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Intermountain and the Growing Importance of Administrative Law in Tax Law

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This report argues that the tax community cannot safely ignore general principles of administrative law. This fact is illustrated by the *Intermountain* case recently decided by the Tax Court *en banc* and on appeal to the D.C. Circuit. In that case, the Tax Court invalidated a temporary regulation that includes basis overstatements within the six-year statute of limitations of sections 6501(e) and 6229(c).

This report explores important issues of administrative law raised by *Intermountain*. It argues that the tax community should discard the conventional — but wrong — tendency to call specific-authority regulations "legislative regulations" and general-authority regulations "interpretive regulations." Many general-authority regulations, including those at issue in *Intermountain*, are legislative regulations. The conventional misidentification is worse than sloppy. It is pernicious because it distorts analysis of whether tax regulations are valid. The report also discusses *Chevron*, *Brand X*, and notice-and-comment issues.

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On September 29, 2009, Treasury issued regulations retroactively[1] extending the six-year limitations period for income tax deficiencies resulting from basis overstatements.[2] In its May 6 *Intermountain* decision, the Tax Court unanimously invalidated those regulations, but on divided rationales.[3] The government has appealed.

Intermountain is a must-read for tax academics and practitioners. It is among the richest decisions on the procedural and substantive validity of tax regulations.[4] Moreover, the opinions in the case, subsequent cases on the issue, and commentary on these opinions and cases present genuine opportunity for improvement of the law.

This report has five sections. Section I sketches the growing significance of administrative law in tax law. The days of comfortable insularity are drawing to a close. To maintain dexterity in the years to come, tax practitioners and tax scholars will increasingly need to possess competence in broader principles of administrative law.

Intermountain is a harbinger of that growing necessity. Section II describes the background of the case, summarizes the three opinions rendered in it, and evaluates the result reached. I think that the *Intermountain* result is correct but (in terms of the arguments in the opinions)

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[1]Although the regulations apply to returns for years before 2009, the IRS denies that they are retroactive, reasoning that a regulation has retroactive effect only if it would impair a party's rights, increase his liability for past conduct, or impose new duties as to conduct already completed, none of which the regs do, according to the IRS. Respondent's brief in support of motion to vacate order and decision, *Intermountain Ins. Serv. of Vail LLC, Thomas A. Davies, Tax Matters Partner v. Commissioner*, 134 T.C. No. 11, at 7-10 (Jan. 5, 2010), *Doc 2010-10163, 2010 TNT 88-12*, (hereafter "IRS brief"). The IRS further contends that the regulations, even if they are retroactive, are valid under the effective date of section 7805(b) and the "prevention of abuse" exception of section 7805(b)(3). *Id.* at 10-13.

[2]Temp. reg. sections 301.6229(c)(2)-IT and 301.6501(e)-IT.

[3]*Intermountain*, *supra* note 1, *appeal docketed*, No. 10-1204 (D.C. Cir. July 30, 2010).

[4]Illustrating the pace at which this area is developing, another important administrative law tax case, *Swallows Holding*, preceded *Intermountain* by only a few years. *Swallows Holding Ltd. v. Commissioner*, 126 T.C. 6 (2006), *Doc 2006-1541, 2006 TNT 18-10, rev'd*, 515 F.3d 162 (3d Cir. 2008), *Doc 2008-3372, 2008 TNT 33-41*. For discussion of *Swallows Holding*, see 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*; Johnson, "*Swallows Holding* as It Is: The Distortion of *National Muffler*," *Tax Notes*, July 24, 2006, p. 351, *Doc 2006-13093*, or *2006 TNT 142-37*.

only on the procedural ground advanced by two concurring judges: that the regulations violate the Administrative Procedure Act (APA) for failure to satisfy the notice-and-comment requirements.

Sections III, IV, and V address some important aspects of *Intermountain*. My treatment is selective. Leaving some material for future discussion, I delve into three of the interesting veins of the case, including issues appearing in the opinions as well as issues omitted from them.

Section III discusses whether the regulations at issue in the case are legislative or interpretive in nature. This matters to the APA argument. Unless another exception applies (and none does in *Intermountain*), legislative regulations must go through notice-and-comment, but interpretive regulations need not. I conclude that the challenged regulations are legislative, and I urge tax practitioners to refine their definitions of legislative and interpretive regulations.

Section IV examines the light shed by *Intermountain* on the *Brand X* rule as to when agency rulemaking may displace prior judicial interpretations of statutes.[5] I conclude that *Intermountain* and similar cases may help at one level: whether "magic words" must appear in the judicial interpretations. However, they are unlikely to help at two other levels: what should be done if the precedents' characterizations are unsupportable, and whether the *Brand X* analysis of the underlying statute turns on the statute's language or also embraces pertinent legislative history.

Section V explores two arguments that weren't considered in the *Intermountain* opinions but that might be brought against the temporary regulations in future cases. One such argument is that the temporary regulations have not gone through the notice-and-comment process, and *Chevron* deference is rarely accorded to administrative rules and interpretations that were not subject to this process. This argument is of short-term significance. It will evaporate after the regulations in their proposed form complete the process.

The other argument has to do with whether Congress explicitly or implicitly authorized Treasury to promulgate regulations extending section 6501(e) to overstated basis situations. The explicit authorization argument involves a contention I will develop at greater length in a future article. Briefly, the statutory authority under which the temporary regulations were promulgated allows Treasury to "prescribe all needful rules and regulations for the enforcement of" the code.[6] It is arguable — although far from certain — that this language authorizes only rules that implement code provisions, not rules that extend code provisions to situations beyond the provisions' original scope. If Congress did not explicitly authorize the rules at issue, it probably did not implicitly authorize them, either. Section 6501 is a highly detailed and articulated statute; courts usually are disinclined to allow other, extrinsic rules to be read into such statutes to modify them.

[5]*Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

[6]Section 7805(a).

I. Admin Law's Growing Importance in Tax Law

As is true of other specialties in law, there is a tendency toward insularity in tax practice.[7] Because of the ever-growing complexity of the law, this tendency is understandable, but ultimately untenable. The days are long gone when an attorney could practice the whole law. Indeed, specialization has yielded to sub-sub-specialization. Few are the lawyers or professors who can legitimately claim to be competent in all areas of tax law. Because we are barely able to keep up with our own area of law, it is not surprising that we greet with little enthusiasm the notion that we also need to learn other areas of law (like general administrative law).

But yield we must. The tax community will not be able to avoid being dragged into functional competence in general administrative law. Both the APA[8] and administrative common law[9] have long made appearances in tax cases, although they have not always been handled well.[10]

Events in recent decades have brought into greater prominence the intersection of tax law and administrative law. One such event was the *Chevron* decision.

[7]For articles noting this tendency, see 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, 2-3 (2004); Paul L. Caron, "Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers," 13 *Va. Tax Rev.* 517, 518 (1994); 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, 1155-1156 (2008); Leandra Lederman, "'Civil'izing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency," 30 *U.C. Davis L. Rev.* 183, 183 (1996); *see also* Jasper L. Cummings, Jr., *The Supreme Court's Federal Tax Jurisprudence* 3, 7, 13 (2010).

[8]*E.g.*, *Wing v. Commissioner*, 81 T.C. 17 (1983) (rejecting several APA-based challenges to regulations under section 612). *But see Intermountain*, 2010 WL 1838297, at *20 n.15 (Halpern and Holmes, JJ., concurring) (criticizing *Wing*).

[9]*E.g.*, *Vesco v. Commissioner*, 39 T.C. 101 (1979) (imposing, without statutory basis, a duty on the IRS to behave consistently as to similarly situated taxpayers). The IRS duty of consistency issue is complex and has spawned many cases and much commentary. *E.g.*, 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); Christopher M. Pietruszkiewicz, "Does the Internal Revenue Service Have a Duty to Treat Similarly Situated Taxpayers Similarly?" 74 *U. Cin. L. Rev.* 531 (2005); Lawrence Zelenak, "Should Courts Require the Internal Revenue Service to Be Consistent?" 38 *Tax L. Rev.* 411 (1985).

[10]For example, the Tax Court has held the APA judicial review provisions inapplicable because the Tax Court is not a governmental "agency" for APA purposes. *Nappi v. Commissioner*, 58 T.C. 282, 284 (1972). The court's analysis missed the point since the actions under challenge were those of the IRS, not the Tax Court, and the IRS *is* an agency for APA purposes. 5 U.S.C. section 551(1).

Copious case law[11] and commentaries[12] have examined whether and how *Chevron* applies in the tax arena.[13] Another event was enactment of the Internal Revenue Service Restructuring and Reform Act of 1998.[14] Several provisions of this landmark legislation — especially the collection due process rules[15] — have presented important administrative law issues.[16] Whether motivated by these or other events, commentators have increasingly focused on the interactions of tax and administrative law.[17]

These interactions will continue to grow in significance. *Intermountain* exemplifies the trend and will contribute to it. It is to that case we now turn.

II. *Intermountain* and Its Context

A. Background

Section 6501(a) provides that the IRS usually must assess tax liabilities within three years of the later of when the tax return at issue was filed or was required to be filed. There are, however, many exceptions to the usual three-year statute of limitations,[18] such as section 6501(e)(l), which gives the IRS six years to assess income tax liabilities "if the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return." Section 6229(c)(2) provides a similar exception for cases governed by the 1982 Tax Equity and Fiscal Responsibility Act partnership audit and litigation rules.[19]

These exceptions undoubtedly apply when the taxpayer omits enough taxable receipts, but it has been controversial whether they apply when the understatement arises instead from overstated basis of sold assets.[20] Case law on the section 6501(e) overstated basis issue is divided, but both the preponderance of the cases and the more authoritative cases are contrary to the Service's position.[21]

Following a string of high-profile defeats in section 6501(e) cases in 2009, Treasury issued the regulations in both temporary and proposed form.[22] The temporary regulations aggressively were declared to apply to tax years still open to assessment on the date of issuance, with the intention that they apply to all pending cases, including those the taxpayers had won but in which the decisions had not yet become final.[23] Both the new regulations and their effective date have been highly controversial from the start.[24]

B. The *Intermountain* Opinions

Intermountain involves what the IRS considers an abusive tax shelter involving overstated basis.[25] Having

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[11]*E.g., Mayo Found. for Med. Educ. & Research v. United States*, 568 F.3d 675, 679 (8th Cir. 2009), *Doc 2009-13439, 2009 TNT 112-75, cert. granted*, 130 S. Ct. 3353 (2010); *Stobie Creek Inv. LLC v. United States*, 82 Fed. Cl. 636, 668 (2008), *Doc 2008-16870, 2008 TNT 149-5*; *Lewis v. Commissioner*, 128 T.C. 48, 53-54 (2007), *Doc 2007-7925, 2007 TNT 61-15*.

[12]*E.g.*, Ellen P. Aprill, "Muffled *Chevron*: Judicial Review of Tax Regulations," 3 *Fla. Tax. Rev.* 51 (1996); John F. Coverdale, "*Chevron*'s Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After *Mead*," 55 *Admin. L. Rev.* 39 (2003); Kristin E. Hickman, "Of Lenity, *Chevron*, and KPMG," 26 *Va. Tax Rev.* 905 (2007).

[13]Some in the tax community have sought to limit application of *Chevron* in tax cases. *E.g.*, Mitchell M. Gans, "Deference and the End of Tax Practice," 36 *Real Prop. Prob. & Tr. J.* 731 (2002).

[14]P.L. 105-206, 112 Stat. 685.

[15]Sections 6320 and 6330.

[16]*See, e.g., Robinette v. Commissioner*, 439 F.3d 455 (8th Cir. 2006), *Doc 2006-4491, 2006 TNT 46-11, rev'g* 123 T.C. 85 (2004), *Doc 2004-14878, 2004 TNT 140-17*; Nick A. Zotos, "Service Collection Abuse of Discretion: What Is the Appropriate Standard of Review and Scope of the Record in Collection Due Process Appeals?" 62 *Tax Law.* 223 (2008).

[17]*E.g.*, Bryan T. Camp, "The Failure of Adversarial Process in the Administrative State," 84 *Ind. L.J.* 57 (2009); Danshera Cords, "Administrative Law and Judicial Review of Tax Collection Decisions," 52 *St. Louis U. L.J.* 429 (2008); Diane L. Fahey, "Is the United States Tax Court Exempt From Administrative Law Jurisprudence When Acting as a Reviewing Court?" ___ *Clev. St. L. Rev.* ___ (forthcoming 2010).

[18]*See, e.g.*, David M. Richardson, Jerome Borison, and Steve Johnson, *Civil Tax Procedure* 146-154 (2d ed. 2008).

[19]P.L. 97-248, 96 Stat. 324 (1982). For discussion of the TEFRA rules, see Richardson, Borison, and Johnson, *supra* note 18, ch.6. The TEFRA statute of limitations under section 6229 supplements rather than displaces the general statute of limitations under section 6501. *E.g., Curr-Spec Partners LP v. Commissioner*, 579 F.3d 391 (5th Cir. 2009), *Doc 2009-18226, 2009 TNT 154-11, cert. denied*, 130 S. Ct. 3321 (2010).

[20]Gain from dealing in property is taxable. Section 61(a)(2). Such gain is the excess of the amount realized from sale or other disposition over the taxpayer's basis in the property. Section 1001(a). Thus, overstatement of basis leads to understatement of income.

[21]*See* Steve R. Johnson, "What's Next in the Section 6501(e) Overstated Basis Controversy?" *ABA Section of Tax'n News Quarterly*, Fall 2009, p. 19 (summarizing the cases).

[22]*See* T.D. 9466 (Sept. 28, 2009), *Doc 2009-21297, 2009 TNT 184-9*.

[23]Temp. reg. section 301.6501(e)-IT(b). ("The rules of this section apply to tax years with respect to which the applicable period for assessing tax did not expire before September 24, 2009.") Being temporary, the new regulations expire in three years, by September 24, 2012. Section 301.6501(e)-IT(c). The expectation is that the regulations, now in proposed and temporary form, will have been finalized by then.

[24]*See* Jeremiah Coder, "IRS Strikes Back Against Judicial Losses in Overstated Basis Cases," *Tax Notes*, Oct. 5, 2009, p. 19, *Doc 2009-21733*, or *2009 TNT 190-4*.

[25]One sometimes gets the impression that the IRS loses perspective when a case involves a tax shelter. The end does not justify the means. Fundamental rules of tax administration should not be violated simply because the case involves a tax shelter. The *Intermountain* majority had this concern, see 2010 WL 1838297 at *5. ("We find the [Service's] interpretation to be irreparably marred by circular, result-driven logic and the wishful notion that the temporary regulations should apply to this case because *Intermountain* was involved in what [the IRS] believes was an abusive tax transaction. For these reasons, we refuse to accord respondent's interpretation deferential treatment.")

failed to assess within the normal three years, the IRS relied on the six-year limitations period. Less than a month before issuance of the temporary regulations, the Tax Court decided the statute of limitations issue in Intermountain's favor.[26] Based on the new regulations, the IRS filed motions to vacate and for reconsideration of that decision.

The Tax Court denied the Service's motions, unanimous in its holding against the IRS. The 13 judges fell into three camps, however, with 7 judges joining Judge Robert A. Wherry Jr. in exploring the possibility that the effective date provision as drafted did not effectuate Treasury's intention to reach not-yet-final decisions.[27] Although advancing a questionable "plain meaning" analysis, the majority chose not to rest the decision on that ground.[28]

Instead, the majority examined the substantive validity of the temporary regulations. Assuming *arguendo* that *Chevron* provides the governing standard,[29] the majority concluded that the regs did not pass muster under *Chevron* step one[30] or *Brand X*. The majority concluded that the Supreme Court's *Colony* decision a half century ago[31] held that what is now section 6501(e) unambiguously precludes the position taken in the temporary regulations.[32] The majority also noted, but believed it unnecessary to rule on, the taxpayer's argument that the temporary regulations have impermissibly retroactive effect.[33]

Four other judges concurred in an opinion penned by Judge Mary Ann Cohen. This concurrence would have resolved the case on narrower grounds. Motions such as the Service's typically are granted only in unusual circumstances,[34] and an intervening statutory change is such a circumstance.[35] The concurrence would have held, however, that an intervening regulatory change does not rise to the same level, and thus is insufficient to warrant vacating or reconsidering.[36]

Judges James S. Halpern and Mark V. Holmes concurred in the result only. These judges rejected the majority's effective date[37] and *Chevron* analyses[38] but would have invalidated the temporary regulations on procedural grounds. The APA applies to rulemaking by federal agencies, including Treasury.[39] Unless a stated exception applies, regulations are validly promulgated only if they go through the notice-and-comment process prescribed by 5 U.S.C. section 553. In general, the agency must provide public notice in the *Federal Register* of its proposed rulemaking.[40] The agency must offer interested parties the chance to submit comments and must set forth a "concise general statement of [the regulation's] basis and purpose."[41] The regulation cannot be effective until at least 30 days after its publication in the Code of Federal Regulations.[42]

The temporary regulations were not promulgated using this process. Nonetheless, the IRS defended the regulations' validity on two grounds: that they fell within the APA exception for merely interpretive rules[43] and that Congress implicitly excepted temporary tax regulations from the notice-and-comment requirement.[44] The Halpern/Holmes concurrence rejected both contentions, and it would have held the regulations procedurally invalid under the APA.[45]

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[26]T.C. Memo. 2009-195 (Sept. 1, 2009), *Doc 2009-19672, 2009 TNT 168-5*.

[27]*See* 2010 WL 1838297, at *4-6. One wonders how Treasury and the IRS felt when a majority of the Tax Court said the agencies misread their own regulations — probably much the same way the Tax Court felt when, a few years earlier, the Supreme Court told the Tax Court that it had misread its own rules; *see Ballard v. Commissioner*, 544 U.S. 40 (2005).

[28]*See* 2010 WL 1838297, at *6. The majority's choice not to resolve the case on this ground was based in part on this consideration: "We also recognize that respondent could amend the temporary regulations' effective/applicability date provision and file renewed motions to reconsider and to vacate based on those amended provisions, thereby extending this dispute to yet another case." *Id.* at n.13.

[29]*Id.* at *6. The majority took this tack to avoid a controversy that has split the Tax Court before. It is almost universally agreed that *Chevron* provides the controlling standard when specific authority tax regulations are challenged. *E.g., Carlos v. Commissioner*, 123 T.C. 275, 280 (2004). However, many Tax Court judges have been reluctant to apply *Chevron* to general authority regulations. For example, in *Swallows Holding, supra* note 4, the majority applied the pre-*Chevron*, tax-specific *National Muffler* case instead of *Chevron*, 126 T.C. at 131. Dissenters would have applied *Chevron; Id.*, at 157 (Halpern, J., dissenting) and 175-176 (Holmes, J., dissenting). The circuit court did apply *Chevron* and reversed, 515 F.3d at 170. The *Intermountain* majority no doubt applied *Chevron arguendo* to avoid reopening this wound and courting similar reversal. The Tax Court has taken this tack in other cases as well. *E.g., Estate of Gerson v. Commissioner*, 127 T.C. 139, 154 (2006), *Doc 2006-21771, 2006 TNT 206-15 (en banc), aff'd*, 507 F.3d 435 (6th Cir. 2007).

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

[31]*Colony Inc. v. Commissioner*, 357 U.S. 28 (1958).

[32]*See* 2010 WL 1838297, at *7-8.

[33]*Id.* at *8. Courts recently have split as to the validity of another retroactive regulation section 1.752-6. *Compare Sala v. United States*, 552 F. Supp.2d 1167, 1185 (D. Colo. 2008), *Doc 2008-9012, 2008 TNT 80-10* (invalidating the regulation), *rev'd on other grounds*, 2010 WL 2872368 (10th Cir., July 23, 2010), *with Cemco Investors LLC v. United States*, 515 F.3d 749, 752 (7th Cir. 2008), *Doc 2008-2695, 2008 TNT 27-8* (upholding retroactive application of the regulation).

[34]*See, e.g., Estate of Quick v. Commissioner*, 110 T.C. 440, 441 (1998), *Doc 98-21021* or *98 TNT 125-9*.

[35]*Alioto v. Commissioner*, T.C. Memo. 2006-199, *Doc 2006-19533* or *2006 TNT 181-7*.

[36]*See* 2010 WL 1838297 at *9.

[37]*Id.* at *10-11.

[38]*Id.* at *12-17.

[39]*See* 5 U.S.C. section 551(1).

[40]5 U.S.C. section 553(b).

[41]5 U.S.C. section 553(c).

[42]5 U.S.C. section 553(d).

[43]*See* 5 U.S.C. section 553(b)(A).

[44]*See* 2010 WL 1838297, at *17-22.

[45]Important work on this issue has been done by Prof. Kristin Hickman. *See* Hickman, *supra* note 7; and Hickman, "Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance With Administrative Procedure Act Rulemaking

(Footnote continued on next page.)

C. Evaluation of the Issues

All three opinions in *Intermountain* reflect distaste for what the judges viewed as overzealous use of the regulations process.[46] Issuing a regulation while a matter is in litigation seems like changing the rules while the game is being played. Applying that regulation retroactively to cases already decided smacks of changing the score after the game is over. However, taxation is not a game but a matter of fundamental national import.[47] Moreover, the objection to the IRS "bootstrapping" itself to victory[48] is doctrinally misplaced. In both tax[49] and nontax[50] cases, courts have cast suspicion on agency interpretations apparently adopted to bootstrap the agency into victory in litigation. But this concern is weak when applied to otherwise valid regulations. The leading cases distinguish between bare agency litigating positions and litigating positions supported by regulations.[51]

Nonetheless, law is an intensely human operation. One can understand distaste for the aggressive (some would say abusive) position of Treasury and the IRS in the temporary regulations. Certainly, the judges participating in *Intermountain* shared this distaste.

Although motivated by a common impulse, the Tax Court judges differed greatly on the doctrine by which to make that impulse legally operative. In my opinion, Judges Halpern and Holmes had the best view of the case. The omission of notice-and-comment is not justified by either of the grounds asserted by the IRS. The Service's "merely interpretive" argument is hopeless, as shown in Section III.

The Service's argument that Congress excepted temporary tax regulations from APA notice-and-comment is better but probably not good enough. That argument runs along the following lines: Congress revised section 7805 in 1988, adding subsection 7805(e).[52] In so doing, the IRS argued, Congress codified Treasury's practice of promulgating temporary regulations issued simultaneously with proposed regulations: "The trade-off was that any temporary regulations promulgated in this manner would no longer have unlimited life but instead would expire within three years from the date of issuance."[53]

This is a variation of the "legislative bargain" approach to statutory interpretation. That approach sees legislation as the product of compromise between competing interest groups or values and posits that the role of the courts is to discern and give effect to the bargain struck in the legislature.[54]

However, there are two problems with the Service's argument. First, the Service's description of the "trade-off" may be incomplete. Why do temporary regulations exist at all? Typically, temporary regulations are issued when there is a need for immediate guidance. Such situations would fall within the APA's good-cause exception to the notice-and-comment requirements.[55] Congress may have fashioned the current version of section 7805 in light of this understanding, which suggests that Congress expected that temporary tax regulations would need to fit into the good-cause exception in order to avoid notice-and-comment requirement.[56] However, there was

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Requirements," 82 *N.D. L. Rev.* 1727 (2007). The Halpern/Holmes concurrence frequently cited Hickman's articles. *E.g.*, 2010 WL 1838297 at *18, 19, 21, and 22.

Other works exploring this issue include Jasper L. Cummings, Jr., "Treasury Violates the APA?" *Tax Notes*, Oct. 15, 2007, p. 263, *Doc 2007-21652*, or *2007 TNT 200-28*; Naftali Z. Dembitzer, "Beyond the IRS Restructuring and Reform Act of 1998: Perceived Abuses of the Treasury Department's Rulemaking Authority," 52 *Tax Law.* 501, 503, and 509-510 (1999); Juan F. Vasquez Jr. and 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, 249-254 (2003).

[46]*See, e.g.*, 2010 WL 1838297, at *4 (majority opinion); *id.* at *9 (Cohen, J., concurring) ("This petitioner should not bear the burden of relitigating this case on a playing field unilaterally redesigned by the adverse party after petitioner prevailed at this level."); *id.* at *9 (Halpern and Holmes, JJ., concurring).

[47]*See* Steve R. Johnson, "The Work Product Doctrine and Tax Accrual Workpapers," *Tax Notes*, July 13, 2009, p. 155, *Doc 2009-13526*, or *2009 TNT 131-9* (rejecting such analogies in urging reversal of the panel opinion in *United States v. Textron Inc.*, 553 F.3d 87 (1st Cir. 2008), *rev'd*, 577 F.3d 21 (1st Cir. 2009), *Doc 2009-18383*, *2009 TNT 155-7* (*en banc*), *cert. denied*, 78 U.S.L.W. 3375 (May 24, 2010)). The full circuit echoed this rejection on reversal. 577 F.3d at 31.

[48]*See, e.g.*, Coder, *supra* note 24, at p. 730 (quoting attorney and former Treasury official Christopher S. Rizek describing the temporary regulations as "pure bootstrap").

[49]*E.g.*, *Cottage Savings Ass'n v. Commissioner*, 499 U.S. 554, 562-563 (1991) (noting that the IRS had "not issued an authoritative, *prelitigation* interpretation") (emphasis added); *Caterpillar Tractor Co. v. United States*, 589 F.2d 1040, 1043 (Ct. Cl. 1978); *Swallows Holding*, *supra* note 4, at 148.

[50]*E.g.*, *Securities Ind. Ass'n v. Bd. of Governors of Fed. Reserve Syst.*, 468 U.S. 137, 143-144 (1984); *Gonzalez v. Reno*, 212 F.3d 1338, 1350 (11th Cir.), *cert. denied*, 530 U.S. 1270 (2000). *But see Long Island Care at Home Ltd. v. Coke*, 551 U.S. 158 (2007) (deferring to an agency memorandum even though it had been prepared in anticipation of litigation).

[51]*Smiley v. Citibank*, 517 U.S. 735, 742-743 (1996); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988); *Texaco Inc. v. United States*, 528 F.3d 703, 710-711 (9th Cir. 2008); American Bar Association Section of Taxation, "Report of the Task Force on Judicial Deference," 57 *Tax Law.* 717, 759 (2004) ("positions taken in regulations are given full *Chevron* deference, even if a regulation is promulgated in response to pending litigation").

[52]Technical and Miscellaneous Revenue Act of 1988, P.L. 100-647, section 6232, 102 Stat. 3342.

[53]IRS brief, *supra* note 1, at 20.

[54]*See, e.g.*, *Alaska Airlines Inc. v. Brock*, 480 U.S. 678, 685 (1987); *Stupak-Thrall v. United States*, 89 F.3d 1269, 1293 (6th Cir. 1996) (Moore, J., concurring), *cert. denied*, 519 U.S. 1090 (1997).

[55]5 U.S.C. section 553(b)(B) (the notice-and-comment rules do not apply "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

[56]"Congress may have intended [section 7805] to apply only to temporary regulations that already fit into an exception to the APA, especially considering that a need for temporary regulations would normally be expected in emergency or good-cause situations." 2010 WL 1838297, at *20 n.15 (Halpern and Holmes, JJ., concurring).

no emergency or other good-cause justification for the temporary regs at issue in *Intermountain* — apart from the fact that the tide of litigation had turned against the IRS. Indeed, neither the Treasury decision accompanying the regulations nor the Service's *Intermountain* briefs asserted the good-cause exception.

Second, the Service's section 7805 contention is based on inference, not explicit text. However, Congress has provided that other statutes may modify APA requirements only expressly, not by implication.[57] The IRS may have been trying obliquely to address this problem when it argued that "section 7805(e) provides a specific statutory exemption to the general statutory requirements of the APA,"[58] supporting its theory with citations to the canon of statutory construction that specific provisions control over general provisions.[59] However, "specific" in this context is not synonymous with "express," and canons "are not mandatory rules."[60] Indeed, a recent high-profile tax case rejected use of the canon of specific controls over general to decide the controversy there at issue.[61]

The arguments advanced in the other *Intermountain* opinions do not strike me as persuasive. First, as pointed out by Judges Halpern and Holmes, the regulations' effective date provision is ambiguous, not plain.[62] The provision might be read to mean "open under the normal three-year period," as the *Intermountain* majority read it,[63] or it might mean "open under the six-year period, as that period is extended by this regulation," as Treasury and the IRS intended.[64] An agency's construction of its own ambiguous regulation is entitled to deference.[65]

Second, the majority is wrong about its *Chevron* step one analysis. *Colony* did not say that its result was unambiguously commanded by the statute.[66] Moreover, *Colony* construed section 275(c) of the code of 1939, a predecessor of current section 6501(e), and the current statute arguably is somewhat more congenial to the Service's position. In the government's view:

> When Congress enacted the 1954 Internal Revenue Code, it was aware of the disagreement among the courts that existed at the time regarding the proper scope of section 275. The changes that Congress enacted [in 1954] predated . . . *Colony* and were intended to resolve the matter for the future. Therefore, by amending the Internal Revenue Code, including the addition of a special definition of "gross income" with respect to a trade or business, Congress effectively limited what ultimately became the holding in *Colony*, to cases subject to section 275(c).[67]

Finally, the pre-*Intermountain* case law refutes *Intermountain*'s expansive reading of *Colony*. The IRS won some of the cases on the overstated basis issue decided after *Colony*.[68] Further, even cases the IRS lost stopped short of saying that *Colony* had found the statute unambiguous. *Bakersfield* conceded that the Service's interpretation was reasonable (although ultimately erroneous)[69] and stated that the IRS "may have the authority to promulgate a reasonable reinterpretation of an ambiguous provision of the tax code, even if its interpretation runs contrary to the Supreme Court's 'opinion as to the best reading' of that provision."[70] *Salman Ranch* involved a 2-2 split of the judges, but the IRS lost because the two judges agreeing with it were a trial judge and an appellate judge while the two judges agreeing with the taxpayer were both appellate judges.[71]

There are two possibilities. Either the judges in these prior cases failed to notice that *Colony* had settled the issue, or more likely, the *Intermountain* majority overplayed its hand in characterizing *Colony*'s holding.

Third, the narrow ground offered by Judge Cohen and the judges joining her is dubious. Yes, a statute outranks a regulation. But, as developed below in Section III.A.1, a validly promulgated legislative regulation has the force of law.[72] Thus, the distinction offered by Judge Cohen's concurrence is not a meaningful difference.

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[57]5 U.S.C. section 559; *see also Dickinson v. Zurko*, 527 U.S. 150, 154-155 (1999) (stressing the importance of uniformity in applying the APA). This argument is presented here in summary form because it is not the central concern of this report. A longer explanation would address the "legislative entrenchment" question, *i.e.*, the extent to which one Congress can impose roadblocks on the amendment of a statute by a later Congress. *See, e.g.*, Amandeep S. Grewal, "Legislative Entrenchment Rules in the Tax Law," 62 *Admin. L. Rev.* ___ (forthcoming 2010).

[58]IRS brief, *supra* note 1, at 20.

[59]For discussion of this canon, see Steve R. Johnson, "When General Statutes and Specific Statutes Conflict," *State Tax Notes*, July 12, 2010, p. 113, *Doc 2010-11554*, or *2010 STT 132-3*.

[60]*Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001).

[61]*Xilinx Inc. et al. v. Commissioner*, 598 F.3d 1191, 1196 (9th Cir. 2009), *Doc 2009-11943, 2009 TNT 100-9*.

[62]*See* 2010 WL 1838297 at *10-11.

[63]*Id.* at *5-6.

[64]*See* IRS brief, *supra* note 1, at 5-7; CC-2010-010 (Nov. 23, 2009), *Doc 2010-13821, 2010 TNT 120-20*.

[65]*E.g., Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Stinson v. United States*, 508 U.S. 36, 44-46 (1993); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 412-418 (1945).

[66]*See* 357 U.S. at 33 ("it cannot be said that the [statutory] language is unambiguous").

[67]T.D. 9466, *supra* note 22, at 552; *see also CC&F Western Operations Ltd. P'ship*, 273 F.3d 402, 406 n.2 (1st Cir. 2001), *Doc 2001-30601, 2001 TNT 239-11*. ("Whether *Colony*'s main holding carries over to section 6501(e) is at least doubtful.")

[68]*Burks v. United States*, 2009 WL 2600358 (N.D. Tex. June 13, 2009); *Home Concrete & Supply LLC v. United States*, 599 F. Supp.2d 678 (E.D.N.C. 2008); *Brandon Ridge Partners v. United States*, 2007-2 U.S. Tax Cas. para. 50,573 (M.D. Fla. 2007).

[69]*Bakersfield Energy Partners v. Commissioner*, 568 F.3d 767, 775 (9th Cir. 2009), *Doc 2009-13801, 2009 TNT 115-10*.

[70]*Id.* at 778 (citing *Brand X*, 545 U.S. at 982-983).

[71]*Salmun Ranch Ltd. v. United States*, 573 F.3d 1362 (Fed. Cir. 2009), *Doc 2009-17311, 2009 TNT 145-13* (2-1 decision), *rev'g* 79 Fed. Cl. 189 (Ct. Fed. Cl. 2007), *Doc 2007-25341, 2007 TNT 221-12*.

[72]*E.g.*, Justice Department, *Attorney General's Manual on the Administrative Procedure Act* 30 at n.3 (1947); Robert A. Anthony, "A Taxonomy of Federal Agency Rules," 52 *Admin. L. Rev.* 1045, 1046 (2000); Peter L. Strauss, "The Rulemaking Continuum," 41 *Duke L.J.* 1463, 1464 (1992). The *Attorney General's Manual* is "the Government's own most authoritative interpretation of the

(Footnote continued on next page.)

III. Legislative Versus Interpretive Tax Regulations

The APA notice-and-comment rules are important. They are "the procedure by which the persons affected by legislative rules are enabled to communicate their concerns in a comprehensive and systematic fashion to legislating agency."[73] This allows participation by the governed and decreases the chance of error by the agency.[74]

There are exceptions to the APA's command that regulations go through notice-and-comment. One exception arguably relevant here operates when the regulation is interpretive, not legislative, in nature.[75] In attempting to deflect Intermountain's APA argument, the IRS relied in part on this exception.[76] Indeed, this is a position that Treasury and the IRS often take as to tax regulations.[77]

The government's position is defective. The IRS is trying to have its cake and eat it, too, by claiming that (1) the regulations did not have to go through notice-and-comment because they are interpretive, not legislative, yet (2) the regulations have the force of law even though they are not legislative. The IRS is wrong on both ends: The regulations at issue are legislative (thus had to go through notice-and-comment) and lack force of law (and thus do not reverse the case law adverse to the IRS) if they are merely interpretive.

A. Legislative, Not Interpretive

The key difference between legislative and interpretive regulations is that the former make binding law while the latter do not. The IRS wants the temporary regulations at issue to make law binding the courts and compelling them to reverse the former thrust of the section 6501(e) case law. These points are developed below, after which I consider and reject the Service's two arguments for treating the regulations as merely interpretive: that they are general, not specific authority, and that they were derived by statutory interpretation.

1. 'Force of law' nature of legislative regulations. Courts have had difficulty drawing lines to distinguish legislative regulations from interpretive ones.[78] The core of distinction is reasonably clear, however, and suffices to resolve the *Intermountain* issue. Legislative regulations have the force of law — that is, they make binding law or change the law. Interpretive regulations do not have force of law; they merely inform the public of what the agency believes the statute means.[79]

Because it hears the largest number of cases involving federal agencies, the D.C. Circuit is sometimes called the second most important federal court.[80] The D.C. Circuit's decision in *American Mining Congress*[81] is among the most influential on the legislative/interpretive distinction.[82] The decision offered the following hallmarks of legislative rule status:

> (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule.[83]

Significantly, the decision added: "If the answer to *any* of these questions is affirmative, we have a legislative, not an interpretive rule."[84]

Under this test, the temporary regs at issue in *Intermountain* are legislative, not interpretive.[85] Not just one,

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APA . . . which [the Supreme Court has] repeatedly given great weight." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 218 (1988) (Scalia, J., concurring).

[73]*Hoctor v. USDA*, 82 F.3d 165, 171 (7th Cir. 1986).

[74]*See, e.g.*, Ronald A. Cass, "Models of Administrative Action," 72 *Va. L. Rev.* 363, 364 (1986) (stating that the APA's rulemaking approach "loosely resembles the legislative process"); Mark Seidenfeld, "A Civic Republican Justification for the Bureaucratic State," 105 *Harv. L. Rev.* 1511, 1560 (1992) (maintaining that the notice-and-comment process "is specifically geared to advance the requirements of civic republican theory" though perhaps "only to a limited extent," given the procedures agencies actually use).

[75]5 U.S.C. section 553(b).

[76]*See* IRS brief, *supra* note 1, at 21-23.

[77]The IRS takes the position that most Treasury regulations are interpretive in nature. Internal Revenue Manual section 32.1.5.4.7.5.1; *see also* Hickman, *supra* note 45, at 1760-1773.

[78]*See, e.g.*, Richard J. Pierce Jr., "Distinguishing Legislative Rules From Interpretative Rules," 52 *Admin. L. Rev.* 547, 547 (2000) ("For over fifty years, courts and commentators have

(Footnote continued in next column.)

struggled to identify, and to apply, criteria that are appropriate to distinguish between legislative and interpretative rules. The results have not been pretty.") (citing cases).

For additional discussion of the "legislative versus interpretive" issue, see Robert A. Anthony, "Which Agency Interpretations Should Bind Citizens and Courts?" 7 *Yale J. Reg.* 1 (1990); Anthony, "'Interpretive' Rules, 'Legislative' Rules and 'Spurious' Rules: Lifting the Smog," 8 *Admin. L.J. Am. U.* 1 (1994); Anthony, "Three Settings in Which Nonlegislative Rules Should Not Bind," 53 *Admin. L. Rev.* 1313 (2001); and William Funk, "When Is a 'Rule' a Regulation? Marking a Clear Line Between Nonlegislative Rules and Legislative Rules," 54 *Admin. L. Rev.* 659 (2002).

[79]*E.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 301-302 (1979).

[80]"In administrative law corners, some say that D.C. Circuit cases carry equal — if not more — precedential weight than Supreme Court decisions." Jim Rossi, "Does the Solicitor General Advantage Thwart the Rule of Law in the Administrative State?" 28 *Fl. St. U.L. Rev.* 459, 460 (2000).

[81]*American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106 (D.C. Cir. 1993).

[82]*See, e.g.*, Hickman, *supra* note 45, at 1766 (calling *American Mining Congress* the "dominant standard"); Pierce, *supra* note 78, at 548 (stating that *American Mining Congress* "does an excellent job of identifying all of the [important] criteria"); Richard J. Pierce Jr., *Administrative Law Treatise* 454 (5th ed. 2010) (noting that *American Mining Congress* has been adopted in six circuits, including the Tenth Circuit, to which *Intermountain* is appealable).

[83]*American Mining Congress*, 995 F.2d at 1112. Subsequent cases have modified these indicia at the margins. *See* 2010 WL 1838297, at *19 (Halpern and Holmes, JJ., concurring).

[84]995 F.2d at 1112 (emphasis added).

[85]Significantly, temporary tax regulations have the same weight as final regulations. *E.g., UnionBanCal v. Commissioner*,

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but two of the indicia are present. The first indicium is present because, absent the regulations, the IRS would have no adequate legal basis for applying section 6501(e) to overstated basis situations. Treasury and the IRS were not simply informing the public of their view of the statute — that view was already well known from the many cases (most of them losses[86]) in which the government had advanced it. The whole point of issuing the regulations was to change the law and bind the courts by administratively reversing the law as articulated by the weight of the cases.[87]

The third indicium also is present. In paragraph 1 of the amendment to 26 C.F.R. part 301 introduced by the new regulations, Treasury explicitly invoked its general legislative authority under section 7805.[88] Section 7805(a) is a general conferral of authority, and "the general consensus now is that a general rulemaking power confers delegated power [on agencies] to adopt binding legislative rules."[89]

The regulations at issue in *Intermountain* seek to make or change binding law, not merely to inform the public of Treasury's construction of the statute. Therefore, they are legislative in nature and so do not qualify for the interpretive regulations exception to the APA notice-and-comment requirements. We now turn to the Service's rejoinders to that argument.

2. General authority versus specific authority. The Service's first rejoinder in *Intermountain*[90] relies on an error that Treasury and the IRS have perpetuated for decades and that taxpayers and even courts have too often accepted.[91] This error equates interpretive regulations with regulations issued under the general authority of section 7805(a) and equates legislative regulations with regulations issued under specific authority within the code section at issue. Because the temporary regs were issued under section 7805(a) and not under sections 6501 or 6229, the IRS claims they are interpretive.

The problem is that the equations on which the Service's argument rests are wrong, and the mere fact that much of the tax community has long recited these equations without question does not make them right.[92] The classification of a regulation as legislative or interpretive depends on whether the regulation has the force of law, not on which code section the regulation was promulgated under. Tax regulations that make binding law are legislative whether they are promulgated under specific authority or general authority.[93]

Nevertheless, the IRS argued in *Intermountain* as follows:

> Regulations that are not interpretive but rather legislative or substantive generally result from statutes that specifically direct the [Treasury] to prescribe regulations under a provision of the law. . . . In these situations, Congress simply provides an end result without any guidance as to how to achieve the end result. Regulations issued pursuant to this type of blank slate grant of authority are issued to create substantive law necessary to achieve the end result commanded by Congress, thus they are legislative or substantive regulations.
>
> In contrast, the statutory provisions in this case, sections 6229 and 6501, do not direct the Secretary to issue regulations. . . . There is no mandate from Congress requiring the [Treasury] to take any action other than administer the provisions.[94]

In my opinion that argument is weak. First, the "blank slate" description of specific-authority regulations is overinclusive. As shown below, the statutes authorizing such regulations often impose specific limits within which Treasury is to exercise the delegated power.[95]

Second, the "no mandate" description is underinclusive and is not limited to general authority regulations. Treasury sometimes does not issue regulations even when authorized to do so by specific authority provisions,[96] which undercuts the practical significance of any "mandate." Moreover, *Chevron* and other cases have made it clear that Congress confers power, not just by express delegations, but also implicitly by leaving gaps for the agency to fill.[97] The agency can make binding rules in either case. An implicit delegation by means of

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305 F.3d 976, 985 (9th Cir. 2002), *Doc 2002-21272, 2002 TNT 182-11; E. Norman Peterson Marital Trust v. Commissioner*, 78 F.3d 795, 798 (2d Cir. 1996).

[86]*E.g., Salman Ranch Ltd. v. United States*, 573 F.3d 1362 (Fed Cir. 2009); *Bakersfield Energy Partners v. Commissioner*, 568 F.3d 767 (9th Cir. 2009).

[87]As the Halpern/Holmes concurrence notes, the IRS "wants us to vacate our otherwise final decision, which he could not logically ask us to do without implying that the [Treasury] intended that these new rules have the force of law." 2010 WL 1838297 at *20; *cf. United States v. Booker*, 543 U.S. 220, 234 (2005) (Stevens, J., delivering the opinion of the Court in part) ("Because [the sentencing guidelines] are binding on judges, we have consistently held that the Guidelines have the force and effect of laws.").

[88]2009-43 IRB at 552.

[89]Michael Asimow, "Public Participation in the Adoption of Temporary Tax Regulations," 44 *Tax Law.* 343, 354 (1991) (citing "emphatic holdings" in several nontax cases).

[90]*See* 2010 WL 1838297 at *18-20.

[91]*See* John F. Coverdale, "Court Review of Tax Regulations and Revenue Rulings in the *Chevron* Era," 64 *Geo. Wash. L. Rev.* 35, 52 (1995).

[92]*Carr v. United States*, 560 U.S. ___, 2010 WL 2160783, at *13 (June 1, 2010) (Alito, J., dissenting) ("A bad argument does not improve with repetition.").

[93]*See, e.g., Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995); *American Hosp. Ass'n v. NLRB*, 899 F.2d 651, 655-656 (7th Cir. 1990); *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 695 (2d Cir.), *cert. denied*, 423 U.S. 827 (1975); *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

[94]IRS brief, *supra* note 1, at 22.

[95]*See* subpart V.B.2.

[96]For example, the sorry saga of Treasury's failure to issue debt versus equity regulations under section 385 is well known. *See, e.g.*, Glenn E. Coven, Robert J. Peroni, and Richard Crawford Pugh, *Cases and Materials on Taxation of Business Enterprises* 132 (2d ed. 2002).

[97]*E.g., Chevron*, 467 U.S. at 842; *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

leaving a gap to be filled is, if anything, even more of a "no mandate" situation than a general authority delegation.

Third, and most importantly, even if the "blank slate" versus "no mandate" categories had been accurately described by the IRS, it is not clear why the distinction would matter. Why does the fact that Treasury could have chosen not to issue a particular regulation mean that when it does issue a regulation it may skip notice-and-comment? The APA prescribes notice-and-comment both to allow the governed to express their views and to reduce the chance of the agency making a policy error. Those reasons apply as fully when an agency issues a regulation Congress didn't require as when it issues a regulation Congress did require.

3. Process of interpretation. In *Hoctor*, a nontax case, the Seventh Circuit took a different tack to defining interpretive regulations. In the opinion for the court, Chief Judge Richard A. Posner wrote that a regulation is interpretive "only if it can be derived from the [statute or other governing law] by a process reasonably described as interpretation."[98]

In the cases litigated before issuance of the temporary regulations, the IRS advanced plausible (though usually unavailing) statutory interpretation arguments for its view that basis overstatements are within the ambit of the six-year limitations period.[99] Thus, the government could argue that the regulations are derived from sections 6501 and 6229 "by a process reasonably described as interpretation."[100]

There are three problems with this argument. First, it is not clear that *Hoctor* was providing a universal or even general test. Even if it was, *Hoctor* has not been widely followed. Certainly, *American Mining* has been far more influential.

Second, *Hoctor* is in tension with the established distinction between legislative and interpretive regulations. One can imagine situations in which a regulation could be derived via a process of interpretation (so would be interpretive under *Hoctor*) but would make binding law (so would be legislative under the established definition). A regulation cannot be both legislative and interpretive, making *Hoctor* at odds with the dominant standard.[101]

Third, the argument that the regs at issue were derived by a process of interpretation might work better on a clean slate than in the current posture. It would have been easier to say that the temporary regs were derived via interpretation before the majority of the cases (and the most authoritative of the cases) rejected the interpretations on which the position is based.

In short, I believe the new regulations are legislative in character. They do not qualify for the interpretive rule exception to the APA notice-and-comment requirements.

B. Nonbinding if Only Interpretive

Back to the basics. Legislative regulations make binding law; interpretive regulations do not. Thus, if — contrary to the points in Section III.A above — the IRS were to prevail in its argument that the temporary regulations are merely interpretive, the IRS would have won the battle but lost the war. The interpretive temporary regulations would not be binding on the courts.[102] Being just the opinion of the IRS, they would be entitled to a respectful hearing, which wouldn't count for much. The courts have already heard the Service's position and have rejected it, for the most part.

The IRS, however, maintains that "interpretative rules can be implemented by interpretative Treasury regulations that are decreed to have force of law but that still qualify as interpretative rules exempt from the APA,"[103] citing *National Restaurant*.[104]

This can't be right for three reasons. First, the argument ignores the fundamental trade-off embodied in the APA notice-and-comment requirements. "Legislative rules carry the force and effect of law, which is why the APA ordinarily subjects these rules to public notice and comment before they become final."[105] Precisely because they are not binding, the harm posed by a misguided interpretive regulation is far less than the harm that would be posed by a misguided legislative regulation, which is why it is safe to exempt interpretive, but not legislative, rules from notice-and-comment. The Service's position would imbalance the congressional calculation by making a rule binding while dispensing with the safeguard that makes binding administrative power an acceptable risk.[106]

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[98]*Hoctor*, 82 F.3d at 170.

[99]*See, e.g., Salman Ranch*, 573 F.3d at 1371-1372 (Fed. Cir. 2009) (describing the Service's statutory arguments).

[100]Although only in passing and without citation to *Hoctor*, the IRS invoked this argument in *Intermountain*. IRS brief, *supra* note 1, at 23. ("Under any applicable legal test or measure, the temporary regulations are interpretive because they merely interpret an ambiguous phrase in the relevant statutes and are thus exempt from the APA's notice and comment requirements.")

[101]The root of the problem is that the *Hoctor* approach applies an ordinary, vernacular meaning to "interpretation" and its derivative terms. But "interpretive" as used in the "interpretive versus legislative" dichotomy is a term of art. *See generally* Yule Kim, *Statutory Interpretation: General Principles and Recent Trends*, 4-6 (Cong. Res. Serv. No. 97-589) (rev. Aug. 31, 2008) (distinguishing between terms of art and words of ordinary meaning).

[102]*See, e.g.*, William Funk, "A Primer on Nonlegislative Rules," 53 *Admin. L. Rev.* 1321, 1332-1333 (2001).

[103]IRS brief, *supra* note 1, at 21.

[104]*National Restaurant Ass'n v. Simon*, 411 F. Supp. 993, 999 (D.D.C. 1976).

[105]Kristin E. Hickman, "IRB Guidance: The No Man's Land of Tax Code Interpretation," 2009 *Mich. St. L. Rev.* 239, 253-254.

[106]"So long as the administrative state remains such a pervasive and coercive force in society, one should think very hard before eliminating legal doctrines that provide checks on the arbitrariness of agency action. . . . [We] must not divert the focus entirely away from the need to ensure that agencies act not only within acceptable legal and political bounds, but also exercise their discretion in a deliberative manner." Mark Seidenfeld, "Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking," 75 *Tex. L. Rev.* 483, 489-490 (1997).

Second, in trying to have it both ways, the IRS would put interpretive regulations in a preferred position relative to legislative regulations. From the agency's standpoint, interpretive regulations would have the same benefit (binding effect) as legislative regulations but without the same inconvenience (having to go through notice-and-comment). As a practical matter, legislative regulations could become redundancies, the legislative category being swallowed by the interpretive category. It is hard to believe Congress intended such an outcome.

Third, *National Restaurant* is weak authority. It is an old trial court decision that is incompletely reasoned, little cited, and difficult to reconcile with current doctrine. *National Restaurant* acknowledged that controlling circuit law distinguished between legislative and interpretive rules based on the binding nature of the former and the nonbinding nature of the latter.[107] The court still rejected a "no notice-and-comment" challenge to a revenue ruling that created new record-keeping and reporting requirements because the revenue ruling did so "by interpreting the meaning of already binding regulations, rather than by creating any new obligations."[108] To justify the holding, the court said that in its view, "it is a ruling of the sort that Congress intended the [IRS] to make as a matter of administrative construction, not subject to the normal rulemaking requirements."[109] This is clairvoyance, not reasoning.

IV. *Intermountain* and *Brand X*

The temporary regulations are an attempt by an agency to reverse judicial statutory interpretation. Can agencies do that?[110] *Brand X* is a key case. The Supreme Court held that a regulation trumps prior judicial interpretations as long as two conditions are met: the regulation qualifies for *Chevron* deference, and the prior cases did not say their results were commanded by an unambiguous statute.[111]

The *Intermountain* majority concluded that section 6501(e) unambiguously precludes the Service's position (thus defeating *Chevron* deference) and that the Supreme Court had so held in *Colony*. As noted in Section II.C, I disagree with these conclusions. It will be interesting to see whether future decisions embrace or reject them.

Brand X is a comparatively recent decision, and important questions it raises still must be resolved.[112] *Intermountain* and comparable cases may help on some of these questions but not on others. Three such questions are addressed below.

A. What *Intermountain*-Type Cases May Clarify

The first question is the "magic words" issue. The second prong of the *Brand X* test requires that the holding in a prior case was not based on an unambiguous statute. Is the second prong satisfied only if the prior case expressly used "unambiguous" or a synonym in characterizing the statute? Courts have grappled with similar issues in other areas of administrative law. For example, the APA distinguishes between informal and formal agency rulemaking (and agency adjudication). When a regulation may be promulgated informally, the notice-and-comment process suffices. When formal rulemaking is required, additional procedural steps must be taken.[113] Formal rulemaking is required when the underlying statute states that the rules in question "are required . . . to be made on the record after opportunity for an agency hearing."[114] Must precisely or essentially these words appear in the statute, or may a court hold that formal rulemaking is triggered by some less exact statutory language? The case law is not wholly consistent.[115] The Supreme Court seems to have embraced the former alternative, the magic words approach.[116]

But context is everything in law,[117] and the magic words question need not be handled the same way for *Brand X* purposes as for informal versus formal rulemaking purposes.[118] *Intermountain* rejected the contention that the word "unambiguous" need appear in the prior cases that a regulation is trying to reverse.[119] I think it was right to do so.

Colony and some other precedents were decided before *Brand X* and even *Chevron* were handed down. Unless they are charged with a burden of precognition, the justices and judges deciding those cases had no reason to know that their omitting particular words from their opinions could affect the allocation of power between courts and agencies.

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[107] 411 F. Supp. at 999.

[108] *Id.*

[109] *Id.*

[110] For discussion of this issue in the context of the check-the-box regulations as to entity classification, see Gregg Polsky, "Can Treasury Overrule the Supreme Court?" 84 *B.U. L. Rev.* 185 (2004). The courts, however, have upheld the check-the-box regulations. *E.g.*, *Littriello v. United States*, 484 F.3d 372 (6th Cir. 2007), *Doc 2007-9567*, *2007 TNT 73-16*.

[111] 545 U.S. at 982.

[112] Hundreds of cases have cited *Brand X*, and a substantial literature exists as to it. *E.g.*, *Mercado-Zazueta v. Holder*, 580 F.3d 1102, 1113-1115 (9th Cir. 2009); 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).

[113] *See* 5 U.S.C. sections 556 and 557.

[114] 5 U.S.C. section 553(c).

[115] *See* Alfred C. Aman Jr., *Administrative Law and Process*, sec. 3.03 (2d ed. 2006) (discussing both formal agency adjudication and formal agency rulemaking).

[116] *E.g.*, *United States v. Florida East Coast Railway*, 410 U.S. 224, 241-242 (1973).

[117] *See, e.g.*, Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, 37 (1997).

[118] For instance, the courts freely dispense with the "consistent meaning" canon of statutory construction when the same word appears in substantively different statutory contexts. *See* Steve R. Johnson, "Supertext and Consistent Meaning," *State Tax Notes*, May 25, 2009, p. 675, *Doc 2009-9545*, or *2009 STT 99-4*.

[119] *See* 2010 WL 1838297, at *8 n.22 ("We agree . . . with the U.S. Court of Appeals for the Fourth Circuit, which stated that we . . . do not hold that a court must say in so many magic words that its holding is the only permissible interpretation of the statute in order for that holding to be binding on an agency.'") (quoting *Fernandez v. Keisler*, 502 F.3d 337, 347 (4th Cir. 2007)).

Thus, the test under *Brand X* should be whether the prior cases, fairly read, suggest a view that the statute is unambiguous, not that the word "unambiguous" actually appear in the prior cases. If that construction prevails, *Intermountain* will have contributed to clarifying *Brand X*.[120]

Unfortunately, the *Intermountain* majority misapplied this approach. The majority read *Colony* to hold the statute to be unambiguous based on the legislative history, citing parts of the opinion calling the history "persuasive evidence" and saying that it "shows to [the majority's] satisfaction" that Congress intended the result reached.[121] This quoted language surely reflects a comfort level exceeding 50 percent, but it strikes me as falling short of unambiguous.

Colony can be compared with the prior judicial interpretation at issue in *Brand X*. In *Brand X* the Ninth Circuit held against the Federal Communications Commission because the agency's position was incompatible with the prior judicial interpretation of the governing statute in *AT&T Corp. v. City of Portland*.[122] The Supreme Court reversed the Ninth Circuit in *Brand X*, finding that the *Portland* court had not treated the underlying statute as unambiguous but had "held only that [its reading was] the *best* reading of" the statute.[123] Similarly, the *Colony* opinion seems to me to reach only a "best reading" conclusion, not an "unambiguous" conclusion.

B. What *Intermountain*-Type Cases May Not Clarify

One unsettled question from *Brand X* is what should be done if the conclusions reached by the prior case on whether the statute is ambiguous are insupportable. What if the precedent declared the statute to be unambiguous, but better analysis would have called it ambiguous, and vice versa?

I don't think *Intermountain* presents either of these situations. In my view, the predecessor of section 6501(e) was ambiguous on whether basis overstatements are covered, and current section 6501(e) remains so; and contrary to *Intermountain*, *Colony* cannot be read as declaring the statute to unambiguously exclude basis overstatements.

But what if I am right about the first of these conclusions and wrong about the second? In other words, what if *Colony* erroneously treated an ambiguous statute as unambiguous? In that case, future courts would either have to reject *Brand X* protection for the new regulations even though the *Colony* Court was wrong about ambiguity, or protect the regulations under *Brand X* on the ground that *Colony*'s conclusion was wrong. The choice courts make between these alternatives would clarify the implementation of the *Brand X* rule.

However, *Intermountain*-type cases are not a good vehicle for achieving that clarification. *Colony* was a Supreme Court decision, and lower courts are not authorized to declare Supreme Court decisions wrongly reasoned.[124] Thus, this clarification would be achieved only if the Supreme Court itself heard and decided *Intermountain* or a future case in this line. Given the number of tax cases the Supreme Court takes each year,[125] and the other important tax issues that vie for the Court's attention, this scenario is unlikely.[126]

I also doubt that *Intermountain*-type cases, or indeed cases of any type, will lead to resolution of another of *Brand X*'s ambiguities: whether the clarity of the statute is to be determined only from the statutory text or whether legislative history also may be examined as part of the inquiry. The *Intermountain* majority believed that resort to legislative history is properly part of the process,[127] while Judges Halpern and Holmes believed text to be controlling, saying that "*Colony*'s resort to legislative history in the first place shows a gap that [Treasury] is ipso facto allowed to fill."[128]

The Halpern/Holmes concurrence said that this ambiguity in *Brand X* is "not [an issue] that we as a trial court can possibly solve on our own."[129] I would go further and offer that this *Brand X* issue will never be resolved by any court because the dispute ultimately reflects the clash between textualism and purposivism in statutory interpretation. Despite centuries of debate, that clash has not been resolved and likely never will be resolved.[130]

The main support for the position that the *Brand X* ambiguity analysis includes legislative history is *Chevron*, which states that step one is answered by resort to "traditional tools of statutory construction,"[131] which for many judges would include legislative history. *Chevron* was written by Justice John Paul Stevens, a leading purposivist, but the *Brand X* opinion was written by Justice Clarence Thomas, a textualist (or even literalist). Justice Thomas framed the *Brand X* inquiry as whether "the prior court decision holds that its construction follows from the unambiguous *terms* of the statute,"[132] a

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[120]*See generally* Thomas W. Merrill and Kristin E. Hickman, "*Chevron*'s Domain," 89 *Geo. L.J.* 833, 917 (2001); Note, "Implementing *Brand X*: What Counts as a Step One Holding?" 119 *Harv. L. Rev.* 1532 (2006) (both exploring alternative approaches to this issue).

[121]357 U.S. at 33 and 36.

[122]216 F.3d 871 (9th Cir. 2000).

[123]545 U.S. at 984 (emphasis in original).

[124]*E.g., Agostini v. Felton*, 521 U.S. 203, 237 (1997) (requiring lower courts to adhere to the Court's directly controlling precedents, even those resting on rationales rejected in other decisions).

[125]Usually between one and four.

[126]For example, the Court recently denied certiorari on the important issue of the amenability of tax accrual workpapers to the federal tax liens. *United States v. Textron Inc.*, 577 F.3d 21 (1st Cir. 2009) (*en banc*), *cert. denied*, 130 S. Ct. 3320 (2010). This is a reminder that importance alone does not guarantee obtaining the Supreme Court's attention.

[127]2010 WL 1838297, at *7.

[128]*Id.* at *15.

[129]*Id.*

[130]For discussion of these approaches to statutory interpretation, see Frank B. Cross, *The Theory and Practice of Statutory Interpretation*, chs. 2 and 3 (2009).

[131]467 U.S. at 843.

[132]545 U.S. at 982 (emphasis added).

locution that seems to limit the inquiry to the statutory language[133] (and perhaps statutory structure and maybe some canons[134]).

Future *Brand X* decisions will sometimes be written by purposivist judges who will embrace legislative history, and sometimes by textualist judges who will eschew it. With each new decision, one side or the other will gain ascendancy, but only until the next opinion penned by a jurist of the contrary persuasion on statutory interpretation. *Intermountain*-type cases won't resolve the legislative history issue, which I don't believe will ever be resolved.

The history of *Chevron* supports this pessimistic prediction. *Chevron* is over 25 years old and remains unclear in key respects. Consider four points in this regard, moving from general to specific.

First, the courts — particularly the Supreme Court — have seriously muddied the threshold question of when *Chevron* applies. By one count, the Supreme Court has applied no fewer than seven distinct deference regimes in the years after *Chevron* — often without explanation of why one regime was used instead of another[135] — leaving lower courts with inadequate guidance,[136] and the Supreme Court's deference jurisprudence a mess.[137]

Second, when *Chevron* is held to provide the governing standard, there is confusion about how its steps are to be applied. *Intermountain*, using *Chevron* step one, held that the statute unambiguously forecloses the regulation (or at least that *Colony*'s view of the statute does). But it has long been thought that courts manipulate the step one analysis to reach the desired results or, more generously, that step one holdings have a "length of the Chancellor's foot" quality.[138] "The threshold determination of ambiguity remains the most troubling aspect of the Court's deference jurisprudence."[139]

Third, in post-*Chevron* cases the Supreme Court has been inconsistent on what the role of the "traditional tools of statutory construction" is in the step one analysis. In some cases, it has applied at least some of these tools at step one,[140] while in other cases, it has not done so even though presented with the opportunity.[141]

Fourth, if traditional tools should be applied, there is little consistency as to what those tools are. This may result from the difficulties of coalition building,[142] sloppiness, or results orientation.[143] Whatever the cause, the inconsistency is unlikely to be resolved anytime soon.[144]

The interpretative tool stressed by the *Intermountain* majority is legislative history. Supreme Court cases support at least three inconsistent positions on legislative history: (1) the history is to be considered at step one[145]; (2) it is not to be considered at step one[146]; and (3) it is to be considered at step one but only if the statutory text is ambiguous.[147] As the Halpern/Holmes concurrence shows,[148] lower court decisions also are split.[149]

The post-*Chevron* case law is a mess, largely because of the Supreme Court's own vacillation and divisions on the case's purport. The passage of time has confused the situation more, with some declaring *Chevron* dead[150] and

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[133]*See, e.g., AARP v. EEOC*, 390 F. Supp.2d 437, 445 (E.D. Pa. 2005) (stating that terms in *Brand X* "clarified the *Chevron* standard itself"), *aff'd on other grounds*, 489 F.3d 558 (3d Cir. 2007).

[134]*Brand X* itself referred to a substantive canon: the rule of lenity. 545 U.S. at 985.

[135]William N. Eskridge and Lawrence E. Bauer, "The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation From *Chevron* to *Hamdan*," 96 *Geo. L.J.* 1083, 1098-1117 (2008).

[136]*See, e.g., Wilderness Society v. United States Fish & Wildlife Serv.*, 316 F.3d 913, 921 (9th Cir. 2003); Adrian Vermeule, "*Mead* in the Trenches," 71 *Geo. Wash. L. Rev.* 347, 361 (2003) ("the Court has inadvertently sent the lower courts stumbling into a no-man's land").

[137]Eskridge and Bauer, *supra* note 135, at 1157; *see also* Lisa Schultz Bressman, "How *Mead* Has Muddled Judicial Review of Agency Action," 58 *Vand. L. Rev.* 1443, 1464 (2005); Jim Rossi, "Respecting Deference: Conceptualizing *Skidmore* Within the Architecture of *Chevron*," 42 *Wm. & Mary L. Rev.* 1105, 1125 (2001) (noting "much uncertainty regarding how *Skidmore* should be applied to agency interpretations of law" as a result of post-*Chevron* case law).

[138]*See, e.g.*, Note, "'How Clear Is Clear' in *Chevron*'s Step One?" 118 *Harv. L. Rev.* 1687, 1691-1692 (2005).

[139]J. Lyn Entrikin Goering, "Tailoring Deference to Variety With a Wink and a Nod to *Chevron*: The Roberts Court and the

(Footnote continued in next column.)

Amorphous Doctrine of Judicial Review of Agency Interpretations of Law," 36 *J. Legis.* 18, 89 (2010).

[140]*E.g., Christensen v. Harris County*, 529 U.S. 576, 583 (2000).

[141]*E.g., Negusie v. Holder*, 129 S. Ct. 1159, 1172 (2009) (Stevens, J., concurring in part and dissenting in part); *Auer v. Robbins*, 519 U.S. 452, 462-463 (1997).

[142]*See* Frank H. Easterbrook, "Ways of Criticizing the Court," 95 *Harv. L. Rev.* 802, 815-817 (1982).

[143]*See* Goering, *supra* note 139, at 90. ("More often than not, a shifting majority of the Roberts Court appears to cherry-pick among [traditional tools of statutory construction] to reach its desired result.")

[144]The issue has been part of the universe of *Chevron* discussion for many years. *See, e.g.*, Mark Seidenfeld, "A Syncopated *Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes," 73 *Tex. L. Rev.* 83, 85 (1994); Cass R. Sunstein, "Law and Administration After *Chevron*," 90 *Colum. L. Rev.* 2071, 2105-2119 (1990).

[145]*E.g., FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 133, 137 (2000).

[146]*E.g., Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 417 (1992); *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 293 n.4 (1988).

[147]*E.g., Zuni Pub. Sch. Dist. No. 89 v. DOE*, 550 U.S. 81, 89 (2007); *HUD v. Rucker*, 535 U.S. 125, 132-133 (2002).

[148]*See* 2010 WL 1838297, at 14-15 (providing a circuit-by-circuit breakdown of cases on the issue).

[149]*Compare Succar v. Ashcroft*, 394 F.3d 8, 31 (1st Cir. 2005) (use of legislative history "is permissible and may even be required at stage one of *Chevron*") *with United States v. Geiser*, 527 F.3d 288, 292 (3d Cir. 2008) (agreeing with the government's argument that "legislative history should not be considered at *Chevron* step one"), *cert. denied*, 129 S. Ct. 937 (2009); *see also* Melina Forte, Case Comment, "May Legislative History Be Considered at *Chevron* Step One? The Third Circuit Dances the *Chevron* Two-Step in *United States v. Geiser*," 54 *Vill. L. Rev.* 727 (2009).

[150]Ann Graham, "Searching for *Chevron* in Muddy *Watters*: The Roberts Court and Judicial Review of Agency Regulations," 60 *Admin. L. Rev.* 229, 239 (2008). ("Classical *Chevron* analysis is dead.") Graham does not mourn that perceived demise because

(Footnote continued on next page.)

others urging that it be relegated to the doctrinal dustbin.[151] I expect no better of *Brand X*, at least regarding this issue. Against this larger context, future *Intermountain*-type cases — no matter the holdings — are unlikely to have lasting effect.

V. Roads Not Traveled

There may be ways to attack the regulations beyond those developed in the *Intermountain* opinions. Some possibilities are explored below. I am not endorsing these arguments, instead offering them to provoke discussion and thought.[152]

The arguments proceed from a common foundation. Subsequent cases have shown that *Chevron* does not provide the analytical framework for all cases in which agency rules are challenged. Instead, *Chevron* will apply only if both of two conditions are present: (1) Congress has delegated (either expressly or implicitly) rulemaking authority to the agency, and (2) the agency issued the challenged position in the exercise of that authority.[153] One's initial reaction might be similar to that of the IRS, which I paraphrase here: "Of course the conditions are satisfied here. In section 7805(a), Congress delegated to Treasury general rulemaking authority as to the entire code, and Treasury stated that the 2009 regulations were issued pursuant to section 7805(a)."[154] That initial reaction may ultimately be correct, but I want to explore it a bit more deeply before accepting it.

It is probably pointless to dispute the second condition, but there may be grounds on which to question whether Congress delegated to Treasury the power to make a rule extending the six-year limitations period to tax deficiencies attributable to overstated basis. Below we consider three perspectives: (1) the significance for delegation purposes of Treasury's failure to use the notice-and-comment process for the temporary regulations, (2) whether section 7805(a) constitutes an explicit delegation in this case, and (3) whether Congress implicitly delegated the power by leaving a gap in sections 6229 and 6501 for Treasury to fill.

A. Failure to Use Notice-and-Comment

The Supreme Court justices have been split between those who want to implement *Chevron* using bright lines and those who prefer facts-and-circumstances approaches.[155] So far, the latter group has prevailed, adding to the *Chevron* muddle.

One particularly strong indicator of *Chevron*'s applicability is that the agency's position went through the notice-and-comment process. In *Mead*, the Court said that the requisite delegation "may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."[156] Some nuance is needed to connect this statement to the two predicates for *Chevron*'s applicability. If Congress required an agency to make a particular rule through the notice-and-comment process that would bear on the first predicate: that Congress delegated the particular power to the agency. That the agency chose to go through that process would bear on the second predicate: that the agency was acting in the exercise of that delegated power.[157]

Although the *Mead* statement suggests that notice-and-comment is one of several indicators of *Chevron*'s applicability,[158] it is a particularly important one. Its absence does not by itself render *Chevron* inapposite, but it does create a hill to climb. As one commentator noted:

> By the end of Chief Justice William H. Rehnquist's last term, the court had settled into a relatively predictable dichotomy. The Court generally applied *Chevron* deference if a rule had been adopted in notice-and-comment proceedings, and otherwise defaulted to [less deferential] analysis of various persuasive factors to determine whether a less formal agency interpretation warranted deference.[159]

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she sees Supreme Court deference jurisprudence as "a confusing muddle of decisions which turn on internecine disputes, backfilling from the desired result, and flavor-of-the-week analytical models." *Id.* at 262. *See also* Note, "Justifying the *Chevron* Doctrine: Insights From the Rule of Lenity," 123 *Harv. L. Rev.* 2043, 2043 (2010). ("Where *Chevron* deference was once the background presumption, it is becoming the exception.")

[151]*E.g.*, William R. Andersen, "Against *Chevron*: A Modest Proposal," 56 *Admin. L. Rev.* 957, 964-969 (2004); 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, 783 (2010). ("Currently, the application of the *Chevron* doctrine is highly unpredictable, and the decision itself is cited for opposing propositions.")

[152]In this, I proceed in the same spirit as a prominent American theologian, who described one of his books as "an attempt at a partial exploration. Its significance, if any, lies in the resources it draws into the questioning." Ewert H. Cousins, *Christ of the 21st Century* (1998).

[153]*E.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 237 (2001). In the *Chevron* literature, this dimension is sometimes called *Chevron* step 1.5 because it fits between step one and step two. *See* Goering, *supra* note 139, at 44 and n.232.

[154]*See* IRS brief, *supra* note 1, at 24.

[155]This is well illustrated by the exchange between Justice Breyer's concurrence and Justice Scalia's dissent in *Brand X*. *Compare* 545 U.S. at 1003-1005 (Breyer, J.) *with id.* at 1014-1016 (Scalia, J.).

[156]533 U.S. at 227.

[157]*Cf. Long Island Care at Home*, 551 U.S. at 173 (applying the *Chevron* standard and emphasizing that the agency interpretation had been the product of notice-and-comment even though use of that process is not required for merely interpretive rules).

[158]To reinforce the point, Justice Breyer maintains that "the existence of a formal rulemaking proceeding is neither a necessary nor a sufficient condition for according *Chevron* deference. . . . It is not a necessary condition because an agency might arrive at an authoritative interpretation of a congressional enactment in other ways." *Brand X*, *supra*, 545 U.S. at 1004 (Breyer, J., concurring). In context, Justice Breyer appears to be referring to notice-and-comment rulemaking although that is usually described as informal, not formal, rulemaking. *See, e.g.*, Alfred C. Aman Jr., *Administrative Law and Process* sec. 4.02 (2d ed. 2006).

[159]Goering, *supra* note 139, at 20; *see also id.* at 47.

Thus, Treasury's decision to skip notice-and-comment undercuts the argument for delegation in this case. This perspective is not dispositive, but does create the need — if the regulations are to be sustained — to identify "some other indication of a comparable congressional intent" to delegate to Treasury the power to create this binding rule.

Whatever the merits of this perspective, it is easy to understand why the *Intermountain* majority did not advance such an argument. Because the temporary regulations were simultaneously published in proposed form,[160] regulations objection would disappear once the notice-and-comment process is complete. It would not accomplish the majority's apparent goal of invalidating the regulations for all cases, whether litigated yet or not.

B. Explicit Delegation

The explicit delegation portion of the argument involves analysis that I will develop more fully in a future article. In brief, I believe that, to date, our dichotomization of tax regulations has been misdirected. As discussed in Section III.A.2, tax practitioners are accustomed to classifying regulations as either specific authority or general authority. I think we should drop these labels. It would be more helpful to refer to the precise statutory language by which Congress delegated power to write particular regulations. If one were to do that, it could be argued that the language of section 7805(a) is insufficient to delegate to Treasury power to write the new regulations. These propositions are explored below.

1. Inadequacy of the traditional distinction. Numerous cases distinguish between specific authority and general authority regulations, and recite the boilerplate proposition that the former are entitled to greater deference than the latter.[161] This distinction is of dubious value and should be eliminated for three reasons.

First, the traditional distinction is deceptive. I[162] and others[163] doubt that reality matches the rhetoric. If a court dislikes a regulation, it probably will find a way to invalidate it even if it is specific authority in nature.[164] If a court likes a regulation, it probably will find a way to uphold it even if it is general authority in nature.[165] I cannot recall a case in which the court said in essence, "We're invalidating this general authority regulation, but we would have upheld it had it been specific authority in nature." If there are such cases, they are rare.

Second, the traditional distinction is unnecessary. In part, courts are motivated to intone the traditional distinction out of respect for Congress. Section 7805(a) covers the entire code, and yet Congress has written more than a thousand specific authority provisions.[166] There must be some reason why Congress writes specific authority provisions. If section 7805(a) effects complete delegation, aren't the numerous specific authority provisions mere surplusage?[167] According specific authority regulations nominally higher dignity than general authority regulations avoids the surplusage problem and any implied derogation of the work of Congress.

But we need not create a legal fiction to avoid such *lèse-majesté*. One reason, described below, is that specific authority provisions usually are worded differently than section 7805(a). There is no surplusage when sections do different things or convey different commands.[168]

There is another reason the legal fiction is unnecessary. Surplusage appears problematic when one assumes that Congress, through its legislation, is speaking only to the courts as the statutes' interpreters. But this one-dimensional model is flawed. A legislature speaks not just to the courts but also to several different "interpretive communities."[169]

One such community is the agency charged with administering the statute in question. Indeed, agencies typically interpret statutes earlier and more often than courts do,[170] a fact that abates surplusage concerns. A specific authority provision — even if worded identically to section 7805(a) — can be understood as Congress instructing Treasury, not the courts, that Congress is

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[160]Notice of Proposed Rulemaking, 74 *Fed. Reg.* 49,354 (Sept. 28, 2009).

[161]*E.g., United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24-25 (1982); *Helvering v. R.J. Reynolds Co.*, 306 U.S. 110, 114 (1939).

[162]Steve R. Johnson, "*Swallows* as It Might Have Been: Regulations Revising Case Law," *supra* note 4.

[163]*E.g.*, Boris I. Bittker, Martin J. McMahon Jr., and Lawrence A. Zelenak, *Federal Income Taxation of Individuals*, 46-5 (3d ed. 2002); Asimow, *supra* note 89, at 357; Mitchell Rogovin and Donald L. Korb, "The Four R's Revisited: Regulations, Rulings, Reliance and Retroactivity in the 21st Century: A View From Within," *Taxes*, Aug. 2009, p. 21, at 22.

[164]Specific authority regulations sometimes have been invalidated by the courts. *E.g., Rite Aide Corp. v. United States*, 255 F.3d 1357 (Fed. Cir. 2001), *superseded in part by* American Jobs Creation Act of 2004, P.L. 108-357, section 844, 118 Stat. 1418, 1600; *Phillips Petroleum v. Commissioner*, 70 F.3d 1282 (10th Cir. 1995) (unpublished opinion); *Estate of Bullard v. Commissioner*, 87 T.C. 261 (1986).

[165]"Even if we regard the challenged regulation as interpretive because it was promulgated under section 7805(a)'s general

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rulemaking grant . . . we must still treat the regulation with deference." *Boeing Co. v. United States*, 537 U.S. 437, 447 (2003); *see also Nathel v. Commissioner*, No. 09-1955, 2010 WL 2183960, at *5 (2d Cir. June 2, 2009), *Doc 2010-12160, 2010 TNT 106-12; McNamee v. Department of the Treasury*, 488 F.3d 100, 106 (2d Cir. 2007), *Doc 2010-12575, 2010 TNT 101-13.* In fact, the great majority of challenges to general authority tax regulations fail.

[166]*See* Coverdale, *supra* note 12, at 52.

[167]As examples of the judicial reluctance to find surplusage in legislative enactments, see *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2003); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991).

[168]*E.g., Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992).

[169]*See, e.g.*, William S. Blatt, "Interpretive Communities: The Missing Element in Statutory Interpretation," 95 *Nw. U. L. Rev.* 629, 641-649 (2001).

[170]Substantial literature now exists as to statutory interpretation by agencies. *E.g.*, Jerry Mashaw, "Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry Into Agency Statutory Interpretation," 57 *Admin. L. Rev.* 501 (2005); Nathaniel L. Nathanson, "Administrative Discretion in the Interpretation of Statutes," 3 *Vand. L. Rev.* 470 (1950).

particularly interested in action on this front, or to reassure Treasury that there's political support for attending to this matter.[171]

Third, and most important, the traditional distinction deflects the attention of the courts from the precise language of the statute containing the specific authorization. The traditional distinction lumps specific authority statutes into one category regardless of the fact that such statutes often word their delegations differently. Congress would be better honored by giving effect to, rather than largely disregarding, textual differences.

2. Textually nuanced interpretation. Section 7805(a) confers on Treasury general authority to "prescribe all needful rules and regulations for the enforcement of" the code. Many specific authority provisions use identical or similar language.

But many other specific authority provisions use different language from section 7805(a). For example:

- Treasury "is authorized to prescribe such regulations as may be necessary or appropriate to determine whether an interest in a corporation is to be treated . . . as stock or indebtedness."[172]
- Treasury "shall prescribe such regulations as may be necessary or appropriate to prevent the avoidance of subsection (a)."[173]
- Treasury "may by regulations exempt" designated types of organizations from the general rules of "this section."[174]
- Treasury "may issue regulations or other guidance providing for adjustment of the [rule generally prescribed by the section] on the basis of geographic differences in housing costs."[175]
- Treasury "may by regulations provide that other restrictions [in addition to those identified in the statute] shall be disregarded in determining the value of" transferred property.[176]
- Treasury "shall prescribe rules which reallocate items of income, deduction, credit, exclusion, or other allowance to the extent necessary to prevent the avoidance of tax imposed by reason of this paragraph. [Treasury] may prescribe rules which exclude from the tax imposed by subsection (a) amounts attributable to mileage awards which are used other than for transportation of persons by air."[177]
- "Nothing in the regulations prescribed for purposes of chapter 24 (relating to income tax withholding) which provides an exclusion from 'wages' as used in such chapter shall be construed to require a similar exclusion from 'wages' in the regulations prescribed for purposes of this chapter" relating to employment taxes.[178]
- Treasury "shall prescribe such regulations as [it] may deem necessary in order that the tax liability of any affiliated group of corporations making a consolidated return and of each corporation in the group . . . may be returned, determined, computed, assessed, collected, and adjusted, in such manner as clearly to reflect the income-tax liability and the various factors necessary for the determination of such liability, and in order to prevent avoidance of such liability. In carrying out the preceding sentence, [Treasury] may prescribe rules that are different from the provisions of chapter 1 that would apply if such corporations filed separate returns."[179]

Hundreds of other examples could be added, but those given above reveal several patterns: (1) some delegations allow Treasury to write rules of an interstitial or implemental nature to carry out the section or its purposes, broadly defined; (2) other delegations are more restrictive, limiting the scope of the delegated power to particular objects; (3) other delegations allow Treasury to define key statutory terms not defined by the statute itself; (4) others allow Treasury to suspend or alter results commanded by the statute; and (5) some provisions direct Treasury to act, some permit Treasury to act, and some prohibit Treasury from acting.

Some of these variations are the result of deliberate choices and careful drafting, and courts should respect such legislative decisions.[180] In some instances, the language employed may have been the product of less care, but I believe that the statutory language should usually (perhaps always) be respected even in such situations. Courts frequently contrast language at issue with other statutory language that more clearly expresses the outcome urged by a party. They do so to maintain that "Congress knows how to say" something when it wishes to convey that meaning.[181] This approach sometimes ascribes deliberation to accidents of drafting. Though it is sometimes a fiction, it is a useful fiction. A similar spirit

[171]Neither of these messages, however, need translate into greater judicial deference for specific authority regulations. Both just encourage Treasury to act. They do not guarantee that Congress or the courts will endorse the substantive content of whatever regs are ultimately promulgated.

[172]Section 385(a); *see also* section 469(l) (Treasury "shall prescribe such regulations as may be necessary or appropriate to carry out provisions of this section, including regulations" to carry out five enumerated functions); section 585(b)(3) (Treasury "shall define the term loan and prescribe such regulations as may be necessary to carry out the purposes of this section"); section 777, section 1202(k), and section 1446(f).

[173]Section 504(b).

[174]Section 508(c)(2).

[175]Section 911(c)(2)(B).

[176]Section 2704(b)(4).

[177]Section 4261(e)(3)(C).

[178]Section 3121(a) (flush language).

[179]Section 1502.

[180]"In our constitutional system, it is widely assumed that . . . federal judges must act as Congress's faithful agents" in interpreting statutes. John F. Manning, "Absurdity Doctrine," 116 *Harv. L. Rev.* 2387, 2393-2394 (2003); *see also* Cass R. Sunstein, "Interpreting Statutes in the Regulatory State," 103 *Harv. L. Rev.* 405, 415 (1989).

[181]*E.g.*, *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003); *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176-177 (1994).

should apply to interpretation of varying statutes delegating tax rulemaking power to the Treasury.

This approach respects Congress and the separation of powers principle. As has been observed in another context, "If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent. It is beyond our province to rescue Congress from its drafting errors. . . . This allows both of our branches to adhere to our respected, and respective constitutional roles."[182] Few, if any, principles of statutory interpretation are absolute, of course, and the courts have "corrected" apparent drafting errors under the absurdity, scrivener's error, and other doctrines.[183] However, no less staunch a purposivist than Justice Stevens has observed that adherence to text is particularly important in areas involving "technical and complex laws,"[184] a characterization that fits our tax statutes.

The traditional dichotomy proceeds categorically, paying more heed to the specific authority versus general authority categorization than to textual divergences among different specific authority delegations. This approach should be replaced with greater attention to statutory language.

3. Application to the 'overstated basis' regulations. Did Congress explicitly, through section 7805(a), delegate to Treasury the power to extend the six-year limitations period to basis overstatements?[185] One could argue that the answer is no. That section authorizes regulations for the enforcement of the code. Arguably that contemplates enforcement of code sections within the ambits already set by Congress, not enlargement of those ambits. If future decisions follow this reasoning, *Chevron* is not triggered in *Intermountain*-type cases by an explicit delegation.

[182]*Lamie v. United States Trustee*, 540 U.S. 526, 542 (2004) (Kennedy, J., writing for a unanimous Court); *see also Gorospe v. Commissioner*, 451 F.3d 966, 969-970 (9th Cir. 2006).

[183]*See, e.g.*, William N. Eskridge Jr., Philip P. Frickey, and Elizabeth Garrett, *Legislation and Statutory Interpretation* 267-271 (2d ed. 2006); Steve R. Johnson, "The 'Absurd Results' Doctrine in State and Local Tax Cases," *State Tax Notes*, Oct. 19, 2009, p. 195, *Doc 2009-21703*, or *2009 STT 199-4*.

[184]*St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 791 (1981) (Stevens, J., concurring).

[185]The IRS, of course, thinks that there is no extension, that the result is consistent with the statutes as they stand. *See* IRS brief, *supra* note 1, at 10. The reason the new regulations were needed, however, is that most courts disagree with the IRS on this point.

C. Implicit Delegation

If an explicit delegation does not support the section 6501/6229 regulations, an implicit delegation probably doesn't either. An implicit delegation may exist[186] when a gap in a statute reasonably implies that Congress intended the agency to fill the gap.[187] However, courts are reluctant to find gaps in, or to allow supplementation or modification of, statutes that are long, detailed, or intricate.[188] Supposed implicit *Chevron* delegations have been rejected on this basis.[189] Section 6501(e) is a detailed and carefully articulated provision.

VI. Conclusion

The Tax Court's *Intermountain* decision surely is not the last shot that will be fired in the overstated basis statute of limitations battle. The government has appealed *Intermountain*, and the validity and applicability of the new regulations will surely be tested in future cases.

Based on the above analysis, the temporary regulations should continue to be invalidated. Leaving aside the considerations in Section V, however, once the regulations have been finalized following completion of notice-and-comment, they should be upheld, particularly if applied only prospectively. Taxpayers who already have won their cases should be safe, but taxpayers whose cases have not yet been decided will be in jeopardy.

As important as the particular issue is to tax administration, the wider dimensions of *Intermountain* and related future cases may ultimately be of greater import. The aspects elaborated above are only some of the interesting matters raised by *Intermountain*. The case is a treasure trove for those interested in tax procedure, and we can eagerly anticipate future decisions on the validity of the basis overstatement statute of limitations regulations. Perhaps above all, *Intermountain* and related future decisions may help shake us out of our professional insularity and convince us that tax practitioners and scholars discount general administrative law only at peril to their professional competence.

[186]The precise role of implicit delegations in the *Chevron* scheme has been debated for years. *See, e.g.*, Goering, *supra* note 139, at 45; Kristin E. Hickman, "The Need for *Mead*: Rejecting Tax Exceptionalism in Judicial Deference," 90 *Minn. L. Rev.* 1537, 1549-1550 (2006).

[187]*E.g., Morton v. Ruiz*, 415 U.S. 199, 231 (1974), *quoted by Chevron, supra*, 467 U.S. at 843-844.

[188]*E.g., United States v. Brockamp*, 519 U.S. 347, 350-352 (1997); *Commissioner v. Brown*, 380 U.S. 563, 579 (1965).

[189]*E.g., ABA v. FTC*, 430 F.3d 457, 469 (D.C. Cir. 2005).