the post-*Mead* Court has actually applied *Chevron* review to evaluate agency action have involved informal adjudications, not rulemaking.¹²⁶ Consistent with *Christensen*, the Court has consistently extended only *Skidmore* review to agency rules that lack notice and comment.¹²⁷

120. *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (“Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.”).

121. *See id.* at 230–31 (“[A]s significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case . . .”).

122. *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995).

123. *See Mead*, 533 U.S. at 231.

124. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

125. *See, e.g.*, *Mayo Found. for Educ. & Research v. United States*, 131 S. Ct. 704, 714 (2011); *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2469 (2009); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 45 (2002).

126. *See Negusie v. Holder*, 555 U.S. 511, 516 (2009) (extending *Chevron* deference to Bureau of Immigration Affairs adjudication interpreting the Immigration and Nationality Act); *United States v. Eurodif*, 555 U.S. 305, 316 (2009) (granting *Chevron* deference to Commerce Department interpretation of the Tariff Act in adjudication).

127. *See Gonzales v. Oregon*, 546 U.S. 243, 246 (2006) (applying *Skidmore* standard and declining to defer to interpretative rule); *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 17 (2004) (citing *Skidmore* in support of deference to agency advisory opinion); *Clackamas Gastroenterology Assoc., P.C. v. Wells*, 538 U.S. 440, 449 n.9 (2003) (analogizing the Equal Employment Opportunity Commission (“EEOC”) Compliance Manual to nonbinding formats identified as only worthy of *Skidmore* review by *Christensen*). Less directly,

Nevertheless, the Court has continued to maintain that notice and comment are neither necessary nor sufficient to justify *Chevron* deference.¹²⁸ Further, in *Barnhart v. Walton*, the Court extended *Chevron* deference to an agency regulation not only for its notice-and-comment pedigree but additionally for the agency's "longstanding" embrace of the same interpretation in less formal rulings and guidance documents—seemingly suggesting that such interpretive formats might on some occasions be *Chevron* eligible.¹²⁹

The Supreme Court's refusal to limit *Chevron* deference to notice-and-comment regulations and its simultaneous failure to elaborate the circumstances when other agency rules might be *Chevron* eligible have perplexed lower courts forced to evaluate agency rules that lack notice and comment procedures. Courts in a few cases have responded essentially by favoring *Barnhart* over *Mead* and applying the *Chevron* standard to informal agency actions that the Court in *Christensen* marked for *Skidmore* review.¹³⁰ But many lower courts appear to have dealt with the uncertainty by ignoring it, simply treating the absence of notice and comment as dispositive without further inquiry, notwithstanding the Supreme Court's contrary advice.¹³¹

in *Wisconsin Department of Health and Family Services v. Blumer*, the Court cited *Mead* as supporting "respectful consideration" for a proposed regulation and informal ruling letter—reasoning the dissent characterized as *Skidmore* review. 534 U.S. 473, 497 (2002); *id.* at 505 (Stevens, J., dissenting). Also, in *Dada v. Mukasey*, the Court again counseled "respectful consideration" for a proposed regulation and cited *Wisconsin Department of Health and Family Services v. Blumer* for this proposition. 554 U.S. 1, 20–21 (2008).

128. See, e.g., *Nat'l Cable & Telecomms.*, 545 U.S. at 1004 (2005) (Breyer, J., concurring) (quoting *Mead* for the proposition that "notice-and-comment rulemaking [does] 'not decide the case'" for or against *Chevron* deference); see also *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 (2002) (agreeing that "deference under [*Chevron*] does not necessarily require an agency's exercise of express notice-and-comment rulemaking power").

129. *Barnhart v. Walton*, 535 U.S. 212, 219–22 (2002).

130. See, e.g., *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 60–61 (2d Cir. 2004) (relying on *Barnhart* to extend *Chevron* deference to policy statement lacking notice and comment); *Schuetz v. Banc One Mortg. Corp.*, 292 F.3d 1004, 1011–13 (9th Cir. 2002) ("*Chevron* deference is due even though HUD's Policy Statements are not the result of formal rulemaking or adjudication."); see also *Hagans v. Comm'r of Soc. Sec.*, 694 F.3d 287, 300 (3d Cir. 2012) (deriving several factors from *Barnhart* for the purpose of determining whether a Social Security Acquiescence Ruling was eligible for *Chevron* deference notwithstanding its lack of notice and comment); Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1458–64 (2005) (recognizing the doctrinal inconsistency between *Barnhart* and *Mead* and discussing circuit courts following the former).

131. See, e.g., *Lopez v. Terrell*, 654 F.3d 176, 182–83 (2d Cir. 2011) (declining to defer to Bureau of Prisons Administrative Remedy Program Letter for lack of notice and comment); *Freeman v. Quicken Loans, Inc.*, 626 F.3d 799, 805–06 (5th Cir. 2010) (rejecting *Chevron* deference for HUD policy statement for lack of notice and comment); *Bradley v. Sebelius*, 621

C. Tax Administrative Practices

No one seriously doubts that Treasury and its delegee, the IRS, have the congressionally delegated power to act with legally binding force.¹³² The I.R.C. contains precisely the sort of grants of rulemaking authority that the Supreme Court has described both in *Chrysler Corp. v. Brown* and in *Mead* and its progeny. Numerous I.R.C. provisions authorize or even command Treasury to adopt regulations to fill specific, congressionally identified gaps.¹³³ In addition, I.R.C. § 7805(a) authorizes Treasury to adopt “all needful rules and regulations for the enforcement of” the I.R.C. without imposing any subject matter limitations of the sort at issue in *Gonzales v. Oregon*.¹³⁴

Treasury has long conceded that regulations promulgated pursuant to specific authority grants are legislative rules subject to APA notice-and-comment rulemaking procedures.¹³⁵ Treasury also purports to comply with APA notice and comment requirements in adopting all of its regulations,¹³⁶ and more often than not does follow those procedures at least in form.¹³⁷ Courts and tax commentators have correspondingly agreed for many years that specific authority Treasury regulations are eligible for *Chevron* deference.¹³⁸ More recently, the Supreme Court in *Mayo* found I.R.C. § 7805(a)’s general authority grant also to be the sort of “express congressional authorization to engage in the process of rulemaking” that serves as “a very good indicator of delegation meriting *Chevron* treatment.”¹³⁹

F.3d 1330, 1338, 1338 n.18 (11th Cir. 2010) (rejecting HHS claim to *Chevron* deference for Medicare field manual lacking notice and comment).

132. See, e.g., *Haffner’s Serv. Stations, Inc. v. Comm’r*, 326 F.3d 1, 3 (1st Cir. 2003) (recognizing binding force of Treasury regulations); *Suzy’s Zoo v. Comm’r*, 273 F.3d 875, 881 n.7 (9th Cir. 2001) (same); Irving Salem et al., *ABA Section of Taxation Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717, 737–44 (2004) (same).

133. See, e.g., I.R.C. § 1502 (2006).

134. I.R.C. § 7805(a) (2006); see also *supra* notes 116–19 and accompanying text (discussing *Gonzales v. Oregon*, 546 U.S. 243 (2006)).

135. See, e.g., INTERNAL REVENUE MANUAL, *supra* note 14, § 32.1.1.4.

136. See *id.*

137. See *Hickman*, *supra* note 15, at 1749 (documenting that, during at least one three-year period, Treasury followed the traditional notice-and-comment sequence with roughly sixty percent of its regulation projects).

138. See, e.g., *Bankers Life & Cas. Co. v. United States*, 142 F.3d 973, 978–79 (1998); *UnionBanCal Corp. v. Comm’r*, 113 T.C. 309, 316 (1999), *aff’d*, 305 F.3d 976 (9th Cir. 2002); Salem et al., *supra* note 132, at 737–38.

139. *Mayo Found. for Med. Educ. & Research*, 131 S. Ct. 704, 714 (2011).

Like most regulatory agencies, however, Treasury and the IRS use a variety of interpretive formats in administering the tax laws.¹⁴⁰ Two formats routinely used by Treasury and the IRS in administering the I.R.C.—temporary regulations and IRB guidance—raise particular questions regarding the force of law for both APA rulemaking and *Chevron* deference purposes.

1. Temporary Treasury Regulations

In the ordinary course, the APA contemplates that an agency seeking to promulgate legislative rules will issue a NOPR and will give the public the opportunity to submit comments before the agency adopts regulations that bind the actions of private parties.¹⁴¹ Treasury frequently inverts this procedural sequence by issuing temporary regulations without notice and comment.¹⁴² I.R.C. § 7805(e), adopted in 1996, requires Treasury to accompany any temporary regulations with a simultaneous NOPR and to finalize the regulations within three years.¹⁴³ The implied promise is that Treasury will consider the comments received and may make modifications in adopting replacement final rules, and Treasury typically does so. Meanwhile, Treasury publishes its temporary regulations in the Federal Register and Code of Federal Regulations, just like its final regulations. And in the interim between issuance and finalization, taxpayers and their advisers who fail to comply with temporary Treasury regulations face penalties for their noncompliance: I.R.C. § 6662(b)(1) imposes a penalty on taxpayers who underreport and underpay their taxes due to “negligence or disregard of rules or regulations,”¹⁴⁴ and I.R.C. § 6694(b) sanctions tax return preparers similarly.¹⁴⁵ Since 1991,

140. Beyond Treasury regulations, former IRS Chief Counsel Donald Korb has identified at least twenty-five different types of informal IRS interpretive formats ranging from published rulings to oral communications. See Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View From Within*, 46 DUQ. L. REV. 323, 323 (2008).

141. See 5 U.S.C. § 553(b)–(c) (2006); see also discussion *supra* notes 27–35 and accompanying text (describing APA procedural requirements for legislative rules).

142. See Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX LAW. 343, 343 (1991) (recognizing the Treasury's use of temporary regulations with only postpromulgation notice and comment); Hickman, *supra* note 15, at 1759–60 (documenting Treasury's use of temporary regulations in one-third of regulation projects undertaken from 2004 to 2006).

143. I.R.C. § 7805(e) (2006).

144. I.R.C. § 6662(b)(1) (2006).

145. See I.R.C. § 6694(b)(1)–(2) (sanctioning tax return preparers who exhibit “a reckless or intentional disregard of rules or regulations”).

Treasury has interpreted these penalty provisions as extending to temporary as well as final Treasury regulations.¹⁴⁶ In short, Treasury frequently begins its rulemaking with the legal equivalent of a final rule rather than with merely a nonbinding proposal.

Treasury is not the only agency to use temporary regulations, which other agencies and courts sometimes label interim-final regulations.¹⁴⁷ Courts and scholars have recognized interim-final rulemaking as compliant with the APA only when the rules in question qualify for an exception from the procedural requirements of APA § 553; otherwise, the legal consensus holds that interim-final rulemaking violates both the text and the spirit of the APA.¹⁴⁸ Where Treasury differs from other agencies is in its justification for departing from the procedural sequence required by the APA's text.

Agencies most often justify interim-final rulemaking by claiming the good cause exception of APA § 553(b)(B).¹⁴⁹ That provision excuses agencies from engaging in prepromulgation notice and comment “when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”¹⁵⁰ The terms of APA § 553(b)(B) require an agency claiming the exception to include both its finding of good cause and its reasons for that finding “in the rules issued.”¹⁵¹ Hence, courts generally require agencies asserting the good cause exception to do so expressly and contemporaneously,¹⁵² and with

146. Treas. Reg. § 1.6662-3 (2012).

147. See Administrative Conference of the United States, Notice; Adoption of Recommendations, 60 Fed. Reg. 43,108, 43,111 (Aug. 18, 1995) (acknowledging interim-final rulemaking by many agencies).

148. See, e.g., *id.* at 43,111–12 (“Courts generally have not allowed post-promulgation comment as an alternative to the prepromulgation notice-and-comment process in situations where no exemption is justified.”); Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 717, 725–26 (1999) (observing that, absent a legal exception from APA notice and comment requirements, “a rule adopted with post- rather than pre-adoption notice and comment is procedurally invalid”).

149. See Administrative Conference of the United States, Notice; Adoption of Recommendations, 60 Fed. Reg. at 43,111.

150. 5 U.S.C. § 553(b)(B) (2006).

151. *Id.*

152. See, e.g., *Buschmann v. Schweiker*, 676 F.2d 352, 356–57 (9th Cir. 1982) (requiring good cause claim and justification to be included with new regulations); *Bohner v. Daniels*, 243 F. Supp. 2d 1171, 1176 (D. Or. 2003) (holding “good cause” exception inapplicable because it was not invoked or justified in statement accompanying the regulation); see also 1 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 4.13[1] (3d ed. 2010) (“An agency cannot claim the ‘good cause’ exemption for the first time after its procedures have been challenged in court. It must invoke the exemption at the time of rulemaking and explain why it needs to bypass APA procedures.”); cf. *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm’n*, 673 F.2d

specificity and particularity.¹⁵³ As for what constitutes good cause, courts tend to be skeptical of generic assertions of a need for immediate guidance.¹⁵⁴ Instead, courts generally limit the scope of the exception to truly unusual circumstances, such as when public safety is threatened or advance notice of a rule might undermine its application.¹⁵⁵ Courts often conclude after the fact that agencies' claims of good cause for promulgating temporary or interim-final rules are inadequate.¹⁵⁶ Where agencies assert the good cause exception in good faith and offer postpromulgation notice and comment with an open mind, the Administrative Conference of the United States has encouraged courts to be lenient.¹⁵⁷ On some occasions, however, courts have rejected even final regulations with temporary origins for the irregularity of the agency's procedures.¹⁵⁸

Treasury, by contrast, typically does not rely upon the good cause exception to justify its use of temporary regulations.¹⁵⁹ In fact, Treasury rarely offers any contemporaneous justification at all for its claims that its regulations are exempt from APA procedural

425, 447 (D.C. Cir. 1982) (requiring contemporaneous explanation of rationale supporting good cause claim).

153. See, e.g., *Natural Res. Def. Council, Inc. v. Evans*, 316 F.3d 904, 912 (9th Cir. 2003) (requiring "context-specific analysis"); *Zhang v. Slattery*, 55 F.3d 732, 746 (2d Cir. 1995) ("A mere recitation that good cause exists, coupled with a desire to provide immediate guidance, does not amount to good cause.").

154. See, e.g., *Evans*, 316 F.3d at 912 (finding good cause assertion based on "generic" claims regarding the "complexity of data collection and time constraints" to be inadequate); *Cal-Almond, Inc. v. U.S. Dep't of Agric.*, 14 F.3d 429, 441–42 (9th Cir. 1993) (citing *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479 (9th Cir. 1992)) (rejecting good cause assertion for lack of specificity). *But see Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1125 (9th Cir. 2006) (holding that "habitual invocation" of good cause exception was not improper so long as specific support was provided); *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1236–37 (D.C. Cir. 1994) (holding that strict deadlines and special procedures justified application of "good cause" exception).

155. See, e.g., *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93–95 (D.C. Cir. 2012) (describing circumstances justifying good cause claims); James Kim, *For a Good Cause: Reforming the Good Cause Exception to Notice and Comment Rulemaking Under the Administrative Procedure Act*, 18 GEO. MASON L. REV. 1045, 1053–58 (2011) (summarizing cases in which courts upheld agency assertions of good cause).

156. See, e.g., *Evans*, 316 F.3d at 906, 912 (rejecting agency's good cause explanation as insufficiently context specific); see also KOCH, *supra* note 152, § 4.14 (recognizing a trend toward greater judicial scrutiny of agency explanations).

157. See Administrative Conference of the United States, Notice; Adoption of Recommendations, 60 Fed. Reg. 43,108-02, 43,112 (Aug. 18, 1995) (recommending a finding of harmless error "[w]here an agency has used post-promulgation comment procedures, responded to significant adverse comments and ratified or modified the rule as appropriate").

158. See discussion *infra* Part III.B.1. and accompanying text.

159. See Hickman, *supra* note 15, at 1750 (documenting claims of good cause in fifteen of eighty-four Treasury regulation projects utilizing temporary regulations).

requirements.¹⁶⁰ When Treasury does assert the good cause exception, it typically offers only a generalized, boilerplate assertion that its regulations “are necessary to provide taxpayers with immediate guidance.”¹⁶¹ In litigation over the validity of temporary Treasury regulations, Treasury has not attempted belatedly to rely upon the good cause exception.

Instead, the government’s principal defense against accusations that its temporary regulations violate the APA has been that most of its regulations are exempt as interpretative rules. Treasury and the IRS historically have taken the position that only specific authority Treasury regulations are legislative rules, that general authority Treasury regulations are interpretative rules exempt from APA notice and comment requirements, and that most Treasury regulations are issued under general authority.¹⁶² Although the Supreme Court in *Mayo* did not address the legislative versus interpretative characterization of general authority Treasury regulations, the Court did reject the specific versus general authority distinction in concluding that such regulations carry the force of law for *Chevron* purposes.¹⁶³ Since the *Mayo* decision, the IRS has amended the Internal Revenue Manual (“IRM”) to acknowledge that at least some general authority regulations may be legislative rules.¹⁶⁴

160. *See id.* at 1778–82 (describing patterns of good cause claims in Treasury regulations).

161. *See, e.g.*, Portability of a Deceased Spousal Unused Exclusion Amount, 77 Fed. Reg. 36,150-01, 36,156 (June 18, 2012) (“These regulations are necessary to provide immediate guidance”); Amendments to the Section 7216 Regulations-Disclosure or Use of Information by Preparers of Returns, 75 Fed. Reg. 48-01, 51 (Jan. 4, 2010) (“These regulations are necessary to provide tax return preparers and taxpayers with immediate guidance”); Guidance Under Section 1502; Amendment of Matching Rule for Certain Gains on Member Stock, 73 Fed. Reg. 12,265-01, 12,267 (Mar. 7, 2008) (“The regulations are necessary to provide immediate guidance and relief to taxpayers”); *see also* INTERNAL REVENUE MANUAL, *supra* note 14, § 32.1.5.4.7.5.1(7)–(8) (instructing IRS personnel to justify good clause claims based on “the need for immediate guidance”).

162. *See* Hickman, *supra* note 15, at 1729 n.9, 1749 (documenting official IRS position and pattern of disclaimers regarding APA applicability in preambles of Treasury regulations, and tracing to IRM instruction regarding interpretative rules).

163. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713–14 (2011).

164. *See* INTERNAL REVENUE MANUAL, *supra* note 14, § 32.1.1.2.7 (amending the IRM as of September 23, 2011, to read, “Legislative rules are required when Congress simply provided an end result, without any guidance as to how to achieve the desired goal or when a statutory provision does not provide adequate authority for the regulatory action taken.”); *Id.* § 32.1.1.2.8 (amending the IRM as of September 23, 2011, to recognize that “[w]hether a regulation is promulgated under a specific grant of authority in the Internal Revenue Code does not govern whether the regulation is interpretative or legislative,” and providing standards for classification of regulations). For several years prior to these recent amendments, the IRM indicated only that “most IRS/Treasury regulations are interpretative, and therefore not subject to” APA rulemaking

Nevertheless, in the course of actual rulemaking, Treasury routinely continues to assert the inapplicability of APA procedures.¹⁶⁵

In recent litigation, the government has claimed additionally that I.R.C. § 7805(e) authorizes Treasury's issuance of temporary regulations with only postpromulgation notice and comment. When Treasury issues a temporary regulation, I.R.C. § 7805(e)(1) requires Treasury to issue a corresponding notice of proposed rulemaking.¹⁶⁶ I.R.C. § 7805(e)(2) in turn sunsets temporary regulations after three years, thus setting a time frame within which Treasury must complete APA notice-and-comment rulemaking to finalize any temporary regulation it issues and wishes to retain.¹⁶⁷ The government characterizes these provisions as a congressionally authorized, tax-specific exception from prepromulgation notice and comment for temporary Treasury regulations; according to the government, to hold otherwise would be to deprive I.R.C. § 7805(e) of any meaning.¹⁶⁸

The merits of the government's interpretation of I.R.C. § 7805(e) are arguably tangential to this Article's consideration of the force of law question. Nevertheless, some evaluation of I.R.C. § 7805(e) here is warranted, if only to demonstrate why the force of law question matters for the procedural validity of temporary Treasury regulations.

The APA is only a statute, and Congress may and often does alter APA procedural requirements in specific instances. But Congress has also instructed the courts that another statute "may not be held to supersede or modify" APA rulemaking requirements "except to the

requirements. *See* Hickman, *supra* note 15, at 1729 n.9, 1736 n.45 (documenting IRM statements prior to recent amendments).

165. *See, e.g.*, Public Inspection of Material Relating to Tax Exempt Organizations, T.D. 9581, 77 Fed. Reg. 12,202-01, 12,203 (Feb. 29, 2012) (claiming APA § 553(b) inapplicable to regulations issued under I.R.C. § 7805 general authority); Rewards and Awards for Information Relating to Violations of Internal Revenue Laws, T.D. 9580, 77 Fed. Reg. 10,370-01, 10,371 (Feb. 22, 2012) (same); Foreign Tax Credit Splitting Events, T.D. 9577, 77 Fed. Reg. 8127-01, 8134 (Feb. 14, 2012) (same); *see also* Source of Income from Qualified Fails Charges, T.D. 9579, 77 Fed. Reg. 9846-01, 9846 (Feb. 21, 2012) (claiming same for regulation citing both specific and general authority).

166. *See* I.R.C. § 7805(e)(1) (2006) ("Any temporary regulation issued by the Secretary shall also be issued as a proposed regulation.").

167. *See* § 7805(e)(2) ("Any temporary regulation shall expire within 3 years after the date of issuance of such regulation.").

168. *See* Brief for the United States, *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836 (2011) (No. 11-139), 2011 WL 5591822, at *29 (citing I.R.C. § 7805(e) as "granting the Treasury Department authority to issue temporary regulations"); Brief for the Appellant, *Intermountain Ins. Serv. of Vail, LLC v. United States*, 650 F.3d 691 (D.C. Cir. 2011) (No. 10-1204), 2010 WL 6210551, at *50-52 ("If the absence of notice and comment could deprive temporary regulations of validity, then § 7805(e) is meaningless.").

extent that it does so expressly.”¹⁶⁹ The courts have generally “looked askance at agencies’ attempts to avoid the standard notice and comment procedures” and have construed supposed statutory exceptions from APA § 553 narrowly.¹⁷⁰ Thus, judicially recognized statutory authorizations to promulgate temporary or interim-final regulations tend to be more explicit than I.R.C. § 7805(e). For example, the Federal Aviation Reauthorization Act of 1996 provided that the Federal Aviation Administration (“FAA”) “shall publish in the Federal Register an initial fee schedule and associated collection process as an interim final rule.”¹⁷¹

Moreover, the more straightforward reading of the text of I.R.C. § 7805(e) harmonizes with APA § 553, rather than setting them at odds. APA § 553 expressly permits Treasury, like all agencies, to issue temporary regulations without public notice and opportunity for comment so long as it can demonstrate good cause or the applicability of one of the other exceptions provided therein. I.R.C. § 7805(e), by contrast, contains no authorizing language, but rather speaks in terms of the consequences should Treasury and the IRS choose to issue temporary regulations—specifically, any temporary regulation “shall also be issued as a proposed regulation” and “shall expire within 3 years.”¹⁷² In other words, I.R.C. § 7805(e): acknowledges that Treasury, like other agencies, has the power to and sometimes does adopt temporary regulations without public notice and comment; assumes that Treasury, like other agencies, does so validly within the parameters established by the APA § 553; but then imposes additional requirements on Treasury to issue a NOPR and finalize the regulation before it expires.¹⁷³

Reading I.R.C. § 7805(e) as limiting Treasury’s authority in this way, rather than expanding it as the government suggests, is consistent with the circumstances driving the provision’s enactment. Congress adopted I.R.C. § 7805(e) in 1988 as part of the Taxpayer Bill of Rights. Treasury had only started issuing temporary regulations without prepromulgation notice and comment regularly in the

169. 5 U.S.C. § 559 (2006).

170. *Lake Carriers’ Ass’n v. EPA*, 652 F.3d 1, 6 (D.C. Cir. 2011) (quoting *Asiana Airlines v. FAA*, 134 F.3d 393, 396 (D.C. Cir. 1998)).

171. Pub. L. No. 104-264, § 273(a), 110 Stat. 3213 (codified at 49 U.S.C. § 45301(b)(2) (2006)); see also *Asiana Airlines*, 134 F.3d at 398 (recognizing this language as exempting FAA regulations from prepromulgation notice-and-comment rulemaking).

172. I.R.C. § 7805(e).

173. See *Intermountain Ins. Serv. of Vail, LLC v. Comm’r*, 134 T.C. 211, 245 (2010) (Halpern & Holmes, J.J., concurring) (adopting this reasoning); see also Asimow, *supra* note 142, at 363 (advocating this reading of I.R.C. § 7805(e)).

1980s.¹⁷⁴ Then, as now, Treasury maintained that most of its regulations were exempt from APA § 553 notice and comment requirements as interpretative rules. Nevertheless, until the 1980s, Treasury routinely used notice and comment procedures in adopting its regulations. According to Michael Asimow, Congress's primary concern in adopting I.R.C. § 7805(e) was the sizeable number of temporary Treasury regulations that had languished on the books for several years with no indication of when or whether Treasury might finalize them using public notice and comment.¹⁷⁵ Wanting Treasury to use notice and comment, and taking at face value Treasury's claim that most of its regulations were exempt from notice and comment as interpretative rules, Congress contemplated language eliminating or restricting the interpretative rule exception in the tax context.¹⁷⁶ Ultimately, Congress chose instead to require postpromulgation notice and comment within three years and to avoid wreaking havoc on the tax system by grandfathering any then-existing temporary Treasury regulations. Regardless, this historical context further supports the conclusion that Congress adopted the requirements of I.R.C. § 7805(e) as additions to rather than subtractions from the procedures of APA § 553.¹⁷⁷

The government's recent reliance on I.R.C. § 7805(e) as authorizing temporary Treasury regulations with only postpromulgation notice and comment is interesting because it seems implicitly to recognize that the APA otherwise would require Treasury to follow the traditional procedural sequence at least more often than it does. After all, if Treasury is correct that most of its regulations are interpretative, then Congress would have no need to adopt I.R.C. § 7805(e) to authorize temporary Treasury regulations. Courts thus far have avoided reaching any conclusions regarding the interplay of APA § 553 and I.R.C. § 7805(e). As a matter of litigation strategy, the government is wise to hedge its bets with alternative arguments. Still, in the only published opinion to address the issue squarely—a concurring opinion in *Intermountain Insurance Service of Vail, LLC v.*

174. See Asimow, *supra* note 142, at 343 (linking temporary Treasury regulations to the 1980s); Hickman, *supra* note 15, at 1797 (describing the evolution of Treasury's use of temporary regulations).

175. See Asimow, *supra* note 142, at 362–64 (documenting the history of § 7805(e)); see also Salem et al., *supra* note 132, at 735 (2004) (recognizing same); Juan F. Vasquez, Jr. & Peter A. Lowy, *Challenging Temporary Treasury Regulations*, 3 HOUS. BUS. & TAX L.J. 248, 254 (2003) (describing similar reasons for adopting I.R.C. § 7805(e)).

176. See Asimow, *supra* note 142, at 362–63 (tracing legislative drafts).

177. See *id.* at 364 (reaching this conclusion).

Commissioner—Judges Halpern and Holmes of the United States Tax Court expressly rejected Treasury’s interpretation of I.R.C. § 7805(e) as inconsistent with the plain text of that provision and as contrary to congressional intent regarding the APA.¹⁷⁸

Which leads the discussion back to whether general authority Treasury regulations could be interpretative rules. Assuming that courts find the government’s interpretation of I.R.C. § 7805(e) unpersuasive, and recognizing that Treasury rarely claims good cause, the only exception remaining for most temporary Treasury regulations is that for interpretative rules. Again, the original basis for Treasury’s claim that most of its regulations are interpretative rested in the distinction between specific versus general rulemaking authority.¹⁷⁹ Notwithstanding the Supreme Court’s rejection in *Mayo* of this divide for *Chevron* purposes, and its own concessions in the Internal Revenue Manual,¹⁸⁰ the government in litigation has continued to maintain that regulations issued pursuant to I.R.C. § 7805(a) general authority—whether temporary or final—are per se interpretative.¹⁸¹ In addition to that argument, the government sometimes contends that the temporary Treasury regulations at issue merely clarify and thus interpret existing law—avoiding the force of law phraseology and ignoring altogether, in favor of fuzzier rhetoric, the standards that administrative law scholars would recognize.¹⁸² In other briefs, the

178. See *Intermountain*, 134 T.C. at 245–46 (Halpern & Holmes, J.J., concurring).

179. See *supra* note 162 and accompanying text (explaining Treasury’s position regarding specific versus general authority regulations).

180. See *supra* note 164 and accompanying text (describing changes to the Internal Revenue Manual).

181. See, e.g., Brief for the Appellee, Northrop Corp. Emp. Ins. Benefits Plan Master Trust v. United States, 467 F. App’x 886 (Fed. Cir. 2012) (No. 2011-5125), 2011 WL 7038432, at *69–70 (arguing that Treas. Reg. § 1.512(a)-5T was an interpretative regulation exempt from notice and comment because it was issued under I.R.C. § 7805(a) general authority); Combined Answering and Reply Brief for the United States, Bemont Investments, L.L.C. *ex rel* Tax Matters Partner v. United States, 679 F.3d 339 (5th Cir. 2012) (No. 10-41132), 2011 WL 2828208, at *53–55 (“Further supporting the IRS’s characterization of the regulations as interpretive is the fact that they were issued pursuant to § 7805(a) . . . Regulations issued pursuant to that general authority generally have been viewed as interpretive.”); Reply Brief for the Appellant, Wilmington Partners L.P. v. Comm’r, No. 10-4183 (2d Cir. May 11, 2011), 2011 WL 2113367, at *25–26 (“Interpretive regulations are exempt from the APA’s notice-and-comment requirements. . . . Regulations promulgated, as here, pursuant to the IRS’s general rule-making authority, I.R.C. § 7805(a), are interpretive.”); Reply Brief for the Appellant, Reynolds Properties, L.P. v. Comm’r, Nos. 10-72406 & 10-73376 (9th Cir. filed Aug. 5, 2010), 2011 WL 1653618 at *23 (“Interpretive regulations are exempt from the APA’s notice-and-comment requirements. . . . Regulations promulgated, as here, pursuant to the IRS’s general rule-making authority, I.R.C. § 7805(a), are interpretive.”).

182. See, e.g., Brief for the Appellant, Beard v. Comm’r, 633 F.3d 616 (7th Cir. 2011) (No. 09-3741), 2010 WL 3950613, at *34–38 (citing circuit precedent for proposition that “[a]n

government has argued that a regulation can affect taxpayer rights and obligations without automatically being legislative in character, again avoiding reference to *American Mining Congress* and the force of law.¹⁸³

Most of the relatively limited jurisprudence that addresses this question predates *Mayo*, and courts in most of those cases accepted Treasury's characterization of general authority regulations as interpretative, either arguendo or without any discussion at all, in considering the extent to which the regulations at issue were entitled to judicial deference.¹⁸⁴ In *Abbott Laboratories v. United States*, the Court of Federal Claims rejected the interpretative rule label for a temporary Treasury regulation, notwithstanding Treasury's original characterization of the regulation as interpretative, but largely because Treasury also cited a specific authority grant when it issued the regulation.¹⁸⁵ In the *Intermountain* case mentioned above, a majority of the United States Tax Court's judges expressly declined to resolve whether or not the general authority temporary regulation at issue was legislative or interpretative, or whether it qualified for *Chevron* deference, and instead invalidated the regulation on other grounds.¹⁸⁶ Writing in concurrence, however, Judges Halpern and Holmes rejected the government's claim that a temporary Treasury regulation was interpretative and concluded instead that the rule was legislative and thus invalid for its lack of prepromulgation notice and comment. Halpern and Holmes dismissed the distinction between specific authority and general authority as irrelevant.¹⁸⁷ Instead, citing *American Mining Congress*, Halpern and Holmes maintained

interpretive rule is a statement as to what the administrative officer thinks the statute or regulation means" and arguing that, "[s]ince the regulations are a clarification of existing law, they are 'interpretive' under the APA, and notice and comment is not required."); Reply Brief for the Appellant, *Burks v. United States*, 633 F.3d 347 (5th Cir. 2011) (No. 09-60827), 2010 WL 3050316, at *16-17 (citing and quoting from various circuit court cases to justify interpretative rule characterization).

183. See, e.g., Brief for the Appellant, *Beard v. Comm'r*, *supra* note 182, at *35-38 ("A rule can be interpretive even though it affects the parties' rights and obligations.").

184. See, e.g., *Boeing Co. v. United States*, 537 U.S. 437, 447-48 (2003) ("Even if we regard the challenged regulation as interpretative because it was promulgated under § 7805(a)'s general rulemaking grant rather than a specific grant of authority, we must still treat the regulation with deference." (emphasis added)); *Estate of Gerson v. Comm'r*, 507 F.3d 435, 437-38 (6th Cir. 2007) (labeling general authority Treasury regulation "interpretive" without discussion of label); *Stobie Creek Invs., LLC v. United States*, 82 Fed. Cl. 636, 668-69 (2008) (recognizing the specific versus general distinction in the course of discussing deference).

185. 84 Fed. Cl. 96, 109-10 & n.22 (2008).

186. *Intermountain Ins. Serv. of Vail, LLC v. Comm'r*, 134 T.C. 211, 220-21 (2010).

187. See *id.* at 240 (Halpern & Holmes, J.J., concurring) ("[I]nterpretive' means something different in administrative law.").

that all Treasury regulations carry the force of law because Congress imposed penalties upon taxpayers who fail to comply with them, whether those regulations are temporary or final, or issued under specific or general authority.¹⁸⁸ Considering the four *American Mining Congress* factors,¹⁸⁹ Halpern and Holmes reasoned further that Treasury clearly acts with the force of law when it invokes the general authority of I.R.C. § 7805(a) in adopting temporary Treasury regulations.¹⁹⁰

Meanwhile, the government routinely insists that temporary Treasury regulations carry the force and effect of law for purposes of *Chevron* deference.¹⁹¹ While, again, the Supreme Court in *Mayo* concluded that Treasury regulations issued with notice and comment carry the force of law and are *Chevron* eligible, post-*Mead* jurisprudence concerning temporary Treasury regulations is relatively sparse, and the circuit courts that have offered guidance thus far are divided. After *Mead* but prior to *Mayo*, in *Hospital Corporation of America v. Commissioner*, the Sixth Circuit granted *Chevron* deference to a temporary Treasury regulation irrespective of its lack of notice and comment, although the court recognized, without deciding, that such regulations might violate the APA.¹⁹² Post-*Mayo*, in *Beard v. Commissioner*, the Seventh Circuit expressed in dicta its inclination to extend *Chevron* review to temporary Treasury regulations, given that the Supreme Court does not require notice-and-comment rulemaking for *Chevron* deference.¹⁹³ By contrast, in *Burks v. United States*, the

188. See *id.* at 240–41.

189. See *supra* text accompanying notes 76–83 (summarizing *American Mining Congress* factors).

190. See *Intermountain*, 134 T.C. at 243–44 (Halpern & Holmes, J.J., concurring) (concluding that regulations issued under I.R.C. § 7805(a) “carry the force of law, because the Code imposes penalties for failing to follow them,” and that, by relying on I.R.C. § 7805(a) in promulgating the regulations at issue, “the Secretary explicitly invoked his legislative authority”).

191. See, e.g., Brief for the Appellee, *Northrop Corp. Emp. Ins. Benefits Plan Master Trust v. United States*, *supra* note 181, at *70–71 (claiming that temporary Treasury regulation was an interpretative rule even though it carried the force of law for *Chevron* purposes); Brief for the Appellant, *JT USA, LP v. Comm’r*, No. 12-70037 (9th Cir. filed Jan. 5, 2012), 2012 WL 993020, at *39 (claiming *Chevron* deference for a temporary Treasury regulation).

192. See 348 F.3d 136, 144–45 & n.3 (6th Cir. 2003) (acknowledging but declining to address “the issue of whether the Administrative Procedure Act requires notice and comment procedures before Treasury may promulgate temporary interpretive regulations that make substantive choices among permissible statutory interpretations”).

193. See 633 F.3d 616, 623 (7th Cir. 2011) (explaining that “we would have been inclined to grant the temporary regulation *Chevron* deference” because “we have previously given deference to interpretive Treasury regulations issued with notice-and-comment procedures” and “the

Fifth Circuit strongly suggested that Treasury's failure to use prepromulgation notice and comment in issuing temporary regulations could make them ineligible for *Chevron* deference.¹⁹⁴ Courts are likewise divided regarding the degree of deference due to final Treasury regulations with temporary origins, with the D.C. Circuit and the Federal Circuit suggesting that Treasury's use of notice and comment in promulgating final regulations mooted taxpayers' complaints regarding the procedural validity of the earlier temporary regulations,¹⁹⁵ and the Fifth Circuit contending postpromulgation notice and comment "is not an acceptable substitute for pre-promulgation notice and comment."¹⁹⁶

2. IRB Guidance

IRB guidance documents—revenue rulings, revenue procedures, and notices published in the Internal Revenue Bulletin—raise the same issues as temporary Treasury regulations, for largely the same reasons. The IRS defines revenue rulings formally as "interpretation[s]" and "conclusion[s] of the Service on how the law is applied to a specific set of facts."¹⁹⁷ Notices are "public pronouncement[s] by the Service that may contain guidance that involves substantive interpretations of" the tax laws, though their original purpose in contrast to revenue rulings was to allow the IRS to provide immediate, informal guidance as needed and appropriate.¹⁹⁸ Finally, the IRS has described revenue procedures as "statements of practice and procedure issued primarily for internal use."¹⁹⁹ Although both Treasury and the IRS recognize that revenue procedures may "affect[] the rights or duties of taxpayers or other members of the

Supreme Court has stated that the absence of notice-and-comment procedures is not dispositive to the finding of *Chevron* deference"), *vacated on other grounds*, 132 S. Ct. 2099 (2012).

194. *See* *Burks v. United States*, 633 F.3d 347, 360 n.9 (5th Cir. 2011) (distinguishing temporary Treasury regulations from those at issue in *Mayo*).

195. *Grapevine Imports, Ltd. v. United States*, 636 F.3d 1368, 1380 (Fed. Cir. 2011); *Intermountain*, 650 F.3d at 709.

196. *Burks*, 633 F.3d at 360 n.9.

197. Rev. Proc. 2012-4, 2012-1 I.R.B. 125, app. E § 3.07. Earlier IRS documents used a slightly different definition of revenue rulings as "official interpretation[s]." *E.g.*, Rev. Proc. 89-14, 1989-1 C.B. 814, § 3.01; Rev. Proc. 86-15, 1986-1 C.B. 544, § 3.01; Rev. Proc. 78-24, 1978-2 C.B. 503, § 3.01. Treas. Reg. § 601.601(d)(2)(i)(a) still uses the term "official interpretation" in describing revenue rulings.

198. *See, e.g.*, Korb, *supra* note 140, at 339 (emphasizing relative informality of notices and consequent suitability for providing immediate guidance).

199. Rev. Proc. 55-1, 1955-2 C.B. 897, § 3.

public under the Code and related statutes,”²⁰⁰ former IRS Chief Counsel Donald Korb has suggested that revenue procedures “would generally not be useful to taxpayers in planning transactions or determining positions to be taken on returns.”²⁰¹ The IRS almost never seeks public comments in issuing any of these guidance documents; on the rare occasions when the IRS does seek public input, it does not purport to comply with APA procedural requirements.

As originally envisioned by the IRS, and as widely regarded by tax practitioners, these documents would seem to be precisely the sort of informal guidance that one would expect to be exempt from notice-and-comment rulemaking and generally ineligible for *Chevron* deference. Treasury regulations and the Internal Revenue Bulletin state, as they have for decades, that these guidance documents “do not have the force and effect of Treasury Department Regulations”²⁰² The courts generally recognize IRB guidance as “authoritative,”²⁰³ but in 1965, in *Dixon v. United States*, the Supreme Court concluded that “[t]he Commissioner’s rulings have only such force as Congress chooses to give them, and Congress has not given them the force of law.”²⁰⁴ It is possible that one or another IRB guidance document might arguably have possessed sufficient practical binding effect to slip over the legislative rule line, particularly under the broad substantial impact test.²⁰⁵ For example, *Simon v. Eastern Kentucky Welfare Rights Organization*, addressed by the Supreme Court in 1976, originated as an APA procedural challenge against a revenue

200. Treas. Reg. § 601.601(d)(2)(i)(b) (2012); *see also* Rev. Proc. 89-14, 1989-1 C.B. 814, § 3.02 (adopting a similar definition).

201. Korb, *supra* note 140, at 338; *see also* Mitchell Rogovin, *The Four R’s: Regulations, Rulings, Reliance and Retroactivity: A View from Within*, 43 TAXES 756, 764 n.40 (1965) (explaining that the Revenue Procedure program was established to publicize primarily internal statements of practice and procedure relevant to taxpayers and to inform taxpayers of certain audit procedures); Salem et al., *supra* note 132, at 730 (noting that the IRS initially “distinguished revenue procedures from revenue rulings, the latter pertaining to ‘substantive tax law,’ as opposed to ‘internal practices or procedures’”).

202. *E.g.*, Treas. Reg. § 601.601(d)(2)(v)(d); 2008-2 C.B. ii, Introduction; 2012-26 I.R.B. Introduction.

203. *E.g.*, *Mass. Mut. Life Ins. Co. v. United States*, 103 Fed. Cl. 111, 141 (2012) (quoting *Reliant Energy Inc. v. United States*, 45 Fed. Cl. 302, 306 n.6 (1999)).

204. 381 U.S. 68, 73 (1965); *see also* *Bartels v. Birmingham*, 332 U.S. 126, 132 (1947) (characterizing IRS rulings published in the IRB as lacking “the force and effect of” Treasury regulations).

205. *See generally* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992) (examining agency use of nonlegislative rules to practically if not legally govern regulated party behavior, and listing numerous examples).

ruling for lack of notice and comment,²⁰⁶ although the D.C. Circuit rejected the claim after the taxpayer conceded that the ruling lacked “independent binding effect” on either taxpayers or the court,²⁰⁷ and the Supreme Court dismissed the case on standing grounds.²⁰⁸ Nevertheless, for a long time, the United States Tax Court’s description of IRB guidance as “merely opinions of a lawyer in the agency” was widely shared.²⁰⁹

Two aspects of contemporary IRB guidance documents shift them squarely into the force of law gray zone with respect to both APA procedural requirements and *Chevron* eligibility. First, the IRS’s utilization of IRB guidance documents has evolved considerably, to a point where it is often easier to declare that they create law rather than merely interpret existing law. Revenue rulings were always substantive—for example, explaining how particular statutory and regulatory provisions applied to a particular set of hypothetical facts and circumstances;²¹⁰ or acknowledging a particular source of ambiguity in the I.R.C., articulating various guiding principles that the IRS considered relevant in resolving the ambiguity, and providing examples demonstrating the application of those principles.²¹¹ The IRS continues to enforce past revenue rulings through litigation, but its use of these documents has declined substantially, and many that are issued merely communicate periodic adjustments to federal interest rates and adjustable percentages for various I.R.C. sections.²¹² Meanwhile, many revenue procedures are now significantly more substantive than in the past. Many revenue procedures still offer instructions for accomplishing particular filing tasks or communicating with the IRS.²¹³ But the IRS also routinely uses

206. See 426 U.S. 26, 33–34 (1976) (summarizing the taxpayer’s claims regarding Revenue Ruling 69-545).

207. *E. Ky. Welfare Rights Org. v. Simon*, 506 F.2d 1278, 1290 (D.C. Cir. 1974).

208. *Simon v. E. Ky. Welfare Rights Org.*, 429 U.S. 26, 44–45 (1976).

209. *Lunsford v. Comm’r*, 117 T.C. 159, 174 n.6 (2001); see also *McLaulin v. Comm’r*, 115 T.C. 255, 263 (2000) (“We generally treat a revenue ruling as merely the Commissioner’s litigating position not entitled to any judicial deference or precedential weight.”); *Philips Petroleum Co. v. Comm’r*, 101 T.C. 78, 99 n.17 (1993) (noting that revenue rulings, revenue procedures, and notices “do not have the force of law, are merely statements of the Commissioner’s position, and are entitled to no special deference in this Court”).

210. See, e.g., Rev. Rul. 14, 1953-1 C.B. 348; Rev. Rul. 9, 1953-1 C.B. 468; Rev. Rul. 7, 1953-1 C.B. 224.

211. See, e.g., Rev. Rul. 12, 1953-1 C.B. 290; Rev. Rul. 8, 1953-1 C.B. 300.

212. See Hickman, *supra* note 17, at 244–46 (analyzing current revenue ruling utilization patterns).

213. See, e.g., Rev. Proc. 2012-1, 2012-1 I.R.B. 1; Rev. Proc. 2012-2, 2012-1 I.R.B. 92; Rev. Proc. 2012-3, 2012-1 I.R.B. 113.

revenue procedures to establish safe harbors or other criteria for satisfying the requirements of various substantive provisions.²¹⁴ In addition, the IRS has issued several revenue procedures identifying specific transactions as not being reportable transactions, meaning that taxpayers will not be penalized for failing to disclose their participation in such transactions on their tax returns under I.R.C. § 6707A and Treas. Reg. § 1.6011-4.²¹⁵ Similarly, while the IRS initially began to use the notice format in the 1980s to communicate minor matters to taxpayers, now the IRS publishes notices to accomplish at least one particularly significant substantive function. Whereas the IRS uses the revenue procedure format to notify taxpayers of transactions that are not reportable under I.R.C. § 6707A and Treas. Reg. § 1.6011-4, the IRS has issued numerous notices declaring particular transactions to be “listed transactions” that are thus, by regulatory definition, reportable.²¹⁶ Courts may ultimately uphold the legality of a listed transaction,²¹⁷ but the label represents at least a preliminary communication by the IRS that it considers the transaction to be abusive. Yet while these notices tend to provide factual descriptions of the transactions at issue, they offer little legal analysis to explain or support their designation. Meanwhile, taxpayers engaging in listed transactions must file detailed disclosure statements with the IRS or face substantial financial penalties.²¹⁸

Beyond the content of IRB guidance, the legal significance that Treasury and the IRS assign to these documents has changed. For example, I.R.C. § 6662 imposes penalties on taxpayers who underreport and underpay their taxes due to “negligence or disregard of rules or regulations.”²¹⁹ In 1991, Treasury adopted language in Treas. Reg. § 1.6662-3 defining “rules and regulations” for this

214. See, e.g., Rev. Proc. 2009-10, 2009-2 I.R.B. 267; Rev. Proc. 2008-43, 2008-30 I.R.B. 186; Rev. Proc. 2008-26, 2008-21 I.R.B. 1014; Rev. Proc. 2008-25, 2008-13 I.R.B. 686; Rev. Proc. 2008-16, 2008-10 I.R.B. 547; Rev. Proc. 2002-12, 2002-1 C.B. 374; see also Kathryn Sedo & Katrina Wessbecker, *Should Courts Ever Give Deference to Revenue Procedures?*, 134 TAX NOTES 225, 227–33 (2012) (offering additional examples of substantive revenue procedures).

215. See Rev. Proc. 2007-20, 2007-1 C.B. 517; Rev. Proc. 2004-68, 2004-2 C.B. 969; Rev. Proc. 2004-67, 2004-2 C.B. 967; Rev. Proc. 2004-66, 2004-2 C.B. 966.

216. See, e.g., I.R.S. Notice 2008-111, 2008-2 C.B. 1299; I.R.S. Notice 2008-34, 2008-1 C.B. 645; I.R.S. Notice 2007-83, 2007-2 C.B. 960. A more complete list of transactions designated by the IRS as abusive, including listed transactions and delisted transactions, is available on the IRS website.

217. Treasury states explicitly that the listing of a transaction “shall not affect the legal determination of whether the taxpayer’s treatment of the transaction is proper.” Treas. Reg. § 1.6011-4(a) (2012).

218. I.R.C. § 6707A (2006).

219. I.R.C. § 6662(b)(1).

purpose as including “revenue rulings or notices (other than notices of proposed rulemaking) issued by the Internal Revenue Service and published in the Internal Revenue Bulletin” and indicated in the preamble that revenue procedures “may or may not be treated as ‘rules or regulations’ depending on all facts and circumstances.”²²⁰ I.R.C. § 6694 similarly imposes penalties on professional tax advisers who prepare tax returns that understate taxes due based on “a reckless or intentional disregard of rules or regulations.”²²¹ As with I.R.C. § 6662, Treasury in 1991 adopted regulatory language extending the definition of “rules and regulations” for this purpose to include revenue rulings, notices, and some revenue procedures.²²² In short, taxpayers are potentially subject to underpayment penalties, and tax professionals may face tax preparer penalties, should they decline or otherwise fail to comply with legal interpretations that the IRS articulates in IRB guidance documents. Finally, in 2004, Congress adopted I.R.C. § 6707A, imposing hefty financial penalties (in addition to those for underpayment of taxes) upon taxpayers who fail to disclose their participation in “reportable transactions,” including but not limited to “listed transactions,” on their tax returns.²²³ As noted above, the IRS principally uses revenue procedures and notices to communicate its conclusions regarding whether or not a particular transaction falls within these categories.

Post-*Mead*, until the *Mayo* decision, the DOJ routinely argued in tax cases that IRB guidance documents carry the force of law and are entitled to *Chevron* deference.²²⁴ In making that argument, the DOJ described IRB guidance documents as “official” agency pronouncements, reviewed and issued by top agency officials and published in the IRB, just like Treasury regulations.²²⁵ The DOJ

220. Treas. Reg. § 1.6662-3(b)(2) (2012); Accuracy-related Penalty, T.D. 8381, 56 Fed. Reg. 67,492-01, 67,494 (Dec. 31, 1991).

221. I.R.C. § 6694(b)(1)–(2).

222. Treas. Reg. § 1.6694-3(e) (2012); Penalty on Income Tax Return Preparers Who Understate Taxpayer’s Liability on a Federal Income Tax Return or a Claim for Refund, T.D. 8382, 56 Fed. Reg. 67,509-01, 67,513 (Dec. 31, 1991).

223. I.R.C. § 6707A(a)–(b) (imposing penalties of up to two hundred thousand dollars for failure to disclose participation in a listed transaction and up to fifty thousand dollars for failure to disclose participation in any other reportable transaction); American Jobs Creation Act of 2004, Pub. L. No. 108-357 § 811(a), 118 Stat. 1418 (adopting the new § 6707A).

224. *E.g.*, Brief for the Appellee, *Conopco, Inc. v. United States*, *supra* note 20, at 59–60; Brief for the Defendant-Appellant, *Fortis, Inc. v. United States*, *supra* note 20, at 42–43; Brief for the Appellant (Final), *Aeroquip-Vickers, Inc. v. Comm’r*, *supra* note 20, at 31–32.

225. *E.g.*, Brief for the Appellee, *Conopco Inc. v. United States*, *supra* note 20, at 59–60; Brief for Defendant-Appellant, *Fortis, Inc. v. United States*, *supra* note 20, at 43; Reply Brief for the Appellant at 24–25, *Fed. Nat’l Mortg. Assoc. v. United States* (Fed. Cir. 2004) (No. 03-5162),

particularly described revenue rulings as “formal” rulings involving “substantive tax law” and having precedential effect for the disposition of other cases.²²⁶ In at least one case, the DOJ claimed that “[t]he only material distinction” between Treasury regulations and revenue rulings “is that the latter are not issued pursuant to notice-and-comment procedures.”²²⁷ In another brief, the DOJ claimed that the revenue procedure at issue was eligible for *Chevron* deference because it “contain[ed] not just procedural instructions, but rather a substantive rule” that had “the force and effect of law” notwithstanding its lack of notice and comment.²²⁸

Post-*Mayo*, the DOJ publicly signaled its intent to stop seeking *Chevron* deference for IRB guidance documents.²²⁹ To date, several circuits have generally rejected *Chevron* deference for IRB guidance documents, taking at face value IRS assertions that revenue rulings lack “the force and effect of Treasury Department regulations,”²³⁰ and also on the ground that IRB guidance documents lack notice and comment—procedures that the Supreme Court has explicitly rejected as required for *Chevron* eligibility.²³¹ Other circuits, including the D.C. Circuit, have deliberately left open which standard of review ought to

2004 WL 3763424 at *24–25; see also Brief for the Appellant at 27–28, *Texaco Inc. v. United States* (9th Cir. 2008) (No. 06-16098), 2006 WL 3623262 (acknowledging that, like Treasury regulations, revenue rulings are “published,” in addition to being “written and reviewed at the same level of the IRS and the Department of Treasury”).

226. *E.g.*, Brief for the Appellant at 58, *Gen. Mills, Inc. v. United States* (8th Cir. 2009) (No. 08-1638), 2008 WL 2505866 at *58 (quoting Treas. Reg. § 601.601(d)(2)(v)(a)); Brief for the Appellee, *Conopco Inc. v. United States*, *supra* note 20, at 60 (quoting Treas. Reg. § 601.601(d)(2)(v)(a)); Brief for the Appellant at 39–40, *USA Choice Internet Serv., LLC v. United States* (Fed. Cir. 2008) (No. 2007-5077), 2007 WL 1997157 (quoting Treas. Reg. § 601.601(d)(2)(v)(a)).

227. Brief for the Appellant, *Texaco Inc. v. United States*, *supra* note 225, at 28.

228. Reply Brief for the Appellant, *Fed. Nat’l Mortg. Assoc. v. United States*, *supra* note 225, at 25.

229. See Sapirie, *supra* note 20, at 674 (reporting that the DOJ Tax Division appellate section chief announced intent to stop seeking *Chevron* deference for revenue rulings and revenue procedures).

230. *Aeroquip-Vickers, Inc. v. Comm’r*, 347 F.3d 173, 181 (6th Cir. 2003) (quoting Rev. Proc. 89-14, 1989-1 C.B. 814).

231. See, *e.g.*, *Kornman & Assocs. v. United States*, 527 F.3d 443, 452–57 (5th Cir. 2008) (rejecting *Chevron* deference for revenue rulings because they “are not promulgated pursuant to the notice-and-comment procedures of the Administrative Procedures Act” and because “we believe that the lack of notice-and-comment and the IRS’s own divergent treatment of treasury regulations and revenue rulings is dispositive of the deference issue”); *cf.* *Nelson v. Comm’r*, 568 F.3d 662, 665 (8th Cir. 2009) (according revenue rulings *Skidmore* deference without further analysis); *Del Commercial Props., Inc. v. Comm’r*, 251 F.3d 210, 214 (D.C. Cir. 2001) (same).

apply to IRB guidance.²³² In particular, the Ninth Circuit has reserved the question repeatedly since Judge O’Scannlain, in a concurring opinion in *Tualatin Valley Builders Supply, Inc. v. United States*, opined that a revenue procedure was legally binding and thus *Chevron* eligible.²³³ The *Tualatin Valley* decision predates the Supreme Court’s decision in *Mayo*. But in 2012, in *Taproot Administrative Services, Inc. v. Commissioner*, the Ninth Circuit reiterated its reservation regarding the level of deference due to IRB guidance, notwithstanding the government’s position on brief that *Skidmore* provided the appropriate evaluative standard for a revenue ruling.²³⁴ Because courts rather than litigants determine which standard of review applies, the Justice Department’s shift away from claiming *Chevron* deference for IRB guidance may not foreclose a potential future circuit split on this issue.

Meanwhile, the IRS has claimed in litigation that IRB guidance is nonlegislative and thus is exempt from APA notice-and-comment rulemaking requirements. The courts may not agree. In particular, in *Cohen v. United States*, the D.C. Circuit considered the justiciability of an APA challenge to Notice 2006-50, which designated procedures for obtaining refunds of a defunct telephone excise tax.²³⁵ Most of the discussion in *Cohen* concerned other issues, including but not limited to the meaning of the I.R.C.’s Anti-Injunction Act, 26 U.S.C. § 7421(a).²³⁶ Among other claims, however, the government asserted that Notice 2006-50 was a policy statement that lacked the force of law for APA purposes, and thus was not final agency action as

232. See, e.g., *Nat’l R.R. Passenger Corp. v. United States*, 431 F.3d 374, 379 (D.C. Cir. 2005) (“[A]lthough the parties discuss whether we should defer to Revenue Ruling 79-404 pursuant to [*Chevron* or *Skidmore*], we need not resolve that question.”); *Am. Bankers Ins. Group v. United States*, 408 F.3d 1328, 1335 (11th Cir. 2005) (“[W]e need not determine the proper level of deference to be given Revenue Ruling 79-404.”).

233. 522 F.3d 937, 945–46 (9th Cir. 2008) (O’Scannlain, J., specially concurring) (recognizing circuit confusion regarding proper standard of review for IRB guidance documents and concluding that the IRS revenue procedure at issue was entitled to *Chevron* deference); see also *Bluetooth SIG Inc. v. United States*, 611 F.3d 617, 622 & n.6 (9th Cir. 2010) (acknowledging Judge O’Scannlain’s special concurrence without resolving the open question); *Texaco Inc. v. United States*, 528 F.3d 703, 711 & n.8 (9th Cir. 2008) (same).

234. 679 F.3d 1109, 1115–16 & n.14 (9th Cir. 2012) (holding open the question of whether *Skidmore* deference or *Chevron* deference applies to revenue rulings as well as revenue procedures).

235. *Cohen v. United States*, 599 F.3d 652, 652 (D.C. Cir. 2010); Final Brief for the Appellee at 3–4, *Cohen*, 599 F.3d 652 (D.C. Cir. 2010) (Nos. 08-5088, 08-5093 & 08-5174), 2009 WL 857437.

236. See *Cohen*, 599 F.3d at 652 (ordering briefing of four questions, three of which concerned the Anti-Injunction Act).

required for judicial review under the APA.²³⁷ A majority of the three-judge panel initially hearing the case concluded after some discussion that Notice 2006-50 was reviewable as final agency action, calling it “a binding standard” that “alters the legal obligations of service providers charged with collecting excise taxes” and “changes taxpayers’ rights and obligations,” and declaring that it “operates as a substantive rule that binds the IRS, excise tax collectors, and taxpayers.”²³⁸ While the rehearing en banc concerned different questions, the majority of the court made a point of reiterating its earlier finality conclusion: “Put simply, ‘Notice 2006-50 binds the IRS.’”²³⁹ While the D.C. Circuit’s holding concerned the finality of Notice 2006-50 rather than its characterization as a legislative rule, on remand the district court interpreted the D.C. Circuit’s decision in *Cohen* as requiring the invalidation of Notice 2006-50 for its lack of notice and comment.²⁴⁰ “Simply stated, because Notice 2006-50 is binding, the defendant was required to abide by the APA’s notice-and-comment requirements, or to, alternatively, provide good-cause for not doing so.”²⁴¹

II. WRESTLING WITH THE DOCTRINE

Whether the issue is distinguishing legislative and nonlegislative rules or ascertaining eligibility for *Chevron* deference, the judicial rhetoric that accompanies the force of law concept reflects considerable overlap. Where an agency employs notice-and-comment rulemaking under clear congressional authority to adopt rules and regulations, there is little doubt that the courts will treat the rule both as legislative and as eligible for *Chevron* deference. An agency’s failure to employ notice-and-comment rulemaking does not foreclose either the possibility that the rule is legislative, and thus that the agency should have used notice and comment, or that *Chevron* may apply.

237. Final Brief for the Appellee, *supra* note 235, at pt. II.C.1. Subsequently, before the D.C. Circuit en banc, the government repackaged the same argument as relating to the APA’s exclusion from judicial review those matters “committed to agency discretion,” citing 5 U.S.C. § 701(a)(2). En Banc Brief for the Appellee at 64, *Cohen v. United States*, 650 F.3d 717, 723 (D.C. Cir. 2011) (Nos. 08-5088, 08-5093 & 08-5174), 2010 WL 3514351 at *64.

238. *Cohen v. United States*, 578 F.3d 1, 6–9 (D.C. Cir. 2009).

239. *Cohen v. United States*, 650 F.3d 717, 723 (D.C. Cir. 2011) (en banc) (quoting *Cohen v. United States*, 578 F.3d 1, 8 (D.C. Cir. 2009)).

240. *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Lit.*, 853 F. Supp. 2d 138, 142–43 (D.D.C. 2012).

241. *Id.* at 143 (citations omitted).

Courts can and have applied the various tests articulated in Part I above to reach all of these conclusions.

Yet, focusing too closely on the various steps, elements, and factors of the standards outlined in Part I risks missing the point. As the Supreme Court has made clear on various occasions, most notably in *Chrysler Corp. v. Brown* and *Mead*, whether agency rules are legislative and whether they are eligible for *Chevron* deference both turn on evidence of a congressional delegation of power to act with legal force and agency intent to utilize that authority. Cases like *American Mining Congress*, *Community Nutrition Institute*, and *Mead*—and the steps, elements, or factors they adopt—merely reflect courts' efforts to elaborate that force of law concept and to discern the presence or absence of congressional delegation and agency intent with respect thereto.

Extensive scholarly ink has been spilled criticizing courts' existing standards for grappling with these questions. Much of the criticism is aimed at the practical difficulties of applying the delegation premise consistently, although commentators also challenge the merits of the premise itself. Trying to resolve all the problems with the delegation premise is beyond the scope of this Article. Nevertheless, the Supreme Court in particular shows no signs of backing away from delegation. Hence, stepping back a bit to contemplate delegation theory and its relationship to the tax laws seems warranted. Without wholeheartedly embracing the delegation premise as a normative matter, the following analysis at least attempts to ground it a little in administrative law theory and to apply it to the tax context.

A. *The Limits of the "Short Cut"*²⁴²

Administrative law scholars have criticized the standards discussed in Part I for decades. Instead of trying to distinguish between legislative and nonlegislative rules on the basis of what they do,²⁴³ some scholars have suggested that courts instead should simply accept an agency's characterization of its own rules as evidenced by its

242. I borrow this language from David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 278–82 (2010), which discusses some of the same issues addressed in this Article. I think, however, that I expand my use of the term beyond what Franklin envisioned.

243. See *supra* text accompanying notes 52–61 (discussing emphasis of contemporary standards for characterizing rules).

decision whether to undertake notice-and-comment rulemaking.²⁴⁴ Thus, agency rules promulgated using notice and comment procedures would be legislative, while agency interpretations advanced through formats lacking those procedures would be interpretative rules or policy statements—an approach that David Franklin recently dubbed the “short cut.”²⁴⁵ Pre-*Mead*, Donald Elliott described this approach as “pay me now, or pay me later,” with the understanding that an agency that chose to avoid the scrutiny of notice and comment would have to suffer closer inspection of its legal interpretations case by case through judicial review of enforcement actions.²⁴⁶ In other words, because nonlegislative rules lack binding force, an agency that chose to forego notice and comment would need to “be prepared to support the policy just as if the policy statement had never been issued.”²⁴⁷ More recently, Jacob Gerson has suggested that *Mead* only increases the “pay later” burden by generally denying *Chevron* deference to interpretative rules and policy statements.²⁴⁸ While not per se embracing the short cut approach to distinguishing between legislative and nonlegislative rules, John Manning has made a similar observation regarding *Mead*: “By denying *Chevron* deference to nonlegislative rules, the Court makes them nonbinding in practice. Such a default position, moreover, meaningfully distinguishes nonlegislative from legislative rules without the confusing form of inquiry that direct judicial review of that distinction has thus far entailed.”²⁴⁹

As both Gerson and Manning recognize, *Mead* does not absolutely condition *Chevron*’s applicability upon the use of notice and

244. See, e.g., E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1490 (1992) (contending that “a court should not go behind the objective terms of a statement of agency policy to speculate about whether the statement was ‘really intended’ to bind the public”); William Funk, *When Is a “Rule” a Regulation? Marking a Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 ADMIN. L. REV. 659, 663 (2002) (advocating a “notice-and-comment test,” which “is simply that any rule not issued after notice and comment is an interpretive rule or statement of policy, unless it qualifies as a rule exempt from notice and comment on some other basis”); Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1719 (2007) (“Rather than asking whether a rule is legislative to answer whether notice and comment procedures should have been used, courts should simply ask whether notice and comment procedures were used.”); see also Franklin, *supra* note 242, at 289–94 (summarizing this literature).

245. Franklin, *supra* note 242, at 279.

246. Elliott, *supra* note 244, at 1491.

247. *Pac. Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 38 (D.C. Cir. 1974).

248. See, e.g., Gersen, *supra* note 244, at 1720–21 (discussing *Mead*’s impact on the short cut).

249. John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 940 (2004).

comment.²⁵⁰ Most judicial opinions discussing *Mead* acknowledge the same, although they also reflect uncertainty regarding exactly which agency rules that lack notice and comment might nevertheless qualify for *Chevron* deference. Nevertheless, lower courts on occasion have seemed implicitly to follow a short cut approach to *Mead* by simply extending or rejecting *Chevron* review based on the presence or absence of public notice and comment without further inquiry.²⁵¹ Putting it all together, therefore, one might envision an expanded short cut as follows: if an agency uses notice-and-comment rulemaking, then the resulting rule carries the force of law, is legislative, and should be eligible for *Chevron* deference. If an agency rule lacks notice and comment, then the rule lacks the force of law, is nonlegislative, and should merit *Skidmore*'s greater scrutiny.

The simplicity of this approach is appealing. Judicial efforts to define the force of law concept in the abstract both for legislative rule characterization and for assessing *Chevron*'s scope have yielded confusion and inconsistency. Most of the cases in which courts evaluate whether rules are legislative or nonlegislative come down to relatively minute degrees of practical binding effect, as evidenced by the fact that contemporary standards for evaluating that question are targeted at defining that illusive characteristic. At least anecdotally, most agency rules seem to fall rather obviously into the legislative or nonlegislative categories in a manner consistent with the presence or absence of notice-and-comment rulemaking, making the question of *Chevron* versus *Skidmore* fairly simple. While some members of the Supreme Court are clearly comfortable with extending *Chevron* deference to at least some nonlegislative rules, the Court has yet to find an opportunity to apply *Chevron* to a rule promulgated using procedures other than notice and comment.²⁵² The short cut's bright

250. Gersen, *supra* note 244, at 1720–21; Manning, *supra* note 249, at 938–40.

251. *See, e.g.*, *Mont. Sulphur & Chem. Co. v. EPA*, 666 F.3d 1174, 1183 n.2 (9th Cir. 2012) (“Agency actions which have gone through notice and comment are typically reviewed for *Chevron* deference, but those which have not are still afforded *Skidmore* deference . . .”); *Sacora v. Thomas*, 628 F.3d 1059, 1066 (9th Cir. 2010) (“If the challenged policies had been adopted pursuant to the notice-and-comment process, this would be the end of the inquiry.”).

252. Only two cases come close. The first is *Edelman v. Lynchburg College*, 535 U.S. 106 (2002), in which the Supreme Court considered a procedural regulation initially adopted by the EEOC without notice and comment but subsequently reissued using those procedures. *Id.* at 122–24 (O'Connor, J., concurring). In an amicus brief, the EEOC claimed *Chevron* deference and defended its lack of notice and comment by citing the APA's procedural rule exception. *See* Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner, *Edelman v. Lynchburg Coll.*, 533 U.S. 106 (2002) (No. 00-1072), 2001 WL 1002673 at *19 & n.11. After the Court's majority declined to resolve the deference standard question, Justice O'Connor in concurrence opined in favor of *Chevron*, but in so doing

line would undoubtedly yield the same results as existing doctrine for the vast majority of agency rules while conserving judicial resources.

Not everyone is convinced, however, due largely to continued concerns of agency misuse and practical binding effect. The burdens of notice and comment give agencies an incentive to avoid those procedures as much as possible while still asserting their preferences. As Robert Anthony documented, agencies frequently use nonlegislative rules in a manner that gives them a high level of practical binding effect, even while denying their legal force.²⁵³ The D.C. Circuit describes the pattern of abusive agency behavior as follows:

Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.²⁵⁴

Echoing these concerns, David Franklin observes that “[i]t would seem inconsistent with both legislative intent and democratic theory to allow agencies to make such decisions without public input whenever they wish.”²⁵⁵

Indeed, then-Judge Kenneth Starr, in advocating the short cut, conceded that “[a]gencies may yield to temptation and seek to shield

particularly emphasized the agency’s eventual use of notice and comment. *See Edelman*, 535 U.S. at 122–24 (O’Connor, J., concurring). Subsequently, in *Barnhart v. Walton*, 535 U.S. 212 (2002), the Court extended *Chevron* deference to a regulation adopted by the Social Security Administration using notice-and-comment rulemaking, but continued in dicta to suggest that earlier, less formal documents advancing the same interpretation might also have warranted *Chevron* deference notwithstanding their lack of notice and comment. 535 U.S. at 217–22.

253. *See* Anthony, *supra* note 205, at 1333–55 (summarizing numerous examples). Anthony maintained that his examples were of policy statements, not interpretative rules, and suggested that the two might carry different degrees of practical binding effect. *Id.* at 1355–59. Not all of Anthony’s examples seem so obviously to be one rather than the other. As Ronald Levin observed in response to Anthony’s suggestion, distinguishing between interpretative rules and policy statements would be as difficult as distinguishing between legislative and nonlegislative rules, and even less worth the effort. Ronald M. Levin, *Nonlegislative Rules and the Administrative Open Mind*, 41 DUKE L.J. 1497, 1505–06 (1992).

254. *Appalachian Power Co. v. EPA*, 208 F. 3d 1015, 1020 (D.C. Cir. 2000); *see also* *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 23–26 (D.C. Cir. 2006) (Griffith, J., concurring in part and dissenting in part) (expressing the same concern).

255. Franklin, *supra* note 242, at 305.

their regulations from the scrutiny occasioned by notice and comment procedures, choosing instead to cast would-be regulations as interpretative rules,” although he maintained “the danger is more theoretical than real.”²⁵⁶ Donald Elliott likewise has recognized that agencies might treat claimed policy statements as binding, though he maintains that courts could still accommodate the short cut by invalidating such actions for lack of contemporaneous justification.²⁵⁷ Jacob Gersen also accepts that concerns about agency abuse are “real,” but contends that *Mead* should function to limit agencies’ inappropriate use of nonlegislative formats.²⁵⁸

Irrespective of the short cut’s merits, it does not quite resolve the questions concerning temporary Treasury regulations and IRB guidance in any event. The short cut’s applicability to temporary Treasury regulations is especially superficial. The short cut was promoted to eliminate the need to identify that illusive, heightened degree of practical binding effect that tilts facially nonbinding guidance into the legislative category. While temporary Treasury regulations lack prepromulgation notice and comment, the government does not claim that those documents are not legally binding, but relies on other arguments to justify classifying its regulations as interpretative and postponing notice and comment.²⁵⁹

By comparison, the short cut might seem particularly appropriate for IRB guidance documents, which the government routinely asserts lack at least the force of Treasury regulations. In light of these assertions, and given their lack of notice and comment, characterizing IRB guidance documents as nonlegislative and reviewing them under the *Skidmore* standard as the short cut suggests would seem quite reasonable. Although they do not reference the administrative law literature advocating the short cut, most tax scholars and commentators who label IRB guidance as nonlegislative and advocate *Skidmore* review seem at least implicitly to adopt that approach, as they point to various Treasury and IRS statements disclaiming legal force for those documents in addition to the lack of

256. *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 953 (D.C. Cir. 1987) (Starr, J., concurring in part and dissenting in part).

257. Elliott, *supra* note 244, at 1491.

258. See Gersen, *supra* note 244, at 1721 (“But for *Mead*, agencies might well make critical interpretive choices using nonlegislative rules. But after *Mead*, this approach to policy is implausible, or at least less attractive.”).

259. See *supra* Part I.C.1 (detailing government arguments defending the procedural validity of temporary Treasury regulations).

notice and comment.²⁶⁰ Yet these accounts do not address the penalty elephant in the middle of the room: How should courts square Treasury and IRS claims that IRB guidance lacks the force of law with Treasury regulations that impose penalties for failing to comply with interpretations contained in those formats? Can an interpretation truly be said to lack legal force if it carries penalty potential? By contrast, while they do not say so explicitly, administrative law scholars discussing the relative merits and demerits of the short cut seem to assume that the interpretations at issue do not carry the facial legal effect that penalties represent.

Regardless, courts have declined to adopt the short cut either for distinguishing between legislative and nonlegislative rules or for applying the *Chevron* standard.²⁶¹ Courts continue to invalidate alleged interpretative rules and policy statements on the ground that they are legislative rules that need to go through notice and comment. After expressly refusing to require notice and comment as a condition of *Chevron* deference in *Mead*,²⁶² the Supreme Court has continued to maintain that such procedures alone are neither necessary nor sufficient to justify *Chevron* review. In *Barnhart v. Walton*, while deferring under *Chevron* to a notice-and-comment regulation, the Court observed that “the fact that the Agency previously reached its interpretation through means less formal than ‘notice and comment’ rulemaking does not automatically deprive that interpretation of” *Chevron* deference.²⁶³ In *Edelman v. Lynchburg College*, without deciding whether an Equal Employment Opportunity Commission regulation interpreting Title VII was eligible for *Chevron* deference under *Mead*, the Court noted that *Chevron* deference “does not necessarily require an agency’s exercise of express notice-and-comment rulemaking power.”²⁶⁴

B. Exploring the Delegation Premise

In lieu of the short cut, the Supreme Court has embraced congressional delegation and agency exercise of delegated power as driving the force of law inquiry for both legislative rule

260. See, e.g., Salem et al., *supra* note 132, at 744–45 (discussing Treasury and IRS characterizations of IRB guidance and recommending *Skidmore* review for those formats).

261. See Franklin, *supra* note 244, at 294–303 (summarizing key cases).

262. See 533 U.S. 218, 231 (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.”).

263. 535 U.S. 212, 222–23 (2002).

264. 535 U.S. 106, 114 (2002).

characterization and *Chevron* deference. Although the Supreme Court has never had very much to say about the distinction between legislative rules and nonlegislative ones, the Court has consistently described the capacity of administrative agencies to promulgate legislative rules as a function of congressional delegation. In describing legislative rules as “affecting individual rights and obligations” and having “the force of law,” the Supreme Court in *Chrysler Corp. v. Brown* elaborated that “the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.”²⁶⁵ In addressing a related question of an agency’s power to adopt retroactively effective rules in *Bowen v. Georgetown University Hospital*, the Court said, “It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”²⁶⁶ In *Long Island Care at Home, Ltd. v. Coke*, the Court listed the agency’s use of notice-and-comment rulemaking as a reason for characterizing a regulation as legislative, but principally as an indicator that the agency intended the regulation to be “a binding exercise of its rulemaking authority” as delegated by Congress.²⁶⁷

The D.C. Circuit has likewise linked the characterization of legislative rules with the exercise of delegated power. As already noted, in the *American Mining Congress* case, the court expressly linked the determination that a rule is legislative with the existence and exercise of congressionally delegated power.²⁶⁸ *American Mining Congress* was not an outlier in this regard. Other D.C. Circuit decisions express similar sentiments. For example, in *National Latino Media Coalition v. Federal Communications Commission*, the D.C. Circuit recognized that “[w]hen Congress delegates rulemaking authority to an agency, and the agency adopts legislative rules, the agency stands in the place of Congress and makes law.”²⁶⁹ And in *American Postal Workers Union v. United States Postal Service*, the D.C. Circuit said that “[a] rule can be legislative only if Congress delegated legislative power to the agency and if the agency intended to

265. 441 U.S. 281, 302 (1979) (quoting *Morton v. Ruiz*, 415 U.S. 199, 232 (1974)).

266. 488 U.S. 204, 208 (1988).

267. 551 U.S. 158, 172 (2007).

268. 995 F.2d 1106, 1109 (D.C. Cir. 1993); *see also supra* notes 75–84 and accompanying text (discussing the *American Mining Congress* test for distinguishing between legislative and nonlegislative rules).

269. 816 F.2d 785, 788 (D.C. Cir. 1987).

use that power in promulgating the rule at issue.”²⁷⁰ Other federal circuit courts have followed the D.C. Circuit’s lead, embracing the relationship between the force of law and congressional delegation in distinguishing legislative rules from nonlegislative ones.²⁷¹ As the Third Circuit observed in *Elizabeth Blackwell Health Center for Women v. Knoll*, for example:

American Mining is nothing more than a refinement of the law . . . ; that is to say, for a rule to be legislative and have the force of law, Congress must have delegated legislative power to the agency and the agency must have intended to exercise that power in promulgating its rule.²⁷²

Regarding deference, the *Chevron* Court spoke in terms of congressional delegations of power in describing the types of agency interpretations eligible for the strong, mandatory deference advocated in that case.²⁷³ The Court recognized that Congress sometimes “explicitly [leaves] a gap for the agency to fill,” creating “an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.”²⁷⁴ The Court also maintained that “[s]ometimes the legislative delegation to any agency on a particular question is implicit, rather than explicit,” but cautioned reviewing courts in such instances not to “substitute [their] own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”²⁷⁵

In articulating its own two-part test, the Court in *Mead* likewise predicated the availability of *Chevron* deference on the presence and the exercise of congressionally delegated power. According to *Mead*, *Chevron* only applies “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”²⁷⁶ As with *Chevron*, the *Mead* Court recognized that both express and implied statutory delegations of power to elucidate statutory

270. 707 F.2d 548, 558 (D.C. Cir. 1983).

271. See, e.g., *Erringer v. Thompson*, 371 F.3d 625, 630 (9th Cir. 2004) (“Legislative rules . . . create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress.” (internal quotation marks omitted)); *Hoctor v. U.S. Dep’t of Agric.*, 82 F.3d 165, 169 (1996) (describing the promulgation of a legislative rule as a “legislative task entrusted to the agency” by Congress).

272. 61 F.3d 170, 187 (3d Cir. 1995).

273. 467 U.S. 837, 843–44 (1984).

274. *Id.* at 843–44.

275. *Id.* at 844.

276. 533 U.S. 218, 226–27 (2001).

provisions and fill statutory gaps indicate “that Congress would expect the agency to be able to speak with the force of law.”²⁷⁷ In the presence of such an expectation, “a reviewing court has no business rejecting an agency’s exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency’s chosen resolution seems unwise.”²⁷⁸ An agency’s use of notice-and-comment rulemaking procedures was relevant only as “a very good indicator of delegation meriting *Chevron* treatment.”²⁷⁹

The Court has spoken of *Chevron*’s delegation premise in subsequent cases as well. In *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, the Court described “ambiguities in statutes within an agency’s jurisdiction” as “delegations of authority to the agency to fill the statutory gap in reasonable fashion.”²⁸⁰ Looking at the language of the statute, the Court went on to defer to the Federal Communications Commission’s interpretation of the Communications Act because “Congress has delegated to the Commission the authority to ‘execute and enforce’ the Communications Act . . . and to ‘prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions’ of the Act.”²⁸¹ Most recently, in *United States v. Home Concrete & Supply, LLC*, writing for a four-Justice plurality, Justice Breyer took the position that not every ambiguity in a statute represents a congressional delegation of gap-filling power.²⁸² Meanwhile, Justice Kennedy in dissent, also writing for four Justices, described statutory amendments as “Congress [giving] new instruction” to an administering agency and the majority’s *Chevron* step one resolution as “constricting Congress’s ability to leave agencies in charge of filling statutory gaps.”²⁸³ Neither of these opinions even mentioned notice and comment procedures.

The Court’s emphasis on delegation as primary, with notice and comment as only a secondary indicator, is hardly surprising. The modern administrative state reflects an implicit compromise of allowing Congress to delegate expansive lawmaking power to agencies

277. *Id.* at 229.

278. *Id.*

279. *Id.*

280. 545 U.S. 967, 980 (2005).

281. *Id.* (quoting 47 U.S.C. §§ 151 & 201(b)).

282. 132 S. Ct. 1836, 1844 (2012) (“There is no reason to believe that the linguistic ambiguity noted by [*Colony, Inc. v. Comm’r*, 354 U.S. 28 (1958)] reflects a post-*Chevron* conclusion that Congress had delegated gap-filling power to the agency.”).

283. *Id.* at 1852.

in exchange for imposing substantial procedural requirements as agencies exercise those powers, with courts serving as the enforcer thereof. While courts continue formally to recognize the doctrine that Congress may not constitutionally delegate the legislative power conferred upon it by the Constitution,²⁸⁴ as a practical matter the nondelegation doctrine has been inoperative for several decades.²⁸⁵ Contemporary administrative law doctrine revolves around the rebalancing of governmental power in light of extensive congressional delegations of legislative power to administrative agencies.²⁸⁶

Scholars and courts generally offer two reasons for accepting congressional delegations of lawmaking powers to agencies. First, Congress simply must delegate power if it is to accomplish all that the American people expect from their government.²⁸⁷ Second, applying the nondelegation doctrine requires distinguishing between legislating and executing the law, but the line between legislation and execution is blurry, and meaningful distinctions are elusive.²⁸⁸

A likely third reason the Court has so willingly avoided challenging Congress over delegations, while preserving the option to do so, is that Congress has provided an acceptable alternative in the

284. See, e.g., *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001) (overturning the Court of Appeals's holding that the EPA violated the nondelegation doctrine).

285. The Supreme Court has not rejected a statute on nondelegation grounds since 1935. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935) (declaring Section 3 of the National Industrial Recovery Act “an unconstitutional delegation of legislative power”); *Pan. Refining Co. v. Ryan*, 293 U.S. 388, 431 (1935) (rejecting Section 9(c) of the National Industrial Recovery Act as unconstitutional on nondelegation grounds). Indeed, much more recently, the Court declared itself unqualified “to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.” *American Trucking Ass'ns*, 531 U.S. at 474–75 (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989)); see also 1 PIERCE, *supra* note 26, § 2.6 (“The Court has become increasingly candid in recognizing its inability to enforce any meaningful limitation on Congress’ power to delegate its legislative power to an appropriate institution.”); Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 713 (1969) (“The non-delegation doctrine is almost a complete failure. It has not prevented the delegation of legislative power.”).

286. See, e.g., Davis, *supra* note 285, at 713 (recognizing the nondelegation doctrine’s failure and suggesting that “[t]he focus of judicial inquiries thus should shift from statutory standards to administrative safeguards and administrative standards”).

287. See *Mistretta*, 488 U.S. at 372 (“[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”).

288. See *id.* at 415 (Scalia, J., dissenting) (recognizing the difficulty of enforcing the nondelegation doctrine because “[o]nce it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree”).

form of APA notice and comment procedures. As agencies have expanded their use of statutory authority to promulgate legally binding rules, courts have interpreted the APA's requirements more expansively to facilitate meaningful public participation and transparency in rulemaking and to enhance their own ability to police against agency arbitrariness.²⁸⁹ Particularly as interpreted by courts, the APA's procedural requirements for agency rulemaking mimic key aspects of the legislative process.²⁹⁰ Much like the legislative process, the APA's notice and comment requirements provide the agency with "the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions,"²⁹¹ and "reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies."²⁹²

Another key feature of the APA is its designation of the courts as a meaningful check against agency exercises of rulemaking power. Since the Court's decision in *Abbott Laboratories v. Gardner* in 1967, courts have interpreted the APA as establishing a presumption in favor of pre-enforcement judicial review of agency rulemaking efforts.²⁹³ Thus, regulated parties ordinarily may challenge the validity of legally binding agency rules in court as soon as the agency finalizes them, before the rules become too entrenched. In other words, regulated parties are not left with a choice between incurring the costs to organize their primary behavior to conform with arguably

289. See Mathew McCubbins, Roger Noll & Barry Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243, 244 (1987) (making a similar observation regarding the relationship between procedure and political control of regulatory agencies, and noting that administrative procedures provide information necessary for policing agency action and allow interested parties to participate in agency decisionmaking); cf. Christopher Edley, Jr., *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 DUKE L.J. 561, 566 (describing contemporary U.S. administrative law as an exercise in "antidiscretion," with judges employing doctrine to curtail agency discretion through congressionally enacted procedural safeguards and judicial review).

290. See *Atchison, Topeka & Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 441-42 (7th Cir. 1994) (comparing APA rulemaking requirements with the legislative process). Indeed, McCubbins, Noll, and Weingast have argued that some members of Congress supported the APA's enactment as a means of slowing down the rulemaking process through procedure. See McCubbins, Noll & Weingast, *supra* note 289, at 255-59.

291. *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (quoting *Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 662 (D.C. Cir. 1978)).

292. *Id.* (quoting *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980)).

293. 387 U.S. 136, 140 (1967).

invalid rules or suffering the uncertainty and potential penalties of noncompliance.²⁹⁴

Nevertheless, while asserting its authority both to police agency behavior and to interpret the law, the Court has recognized that some agency actions are less about legal interpretation and more about choosing between competing policy alternatives, both of which are compatible with statutory language. Indeed, as with the Court's nondelegation jurisprudence, *Chevron* recognizes that the line between lawmaking and statutory interpretation is a difficult one to draw, and that much of what we label as statutory interpretation is really about policy choice. Where Congress's meaning is clear,²⁹⁵ an agency's actions cannot be anything more than an exercise of congressional intent. But where a statute is ambiguous, and an agency is exercising congressionally delegated power to act with the force of law, *Chevron* instructs reviewing courts to defer to the agency's substantive interpretations of legal meaning so long as those interpretations remain within the boundaries of delegated authority.²⁹⁶

The *Chevron* doctrine is designed to remove the courts from the substantive act of agency lawmaking so long as the agency stays within legislatively defined parameters. As the Court made clear in *Mead*, however, *Chevron* only applies where Congress has granted an agency the power to act with the force of law, and where the agency has exercised that power. In other words, the Court has predicated eligibility for *Chevron* on the agency's acting in the role of Congress's delegee.

In sum, agencies act with the force of law when they exercise congressionally delegated power. To the extent the Court's acquiescence to congressional delegations derives from the corresponding guarantees of transparency and accountability offered by the APA, it makes sense that the Court would closely associate

294. *See id.* at 152–53 (“If petitioners wish to comply they must . . . invest heavily in new printing type and new supplies. The alternative to compliance—continued use of material which they believe in good faith meets the statutory requirements, but which clearly does not meet the regulation of the Commissioner—may be even more costly. That course would risk serious criminal and civil penalties for the unlawful distribution of ‘misbranded’ drugs.”).

295. Of course, how clear is “clear” is a classic *Chevron* question that courts and scholars have never been able to resolve with any accuracy. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520–21 (“How clear is clear? It is here, if *Chevron* is not abandoned, that the future battles over acceptance of agency interpretations of law will be fought.”).

296. 467 U.S. 837, 844 (1984).

both the legislative rule category and *Chevron* deference with notice-and-comment rulemaking.

Congress has at times authorized legally binding regulations through procedures other than the APA's notice and comment requirements. APA notice-and-comment rulemaking reflects a congressional assessment regarding the proper balance in most cases between agency flexibility on the one hand and transparency and accountability on the other. Occasionally, Congress calibrates that balance differently. Sometimes, Congress does this in individual statutes. For example, in the Federal Aviation Reauthorization Act, Congress instructed the FAA to "publish in the Federal Register an initial fee schedule and associated collection process as an interim-final rule, pursuant to which public comment will be sought and a final rule issued."²⁹⁷ In *Asiana Airlines v. FAA*, the D.C. Circuit held that, with this language, Congress authorized the FAA to utilize procedures somewhat different than those outlined in the APA in adopting legally binding regulations.²⁹⁸ More generally, in the APA itself, Congress provided the good cause exception whereby agencies can adopt legislative rules without notice and comment given the right circumstances.²⁹⁹ If Congress has authorized alternative procedures for binding regulated parties with the force of law, then it makes little sense to deny the resulting rules legal force and thus *Chevron* deference because the agency did not follow the APA's notice and comment procedures.

Commentary regarding *Mead* has been particularly critical of the Supreme Court's delegation premise. Reflecting perhaps the most common criticism, in an article with David Barron, now-Justice Elena Kagan described *Mead's* emphasis on delegation and its resulting inquiry into congressional intent "chimerical" and "fraudulent," as Congress "rarely discloses (or, perhaps, even has) a view" regarding whether *Chevron* ought to apply instead of *Skidmore*.³⁰⁰ *Mead's* critics are absolutely correct that "[f]ederal statutes almost never speak directly to the standard of review of an agency's interpretations."³⁰¹ Nevertheless, Congress often attends carefully to the details in establishing which agency it charges with administering particular

297. 49 U.S.C. § 45301(b)(2) (2006).

298. 134 F.3d 393, 398 (D.C. Cir. 1998).

299. 5 U.S.C. § 553(b)(B) (2006); see also *supra* notes 150–61 and accompanying text (discussing the good cause exception).

300. David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 203.

301. *Id.* at 216.

statutes, and the organizational elements of new agencies that it establishes for such purposes. For example, Congress has authorized the EEOC only to issue “procedural regulations” under the Civil Rights Act,³⁰² even while giving the same agency substantive rulemaking power under the Americans with Disabilities Act.³⁰³ As highlighted in *Skidmore*, Congress designated the courts rather than the Wage and Hour Division of the Department of Labor as the primary interpreter of the Fair Labor Standards Act.³⁰⁴ In some instances, Congress has divided rulemaking and administrative adjudication tasks between different agencies,³⁰⁵ while in other cases it has combined both powers in the same agency.³⁰⁶ Courts are entirely reasonable to infer from such statutory markers that Congress intended to give agencies a special gap-filling role in some statutes but not in others.³⁰⁷ Recent empirical research by Lisa Bressman and Abbe Gluck suggests further that at least today’s Congress is both aware of *Chevron*³⁰⁸ and, in drafting legislation, thinks of delegation in terms consistent with *Mead*’s assumptions.³⁰⁹

302. See 42 U.S.C. § 2000e-12(a) (2006) (“The Commission shall have the authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter.”)

303. See *id.* § 12116 (authorizing the EEOC to adopt substantive regulations governing private sector discrimination under the Americans with Disabilities Act).

304. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944) (“Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act. Instead, it put this responsibility on the courts.”).

305. See, e.g., *Dir., Office of Workers’ Comp. Programs v. O’Keefe*, 545 F.2d 337, 342–43 (3d Cir. 1976) (detailing the administrative scheme of the Longshore and Harbor Workers’ Compensation Act, which divides responsibilities in this way); George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315, 317–23 (1987) (detailing the history of the Occupational Safety and Health Act and the Mine Safety and Health Act, both of which adopted this model).

306. See, e.g., *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 290–95 (1974) (recognizing the authority of the NLRB to engage in both rulemaking and adjudication at its discretion).

307. See Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2012 (2011) (describing the fiction of congressional delegation as “a fiction only in the sense that the Court is not searching for actual legislative intent but is imputing legislative intent”).

308. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Legislative Drafting, Delegation and the Canons*, 65 STAN. L. REV. (forthcoming 2013) (on file with author) (documenting that 82.48 percent of congressional counsels surveyed are aware of the *Chevron* standard).

309. *Id.*; see also Bressman, *supra* note 307, at 2011 (recognizing additional empirical support that “the basic presumption of congressional delegation is well grounded” and “an express delegation of regulatory authority generally carries an implied delegation of interpretive authority”).

C. Penalties as a Key Indicator of Delegation

So how should the courts discern that Congress has delegated the power to act with the force of law through rulemaking? As discussed above, for the most part, the courts' emphasis has been on statutory language generally authorizing agency rules and regulations, as for example with I.R.C. § 7805(a).³¹⁰ Yet, Congress grants rulemaking authority in statutes using a variety of rhetorical formulations, not all of which have been deemed by the courts as delegations of legislative power.³¹¹ The Court in *Mead* recognized that the relevant statute gave the Customs Service the power to act with the force of law, but found little indication in the statute's language or history that Congress intended to recognize classification ruling letters as an exercise of that delegation.³¹²

Shortly after the Court decided the *Mead* case, Thomas Merrill suggested the presence or absence of congressionally imposed sanctions or other adverse consequences for the violation of agency rules as a key variable in ascertaining whether Congress intended to delegate the power to act with the force of law. "Focusing on the presence or absence of congressionally-prescribed legal consequences is more than just a convenient formalism. It also makes sense as a guide to congressional intent."³¹³ Subsequently, Merrill and Kathryn Watts documented exhaustively that, at least in the context of agency rulemaking, Congress historically signaled its intent to delegate legislative power through provisions imposing penalties or similar consequences for noncompliance with agency commands.³¹⁴ If Congress specified in the statute that a violation of agency rules would subject the offending party to some sanction—for example, a civil or criminal penalty; loss of a permit, license, or benefits; or other adverse legal consequences—then the grant conferred power to make rules with the force of law. Conversely, if Congress made no provision for sanctions for rule violations, the grant authorized only procedural or interpretive rules.³¹⁵

310. See *supra* notes 108–115 and accompanying text (summarizing Supreme Court cases recognizing statutes as delegating authority to act with the force of law).

311. See, e.g., *supra* notes 116–119 and accompanying text (discussing the Supreme Court's narrow construction of a general rulemaking grant in the Controlled Substances Act).

312. *United States v. Mead Corp.*, 533 U.S. 218, 231–32 (2001).

313. Merrill, *supra* note 63, at 827–30.

314. Merrill & Watts, *supra* note 49, at 472.

315. *Id.*

The presence or absence of statutory penalties for noncompliance is clearly not the *sine qua non* for concluding that agency pronouncements carry or lack the force of law. Merrill and Watts acknowledge that contemporary courts have not always acted consistently with this approach, leaving the presence of penalty provisions at best a significant indicator of congressional delegation.³¹⁶ Certainly, at the margins, courts have occasionally recognized the legal force of agency rules issued under rulemaking grants that lack corresponding statutory sanctions. Einer Elhauge notes further that *Mead* itself denied *Chevron* deference to individualized tariff letter rulings with which the recipients were required to comply if they wanted to bring their goods into the United States, and that this sort of state sanction for noncompliance with agency adjudications is at least analogous to statutory penalties for noncompliance with agency rules.³¹⁷ While Elhauge is absolutely correct, the phenomenon he observes appears to be limited to informal adjudications like that in *Mead* that are beyond the scope of this Article.

In other words, courts may sometimes conclude that an agency rule that lacks statutory sanctions nevertheless carries the force of law, or that an informal adjudication with a limited coercive range does not carry legal force. But just as courts' application of the legislative rule category has been an exercise in expanding beyond legal effect to some degree of practical binding effect, and just as the boundaries of *Chevron's* domain include but are not limited to agency rules promulgated using APA notice-and-comment rulemaking, so it seems the coupling of rulemaking power with statutory penalties represents the paradigmatic example of a congressional delegation of power to act with the force of law. Correspondingly, the agency's choice to advance its legal interpretations through formats directly associated with congressionally imposed penalties would seem to constitute an exercise of congressionally delegated power to act with the force of law.

316. See *id.* at 473–74 (acknowledging instances of pre-*Chevron* courts failing to evaluate force of law by reference to sanctions). Merrill and Watts highlight two cases in particular: *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), and *National Ass'n of Pharmaceutical Manufacturers v. FDA*, 637 F.2d 877 (2d Cir. 1981). *Id.*; see also *id.* at 549–65 (discussing the circumstances of these two cases at length). Merrill and Watts also recognize *Thorpe v. Housing Authority*, 386 U.S. 670 (1967), as another such case. *Id.* at 529.

317. See EINER ELHAUGE, STATUTORY DEFAULT RULES 92–94 (2008) (discussing the relationship between *Chevron* deference and statutory penalties).

D. Delegation, Penalties, and Tax Administration

In pursuing their thesis, Merrill and Watts present the Internal Revenue Code as an exception, concluding from legislative history that Congress did not intend its inclusion of both general rulemaking authority and corresponding penalties in the early income tax statutes to convey the power to act with the force of law.³¹⁸ I have argued elsewhere that Merrill and Watts misconstrue the early tax penalty provisions, and I will not revisit that argument here.³¹⁹ Whatever the original understanding, more recent events and the Supreme Court's decision in *Mayo* dictate a different conclusion today.

Penalties for underpayment of taxes due to negligence or intentional disregard of tax "rules and regulations" have been part of the tax laws since 1918 and 1921, respectively.³²⁰ The statute failed to define the scope of those penalties, however, and the legislative history of these penalty provisions offered few insights regarding Congress's intent. As a result, for decades after their enactment, courts declined to apply them so long as taxpayers could articulate a reasonable argument for the inapplicability or invalidity of a tax rule or regulation.³²¹ As part of the Tax Reform Act of 1976, Congress adopted new penalties for tax return preparers found guilty of "negligent or intentional disregard of rules and regulations."³²² Again, however, Congress at that time failed to define what it meant by either "negligence or intentional disregard" or "rules and regulations," although the legislative history stated that "good faith dispute[s]" over IRS interpretations of the law were not sanctionable and that the new tax preparer penalty and existing penalties for taxpayer disregard of

318. See Merrill & Watts, *supra* note 49, at 571–72 (discussing the Revenue Act of 1917 and its history).

319. See Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1603–04 & n.336 (2006) (critiquing Merrill and Watts's interpretation of the early tax penalty provisions).

320. See Revenue Act of 1918, Pub. L. No. 254, § 250(b), 40 Stat. 1057, 1083 (1919) (adopting the negligence penalty); Revenue Act of 1921, Pub. L. No. 67-98, § 250(b), 42 Stat. 227, 264–65 (adding language regarding intentional disregard of rules and regulations).

321. See, e.g., Michael Asimow, *Civil Penalties for Inaccurate and Delinquent Tax Returns*, 23 UCLA L. REV. 637, 659 (1976) (recounting the early treatment of the intentional disregard penalty); Arnold Hoffman, *Intentional Disregard of Rules and Regulations*, 28 TAXES 111, 111–13 (1950) (describing the history and application of the intentional disregard penalty); Donald Arthur Winslow, *Tax Penalties—“They Shoot Dogs, Don't They?”*, 43 FLA. L. REV. 811, 836–43 (1991) (describing the history and application of the negligence penalty).

322. Pub. L. No. 94-455, § 1203, 90 Stat. 1520, 1689 (1976) (codified at 26 U.S.C. § 6694 (2006)).

tax rules and regulations should be read similarly.³²³ Congress has never defined precisely what it means in these penalty provisions by “rules and regulations.” Congress defined the terms “negligence” and “disregard” in the Tax Reform Act of 1986, but in doing so mentioned only compliance “with the provisions of this title,” and not temporary regulations or IRB guidance.³²⁴

Nevertheless, as noted above, in 1991, Treasury adopted Treas. Reg. §§ 1.6662-3 and 1.6694-3, in which it expressly defined rules and regulations for purposes of these penalty provisions as including temporary regulations, revenue rulings, and IRS notices, while suggesting in the regulatory preamble that the same would be true of at least some revenue procedures.³²⁵ After comments to the proposed definition objected particularly to the inclusion of revenue rulings on the ground that those documents lacked public notice and comment, Treasury contended that the 1976 legislative history “expressly provides that rules and regulations include regulations and ‘IRS rulings.’”³²⁶ But in discussing the new tax preparer penalty, the 1976 legislative history mostly refers to rules and regulations without elaboration, consistent with the statutory language. In a few instances, the history instead substitutes the term “rulings” for “rules,” and in one instance the history speaks of “IRS regulations and rulings.”³²⁷ That legislative history does not specifically mention revenue rulings or revenue procedures by name, even though the IRS had been issuing those documents since the 1950s. And of course that legislative history is silent regarding temporary regulations and notices, which did not emerge as standard formats until the 1980s.³²⁸

323. See H.R. REP. NO. 94-658, at 278 (1975), *reprinted in* 1976 U.S.C.C.A.N. 2897, 3174; S. REP. NO. 94-938, pt. 1, at 355–56 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3784–85.

324. I.R.C. § 6662(c) (2006) (“[T]he term ‘negligence’ includes any failure to make a reasonable attempt to comply with the provisions of this title, and the term ‘disregard’ includes any careless, reckless, or intentional disregard.”); see also Tax Reform Act of 1986, Pub. L. No. 99-514, § 1503, 100 Stat. 2085, 2742; H.R. REP. NO. 99-841, at 4867–80 (1986) (Conf. Rep.), *reprinted in* 1986 U.S.C.C.A.N. 2897, 779–82 (discussing the addition of the definitional language).

325. Accuracy-related Penalty, T.D. 8381, 56 Fed. Reg. 67,492-01, 67,494 (Dec. 31, 1991); Penalty on Income Tax Return Preparers Who Understate Taxpayer’s Liability on a Federal Income Tax Return or a Claim for Refund, T.D. 8382, 56 Fed. Reg. 67,509-1, 67,513 (Dec. 31, 1991).

326. Accuracy-related Penalty, T.D. 8381, 56 Fed. Reg. at 67,494; Penalty on Income Tax Return Preparers Who Understate Taxpayer’s Liability on a Federal Income Tax Return or a Claim for Refund, T.D. 8382, 56 Fed. Reg. at 67,513.

327. See H.R. REP. NO. 94-658, *supra* note 323, at 278; S. REP. NO. 94-938, *supra* note 323, at 355–56.

328. See Hickman, *supra* note 15, at 1797 (documenting the history of the Treasury’s use of temporary regulations); Hickman, *supra* note 17, at 250 (“The first notice so-labeled seems to

Notwithstanding that the legislative history provides at best a weak foundation for extending the penalty provisions to temporary regulations or IRB guidance, the fact remains that Congress has not itself clarified the scope of these penalty provisions by defining rules and regulations. Meanwhile, Congress has clearly authorized Treasury to adopt regulations resolving ambiguities in the I.R.C. Exercising that congressionally delegated power, Treasury has adopted binding regulations proclaiming, based on legislative history, that statutory penalties apply to taxpayers and tax preparers who fail to comply with the interpretations contained in temporary regulations and IRB guidance documents. In so doing, Treasury has staked its position that Congress delegated to it the power to bind regulated parties with the force of law using temporary regulations and IRB guidance documents. In using those formats to communicate interpretations of the I.R.C., therefore, Treasury and the IRS signal their intent to exercise that delegated power.

Admittedly, the standards for assessing penalties for failing to follow temporary regulations and IRB guidance are different from one another. For example, taxpayers who adopt return positions inconsistent with Treasury regulations—whether final or temporary—must both disclose their noncompliance on their tax returns and have a “reasonable basis” for the position taken to avoid the twenty percent underpayment penalty imposed by I.R.C. § 6662(b)(1).³²⁹ Furthermore, to avoid that penalty, a taxpayer’s decision not to comply with a Treasury regulation must represent “a good faith challenge to the validity of the regulation.”³³⁰ By comparison, a taxpayer who declines or otherwise fails to follow IRB guidance is exempt from the twenty percent underpayment penalty if the taxpayer’s position “has a realistic possibility of being sustained on its merits,” whether or not the taxpayer discloses the noncompliance or intends to challenge the rule’s validity.³³¹ In concluding that revenue rulings lack the force of law for purposes of *Mead* and *Chevron*, the Fifth Circuit in *Kornman*

have been published in the IRB in 1976. . . . The notice format became more regularized in the 1980s . . .”).

329. Disclosure is not required to avoid a penalty for negligence alone, as “[a] return position that has a reasonable basis . . . is not attributable to negligence.” Treas. Reg. § 1.6662-3(b)(1) (2012). Yet reasonable basis alone is inadequate to avoid a penalty for “intentional disregard,” as the regulations define that phrase. Treas. Reg. § 1.6662-3(b)(2).

330. Treas. Reg. § 1.6662-3(c)(1).

331. Treas. Reg. § 1.6662-3(a), (b)(2). This standard does not apply to taxpayers who take positions contrary to IRB guidance with respect to a reportable transaction. *Id.*; see also *supra* notes 215–218 and 223 and accompanying text (discussing the role of revenue procedures and notices in identifying reportable transactions and the penalties associated therewith).

and Associates, Inc. v. United States made special note of the more lenient penalty standard associated with those documents.³³²

If the goal is to determine which agency actions carry the force of law, then distinguishing between temporary Treasury regulations and IRB guidance based on the relative severity or leniency of Treasury's penalty standards, as the *Kornman* court did, draws the line in the wrong place. Under either standard, the government seeks to impose penalties for noncompliance on at least some taxpayers who fail to comply with interpretations advanced in the listed formats. If one associates congressionally imposed penalty provisions (and agency interpretations thereof) with the delegation of authority to act with the force of law, then the relevant line ought instead to be between formats that carry penalties and those that do not.

III. CONFRONTING THE IMPLICATIONS FOR TAX ADMINISTRATION

The foregoing analysis leads me to conclude that temporary Treasury regulations and IRB guidance documents carry the force and effect of law, are legislative rules necessitating APA notice and comment (and are invalid to the extent that they lack those procedures), and under *Mead* fall within *Chevron's* domain. By this statement, I do not mean to suggest that existing legal doctrines concerning the characterization of agency rules or the applicability of *Chevron* review are crystal clear; they certainly are not. If, however, courts continue to take the Supreme Court's delegation rhetoric seriously, then I think these conclusions flow logically from *Mayo's* characterization of I.R.C. § 7805(a) as a delegation to Treasury to act with the force of law and from Treasury's decision to invest the temporary regulation and IRB guidance formats with penalty potential.

Whatever the doctrinal validity of these conclusions, their practical implications for the systemic integrity of the tax system are challenging. Many if not most administrative law cases concerning the procedural validity of agency rules arise pre-enforcement, before regulated parties have much opportunity to organize their primary behavior in compliance.³³³ The standard remedy for agency rules with

332. *Kornman & Assoc., Inc. v. United States*, 527 F.3d 443, 454 (5th Cir. 2008).

333. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (reading the APA as adopting a presumption in favor of pre-enforcement judicial review of agency regulations); 2 PIERCE, *supra* note 26, § 15.14 ("After *Abbott*, pre-enforcement review of rules became the norm in the large class of cases in which the challenge to the rule's validity raised one or more issues that were susceptible to judicial resolution before the rule was applied.").

procedural errors is remand to the agency.³³⁴ On occasion, a court will remand with instructions to comply with the APA but will allow the rule in question to remain in effect in the interim.³³⁵ More typically, however, the reviewing court will invalidate the rule outright and leave the agency to decide how it wishes to proceed.³³⁶

Judicial review in tax cases follows a different norm from that in other areas of administrative law. For a variety of reasons, most prominently the Anti-Injunction Act provision of I.R.C. § 7421(a), pre-enforcement judicial review of APA procedural challenges is a rarity.³³⁷ Instead, taxpayer-initiated tax litigation only occurs after the taxpayer has requested and been denied a refund of taxes already paid or the IRS has examined the taxpayer's tax filings and concluded that taxes or penalties are due.³³⁸ In either of these circumstances, the case comes to court only after the IRS has applied its rules and regulations to reach a conclusion about a particular taxpayer's obligations, which may be years after the initial publication of those rules and regulations.

As noted, Treasury's routine issuance of temporary regulations raises APA procedural questions not only for the temporary regulations themselves but also for final regulations that eventually

334. See 3 KOCH, *supra* note 152, § 8:31[2](a) (recognizing prominence of remand as a remedy in administrative law cases, "including such orders as remand for further proceedings, remand with instruction, and reversal and remand").

335. See, e.g., *Checkosky v. SEC*, 23 F.3d 452, 466 (D.C. Cir. 1994) (listing D.C. Circuit cases remanding without vacating agency actions); *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) (concluding that the agency failed adequately to comply with APA notice and comment requirements but leaving regulation in effect pending completion of those procedures); see also Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 ARIZ. ST. L.J. 599, 624–35 (2004) (criticizing remand without vacating as a remedy); Ronald M. Levin, "Vacation" At Sea: *Judicial Remands and the APA*, ADMIN. & REG. L. NEWS, Spring 1996, at 4 (discussing remand without vacating as a remedy).

336. See 3 PIERCE, *supra* note 26, § 18.1 ("In most cases, successful prosecution of a review proceeding yields instead a judicial decision setting aside the agency action and remanding the proceeding for further agency action not inconsistent with the decision of the reviewing court.")

337. I.R.C. § 7421(a) provides generally that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." I.R.C. § 7421(a) (2006). Although the jurisprudence is not conclusive, this provision is generally thought to preclude pre-enforcement review of most tax cases, including those that raise APA procedural challenges. See also Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1165–81 (2008) (discussing doctrinal limitations on pre-enforcement judicial review in the tax context, including but not limited to I.R.C. § 7421(a)).

338. See GERALD A. KAFKA & RITA A. CAVANAGH, *LITIGATION OF FEDERAL CIVIL TAX CONTROVERSIES* § 1.01 (2d ed. 1997) (dividing tax litigation generally into the refund and deficiency categories).

replace them. Given the timing of judicial review in tax cases, adopting a categorical rule rejecting as procedurally invalid all Treasury regulations with temporary origins in addition to existing temporary Treasury regulations could be destabilizing. While Treasury has never finalized many of the temporary regulations that it issued in the 1980s and early 1990s, many more Treasury regulations that were initially promulgated in temporary form have since been finalized through postpromulgation notice and comment. Often, though not always, Treasury has made changes to its temporary regulations in response to comments received. Taxpayers have relied upon these regulations in organizing their affairs. Categorically invalidating and remanding Treasury regulations with temporary origins would upset taxpayers' settled expectations and could seem more arbitrary and capricious than leaving the regulations in place notwithstanding their procedural flaws. Other areas of law might suffer similarly from a categorical rejection of Treasury's use of temporary regulations, as many other agencies employ interim-final rulemaking with postpromulgation notice and comment, and presumably at least some of those efforts rest upon flawed assertions of one or another exception from APA § 553.³³⁹

The procedural shortcomings of IRB guidance documents arguably present a different problem. The IRS simply cannot subject all IRB guidance to APA notice-and-comment rulemaking, nor should taxpayers want it to do so. As already noted, many IRB guidance documents address minor housekeeping-type matters. Subjecting all such pronouncements to notice-and-comment rulemaking would be ridiculously wasteful. To a great extent, such fears are overblown, as IRB guidance that is truly mundane or taxpayer friendly is unlikely to face legal challenge. Nevertheless, the IRS could curtail the IRB guidance it offers, even while taxpayers crave direction. Yet, the courts should be equally wary of utilizing the fuzziness of the force of law concept to categorically permit Treasury and the IRS to continue their existing practices. Tax practitioners are already dismayed by the power they perceive the *Mayo* decision has given to Treasury to dictate legal outcomes. If courts allow Treasury to continue issuing temporary regulations with only postpromulgation notice and comment and also extend *Chevron* deference to those regulations, their dismay will undoubtedly increase, and their respect for the tax system will likely erode. Absent notice and comment, *Chevron*

339. See Asimow, *supra* note 148, at 712–15 (counting interim-final rules published in the Federal Register and the agencies publishing them over time).

deference for IRB guidance would present substantial legitimacy issues.

The solution is neither purely administrative nor purely judicial. Treasury, the IRS, and the courts all have the means to facilitate more precise convergence between tax administration and general administrative law requirements without dramatically altering the status quo.

A. Administrative Solutions

Treasury and the IRS are the authors of the regulations and practices that give rise to all of the force of law questions surrounding temporary Treasury regulations and IRB guidance. To a great extent, therefore, Treasury and the IRS possess the power to resolve the problem as well.

Presumably Treasury would like to retain the legally binding force of the temporary regulations it issues. At least prospectively, Treasury could bring its use of temporary Treasury regulations into line with general administrative law understandings of APA § 553 with little impact on contemporary tax practice. The two standard justifications for issuing legally binding temporary Treasury regulations rather than nonbinding proposed regulations are to protect the integrity of the fisc and to provide taxpayers with guidance upon which they can rely. Where circumstances truly warrant quick action to protect the fisc, as may well be the case with respect to tax shelters, for example, Treasury can still rely on the good cause exception to justify temporary regulations. The Attorney General's Manual on the Administrative Procedure Act, generally considered the authoritative history of that statute, is arguably consistent with this assessment of the good cause exception, in that it offers as an example of good cause "such circumstances that advance notice of [the proposed] rules would tend to defeat their purpose."³⁴⁰ In the future, Treasury will simply need to provide the requisite specific and particularized explanation that the courts require to substantiate a valid good cause claim. If Treasury complies with the APA in this way, then based on the above analysis, its penalty provisions will justifiably apply, and *Chevron* review is entirely appropriate.

340. U.S. DEP'T OF JUSTICE, *supra* note 11, at 31. The specific example offered by the manual is the issuance of financial controls, but the same concern would be true of most tax shelters.

Treasury's usual unspecified and generic need for immediate guidance is substantially less persuasive as a basis for utilizing temporary Treasury regulations. By the time that it issues proposed regulations, Treasury has already accomplished much of the work of promulgating final regulations. Finalizing proposed regulations is often accomplished in a matter of months, not years, especially when the regulations in question are narrow in scope.³⁴¹ But as I documented empirically a few years ago, when the regulatory project in question is broader, more complicated, or both, Treasury's temporary regulations may fail to consider key issues, forcing Treasury to issue successive additional temporary regulations to address those failings even while it continues to consider taxpayer comments.³⁴² In other words, Treasury's haste to provide immediate guidance sometimes merely increases rather than lessens taxpayer confusion and uncertainty. Some tax attorneys charged with writing legal opinions regarding the tax consequences of proposed transactions (and their clients) undoubtedly prefer the comparative binding effect of temporary Treasury regulations on the government as well as taxpayers. For most other taxpayers, however, the desire for guidance is driven by the goal of avoiding an audit, a deficiency notice, and litigation. Toward those ends, most taxpayers do want to know how the IRS interprets the law and happily follow whatever scrap of guidance they can find without regard for its legal force. By contrast, penalties for noncompliance while Treasury contemplates adjustments in response to comments would not be these taxpayers' preference. If Treasury cannot articulate good cause with specificity and particularity but nevertheless genuinely believes that taxpayers want immediate guidance that they can rely upon, then Treasury ought simply to inform taxpayers that, if they comply with proposed regulations, they will not be targets for enforcement.

As for IRB guidance, the IRS's preference presumably would be avoiding the necessity of notice-and-comment rulemaking over binding taxpayers through penalties. The meaning of "rules and regulations"

341. See, e.g., Amendment of Prohibited Payment Option Under Single-Employer Defined Benefit Plan of Plan Sponsor in Bankruptcy, T.D. 9601, 77 Fed. Reg. 66,915-01, 66,916 (Nov. 8, 2012) (finalizing regulations initially proposed less than five months earlier, on June 21, 2012); Guidance Under Section 267(f); Deferral of Loss on Transactions Between Members of a Controlled Group, T.D. 9583, 77 Fed. Reg. 22,480-02, 22,481 (Apr. 16, 2012) (finalizing regulations initially proposed approximately twelve months earlier, on April 21, 2011); Tax Return Preparer Penalties Under Section 6695, T.D. 9570, 76 Fed. Reg. 78,816-01, 78,816-18 (Dec. 20, 2011) (finalizing proposed regulations issued only two months earlier, on October 21, 2011, notwithstanding comments received and changes made in response to those comments).

342. See Hickman, *supra* note 15, at 1801-04 (offering examples).

is sufficiently ambiguous that, just as Treasury had the power to extend that phrase to encompass revenue rulings, notices, and some revenue procedures, Treasury likewise has the power to interpret that phrase by rescinding that interpretation. Amending Treas. Reg. § 1.6662-3 to disassociate IRB guidance from statutory penalties offers the most comprehensive solution, encompassing existing as well as future IRB guidance documents. In the alternative, if Treasury and the IRS want to continue to use IRB guidance formats to bind taxpayers, or if Treasury simply wants to avoid the hassle of amending its regulations, the IRS could at least mitigate its exposure to judicial imposition of notice and comment requirements by shifting housekeeping matters and other obviously nonlegislative guidance to an alternative informal format that does not fall within the definitional scope of Treas. Reg. § 1.6662-3.

B. Judicial Solutions

Absent further judicial action, however, Treasury and the IRS seem unlikely to alter their current practices. Meanwhile, courts are faced with cases in which the government seeks to enforce the requirements of temporary Treasury regulations and IRB guidance, claiming *Chevron* deference for the former, and seeking to impose penalties upon taxpayers for disregarding its pronouncements in both. Courts have an obligation to require Treasury and the IRS to comply with the APA and to effectuate taxpayers' rights under that statute to have their say in the legal rules that govern them. Yet, as already suggested, courts should be wary of causing more harm than good with a hard line, categorical response. If courts accept as their goal prodding Treasury and the IRS toward greater compliance with the APA without wholly undermining taxpayer expectations and reliance upon existing Treasury regulations and IRB guidance, existing case law offers a few possibilities for charting that middle path.

1. Open Minds and Harmless Errors

Scholarly and judicial consensus holds that the procedural sequence Treasury uses when it adopts temporary regulations (and the final regulations that succeed them) is inconsistent with APA requirements absent a valid statutory exception from notice-and-comment rulemaking. Nevertheless, while the courts should not read I.R.C. § 7805(e) as authorizing Treasury to issue temporary Treasury

regulations at will,³⁴³ the fact remains that, due largely to I.R.C. § 7805(e), many Treasury regulations initially promulgated in temporary form have since gone through public notice and comment.

Outside the tax context, some courts have concluded that such postpromulgation notice and comment alone is inadequate to remedy the initial procedural flaws of temporary or interim-final regulations.³⁴⁴ As these courts have recognized, allowing postpromulgation notice and comment to cure the procedural flaws of temporary or interim-final regulations merely invites agencies to ignore the APA's procedural sequence whenever they like.³⁴⁵ Further, as observed by the D.C. Circuit, "an agency is not likely to be receptive to suggested changes once the agency puts its credibility on the line in the form of final rules. People naturally tend to become more close-minded and defensive once they have made a final determination."³⁴⁶

Courts in other cases, however, have expressed reluctance to undo agency regulations where doing so would yield no substantive difference.³⁴⁷ In some decisions, therefore, courts have declined to

343. See *supra* notes 169–178 and accompanying text (rebutting the Justice Department's claim that I.R.C. § 7805(e) independently authorizes the Treasury to issue temporary regulations).

344. See, e.g., *United States v. Johnson*, 632 F.3d 912, 929 (5th Cir. 2011) ("Nor does accepting post-promulgation comments excuse compliance with APA procedures. . . . If we allowed post-promulgation comments to suffice in this case, 'we would make the provisions of § 553 virtually unenforceable.' " (quoting *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979))); *Air Transp. Ass'n of Am. v. Dep't of Transp.*, 900 F.2d 369, 379–80 (D.C. Cir. 1990) *vacated without opinion and remanded*, 498 U.S. 1023 (1991), *vacated as moot*, 933 F.2d 1043 (D.C. Cir. 1991) ("Finally, we reject the FAA's contention that its response to comments after promulgation of the Penalty Rules cured any noncompliance with section 553."); cf. *U.S. Steel Corp. v. EPA*, 649 F.2d 572, 576 (8th Cir. 1981) (rejecting adequacy of postpromulgation notice and comment to satisfy APA procedural requirements); *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979) ("We hold that the period for comments after promulgation cannot substitute for the prior notice and comment required by the APA.").

345. See, e.g., *Natural Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 768 (3d Cir. 1982) ("To allow the APA procedures in connection with the further postponement to substitute for APA procedures in connection with an initial postponement would allow EPA to substitute post-promulgation notice and comment procedures for pre-promulgation notice and comment procedures at any time by taking an action without complying with the APA, and then establishing a notice and comment procedure on the question of whether that action should be continued."); *Sharon Steel Corp.*, 597 F.2d at 381 ("If a period for comments after issuance of a rule could cure a violation of the APA's requirements, an agency could negate at will the Congressional decision that notice and an opportunity for comment must precede promulgation.").

346. *Air Transp. Ass'n of Am.*, 900 F.2d at 379 (internal quotation marks and brackets omitted).

347. See, e.g., *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 291 (7th Cir. 1979) ("Given that the agency was clearly willing to consider, fully and objectively, all comments in the post-

invalidate final regulations solely due to their temporary or interim-final origins, based upon findings that the agency's handling of postpromulgation comments demonstrated an "open mind" in the process of adopting final regulations.³⁴⁸ In applying this standard, the D.C. Circuit has suggested its presumption that the agency's mind is closed absent "a compelling showing" that the agency considered comments received "with particularly searching consideration."³⁴⁹

Courts have previously applied this open mind standard in evaluating the procedural validity of regulations that strongly resemble temporary Treasury regulations and their final successors. For example, in *Air Transport Ass'n of America v. Department of Transportation*, the FAA adopted an initial set of legally binding regulations that it labeled as "final" without prepromulgation notice and comment. Analogous to Treasury's standard practice, in the same document, the FAA requested comments, provided for a ninety-day comment period, and subsequently responded in a document labeled "Disposition of comments" without changing any regulatory language.³⁵⁰ After deciding that the agency's claim of good cause was inadequate, the court held that "[t]he FAA has not come close to overcoming the presumption of closed-mindedness in this case" because the agency failed either to change its rules or otherwise respond to public comments with "particularly searching consideration."³⁵¹

In *Intermountain Insurance Service of Vail, LLC v. Commissioner*, a D.C. Circuit panel suggested that the open mind standard might not apply in evaluating temporary Treasury regulations.³⁵² According to the D.C. Circuit in that case:

Ordinarily, we evaluate an agency's so-called open-mindedness only when it issues final regulations without the requisite comment period and then tries to cure that Administrative Procedure Act violation by holding a post-promulgation comment period. Here the Commissioner simultaneously issued immediately effective temporary regulations

promulgation period, there is no reason to believe that its consideration of the comments would have been any different if completed before the effective date.").

348. See, e.g., *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994) ("What is at issue is whether the FHWA displayed an open mind when considering the comments received *in response to* the June 3rd request."); *Levesque v. Block*, 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.").

349. *Advocates for Highway and Auto Safety*, 28 F.3d at 1292 (quoting *Air Transport Ass'n of Am.*, 900 F.2d at 379-80).

350. 900 F.2d at 373.

351. *Id.* at 380.

352. 650 F.3d 691, 709-10 (D.C. Cir. 2011).

and a notice of proposed rulemaking for identical final regulations and then held a 90-day comment period before finalizing the regulations.³⁵³

From this limited passage, it is unclear whether the D.C. Circuit intended to repudiate altogether the applicability of the open mind standard for temporary Treasury regulations or, if so, exactly why. Treasury clearly labels its temporary regulations as such, rather than as final or interim-final. By comparison, the regulatory documents in the case cited by the *Intermountain* Court as its contrary example, *Advocates for Highway and Auto Safety v. Federal Highway Administration*,³⁵⁴ were not precisely identified as final, either, but rather carried the labels “Notice of intent to accept applications for waivers,”³⁵⁵ “Receipt of waiver applications; request for comments,”³⁵⁶ and “Notice of final disposition.”³⁵⁷ At least one other circuit has applied the open mind standard in evaluating regulations that started as “interim-final” rules.³⁵⁸ It is unclear why the label a rule bears, rather than the legal effect of the rule, should matter for purposes of the open mind standard, and the *Intermountain* court did not elaborate further. Also, while the initial rule and request for comments in *Advocates for Highway and Auto Safety* were published several weeks apart rather than simultaneously, the *Intermountain* court did not explain why that distinction should matter, either.

The open mind standard represents one potential middle path for dealing with temporary Treasury regulations. Although jurisprudence applying the open mind standard is limited, courts are already at least somewhat familiar with it. APA § 706 instructs courts reviewing agency action to take “due account . . . of the rule of prejudicial error,”³⁵⁹ offering a textual anchor for an open mind standard for evaluating Treasury regulations with temporary origins. Most importantly, the open mind standard provides Treasury an opportunity to demonstrate case by case that its inversion of the APA’s procedural sequence was indeed harmless (or at least less

353. *Id.* at 709.

354. 28 F.3d 1288 (D.C. Cir. 1994).

355. Qualification of Drivers; Waiver Applications; Vision, Notice of Intent to Accept Applications for Waivers, 57 Fed. Reg. 10,295 (Mar. 25, 1992).

356. Qualification of Drivers; Waiver Applications; Vision, Receipt of Waiver Applications; Request for Comments, 57 Fed. Reg. 23,370 (June 3, 1992).

357. Qualification of Drivers; Vision Waivers, Notice of Final Disposition, 57 Fed. Reg. 31,458 (July 16, 1992).

358. *See* *Mortg. Investors Corp. of Ohio v. Gober*, 220 F.3d 1375, 1378–79 (Fed. Cir. 2000) (evaluating the agency’s open-mindedness with respect to an interim-final rule followed by postpromulgation notice and comment).

359. 5 U.S.C. § 706 (2006).

harmful than invalidating the regulation), while giving courts the flexibility to enforce the APA's expectations where Treasury cannot meet that burden.

As another possible application of the "prejudicial error" language of APA § 706, at least one court has employed an alternative "harmless error" rule to excuse deviations from APA rulemaking requirements. The Fifth Circuit's decision in *United States v. Johnson* is particularly instructive, as the procedures considered by the court in that case fairly closely approximate Treasury's approach to temporary regulations.³⁶⁰ In *Johnson*, the court considered the validity of a regulation interpreting the Sex Offender Registration and Notification Act ("SORNA"), which regulation was promulgated by the Attorney General initially as an interim-final rule accompanied by a good cause claim and request for public comments.³⁶¹ A few months later, the Attorney General separately issued a NOPR, requested comments, and subsequently issued final regulations.³⁶² The *Johnson* court rejected the Attorney General's good cause argument, and also rebuffed postpromulgation notice and comment as a categorical cure for improperly promulgated temporary or interim-final rules.³⁶³ "If we allowed post-promulgation comments to suffice in this case, 'we would make the provisions of § 553 virtually unenforceable.'"³⁶⁴ Nevertheless, citing among other cases the Supreme Court's decision in *Shinseki v. Sanders*, the *Johnson* court went on to conclude that the Attorney General's failure to comply with the APA in that instance represented harmless error, "in part because the interim rule publication addressed counter-arguments and set forth the basis and purpose of the rule."³⁶⁵

360. 632 F.3d 912 (5th Cir. 2011).

361. Office of the Attorney General; Applicability of the Sex Offender Registration and Notification Act, Interim Rule with Request for Comments, 72 Fed. Reg. 8894 (Feb. 28, 2007).

362. See Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification, Final Guidelines 73 Fed. Reg. 38,030 (July 2, 2008) (finalizing proposed SORNA regulations); Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification, Notice; Proposed Guidelines, 72 Fed. Reg. 30,210 (May 30, 2007) (proposing comprehensive regulations implementing SORNA). For good measure, in response to complaints that the Attorney General had not actually finalized the initial interim-final rule, the Attorney General formally did so and addressed comments received in response thereto, although without in any way altering the final regulations adopted in July 2008. See Office of the Attorney General; Applicability of the Sex Offender Registration and Notification Act, Final Rule, 75 Fed. Reg. 81,849 (Dec. 29, 2010) (formally "finalizing" the 2007 interim SORNA regulation, effective January 28, 2011).

363. *Johnson*, 632 F.3d at 929–31.

364. *Id.* at 929 (quoting *U.S. Steel Corp. v. EPA*, 595 F.2d. 207, 214 (5th Cir. 1979)).

365. *Id.* at 931.

According to the Supreme Court in *Sanders*, evaluating the applicability of the harmless error rule is a distinctly case-by-case determination that considers, among other factors,

an estimation of the likelihood that the result would have been different, an awareness of what body (jury, lower court, administrative agency) has the authority to reach that result, a consideration of the error's likely effects on the perceived fairness, integrity, or public reputation of judicial proceedings, and a hesitancy to generalize too broadly about particular kinds of errors when the specific factual circumstances in which the error arises may well make all the difference.³⁶⁶

Although courts have placed the burden of demonstrating an open mind on the agency, in describing the harmless error rule, the *Sanders* Court placed the burden of showing prejudice on the party challenging the regulation.³⁶⁷ Nevertheless, the Court went on to elaborate that the burden of demonstrating that the agency's error was harmful should not be particularly onerous. "Often the circumstances of the case will make clear to the appellate judge that the ruling, if erroneous, was harmful and nothing further need be said. But, if not, then the party seeking reversal normally must explain why the erroneous ruling caused harm."³⁶⁸

As was the case in *Johnson*, the typical temporary Treasury regulation is accompanied by a preamble in which Treasury offers some explanation of and justification for its interpretive choices. The simultaneously issued NOPR cross-references that document. Presumably many, if not most, of the preambles that accompany temporary Treasury regulations provide adequate justification for Treasury's interpretations to support a conclusion that postpromulgation notice and comment represented harmless error. Like the open mind standard, therefore, the harmless error rule provides courts with a potential basis for upholding many if not most Treasury regulations while still effectuating taxpayer rights under the APA.

366. 556 U.S. 396, 411–12 (2009). *Shinseki* concerned the interpretation of prejudicial error language in the statute governing the Veterans Court rather than the APA. *Id.* at 406. In considering that language, however, the Court observed that "Congress used the same words in the Administrative Procedure Act" and noted that "[l]egislative history confirms that Congress intended the Veterans Court 'prejudicial error' statute to 'incorporate a reference' to the APA's approach." *Id.* at 406–07. Consequently, the Court proceeded to evaluate the case at bar "in light of our general case law governing application of the harmless-error standard." *Id.* at 407.

367. *Id.* at 409.

368. *Id.* at 410.

2. *Chevron* Step Two

While the open mind standard and the harmless error rule offer interesting potential alternatives for addressing APA procedural challenges against temporary Treasury regulations and final Treasury regulations with temporary origins, in many cases, taxpayers do not explicitly raise a direct APA challenge in the course of tax litigation, or at least they do so in a manner clearly distinct from their claims regarding substantive validity. To paraphrase and perhaps oversimplify some litigation briefs, taxpayers often argue merely that courts should decline to extend *Chevron* deference to temporary Treasury regulations because Treasury has not employed notice and comment procedures in issuing those rules. Correspondingly, in cases concerning IRB guidance, taxpayers may argue simply that *Skidmore* provides the appropriate evaluative standard, again solely because the IRS did not subject its interpretations to notice and comment.

One way of construing such arguments—and the way I think courts have often read them in the past—is as invoking *Mead*'s two-part test. If courts accept the analysis of this Article regarding the proper application of *Mead* to temporary Treasury regulations and IRB guidance, then the above-described arguments must fail, as the lack of notice and comment alone does not dictate the standard of review. *Chevron* deference may apply, but potentially for the wrong reason, creating doctrinal confusion.

By contrast, another construction of these arguments exists that would allow the courts to clarify the relationship between procedural compliance and *Chevron* deference. In *Burks v. United States*, the Fifth Circuit in dicta suggested that noncompliance with the procedural requirements of notice-and-comment rulemaking where they clearly apply represents an alternative reason for declining to defer to an agency's legal interpretation as arbitrary and capricious at *Chevron* step two.³⁶⁹ Although the *Burks* court did not offer much analysis for this assertion, existing law does offer some basis for such an argument.

In *Motor Vehicle Manufacturers Ass'n of United States, Inc. v. State Farm Mutual Automobile Insurance Co.* and subsequent cases, the Supreme Court interpreted the arbitrary and capricious standard of APA § 706(2)(A) as requiring agencies to contemporaneously justify

369. See *Burks v. United States*, 633 F.3d 347, 360 n.9 (5th Cir. 2011).

their interpretive choices.³⁷⁰ Encouraged by at least some administrative law scholars,³⁷¹ many courts have extended the second step of *Chevron* analysis to encompass not only an evaluation of the substantive validity of agency action but also the variant of arbitrary and capricious review envisioned by the Court in *State Farm*.³⁷² In other words, by incorporating the *State Farm* approach to the arbitrary and capricious standard of APA § 706(2)(A) into *Chevron* step two analysis, these courts have rejected agency interpretations of ambiguous statutes that might otherwise be substantively valid on the ground that the agency has failed to explain the basis for its choice. Although the Supreme Court has not conclusively embraced this melding of *State Farm* arbitrary and capricious review and *Chevron* step two, it has at least hinted that its sympathies may lie in that direction.³⁷³

At least in theory, an APA procedural challenge is reviewable under APA § 706(2)(D), which specifically instructs reviewing courts to invalidate regulations that fail to comply with statutory procedures, rather than under the arbitrary and capricious standard of APA §

370. 463 U.S. 29, 42–43 (1983) (rejecting rules where the agency has, inter alia, “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency”); see also, e.g., *Judulang v. Holder*, 132 S. Ct. 476, 483–84 (2011) (applying *State Farm* arbitrary and capricious—or hard look—review to reject agency action); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–16 (2009) (elaborating the parameters of arbitrary and capricious review under APA § 706(2)(A) and *State Farm*).

371. See, e.g., Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1285–86 (1997) (advocating a merger of *Chevron* step two and *State Farm* hard look review based on an analysis of D.C. Circuit jurisprudence); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 128–29 (1994) (“Substituting something akin to hard look review for the deferential reasonableness standard that courts have used in *Chevron*’s step two would go far toward implementing the deliberative model.”).

372. See *Nat’l Ass’n of Regulatory Util. Comm’rs v. Interstate Commerce Comm’n*, 41 F.3d 721, 726 (D.C. Cir. 1994) (noting that “the inquiry at the second step of *Chevron* overlaps analytically with a court’s task under the [APA] . . . in determining whether agency action is arbitrary and capricious (unreasonable)”; see also *Leyse v. Clear Channel Broad. Inc.*, 697 F.3d 360, 372 (6th Cir. 2012) (describing *Chevron* step two analysis by reference to *State Farm*); *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111, 115 (1st Cir. 2009) (explaining the *Chevron* framework in *State Farm* terms); *North Carolina v. EPA*, 531 F.3d 896, 906 (D.C. Cir. 2008) (quoting *State Farm* standard in describing *Chevron* analysis). *But see* *Recording Indus. Ass’n of Amer., Inc. v. Librarian of Cong.*, 608 F.3d 861, 865 (D.C. Cir. 2010) (“[T]his is a *State Farm* case, not a *Chevron* case.”); *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009) (“Unlike *Chevron* step two review, which focuses on whether the agency’s interpretation was reasonable, ‘arbitrary and capricious’ review focuses on the reasonableness of the agency’s decisionmaking processes.”).

373. See *Judulang*, 132 S. Ct. at 483 n.7 (2011) (calling *Chevron* step two and arbitrary and capricious review under APA § 706(2)(A) “the same” in dicta).

706(2)(A). Nevertheless, APA § 706(2)(A) in full correspondingly compels reviewing courts to set aside regulations found to be “arbitrary, capricious, an abuse of discretion, or *otherwise not in accordance with law*.”³⁷⁴ Failing to comply with congressionally mandated procedural requirements, whether found in APA § 553(b) or elsewhere, is obviously not in accordance with law. Viewing APA § 706(2)(A) and (D) in this way supports the *Burks* court’s linkage of procedural noncompliance with *Chevron* step two.

In any case in which the government bases its enforcement claims upon a temporary Treasury regulation or IRB guidance document, and particularly where the government asserts penalties for noncompliance with those formats, courts should recognize that *Chevron* provides the appropriate evaluative standard. When confronted with taxpayer arguments that *Chevron* deference is inappropriate or *Skidmore* review applies due to the government’s lack of notice and comment, courts ought to adopt the approach suggested by the *Burks* court. In other words, courts should, at *Chevron* step two, at least contemplate whether the want of notice and comment procedures means that Treasury regulations and IRB guidance documents are arbitrary, capricious, and contrary to law.

Such an approach does not necessarily mean that the taxpayer will win in all cases. For example, courts may conclude that the government’s interpretation of the law is demonstrably correct at *Chevron* step one. Alternatively, in the case of temporary Treasury regulations with postpromulgation notice and comment, courts could decide at *Chevron* step two that the lack of notice and comment represents harmless error, as described above. But to the extent that the I.R.C. is ambiguous, blending *Chevron* step two and procedural review in this manner again offers courts flexibility to accept or reject temporary Treasury regulations or IRB guidance documents case by case while maintaining doctrinal consistency.

CONCLUSION

From an administrative law perspective, the tax system is a bit of a mess. Unnoticed and unchecked, administrative law doctrine and the government’s tax administrative practices evolved in different directions. Many legal scholars would argue that existing administrative law doctrines are misguided and that the government’s tax administrative practices are better. They may be right as a

374. 5 U.S.C. § 706(2)(A) (2006) (emphasis added).

normative matter. For one thing, as this Article amply demonstrates, applying the framework of *Mead*, *Chevron*, and *Skidmore* formalistically may lead to some challenging conclusions. Now that the Supreme Court in *Mayo* has asserted its policy of administrative law uniformity vis-à-vis the tax system, however, reconciling the tax administrative practices and administrative law doctrines becomes necessary. The courts are more likely to require tax administration to fall in line with general administrative law norms than the other way around.

Hence, the purpose of this Article is not to justify the administrative law doctrines discussed herein, but rather to explore the implications and possibilities of those doctrines for the temporary regulations and IRB guidance formats that are such an integral part of the existing tax laws. Some uncertainty is perhaps inevitable as the tax community resolves the discrepancies between administrative law doctrines and actual practices. The solution, however, is not to bury our heads in the sand and hope the problems that *Mayo* brings to the fore go away. It is much better to face those issues head on, with concrete proposals for resolving them coherently.