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Mayo and the Future of Tax Regulations

By Steve R. Johnson

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The years 2009 to 2011 have been an active period for taxpayer challenges to regulations. This has resulted in many important judicial opinions. Johnson believes the most important is the Supreme Court's January 11 *Mayo* decision. *Mayo* makes it clear that *Chevron* provides the standard when tax regulations are challenged; it rejects the old view that general authority regulations receive less deference than specific authority regulations; and it confirms that Treasury and the IRS are fully subject to the usual rules of administrative law. However, it does not fundamentally change the balance between taxpayers and the government. This report examines these and other aspects of *Mayo* and suggests possible future battlegrounds for challenges to tax regulations.

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Of the heady early days of the French Revolution, Wordsworth wrote: "Bliss it was in that dawn to be alive. But to be young was very heaven." Those of us interested in the intersection of tax law and administrative law may be excused if we feel similar exhilaration about the time in which we live.

In terms of the intersection, this is the most exciting moment in the tax history of the United

States. Recent cases have tested — and cases still in progress continue to test — the validity of several Treasury regulations:

1. On January 11 the Supreme Court decided *Mayo*, the culmination of controversy over the validity of a regulation dealing with employment taxes for medical residents and other student-employees.¹

2. Section 6015 prescribes a two-year limitations period for claims for spousal relief under section 6015(b) and (c), but it is silent as to a limitation period for claims for spousal relief under section 6015(f). By regulation, Treasury established a two-year limitations period for section 6015(f).² The Tax Court has repeatedly held that regulatory provision invalid. Thus far, the Tax Court has been reversed on this issue by the Third Circuit³ and the Seventh Circuit,⁴ and the Sixth Circuit is expected to weigh in soon.⁵

3. Section 6501(e) creates a six-year limitations period for income tax assessments when a return omits income exceeding 25 percent of reported income. The IRS maintains that this extended period also applies when overstatements of basis lead to the requisite understatement of income. Treasury promulgated a

¹*Mayo Foundation for Medical Education & Research v. United States*, 131 S. Ct. 704 (Jan. 11, 2011), Doc 2011-609, 2011 TNT 8-10. For discussion of *Mayo*, see Irving Salem, "Mayo Dissected: Some Dragons Slain, Some Still Breathing Fire," *Tax Notes*, Mar. 14, 2011, p. 1327, Doc 2011-4255, 2011 TNT 50-5.

²Reg. section 1.6015-5(b)(1).

³*Mannella v. Commissioner*, 132 T.C. 196 (2009), Doc 2009-8425, 2009 TNT 69-21, rev'd, 631 F.3d 115 (3d Cir. 2011), Doc 2011-1183, 2011 TNT 13-10.

⁴*Lantz v. Commissioner*, 132 T.C. 131 (2009), Doc 2009-7979, 2009 TNT 65-8, rev'd, 607 F.3d 379 (7th Cir. 2010), Doc 2010-12604, 2010 TNT 110-17. For discussion of this case, see Bryan T. Camp, "Interpreting Statutory Silence," *Tax Notes*, Aug. 2, 2010, p. 501, Doc 2010-13289, or 2010 TNT 148-6 (arguing that the Tax Court was right in *Lantz* and the Seventh Circuit was wrong).

⁵*Hall v. Commissioner*, 135 T.C. No. 19 (Sept. 22, 2010), Doc 2010-20733, 2010 TNT 184-11, on appeal, No. 10-2628 (6th Cir.); *Buckner v. Commissioner*, No. 12153-09 (T.C. 2010) (unreported order), on appeal, No. 10-2056 (6th Cir.). *Hall* is in the briefing stage. *Buckner* has been fully briefed and is awaiting oral argument.

temporary regulation, now replaced by a permanent regulation, enshrining the IRS's interpretation.⁶ The temporary regulation was invalidated by the Tax Court, whose decision is now on appeal to the D.C. Circuit, with oral argument scheduled for April 5.⁷ Four other circuit courts have already weighed in on the issue. On January 26 the Seventh Circuit held for the IRS on the issue (although it did so as a matter of statutory construction, with only dicta as to the validity of the regulation).⁸ On February 7 and February 9 the Fourth Circuit and the Fifth Circuit, respectively, held against the IRS, refusing to accord *Chevron* deference because the section was seen as unambiguous.⁹ On March 11 the Federal Circuit held for the IRS, according the regulation deference under *Chevron*.¹⁰ The issue remains pending in the Tenth Circuit.¹¹

4. The section 263 Uniform Capitalization regime is implemented in part by a regulation setting forth the so called "associated-property" rule.¹² In a case of first impression, the Court of Federal Claims considered the validity of the regulation. The court found discrepancies in the regulation and saw it as stretching the boundaries of reasonableness. Nonetheless, on February 25, the court reluctantly upheld the regulation.¹³

This report is about *Mayo*. As a Supreme Court decision, it is the most authoritative of the recent cases, and it has been cited in arguments in other recent cases challenging tax regulations. When relevant, this report also addresses these other cases.¹⁴

⁶Reg. section 301.6501(e)-1T(a)(1)(iii), replaced by T.D. 9511, Doc 2010-26662, 2010 TNT 240-11, accompanying reg. sections 301.6229(c)(2)-1 and 301.6501(e)-1.

⁷*Intermountain Insurance Services of Vail LLC v. Commissioner*, 134 T.C. 211 (2010), Doc 2010-10163, 2010 TNT 88-12.

⁸*Beard v. Commissioner*, 2011 WL 222249 (7th Cir. Jan. 26, 2011), Doc 2011-1764, 2011 TNT 18-10. The taxpayer has asked the Seventh Circuit to reconsider *Beard* en banc.

⁹*Home Concrete & Supply LLC v. United States*, 107 AFTR2d 2011-767 (4th Cir. 2011), Doc 2011-2674, 2011 TNT 26-7; *Burks v. Commissioner*, 107 AFTR2d 2011-824 (5th Cir. 2011).

¹⁰*Grapevine Imports Ltd. v. United States*, 2011 WL 832915 (Fed. Cir. 2011), Doc 2011-5233, 2011 TNT 49-14.

¹¹*Salman Ranch Ltd. v. United States*, No. 09-9015 (10th Cir.), Doc 2010-14410, 2010 TNT 125-18.

¹²Reg. section 1.263A-11(e)(1)(ii)(B).

¹³*Dominion Resources Inc. v. United States*, 107 AFTR2d 2011-1033 (Ct. Fed. Cl. 2011), Doc 2011-4145, 2011 TNT 40-11.

¹⁴The cases are not just doctrinally significant. They also have significant revenue implications for taxpayers and the federal fisc. The government estimates that Social Security taxes on medical residents can be as much as \$700 million per year and that had it lost *Mayo*, it would have had to pay out more than \$1 billion in refunds of overpayments. See, e.g., Inside

(Footnote continued in next column.)

Mayo is a helpful case in that it clarifies the analytical process to be used when taxpayers challenge the validity of Treasury regulations. In general, *Mayo* confirms directions in which the administrative rules of tax have been moving, and it clears out much of the accreted debris of outdated thinking.

Part I describes the facts of *Mayo* and the Supreme Court's decision. Part II explains the ways in which *Mayo* clarifies the law governing challenges to the validity of tax regulations. Part III seeks to allay the fear that *Mayo* fundamentally shifts the balance in a pro-government direction in cases in which Treasury regulations are challenged. Finally, Part IV discusses some likely post-*Mayo* battlegrounds.

I. *Mayo* Facts and Decision

Under FICA, both employers and employees are subject to tax, based on wages.¹⁵ Excluded from taxation, however, 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."¹⁶

The Mayo Foundation and the University of Minnesota offer residency programs that train doctors. The programs are multiyear and emphasize hands-on experience. Residents often spend 50 to 80 hours a week examining patients, making diagnoses, prescribing medication, recommending plans of care, and performing procedures. Residents are supervised. They are paid between \$41,000 and \$56,000 annually and are provided medical insurance, malpractice insurance, and paid vacation time.

In addition to learning through service, Mayo residents participate in structured education. They are assigned material to read, attend lectures and conferences, and take examinations.

The issue in *Mayo* was whether medical residents fit within the FICA exception for students. Treasury regulations promulgated in 1951 provide that the exception applies to students who work for their schools "as an incident to and for the purpose of pursuing a course of study."¹⁷ Until 2005, the "incident to" determination was made case by case.¹⁸

Higher Ed, "Medical Residents Ruled Employees," available at http://www.insidehighered.com/news/2011/01/12/supreme-court_says_medical_residents_not_students_for_tax_purposes (Jan. 12, 2011).

¹⁵Sections 3101(a) (FICA tax on employees) and 3111(a) (FICA tax on employers).

¹⁶Section 3121(b)(10).

¹⁷Reg. section 31.3121(b)(10)-2(d).

¹⁸E.g., Rev. Rul. 78-17, 1978-1 C.B. 307.

In late December 2004, Treasury amended the regulation to provide that the exception applies only when the educational aspect predominates over the service aspect.¹⁹ The amended regulation categorically provides that services as a full-time employee (including scheduled work of more than 40 hours a week) are not within the exception.²⁰

The Mayo Foundation and the University of Minnesota challenged the validity of the amended regulation. The district court agreed with the taxpayers,²¹ in part because of its reading of the Supreme Court's pre-*Chevron*, tax-specific *National Muffler* decision.²² The circuit court reversed, concluding that the nontax *Chevron* decision²³ provided the governing standard and that, under *Chevron*, the amended regulation was valid.²⁴

In an opinion by Chief Justice John G. Roberts Jr., the Supreme Court unanimously affirmed the circuit court. The Court held that (1) *Chevron*, not *National Muffler*, controls²⁵; (2) section 3121(b)(10) is silent or ambiguous as to the definition of the student exception²⁶; and (3) the amended regulation reasonably interprets section 3121(b)(10).²⁷

II. What Mayo Does

Taxpayers have been challenging the validity of tax regulations for nearly as long as there have been tax regulations.²⁸ As a result, many cases specific to tax existed before *Chevron* was decided.²⁹ The pre-*Chevron* cases had uncertainties; *Chevron* itself (as modified by subsequent cases) has been far from a model of clarity³⁰; and the relationship of the two lines of authority was unsettled. The intersection of these three sets of ambiguities created a doctrinal mess, for which the Supreme Court itself bore a considerable share of the blame.³¹ For example, in post-*Chevron* tax cases, the Court sometimes cited

National Muffler and other times cited *Chevron* without explanation of why one case and not the other was being cited.³²

Mayo improves the situation. Five aspects of the case are noteworthy.

First, it was generally agreed long before *Mayo* that *Chevron* provides the standard when a taxpayer challenges a specific authority regulation issued under a delegation in some section other than section 7805(a).³³ However, courts³⁴ and commentators³⁵ disagreed about whether *Chevron* also governed challenges to the validity of regulations promulgated under section 7805(a)'s general delegation to Treasury of authority to "prescribe all needful rules and regulations for the enforcement" of the code.

That debate is now over. *Mayo* makes it clear that *Chevron* provides the controlling standard for general authority regulations too,³⁶ particularly when the regulation has gone through the notice and comment procedures of the Administrative Procedure Act (APA),³⁷ as the regulation at issue in *Mayo* had.

Second, *Mayo* undercuts the distinction that traditionally has been drawn between specific authority and general authority regulations. Some courts — including the Supreme Court — and some commentators used to say that general authority regulations receive less deference than specific authority

Chevron deference have produced so much confusion in the lower courts." *Coeur Alaska*, 129 S. Ct. at 2479-2480 (Scalia, J., concurring).

³²Compare *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 219 (2001), and *Cottage Savings Ass'n v. Commissioner*, 499 U.S. 554, 560-561 (1991) (both citing *National Muffler*) with *Atlantic Mutual Insurance 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*).

³³E.g., *Carlos v. Commissioner*, 123 T.C. 275, 280 (2004), Doc 2004-18624, 2004 TNT 183-9; *Square D Co. v. Commissioner*, 118 T.C. 299, 307 (2002), Doc 2002-7591, 2002 TNT 60-8, *aff'd*, 438 F.3d 739 (7th Cir. 2006), Doc 2006-2877, 2006 TNT 30-9.

³⁴E.g., *Swallows Holding Ltd. v. Commissioner*, 126 T.C. 96 (2006), Doc 2006-1541, 2006 TNT 18-10 (applying *National Muffler*), *rev'd*, 515 F.3d 162 (3d Cir. 2008), Doc 2008-3372, 2008 TNT 33-41 (applying *Chevron*).

³⁵Compare John F. Coverdale, "Court Review of Tax Regulations and Revenue Rulings in the *Chevron* Era," 64 *Geo. Wash. L. Rev.* 35 (1995) (arguing that *Chevron* should not apply to Treasury regulations) to Steve R. Johnson, "Swallows as It Might Have Been: Regulations Revising Case Law," *Tax Notes*, Aug. 28, 2006, p. 773, Doc 2006-14217, or 2006 TNT 167-105 (arguing that *Chevron* should apply to general authority tax regulations).

³⁶*Mayo*, 131 S. Ct. at 714.

³⁷5 U.S.C. section 553.

¹⁹Reg. section 31.3121(b)(10)-2(d)(3)(i).

²⁰Reg. section 31.3121(b)(10)-2(d)(3)(iii).

²¹503 F. Supp.2d 1164 (D. Minn. 2007), Doc 2007-18316, 2007 TNT 153-7.

²²*National Muffler Dealers Ass'n Inc. v. United States*, 440 U.S. 472 (1979).

²³*Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984).

²⁴568 F.3d 675 (8th Cir. 2009), Doc 2009-13439, 2009 TNT 112-75.

²⁵*Mayo*, 131 S. Ct. at 712-714.

²⁶*Id.* at 711.

²⁷*Id.* at 716.

²⁸E.g., *Helvering v. Winmill*, 305 U.S. 79 (1938).

²⁹See cases cited in notes 69-75 *infra*.

³⁰See, e.g., *Coeur Alaska Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2479 n.* (2009) (Scalia, J., concurring) (citing cases applying *Chevron* but reaching inconsistent results).

³¹The Court significantly modified *Chevron* in *United States v. Mead Corp.*, 533 U.S. 218 (2001). Justice Scalia describes *Mead* as an "inscrutable opinion . . . whose incomprehensible criteria for

(Footnote continued in next column.)

regulations.³⁸ Others doubted the usefulness or the validity of that incantation.³⁹

Previous cases had wounded the traditional distinction.⁴⁰ *Mayo* deals it a mortal blow. The Court noted that "the administrative landscape has changed significantly" since the old cases expressing the traditional view,⁴¹ and it remarked: "Our inquiry [as to deference] does not turn on whether Congress's delegation of authority was general or specific."⁴²

Third, *Mayo* continues the debate about interpretive method at *Chevron's* step one. What sources may a judge legitimately consult in ascertaining whether the statute is ambiguous? The answer depends on which judge is writing the opinion. When a textualist judge does so, as Justice Clarence Thomas did in *Brand X*, the focus will be limited to the language and structure of the statute (perhaps with a constructional canon or two).⁴³ When a purposivist judge writes the opinion, as Justice John Paul Stevens did in *Chevron* itself, a wider angle of vision will be used,⁴⁴ including legislative history and other indicators of congressional intent.⁴⁵

Chief Justice Roberts is a textualist, so unsurprisingly the step one analysis in *Mayo* is constrained in scope, with principal attention paid to the language of the statute.⁴⁶ Although this is interesting, it could hardly be called profoundly significant. The next time a purposivist judge writes a step one opinion, he is unlikely to feel constrained by Chief Justice Roberts's approach.

Fourth, *Mayo's* approach to the step two inquiry also is interesting. What are the criteria by which one decides whether the agency's interpretation is reasonable? It might be argued that the only acceptable measures of reasonableness are those that bear on

accuracy of meaning.⁴⁷ For example, the relevant ambiguity in *Mayo* involves the definition of student under section 3121(b)(10). It could be maintained that only indicia bearing on the characteristics of students versus the characteristics of employees should be taken into account.

Mayo, however, was not so limited. One consideration that led the Court to conclude that the amended regulation is reasonable is that compared with a facts and circumstances inquiry, a categorical approach improves administrability, avoiding "the wasteful litigation and continuing uncertainty that would inevitably accompany any purely case-by-case approach."⁴⁸

Administrability, of course, is a process value, not an accuracy indicator. Indeed, inherent in administrability as an operative value is that some loss of classificatory precision is acceptable to enhance predictability, preserve resources, and the like.⁴⁹ Thus, the teaching of *Mayo* is that the step two reasonableness inquiry is not limited to accuracy-of-meaning considerations but includes process values as well.⁵⁰

Finally, the ever-growing complexity of American law requires professionals to specialize. That survival necessity imposes costs, however: a tendency to tunnel vision and ignorance or rejection of currents moving the broader law. Tax exceptionalism (carving tax out of rules of general application

³⁸E.g., *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982); *Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981).

³⁹E.g., Boris I. Bittker et al., *Federal Income Taxation of Individuals* 46-5 (2002); Johnson, *supra* note 35, at 780-781.

⁴⁰E.g., *Boeing Co. v. United States*, 537 U.S. 437, 448 (2003), *Doc* 2003-5648, 2003 TNT 43-7 (noting that although the tax regulation at issue was general authority in nature, "we must still treat the regulation with deference").

⁴¹*Mayo*, 131 S. Ct. at 713.

⁴²*Id.* at 713-714.

⁴³*National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 989 (2005) (conducting the step one inquiry by reference to the statute's "plain terms").

⁴⁴*Chevron*, 467 U.S. at 843 n.9 (referring to use of "traditional tools of statutory construction" to ascertain the "intention" of Congress).

⁴⁵For an illustration of the clash, compare Justice Ruth Bader Ginsburg's opinion for the Court in *Regions Hospital v. Shalala*, 522 U.S. 448 (1998), with Justice Scalia's dissent in that case.

⁴⁶See *Mayo*, 131 S. Ct. at 711.

⁴⁷See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411-412 (1971) (emphasizing that the reasons for agency choices should relate to the considerations and purposes Congress made relevant to the statute at hand).

⁴⁸*Mayo*, 131 S. Ct. at 715 (quoting *United States v. Correll*, 389 U.S. 299, 302 (1967)); see also *Coeur Alaska*, 129 S. Ct. at 2479 (Scalia, J., concurring) (identifying predictability and reduced litigation as goals *Chevron* should promote); *Lantz*, 607 F.3d at 485.

⁴⁹See, e.g., Kenneth W. Gideon, "Assessing the Income Tax: Transparency, Simplicity, Fairness," 25 *Ohio N.U. L. Rev.* 101 (1999); Steve R. Johnson, "The E.L. Wiegand Lecture: Administrability-Based Tax Simplification," 4 *Nev. L.J.* 573, 582-584 (2004).

⁵⁰Arguably, however, administrability is a consideration Congress intends to be relevant to every statute. Thus, even when the statutes in question require an agency to make individualized determinations (as, for example, section 6015(f) does), courts have allowed agencies to adopt bright-line rules to resolve classes of issues that arise frequently in the individual cases. E.g., *Lopez v. Davis*, 531 U.S. 230, 243-244 (2001) (prison punishment case); *American Hospital Ass'n v. NLRB*, 499 U.S. 606, 612 (1991) (collective bargaining case); *Heckler v. Campbell*, 461 U.S. 458, 467 (1983) (disability benefits case).

without the warrant of compelling contextual differences) and tax myopia are understandable but ultimately undesirable, as I⁵¹ and others have argued.⁵²

Mayo is powerful ammunition against tax exceptionalism. In concluding that the law had evolved past *National Muffler* and the traditional "general authority versus specific authority" cases, *Mayo* cited five cases — all of them nontax cases.⁵³ This pattern of citation dispels the idea that tax is an island untouched by the waves lapping on other administrative shores. Indeed, *Mayo* made the point explicitly. It stated:

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.⁵⁴

III. What *Mayo* Doesn't Do

What *Mayo* does is to clarify the law, as shown in Part II above. What *Mayo* doesn't do is fundamentally alter the balance of power between taxpayers and the government in cases in which the validity of Treasury regulations is challenged. Any fear on the part of taxpayers that tax regulations will now be effectively immune from challenge would be exaggeration on the order of Chicken Little's "the sky is falling!"

I say this for three reasons. First, holding that *Chevron* applies to challenges to general authority tax regulations isn't revolutionary — the clear trend of the law was already in that direction. In his dissent in the Tax Court's 2006 *Swallows Holding* decision, Judge Mark V. Holmes tabulated the circuits. He found that six circuits applied *Chevron* in cases involving general authority regulations, that five cir-

cuits rejected *Chevron* in that context, and that two circuits had no clear position on the issue.⁵⁵ Since then, two circuits (the Third Circuit in *Swallows Holding* and the Eighth Circuit in *Mayo*) moved from the *National Muffler* camp into the *Chevron* camp, and one circuit (the Second Circuit) that previously took no side in the controversy seemed to be edging toward *Chevron*.⁵⁶ Moreover, the Tax Court — which had been a principal holdout against the trend — hedged its bets by stating in several cases that it need not choose between *National Muffler* and *Chevron* to decide the case at hand.⁵⁷ The Tax Court also applied *Chevron* in cases involving general authority regulations when compelled to do so by the *Golsen* rule.⁵⁸ In short, *Mayo* merely confirmed where the law was headed in any event.

Second, that a case is analyzed under *Chevron* is far from a guarantee that the agency will prevail. *Chevron* is usually considered a deferential standard favorable to the agency.⁵⁹ However, that need not be the case. When a judge wants to invalidate an agency position, the usually preferred approach is to declare that the statute is unambiguous — and adverse to the agency's view.⁶⁰ Less frequently, but still often enough that the possibility can't be ignored, judges accept that the statute is ambiguous but find the agency's interpretation to be unreasonable.⁶¹

⁵⁵*Swallows Holding*, 126 T.C. at 180-181.

⁵⁶See *Nathel v. Commissioner*, 615 F.3d 83, 93 (2d Cir. 2010), *Doc* 2010-12160, 2010 TNT 106-12.

⁵⁷E.g., *Estate of Gerson v. Commissioner*, 127 T.C. 139, 154 (2006), *Doc* 2006-21771, 2006 TNT 206-15, *aff'd*, 507 F.3d 435 (6th Cir. 2007), *Doc* 2007-25098, 2007 TNT 219-17. The Tax Court is not the only court to have used this strategy. It has happened often enough "that there has now appeared the phenomenon of *Chevron* avoidance — the practice of declining to opine whether *Chevron* applies or not." *Coeur Alaska*, 129 S. Ct. at 2479-2480 (Scalia, J., concurring); see also Lisa Schultz Bressman, "How *Mead* Has Muddled Judicial Review of Agency Action," 58 *Vand. L. Rev.* 1443, 1464 (2005).

⁵⁸E.g., *Mannella*, 132 T.C. at 201; *Feller v. Commissioner*, 135 T.C. No. 25, at *6 (2010), *Doc* 2010-24040, 2010 TNT 216-16; see *Golsen v. Commissioner*, 54 T.C. 742 (1970) (holding that the Tax Court will apply the law of the circuit to which the case is appealable), *aff'd*, 445 F.2d 985 (10th Cir. 1971).

⁵⁹See, e.g., William D. Popkin, *Materials on Legislation: Political Language and the Political Process* 582 (4th ed. 2005) (calling *Chevron* a "super-deferential approach").

⁶⁰E.g., Antonin Scalia, "Judicial Deference to Administrative Interpretations of Law," 1989 *Duke L.J.* 511, 520-521; 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, 1691-1692 (2005).

⁶¹E.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); *Abbott Laboratories v. Young*, 920 F.2d 984 (D.C. Cir. 1990), *cert. denied*, 502 U.S. 819 (1991). A recent illustration is the dissent in *Mannella*, which would have held a regulation under section 6015 to be invalid at *Chevron's* step two. *Mannella*, 2011 WL

(Footnote continued on next page.)

⁵¹Steve R. Johnson, "Intermountain and the Importance of Administrative Law in Tax Law," *Tax Notes*, Aug. 23, 2010, p. 837, *Doc* 2010-15990, 2010 TNT 163-4.

⁵²E.g., 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).

⁵³See *Mayo*, 131 S. Ct. at 713-714 (citing *Mead*; *Chevron*; *Brand X*; *Sullivan v. Everhart*, 494 U.S. 83 (1990); and *Long Island Care at Home Ltd. v. Coke*, 551 U.S. 158 (2007)).

⁵⁴*Mayo*, 131 S. Ct. at 713 (punctuation omitted). In support of this proposition, the Court quoted one nontax case, *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999), and cited another nontax case, *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989).

Perhaps America's greatest contribution to philosophy is pragmatism. Despite the shift from the common law to statutes and regulations as the principal instruments of lawmaking, the single most important word in the Anglo-American legal tradition remains "reasonableness." Judges steeped in the tradition will usually find doctrinally palatable ways to uphold regulations they find reasonable and to strike down regulations they find unreasonable.⁶²

There is ample play in *Chevron's* doctrinal joints to allow invalidation of overreaching tax regulations. *Mayo* does not change that.

Third, correctly understood, *National Muffler* was a weak reed for taxpayers to rely on. Chief Justice Roberts accepted that *National Muffler* is a less deferential standard than *Chevron*.⁶³ In this, he was buying a notion that has been peddled in recent years by lawyers and judges looking for ways to justify invalidating particular regulations. However, both the chief justice and the purveyors of this notion are wrong. Properly understood, *National Muffler* is a deferential case.

I make here as to *Mayo* an argument similar to that I made in criticizing the Tax Court's (later reversed) *Swallows Holding* decision.⁶⁴ The part of *National Muffler* that some have latched onto is its listing of six considerations:

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 reenactments of the statute.⁶⁵

149379 at *10-13 (Ambro, J., dissenting). In addition, in the *Dominion Resources* case cited *supra* note 13, the Court of Federal Claims came "very close" to invalidating a tax regulation at *Chevron's* step two. 107 AFTR2d 2011-1033, at * 20.

⁶²Indeed, the whole of *Chevron* boils down to reasonableness. A regulation contrary to an unambiguous statute is per se unreasonable. Thus, any regulation that would be invalidated at step one also would be invalidated at step two. *Chevron* can therefore be condensed to the simpler formulation that "administrative regulations issued pursuant to authority delegated by Congress must be upheld unless unreasonable." *Lantz*, 607 F.3d at 481.

⁶³*Mayo*, 131 S. Ct. at 712-713.

⁶⁴Steve R. Johnson, "Swallows Holding as It Is: The Distortion of *National Muffler*," *Tax Notes*, July 24, 2006, p. 351, Doc 2006-13093, 2006 TNT 142-37.

⁶⁵*National Muffler*, 440 U.S. at 477 (numbers added).

What the *Mayo* taxpayers (and other taxpayers) said was: "Aha! One or several of those six considerations is absent as to the regulation here at issue. Therefore, *National Muffler* dictates that this regulation receive little or no deference." *Mayo* rejected this argument. The Court disposed of several of the above considerations as arguments against the regulation:

- "We have repeatedly held that agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework."⁶⁶
- "We have instructed that neither the antiquity nor the contemporaneity with a statute is a condition of a regulation's validity."⁶⁷
- "We have found it immaterial to our analysis that a regulation was prompted by litigation."⁶⁸

The type of argument used by the *Mayo* taxpayers ignores context and distorts *National Muffler*. I offer three points in that regard. First, *National Muffler* was not a solitary event. It was one of a line of pre-*Chevron*, tax-specific cases, and that line was deferential in nature.⁶⁹

Second, the spirit of *National Muffler* itself was deferential. In the opinion in that case, the six considerations were bracketed by deferential language. They are preceded by the Court's acknowledgement that Congress delegated to Treasury, not to the courts, the authority to prescribe needful rules and that Treasury regulations should be upheld if they implement the statute "in some reasonable manner."⁷⁰ The considerations are succeeded by the Court's injunction: "The choice among reasonable interpretations is for the Commissioner, not the courts."⁷¹ So bracketed, it would be myopic to see the six *National Muffler* factors as hostile to regulatory flexibility.

⁶⁶*Mayo*, 131 S. Ct. at 712 (punctuation omitted) (quoting *Brand X*, 545 U.S. at 981, and citing *United States v. Eurodif S.A.*, 129 S. Ct. 878, 887 (2009)). Indeed, *Chevron* itself involved an agency (the Environmental Protection Agency) changing its previous position. For discussion of other aspects of Treasury and IRS inconsistency, see Steve R. Johnson, "An IRS Duty of Consistency: The Failure of Common Law Making and a Proposed Statutory Solution," 77 *Tenn. L. Rev.* 563 (2010).

⁶⁷*Mayo*, 131 S. Ct. at 712 (punctuation omitted) (quoting *Smiley v. Citibank (South Dakota) N.A.*, 517 U.S. 735, 740 (1996)). The regulation at issue in *Chevron* was not contemporaneous with the statute under which it was promulgated.

⁶⁸*Mayo*, 131 S. Ct. at 712 (punctuation omitted) (quoting *Smiley*, 517 U.S. at 741, and citing *United Dominion Industries Inc. v. United States*, 532 U.S. 822, 838 (2001)).

⁶⁹See, e.g., *Commissioner v. Portland Cement Co.*, 450 U.S. 156, 169 (1981); *United States v. Cartwright*, 411 U.S. 546, 550 (1973); *Correll*, 389 U.S. 299.

⁷⁰*National Muffler*, 440 U.S. at 476-477 (citing many cases).

⁷¹*Id.* at 488.

Third, it is worth remembering what actually happened in *National Muffler*. The Court upheld the regulation being challenged in that case. Moreover, it upheld the regulation even though it lacked contemporaneity, one of the six listed considerations.⁷²

In sum, the *Mayo* taxpayers attempted to turn *National Muffler* on its head. *National Muffler* was a deferential case in a deferential line of cases. In that light, the six considerations should be viewed as shields to protect tax regulations, not swords with which to attack them. That is, *National Muffler* should be read as saying that when one or more of the six considerations are present, the regulation is entitled to even more than usual deference — not that when one or more are absent, the regulation is due less deference. The six are plus factors, not negative factors.

This reading of *National Muffler* is supported by the deferential context of the case. It also is supported by the language the Court used to introduce the six considerations: “A regulation may have particular force if . . .” That is positive language, not negative language.

The positive view of the six *National Muffler* considerations also is supported by their derivation. The six were not inventions. Justice Harry A. Blackmun, writing for the Court, offered them as a distillation of previous cases of the pre-*Chevron*, tax-specific line. Following the distillation, Justice Blackmun cited⁷³ two cases of the line: *South Texas Lumber*⁷⁴ and *Winnmill*.⁷⁵ Both of these cases were deferential in nature, both upheld the regulations being challenged, and both used considerations among the six to reach that result.⁷⁶

In seeing the six considerations as positive, not negative, factors, I read what the Court did in *National Muffler* as similar to what it did in *Dixon*, another pre-*Chevron* tax-specific case.⁷⁷ In *Dixon*, the taxpayer contended that the IRS abused its discretion when it gave retroactive effect to its withdrawal of an acquiescence to a prior case. In part, the taxpayer relied on *Automobile Club of Michigan*, in which the Court had upheld another retroactive IRS ac-

tion.⁷⁸ The taxpayer argued that considerations mentioned in *Automobile Club* were not present in *Dixon*, and therefore *Dixon* should be decided adversely to the IRS. The Supreme Court rejected that argument:

Although we mentioned certain facts in support of our conclusion in *Automobile Club* that there had not been an abuse of discretion in that case, it does not follow that the absence of one or more of these facts in another case wherein a ruling or regulation is applied retroactively establishes an abuse of discretion.⁷⁹

The considerations mentioned in *National Muffler* should be understood as positive factors, not negative factors, just as *Dixon* understood that the considerations mentioned in *Automobile Club* were positive, not negative, factors. The attempt by the *Mayo* taxpayers to apply the *National Muffler* considerations negatively was a misuse of *National Muffler*.

In this respect, Chief Justice Roberts’s opinion for the *Mayo* Court threw the baby out with the bath water. The misuse of *National Muffler* by taxpayers (and by some judges, such as the Tax Court majority in *Swallows Holding*⁸⁰) had to be stopped, and *Mayo* accomplished that end. The better way to have stopped it, however, would have been to explain that *National Muffler* is actually a deferential case, not to have accepted that *National Muffler* is non-deferential and then suggest that it is no longer good law.

Put another way, the destination reached was good but the choice of roads was not. One may hope that future cases will rehabilitate *National Muffler* based on a better understanding of it.

To summarize Part III: (1) the clear trend before *Mayo* was to recognize that *Chevron* applies to general authority tax regulations (at least those that have gone through the APA notice and comment process); (2) application of *Chevron* does not guarantee that a challenged regulation will be upheld; and (3) properly understood, *National Muffler* was not a pro-taxpayer standard, so its denigration by *Mayo* was a small loss to taxpayers.

By emphasizing *Chevron*, *Mayo* changes the vocabulary in which taxpayer challenges to tax regulation must be couched. *Mayo* does not, however, fundamentally alter the litigating balance between taxpayers and the government.

⁷²*Id.* at 485.

⁷³*Id.* at 477.

⁷⁴*Commissioner v. South Texas Lumber Co.*, 333 U.S. 496, 501 (1948).

⁷⁵*Winnmill*, 305 U.S. at 83.

⁷⁶Similarly, courts deciding deference questions in nontax contexts often have treated *National Muffler*-like considerations as positive factors. *E.g.*, *Coeur Alaska*, 129 S. Ct. at 2479 (Scalia, J., concurring) (using the consistency of agency practice as a positive factor in upholding the agency’s position in an environmental law case).

⁷⁷*Dixon v. United States*, 381 U.S. 68 (1965).

⁷⁸*Automobile Club of Michigan v. Commissioner*, 353 U.S. 180 (1957).

⁷⁹*Dixon*, 381 U.S. at 76.

⁸⁰See *Swallows Holding*, 126 T.C. at 137-138.

IV. Future Battlegrounds

Questions about the appropriate standards to apply to challenges to the validity of Treasury regulations existed long before *Mayo*,⁸¹ and although *Mayo* answers some questions, other questions will continue and indeed might be brought more to the fore as a result of *Mayo*. Five such topics are addressed below: (1) regulations promulgated without notice and comment, (2) textually nuanced delegations, (3) explanation of regulatory choices, (4) *Chevron* and sub-regulation authorities, and (5) the future of *Chevron*.

A. Regulations Without Notice and Comment

Post-*Chevron* cases make it clear that *Chevron* does not apply to all cases in which agency positions are challenged.⁸² In concluding that the regulation at issue is *Chevron*-qualified,⁸³ *Mayo* noted that the regulation had gone through the notice and comment process, which has often been identified by the Court as an important factor as to whether *Chevron* applies.⁸⁴

Treasury usually submits regulations for notice and comment, and when it doesn't, one or another of the APA exceptions⁸⁵ sometimes applies. But not always. There are times when Treasury promulgates regulations without notice and comment even when no statutory exception applies.⁸⁶

Mayo does not cover this situation, and the stakes the situation raises are higher than merely which of several standards of deference may apply — failure to follow the APA when required means that the regulation is invalid.⁸⁷

⁸¹For discussion of the law up to 2004, see Irving Salem et al., "ABA Section of Taxation Report of the Task Force on Judicial Deference," *Tax Notes*, Sept. 13, 2004, p. 1231, Doc 2004-17659, or 2004 TNT 178-26.

⁸²E.g., *Mead Corp.*, 389 U.S. 299.

⁸³*Mayo*, 131 S. Ct. at 714.

⁸⁴E.g., *Long Island Care at Home Ltd. v. Coke*, 551 U.S. at 173-174; *Mead*, 533 U.S. at 230-231.

⁸⁵For example, notice and comment is not required when the regulation is merely interpretive, not binding, 5 U.S.C. section 553(b)(A), or "when the agency finds for good cause (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. section 553(b)(B).

⁸⁶See Kristin E. Hickman, "Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance With Administrative Procedure Act Rulemaking Requirements," 82 N.D. L. Rev. 1727 (2007); 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).

⁸⁷An unfortunate aspect of *Chevron* and subsequent cases is sloppy use of the term "deference." *Chevron* issues can arise in two very different contexts: (1) whether a purportedly binding regulation makes valid, enforceable law, or (2) whether a

(Footnote continued in next column.)

Some prior cases acknowledged awareness of the issue but did not resolve it.⁸⁸ *Intermountain*, recently decided by the Tax Court and on appeal to the D.C. Circuit, presents the issue via the concurring opinion of judges James S. Halpern and Holmes, which found the regulation invalid for failure to follow the notice and comment requirements.⁸⁹ I have written in support of the Halpern-Holmes position,⁹⁰ and future cases are likely to pose this issue as well.⁹¹ The validity of regulations promulgated outside the APA will be a post-*Mayo* battleground.

B. Textually Nuanced Delegations

When an old tree falls in a forest, sunlight penetrates to nurture new growth. *Mayo* disposed of the traditional notion that general authority regulations receive less deference than specific authority regulations. What I propose take its place is greater attention to the precise terms of the delegation set out by Congress in the statute — whether specific or general — under which the regulation at issue was promulgated.

As I described in some detail in a previous report⁹² and will develop in greater detail in a future one, Congress frames its delegations to Treasury in very different ways in different sections of the code. Some sections authorize Treasury only to fill interstices⁹³; others allow Treasury to write new, major rules⁹⁴; and yet others permit Treasury to suspend or alter substantive rules set out in the statute itself.⁹⁵

Under the *mayo* of the now-discarded traditional notion, courts in the past too often focused on whether the regulation was general authority or specific authority in nature, to the neglect of the particular language of the delegation at issue in the

nonbinding administrative position should be seen as persuasive. Strictly speaking, "deference" should pertain only to the second of these contexts, but it has been applied to both.

⁸⁸E.g., *Hospital Corp. of America v. Commissioner*, 348 F.3d 136, 145 n.3 (6th Cir. 2003), Doc 2003-23580, 2003 TNT 211-8, cert. denied, 543 U.S. 813 (2004); *American Standard Inc. v. United States*, 602 F.2d 256, 267-269 (Ct. Cl. 1979).

⁸⁹*Intermountain*, 134 T.C. at 222-223.

⁹⁰Johnson, *supra* note 51. For additional discussion of *Intermountain*, see Note, "Administrative Law," 124 Harv. L. Rev. 1066 (2011).

⁹¹Recently, the Seventh Circuit addressed the controversy involved in *Intermountain*. The Seventh Circuit held for the IRS on statutory grounds. That court offered its view that the regulation at issue is valid. However, its remarks in this regard were dicta, and the court did not address the APA issue. *Beard*, 2011 WL 222249, at *7.

⁹²Johnson, *supra* note 51, at 850-852.

⁹³E.g., section 911(c)(2)(B).

⁹⁴Sections 1502 and 2704(b)(4).

⁹⁵Sections 508(c)(2) and 4261(e)(3)(C).

case. *Mayo* clears the way for more textually nuanced interpretation of delegations for tax regulations.

Indeed, *Mayo* instructs that “the ultimate question is whether Congress would have intended, and expected, courts to treat the regulation as within, or outside, its delegation to the agency of gap-filling authority.”⁹⁶ A prime source through which to determine whether that intention exists is the language of the statute containing the delegation.⁹⁷ I hope post-*Mayo* cases will more fully explore textually nuanced interpretation of delegations for tax regulations.

C. Explanation of Regulatory Choices

As maintained in Part II, *Mayo* makes untenable the parochial notion that tax law stands apart from administrative law generally. The numerous doctrines of administrative law are fair game in contests about the validity of tax regulations.

A recent case, *Mannella*,⁹⁸ raises one of those doctrines: the obligation of an agency to explain the choices it makes in constructing binding rules. Some previous tax cases had noted, but usually not resolved, those issues.⁹⁹ The appearance of the issue in *Mannella* may prompt taxpayers’ counsel to raise it more often in future cases — especially because the distorted *National Muffler* argument is no longer available.¹⁰⁰

Mannella is one of the cases testing the validity of the Treasury regulation imposing a time limit on claims for relief under section 6015(f). Reversing the Tax Court, the Third Circuit in *Mannella* upheld the validity of the regulation. In a dissent, Judge Thomas L. Ambro said that he would have held the regulation invalid because, in promulgating it, Treasury had “not advanced any reasoning for its decision to impose [the] limitations period on taxpayers seeking

relief under subsection (f), leaving us no basis to conduct the analysis mandated by *Chevron* Step Two.”¹⁰¹

Judge Ambro invoked the Supreme Court’s decision in *State Farm*, an important nontax administrative law case.¹⁰² However, these are deep waters doctrinally, historically, and as a matter of policy. Doctrinally, *State Farm* is part of the broader topic of “hard look” review of agency decisions. Both the hard-look doctrine in general and the explanation requirement in particular have been subject to varying degrees of rigor in judicial application. *State Farm* exemplifies a strong form of the rules, but other decisions have been looser in approach.¹⁰³

Historically, *State Farm* has been refined by several subsequent decisions, including the Supreme Court’s 2009 *Fox* decision.¹⁰⁴ The government thinks that one of those decisions — the Supreme Court’s 2002 *Verizon* decision¹⁰⁵ — vitiates the “failure to explain” argument in the section 6015 context. In a brief filed on January 26 in a pending Sixth Circuit case, the Department of Justice argued that *State Farm* applies only when an agency is changing its course, not when it is “taking a position in the first instance.” Thus, in DOJ’s view, “Judge Ambro’s criticism is . . . completely misconceived.”¹⁰⁶

I doubt that *Verizon* is the stake through the heart of Judge Ambro’s contention. The *Verizon* Court was discussing *State Farm* in connection with whether the agency’s choice is rationally connected to the purpose of the statute, which is different from whether the agency must explain why it made the choices it did.¹⁰⁷ Moreover, although *State Farm* did entail an agency change of position, many other explanation and hard-look cases involved initial agency positions, not changed positions.¹⁰⁸ Thus, I think the government will have to formulate a better response to the “failure to explain” argument.

As a matter of policy, hard-look review has been very controversial.¹⁰⁹ One aspect of the debate is the

⁹⁶*Mayo*, 131 S. Ct. at 714 (punctuation omitted) (quoting *Long Island Care*, 551 U.S. at 173).

⁹⁷“Congress’ intent is best determined by looking to the statutory language that it chooses.” *United States v. Monsanto*, 491 U.S. 600, 610 (1989) (punctuation omitted) (quoting *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985)).

⁹⁸*Mannella*, 631 F.3d 115, was decided by the Third Circuit on January 19, 2011 — eight days after *Mayo*.

⁹⁹E.g., *American Standard Inc. v. United States*, 602 F.2d 256, 268-269 (Ct. Cl. 1979); *Georgia Fed. Bank F.S.B. v. Commissioner*, 98 T.C. 105, 110 (1992).

¹⁰⁰Even before *Mannella*, commentary had urged greater use of the “inadequate explanation” argument. Patrick J. Smith, “*Mayo* and *Chenery*: Too Much of a Shift in Rationale?” *Tax Notes*, Oct. 25, 2010, p. 454, Doc 2010-21077, 2010 TNT 207-12; Smith, “Omissions From Gross Income and the *Chenery* Rule,” *Tax Notes*, Aug. 16, 2010, p. 763, Doc 2010-16074, 2010 TNT 158-3.

¹⁰¹*Mannella*, 631 F.3d at 127.

¹⁰²*Id.* (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)); see also *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 289 n.5 (1978).

¹⁰³For discussion of shifting tides in hard look review, see Richard J. Pierce Jr., *Administrative Law* 81-86 (2008); Note, “Rationalizing Hard Look Review After the Fact,” 122 *Harv. L. Rev.* 1909, 1910-1914 (2009).

¹⁰⁴*FCC v. Fox Television Stations Inc.*, 129 S. Ct. 1800 (2009).

¹⁰⁵*Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002).

¹⁰⁶Brief of Appellant, *Hall v. Commissioner*, No. 10-2628, at 58 (6th Cir. Filed Jan. 26, 2011).

¹⁰⁷*Verizon*, 535 U.S. at 502 n.20.

¹⁰⁸E.g., *Overton Park*, 401 U.S. 402; *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), later opinion, 332 U.S. 194 (1947).

¹⁰⁹See, e.g., Thomas J. Miles and Cass R. Sunstein, “The Real World of Arbitrariness Review,” 75 *U. Chi. L. Rev.* 761, 762

(Footnote continued on next page.)

"ossification" question: whether hard-look review, or the specter of it, makes issuing regulations more time consuming and expensive, perhaps even forestalling desirable regulations entirely.¹¹⁰ Scholars are divided about these and other putative benefits and burdens of hard-look review.¹¹¹

That debate could, of course, occur in the tax context. Tax regulations entail numerous choices among numerous alternatives. Judge Ambro's *Mannella* dissent did not define the scope of the explanation requirement that he would impose on Treasury. Depending on that definition, some might argue that the costs of explanation would exceed its benefits.

This issue also surfaced in *Dominion Resources*, in which the Court of Federal Claims upheld a regulation under section 263A. The court accepted that the duty of explanation applies to tax regulations. The court remarked: "it is a stretch to conclude that Treasury cogently explained why it has exercised its discretion [as it did in the regulation]."¹¹² Despite the fact that Treasury's explanation of the key choices lacked "analytical precision" and were "even confusing,"¹¹³ the court found the explanation adequate because Treasury did provide some explanation, Treasury responded to the remarks of commentators, and "the path that Treasury was taking in the rulemaking proceedings can be discerned, albeit somewhat murkily."¹¹⁴

I have offered tentative views about Judge Ambro's argument elsewhere,¹¹⁵ and I will address it at

greater length in a future article. The point now simply is that arguments like "failure to explain" and other staples of administrative law discourse will arise with increasing frequency in tax cases in the post-*Mayo* environment.

D. *Chevron* and Sub-Regulation Authorities

Mayo and the other recent cases involve challenges to Treasury regulations. Will we see more litigation in the future about whether *Chevron* deference attaches to IRS pronouncements of a lower level of dignity than regulations, such as revenue rulings, revenue procedures, notices, announcements, and the like?¹¹⁶

There has already been much discussion about this question.¹¹⁷ The preponderance of cases and commentary suggests that sub-regulation administrative tax authorities typically should receive deference under the more probing *Skidmore* standard¹¹⁸ rather than under *Chevron*.¹¹⁹

As one who often prefers bright lines to mushy facts and circumstances approaches,¹²⁰ I would be happy to see this view attain settled status. But that might not be the case. First, despite Justice Antonin Scalia's urging, the Supreme Court has resisted drawing a bright *Chevron* line.¹²¹ For example, the Court has stated that the use of the notice and comment procedure, although often a good indicator of *Chevron* qualification, is neither a necessary nor a sufficient condition for applying *Chevron*.¹²²

(2008); see also Peter L. Strauss, "Overseers or 'the Deciders' — The Courts in Administrative Law," 75 U. Chi. L. Rev. 815 (2008) (responding to Miles and Sunstein).

¹¹⁰See, e.g., Thomas O. McGarity, "The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld," 75 Tex. L. Rev. 525 (1997); Mark Seidenfeld, "Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking," 77 Tex. L. Rev. 483 (1997).

¹¹¹See, e.g., Jim Rossi, "Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry," 1994 Wis. L. Rev. 763; Rossi, "Antitrust Process and Vertical Deference: Judicial Review of State Regulatory Inaction," 93 Iowa L. Rev. 185, 225 (2001) (calling the *Chenery* explanation principle a "foundation of administrative law, frequently serving as a basis for agency reversal"); Seidenfeld, "Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking," 87 Cornell L. Rev. 486 (2002); Peter L. Strauss, "Revisiting *Overton Park*: Political and Judicial Controls Over Administrative Action Affecting the Community," 39 UCLA L. Rev. 1251 (1992).

¹¹²107 AFTR2d para. 2011-1033, at *22 (punctuation omitted) (quoting *State Farm*, supra, 463 U.S. at 48).

¹¹³107 AFTR2d para. 2011-1033, at *22.

¹¹⁴*Id.* (punctuation omitted) (quoting *State Farm*, supra, 463 U.S. at 43).

¹¹⁵Steve R. Johnson, "Do Treasury and the IRS Have to Explain Their Choices?" ABA Section of Taxation NewsQuarterly, (Footnote continued in next column.)

Spring 2011, at 11; "Johnson: More on *Mannella*," TaxProf Blog, Jan. 25, 2011, available at http://taxprof.typepad.com/taxprof_blog/2011/01/johnson.html.

¹¹⁶For description of the types of administrative authorities in tax, see David M. Richardson et al., *Civil Tax Procedure* 16-23 (2d ed. 2008).

¹¹⁷E.g., Kristin E. Hickman, "IRB Guidance: The No Man's Land of Tax Code Interpretation," 2009 Mich. St. L. Rev. 239.

¹¹⁸*Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (listing as factors "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade"); see also *Mead*, 533 U.S. at 235 (listing "the merit of [the] writer's thoroughness, logic, and expertise, its fit with interpretations, and any other sources of weight").

¹¹⁹E.g., *Aeroquip-Vickers Inc. v. Commissioner*, 347 F.3d 173 (6th Cir. 2003), Doc 2003-22794, 2003 TNT 203-11; *Omohundro v. United States*, 300 F.3d 1065, 1069 (9th Cir. 2002), Doc 2002-19316, 2002 TNT 162-20; Salem et al., supra note 81, at 744-750. But see Ryan Lirette, "Giving *Chevron* Deference to Revenue Rulings and Procedures," Tax Notes, Dec. 20, 2010, p. 1357, Doc 2010-24589, or 2010 TNT 245-7.

¹²⁰See, e.g., the judicial "cry from the heart" about problematic facts and circumstances determinations in *Biedenharn Realty Co. v. United States*, 526 F.2d 409, 414-415 (5th Cir. 1976).

¹²¹*Compare Brand X*, 545 U.S. at 1003-1004 (Breyer, J., concurring) to *id.* at 1014-1019 (Scalia, J., dissenting).

¹²²E.g., *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

Second, Treasury and the IRS sometimes omit notice and comment for regulations but sometimes employ it for sub-regulation pronouncements.¹²³

In short, the waters are muddy enough that the application of *Chevron* to sub-regulation authorities may grow as an aspect of controversy in the post-*Mayo* world. Indeed, the ink was barely dry on *Mayo* when a circuit court case reminded us that notice and comment is not invariably required for an administrative position to claim *Chevron* entitlement.¹²⁴

E. Future of *Chevron*

I've saved the broadest of the future issues for last. Now that tax regulations have been brought unambiguously within its domain, what may be the future of *Chevron*?

It is ironic that after waiting more than a quarter of a century, the Supreme Court unanimously applied *Chevron* to tax regulations after a rising chorus has proclaimed that *Chevron* has failed. Judge Ambro's dissent¹²⁵ cites Prof. Jack M. Beerman's article "End the Failed *Chevron* Experiment Now: How *Chevron* Has Failed and Why It Can and Should Be Overruled."¹²⁶

Beerman is far from alone. Many other commentators (both tax¹²⁷ and nontax) have suggested that *Chevron* has failed, either empirically (because it is at best haphazardly applied)¹²⁸ or normatively (for many reasons, including that *Chevron* is contrary to the APA and that it lacks an adequate theoretical foundation).¹²⁹ But, of course, there isn't uniformity of view as to *Chevron*'s success or lack of it. *Chevron* still has defenders.¹³⁰

¹²³For example, in 2010 the IRS developed a new schedule, Schedule UTP, to be attached to the returns of business taxpayers to disclose uncertain tax positions taken on their returns. In doing so, the IRS used the notice and comment process. See Announcement 2010-75, 2010-41 IRB 428, Doc 2010-20922, 2010 TNT 186-26, and Announcement 2010-9, 2010-7 IRB 408, Doc 2010-1882, 2010 TNT 17-14.

¹²⁴*Beard*, 2011 WL 222249, at *7.

¹²⁵*Mannella*, 631 F.3d at 127, n.14.

¹²⁶42 Conn. L. Rev. 779 (2010).

¹²⁷As one example in tax, Prof. Bryan Camp does not conceal his distaste for *Chevron*. Camp, *supra* note 4, at 507 ("Everybody starts with *Chevron*. What a crock.").

¹²⁸E.g., Ann Graham, "Searching for *Chevron* in Muddy Waters," 60 Admin. L. Rev. 230 (2008); 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).

¹²⁹E.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. Duffly, "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," 59 Admin. L. Rev. 673 (2007).

I share the opinion of *Chevron*'s critics. *Chevron* is the most widely discussed principle of administrative law.¹³¹ Yet it is, in a sense, an accidental doctrine — the Court did not appreciate when it decided *Chevron* that the case would attain the significance it has.¹³² Perhaps the Court would have thought more carefully about the underpinnings and consequences of its opinion had it had that foresight. In any event, both because of its original weakness and because of its massaging by subsequent cases, the skein of *Chevron* is now so knotty that its untanglement may be impossible.

This does not cause me to lament *Mayo*. Until the Supreme Court abrogates *Chevron*, tax should be subject to *Chevron* no less than any other area of law is. The weaknesses of *Chevron* argue for the case's overthrow or reform generally rather than serving as an excuse for tax exceptionalism.

Despite the trenchant criticisms of *Chevron*, I doubt that the Supreme Court will accept Beerman's invitation to overrule it. The unanimity of *Mayo* suggests that the Court is in no such mood. Nonetheless, as identified in Part II above, significant questions remain as to the nature of the inquiries to be made under the *Chevron* framework. The practical and theoretical problems with *Chevron* will affect the resolution of those questions. In light of *Mayo*, we in the tax community have a vital interest in that resolution, and we cannot remain indifferent to the larger debates about *Chevron* and its future.

V. Conclusion

Mayo is a welcome decision. It settles several important questions that had lingered too long. I doubt that *Mayo* will change the outcomes of many litigated cases, but it will allow us to arrive at the right answers with less wasted motion. Standing on the platform of *Mayo*, we can now reach toward resolution of other issues as to the validity of Treasury regulations.

¹³⁰For survey of some of the commentary, see Evan J. Criddle, "*Chevron*'s Consensus," 88 B.U.L. Rev. 1271 (2008).

¹³¹See, e.g., Stephen G. Breyer et al., *Administrative Law and Regulatory Policy* 247 (6th ed. 2006).

¹³²See Thomas W. Merrill, "The Story of *Chevron*: The Making of an Accidental Landmark," in *Administrative Law Stories* 398 (Peter L. Strauss, ed. 2006).