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PRESERVING FAIRNESS IN TAX ADMINISTRATION IN THE *MAYO* ERA

*Steve R. Johnson**

One of the dominant themes in contemporary federal taxation is bringing tax administration within the fold of general administrative law. In 2011, the United States Supreme Court unambiguously embraced this movement in the landmark case *Mayo Foundation for Medical Education & Research v. United States*, in which the Court held that challenges to the validity of Treasury regulations generally are governed by the *Chevron* standard to the same extent as are regulations issued by other administrative agencies.

There was an immediate and strong hostile reaction to *Mayo* in tax circles. Many fear that *Mayo* dramatically tips the balance in favor of the Internal Revenue Service (Service), such that challenging allegedly invalid tax regulations will be very difficult in the future. This article maintains that, just on its own terms, *Mayo* is unlikely to have this effect.

But the world into which *Mayo* has thrust tax administration is populated by other denizens. *Mayo*, safe in itself, may become dangerous when combined with them. Specifically, *Mayo* may pose the peril of governmental overreaching when Treasury and the Service use that case in conjunction with the *Brand X* holding allowing regulations to supersede prior judicial statutory construction, or with the *Auer* rule according agencies great deference in interpreting their own regulations, or with statutory rules allowing Treasury to issue regulations with retroactive effect, or with possible application of *Chevron* to Service guidance documents below the level of regulations.

This article assesses the practical significance of such threats, and it

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suggests ways by which they may be defused. These ways entail the core notion of delegation, which is the basis of administrative deference doctrines. They also entail substantive, procedural, and constructional arguments by which government overreaching through tax regulations may be curbed. Such arguments sometimes are within existing doctrine; other times they will require modest and salutary doctrinal adjustment. On the basis of these approaches, the benefits of *Mayo* can be preserved without the blight of regulatory unfairness.

TABLE OF CONTENTS

I.	INTRODUCTION.....	271
II.	<i>MAYO</i>	274
III.	BENEFITS OF <i>MAYO</i>	275
	A. <i>Mayo and the Attack on Tax Exceptionalism</i>	275
	1. Narrow Aspect	275
	1. Broad Aspect.....	278
	B. <i>Mayo and Chevron</i>	280
	1. Problems with <i>Chevron</i>	281
	2. Options.....	283
	3. <i>Mayo's</i> Effect on <i>Chevron</i>	284
IV.	GOVERNMENTAL OVERREACHING — <i>MAYO</i> ALONE	285
	A. National Muffler <i>Deferential</i>	286
	B. <i>Chevron Not Insuperable</i>	287
	C. <i>Experience Under Mayo</i>	288
V.	GOVERNMENTAL OVERREACHING — <i>MAYO</i> WITH OTHER RULES.....	289
	A. <i>Values</i>	290
	B. <i>Potentially Dangerous Combinations</i>	291
	1. <i>Brand X</i>	292
	2. <i>Auer</i>	292
	3. Section 7805(b).....	293
	4. Sub-Regulation Positions.....	295
	5. Potential Combinations	296
	C. <i>Practical Significance</i>	298
VI.	CURBING THE POTENTIAL FOR OVERREACHING	300

A. <i>Delegation Arguments</i>	301
1. Beyond the Terms of the Delegation	301
2. Adds a New Requirement for Limitation.....	303
3. Choice Appropriate for Congress Only.....	304
B. <i>Procedural Arguments</i>	307
1. Notice and Comment.....	307
2. “Hard Look” Review.....	309
3. Retroactivity	311
4. <i>Auer/Seminole Rock</i>	313
a. <i>Arguments Within Existing Doctrines</i>	313
b. <i>Abrogation</i>	314
5. Regulatory Flexibility Act.....	315
C. <i>Substantive Arguments</i>	316
1. Regulations.....	316
a. <i>Inconsistent with Statutory</i> <i>Text or Structure</i>	316
b. <i>Inconsistent with Statutory Purpose</i>	317
c. <i>Inconsistent with Extrinsic Norms</i>	318
2. Sub-Regulation Positions	320
D. <i>Construction Arguments</i>	322
E. <i>Summary</i>	323
VII. CONCLUSION	324

I. INTRODUCTION

In its impact on our lives, the tax law is the single greatest medium of interface between our government and our citizens. As the Supreme Court has recognized, “[n]o other branch of the law touches human activities at so many points.”¹

Despite the length and complexity of the statutory tax law, the variety of economic and social transactions is such that numerous important matters are addressed only generally or not at all by the statutes. At the federal level, the gaps are filled by tax regulations promulgated by the Department of the Treasury and sub-regulation guidance issued by the Internal Revenue Service (Service).² Valid Treasury regulations have the

¹ *Dobson v. Commissioner*, 320 U.S. 489, 494–95 (1943). Of course, the length and complexity of the Internal Revenue Code (the “Code”) and thus its impact on our affairs has only grown since *Dobson* was handed down.

² For a description of Treasury regulations and lower-level Internal Revenue Service (Service) guidance, see DAVID M. RICHARDSON, JEROME BORISON & STEVE JOHNSON, *CIVIL*

force of law³ and are second in importance only to the Internal Revenue Code (Code) itself.⁴ Thus, the standards by which the validity of tax regulations is assessed are of critical significance to tax administration in the United States.

In January 2011, the Supreme Court decided a landmark case in this area: *Mayo Foundation for Medical Education & Research v. United States*.⁵ Speaking of *Mayo*, the chief of the appellate section of the Department of Justice Tax Division stated: “There has been a sea change in administrative law, and certainly tax has been part of it.”⁶ Like most important cases, *Mayo* clarified some significant issues but left others unresolved.

The reaction to *Mayo* from the community of taxpayers and their representatives has been decidedly negative.⁷ The most important aspect of this reaction has been the fear that *Mayo* radically tilts the “playing field” in favor of the Service, making it difficult, if not impossible, for taxpayers to effectively challenge Treasury regulations in many cases.

This article evaluates that concern. It concludes that, on its own terms alone, *Mayo* is not particularly dangerous and, indeed, is desirable in several major respects. However, the article also concludes that, when *Mayo* is combined with other principles of administrative law, the potential for overreaching by the Service exists. The article offers specific suggestions — both arguments available to taxpayers and doctrinal alterations available to the courts — by which this potential can be

TAX PROCEDURE 17–31 (2d ed. 2008).

³ E.g., *Helvering v. R.J. Reynolds Tobacco Co.*, 306 U.S. 110, 115 (1939); *Boulez v. Commissioner*, 810 F.2d 209, 212 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 896 (1987); *Union Elec. Co. v. United States*, 305 F.2d 850, 854 (Ct. Cl. 1962).

⁴ For a description of the process by which tax regulations are drafted, reviewed, and issued, see *Treas. Reg. § 601.601(a)-(c)* (as amended in 1987); Mitchell Rogovin & Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance and Retroactivity in the 21st Century: A View from Within*, TAXES, Aug. 2009, at 21; Paul F. Schmid, *The Tax Regulations Making Process— Then and Now*, 24 TAX LAW. 541 (1971).

⁵ *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704 (2011).

⁶ Jeremiah Coder, *IRS Official Explains, Defends Rulemaking Process*, 134 TAX NOTES 1229, 1229 (Mar. 5, 2012) (quoting Gilbert Rothenberg).

⁷ The commentary, favorable as well as critical, includes Jeremiah Coder, *Mayo's Unanswered Questions*, 130 TAX NOTES 1118 (Mar. 7, 2011); Bruce Givner & Ken Barish, *Challenging IRS Regulations: The Supreme Court's Mayo Decision*, TAX PRAC. & PROC., Feb.-Mar. 2011, at 25; Leandra Lederman & Stephen Mazza, *More Mayo Please? Temporary Regulations After Mayo Foundation v. United States*, 31 ABA SECTION OF TAX'N NEWS QUARTERLY 15 (2011); Richard M. Lipton & Russell R. Young, *Mayo Foundation, Treasury Regulations, and the "Death" of National Muffler*, 114 J. TAX'N 206 (2011); David J. Shakow, *Who's Afraid of the APA?*, 134 TAX NOTES 825 (Feb. 13, 2012); Patrick J. Smith, *Life After Mayo: Silver Linings*, 131 TAX NOTES 1251 (Jun. 20, 2011).

mitigated. Taking these possibilities into account, the article predicts that, over time, it will be recognized that *Mayo* (properly argued in future cases) will increase, not decrease, the chances that taxpayers can successfully attack unwholesome exercises of tax rulemaking by the Treasury and the Service.

The article has seven parts. Part II is foundational. It describes the context, facts, and holdings of *Mayo*.

Part III explains the two great benefits produced by the *Mayo* decision. First, there has been a parochialism about tax practice. Tax practitioners have often thought of tax as an island upon whose shores the waves of general administrative law do not wash. *Mayo* firmly dispels such insularity.⁸ It does so narrowly by establishing that the proper standard for evaluating the validity of tax regulations is provided by the general administrative law *Chevron* decision⁹ rather than by the pre-*Chevron*, tax-specific *National Muffler* case.¹⁰ *Mayo* also does so more broadly by providing that the Administrative Procedure Act (APA)¹¹ and other sources of general administrative law apply as surely to tax as they do to other regulatory areas. Second, *Mayo* contributes to a welcome trend in the case law to mitigate some of the objectionable aspects of *Chevron*.

Part IV begins the discussion of the possibility of governmental overreaching in tax rulemaking. It shows that, on its own terms, *Mayo* does not materially shift the prospects of success in litigation involving challenges to tax regulations. Thus, simply at this level, the risks of *Mayo* pale in comparison to its benefits.

Part V, however, takes a wider angle of vision. It considers *Mayo* not in isolation but in conjunction with other principles of administrative and tax law. These other principles include (1) the *Brand X* rule under which agency rulemaking can trump previous judicial decisions construing statutes,¹² (2) the *Auer* principle under which courts accord great deference to agencies' interpretations of their own regulations,¹³ (3) the ability of the Treasury under section 7805(b), in certain circumstances, to issue regulations with retroactive effect and (4) possible application of *Chevron* to Service positions lower in dignity and effect than Treasury regulations.

⁸ See, e.g., Jeremiah Coder, *Tax Law's Vanity Mirror Shattered*, 131 TAX NOTES 35 (Jan. 2, 2012); Roger Dorsey, *Mayo and the End of "Tax Exceptionalism" in Judicial Deference*, 87 PRAC. TAX STRATEGIES 63 (2011).

⁹ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹⁰ *Nat'l Muffler Dealers Ass'n v. United States*, 440 U.S. 472 (1979).

¹¹ Administrative Procedure Act, 5 U.S.C. §§ 551–59 (2012).

¹² *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

¹³ *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413–14 (1945).

If the government combines these principles and rules in an aggressive fashion, it could short-circuit appropriate procedural safeguards and achieve substantively undesirable outcomes. Although I have high regard for the fairness and sensitivity with which Treasury and the Service typically administer the tax law, the potential for governmental overreaching demands attention and containment.

Part VI develops means by which such containment can be effected. It explores four categories of limiting principles based on delegation, procedure, substance, and interpretation concepts. Part VI notes several particular cabining principles under each of these categories. The assertion of such principles by taxpayers, and their acceptance by the courts, will go far to preserve the benefits of *Mayo* while controlling the potential for governmental overreaching that could arise from the combination of *Mayo* and other rules. Part VII concludes.

II. *MAYO*

Taxes imposed under the Federal Insurance Contributions Act (“FICA”) fund the Social Security system. FICA taxes are imposed on wages,¹⁴ but excluded from tax are amounts paid for “service performed in the employ of . . . a school, college, or university . . . if such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university.”¹⁵

The Mayo Foundation and the University of Minnesota have residency programs that train doctors. The programs are of mixed character. Those enrolled in them receive education, but they also render substantial services for which they receive substantial compensation.

The issue in *Mayo* was whether the medical residents in these programs are students within the meaning of the FICA exception described above. Under a Treasury regulation promulgated in 1951, eligibility for the exception was determined on a case-by-case basis.¹⁶ In December 2004, Treasury amended the regulation to provide prospectively that the exception applies only when the educational component predominates over the service component. The amended regulation also provides categorically that scheduled work of over 40 hours per week disqualifies a person from the exception.¹⁷ The Mayo medical residents’ schedules and the University medical residents’ schedules typically far exceed this limit.

¹⁴ I.R.C. §§ 3101(a), 3111(a).

¹⁵ I.R.C. § 3121(b)(10)(A)-(B).

¹⁶ Treas. Reg. § 31.3121(b)(10)-2(d) (1960); Rev. Rul. 78-17, 1978-1 C.B. 307.

¹⁷ Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii) (1960).

Mayo and the University challenged the validity of the amended regulation. The district court held for the challengers.¹⁸ The circuit court reversed.¹⁹ In an opinion by Chief Justice Roberts, the Supreme Court unanimously affirmed the circuit court. The Court held that *Chevron* provided the controlling standard.²⁰ Applying the famous *Chevron* two-step,²¹ the Court further held that the amended regulation survived step one because the statute is silent or ambiguous as to the content of the student exception²² and that it survived step two because it reasonably interprets the statute.²³

III. BENEFITS OF *MAYO*

Mayo makes salutary contributions to tax administration. Two of the benefits are of principal significance. First, *Mayo* integrates tax law into the broader fabric of administrative law. It does so both narrowly (by establishing the primacy of *Chevron* as the standard governing attacks on tax regulations) and broadly (by holding the APA and other administrative law rules applicable in tax). Second, *Mayo* furthers a developing trend in the law to ameliorate some of the problems with *Chevron*.

A. *Mayo and the Attack on Tax Exceptionalism*

1. Narrow Aspect

The validity or weight of tax regulations and sub-regulation guidance had been tested numerous times over scores of years before *Chevron* was handed down in 1984.²⁴ In *Mayo*, the taxpayer argued that *National*

¹⁸ *Mayo Found. For Med. Educ. & Research v. United States*, 503 F. Supp. 2d 1154 (D. Minn. 2007), *rev'd*, 131 S. Ct. 704 (2011), *aff'g* 568 F.3d 675 (8th Cir. 2009).

¹⁹ *Mayo Found. For Med. Educ. & Research v. United States*, 568 F.3d 675 (8th Cir. 2009), *aff'd*, 131 S. Ct. 704 (2011).

²⁰ *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 712–14 (2011).

²¹ *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

²² 131 S. Ct. at 711.

²³ *Id.* at 716.

²⁴ The result of these cases was considerable, but not unlimited, deference to Treasury regulations:

“There is a strong presumption in favor of the validity of Treasury regulations. . . . A challenger to a Treasury regulation will prevail, however, if he establishes that a regulation is unreasonable or plainly inconsistent with the Code itself. It is thus apparent that the deference paid to Treasury regulations is not boundless.”

Goodson-Todman Enters., Ltd. v. Commissioner, 784 F.2d 66, 74 (2d Cir. 1986) (citations

Muffler, the most frequently cited case of the tax-specific pre-*Chevron* line, should provide the standard for assessing the validity of the regulation at issue. Central to the dispute as to standards was the fact that the regulation at issue in *Mayo* is a general authority, not specific authority, regulation.

Congress has conferred rulemaking authority to Treasury and the Service in two principal ways: specific authority and general authority delegations.²⁵ Specific authority delegations appear in hundreds of sections of the Internal Revenue Code,²⁶ in subsections or paragraphs which, with varying language, direct or authorize Treasury to promulgate regulations to implement the section at hand.²⁷ In contrast, general authority regulations derive from Code section 7805(a), which allows Treasury to issue regulations “needful . . . for the enforcement of” the Code.

It was widely agreed even before *Mayo* that *Chevron* provides the standard when a taxpayer challenges a specific authority regulation.²⁸ However, courts²⁹ and commentators³⁰ disagreed as to whether *Chevron* or the *National Muffler* line of cases governed attacks on the validity of general authority regulations. The Supreme Court itself was responsible for much of the confusion, sometimes citing *Chevron* and other times citing *National Muffler* without explaining why one case and not the other was being cited.³¹ Some older cases stated that general authority regulations are

omitted); see also *United States v. Cartwright*, 411 U.S. 546, 550 (1973) (noting deference paid to tax regulations but adding: “But that principle is to set the framework for judicial analysis; it does not displace it.”).

²⁵ In addition to Treasury regulations, there are a number of internal procedural regulations of the Service. They describe how Service functions are performed and address the respective roles of taxpayers and Service personnel in various administrative processes. These procedural regulations are issued by the Service without the necessity of Treasury approval. Treas. Reg. §§ 601.101–601.901 (1996).

²⁶ Different observers have come up with different tallies. E.g., N.Y.S. Bar Ass’n Tax Section, *Report on Legislative Grants of Regulatory Authority*, 2006 TNT 215-22 (Nov. 3, 2006) (stating that there are approximately 550 specific authority delegations in the Code).

²⁷ E.g., I.R.C. §§ 385(a), 469(l), 1502.

²⁸ E.g., *Carlos v. Commissioner*, 123 T.C. 275, 280 (2004); *Square D. Co. & Subsidiaries v. Commissioner*, 118 T.C. 299, 307 (2002), *aff’d*, 438 F.3d 739 (7th Cir. 2006).

²⁹ E.g., *Swallows Holding, Ltd. v. Commissioner*, 126 T.C. 96, 97 (2006) (applying *National Muffler*), *rev’d*, 515 F.3d 162, 169–70 (3d Cir. 2008) (applying *Chevron*).

³⁰ Compare John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the Chevron Era*, 64 GEO. WASH. L. REV. 35 (1995) (arguing against application of *Chevron*), with Steve R. Johnson, *Swallows as it Might Have Been: Regulations Revising Case Law*, 112 TAX NOTES 773 (Aug. 28, 2006) (arguing for application of *Chevron*).

³¹ Compare *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 219 (2001), and *Cottage Sav. Ass’n v. Commissioner*, 499 U.S. 554, 560–61 (1991) (both citing *National Muffler*), with *Atl. Mut. Ins. Co. v. Commissioner*, 523 U.S. 382, 387 (1998), and *United States v. Boyle*, 469 U.S. 241, 246 n.4 (1985) (both citing *Chevron*).

entitled to less deference than specific authority regulations,³² but the truth of that has been questioned.³³

In *Mayo* and other cases, taxpayers pressed the following language from *National Muffler*:

A regulation may have particular force if (1) it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, (2) the manner in which it evolved merits inquiry. Other relevant considerations are (3) the length of time the regulation has been in effect, (4) the reliance placed on it, (5) the consistency of the Commissioner's interpretation, and (6) the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.³⁴

Taxpayers argued that, in the given case, one or more of the six factors was absent, and thus that the regulation was not entitled to deference.³⁵

In significant part, *Mayo* resolved the clash as to the governing standard. It makes clear that *Chevron* controls as to general authority, as well as specific authority, regulations, especially when the regulation has gone through the APA notice-and-comment procedure,³⁶ as the regulation at issue in *Mayo* had.³⁷

Moreover, *Mayo* disregarded a number of the considerations listed in *National Muffler*. Specifically,

- “We have repeatedly held that ‘[a]gency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework.’”³⁸

³² *E.g.*, *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982); *Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981).

³³ *E.g.*, BORIS I. BITTKER, MARTIN J. MCMAHON, JR. & LAWRENCE A. ZELENAK, *FEDERAL INCOME TAXATION OF INDIVIDUALS* 46-5 (3d ed. 2002); Johnson, *supra* note 30, at 780–81.

³⁴ *Nat’l Muffler Dealers Ass’n v. United States*, 440 U.S. 472, 477 (1979) (numbers added).

³⁵ For example, the *Mayo* taxpayer argued that the regulation was not a substantially contemporaneous construction of the statute, that it emerged from a course of litigation, and that there had been little reliance on the regulation. *Mayo Found. For Med. Educ. & Research v. United States*, 503 F. Supp. 2d 1154, 1176 (D. Minn. 2007), *rev’d*, 131 S. Ct. 704 (2011), *aff’g* 568 F.3d 675 (8th Cir. 2009).

³⁶ *See* 5 U.S.C. § 553 (2012).

³⁷ *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 714 (2011).

³⁸ *Id.* at 712 (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545

- “We have instructed that ‘neither antiquity nor contemporaneity with [a] statute is a condition of [a regulation’s] validity.’”³⁹
- “We have found it immaterial to our analysis that a ‘regulation was prompted by litigation.’”⁴⁰ This makes sense. Numerous tax questions eventually are litigated, and Treasury or the Service will be parties to all of those cases. Thus, denying validity to regulations issued in expectation of litigation would render most, if not all, regulations suspect.⁴¹

The language of *Mayo* could fairly be read as entirely overthrowing *National Muffler*,⁴² but doing so would be slightly undesirable because *National Muffler* and the line of cases of which it was a part reached sensible results based on sensible criteria.⁴³ Wholesale overthrow also would be unnecessary. As shown in part IV.A below, *National Muffler*, like *Chevron*, is a deferential precedent.⁴⁴

2. Broad Aspect

The second main thrust of *Mayo* is broader and will ultimately be more significant. In reaching its conclusions about general authority versus specific authority tax regulations and *Chevron* versus *National Muffler*, the *Mayo* Court cited five cases — all of them non-tax cases.⁴⁵

U.S. 967, 981 (2005) and citing *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009)) (punctuation omitted). Indeed, the regulation in *Chevron* was upheld despite the agency having changed its previous position. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 857–58 (1984).

³⁹ *Mayo*, 131 S. Ct. at 712 (quoting *Smiley v. Citibank (S.D.) N.A.*, 517 U.S. 735, 740 (1996)) (punctuation omitted). The regulation at issue in *Chevron* was not roughly contemporaneous with the statute. *Chevron*, 467 U.S. at 851–58.

⁴⁰ *Mayo*, 131 S. Ct. at 712 (quoting *Smiley*, 517 U.S. at 741, and citing *United Dominion Ind. Inc. v. United States*, 532 U.S. 822, 838 (2001)) (punctuation omitted). For detailed exploration of this matter, see Leandra Lederman, *The Fight over “Fighting Regs” and Judicial Deference in Tax Litigation*, 92 B.U. L. REV. 643 (2012).

⁴¹ See *Indianapolis Life Ins. Co. v. United States*, 115 F.3d 430, 436 (7th Cir. 1997).

⁴² See *Mayo*, 131 S. Ct. at 712–14.

⁴³ E.g., *Nat’l Muffler Dealers Ass’n v. United States*, 440 U.S. 472, 477 (stating that the ultimate question is “whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose.”).

⁴⁴ The *Mayo* Court accepted the taxpayers’ contention that *National Muffler* is less deferential than *Chevron*. *Mayo*, 131 S. Ct. at 713. As shown in part IV.A *infra*, this view is incorrect.

⁴⁵ *Mayo*, 131 S. Ct. at 713–14 (citing *Chevron*, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005), *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Sullivan v. Everhart*, 494 U.S. 83 (1990)).

Inference is unneeded here, however, as the Court made explicit the equivalent treatment of tax and non-tax regulations:

Mayo has not advanced any justification for applying a less deferential standard of review to Treasury Department regulations than we apply to the rules of any other agency. In the absence of such justification, we are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly recognized the importance of maintaining a uniform approach to judicial review of administrative action.⁴⁶

With these words, the *Mayo* Court disposed of tax exceptionalism, the notion that tax administration is exempt from the rules governing other areas of regulation.⁴⁷ Similarly, a few months after *Mayo* was handed down, the D.C. Circuit stated: “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.”⁴⁸ Other courts have followed suit.⁴⁹

Precisely how far we can go in this direction remains to be seen. In one respect, taxation is different from and more important than any other single federal activity.⁵⁰ Revenue is the *sine qua non* for all other governmental activities. The modern welfare and regulatory state could not exist without a robust tax system.⁵¹

This revenue imperative has resulted in several features of tax

⁴⁶ *Mayo*, 131 S. Ct. 713 (punctuation omitted). Fittingly, *Mayo* quoted one case and cited one more as support, both non-tax cases. *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999); *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212 (1989).

⁴⁷ For arguments against tax exceptionalism, see Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow up to Be Tax Lawyers*, 13 VA. TAX REV. 517 (1994); Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537 (2006); Steve R. Johnson, *Intermountain and the Importance of Administrative Law in Tax Law*, 128 TAX NOTES 837 (Aug. 23, 2010); Rimma Tsvasman, Note, *No More Excuses: A Case for the IRS's Full Compliance with the Administrative Procedure Act*, 76 BROOK. L. REV. 837 (2011).

⁴⁸ *Cohen v. United States*, 650 F.3d 717, 723 (D.C. Cir. 2011) (en banc) (applying APA waiver of sovereign immunity and presumption of judicial reviewability). For discussion of *Cohen*, see Steve R. Johnson, *Cohen: Hard Case Makes (Semi) Bad Law*, ABA SEC. TAX'N NEWS Q., Fall 2011, at 12.

⁴⁹ E.g., *Koprowski v. Commissioner*, 138 T.C. 5, 9 (2012) (Holmes, J., concurring).

⁵⁰ See, e.g., *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 734 (1979) (“That collection of taxes is vital to the functioning, indeed existence, of government cannot be denied.”).

⁵¹ Generations ago, the Supreme Court declared: “taxes are the lifeblood of government, and their prompt and certain availability an imperious need.” *Bull v. United States*, 295 U.S. 247, 259 (1935).

administration that uniquely advantage the Service. For example, (1) the Service's administrative summons is an unusually powerful information-gathering device, subject to only weak limitations;⁵² (2) the Service's tools for collecting tax debts far exceed in power debt collection options available to private creditors;⁵³ and (3) the Anti-Injunction Act and the Declaratory Judgment Act typically bar taxpayer efforts to sue to forestall Service actions prior to commencement of collection activity.⁵⁴

Such differences, however, do not diminish the significance of *Mayo* in this regard. The movement against tax exceptionalism does not demand that tax and all other areas be made to fit a Procrustean bed. It requires only that differences between tax and other areas be created for good reason by Congress, rather than stemming from judicial decree or parochial insularity.

Mayo is right to insist on the greatest degree of congressionally permitted administrative uniformity between tax and other regulatory areas. Treasury and the Service are agencies within the meaning of, and thus subject to the requirements of, the APA.⁵⁵ The APA and other sources of administrative law have made occasional appearances in tax case law⁵⁶ and commentary⁵⁷ for decades, but the tax bar has been slow to weave these strands together. Under the impetus of *Mayo*, we may hope — and reasonably expect — that this belated morn will dawn.

B. *Mayo* and Chevron

Chevron is a heavily criticized doctrine. In my view, the criticism is appropriate. The *Chevron* opinion was flawed to start with, and its flaws have been compounded by subsequent developments. Fortunately, there

⁵² See, e.g., Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1 (2004).

⁵³ See, e.g., *United States v. Rodgers*, 461 U.S. 677, 697 (1983); Steve R. Johnson, *The IRS as Super Creditor*, 92 TAX NOTES 655, 655 (July 30, 2001).

⁵⁴ I.R.C. § 7421; 28 U.S.C. § 2201 (2012). These statutes have reared their heads recently as potential obstacles to judicial review of the constitutionality of the individual mandate and shared responsibility payment components of the Patient Protection and Affordable Care Act of 2010 (so-called Obamacare). See Steve R. Johnson, *Anti-Injunction Act and the Individual Mandate*, 133 TAX NOTES 1395 (Dec. 12, 2011).

⁵⁵ Administrative Procedure Act, 5 U.S.C. § 551(1) (2012).

⁵⁶ E.g., *Am. Standard Inc. v. Commissioner*, 602 F.2d 256 (Ct. Cl. 1979) (applying the APA notice-and-comment requirements to a tax regulation); *Wing v. Commissioner*, 81 T.C. 17 (1983).

⁵⁷ E.g., Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX LAW. 343 (1991); Schuyler M. Moore, *New Regulations Violate Regulatory Flexibility Act and Executive Order 12291*, 36 TAX NOTES 805 (Aug. 3, 1987).

appears to be a move afoot to downplay *Chevron*, not in name but in fact. *Mayo* contributes to that trend.

1. Problems with *Chevron*

Chevron is the most cited case in administrative law and perhaps in American law generally.⁵⁸ Yet, it is an accidental doctrine; the Supreme Court did not appreciate that *Chevron* would become a landmark case.⁵⁹

Discontent with *Chevron* has been building, and both tax and non-tax scholars have called for its abrogation.⁶⁰ The criticisms are both empirical and normative, including the following. First, *Chevron* has proved highly unpredictable, both as to when it will be applied⁶¹ and what results it will produce when applied.⁶² Subsequent cases have contributed to the muddle.⁶³

Second, many have complained that *Chevron* lacks an adequate theoretical foundation.⁶⁴ For example, a key aspect of *Chevron* is the notion

⁵⁸ See, e.g., STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 247 (6th ed. 2006).

⁵⁹ Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in ADMINISTRATIVE LAW STORIES 398 (Peter L. Strauss ed., 2006).

⁶⁰ E.g., Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010); Bryan T. Camp, *Interpreting Statutory Silence*, 128 TAX NOTES 501, 507 (Aug. 2, 2010). Professor Beerman's article was cited in a dissenting opinion in a much-discussed recent tax case. *Mannella v. Commissioner*, 631 F.3d 115, 130 n.14 (3d Cir. 2011) (Ambro, J., dissenting).

⁶¹ E.g., Ann Graham, *Searching for Chevron in Muddy Waters: The Roberts Court and Judicial Review of Agency Regulations*, 60 ADMIN. L. REV. 229 (2008); David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327 (2000); Linda Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725 (2007); Note, *Justifying the Chevron Doctrine: Insights from the Rule of Lenity*, 123 HARV. L. REV. 2043 (2010).

⁶² E.g., *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 295 (2009) (Scalia, J., concurring) (citing cases applying *Chevron* but reaching inconsistent results).

⁶³ The Court clarified or modified *Chevron* in *United States v. Mead Corp.*, 533 U.S. 218 (2001). *Mead* has been called an "inscrutable opinion . . . whose incomprehensible criteria for *Chevron* deference have produced so much confusion in the lower courts." *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 295 (2009) (Scalia, J., concurring).

⁶⁴ E.g., William R. Anderson, *Against Chevron: A Modest Proposal*, 56 ADMIN. L. REV. 957 (2004); Lisa Schultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 549 (2009); John E. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 189–211 (1998); Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 569 ADMIN. L. REV. 673 (2007).

that Congress intended the relevant agency to fill in gaps in the statute.⁶⁵ Yet “[s]everal important commentators have serious doubts that there is any evidence to support the cornerstone of *Chevron* deference for gaps.”⁶⁶

Third, the very term “*Chevron* deference” breeds confusion and analytical imprecision.⁶⁷ “Deference” is a decidedly bad word choice because it elides two fundamentally different operations.

One sense in which deference has been used in the *Chevron* context refers to the validity of a regulation or other rule. Thus “to accord *Chevron* deference” is sometimes used to mean “to hold that the regulation or other rule is valid and legally enforceable.”

But this is strange. A court does not “defer” to the Constitution or a statute. Such measures are binding law. Judges apply binding law; they do not defer to it. Similarly, a valid substantive or legislative regulation has “force of law” effect.⁶⁸ Thus, when a court applies *Chevron* in this context, the question is whether the regulation is valid and thus binding on the court, not whether the court will “defer” to the regulation.⁶⁹

The other sense in which deference is used refers to nonbinding administrative positions, including interpretive regulations.⁷⁰ Here, it is linguistically possible to speak of deference. A court *must* follow a valid substantive regulation; it *may* choose to be influenced by a lower-level

⁶⁵ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

⁶⁶ Irving Salem, *Mayo Dissected: Some Dragons Slain, Some Still Breathing Fire*, 130 TAX NOTES 1327, 1332 (Mar. 14, 2011) (citing Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2638 (2003) and Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 468–78 (1989)). Indeed, *Chevron* seems to turn delegation on its head. Originally, delegation doctrine looked to an affirmative conferral of authority by Congress upon the agency. *Chevron*, however, is satisfied to presume delegation from statutory silence.

⁶⁷ Cf. Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 2 (1996) (“[T]he Court befogs APA concepts by sloppy and bloated opinions, which leave confusion in their wake. The Court’s most hurtful sin is its pervasive imprecision.”).

⁶⁸ E.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979); *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993). Although widely used, “force of law” is a concept of limited clarity. See, e.g. Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can't Figure Out About Controlling Administrative Law*, 61 ADMIN. L. REV. 5 (2009).

⁶⁹ See, e.g., Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187 (1992); Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1 (1990).

⁷⁰ See 5 U.S.C. § 553(b) (2012) (providing that regulations which are merely interpretative and so lack the force of law need not go through the notice-and-comment process).

administrative position. Nonetheless, it would be doctrinally “cleaner” to confine *Chevron* to the first (binding) sense of deference, leaving this second (merely influential) sense to the *Skidmore/Mead* standard.⁷¹

Fourth, the *Chevron* standard raises a substantial issue of legitimacy. Since enactment of the APA in 1946, we have had statutory rules as to the standards courts should apply when reviewing agency actions, including the rule that courts should set aside such actions when they are “arbitrary” or “capricious.”⁷² Courts should not use common law making to displace statutes.⁷³ Thus, if *Chevron* created a new standard of review,⁷⁴ the decision is of dubious legitimacy.

2. Options

Faced with the serious theoretical and practical problems of *Chevron*, we have three options. They are (1) continue to try to muddle along, hoping that these problems will somehow disappear or moderate, (2) expressly overturn *Chevron*, or (3) continue to honor *Chevron* in name but apply it so that, in substance, it is no longer an independently operative principle of law. I believe that the third option is the most satisfactory choice.

Choosing the first option would be a triumph of wishful thinking. The problems with *Chevron* described above are not mere annoyances or the grouching of idle pedants. They are serious. Moreover, they show no signs of ameliorating. There is no evidence that *Chevron* is on a path toward self-correction.

The second option seems unlikely to occur. Judicial reversal of *Chevron* could be effected only by the Supreme Court. The Court does sometimes overturn its own precedents.⁷⁵ However, the conservatism of the

⁷¹ Under *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944), the weight accorded to the agency’s view depends on “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) (footnotes omitted) (interpreting *Skidmore*). *Skidmore*, long thought moribund, was revived in *Mead*, 533 U.S. at 228.

⁷² 5 U.S.C.A. § 706(2)(A) (2012).

⁷³ See, e.g., Steve R. Johnson, *The Taxpayer’s Duty of Consistency*, 46 TAX L. REV. 537, 571–76 (1991).

⁷⁴ It is doubtful that the Supreme Court intended the *Chevron* two-step procedure to be a new rule independent of statutory standards. Indeed, although not citing the APA expressly, *Chevron* traced the language of 5 U.S.C. § 706 when it stated that “legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

⁷⁵ See, e.g., William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988) (identifying numerous cases in which the Supreme Court reversed one or

judiciary makes express overruling the last, not the first, option. Absent judicial action, Congress probably could overturn *Chevron* by legislation.⁷⁶ However, there is no indication that Congress has an appetite to do so.

Thus, the third option seems the most feasible. Moreover, as shown by the following section, there is evidence both (1) that *Chevron* is being eroded in fact if not in name and (2) that *Mayo* furthers that movement.

3. *Mayo's* Effect on *Chevron*

Chevron has been eroded from two directions. First, it is now clear that *Chevron's* domain is limited. *Mead*⁷⁷ and other cases⁷⁸ have made it clear that *Chevron* does not always provide the standard by which challenges to agency actions and positions are evaluated.

Second, when *Chevron* does apply, its two steps appear to be collapsing into a single “reasonableness” inquiry based on the APA’s “arbitrary or capricious” standard. *Chevron's* first step — whether the statute itself clearly answers the question at issue — never had any outcome-determinative significance independent of *Chevron's* second step — whether the agency’s position reasonably interprets the statute.⁷⁹ A regulation contrary to a clear statute can never be reasonable.⁸⁰ Thus, step one will never invalidate a regulation that would not also be invalidated under step two.

Therefore, all of *Chevron* boils down to step two, which increasingly is being conflated with “arbitrary or capricious” interpreted as “unreasonable.” For example, in late 2011, the Supreme Court decided the *Judulang* case. The Court unanimously invalidated an immigration regulation, doing so under the APA “arbitrary or capricious” standard. The government argued that *Chevron's* step two should have been applied

another of its statutory precedents).

⁷⁶ There is some question whether the legislative branch has the constitutional authority to dictate interpretational methods to the co-equal judicial branch. See, e.g., Steve R. Johnson, *Statutes Requiring “Plain Meaning” Interpretation*, 53 ST. TAX NOTES 763 (2009); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002). However, that question probably would be resolved in favor of upholding the validity of such a statute.

⁷⁷ See *United States v. Mead Corp.*, 533 U.S. 218, 220 (2001).

⁷⁸ E.g., *Tualatin Valley Builders Supply, Inc. v. United States*, 522 F.3d 937, 941 (9th Cir. 2008).

⁷⁹ *Chevron* sometimes frames the second step as whether the agency’s position “reasonably” interprets the statute but includes other things such as whether it “permissibly” interprets the statute — suggesting that these terms are functionally equivalent in this context. Compare *Chevron*, 467 U.S. at 843 (“permissible”) with *id.* at 844 (“reasonable”).

⁸⁰ See *infra* Part VI.C.1.

instead. The Court replied: “Were we to do so, our analysis would be the same.”⁸¹ A number of lower court decisions are in the same vein.⁸²

Mayo contributes to this movement. *Mayo* states that, under step two, a court “may not disturb an agency rule unless it is ‘arbitrary or capricious in substance, or manifestly contrary to the statute.’”⁸³ Thereafter, the *Mayo* Court uses the words “reasonable,” “sensible,” and “rational” multiple times to describe the inquiry.⁸⁴ Such interchangeability implies equivalence of meaning. Thus, “[b]ased on *Mayo*, it is probably no longer profitable to argue that the arbitrary and reasonable tests differ.”⁸⁵

In short, under *Mayo* and other recent case law, the *Chevron* two-step procedure appears to be receding as an independent rule of law. It is collapsing into a reasonableness inquiry pursuant to the APA statutory standard. In terms of legitimacy, this is a wholesome development.

IV. GOVERNMENTAL OVERREACHING—*MAYO* ALONE

Many commentators — especially attorneys and accountants who represent taxpayers before the Service and in court — have voiced the concern that *Mayo* puts a heavy thumb on the scale in favor of the Service in cases involving regulations.⁸⁶ That concern is built on the belief that *National Muffler* was a more taxpayer-friendly standard than *Chevron*.⁸⁷ Thus, the extension of *Chevron* to challenges to general authority regulations has been viewed as inimical to taxpayers, particularly because there are far more general authority than specific authority regulations.

Even were this perception as to *National Muffler* versus *Chevron*

⁸¹ *Judulang v. Holder*, 132 S. Ct. 476, 483 n.7 (2011); see Irving Salem, *Supreme Court Clarifies Mayo; or Is It Something Bolder?*, 2012 TNT 5-18 (Jan. 9, 2012) (discussing *Judulang*).

⁸² E.g., *GHS Health Maint. Org., Inc. v. United States*, 536 F.3d 1293, 1297 (Fed. Cir. 2008); *Dominion Res., Inc. v. United States*, 97 Fed. Cl. 239, 253 (2011); *Barahona v. Napolitano*, No. 10 Civ. 1574(SAS), 2011 WL 4840716, at *5 (S.D.N.Y. Oct. 11, 2011).

⁸³ *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 711 (2011) (punctuation omitted) (quoting *Household Credit Servs., Inc. v. Pfenning*, 541 U.S. 232, 242 (2004), and *Mead*, 533 U.S. at 227).

⁸⁴ *Mayo*, 131 S. Ct. at 714–16.

⁸⁵ Salem, *supra* note 66, at 1330.

⁸⁶ E.g., KPMG, *Mayo Foundation Cures Tax Myopia*, WHAT’S NEWS IN TAX: ANALYSIS THAT MATTERS FROM WASHINGTON NATIONAL TAX, Jan. 17, 2011, at 2; IRS Administration, *Mayo Decision Seen Increasing Regulatory Power, Making Court Challenges Difficult*, 30 TAX MGMT. WKLY. REP., Feb. 28, 2011, at 206; IRS Administration, *Mayo Ruling Raises Bar for Challenges to Tax Regulations, Practitioners Say*, 30 TAX MGMT. WKLY. REP., Feb. 21, 2011, at 217.

⁸⁷ E.g., Lipton & Young, *supra* note 7, at 206.

accurate, *Mayo* would not be a particularly inviting target. Even before *Mayo* was handed down, the clear trend in the lower courts was in favor of applying *Chevron* to challenges to general authority Treasury regulations.⁸⁸ Thus, the “*Chevron* governs” outcome likely was simply a matter of time, with or without *Mayo*.

More significantly, the above perception is inaccurate. This is so for three reasons developed below. First, properly understood, *National Muffler* was a deferential precedent, not a pro-taxpayer precedent. Second, application of *Chevron* does not guarantee victory for the government. Third, taxpayers have prevailed in many of the lower court tax decisions applying *Mayo*.

A. National Muffler Deferential

What *Mayo* properly rejected was not *National Muffler* rightly understood, but the caricature of *National Muffler* offered by this and other taxpayers. Seen properly, *National Muffler* is a pro-deference precedent, not a factors-based anti-deference precedent.

First, context matters. *National Muffler* was not an isolated island but part of an archipelago. *National Muffler* was part of a line of cases, and that line was deferential in spirit.⁸⁹

Second, *National Muffler*’s result was pro-government. The case upheld the challenged regulation even though it lacked contemporaneity, one of the six listed considerations.⁹⁰

Third, in the *National Muffler* opinion, the six listed considerations are bracketed by deferential language. Before them, the Court acknowledged that the congressional delegation was to the Treasury, not to the courts, and that Treasury regulations should be upheld if they implement the statute “in some reasonable manner.”⁹¹ After them, the Court emphasized that “[t]he choice among reasonable interpretations is for the Commissioner, not the courts.”⁹² Similarly, the court offered two posterior citations from the

⁸⁸ See *Swallows Holding Ltd. v. Commissioner*, 126 T.C. 96, 180–81 (2006) (Holmes, J., dissenting) (tabulating the circuits), *rev’d*, 515 F.3d 162 (3d Cir. 2008); Steve R. Johnson, *Mayo and the Future of Tax Regulations*, 130 TAX NOTES 1547, 1551 (Mar. 28, 2011).

⁸⁹ *E.g.*, *Commissioner v. Portland Cement Co. of Utah*, 450 U.S. 156, 169 (1981); *United States v. Cartwright*, 411 U.S. 546, 550 (1973); *United States v. Correll*, 389 U.S. 299, 305–06 (1967). Based on the Supreme Court cases of this line, a circuit court stated: “Our role in determining the validity of a Treasury regulation is a limited one.” *Gehl Co. v. Commissioner*, 795 F.2d 1324, 1328 (7th Cir. 1986).

⁹⁰ *Nat’l Muffler Dealers Ass’n v. United States*, 440 U.S. 472, 485 (1979).

⁹¹ *Id.* at 476–77 (quoting *Cartwright*, 411 U.S. at 550).

⁹² *Id.* at 488.

pre-*Chevron* line. Both cases were deferential, both upheld the challenged regulations, and both used considerations among the six as rationales.⁹³ To read these components as deferential, then anti-deferential, then deferential again would paint the Court as schizophrenic. The six listed considerations should be read as of a piece with the material that preceded and succeeded them. All are deferential in nature.

Fourth, in light of this deferential spirit, the six listed considerations should be seen as plus factors, not minus factors. That is, the presence of one or more would warrant greater than usual deference, but the absence of one or more would not warrant less than usual deference.⁹⁴ This reading would be in line with how the Court treated plus factors in other cases (not repudiated by *Mayo*)⁹⁵ and would avoid the need to consign *National Muffler* to Tartarus.

B. Chevron Not Insuperable

The application of *Chevron* is far from the seal of doom for a party challenging an agency's action. *Chevron* is usually considered a deferential standard.⁹⁶ However, it is no walkover for the agency. Agency positions have often been found invalid at step one as contrary to an unambiguous statute.⁹⁷ Less often, but still frequently enough to matter, judges find the statute ambiguous but hold the agency's position to be unreasonable at step two.⁹⁸

⁹³ *Id.* at 477 (citing *Commissioner v. South Tex. Lumber Co.*, 333 U.S. 496, 501 (1948) & *Helvering v. Winmill*, 305 U.S. 79, 83 (1938)).

⁹⁴ *Id.* (This approach is consistent with the language the Court used to introduce the six factors: “[a] regulation may have particular force if . . .”).

⁹⁵ *E.g.*, *Smiley v. Citibank (S.D.)*, 517 U.S. 735, 740 (1996) (long-standing agency interpretations possess “a certain credential of reasonableness”); *Dixon v. United States*, 381 U.S. 68, 76 (1965) (absence of factors used to support Service position in prior case held not to undercut Service position in current case).

⁹⁶ *E.g.*, WILLIAM D. POPKIN, *MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS* 582 (4th ed. 2005) (calling *Chevron* a “super-deferential approach”).

⁹⁷ *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 520–21; Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 94–95 (1994); Note, “How Clear Is Clear” in *Chevron’s Step One?*, 118 HARV. L. REV. 1687, 1691–92 (2005).

⁹⁸ *E.g.*, *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006); *Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145 (D. C. Cir. 2005); *Abbot Labs. v. Young*, 920 F.2d 984 (D.C. Cir. 1990), *cert. denied*, 502 U.S. 819 (1991). A recent circuit court case invalidated a Treasury regulation under Code section 263A. The court found that the regulation survived *Chevron’s* step one because the statute was ambiguous, but it invalidated the regulation under step two as being an unreasonable interpretation of the statute. *Dominion Res., Inc. v. United States*,

C. Experience Under Mayo

As befits a case of its significance, *Mayo* has already, in its relatively brief existence, been cited by scores of other decisions, from the Supreme Court,⁹⁹ lower federal courts in non-tax cases,¹⁰⁰ and lower courts in tax cases.

In tax, *Mayo* has been cited or discussed in diverse contexts, as described below. One striking fact that emerges from the survey of these cases is that taxpayers win with considerable frequency.

One area in which *Mayo* has been on prominent display is a line of tax shelter cases involving the statute of limitations on assessment of additional tax liabilities.¹⁰¹ Responding to a string of high-profile losses in court, in 2010 Treasury promulgated regulations¹⁰² providing that an extended limitations period applies to a certain category of income tax deficiency.¹⁰³

The new regulation proved highly controversial.¹⁰⁴ The lower federal courts split in the numerous cases testing the validity of the regulations, and the Supreme Court invalidated it.¹⁰⁵ *Mayo* has been cited in decisions holding for the government on the issue¹⁰⁶ and in decisions holding for the

681 F.3d 1313, 1317–1319 (Fed. Cir. 2012).

⁹⁹ *Judulang v. Holder*, 132 S. Ct. 476, 484 n.7 (2011); *Home Concrete & Supply, LLC v. United States*, 132 S. Ct. 1836, 1847 (2012).

¹⁰⁰ *E.g.*, *City of Arlington, Tex. v. FCC*, 668 F.3d 229, 238 (5th Cir. 2012); *Schafer v. Astrue*, 641 F.3d 49, 61 (4th Cir. 2011); *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 659 (D.C. Cir. 2011).

¹⁰¹ I.R.C. § 6229 (The limitations periods for assessments are generally set out as to certain adjustments arising out of partnership transactions).

¹⁰² *See Intermountain Ins. Serv. of Vail, LLC v. Commissioner*, 650 F.3d 691, 701 (D.C. Cir. 2011); *Salman Ranch, Ltd. v. Commissioner*, 647 F.3d 929, 937 (10th Cir. 2011); *Grapevine Imps., Ltd. v. United States*, 636 F.3d 1368, 1376 (Fed. Cir. 2011); *see also* *Treas. Reg. § 301.6229(c)(2)* (2010); *Treas. Reg. § 301.6501(e)* (2010).

¹⁰³ I.R.C. § 6501(a) (the normal limitations period is three years); I.R.C. § 6501(e) (The statute provides a six-year limitations period when a taxpayer fails to report income in excess of 25% of income reported on her federal income tax return. The new regulations provided that this extended period applies not just to unreported receipts, but also to deficiencies that result when the taxpayer claims inflated basis in property he sold or exchanged).

¹⁰⁴ *See Melinda Dunmire, Voting Colony off the Island*, 131 TAX NOTES 1265 (June 20, 2011); *Johnson, supra* note 47.

¹⁰⁵ *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836 (2011). For discussion of *Home Concrete* and its significance, see Steve R. Johnson, *Home Concrete: After the Cheering, Problems*, 31 ABA SEC. TAX'N NEWS Q. 1 (Summer 2012); Patrick J. Smith, *What We Didn't Learn from Home Concrete*, 135 TAX NOTES 1625 (June 25, 2012); William J. Wilkins, *Implications of Home Concrete*, 31 ABA SEC. TAX'N NEWS Q. 25 (Summer 2012).

¹⁰⁶ *Intermountain Ins. Serv. of Vail, LLC v. Commissioner*, 650 F.3d 691, 701 (D.C.

taxpayer on it.¹⁰⁷

Mayo has appeared in other lines of tax cases too. In some cases, *Mayo*'s deployment was of marginal significance;¹⁰⁸ in others it mattered more. Taxpayers have lost many of the tax cases in which *Mayo* was noted,¹⁰⁹ although sometimes only narrowly.¹¹⁰ However, taxpayers prevailed in many other such cases, including cases involving income tax,¹¹¹ gift tax,¹¹² and excise tax.¹¹³

As the above survey reveals, taxpayers have not thus far fared badly in the aggregate in tax cases invoking *Mayo*. When that fact is combined with the realization that *National Muffler* was always a weak reed for taxpayers and the real possibility of an agency losing under *Chevron*, it is fair to conclude that *Mayo*, taken by itself, has not radically altered the balance between taxpayers and the Service in litigation.

V. GOVERNMENTAL OVERREACHING—*MAYO* WITH OTHER RULES

Part IV refuted the fear that *Mayo*, considered by itself, fundamentally disadvantages taxpayers challenging the validity of Treasury regulations. However, a less sanguine scenario may emerge when *Mayo* is put in a larger context, that is, when it is combined with other rules of deference and procedural possibilities. It is to that potentiality that we now turn.

Below, we first identify the values that should guide the formulation of

Cir. 2011); *Salman Ranch, Ltd. v. Commissioner*, 647 F.3d 929, 937 (10th Cir. 2011); *Grapevine Imps., Ltd. v. United States*, 636 F.3d 1368, 1376 (Fed. Cir. 2011).

¹⁰⁷ *Home Concrete & Supply, LLC v. United States*, 634 F.3d 249, 257 (4th Cir. 2011), *aff'd*, 132 S. Ct. 1836 (2011); *Burks v. United States*, 633 F.3d 347, 360 (5th Cir. 2011); *Carpenter Family Invs., LLC v. Commissioner*, 136 T.C. 373, 377–78 (2011).

¹⁰⁸ For example, one case holding for the Service cited *Mayo* for the proposition that tax exclusions are construed narrowly. *Sprint Nextel Corp. & Subsidiaries v. United States*, 779 F. Supp. 2d 1184, 1186 (D. Kan. 2011). That is a boilerplate proposition, well known before *Mayo*, for which numerous other cases could have been cited instead of *Mayo*. See generally Steve R. Johnson, *Interpreting State Tax Exemptions, Deductions, and Credits*, 51 ST. TAX NOTES 607 (Feb. 23, 2009).

¹⁰⁹ E.g., *Dickow v. United States*, 654 F.3d 144, 149 (1st Cir. 2011); *Goodrich Corp. v. United States*, 846 F. Supp. 2d 445, 449 (W.D.N.C. 2012); *Ambase Corp. v. United States*, 834 F. Supp. 2d 71, 74 (D. Conn. 2011); *Tigers Eye Trading, LLC v. Commissioner*, 138 T.C. 67, 72 (2012).

¹¹⁰ In one prominent case, the taxpayer's argument came up just short in the trial court but prevailed on appeal. *Dominion Res., Inc. v. United States*, 97 Fed. Cl. 239, 257 (2011), *rev'd*, 681 F.3d 1313 (Fed. Cir. 2012).

¹¹¹ *Mass. Mut. Life Ins. Co. v. United States*, 103 Fed. Cl. 111, 150 (2012); *Pullins v. Commissioner*, 136 T.C. 432, 441 (2011).

¹¹² *Estate of Petter v. Commissioner*, 653 F.3d 1012, 1023 (9th Cir. 2011).

¹¹³ *Cohen v. United States*, 650 F.3d 717, 736 (D.C. Cir. 2011).

tax regulations. Then we identify the other rules and principles that could come into play and note the dangers that could be posed by too aggressive combination of *Mayo* with other rules. Finally, we assess whether the concern is purely theoretical or whether it has practical significance. I conclude that, although Treasury and the Service typically behave fairly and faithfully in administering the tax laws, history provides enough evidence of actual or arguable overreaching that the concern developed here is worth addressing.

A. Values

To fulfill its important role, regulation-making by the Treasury must advance several core purposes. First and foremost among such purposes, of course, is fidelity to the underlying statute. The duty of the interpreter is “to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.”¹¹⁴ Thus, Treasury’s rulemaking authority is “the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.”¹¹⁵

Second, to the extent the regulation contributes anything not already found in the statute, the regulation entails an exercise of choice by Treasury. How Treasury exercises that opportunity matters. Responsible interstitial decision-making which is “fair” and “reasonable” to taxpayers, the federal fisc, and third parties is the goal.¹¹⁶

Third, countless transactions in our society are planned with an eye to the Code and in anticipation of particular tax effects under the Code. If deal making is to proceed with confidence, there must be a reasonable degree of certitude and predictability about tax regulations. Thus, establishing and protecting a reasonable sphere for private reliance is “one important purpose for issuing Regulations.”¹¹⁷

Fourth, our system of taxation depends on a high degree of citizen “buy

¹¹⁴ *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part).

¹¹⁵ *Manhattan Gen. Equip. Co. v. United States*, 297 U.S. 129, 134 (1936).

¹¹⁶ See, e.g., Randolph E. Paul, *Use and Abuse of Tax Regulations in Statutory Construction*, 49 *YALE L.J.* 660, 661 (1940) (quoting *Sterling Oil & Gas Co. v. Lucas*, 51 F.2d 413, 416 (W.D. Ky. 1931)).

¹¹⁷ Mitchell Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity: A View From Within*, 43 *TAXES* 756, 760 (1965); see also H. R. 1882, 70th Cong. (1st Sess. 1928) (“It is believed that sound administration properly places upon the Government the responsibility and burden of interpreting the law and prescribing regulations upon which taxpayers may rely.”).

in.” The Service audits only a small percentage of the hundreds of millions of returns filed each year.¹¹⁸ Thus, a central goal for all parts of tax administration — including the regulations-writing process — must be to maintain citizen confidence in the system and to avoid alienating taxpayers.¹¹⁹

Finally, another value — the participation of taxpayers in the regulations process — derives from the above purposes. The opportunity to participate, such as through the ability of citizens to comment on proposed tax regulations, can improve the accuracy and fidelity of regulations to their statutes by pointing out where Treasury may have failed to reflect the will of Congress. It can improve the fairness and reasonableness of regulations by identifying practical consequences of which tax regulators may be unaware. It can maintain confidence in the tax system by giving taxpayers a voice in it. Thus, public participation is essential in the rulemaking process, both generally¹²⁰ and in tax.¹²¹

B. Potentially Dangerous Combinations

As seen in part III.A.1 above, *Mayo* makes clear that *Chevron* applies to general authority as well as specific authority Treasury regulations, and *Mayo* dispensed with the relevance of factors such as agency inconsistency, regulatory contemporaneity, and issuance of regulations during litigation. That creates considerable — although, as shown in part III, not intolerable — administrative flexibility.

But that flexibility can be leveraged by Treasury and the Service using other rules, some established, some as yet uncertain. Below, we consider four such possibilities: *Brand X*, *Auer*, Code section 7805(b), and sub-regulation Service guidance. Thereafter, we note the potential for their

¹¹⁸ See, e.g., RICHARDSON, BORISON & JOHNSON, *supra* note 2, at 95; Steve Johnson, *The 1998 Act and the Resources Link Between Tax Compliance and Tax Simplification*, 51 U. KAN. L. REV. 1013, 1015–27 (2003).

¹¹⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-567, TAX ADMINISTRATION: IRS SHOULD EVALUATE PENALTIES AND DEVELOP A PLAN TO FOCUS ITS EFFORTS 8 (2009) (“[I]t is widely believed that taxpayers are more likely to comply voluntarily if they believe that the tax code is implemented fairly and consistently across taxpayers.”).

¹²⁰ E.g., BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 4.12 (3d ed. 1991) (stating that administrative law rulemaking procedures enhance transparency, accountability, and democratic legitimacy through public participation); see also *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (observing that the comment process “reintroduces public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies”) (quoting *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980)).

¹²¹ E.g., Schmid, *supra* note 4, at 541.

combination with *Mayo*.

1. *Brand X*

In 2005, the Supreme Court decided another key case. In *Brand X*, the Supreme Court held that a subsequent regulation trumps prior judicial interpretations of a statute as long as two conditions are met: the regulation qualifies for *Chevron* deference and the prior cases did not base their results on an unambiguous statute.¹²²

Since the case was handed down, hundreds of tax and non-tax decisions have cited *Brand X*, and a substantial literature has developed as to it.¹²³ Despite this, a number of important issues remain as to the scope and meaning of *Brand X*. They include whether the prior judicial decision must have expressly stated that the statute is unambiguous, whether any such statement is conclusive, even if it is objectively incorrect, and whether the clarity or lack thereof of the statute is assessed only from the statutory text or from, as well, any pertinent legislative history.¹²⁴

2. *Auer*

The Supreme Court has stated: “It is well established ‘that an agency’s construction of its own regulations is entitled to substantial deference.’”¹²⁵ The principle was announced over sixty years ago in the *Seminole Rock* case.¹²⁶ These days, though, it is more often identified by reference to the 1997 *Auer* case, in which the Court instructed that an agency’s interpretation of its own regulation is “controlling” unless it is “‘plainly erroneous or inconsistent with the regulation.’”¹²⁷ The Supreme Court reaffirmed its adherence to *Auer* three times in 2011 and 2012.¹²⁸

¹²² Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

¹²³ E.g., Doug Geyser, Note, *Courts Still “Say What the Law Is”: Explaining the Functions of the Judiciary and Agencies After Brand X*, 106 COLUM. L. REV. 2129 (2006).

¹²⁴ See, e.g., Johnson, *supra* note 47, at 846–49. The Court had the opportunity to clarify some of these issues in *United States v. Home Concrete Supply, LLC*, 132 S. Ct. 1836 (2012), but avoided the issues. See, e.g., Smith, *supra* note 105, at 1625.

¹²⁵ *Martin v. OSHRC*, 499 U.S. 144, 150 (1991) (quoting *Lyng v. Payne*, 476 U.S. 926, 939 (1986)).

¹²⁶ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413–14 (1945).

¹²⁷ *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

¹²⁸ *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156 (2012); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254 (2011); *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871 (2011).

In the Supreme Court, *Auer* appears to be a rule of super-deference. According to a recent study, under most deference doctrines, the rates at which courts affirm agency positions cluster within fairly comparable ranges, averaging around seventy percent.” The one notable exception is the *Auer* doctrine. The Supreme Court affirms agency interpretations of agency rules at a much higher rate — 90.9% — than the roughly 70% rate at which it upholds other agency decisions.”¹²⁹ It is not clear, though, that the lower federal courts and the state courts — although deferential — are quite as deferential to agency interpretations of their regulations.¹³⁰

3. Section 7805(b)

“Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”¹³¹ What, then, does the Code provide as to retroactive tax regulations?

Before 1996, Code section 7805(b) provided that Treasury or the Service “may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect.” The exercise of this power was subject to challenge on an “abuse of discretion” standard,¹³² and Treasury regulations sometimes were

¹²⁹ Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 85 (2011) (citations omitted); see also 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 (2008) (studying Supreme Court deference doctrines).

¹³⁰ Steve R. Johnson, *Deference to Tax Agencies’ Interpretations of Their Regulations*, 60 ST. TAX NOTES 665 (May 30, 2011) [hereinafter *Deference to Agencies’ Interpretations*]; see also Steve R. Johnson, *New Light on Auer/Seminole Rock Deference*, 61 ST. TAX NOTES 441 (Aug. 15, 2011) [hereinafter *Auer/Seminole Rock Deference*].

¹³¹ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); see also *id.* at 220 (Scalia, J., concurring) (stating that an unreasonably retroactive regulation may be “arbitrary” or “capricious” under the APA and thus invalid); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (stating that “the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.”); *Retail, Wholesale & Dep’t Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) (offering five-factor test for whether retroactivity is permitted). However, some have perceived emergence of a more modern view which embraces retroactivity. See, e.g., Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015 (2006).

¹³² E.g., *Dixon v. United States*, 381 U.S. 68, 72–73 (1965); *Automobile Club of Mich. v. Commissioner*, 353 U.S. 180, 183–84 (1957); *Lesavoy Found., v. Commissioner*, 238 F.2d 589 (3d Cir. 1956).

invalidated on this ground.¹³³

In 1996, motivated by the belief “that it is generally inappropriate for Treasury to issue retroactive regulations,”¹³⁴ Congress amended section 7805(b). The current version of the statute provides that, in general, Treasury regulations may not be made effective prior to the date on which they were proposed.¹³⁵

However, the rigor of this prohibition and the certainty of its application are considerably reduced by a number of statutory exceptions. Specifically,

- The prohibition does “not apply to regulations filed or issued within 18 months of the date of the enactment of the statutory provision to which the regulation relates.”¹³⁶
- Treasury “may provide that any regulation may take effect or apply retroactively to prevent abuse.”¹³⁷
- Regulations may be applied retroactively when they correct procedural defects in the issuance of prior regulations or when they pertain to internal Treasury policies, practices, or

¹³³ E.g., *Helvering v. R.J. Reynolds Tobacco Co.*, 306 U.S. 110, 114–16 (1939). *Reynolds* sparked extensive commentary from some of the finest tax minds of their (or any) generation. E.g., Erwin N. Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398 (1941); Paul, *supra* note 116; Stanley S. Surrey, *The Scope and Effect of Treasury Regulations Under the Income, Estate, and Gift Taxes*, 88 U. PA. L. REV. 556 (1940); see also Ellsworth C. Alvord, *Treasury Regulations and the Wilshire Oil Case*, 40 COLUM. L. REV. 252 (1940); Robert C. Brown, *Regulations, Reenactment, and the Revenue Acts*, 54 HARV. L. REV. 379 (1941).

The large body of more recent scholarship on retroactivity in tax includes David W. Ball, *Retroactive Application of Treasury Rules and Regulations*, 17 N.M.L. REV. 139 (1987); Michael J. Graetz, *Legal Transitions: The Case for Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47 (1977); John S. Nolan & Victor Thuronyi, *Retroactive Application of Changes in I.R.S. or Treasury Department Positions*, 61 TAXES 777 (1983); Andrew Pruitt, *Judicial Deference to Retroactive Interpretative Treasury Regulations*, 79 GEO. WASH. L. REV. 1558 (2011); James M. Puckett, *Embracing the Queen of Hearts: Deference to Retroactive Tax Rules*, 40 FLA. ST. U. L. REV. (forthcoming 2013); Toni Robinson, *Retroactivity: The Case for Better Regulation of Federal Tax Regulations*, 48 OHIO ST. L.J. 773 (1987); Bryan T. Camp, Note, *The Retroactivity of Treasury Regulations: Paths to Finding Abuse of Discretion*, 7 VA. TAX REV. 509 (1988).

¹³⁴ H. R. REP. NO. 104-506, at 44 (1996); see also Benjamin J. Cohen & Catherine A. Harrington, *Is the Internal Revenue Service Bound by Its Own Regulations and Rulings?*, 51 TAX LAW. 675, 689–99 (1998) (describing congressional efforts to stop retroactive rulemaking by Treasury).

¹³⁵ I.R.C. § 7805(b)(1).

¹³⁶ I.R.C. § 7805(b)(2).

¹³⁷ I.R.C. § 7805(b)(3).

procedures.¹³⁸

- The prohibition “may be superseded by a legislative grant from Congress authorizing [Treasury] to prescribe the effective date with respect to any regulation.”¹³⁹

4. Sub-Regulation Service Guidance

In general administrative law, the traditional distinction is between legislative rules (which have binding legal effect) and interpretive rules and other agency informal guidance positions (which do not have binding legal effect). Yet this distinction — easy to state in the abstract — has proved to be enormously troubling in actual cases.¹⁴⁰ Scholars continue to engage in robust debate about the viability of this traditional distinction and possible alternatives to it.¹⁴¹

The proper level of deference to be accorded to sub-regulation positions issued by the Service is a topic that has provoked considerable commentary over the years.¹⁴² The debate continues today.¹⁴³

As a theoretical matter, one could argue for a higher level of force

¹³⁸ I.R.C. § 7805(b)(4), (b)(5).

¹³⁹ I.R.C. § 7805(b)(6). In addition, Treasury may allow taxpayers to elect to apply regulations retroactively. See I.R.C. § 7805(b)(7).

¹⁴⁰ See, e.g., David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 278 (2010) (“There is perhaps no more vexing conundrum in the field of administrative law than the problem of defining a workable distinction between legislative and nonlegislative rules.”); Richard J. Pierce Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 ADMIN. L. REV. 547, 547 (2000) (“For over fifty years, courts and commentators have struggled to identify, and to apply, criteria that are appropriate to distinguish between legislative and interpretive rules. The results have not been pretty.”).

¹⁴¹ Recent entries in the debate include David L. Franklin, *Two Cheers for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 111 (2012); Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331 (2011).

¹⁴² The extended debate between Professors Caron and Galler remains useful. See Paul L. Caron, *Tax Myopia Meets Tax Hyperopia: The Unproven Case of Increased Judicial Deference to Revenue Rulings*, 57 OHIO ST. L. J. 637 (1996); Caron, *supra* note 47; Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 OHIO ST. L.J. 1037 (1995); Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, 72 B.U.L. REV. 841 (1992).

¹⁴³ E.g., Kathryn Sedo & Katrina Wessbecker, *Should Courts Ever Give Deference to Revenue Procedures?*, 2012 TNT 7-4 (Jan. 11, 2012); Kristin E. Hickman, *IRB Guidance: The No Man’s Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239 (2009); Christopher M. Pietruszkiewicz, *Discarded Deference: Judicial Independence in Informal Agency Guidance*, 74 TENN. L. REV. 1 (2006); Irving Salem, Ellen P. Aprill & Linda Galler, *ABA Section of Taxation Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717, 744–46 & 769–72 (2004).

being accorded Service guidance documents. For instance, one factor sometimes considered in assessing legislative character is whether the agency action “affect[ed] substantial individual rights and obligations.”¹⁴⁴ The Code imposes a penalty (generally equal to twenty percent of the resulting underpayment of tax¹⁴⁵) when a taxpayer’s return reflects “[n]egligence or disregard of rules or regulations,”¹⁴⁶ and the applicable Treasury regulations include revenue rulings and notices as among such “rules and regulations.”¹⁴⁷ The penalty also can be imposed as to a “substantial understatement of income tax” when substantial authority does not exist to support the taxpayer’s return position(s),¹⁴⁸ and revenue rulings and revenue procedures are included within the types of authority for this purpose.¹⁴⁹

5. Potential Combinations

Even brief reflection will suggest the potential for overreaching that could exist were Treasury and the Service to aggressively assert the above doctrines in conjunction with *Mayo*. One such possibility would be combining *Brand X* and *Mayo*. The government should not be able to use *Brand X* to administratively reverse a decision that applied *Chevron* to invalidate a tax regulation. This is because a predicate for application of *Brand X* is that the regulation be *Chevron*-entitled.

However, scores of cases have invalidated Treasury regulations on grounds other than *Chevron*. Treasury could seek to overturn such decisions by promulgating new regulations, perhaps little changed from the original, invalidated versions. In the ensuing litigation, it would assert first that, under *Brand X*, a subsequent regulation can trump a prior judicial decision and second that, under *Mayo*, this is so even if the regulation is general authority in nature, was not contemporaneous with the Code section at issue, and was issued during litigation for the purpose of affecting the outcome of that litigation.

In addition, the government might be able to apply that new or amended regulation retroactively. The exceptions to the 1996 anti-retroactivity provision have not been well tested and defined in litigation.

If *Chevron* deference is pushed downwards, below regulations to sub-regulation Service guidance documents, the government would have even

¹⁴⁴ *Morton v. Ruiz*, 415 U.S. 199, 200 (1974).

¹⁴⁵ I.R.C. § 6662(a).

¹⁴⁶ I.R.C. § 6662(b)(1).

¹⁴⁷ Treas. Reg. § 1.6662-3(b)(2) (as amended in 2003).

¹⁴⁸ I.R.C. § 6662(b)(2), (d)(2)(B)(i).

¹⁴⁹ Treas. Reg. § 1.6662-4(d)(3)(iii) (as amended in 2003).

more leeway. These positions typically do not go through the APA notice-and-comment process, so the benefits to the system would not obtain. Moreover, the Service has considerable discretion as to whether to apply sub-regulation positions retroactively, subject to abuse-of-discretion review.¹⁵⁰

Perhaps most problematic of all, the government might combine *Mayo* and *Auer*. That is, it might write an ambiguous regulation, claiming *Chevron* deference for it under *Mayo*. Then it might wait to see how taxpayers conduct their transactions and how the government's revenue interests might best be served by interpreting the regulation as applied to those transactions. Whichever interpretation proved fiscally felicitous, the government could assert *Auer* deference for that interpretation.

One may hope that such strategic behavior would occur only rarely, but respected commentators and jurists have sounded warnings. For example, Kenneth Gideon, a former Service Chief Counsel and Assistant Secretary of the Treasury for Tax Policy, has stated: "[I]t's hard for me to see what the limitation . . . is [on the trend in judicial deference to support administrative rulemaking]." ¹⁵¹ He questions whether the new environment "might not allow officials in new administrations carte blanche to adopt their own policy preferences under the guise of rulemaking, even ignoring public comments if they carefully follow procedural rules." ¹⁵² In his view, "*Chevron*, *Mayo*, and *Brand X* set up a system that probably already allows such a scenario," which may mean that "fighting over statutory interpretation in tax litigation is effectively doomed [and] the only constraints are political." ¹⁵³

A recent controversy bears on these fears. Part IV.C above notes the litigation as to Treasury's attempt to apply the six-year limitations period of Code section 6501(e) to basis overstatement situations. In brief, in 2009, after losing a string of high-profile cases on the issue, Treasury issued regulations in both temporary and proposed form. The temporary regulations were issued without notice and comment. The proposed regulations later became final after going through notice and comment. The regulations instantiated the government's largely unsuccessful litigation position, and they were made applicable to all cases not yet closed under the statute of limitations. ¹⁵⁴

¹⁵⁰ See I.R.C. § 7805(b)(8).

¹⁵¹ Coder, *supra* note 6, at 1229 (quoting Kenneth Gideon).

¹⁵² *Id.* at 1230 (asking "[w]hat is the stopping point? Is that the tax system we had in mind?").

¹⁵³ *Id.* See generally Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH U. L. REV. 141 (2012).

¹⁵⁴ The history is detailed in Kim Marie Boylan, Roger J. Jones & Andrew R.

The lower courts split on the legality of the new regulations, and the Supreme Court invalidated it. In the Fourth Circuit case eventually affirmed by the Court, Judge Wilkinson decried what he perceived to be overreaching by the Treasury and the Service:

Yet it remains the case that agencies are not a law unto themselves. No less than any other organ of government, they operate in a system in which the last words in law belong to Congress and the Supreme Court. What the IRS seeks to do in extending the statutory limitations period goes against what I believe are plain instructions of Congress, which have not changed, and the plain words of the Court which have not been retracted. . . . This seems to me something of an inversion of the universe and to pass the point where the beneficial application of agency expertise gives way to a lack of accountability and a risk of arbitrariness.¹⁵⁵

C. Practical Significance

We have seen that *Mayo* can be leveraged with other rules and principles to create possibilities for overreaching. But should we be concerned about these theoretical possibilities? Is the chance that the possibilities may come to fruition sufficiently large that we should give thought to how to curb them? Despite my respect and admiration for Treasury and the Service, I believe the answer is “yes.”

The Supreme Court has wisely instructed that, in some situations, we are “left in the first instance to the good sense and common decency of the [tax] collecting authorities.”¹⁵⁶ This typically works. Treasury and the Service set high aspirations of professionalism for themselves,¹⁵⁷ and their

Roberson, *Absolute Power Corrupts Absolutely: Basis Overstatement and the Six-Year Limitations Period – Should the IRS Be Allowed to Re-Write the Law Retroactively?*, 2011 TAX MAN. MEMO. 235. The authors were taxpayers’ counsel in the *Home Concrete* case.

Issuance of temporary regulations without notice and comment with the intention to later issue permanent regulations after notice and comment is sometimes called the “interim-final” approach. Treasury avails itself of this approach with some frequency. *See generally* Brief for Prof. Kristin E. Hickman as Amicus Curiae Supporting Respondents, *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836 (2012) (No. 11-139).

¹⁵⁵ *Home Concrete & Supply, LLC v. United States*, 634 F.3d 249, 259 (4th Cir. 2011) (Wilkinson, J., concurring), *aff’d*, 132 S. Ct. 1836 (2012).

¹⁵⁶ *United States v. Rodgers*, 461 U.S. 677, 699 (1983).

¹⁵⁷ “[I]t is the duty of the Service to carry out [tax] policy by correctly applying the laws enacted by Congress; to determine the reasonable meaning of various Code provisions in light of the Congressional purpose in enacting them; and to perform this work in a fair and impartial manner, with neither a government nor a taxpayer point of view.” Rev. Proc. 64-22,

performance meets their aspirations in the great majority of cases.

The comfort we derive from this fact, however, should not make us heedless as to the abuse potentials described above. There are times when Treasury and the Service yield to overzealousness or to intransigence.

Consider three actual or arguable examples. First, for generations, Treasury has taken the position that general authority regulations are interpretive regulations for APA purposes.¹⁵⁸ Although Treasury usually submits proposed general authority regulations to notice and comment, the “general authority regulations are interpretive regulations” position, if correct, would mean that there would be no legal requirements to use notice and comment as to such regulations.

This position, however, is clearly incorrect. Regulations that seek to create binding law are legislative, not interpretive, for APA purposes whether they are promulgated under general or specific authority.¹⁵⁹ Despite *Mayo*, the government appears not to have fundamentally revised this position.¹⁶⁰ This insistence undermines one’s confidence in the government’s ability to follow administrative law rules.

Second, the saga described above of the section 6501(e) regulations is widely viewed, as Judge Wilkinson viewed it, as a case of abuse by the government. I and others believe that the regulations should have been promulgated prospectively, not retroactively.¹⁶¹

Why did the government take such an aggressive approach? The apparent explanation is that the Treasury and the Service were striking against tax shelter transactions that the Service had failed to process within the normal three-year limitations period.¹⁶²

But the end does not justify the means. The lengths to which the government has shown itself willing to go in its war against shelters raises

1964-1 C.B. 689.

¹⁵⁸ See Schmid, *supra* note 4, at 541; Brief for Appellant at 25-26, *Wilmington Partners L.P. v. Commissioner*, No. 10-4183 (2d Cir. Sept. 10, 2012); Brief for Appellant at 52-60, *Intermountain Ins. Serv. of Vail, LLC v. Commissioner*, No. 10-1204 (D.C. Cir. June 11, 2012).

¹⁵⁹ See, e.g., Johnson, *supra* note 47, at 843-45.

¹⁶⁰ See I.R.M. § 32.1.1.2.8 (Sept. 23, 2011) (conceding that some general authority Treasury regulations might be legislative but maintaining that most are interpretive in nature); see generally Jeremiah Coder, *Current Guidance Process Sufficient for Judicial Deference*, *Butler Says*, 2011 TNT 216-4 (Nov. 14, 2011).

¹⁶¹ See Johnson, *supra* note 47, at 852.

¹⁶² This is evident from the government’s briefs in these cases. Although the substantive merits of the shelters were not at issue, the government’s briefs repeatedly stress the tax shelter aspects. E.g., Brief for the United States at 3-7, *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836 (2012) (No. 11-139).

the specter that it may similarly lose perspective in future controversies.¹⁶³

Third, Treasury and the Service have done this sort of thing before. In 2003, again as part of the war on tax shelters, Treasury amended regulation section 1.752-6 to alter the definition of “liabilities” for purposes of Code section 752. It did so retroactively, claiming authority to do so under a provision of the Community Renewal Tax Relief Act of 2000.¹⁶⁴ However, it may well be the case that, in doing so, Treasury exceeded the authority conferred by the statute. Although some courts have upheld the regulation,¹⁶⁵ many others have not.¹⁶⁶

In short, I think there is enough evidence that Treasury and the Service sometimes depart from their usual probity in administering the tax laws. That being so, we should not blithely ignore the potential for overreaching that exists in the conjunction of *Mayo* with other rules of law.

VI. CURBING THE POTENTIAL FOR OVERREACHING

Part V explained why the possibility of governmental overreaching in the new tax administration environment should be addressed. This part offers suggestions as to the specific steps that should be taken.

These consist of arguments available to taxpayers’ counsel when challenging alleged excesses in tax rulemaking. In most cases, the arguments are within existing doctrine but have too often been ignored or underused. In some cases, the arguments would call upon courts to make reasonable modifications of existing doctrine.

The arguments divide into four classes. They are arguments based on delegation, procedure, substance, and construction.

¹⁶³ “[I]n its war against tax shelters, Treasury has itself gone too far in pushing the limits of the law. Treasury’s failure to comply with the procedural requirements that Congress imposed upon it is just as corrosive to the tax system as the behavior of tax shelter rogues.” Brief for Professor Kristin E. Hickman as Amicus Curiae Supporting Respondents, *supra* note 154, at 35.

¹⁶⁴ Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-554, § 309, 114 Stat. 2763A-587, at 2763A-638.

¹⁶⁵ *E.g.*, *Cemco Investors, LLC v. United States*, 515 F.3d 749, 752 (7th Cir. 2008), *cert. denied*, 555 U.S. 823 (2008); *Maguire Partners-Master Inv., LLC v. United States*, 2009 WL279100, at *18-20 (C.D. Cal. Feb. 4, 2009), *aff’d sub nom.* *Thomas Inv. Partners, Ltd. v. United States*, 444 Fed. Appx. (9th Cir. 2011).

¹⁶⁶ *E.g.*, *Sala v. United States*, 552 F. Supp. 2d 1167, 1197 (D. Colo. 2008), *rev’d on other grounds*, 613 F.3d 1249 (10th Cir. 2010), *cert. denied*, 132 S. Ct. 91 (2011); *Klamath Strategic Inv. Fund, LLC v. United States*, 440 F. Supp. 2d 608, 626 (E.D. Tex. 2006); *Murfam Farms, LLC v. United States*, 88 Fed. Cl. 516, 526–27 (2009); *Stobie Creek Invs., LLC v. United States*, 82 Fed. Cl. 636, 671 (2008), *aff’d*, 608 F.3d 1366 (Fed. Cir. 2010).

A. Delegation Arguments

Rulemaking is a quasi-legislative function. It is fundamental that an administrative agency,¹⁶⁷ including the Treasury,¹⁶⁸ can exercise rulemaking power only to the extent that Congress has conferred such power upon it. Neither *Chevron* nor *Mayo* changes this. Delegation was a key rationale advanced in *Chevron*;¹⁶⁹ *Mayo* recognized delegation to be “the ultimate question.”¹⁷⁰

Post-*Chevron* cases have made it clear that *Chevron* applies only when Congress delegated authority to the agency and the agency promulgated the regulation in question in the exercise of that authority.¹⁷¹ Accordingly, if the taxpayer can demonstrate that the position taken in the Treasury regulation is outside the sphere of the congressionally delegated authority, that position should fail.

Depending on the circumstances of the given case, three delegation arguments are potentially available with respect to an overreaching regulation. The potential arguments are: (1) the regulation goes beyond the terms of the statutory delegation at issue; (2) the regulation adds a new requirement or limitation not in the statute; and (3) the choice made in the regulation involves too fundamental a matter and should be made only by Congress itself, not by Treasury or any other agency.

1. Beyond the Terms of the Delegation

As noted in part III.A.1 above, Treasury regulations are promulgated under either of two types of delegations: the general authority of Code section 7805(a) and specific authority set out in particular Code sections. Thus far, taxpayers usually have not attempted to correlate the regulations in question with the precise language appearing in the general or specific

¹⁶⁷ E.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–16 (1971); *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012); *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 619–20 (D.C. Cir. 1987).

¹⁶⁸ E.g., *Feller v. Commissioner*, 135 T.C. 497, 530–31 (2010) (Gustafson, J., dissenting).

¹⁶⁹ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

¹⁷⁰ *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 714 (2011) (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007)). Last year, the Court made delegation a central part of *Brand X*. *United States v. Home Concrete Supply, LLC*, 132 S. Ct. 1836, 1843 (2012).

¹⁷¹ E.g., *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). See generally Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97VA. L. REV. 2009 (2011).

delegation. This avenue deserves greater exploration and may prove a useful check on overreaching regulations.

The operative language of section 7805(a) gives Treasury authority to issue regulations “needful . . . for the enforcement of” the Code. Most taxpayers’ representatives assume that this language confers broad authority upon Treasury. But this assumption has not been well tested in case law focusing specifically on the precise statutory language, and the assumption may be wrong. For example, Stanley Surrey, one of the leading architects of the modern federal tax structure, believed that the strength of the section 7805(a) language “would hardly seem adequate . . . to support a delegation of legislative power” and thus that general authority regulations lack the force of law and are not entitled to deference.¹⁷² Similarly, a leading current commentator on deference issues in tax finds the “enforcement” language of section 7805(a) to be narrow, not broad, in scope.¹⁷³

The language used in specific authority sections is dazzling in variety. Sometimes it is far broader than “enforcement”; often times it is narrower.¹⁷⁴ When it is narrower, the question arises whether the government could nonetheless argue for the section 7805(a) standard. The question would be whether the specific authority of the particular section and the general authority of section 7805(a) are independent options available to Treasury¹⁷⁵ or whether the narrower specific delegation controls over the broader general delegation. I believe the latter view is preferable because of the well-established principle of construction that the particular controls over the general.¹⁷⁶

A regulation is valid only to the extent that it accords with the statutory delegation on which it is based. Thus, assuming that the argument has been properly raised, a court assessing a challenge to a regulation should identify the precise statutory language of the delegation in question, then determine whether the regulation is within the scope of that language.

¹⁷² Surrey, *supra* note 133, at 557–58 (1940).

¹⁷³ See Salem, *supra* note 66, at 1333 n.59.

¹⁷⁴ For descriptions of some of the patterns, see Johnson, *supra* note 47, at 850–52.

¹⁷⁵ See, e.g., *Tualatin Valley Builders Supply, Inc. v. United States*, 522 F.3d 937, 942 (9th Cir. 2008) (stating that the “broad authority [of section 7805(a)] supplements the specific grant of authority that Congress gave the IRS in [a particular Code section].”). The Treasury Decision accompanying a promulgated regulation typically states the Code section under whose authority the regulation is being issued.

¹⁷⁶ E.g., *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974); *Bulova Watch Co. v. United States*, 365 U.S. 753, 761 (1961). See generally Steve R. Johnson, *When General Statutes and Specific Statutes Conflict*, 57 ST. TAX NOTES 113 (July 12, 2010).

2. Adds a New Requirement or Limitation

A second delegation argument draws upon a line of cases holding that tax regulations cannot add requirements or limitations not in the statute and not fairly inferable from it. These cases were more prominent in prior decades,¹⁷⁷ but they never have been repudiated and are sometimes still invoked.¹⁷⁸ Portions of many regulations have been invalidated on this basis.¹⁷⁹

In deciding whether the position in the regulation is fairly inferable from the statute, there is a helpful line of recent Supreme Court authority. The Court has instructed that Congress does not “hide elephants in mouseholes.”¹⁸⁰ In other words, a particular result demands a firm footing in the text, structure, or purpose of the statute. It will not be lightly inferred from statutory wisps and fragments.¹⁸¹ This principle has been applied in tax cases also.¹⁸²

In order for this argument to have maximum effect in curbing excessive regulation, courts will have to be disabused of sloppy application of *Chevron*. As seen above, under *Chevron*, statutory silence or ambiguity is viewed as a delegation to the agency of authority to fill in the gap or gaps.¹⁸³ This is understandable when the statute addresses a matter but does so in an unclear fashion. It also is understandable when the statute addresses

¹⁷⁷ E.g., *Koshland v. Helvering*, 298 U.S. 441, 446–47 (1936); *Arrow Fastener Co. v. Commissioner*, 76 T.C. 423, 430 (1981) (both holding that when the statute is clear, Treasury and the Service have no power to amend it by regulation); *Sterling Oil & Gas Co. v. Lucas*, 51 F.2d 413, 416 (W.D. Ky. 1931) (the Service “has no right either to enlarge or to take from the provisions of the [tax statute]”).

¹⁷⁸ E.g., *Feller v. Commissioner*, 135 T.C. 497, 526 (2010) (Gustafson, J., dissenting). In a recently filed suit, the Institute for Justice and others claimed that new regulations licensing and regulating return preparers exceed the reach of statutory authority. They prevailed at the trial court level. *Loving v. Internal Rev. Serv.*, No. 12-385(JEB), 2013 WL 204667 (D.D.C. Jan. 18, 2013). The government intends to appeal.

¹⁷⁹ E.g., *United States v. Calamaro*, 354 U.S. 351, 358–59 (1957); *Am. Standard, Inc. v. United States*, 602 F.2d 256 (Ct. Cl. 1979); *Caterpillar Tractor Co. v. United States*, 218 Ct. Cl. 517, 526 (1978); *Hughes Int’l Sales Corp. v. Commissioner*, 100 T.C. 293, 304 (1993); *Estate of Boeshore v. Commissioner*, 78 T.C. 523, 527 (1982).

¹⁸⁰ *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 468 (2001).

¹⁸¹ *Id.*; see also *Chamber of Commerce of United States v. Whiting*, 131 S. Ct. 1968, 2004 (2011); *Bilski v. Kappos*, 130 S. Ct. 3218, 3250 (2010).

¹⁸² E.g., *Colonial Am. Life Ins. Co. v. Commissioner*, 491 U.S. 244, 260 (1989) (“We find it incredible that Congress, with but a whisper, would have [allowed] a deduction of this magnitude.”).

¹⁸³ See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–844 (1984). But see Mark Seidenfeld, *Chevron’s Foundation*, 86 NOTRE DAME L. REV. 273, 276–278 (2011) (rejecting congressional intent to delegate as the basis for *Chevron*).

the general area but not all of the details as to it.

This notion is less understandable, however, when nothing in the statute comes close to addressing a matter set out in a regulation. For example, if a statute dealing only with candy is silent about cheese and automobiles, it should not be viewed as authorizing the relevant agency to write regulations as to cheese and automobiles.

This point was made by Judge Gustafson of the Tax Court in a pre-*Mayo* case. He wrote:

Statutory specificity about one subject cannot sensibly be construed as gap-creating “silence” about another subject When Congress states a plain and unambiguous term involving “the amount shown as the tax by the taxpayer on his return”, the IRS cannot take that enactment as an occasion to craft rules about different subject matter *not* addressed in the statute — i.e., excess withholding credits not shown by the taxpayer and not appearing on the return — as if Congress had left a gap to be filled in.¹⁸⁴

This principle bears on the “adds a requirement or limitation not in the statute” objection to tax regulations. An aggressive reading of the idea that statutory silence is a delegation to fill gaps would hold that *Chevron* rendered obsolete the line of cases on which this objection is based.¹⁸⁵ However, the objection remains viable. The principle described by Judge Gustafson is what preserves that viability in the era of *Mayo*. This principle is the counter to an overly broad (and analytically sloppy) notion of *Chevron*’s teaching as to delegation.

3. Choice Appropriate for Congress Only

Another delegation argument arises out of the separation of powers doctrine, which is the conceptual basis of delegation. Congress has the constitutional authority to write the tax laws.¹⁸⁶ However, the Supreme Court has taught that the articles of the Constitution governing Congress, the executive, and the judiciary are not hermetically sealed off from one

¹⁸⁴ *Feller*, 135 T.C. at 535 (Gustafson, J., dissenting) (emphasis in original).

¹⁸⁵ *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 596 (1983) (“Yet ever since the inception of the tax code, Congress has seen fit to vest in those administering the tax laws very broad authority to interpret those laws. In an area as complex as the tax system, the agency Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems.”).

¹⁸⁶ U.S. CONST. art. I, § 8, cl. 1.

other.¹⁸⁷ Thus, although Congress's role in lawmaking is primary, some lawmaking authority resides in each of the three branches of the federal government.¹⁸⁸

The task, therefore, is to tell where the lawmaking power of agencies (like the Treasury) ends, the point beyond which only Congress can legislate. The line, of course, cannot be drawn with crystal clarity to anticipate all cases, but several Supreme Court decisions have offered a useful tool. These decisions apply a "too big" principle; that is, they teach that certain decisions are so fundamental that they should be made only by Congress, not by an agency.¹⁸⁹

Put in terms of delegation doctrine, the "too big" principle can take either or both of two forms. The stronger form would be constitutional, that the separation of powers doctrine prevents Congress from delegating the power to make choices of fundamental significance.¹⁹⁰ The weaker form would be a matter of statutory construction, that the courts will not presume that Congress intended to delegate to an agency the power to make choices of the most fundamental significance to the statutory scheme.

Two illustrations — *Swallows Holding*¹⁹¹ and the check-the-box line of cases¹⁹² — frame the parameters for application of this principle to tax regulations. In *Swallows Holding*, the applicable statute provides that a foreign corporation with income effectively connected with a U.S. trade or business can claim deductions only by filing an income tax return in the manner required by subtitle F of the Code, dealing with procedural rules.¹⁹³ By amended regulations, Treasury prescribed that such a return had to be filed by a specified time.¹⁹⁴

Taxpayers challenged the validity of the amended regulations. The full Tax Court, with three judges dissenting, held the regulations invalid. The

¹⁸⁷ E.g., *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928).

¹⁸⁸ E.g., *Mistretta v. United States*, 488 U.S. 361, 415 (1988) (Scalia, J., dissenting).

¹⁸⁹ E.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685–87 (1980) (Rehnquist, J., concurring).

¹⁹⁰ Cf. *Mistretta*, 488 U.S. at 371–72 (1988) ("[W]e long have insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch.") (quoting *Field v. Clark*, 143 U.S. 649, 692 (1892)).

¹⁹¹ *Swallows Holding Ltd. v. Commissioner*, 126 T.C. 96 (2006) (full-court reviewed), *rev'd*, 515 F.3d 162 (3d Cir. 2008).

¹⁹² The first case of this line was *Littreillo v. United States*, 484 F.3d 372 (6th Cir. 2007), *cert. denied*, 552 U.S. 1186 (2008).

¹⁹³ I.R.C. § 882(c)(2).

¹⁹⁴ Treas. Reg. § 1.882-4(a)(2) (as amended in 2003).

Third Circuit reversed and upheld the regulations.¹⁹⁵ The Third Circuit was right. When Congress requires that a return be filed, it obviously does not intend that the filing can be made at any time before the end of the world. That there will be some deadline is reasonably inferable from the statute. The particular deadline is a matter of detail, and such line drawing is a proper function for the agency.

In contrast, the check-the-box controversy involved a matter of first-order significance, not mere detail. The Code prescribes different tax rules and thus different tax liabilities depending on whether the entity conducting the transactions is a corporation, partnership, or disregarded entity. Cases of generations-old vintage established criteria by which entities would be classified for tax purposes,¹⁹⁶ and Treasury built on these cases in its original entity-classification regulations.¹⁹⁷

In 1997, however, Treasury promulgated new regulations — called the “check the box” rules — that changed entity classification from a mandatory regime based on defined criteria to a largely elective regime in which many entities can choose how they will be taxed.¹⁹⁸

Commentators questioned the validity of the new regulations.¹⁹⁹ Eventually, the matter was litigated in a series of cases. All of the cases upheld the validity of the new regulations.²⁰⁰

These cases were wrongly decided because they ignored the “too big” principle. Few matters are more significant to entity taxation than the question of classification, and whether classification shall be mandatory or elective is not a matter of mere detail. It is a fundamental choice freighted with enormous revenue and regulatory consequences. An act of Congress, not an act of an agency, should have been required to shift from a mandatory to an elective system.

Unfortunately, the courts were never given the opportunity to consider

¹⁹⁵ For discussion of *Swallows Holding*, see Johnson, *supra* note 30; Steve R. Johnson, *Swallows Holding as It Is: The Distortion of National Muffler*, 112 TAX NOTES 351 (July 24, 2006).

¹⁹⁶ E.g., *Morrissey v. Commissioner*, 296 U.S. 344 (1935); *United States v. Kintner*, 216 F.2d 418 (9th Cir. 1954).

¹⁹⁷ Treas. Reg. §§ 301.7701-1 to -11 (as amended in 1996).

¹⁹⁸ Treas. Reg. §§ 301.7701-1 to -3 (as amended in 1997).

¹⁹⁹ E.g., Brant J. Hellwig & Gregg L. Polsky, *The Employment Tax Challenge to the Check-the-Box Regulations*, 111 TAX NOTES 1039 (May 29, 2006); Gregg D. Polsky, *Can Treasury Overrule the Supreme Court?*, 84 B.U.L. REV. 185 (2004).

²⁰⁰ E.g., *Kandi v. United States*, 295 Fed. App'x 873 (9th Cir. 2008); *McNamee v. Dep't of Treasury*, 488 F.3d 100 (2d Cir. 2007); *L&L Holding Co., L.L.C. v. United States*, No. 05-0794-A, 2008 WL 1908840 (W.D. La. Apr. 30, 2008); *Med. Practice Solutions, LLC v. Commissioner*, 132 T.C. 125 (2009), *aff'd sub nom. Britton v. Shulman*, 106 A.F.T.R.2d 2010-6048 (1st Cir. 2010), *cert. denied*, 131 S. Ct. 2974 (2011).

a “too big” objection to the check-the-box regulations. Taxpayers’ counsel did not raise the argument, presumably because counsel lacked experience with administrative law principles.²⁰¹ This line of cases illustrates the perils of tax exceptionalism. Forcing taxpayers’ counsel to find better arguments than a distortion of *National Muffler* has the potential of improving taxpayers’ outcomes in litigation.

B. Procedural Arguments

The now discredited factors-based approach to *National Muffler* was in large part a procedurally based argument. With this approach no longer available, *Mayo* may compel taxpayers, and thus courts, to probe along other procedural lines.

Treasury and the Service (the Department of Justice is more expert in this regard) are not well-versed in general administrative law and sometimes do not respond effectively to procedural challenges grounded in such law. Accordingly, Judge Mark Holmes of the Tax Court has suggested that if *Mayo* causes taxpayers to better press such challenges, *Mayo* may result in taxpayers winning more often, not less often, when challenging Service and Treasury positions.²⁰² In turn, this may force Treasury and the Service to become more sophisticated in administrative law, an eminently desirable result.

Four procedural challenge possibilities are explored below. They are (1) failure of regulations — including temporary regulations and allegedly interpretive regulations — to go through the APA notice-and-comment process; (2) failure of regulations to satisfy “hard look” review, including failure to explain the reasons for choices made in the regulation; (3) impermissible retroactivity; and (4) inappropriate reliance on the *Auer/Seminole Rock* line of deference.

1. Notice and Comment

The APA prescribes that in order to promulgate binding rules (often called legislative or substantive regulations), the agency must publish general notice of its proposed rulemaking²⁰³ and must, before the rule becomes effective, give interested persons the opportunity to submit

²⁰¹ It would be too late to raise the “too big” argument now against the check-the-box regulations. The validity of those regulations is now protected by a palisade of precedents.

²⁰² Shamik Trivedi, *Mayo Increases Taxpayer Chances of Success, Judge Says*, 131 TAX NOTES 1319, 1319 (June 27, 2011).

²⁰³ 5 U.S.C. § 553(b) (2012).

comments.²⁰⁴ Excepted from this process are “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice”²⁰⁵ and situations in which “the agency for good cause finds (and incorporates the finding and a brief statement of reasons there for in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”²⁰⁶

Treasury usually submits tax regulations to this notice-and-comment process. There is substantial reason to believe, however, that Treasury does not always honor this obligation.²⁰⁷ This issue has been noted in a number of recent tax cases,²⁰⁸ and it may be a useful argument in future cases.²⁰⁹

As noted in part V.B. above, Treasury and the Service sometimes have attempted to avoid the notice-and-comment requirements on the ground that general-authority regulations are interpretive and thus fall within an APA exception. This position is spurious. Although the precise demarcation between legislative and interpretive regulation is vigorously debated,²¹⁰ general-authority tax regulations are legislative in character under the most widely used tests²¹¹ and under the logic of *Mayo*.

Similarly, Treasury should not be able to routinely avoid notice and comment when it issues temporary regulations.²¹² Congress anticipated and

²⁰⁴ 5 U.S.C. § 553(c)–(d) (2012).

²⁰⁵ 5 U.S.C. § 553(b)(3)(A) (2012).

²⁰⁶ 5 U.S.C. § 553(b)(3)(B) (2012).

²⁰⁷ The pioneering work on this was done by Professor Hickman. 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 (2008); 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 (2007); see also Jasper L. Cummings, Jr., *Treasury Violates the APA?*, 117 TAX NOTES 263 (Oct. 15, 2007); Amy S. Elliott, *Panel Explores Noncompliance with Administrative Procedure Act*, 121 TAX NOTES 1141 (Dec. 8, 2008).

²⁰⁸ E.g., *Cohen v. United States*, 650 F.3d 717, 721 (D.C. Cir. 2011) (noting taxpayers' claim that a Notice, which attempted to create a binding rule, is invalid because it did not go through notice and comment); *Burks v. United States*, 633 F.3d 347, 360 n.9 (5th Cir. 2011); *Am. Standard, Inc. v. United States*, 602 F.2d 256, 267–69 (Ct. Cl. 1979); *Hosp. Corp. of Am. v. Commissioner*, 348 F.3d 136, 145 n.3 (6th Cir. 2003); *Intermountain Ins. Serv. of Vail, LLC v. Commissioner*, 134 T.C. 211, 239, 245–47 (2010) (Halpern & Holmes, JJ., concurring), *rev'd & remanded*, 650 F.3d 691 (D.C. Cir. 2011).

²⁰⁹ See also Johnson, *supra* note 88, at 1554.

²¹⁰ See *supra* notes 140 and 141 and accompanying text.

²¹¹ See Johnson, *supra* note 47, at 843–45 (discussing *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106 (D.C. Cir. 1993), and other authorities).

²¹² See, e.g., Asimow, *supra* note 57; Juan F. Vasquez & Peter A. Lowy, *Challenging Temporary Treasury Regulations: An Analysis of the Administrative Procedure Act, Legislative Reenactment Doctrine, Deference, and Invalidity*, 3 HOUS. BUS. & TAX L.J. 248,

provided for situations in which expedited administrative action is necessary. The APA “good cause” exception covers that terrain. If Treasury can make out a convincing case of necessity, the exception would apply and notice and comment could be properly omitted. Otherwise, temporary regulations should go through the same process as any other tax regulation seeking to establish binding law.²¹³

2. “Hard Look” Review

The APA directs that a court reviewing an agency action “shall . . . hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”²¹⁴ “Arbitrary or capricious” did not originate with the APA. The application of this standard by the courts has evolved dramatically.²¹⁵

Before enactment of the APA, and even for some decades thereafter, the standard was strikingly indulgent towards agencies.²¹⁶ Although some cases continue in this vein, contemporary “arbitrary or capricious” review can be, and often is, quite searching. This heightened level of scrutiny has become known as “hard look” review.²¹⁷ Hard-look review has both substantive and procedural aspects. Nonexclusively, the Supreme Court has stated:

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem,

249–54 (2003).

²¹³ Some taxpayers’ representatives have expressed the fear that forcing Treasury to follow the APA process would interfere with the government’s ability to issue pro-taxpayer regulations and to provide needed clarifications. I believe this fear is groundless. See Steve R. Johnson, *Following the APA Will Not Eliminate Useful Guidance*, 130 TAX NOTES 128,128 (Jan. 3, 2011).

²¹⁴ 5 U.S.C. § 706(2)(A) (2012).

²¹⁵ The evolution is traced in RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW* 81–86 (2008).

²¹⁶ *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 185 (1935) (“[I]f any state of facts reasonably can be conceived that would sustain [the agency’s action], there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing . . . that the action is arbitrary.”) (quoting *Borden’s Farm Prods. Co. v. Baldwin*, 293 U.S. 194, 209 (1934)).

²¹⁷ The reviewing court will invalidate the agency action if it “becomes aware, especially from a combination of danger signals, that the agency has not really taken a ‘hard look’ at the salient problems, and has not genuinely engaged in reasoned decision-making.” *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970) (Leventhal, J., writing for the court).

offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.²¹⁸

Substantively, an agency action must meet a test of rationality. This applies to tax regulations as fully as to other types of regulations. Cases invalidating Treasury regulations are studded with variations on this theme.²¹⁹

One procedural aspect of hard-look review is a duty of explanation. An agency “must cogently explain why it has exercised its discretion in a given manner.”²²⁰ This duty was emphasized in the Supreme Court’s recent *Judulang* decision:

Agencies . . . have expertise and experience in administering their statutes that no court can properly ignore. But courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking. . . . That task involves examining the reasons for agency decisions — or, as the case may be, the absence of such reasons.²²¹

Notices of proposed rulemaking and preambles to proposed and final regulations are the principal places where Treasury explains the choices it made in its regulations.²²² If these and other sources fail in the task of

²¹⁸ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

²¹⁹ *E.g.*, *Prof’l Equities, Inc. v. Commissioner*, 89 T.C. 165, 175 (1987) (stating that the method by which the regulation sought to accomplish its goal “is virtually incomprehensible”); *Estate of Bullard v. Commissioner*, 87 T.C. 261, 281 (1986) (noting that the Service “has not raised, nor [have we] discovered, a single rational basis” for its rule, and that the rule “cannot be applied in an arbitrary manner”); *Apis Prods., Inc. v. Commissioner*, 86 T.C. 1192, 1201 (1986) (finding that the regulation “lacks any rational basis” and reflects “arbitrariness”).

²²⁰ *Motor Vehicle Mfrs. Ass’n.*, 463 U.S. at 48; *see also* *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 289 n.5 (1978); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

²²¹ *Judulang v. Holder*, 132 S. Ct. 476, 483–84 (2011).

²²² Depending on the court, statements in these documents may have interpretive weight. Some courts have found them helpful, especially in clarifying ambiguities in the regulation. *E.g.*, *Nalle v. Commissioner*, 997 F.2d 1134, 1140 n.7 (5th Cir. 1993); *Texasgulf, Inc. v. United States*, 17 Cl. Ct. 275, 281 (1989); *Armco, Inc. v. Commissioner*, 87 T.C. 865, 868–69 (1986); *see also* I.R.S. Tech. Adv. Mem. 91-33-006 (Aug. 16, 1991). Other courts, however, have found such documents to be entitled to little weight. *E.g.*, *Allen v. Commissioner*, 118 T.C. 1, 12 (2002); *Dobin v. Commissioner*, 73 T.C. 1121, 1127 n.9

explanation, taxpayers may challenge the validity of the regulation in question. A body of commentary has developed in this regard.²²³ Some older cases have noted the issue,²²⁴ and it has appeared even more frequently in recent cases.²²⁵

3. Retroactivity

One prominent tax commentator believes that the APA prohibits Treasury from promulgating regulations with retroactive effect.²²⁶ Under current Code section 7805(b), it is difficult to see how that is so. No court has expressed that view, and I doubt that any court will in the future.

Clearly, improper retroactivity is a viable argument in certain cases. As noted in part V.B.3., the 1996 changes to section 7805(b) were motivated by a desire to restrict Treasury's use of retroactivity. That is reflected in the case law. Pre-1996 cases stressed that the prior version of the statute "g[ave] the Commissioner broad discretion in delimiting the extent, if any, to which a regulation will be retroactively applied."²²⁷ The tone of the post-1996 cases is strikingly different: "Generally, retroactive regulations are prohibited, except under limited circumstances."²²⁸

(1980), *acq.*, 1980-82 C.B.1. See generally Sheldon I. Banoff & Richard R. Lipton, *Preambles to Regulations: Do They Count?*, 109 J. TAX'N 63, 63 (2008).

²²³ E.g., Johnson, *supra* note 88, at 1555-56; Patrick J. Smith, *The APA's Reasoned-Explanation Rule and IRS Deficiency Notices*, 134 TAX NOTES 331, 331 (Jan. 16, 2012); Patrick J. Smith, *Mayo and Chenery: Too Much of a Shift in Rationale?*, 129 TAX NOTES 454, 454 (Oct. 25, 2010); Patrick J. Smith, *Omissions from Gross Income and the Chenery Rule*, 128 TAX NOTES 763, 763 (Aug. 16, 2010).

²²⁴ E.g., *Am. Standard, Inc. v. United States*, 602 F.2d 256 (Ct. Cl. 1979); *Ga. Fed. Bank, F.S.B. v. Commissioner*, 98 T.C. 105 (1992); *but cf.* *United States v. Vogel Fertilizer Co.*, 455 U.S. 16 (1982) (invalidating a tax regulation, noting that it was inconsistent with the explanation which Treasury had given when it advocated the statutory change).

²²⁵ E.g., *Mannella v. Commissioner*, 631 F.3d 115, 127 (3d Cir. 2011) (Ambro, J., dissenting); *Dominion Res., Inc. v. United States*, 97 Fed. Cl. 239, 258-59 (2011), *rev'd*, 681 F.3d 1313 (Fed. Cir. 2012); *Carpenter Family Inv., LLC v. Commissioner*, 136 T.C. 373, 395-96 (2011).

²²⁶ *Coder, supra* note 6, at 1230 (reporting remarks of Irving Salem); *see also* *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 217 (1988) (Scalia, J., concurring) (appearing to suggest that, under the APA, rules cannot be retroactive).

²²⁷ *Likins-Foster Honolulu Corp. v. Commissioner*, 840 F.2d 642, 647 (9th Cir. 1988). These cases also recognized, however, that retroactive application of a Treasury regulation could be an abuse of discretion if it produced an unduly harsh result and that reasonable reliance on prior law could be evidence of such a result. E.g., *Redhouse v. Commissioner*, 728 F.2d 1249, 1252 (9th Cir.), *cert. denied*, 469 U.S. 1034 (1984).

²²⁸ *Marriott Int'l Resorts, L.P. v. United States*, 83 Fed. Cl. 291, 303 (2008), *aff'd*, 586 F.3d 962 (Fed. Cir. 2009).

Just how binding the section 7805(e) strictures are, however, is not yet clear. The case law is not yet well developed. Consider three examples of the lack of clarity. The first involves the effective date of the 1996 changes. The statute provides that they are effective “with respect to regulations which relate to statutory provisions enacted on or after [June 30, 1996].”²²⁹ This seemingly straightforward language conceals difficulties, however. For example, what if the statute was enacted before June 30, 1996, but significantly amended after that date and the regulations deal with the amendment? The case law thus far has split on effective date questions.²³⁰

The second example involves definition. When is a change retroactive? How important are the following factors in answering that question: the degree to which prior law was settled, whether the taxpayer’s conduct had already occurred, whether the taxpayer’s return had already been filed, and other situation-specific circumstances? The parties in the *Home Concrete* case disagreed as to whether the changes to the section 6501(e) regulations are retroactive.²³¹ Unfortunately, the Supreme Court’s decision in that case did not resolve the question. Deciding the case on other grounds, the Supreme Court majority avoided the retroactivity issue.²³²

The third example involves the exceptions in section 7805(b). Will the general prohibition of retroactivity in section 7805(b)(1) be swallowed by the exceptions in section 7805(b)(2) to (6)? This question is particularly acute as to section 7805(b)(3), which authorizes Treasury to “provide that any regulation may take effect or apply retroactively to prevent abuse.” Whether a given return reporting position constitutes an “abuse” has an “eye of the beholder” quality. In part IV.C. above, we saw that the government has sometimes taken arguably overly aggressive positions, especially in its efforts to combat tax shelters. It would not be astounding to see a similar tack taken, at some point in the future, under section 7805(b)(3).

Although there were exceptions, it used to be the policy of Treasury

²²⁹ Taxpayer Bill of Rights 2, Pub .L. No. 104-168, § 1101(b), 110 Stat. 1452, 1468–69 (1996).

²³⁰ *Compare* *Grapevine Imports, Ltd. v. United States*, 636 F.3d 1368, 1381 n.6 (Fed. Cir. 2011), *with* *Murfam Farms, LLC v. United States*, 88 Fed. Cl. 516 (2009).

²³¹ *Compare* Brief for the United States, *supra* note 162, at 12, *with* Brief for Respondents at 45–48, *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836 (2012) (No. 11-139). *See generally* William V. Luneberg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, 156–57 (defining and classifying types of retroactivity).

²³² The dissent did address the issue briefly. It maintained that the regulation clarified an ambiguous statute, thus “did not upset legitimate settled expectations. . . Having worked no change in the law, and instead having interpreted a statutory provision without an established meaning, the . . . regulation does not have an impermissible retroactive effect.” *Home Concrete*, 132 S. Ct. at 1853 (Kennedy, J., dissenting).

and the Service “to exercise the discretion granted under Section 7805(b) by making any changes in Regulations which would act to the detriment of the taxpayer prospective. [But] changes in Regulations benefiting the taxpayer have generally been applied retroactively to all open years.”²³³ A similar policy would serve tax administration well under the current version of the statute.

4. *Auer/Seminole Rock*

Part V.B described *Auer/Seminole Rock* deference and how it increases the opportunity for strategic and possibly abusive agency behavior. Even under existing doctrine, there are available arguments by which that danger may be addressed. More fundamentally, however, I believe that *Auer/Seminole Rock* is a game not worth the candle. These cases should be abrogated.

a. Arguments Within Existing Doctrine

Despite the Supreme Court’s general adherence to *Auer* and *Seminole Rock*, the Court has recognized limitations on their reach. In a situation of potential Service overreaching, one or another of these limitations may be found to exist.

There are at least four recognized exceptions or limitations. First, *Auer* deference will not be extended if the underlying regulation is unambiguous.²³⁴ Thus, the Service should not be able to obtain greater deference by striving to make unclear what is a clear Treasury regulation.²³⁵

Second, *Auer* deference will not be accorded if the agency’s interpretation is “plainly erroneous or inconsistent with the regulation.”²³⁶ The same result would also obtain, of course, if the interpretation is inconsistent with the statute under which the regulation was promulgated.²³⁷

Third, *Auer* deference will be withheld if it appears that deferring to the agency would effectively permit it, “under the guise of interpreting a regulation, to create *de facto* a new regulation.”²³⁸ Thus, *Auer* cannot be used to circumvent the notice-and-comment process.

²³³ Rogovin, *supra* note 117, at 762-63.

²³⁴ E.g., *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000).

²³⁵ See, e.g., discussion of *Estate of Petter*, *infra* Part VI.D.

²³⁶ *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011) (quoting *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011)).

²³⁷ See *infra* Part VI.C.1.

²³⁸ *Talk Am.*, 131 S. Ct. at 2263 (quoting *Christensen*, 529 U.S. at 588).

Fourth, *Auer* deference will not be accorded if there is “reason to suspect that the interpretation does not reflect the agency’s fair and considered judgment on the matter in question.”²³⁹ For example, a mere “post hoc rationalization” created as part of an agency’s litigation position does not constitute “fair and considered judgment.”²⁴⁰ Additionally, the agency’s lack of consistency in interpreting the regulation over time may bear on this exception.²⁴¹ As discussed in part III.A.1. above, *Mayo* rejected such considerations in assessing whether a tax regulation properly implements the statute. However, they apparently remain viable factors in deciding whether the Service properly interprets an ambiguous Treasury regulation.²⁴²

b. Abrogation

Skillful use of the exceptions described above may or may not suffice to prevent government overreaching via *Auer/Seminole Rock* in the era of *Mayo*. This is a risk we need not take. *Auer/Seminole Rock* is misguided, and this variety of deference should be discarded.

Various rationales have been offered in support of *Auer/Seminole Rock* deference. The most common is that the agency that wrote the ambiguous regulation best understands what it was trying to say.²⁴³ Another is that agencies apply their interpretations over numerous cases, only a small percentage of which are litigated.²⁴⁴ For courts to disturb the agency’s settled position in the cases they hear could undermine uniform application of law.²⁴⁵ Finally, courts should respect the role agencies play in our system of government.²⁴⁶

²³⁹ *Talk Am.*, 131 S. Ct. at 2263 (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)); *Chase Bank*, 131 S. Ct. at 881 (quoting *Auer*, 519 U.S. at 462); *Auer*, 519 U.S. at 462. See also *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962); *SEC v. Chenery*, 332 U.S. 194, 196–197 (1947).

²⁴⁰ *Talk Am.*, 131 S. Ct. at 2263; *Chase Bank*, 131 S. Ct. at 881; *Auer*, 519 U.S. at 462; *Burlington*, 371 U.S. at 168; *Chenery*, 332 U.S. at 196–197.

²⁴¹ *Chase Bank*, 131 S. Ct. at 881 (noting that the agency’s current position was “entirely consistent with its past views”).

²⁴² See *Lipton & Young*, *supra* note 7, at 214. See generally *Sedo & Wessbecker*, *supra* note 143.

²⁴³ E.g., *Abbott Lab. v. United States*, 573 F.3d 1327, 1330 (Fed. Cir. 2009) (quoting *Cathedral Candle Co. v. U.S. Int’l Trade Comm’n*, 400 F.3d 1352, 1363–64 (Fed. Cir. 2005)).

²⁴⁴ See *Deference to Agencies’ Interpretations*, *supra* note 130, at 666; see also *Auer/Seminole Rock Deference*, *supra* note 130.

²⁴⁵ E.g., *French v. D.C. Bd. of Zoning Adjustment*, 658 A.2d 1023, 1033 (D.C. App. 1995).

²⁴⁶ However, courts have their responsibilities also. So, “balancing the necessary

There is something to these rationales, of course. However, when Treasury creates the problem by writing an ambiguous regulation, it is strange to reward it by according unusual deference to the Service's interpretation of the regulation. In my view, the arguments against the *Auer/Seminole Rock* regime described in part II.V.C. are stronger than the arguments for it.

Heartening in this regard is Justice Scalia's recent conversion in the *Talk America* case.²⁴⁷ His argument against *Auer/Seminole Rock* proceeds as follows: In the *Chevron* context, when Congress enacts an imprecise statute, it commits the power of implementation to an agency. Thus, "[t]he legislative and executive functions are not combined."²⁴⁸ In contrast, "when an agency promulgates an imprecise rule, it leaves *to itself* the implementation of that rule It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well."²⁴⁹ Specifically,

[d]eferred to an agency's interpretation of a statute does not encourage Congress, out of a desire to expand its power, to enact vague statutes; the vagueness effectively cedes power to the Executive. By contrast, deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking and promotes arbitrary government.²⁵⁰

5. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") was enacted to minimize unnecessary burdens on small businesses in complying with federal regulations. In general, and subject to exceptions, the RFA requires agencies to prepare initial and final regulatory economic analyses of the potential negative effects on small businesses of new rules promulgated by agencies.²⁵¹

respect for an agency's knowledge, expertise, and constitutional office with the courts' role as interpreter of laws can be a delicate matter." *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006).

²⁴⁷ *Talk Am.*, 131 S. Ct. at 2266 (Scalia, J., concurring) ("While I have in the past uncritically accepted [the *Auer*] rule, I have become increasingly doubtful of its validity.").

²⁴⁸ *Id.*

²⁴⁹ *Id.* (emphasis in original).

²⁵⁰ *Id.*

²⁵¹ 5 U.S.C. §§ 603–604 (2012).

RFA requirements as to tax regulations are set out in Code section 7805(f). Treasury commonly includes RFA analyses (or explanations of why RFA analyses are not required) in the Treasury decisions that accompany proposed and final regulations.²⁵²

RFA challenges have been brought in many administrative law contexts.²⁵³ However, RFA challenges are rarely brought against tax regulations. Nonetheless, it is not clear that Treasury takes RFA analysis seriously as part of the process of promulgating regulations. There may be room to develop RFA arguments in some cases.²⁵⁴

C. Substantive Arguments

Substantive attacks have for generations been mainstays of challenges to Treasury and Service positions. Nothing in *Mayo* diminishes their availability. Below, I address substantive attacks on regulations, then argue that sub-regulation Service guidance documents — which, of course, are potentially subject to similar substantive challenges — typically should not receive *Chevron* deference as a result of *Mayo*.

1. Regulations

Treasury regulations have been invalidated on many substantive grounds, including their being inconsistent with the text or structure of the applicable Code section, inconsistent with the purposes behind the section, and inconsistent with other sources of legal norms extrinsic to the particular Code section. Such attacks remain available under *Mayo*.

a. Inconsistent with Statutory Text or Structure

When the text of a statute is clear, there is no need for resort to other indicia of meaning.²⁵⁵ Thus, when available, the natural starting point for

²⁵² See, e.g., *Hosp. Corp. of Am. v. Commissioner*, 348 F.3d 136, 144 (6th Cir. 2004) (noting Treasury's conclusion that the temporary regulation under review did not require RFA analysis), *cert. denied*, 543 U.S. 813 (2004).

²⁵³ E.g., *Small Bus. in Telecomm. v. FCC*, 251 F.3d 1015, 1025–26 (D.C. Cir. 2001); *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 340–43 (D.C. Cir. 1985); *Thompson v. Clark*, 741 F.2d 401 (D.C. Cir. 1984); *Harlan Land Co. v. USDA*, 186 F. Supp. 2d 1076, 1096–97 (E.D. Cal. 2001); *N.C. Fisheries Ass'n, Inc. v. Daley*, 16 F. Supp. 2d 647, 651 (E.D. Va. 1997).

²⁵⁴ See, e.g., Asimow, *supra* note 57, at 345, 360–72; Moore, *supra* note 57.

²⁵⁵ E.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005); *Blum v. Stenson*, 465 U.S. 886, 896 (1984); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

attack on a regulation is that the regulation is contrary to the text of the Code section under which it has been promulgated. A number of cases have found tax regulations to be incompatible with the “plain meaning” of a Code section.²⁵⁶

“Plain meaning” is not ascertained from the statutory language in isolation. It is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”²⁵⁷ Plain meaning also may be found in a statutory term reflecting a technical, industry understanding of a statutory term rather than common usage.²⁵⁸

Similarly, *Chevron* taught that the meaning of a statute is ascertained with regard to “the traditional tools of statutory construction.”²⁵⁹ Those tools include the various canons of construction. In several cases, such canons have helped persuade courts that a tax regulation was inconsistent with the statutory text or structure.²⁶⁰

b. Inconsistent with Statutory Purpose

Statutory purpose is the great constructional counterweight to statutory text.²⁶¹ Thus, tax regulations often have been invalidated because they ran

²⁵⁶ E.g., *United States v. Vogel Fertilizer Co.*, 455 U.S. 16 (1982); *Rowan Co., Inc. v. United States*, 452 U.S. 247 (1982); *Commissioner v. Standard Life & Accident Ins. Co.*, 433 U.S. 148 (1977); *Ne. Pa. Nat’l Bank & Trust Co. v. United States*, 387 U.S. 213, 221–22 (1967). Cf. *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936) (“A regulation . . . operates to create a rule out of harmony with the statute, is a mere nullity.”).

²⁵⁷ *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989). See also *O’Gilvie v. United States*, 519 U.S. 79, 95 (1996) (Scalia, J., dissenting); *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *United States v. Morton*, 467 U.S. 822, 828 (1984); *Helvering v. Gregory*, 69 F.2d 809, 810–11 (2d Cir. 1934) (“[T]he meaning of a sentence may be more than that of the separate words, as a melody is more than the notes . . .”), *aff’d*, 293 U.S. 465 (1935).

²⁵⁸ E.g., *W. Nat’l Mut. Ins. Co. v. Commissioner*, 65 F.3d 90, 93 (8th Cir. 1995) (invalidating an income tax regulation), *abrogated by* *Atl. Mut. Ins. Co. v. Commissioner*, 523 U.S. 382 (1998); *Mass. Mut. Life Ins. Co. v. United States*, 103 Fed. Cl. 111, 156 (2012).

²⁵⁹ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

²⁶⁰ E.g., *Microsoft Corp. v. Commissioner*, 311 F.3d 1178, 1184–85 (9th Cir. 2002) (deploying the *noscitur a sociis* canon); *Goodson-Todman Enters., Ltd. v. Commissioner*, 784 F.2d 66, 76 (2d Cir. 1986) (*ejusdem generis* canon).

²⁶¹ “[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.” *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945), *aff’d*, 326 U.S. 404 (1945).

counter to the statutory purpose, frequently a purpose revealed by the legislative history.²⁶²

It is a matter of some debate where, under *Mayo* and other cases, purpose fits in the *Chevron* analysis. Does it come in at step one, step two, or not at all? The question is unsettled and, in my opinion, will remain so.

There is no grand doctrinal evolution at work here. Whether purpose (and especially legislative history as indicative of purpose) is considered at all and, if so, whether it appears as part of the step one or step two analysis depends on nothing more than the statutory construction proclivity of the judge or justice who happens to write the particular decision.

Chief Justice Roberts, a textualist, wrote the *Mayo* opinion, so unsurprisingly the step one analysis in *Mayo* is constrained in scope, with principal attention paid to the language of the statute.²⁶³ This is similar to Justice Thomas's opinion for the Court in *Brand X*²⁶⁴ and Justice Scalia's dissent in *Regions Hospital*.²⁶⁵

In contrast, purpose and legislative history are likely to be considered at step one when the opinion is written by a purposive judge or justice, as happened in Justice Stevens' opinion for the Court in *Chevron* itself²⁶⁶ and, subsequently, in Justice Ginsburg's opinion for the Court in *Regions Hospital*.²⁶⁷ In short, the pendulum will continue to swing in future cases as to the role of purpose and legislative history, depending on the interpretational ideology of the author of each new opinion.

c. Inconsistent with Extrinsic Norms

It is widely accepted that courts should interpret laws, as far as text permits, to fit them "most logically and comfortably into the body of both previously and subsequently enacted law."²⁶⁸ The key question is what is

²⁶² E.g., *United States v. Vogel Fertilizer Co.*, 455 U.S. 16 (1982); *Rowan Cos., Inc. v. United States*, 452 U.S. 247 (1981); *Ann Jackson Family Found. v. Commissioner*, 15 F.3d 917, 921 (9th Cir. 1994); *Walt Disney Prod. v. United States*, 480 F.2d 66 (9th Cir. 1973).

²⁶³ *Mayo v. United States*, 131 S. Ct. 704, 711 (2011).

²⁶⁴ *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 989 (2005) (performing the step one analysis by reference to the statute's "plain terms").

²⁶⁵ *Regions Hosp. v. Shalala*, 522 U.S. 448, 464–69 (1998) (Scalia, J., dissenting).

²⁶⁶ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 852–853 (1984).

²⁶⁷ *Regions Hosp.*, 522 U.S. at 460–61.

²⁶⁸ *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991); see also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (noting "[t]he classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination" (quoting *United States v. Fausto*, 484 U.S. 439, 453 (1988))); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 786 n.17 (2000) ("[I]t is well

included in the relevant surrounding legal context. As seen below, tax regulations have been invalidated when found to be inconsistent with a variety of sources extrinsic to the particular Code section under which the regulation was promulgated.

First, regulations have been invalidated or interpreted adversely to the Service for being in conflict with other, already extant parts of the tax laws. These include Code sections other than the section under which the regulation was issued,²⁶⁹ tax treaties to which the United States is a party,²⁷⁰ and previous, but still effective, Treasury regulations.²⁷¹

Second, tax regulations have been invalidated for being in tension with non-tax statutes. For example, in *Cartwright*, the Supreme Court invalidated an estate tax regulation under Code section 2031.²⁷² The Court acknowledged that the challenged regulation was “not, on its face, technically inconsistent with [the statute],” but it concluded that the government’s position was “unrealistic and unreasonable.” In significant part, the Court was moved by perceived inconsistency between the regulation and a non-tax statute. The Court remarked that the regulation “is manifestly inconsistent with the most elementary provisions of the Investment Company Act of 1940 and operates without regard for the market in mutual fund shares that the Act created and regulates.”²⁷³

Third, regulations have been invalidated for incompatibility with the Constitution. Violation of an express constitutional provision obviously would be fatal. Even when no express provision is traduced, the regulation can fall if it is in tension with constitutional values. For example, in one case, the court invalidated a regulation under Code section 103 dealing with arbitrage as to tax-exempt state and local bonds because the regulation was seen to be incompatible with the principle of federalism.²⁷⁴ Even if the regulation escapes outright invalidation, it may be given a limiting

established that a court can, and should, interpret the text of one statute in the light of surrounding statutes”); Steve R. Johnson, *Supertext and Consistent Meaning*, 52 ST. TAX NOTES 675 (May 25, 2009).

²⁶⁹ E.g., *Cottage Sav. Ass’n v. Commissioner*, 499 U.S. 554, 566 (1991); *Minahan v. Commissioner*, 88 T.C. 492, 505–06 (1987).

²⁷⁰ *Nat’l Westminster Bank, PLC v. United States*, 44 Fed. Cl. 120 (1990), *aff’d*, 512 F.3d 1347 (Fed. Cir. 2008).

²⁷¹ E.g., *St. Jude Med., Inc. v. Commissioner*, 34 F.3d 1394, 1402 (8th Cir. 1994).

²⁷² *United States v. Cartwright*, 411 U.S. 546 (1973).

²⁷³ *Id.* at 557, 550.

²⁷⁴ *Wash. v. Commissioner*, 692 F.2d 128, 136 (D.C. Cir. 1982) (“Since these regulations restrict the freedom of states and municipalities to invest the proceeds of their issuances to a degree Congress did not envision, they must be invalidated as exceeding the Commissioner’s authority.”).

construction on account of constitutional tension.²⁷⁵

Mayo lends support to the idea that compatibility with extrinsic sources of legal norms is relevant to the *Chevron* analysis of the validity of tax regulations. Step two directs a reviewing court to determine whether the challenged regulation is reasonable. How wide is that angle of vision? Is the court to confine the reasonableness inquiry to only what bears on the fidelity of the regulation to the statutory provision, or may the court also consider extrinsic factors?

Mayo takes the second road. It included administrability—an extrinsic norm—as part of its step two analysis.²⁷⁶ Although some have seen retrenchment from that view in a post-*Mayo* case,²⁷⁷ I believe that *Mayo* is correct in this regard.²⁷⁸ *Mayo* sanctions a broad look at reasonableness, which keeps the door open to taxpayers, in appropriate cases, to make the “inconsistent with extrinsic norms” arguments described above.

2. Sub-Regulation Positions

In my view, Service guidance documents—including revenue rulings, revenue procedures, and the array of other media—should be treated as nonbinding and, when challenged, should be tested under *Skidmore*, not *Chevron*. Doing so will draw a bright line in an area in need of clarity and will prevent circumvention of restrictions on legislative regulations.

There have been a few decisions that have afforded *Chevron* treatment

²⁷⁵ Under the “avoidance canon,” a statute will be interpreted, if fairly possible, so as to avoid a serious constitutional question. *E.g.*, *Solid Waste Agency of N. Cook Cnty. v. United States Army Corps of Eng’rs*, 531 U.S. 159 (2001). Similarly, under the “plain statement” principle, when a statute appears to be in tension with constitutional values, the courts often insist that Congress has made “its intention unmistakably clear in the language of the statute.” *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985); *see also Gregory v. Ashcroft*, 501 U.S. 452, 460, 464 (1991); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 23 (1981).

²⁷⁶ *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 715 (2011) (finding the regulation reasonable in part because it diminishes “wasteful litigation and continuing uncertainty” (quoting *United States v. Correll*, 389 U.S. 299, 302 (1967))).

²⁷⁷ *See Salem, supra* note 81 (discussing *Judulang v. Holder*, 132 S. Ct. 476 (2011)). But *Judulang*, although it does not give it dispositive significance, does acknowledge that administrability is relevant. *See* 132 S. Ct. at 490 (“[C]ost is an important factor for agencies to consider in many contexts. But cheapness alone cannot save an arbitrary agency policy”).

²⁷⁸ Considering administrability at step two is consistent with the preponderance of the case law. *See, e.g.*, *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 295 (Scalia, J., concurring); *Dickow v. United States*, 654 F.3d 144, 150–51 (1st Cir. 2011); *Lantz v. Commissioner*, 607 F.3d 479, 485 (7th Cir. 2010); *Barahona v. Napolitano*, No. 10 Civ. 1574(SAS), 2011 WL 4840716, at *11 (S.D.N.Y. Oct. 11, 2011).

to sub-regulation Service guidance documents.²⁷⁹ Moreover, there has been a larger number of decisions that have treated the matter as unresolved, that is, have held open the possibility of *Chevron* treatment for such Service positions.²⁸⁰

Nonetheless, the great bulk of the case law holds that revenue rulings and other sub-regulation Service positions are tested under *Skidmore* or some other weak standard, not under *Chevron*.²⁸¹ There is good reason for this. Revenue rulings are generally acknowledged to be the Service guidance documents next in rank after Treasury Regulations. The Service says this about its revenue rulings:

(d) Revenue rulings . . . do not have the force and effect of Treasury Department Regulations . . . but are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose

(e) Taxpayers may generally rely upon Revenue Rulings . . . in determining the tax treatment of their own transactions However, since each Revenue Ruling represents the conclusion of the Service as to the application of the law to the entire state of facts involved, taxpayers, Service personnel, and others concerned are cautioned against reaching the same conclusion in other cases unless the facts and circumstances are substantially the same. They should consider the effect of subsequent legislation, regulations, court decisions, and revenue rulings.²⁸²

Thus, revenue rulings do not have the force of law.²⁸³ They are situation specific, not of general application.²⁸⁴ They may be relied upon

²⁷⁹ *E.g.*, *Ammex, Inc. v. United States*, No. 00-CV-73388, 2002 WL 32065583 (E.D. Mich. July 31, 2002), *abrogated by*, *Ammex, Inc. v. United States*, No. 00-CV-73388, 2002 WL 31777584 (E.D. Mich. Oct. 22, 2002).

²⁸⁰ *E.g.*, *Bluetooth Sig Inc. v. United States*, 611 F.3d 617, 622 (9th Cir. 2010) (stating that revenue rulings “are entitled to *at least Skidmore* deference”) (emphasis added); *Tualatin Valley Builders Supply, Inc. v. United States*, 522 F.3d 937, 941 (9th Cir. 2008) (“Our case law leaves unresolved the question whether a revenue procedure should receive *Chevron* or *Skidmore* deference.”); *Fed. Nat’l Mortg. Ass’n v. United States*, 379 F.3d 1303, 1308 (Fed. Cir. 2004); *Am. Mut. Life Ins. Co. v. United States*, 267 F.3d 1344, 1352 n.3 (Fed. Cir. 2001).

²⁸¹ *E.g.*, *Aeroquip-Vickers, Inc. v. Commissioner*, 347 F.3d 173 (6th Cir. 2003); *Omohundro v. United States*, 300 F.3d 1065, 1069 (9th Cir. 2001).

²⁸² I.R.S. Proc. Regs. § 601.601(d)–(e).

²⁸³ *E.g.*, *Anders v. Commissioner*, 48 T.C. 815, 821 (1967).

²⁸⁴ The APA defines a “rule” as “an agency statement of general or particular

only “generally,”²⁸⁵ and whatever authority they may once have possessed may evanesce as a result of subsequent developments. They typically are issued without notice and comment, and they are not approved by the Secretary of the Treasury.²⁸⁶ In short, sub-regulation guidance from the Service does not make binding law.

The thoughtful ABA Deference Report concluded that rulings and the like should not be *Chevron*-entitled.²⁸⁷ The current policy of the Department of Justice, reversing an earlier position,²⁸⁸ is not to argue that such Service guidance documents are within the *Chevron* ambit.²⁸⁹ In my view, this is a sound position and should become settled law.

D. Construction Arguments

The preceding classes of arguments seek to curtail administrative overreaching by achieving invalidation of allegedly improper regulations. But there is another possible path. Instead of winning by invalidating a regulation, taxpayers may sometimes be able to prevail by persuading the court to interpret the regulation in a favorable fashion. This is similar to the process by which the nondelegation doctrine morphed from a constitutional rule to a principle of statutory interpretation.²⁹⁰

In the past, taxpayers sometimes have succeeded in persuading courts to interpret Treasury regulations adversely to the Service.²⁹¹ In one respect,

applicability and future effect designed to implement, interpret, or prescribe law or policy.” 5 U.S.C. § 551(4) (2012). Revenue rulings are “rules” within the broadest sense of that definition.

²⁸⁵ In fact, although the Service strives to achieve positional consistency, it happens with some frequency that the Service takes a position in a particular case that is inconsistent with a prior, published revenue ruling or other sub-regulation guidance document. See Steve R. Johnson, *An IRS Duty of Consistency: The Failure of Common Law Making and a Proposed Legislative Solution*, 77 TENN. L. REV. 563, 565–70 (2010). A leading administrative law scholar of his day stated: “Of all the agencies of the government, the worst offender against sound principles in the use of precedents may be the Internal Revenue Service.” 2 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 8.12 (2d ed. 1979).

²⁸⁶ *Limited, Inc. v. Commissioner*, 286 F.3d 324, 337 (6th Cir. 2002).

²⁸⁷ *Salem, Aprill & Galler*, *supra* note 143, at 769–72.

²⁸⁸ See Jeremiah Coder, *Officials Comment on Interpreting Mayo*, 2011 TNT 16-4 (Jan. 25, 2011) (quoting acting Deputy Assistant Attorney General Gilbert Rothenberg as saying that “DOJ believes that even revenue rulings should be subject to *Chevron* deference.”).

²⁸⁹ See Marie Sapirie, *DOJ Won’t Argue for Chevron Deference for Revenue Rulings and Procedures*, *Official Says*, 2011 TNT 90-7 (May 10, 2011) (citing Mr. Rothenberg as saying that “[t]he Department of Justice will no longer argue for *Chevron* deference for revenue rulings and revenue procedures”).

²⁹⁰ See ALFRED C. AMAN, JR., *ADMINISTRATIVE LAW AND PROCESS* 547 (2d ed. 2006).

²⁹¹ *E.g.*, *Cottage Sav. Ass’n v. Commissioner*, 499 U.S. 554, 562–66 (1991) (income

Mayo fortifies such efforts. Tax is overwhelmingly statutory, so nearly all tax cases ultimately are events of statutory construction. Statutory construction in American courts involves perpetual conflict between (or, more accurately, ever-shifting balances of) textual and purposive interpretational approaches.²⁹² Principles developed in construing statutes also have been applied to construing regulations.²⁹³

Mayo noted that in a previous case the Court had “expressly invited the Treasury Department to ‘amend its regulations’ if troubled by the consequences of our resolution of the case.”²⁹⁴ This aspect of *Mayo* can be deployed in support of textual construction limiting the reach of a tax regulation.

This was done in *Estate of Petter*, a 2011 Ninth Circuit case.²⁹⁵ The court confronted a controversy as to a federal gift tax regulation. In an opinion authored by a textually inclined judge, the court gave the regulation a restrictive, literal interpretation and held for the taxpayer. The court concluded its analysis by quoting the above language of *Mayo*.²⁹⁶

What was done in *Estate of Petter* could be done in other tax cases in the future. Thus, *Mayo* may give support to textually oriented construction that limits the reach of tax regulations.

E. Summary

Part V showed how *Mayo*, if aggressively used by Treasury and the Service in conjunction with other rules and principles, could present the potential of governmental overreaching. While we need to be vigilant against that danger, this part has demonstrated that ample doctrinal resources remain after *Mayo* to meet this challenge.

Under existing doctrine (or, in some cases, existing doctrine with fairly modest adjustment), many avenues exist by which abusive regulations can

tax regulation); cf. *Commissioner v. Estate of Hubert*, 520 U.S. 93 (1997) (Supreme Court severely split on interpretation of estate tax regulation).

²⁹² See, e.g., WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* chs. 6–9 (2d ed. 2006); Steve R. Johnson, *The Two Kinds of Legislative Intent*, 51 ST. TAX NOTES 1045 (Mar. 30, 2009); Steve R. Johnson, *The Use and Abuse of Plain Meaning Doctrine*, 49 ST. TAX NOTES 831 (Sept. 22, 2008).

²⁹³ Examples of cases citing *Mayo* and construing tax regulations include *Goodrich Corp. v. United States*, 846 F. Supp. 2d 445, 449 (W.D.N.C. 2012), and *Ambase Corp. v. United States*, 834 F. Supp. 2d 71, 74–76 (D. Conn. 2011).

²⁹⁴ *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011) (quoting *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 838 (2001)).

²⁹⁵ *Estate of Petter v. Commissioner*, 653 F.3d 1012 (9th Cir. 2011) (Bybee, J., writing for the court).

²⁹⁶ *Id.* at 1023–24.

be challenged. *Mayo* does not close off those avenues, indeed it widens them in some instances.

It will be up to taxpayers' representatives to present the right arguments to the courts. *Mayo* thus imposes a burden on the tax community to sharpen awareness of general rules of administrative law. The payoff for shouldering that burden, however, will be more effective client representation and preservation of fairness and balance in tax administration.

VII. CONCLUSION

In *Mayo*, the Supreme Court made important contributions to the development of tax law and administrative law. They include bringing the former firmly within the embrace of the latter insofar as regulations are concerned and adding to the momentum for reform of *Chevron*.

These benefits are not eclipsed by the possibility of *Mayo* radically altering the balance between taxpayers and the government in litigation involving the validity of Treasury regulations. The possibility is raised, not by *Mayo* alone, but by potential combinations of *Mayo* with other rules. But this possibility can be minimized to an acceptable degree.

Mayo does take taxpayers out of an accustomed (yet ultimately unpromising) mode of argument: the distorted factors-based conception of *National Muffler*. But taxpayers have been given far more than what has been taken away from them. Removed from their zone of illusory comfort, taxpayers and their representatives will have to find other arguments. And good arguments there are — better arguments than the caricatures of *National Muffler*.

Numerous government victories in tax cases have later been used against the Service by taxpayers.²⁹⁷ A leading tax lawyer of his generation remarked:

Reliable maxims do not abound in the tax field, but there are a few. One relates to Moses' rod. It reminds us that every stick crafted to beat on the head of a taxpayer will metamorphose sooner or later into a large green snake and bite the commissioner on the

²⁹⁷ One prominent example is *Crane v. Commissioner*, 331 U.S. 1 (1947), which, although ostensibly a government victory, "laid the foundation stone for most tax shelters." Boris I. Bittker, *Tax Shelters, Nonrecourse Debt, and the Crane Case*, 33 TAX L. REV. 277, 283 (1978); see also George K. Yin, *The Story of Crane: How a Widow's Misfortune Led to Tax Shelters*, in TAX STORIES ch. 8 (Paul L. Caron ed., 2d ed. 2009).

hind part.²⁹⁸

In the particular dispute, *Mayo* was a victory for the government. However, if taxpayers make effective use of new arguments available to them, *Mayo* may well become another case that bites the Service on the posterior. In the long run, *Mayo* may provoke effective advocacy that leads to more, not less, vigorous testing of arguably improper tax regulations.

²⁹⁸ Martin D. Ginsburg, *Making Tax Law Through the Judicial Process*, 70 A.B.A.J. 74, 76 (1984).