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Judicial Deference to Revenue Rulings: Reconciling Divergent Standards

LINDA GALLER*

I. INTRODUCTION

Ask a tax lawyer about the weight of a revenue ruling, and the response would likely be something like this: "Revenue rulings do not bind taxpayers or the courts, and merely state the position of the Internal Revenue Service (IRS) as to how the law should apply to a particular set of stated facts."¹ Why, then, are revenue rulings important? Your respondent would probably answer: "Revenue rulings help us plan. Taxpayers who have advance notice of an IRS position can make informed decisions on the structuring or reporting of a transaction."² They may choose to comply with a revenue ruling position or to

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¹ See, e.g., MICHAEL J. GRAETZ, *FEDERAL INCOME TAXATION* 73 (2d ed. 1988); MICHAEL I. SALTZMAN, *IRS PRACTICE AND PROCEDURE* ¶ 3.03[2][b] (2d ed. 1991).

² The IRS invites taxpayers to rely on revenue rulings, subject to some qualifications:

Taxpayers generally may rely upon revenue rulings and revenue procedures published in the [Cumulative] Bulletin in determining the tax treatment of their own transactions and need not request specific rulings applying the principles of a published revenue ruling or revenue procedure to the facts of their particular cases. However, taxpayers, Service personnel, and others concerned are also cautioned to determine whether a revenue ruling or revenue procedure on which they seek to rely has been revoked, modified, declared obsolete, distinguished, clarified, or otherwise affected by subsequent legislation, treaties, regulations, revenue rulings, revenue procedures or court decisions.

accept the risk of an IRS challenge by taking a contrary position.³ Taxpayers also save the cost and time of obtaining an advance ruling."⁴

Are the views of our hypothetical lawyer correct? Most tax practitioners would be surprised to learn that the answer is no. During the last five years, traditional understandings have been remarkably disturbed. There is a discernible campaign in the federal courts to give considerable, if not controlling, weight to IRS revenue rulings. Not only does this practice diverge from historical practices, but it also has resulted in a split among the courts that has meaningful consequences.

Most circuit courts of appeals now give some degree of precedential weight to revenue rulings. This newfound regard for rulings does not take one form, however, as the courts have articulated three separate approaches. Under the first, courts defer to revenue rulings because the rulings are reasonable and consistent with the underlying statute. Under the second, courts defer to revenue rulings because the rulings reflect statutory constructions by the agency charged with statutory administration. Finally, under the third approach, courts

³ The penalty rules may require a taxpayer taking a contrary position to bring that position to the IRS's attention by disclosing it on her return. Internal Revenue Code § 6662 imposes a penalty of twenty percent on substantial understatements of tax. I.R.C. § 6662(a), (b)(2) (Supp. V 1993). The penalty may be reduced or avoided if the taxpayer discloses the relevant facts affecting a questionable item's tax treatment and there is a reasonable basis for the tax treatment of the item, or if there is "substantial authority" for her position. *Id.* § 6662(d)(2)(B) (Supp. V 1993). Substantial authority exists when the weight of authorities supporting the taxpayer's position is substantial in relation to the weight of authorities supporting contrary positions. Treas. Reg. § 1.6662-4(d)(3)(i) (1991). Revenue rulings are among the types of authorities that may be considered, although many other authorities, such as scholarly articles, may not. *Id.* § 1.6662-4(d)(3)(i) (1991). Thus, where the only existing authority is a revenue ruling, the taxpayer must disclose the transaction to the IRS, effectively inviting an audit, risk a substantial penalty, or comply with the IRS position.

Internal Revenue Code § 6662 also imposes a penalty for negligence or disregard of rules or regulations. I.R.C. § 6662(a), (b)(1) (Supp. V 1993). A revenue ruling is considered a rule or regulation of which "careless, reckless, or intentional" disregard may result in a penalty. *Id.* § 6662(c). The mere existence of a revenue ruling imposes on taxpayers an affirmative obligation not to disregard an IRS position and to exercise reasonable diligence in determining the correctness of a contrary return position. The penalty for disregarding rules or regulations may be avoided by disclosure if the taxpayer's return position has at least a reasonable basis; the negligence penalty may not be avoided by disclosure because a taxpayer is not considered to have been negligent with respect to a position that has a reasonable basis. Treas. Reg. § 1.6662-7(b), (c) (1995); *see also* WAYS AND MEANS COMMITTEE, OMNIBUS BUDGET RECONCILIATION ACT OF 1993, H.R. REP. NO. 111, 103d Cong., 1st Sess. 754-55 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 984-86.

⁴ *See, e.g.,* United States v. Howard, 655 F. Supp. 392, 400 (N.D. Ga. 1987), *aff'd*, 855 F.2d 1360 (11th Cir. 1988) (observing that "accountants use revenue rulings as 'guidance' when interpreting tax laws").

defer to revenue rulings because they believe that *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*⁵ compels deference. Courts that have enhanced the status of revenue rulings readily cite recent opinions rendered by other circuit courts in support of deference, rather than their own prior opinions, which invariably adopted a far less deferential posture.

The Tax Court⁶ has always eschewed deference, and continues to apply its traditional standard. Revenue rulings merit no special weight in that court because they are deemed merely to represent the contention of one litigating party. The Tax Court's retention of a standard that contradicts circuit court decisions is inconsistent with the court's normal practice of following circuit court precedent.⁷

The adoption of divergent approaches has profound consequences. As to litigants, the choice of forum⁸ may categorically determine the substantive outcome of a case. If the IRS can be expected to cite a revenue ruling, taxpayers are likely to lose in federal court because federal judges defer to rulings. Only the Tax Court offers an opportunity for full consideration of taxpayer arguments. The lack of consistency among the circuits results in inconsistent treatment of similarly situated taxpayers, who are confronted by a different rule depending upon the circuits in which they reside and the courts in

⁵ 467 U.S. 837 (1984).

⁶ The United States Tax Court was created by Congress under the authority of Article I of the United States Constitution. Tax Reform Act of 1969, Pub. L. No. 91-172, §§ 951-962, 83 Stat. 487, 730-36. For a description of the jurisdictional structure in federal tax litigation, see *infra* note 8.

⁷ The Supreme Court has not spoken to the issue, but the Court has hinted that it is aware of revenue rulings' ambiguous status. See *infra* notes 193-201 and accompanying text.

⁸ Taxpayers may, at their option, litigate civil tax controversies in any of three trial level courts: the Tax Court, a federal district court, and the Court of Federal Claims. I.R.C. § 7442 (1988) (giving jurisdiction to the Tax Courts); 28 U.S.C. § 1346(a)(1) (1977 & Supp. V 1993) (giving jurisdiction to the district courts and the Court of Federal Claims). For a thorough description of the scope of each court's jurisdiction and factors to consider in selecting an appropriate forum, see Nina J. Crimm, *Tax Controversies: Choice of Forum*, 9 B.U. J. TAX LAW 1 (1991). If the Tax Court is selected, the taxpayer can litigate without first paying the deficiency. In order to litigate in a district court or the Claims Court, the taxpayer must first pay in full all taxes covered by the suit, *Flora v. United States*, 362 U.S. 145 (1960), file a claim for refund, I.R.C. § 7422(a) (1988), and then commence a lawsuit against the government. Appeals from the Tax Court are heard by the court of appeals for the geographic circuit in which the taxpayer's legal residence is located or in which a corporate taxpayer's principal place of business is located. I.R.C. § 7482 (1988 & Supp. V 1993); see *infra* note 240. Decisions of federal district courts are appealed to the regional courts of appeals, 28 U.S.C. § 1294 (1988), and appeals from the Claims Court are to the Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295(a)(3) (1988 & Supp. V 1993).

which their disputes are heard. Ultimately, taxpayers in one circuit may not pay the same taxes as similarly situated persons in other circuits.

On a systemic level, deference raises questions regarding the allocation of jurisdiction over tax litigation. Concurrent jurisdiction over tax controversies (among the federal courts and the Tax Court) is premised upon benefits that supposedly are offered by each forum: expertise in the specialized Tax Court versus broader perspectives in the generalist federal courts. To the extent that federal court judges are willing to accept and abide by IRS revenue rulings, their courts represent decidedly pro-government tribunals. Federal court judges abdicate their role in the overall system by withholding the benefits for which their participation is most valued.

This Article argues that revenue rulings should be treated consistently in all judicial fora.⁹ The diversity of approaches among the circuit courts suggests that Supreme Court review is warranted. Without judicial resolution, legislative intervention is appropriate; Congress should statutorily prohibit the citation of revenue rulings as authority for substantive arguments, in the same way as it has with IRS letter rulings.

This Article begins by examining the attributes of revenue rulings that contribute to their distinctive status. Revenue rulings are not on a par with regulations, which are entitled to judicial deference, but rulings deserve more weight than other IRS statements of position. Thus, the issues treated in this Article present themselves only with respect to such rulings. Part III analyzes the disparate approaches adopted by the courts, and Part IV explains the circuit courts' apparent eagerness to break with precedent and the Tax Court's firm adherence to tradition. The generalist judges of the federal bench seem to be actively searching for ways to defer, while the specialized Tax Court judges show no interest in letting others decide tax questions. Part V considers the consequences of the movement toward deference and the division among the courts. On a practical level, the existence of a revenue ruling (on point) largely controls the choice of forum. Judicial deference encourages the IRS to issue revenue rulings simply as a means of ensuring success in court. Finally, the courts' increasing tendency to defer to revenue rulings defeats the purposes underlying allocation of jurisdiction over tax controversies, wherein generalist federal judges were meant to contribute something more than a rubber stamp.

⁹ I have argued elsewhere that the Tax Court's standard should be followed in all courts. Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, 72 B.U. L. REV. 841 (1992). Therefore, this Article will not re-examine the issue of what the uniform standard of review should be.

II. THE UNIQUE CHARACTER OF REVENUE RULINGS

The nation's revenue laws are administered and enforced by the Treasury Department,¹⁰ primarily through the IRS.¹¹ These duties are carried out in part by the issuance of "rules and regulations"¹² setting forth departmental positions on selected issues. Statements of position take various forms, and are issued with different degrees of formality and publicity, depending upon the format selected. The significance or weight of a particular pronouncement in court is largely a function of the formality and publicity associated with the issuance process.¹³

The IRS dispenses a steady volume and wide variety of information to assist and advise taxpayers in complying with their obligations under the Code. The least formal sort of guidance, oral advice, does not bind the agency or the taxpayer,¹⁴ while the most formal type, regulations, often are regarded as equivalent to statutory law.¹⁵ Between these two extremes lie a variety of other formats, the most significant of which are revenue rulings and letter rulings. The three major categories—regulations, revenue rulings, and letter rulings—generally are ranked in descending order for purposes of weight or importance.

¹⁰ I.R.C. § 7801(a) (1988).

¹¹ See I.R.C. § 7802(a) (1988).

¹² Internal Revenue Code § 7805(a) (1988) authorizes the Treasury Secretary to "prescribe all needful rules and regulations for the enforcement of [the Internal Revenue Code], including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue." The Secretary has authorized the Commissioner of Internal Revenue to issue these departmental positions, subject to his approval. Treas. Reg. § 301.7805-1(a) (1960).

¹³ See, e.g., *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 332 (D.C. Cir. 1952) (noting that exemption from APA notice and comment procedures affects the weight that courts will accord to interpretive rulings). At least one court of appeals has explicitly concluded that revenue rulings are entitled to less weight than regulations because regulations are promulgated in accordance with APA notice and comment procedures. *American Stores Co. v. American Stores Co. Retirement Plan*, 928 F.2d 986, 993 (10th Cir. 1991); *Flanagan v. United States*, 810 F.2d 930, 934 (10th Cir. 1987); see also *Johnson City Medical Ctr. v. United States*, 999 F.2d 973, 979-80 (6th Cir. 1993) (Batchelder, J., dissenting).

¹⁴ See, e.g., *United States v. Guy*, 978 F.2d 934, 938 (6th Cir. 1992) (holding that taxpayer's reliance on oral statements of an IRS agent was unreasonable); Treas. Reg. § 601.201(k)(2) (as amended in 1983) (stating that IRS is not bound by oral advice offered by its employees); Rev. Proc. 95-1, 1995-1 I.R.B. 9, 14. *But cf.* I.R.C. § 6404(f) (1990) (requiring the IRS to abate any penalty or addition to tax that is due to erroneous *written* advice furnished by an IRS employee, but providing no relief where erroneous advice is oral).

¹⁵ See *infra* notes 57-60 and accompanying text.

Confusion as to judicial weight is prevalent only with respect to revenue rulings because they are hybrids. Like regulations, revenue rulings apply generically rather than to a single recipient, as do letter rulings. Revenue ruling issuance procedures, however, more closely resemble those of letter rulings, which are released without the sort of public participation that is mandated as to regulations. A substantial volume of judicial precedent states that regulations are entitled to deference,¹⁶ while the weight of letter rulings is carefully prescribed by statute. The weight of revenue rulings, however, has been the subject of a confusing and erratic judicial process in which courts are increasingly likely to treat revenue rulings like regulations by deferring to IRS positions that are set forth in the revenue ruling format. This section describes the three regulatory formats and compares the standards that have been applied to each, in an effort to demonstrate the uniqueness of revenue rulings and to establish a framework for analyzing the courts' diverse approaches to deference.

A. Regulatory Formats

1. Treasury Regulations

The most important rules are issued as Treasury regulations.¹⁷ Substantive, or legislative, regulations are issued pursuant to specific statutory authority.¹⁸

¹⁶ Of course, the standards for judicial review of regulations are themselves subject to vigorous debates, particularly as to the repercussions of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See sources cited *infra* notes 69-77. That dialogue, however, is taking place in leading law reviews among noted scholars and jurists, so that judges know well which sources to consult for advice in answering questions that may arise in tax litigation. Moreover, the participants in the regulation debate are experts in a variety of substantive areas.

¹⁷ Treas. Reg. § 601.601(a)(1) (as amended in 1983).

¹⁸ *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981); *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977); see also DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947) [hereinafter ATTORNEY GENERAL'S MANUAL]. For example, Treasury regulations governing consolidated income tax returns for affiliated groups of corporations are legislative regulations because the Code expressly authorizes their issuance. *Wolter Construction Co. v. Commissioner*, 634 F.2d 1029, 1035 (6th Cir. 1980).

Courts sometimes use the terms "substantive" and "legislative" interchangeably to describe rules that are not interpretive. *E.g.*, *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952); *Wing v. Commissioner*, 81 T.C. 17, 27 & n.11 (1983). Using the term "substantive" in this context is confusing because it implies a distinction from "procedural" rules, and interpretive rules relate to substance, not procedure. See Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should*

They implement the statute, and affect individual rights and obligations.¹⁹ Under the Administrative Procedure Act (APA),²⁰ government agencies issuing legislative regulations must provide prior notice to the public of the proposed rulemaking, and must accord the public an opportunity to participate in the rulemaking process by submitting written comments.²¹ Final regulations must be published in the Federal Register prior to their effective date,²² along with a general statement describing the basis and purpose of the regulations and responses to objections and suggestions received from the public.²³

Interpretive regulations emanate from an agency's general authority to interpret and enforce a particular statute.²⁴ They express the agency's views on what the statute means, and explain rights and duties that are already implicit in the statute.²⁵ Treasury regulations issued under the general authority of Internal Revenue Code section 7805(a) are considered interpretive regulations.²⁶

Federal Agencies Use Them to Bind the Public?, 41 DUKE L.J. 1311, 1321 n.37 (1992); Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 521, 523 n.11 (1977).

Similarly, the term "interpretive" customarily is used in place of the statutory term "interpretative." Anthony, *supra* at 1321 n.37; Asimow, *supra* at 522 n.6. Based on an informal etymological study, however, Judge Shadur has concluded that "interpretative" is the linguistically correct form. *American Medical Ass'n v. United States*, 688 F. Supp. 358, 361 n.4 (N.D. Ill. 1988), *aff'd in part and rev'd in part*, 887 F.2d 760 (7th Cir. 1989).

¹⁹ See *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1074 (1985); ATTORNEY GENERAL'S MANUAL, *supra* note 18, at 30 n.3.

²⁰ 5 U.S.C. §§ 551-559, 701-706 (1994).

²¹ 5 U.S.C. § 553(b), (c). The agency may offer the opportunity to present comments orally. *Id.* § 553(c). The Treasury Department's procedures for implementing APA notice and comment requirements are contained in Treas. Reg. § 601.601(a)-(c) (as amended in 1983).

²² 5 U.S.C. § 553(b), (d); *see also* Treas. Reg. § 601.601(d)(1) (as amended in 1983); *Id.* § 601.702(a) (as amended in 1987). The thirty day requirement may be waived for good cause found and published with the rule. 5 U.S.C. § 553(d).

²³ 5 U.S.C. § 553(c).

²⁴ *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976); *E. Norman Peterson Marital Trust v. Commissioner*, 102 T.C. 790, 797 (1994).

²⁵ *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1074 (1985); *cf.* ATTORNEY GENERAL'S MANUAL, *supra* note 18, at 30 n.3 (observing that interpretive rules advise the public of the agency's construction of the statutes and rules that it administers).

²⁶ *See, e.g., United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24-25 (1982); *Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981); *Saint Jude Medical, Inc. v. Commissioner*, 34 F.3d 1394, 1400 n.11 (8th Cir. 1994); *Ann Jackson Family Found. Inc. v. Commissioner*, 15 F.3d 917 (9th Cir. 1994); *Thomas Int'l Ltd. v. United States*, 773 F.2d 300, 303 (Fed. Cir. 1985); *Perkin-Elmer Corp. v. Commissioner*, 103 T.C. 464, 469

Although the APA does not require agencies to follow notice and comment procedures when issuing interpretive regulations, the Treasury Department customarily complies with the APA procedures with respect to both legislative and interpretive regulations.²⁷

2. Revenue Rulings

A revenue ruling is an interpretation or explanation of the tax laws issued by the IRS, and is designated as a "revenue ruling."²⁸ Revenue rulings typically describe a set of hypothetical facts, and state the IRS's legal

(1994); *E. Norman Peterson Marital Trust*, 102 T.C. at 797; *see also* Ellsworth C. Alvord, *Treasury Regulations and the Wilshire Oil Case*, 40 COLUM. L. REV. 252, 259-62 (1940). *But see* *American Medical Ass'n v. United States*, 688 F. Supp. 358, 364 (N.D. Ill. 1988), *aff'd in part and rev'd in part*, 887 F.2d 760 (7th Cir. 1989). The district court refused to follow the traditional paradigm, stating that

in the area of taxation and Treasury Regulations, it would seem more than a bit odd to adopt a bright-line rule that every regulation adopted under the general authority of [Internal Revenue] Code § 7805(a) must be 'interpretative' in the APA § 553 statutory sense, while every regulation adopted under a more particularized statutory authorization is not.

Id. The court noted that the Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651-678 (1988 & Supp. V 1993) contains parallel language to I.R.C. § 7805(a) (1988), authorizing the Secretary of Labor and the Secretary of Health and Human Services (HHS) to "prescribe such rules and regulations as he may deem necessary to carry out their responsibilities under this chapter," O.S.H.A. § 8(g)(2), 29 U.S.C. § 657(g)(2), and that the OSHA language has been held to allow the issuance of both legislative and interpretive regulations. *American Medical Ass'n*, 688 F. Supp. at 364. The nature and substance of a regulation, and not the source of authority for its promulgation, determines its status. *Id.* (citing *Chamber of Commerce v. OSHA*, 636 F.2d 464, 468-70 (D.C. Cir. 1980)).

²⁷ *See* Asimow, *supra* note 18, at 524-25; Deborah A. Geier, *Commentary: Textualism and Tax Cases*, 66 TEMP. L. REV. 445, 463 n.66 (1993); Mitchell Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, 43 TAXES 756, 759 (1965); Paul F. Schmid, *The Tax Regulations Making Process—Then and Now*, 24 TAX LAW. 541, 541 (1971); *see also* *Redhouse v. Commissioner*, 728 F.2d 1249, 1252 (9th Cir. 1984) (noting Treasury's standard practice); *American Medical Ass'n*, 688 F. Supp. at 362 (arguing that compliance with APA procedures does not resolve status of Treasury regulations because procedures are followed with respect to both legislative or interpretive regulations); *cf.* Treas. Reg. § 601.601(a)(2) (as amended in 1983) (mandating that notice and comment procedures be followed where required by the APA and "in such other instances as may be desirable").

²⁸ *See* Treas. Reg. § 601.201(a)(6) (as amended in 1983); *Id.* § 601.601(d)(2)(i)(a) (as amended in 1983); *see also* Rev. Proc. 95-1, 1995-1 I.R.B. 9, 14.

conclusions based on those facts.²⁹ The same individuals who participate in the formulation of Treasury regulations draft and review revenue rulings. Attorneys in the Office of the Chief Counsel prepare the rulings for approval by the Chief Counsel, Commissioner of Internal Revenue, and Assistant Secretary (Tax Policy).³⁰ Because they are considered interpretive rules for purposes of the APA,³¹ revenue rulings are exempt from notice and comment issuance procedures and are published without a precedent announcement.³² Revenue rulings are published in the Internal Revenue Bulletin.³³

The IRS describes the objectives of the revenue rulings program as promoting uniform application of the tax laws and assisting taxpayers in attaining maximum voluntary compliance.³⁴ In 1953, when the program

²⁹ Rev. Proc. 95-1, 1995-1 I.R.B. 9, 14.

³⁰ For a general overview of the review processes, see INTERNAL REVENUE SERVICE, CHIEF COUNSEL DIRECTIVE MANUAL (30)(15)10, CHIEF COUNSEL PUBLICATIONS HANDBOOK ¶¶ 720-728 (1994) [hereinafter PUBLICATIONS HANDBOOK]; INTERNAL REVENUE SERVICE, CHIEF COUNSEL DIRECTIVE MANUAL (30)(15)20 ¶¶ 140-180 (1995).

³¹ Revenue rulings have been called the "classic example" of interpretive rules. *Wing v. Commissioner*, 81 T.C. 17, 27 (1983); see also *Northern Ill. Gas Co. v. United States*, 743 F.2d 539, 541 n.3 (7th Cir. 1984), cert. denied, 472 U.S. 1027 (1985); *Redhouse v. Commissioner*, 728 F.2d 1249, 1253 (9th Cir.), cert. denied, 469 U.S. 1034 (1984). In her dissenting opinion in *Johnson City Medical Ctr. v. United States*, 999 F.2d 973, 978-84 (6th Cir. 1993), Judge Batchelder argues that revenue rulings are not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), precisely because they are exempt from APA notice and comment requirements. See *infra* notes 182-86 and accompanying text.

³² The IRS may solicit comments and suggestions from taxpayers or taxpayer groups if justified by special circumstances. Treas. Reg. § 601.601(d)(2)(v)(f) (as amended in 1983).

³³ Treas. Reg. § 601.201(a)(6) (as amended in 1983); *id.* § 601.601(d)(2)(i)(a) (as amended in 1983); see also Rev. Proc. 95-1, 1995-1 I.R.B. 9, 14; Rev. Proc. 89-14, 1989-1 C.B. 814, 814 (describing the standards for publication of revenue rulings and revenue procedures).

Although the Bulletin contains other forms of announcements, revenue rulings and revenue procedures are the only IRS statements of position or practice that *must* be published there. Treas. Reg. § 601.601(d)(2)(vi) (as amended in 1983); see also Rev. Proc. 89-14, 1989-1 C.B. 815. A revenue procedure is an official statement of procedure that affects the rights or duties of taxpayers or other members of the public under the Internal Revenue Code, related statutes, and regulations, or information that the IRS believes should be a matter of public knowledge even if it does not affect the rights and duties of the public. Treas. Reg. § 601.601(d)(2)(i)(b) (as amended in 1983); see also Rev. Proc. 89-14, 1989-1 C.B. 814, 814.

On at least one occasion, the Government has argued that revenue procedures are entitled to less weight than revenue rulings. See *United States v. Metro Constr. Co.*, 602 F.2d 879, 882 (9th Cir. 1979).

³⁴ Rev. Proc. 89-14, 1989-1 C.B. 814, 814-15; accord PUBLICATIONS HANDBOOK, *supra* note 30, ¶ 211.

commenced, the agency identified three principal purposes. First, revenue rulings would be a vehicle through which the National Office could inform field personnel of precedents or guiding positions.³⁵ Second, the Internal Revenue Bulletin would provide a permanent, indexed reference to IRS positions.³⁶ Third, revenue rulings would enable the public to review interagency communications that the IRS uses as precedents or guides.³⁷

Issuance of revenue rulings benefits the government as well as taxpayers. From the government's perspective, uniformity in application of the law is more likely to be attained through centralized interpretation of the Code.³⁸ Moreover, the issuance of revenue rulings reduces the burden on the letter rulings program.³⁹ Advance notice of an IRS position enables taxpayers to compute their taxes correctly in the first instance.⁴⁰ Those contemplating transactions benefit as well from the elimination of surprise:⁴¹ most taxpayers will avoid controversy by complying with a revenue ruling⁴² (thereby minimizing the likelihood and cost of litigation to both sides),⁴³ while taxpayers who elect not to comply are fully aware of the potential for litigation.⁴⁴

³⁵ Rev. Rul. 2, 1953-1 C.B. 484, 484; *see also* Genshaft v. Commissioner, 64 T.C. 282, 291-92 n.10 (1975); Packard v. Commissioner, 63 T.C. 621, 637 (1975); Sandor v. Commissioner, 62 T.C. 469, 481 (1974) (noting that the purpose of publication of revenue rulings is to promote uniform application of tax laws by IRS employees), *aff'd*, 536 F.2d 874 (9th Cir. 1976).

³⁶ Rev. Rul. 2, 1953-1 C.B. 484, 484.

³⁷ *Id.*

³⁸ Mortimer M. Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles*, 20 INST. ON FED. TAX'N 1, 7 (1962); Rogovin, *supra* note 27, at 765; *cf.* Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1482 (1992) (arguing that by informing the public of how agencies intend to carry out their functions, interpretive rules contribute to uniformity in both enforcement and compliance).

³⁹ Rogovin, *supra* note 27, at 765. For a description of the letter rulings program, see *infra* notes 45-56 and accompanying text.

⁴⁰ Caplin, *supra* note 38, at 7; Rogovin, *supra* note 27, at 765; *cf.* Strauss, *supra* note 38, at 1481-83 (making a similar argument as to all non-notice and comment agency interpretations).

⁴¹ Caplin, *supra* note 38, at 7; *cf.* Rogovin, *supra* note 27, at 765 (noting that advance notice of the IRS's position enables the taxpayer to decide whether to consummate a contemplated transaction).

⁴² Norman A. Sugarman, *Federal Tax Rulings Procedure*, 10 TAX L. REV. 1, 4 (1954).

⁴³ *See* Caplin, *supra* note 38, at 7; Rogovin, *supra* note 27, at 765; Sugarman, *supra* note 42, at 4-5.

⁴⁴ In order to avoid certain accuracy-related penalties under Internal Revenue Code § 6662, taxpayers may be required to disclose tax return positions that contravene IRS revenue rulings. Thus, issuance of revenue rulings may increase the IRS's ability to detect

3. Letter Rulings

Like revenue rulings, letter rulings are written statements issued by the IRS, which interpret and apply the tax laws to a set of stated facts.⁴⁵ Unlike revenue rulings, however, letter rulings are issued only to taxpayers who specifically request them, and bind the agency only with respect to the particular taxpayer to whom they are issued. Taxpayers voluntarily seek letter rulings in advance of consummating transactions⁴⁶ in order to obtain a measure of certainty or security with respect to the IRS.⁴⁷ Letter rulings enable recipients to prepare their tax returns in conformity with IRS interpretations,⁴⁸ and to protect themselves against adverse changes in IRS policies.⁴⁹

promising candidates for audit and litigation. *See supra* note 3. A similar disclosure rule exists with respect to the preparer penalty. *See* I.R.C. § 6694(a)(3) (Supp. V 1993).

⁴⁵ Treas. Reg. § 601.201(a)(2) (as amended in 1983); *see also* Rev. Proc. 95-1, 1995-1 I.R.B. 9, 13.

⁴⁶ Letter rulings may be issued only with respect to prospective transactions and completed transactions before the tax return is filed. Treas. Reg. § 601.201(b)(1) (as amended in 1983); *see also* Rev. Proc. 95-1, 1995-1 I.R.B. 9, 16-17. Rulings are not issued, however, if the identical issue is present in a return of the taxpayer for a prior year and that issue is under examination or audit by a district or appeals office or is pending in litigation. Treas. Reg. § 601.201(b)(1); Rev. Proc. 95-1, 1995-1 I.R.B. 9, 17. For procedures for requesting letter rulings, *see* Rev. Proc. 95-1, 1995-1 I.R.B. 9.

⁴⁷ Rulings "take the gamble out of a business transaction." Sugarman, *supra* note 42, at 4; *see also* Gerald G. Portney, *Letter Rulings: An Endangered Species?*, 36 TAX LAW. 751, 754 (1983). By obtaining a letter ruling, the taxpayer knows in advance of the transaction and the filing of her tax return precisely how the IRS will determine the tax consequences of the transaction. Where the IRS position is adverse to the taxpayer's expectations, the taxpayer still benefits from the elimination of surprise during a later audit. Sugarman, *supra* note 42, at 4.

⁴⁸ Portney, *supra* note 47, at 754.

⁴⁹ The IRS may revoke or modify letter rulings that are found to be in error or not in accord with the IRS's current views. Treas. Reg. § 601.201(l)(4) (as amended in 1983); *see also* Rev. Proc. 95-1, 1995-1 I.R.B. 9, 41.

Except in rare or unusual circumstances, revocation or modification of a ruling will not be applied retroactively . . . if (i) there has been no misstatement or omission of material facts, (ii) the facts subsequently developed are not materially different from the facts on which the ruling was based, (iii) there has been no change in the applicable law, (iv) the ruling was originally issued with respect to a prospective or proposed transaction, and (v) the taxpayer directly involved in the ruling acted in good faith in reliance upon the ruling and the retroactive revocation would be to his detriment.

Treas. Reg. § 601.201(l)(5); *see also* Rev. Proc. 95-1, 1995-1 I.R.B. 9, 41-42.

Sometimes, taxpayers are required by statute to request a ruling seeking the IRS's consent to, or approval of, a contemplated action.⁵⁰

Letter rulings are issued by the IRS National Office,⁵¹ and must be applied by a district office in determining a taxpayer's liability if the representations on which the ruling is based reflect an accurate statement of the material facts and if the transaction is carried out substantially as proposed.⁵² However, a letter ruling applies only as to the taxpayer to which it is issued,⁵³ and may not be used or cited by the IRS as precedent in the disposition of other cases, or be relied upon by other taxpayers.⁵⁴

Letter rulings are open to public inspection,⁵⁵ and are available through private publishers in print and on-line. Names, addresses, and identifying numbers are deleted before public disclosure, and other deletions may be allowed in particular cases.⁵⁶

⁵⁰ For example, taxpayers wishing to change methods of accounting must obtain the IRS's consent. I.R.C. § 446(e) (1988); Treas. Reg. § 1.446-1(e)(2)(i), (e)(3) (as amended in 1993).

⁵¹ Treas. Reg. § 601.201(a)(2) (as amended in 1983); *see also* INTERNAL REVENUE SERVICE, CHIEF COUNSEL DIRECTIVE MANUAL (39)616.1 (1992). Depending on subject matter, letter rulings are issued by the Office of Associate Chief Counsel (Domestic), the Office of Associate Chief Counsel (Employee Benefits and Exempt Organizations), the Office of Associate Chief Counsel (Enforcement Litigation), or the Office of Associate Chief Counsel (International). Rev. Proc. 95-1, 1995-1 I.R.B. 9, 13.

⁵² Treas. Reg. § 601.210(l)(2) (as amended in 1983); *see also* Rev. Proc. 95-1, 1995-1 I.R.B. 9, 41.

⁵³ Rev. Proc. 95-1, 1995-1 I.R.B. 9, 41.

⁵⁴ Treas. Reg. § 601.201(l)(1) (as amended in 1983); *cf.* I.R.C. § 6110(j)(3) (1988) (declaring that letter rulings "may not be used or cited as precedent"). *See infra* notes 101-112 and accompanying text.

⁵⁵ I.R.C. § 6110(a) (1988); Treas. Reg. § 301.6110-1 (1977). The text of any ruling that is open to public inspection is located in the IRS National Office Reading Room. Treas. Reg. § 301.6110-1(c)(1). Background file documents, including the ruling request, written material filed by the taxpayer in support of the request, and any communications between the IRS and others in connection with, but prior to the issuance of, the ruling, are available for public inspection upon written request, I.R.C. § 6110(a), (b), (e) (1988); Treas. Reg. § 301.6110-1(b); Treas. Reg. § 301.6110-2(g) (1977), and may be examined in the National Office Reading Room. Treas. Reg. § 301.6110-1(c)(1). Procedures for requesting background file documents are set forth in Rev. Proc. 88-11, 1988-1 C.B. 636.

⁵⁶ I.R.C. § 6110(c) (1988); Treas. Reg. § 301.6110-3 (1977).

B. Standards of Review

1. Treasury Regulations

Legislative regulations have the same binding effect as statutes.⁵⁷ When Congress expressly directs an agency to prescribe standards for implementing a statute, the courts consider that Congress intended to vest in the agency authority to make binding rules.⁵⁸ Thus, when a court reviews a legislative regulation, its job is merely to determine whether the agency acted within its delegated authority.⁵⁹ Stated differently, the court must apply the regulation unless it finds that the regulation is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."⁶⁰

The status of interpretive regulations is unclear. Traditionally, interpretive regulations have received less deference than legislative regulations.⁶¹ Courts have not considered themselves bound by interpretive rules because they regard these rules merely as interpreting what the statute means.⁶² The court's job, under this view, is to determine whether the regulation implements the statute

⁵⁷ *Long v. United States*, 652 F.2d 675, 678 n.7 (6th Cir. 1981); *accord Chrysler Corp. v. Brown*, 441 U.S. 281, 295, 302 (1979); *Batterton v. Francis*, 432 U.S. 416, 425 (1977); *cf. ATTORNEY GENERAL'S MANUAL*, *supra* note 18, at 30 n.3 (stating that legislative regulations "have the force and effect of law").

⁵⁸ *Francis*, 432 U.S. at 425; *cf. Chrysler*, 441 U.S. at 304 (stating that there must be a nexus between agency regulations and delegation of legislative authority by Congress in order for the regulations to have the "force and effect of law").

⁵⁹ *See Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981); *Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981); *see also* Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 6 (1983) ("[J]udicial review of administrative action contains a question of the allocation of law-making competence in every case, given congressional power to delegate law-making authority to administrative agencies. The court's interpretational task is . . . to determine the boundaries of delegated authority.").

⁶⁰ Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C) (1994); *see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Gray Panthers*, 453 U.S. at 44; *Francis*, 432 U.S. at 426.

⁶¹ *Brown v. United States*, 890 F.2d 1329, 1336 (5th Cir. 1989); *see Rowan*, 452 U.S. at 253 (stating that an interpretive regulation was entitled to less deference than a regulation issued under an express grant of authority to define a statutory term); *see also* *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982); *E.I. du Pont de Nemours & Co. v. Commissioner*, 41 F.3d 130, 135-36 & n.23 (3d Cir. 1994); *Ann Jackson Family Found. Inc. v. Commissioner*, 15 F.3d 917, 920 (9th Cir. 1994); *Thomas Int'l Ltd. v. United States*, 773 F.2d 300 (Fed. Cir. 1985); *Perkin-Elmer Corp. v. Commissioner*, 103 T.C. 464, 469 (1994).

⁶² *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984); *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952).

in a reasonable manner.⁶³ The weight accorded to interpretive regulations depends upon the thoroughness evident in the agency's consideration of the rule, the validity of its reasoning, its consistency with earlier and later pronouncements, and other factors that the reviewing court may deem relevant.⁶⁴

In its seminal *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*⁶⁵ decision, the Supreme Court may have rewritten the standards applicable to judicial review of interpretive regulations. Although *Chevron* itself involved legislative regulations,⁶⁶ the two-step analytical framework adopted by the Court appears to encompass other forms of administrative interpretations as well:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines

⁶³ *Rowan*, 452 U.S. at 252; *Commissioner v. Portland Cement Co.*, 450 U.S. 156, 169 (1981); *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 476 (1979); *Brown*, 890 F.2d at 1336; see also *Cottage Sav. Ass'n v. Commissioner*, 499 U.S. 554, 560-61 (1991) (asserting that the Court must defer to Treasury regulations promulgated under general authority of I.R.C. § 7805(a) (1988) so long as they are reasonable). Opinions in tax cases often cite *United States v. Correll*, 389 U.S. 299, 307 (1967), in which the Court stated: "The role of the judiciary in cases of this sort begins and ends with assuring that the Commissioner's regulations fall within his authority to implement the congressional mandate in some reasonable manner." *Id.* (emphasis added). *Correll*, however, involved an interpretive ruling (I.T.) issued by the Income Tax Unit or Division of the IRS, and not a regulation. See GAIL L. RICHMOND, *FEDERAL TAX RESEARCH* 59-60 (4th ed. 1990). The *Correll* Court's confusion in this regard is evident throughout its opinion.

⁶⁴ *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); see also *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 190 (3d Cir. 1995) (Nygaard, J., dissenting) (arguing that *Skidmore* and *Gilbert* continue to apply to interpretive rules). Among the factors considered by courts are: whether the regulation harmonizes with the plain language, origin, and purpose of the statute; whether the regulation was issued contemporaneously with the statute that it construes; the manner in which the regulation evolved; the length of time the regulation has been in effect; the reliance placed on the regulation; the consistency of the agency's interpretation; and the degree of scrutiny Congress has devoted to the regulation during subsequent reenactments of the statute. See *National Muffler*, 440 U.S. at 477.

⁶⁵ 467 U.S. 837 (1984).

⁶⁶ Anthony, *supra* note 18, at 1325 n.64; Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2093 (1990). The regulations at issue in *Chevron* were issued by the Environmental Protection Agency (EPA) under the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified in scattered sections of Title 42 of the *United States Code*).

Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.⁶⁷

A permissible construction is one that "represents a reasonable accommodation of conflicting policies."⁶⁸ Under *Chevron*, a court must accept, or defer to, an agency's construction regardless of the court's own views, so long as the agency's position is reasonable.

Commentators have written extensively on the meaning of *Chevron*. In its extreme, *Chevron* can be read to require courts to accept any reasonable agency interpretation of a statute, if Congress has not explicitly provided a contrary answer.⁶⁹ Thus, what makes *Chevron* "revolutionary"⁷⁰ is its firm mandate that courts *must* accept agency positions (so long as they are reasonable), rather than exercising their own independent judgment.⁷¹

Chevron's deference principles can be explained in terms of democratic theory.⁷² While Congress is the ultimate source of lawmaking authority, the problem addressed in *Chevron* is who should resolve questions that Congress has failed to answer. As between courts and administrators, *Chevron's* selection of the latter is based simply on political accountability. Neither judges nor agencies are directly accountable to the electorate, but the President is. Therefore, the executive branch of government should resolve competing claims that arise under ambiguous or silent statutes.⁷³

⁶⁷ *Chevron*, 467 U.S. at 842-43 (footnotes omitted).

⁶⁸ *Id.* at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 382-83 (1961)).

⁶⁹ Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 969 (1992); see also Kevin W. Saunders, *Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 DUKE L.J. 346, 365-66.

⁷⁰ Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 284 (1986).

⁷¹ Merrill, *supra* note 69, at 977; Starr, *supra* note 70, at 296.

⁷² See Merrill, *supra* note 69, at 978.

⁷³ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984). Professor Sunstein has noted that statutory interpretation is not merely a process of reconstructing legislative will, but also involves the making of policy choices based on extratextual considerations (such as how a statute is best implemented). In light of their greater electoral accountability and fact-finding capacity, agencies are better suited than courts to make these judgments. Sunstein, *supra* note 66, at 2087-88; see also Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 822-24 (1990); cf. *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991) ("Judicial deference to an agency's interpretation of ambiguous provisions of the statutes it is

Where a statute explicitly directs an agency to issue rules, Congress's intentions regarding the resolution of ambiguities or gaps are clear. But when Congress is silent, can we not assume that Congress intended courts, rather than agencies, to resolve ambiguities? *Chevron* answers this question by presuming a delegation;⁷⁴ "whenever Congress has delegated authority to an agency to administer a statute, it has also delegated authority to the agency to interpret any ambiguities present in the statute."⁷⁵ Thus, so long as the agency has the authority to implement a statute,⁷⁶ deference to agency interpretations is appropriate whether the delegation is explicit or implicit since an implicit delegation is the equivalent of an express one. *Chevron*, then, has been construed to mandate the same level of judicial deference for both interpretive and legislative rules.⁷⁷

authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches.").

⁷⁴ "Sometimes the legislative delegation to an agency is implicit rather than explicit." *Chevron*, 467 U.S. at 844; see *Miller v. United States*, No. 94-3225, 1995 U.S. App. LEXIS 25200, at *5 (8th Cir. Sept. 7, 1995) (asserting existence of "an implicit legislative delegation of authority to the [Internal Revenue] Commissioner to clarify whether income tax deficiency interest is 'properly allocable to a trade or business'").

⁷⁵ Merrill, *supra* note 69, at 979; see also Saunders, *supra* note 69, at 356; Sunstein, *supra* note 66, at 2084; Eric M. Braun, Note, *Coring the Seedless Grape: A Reinterpretation of Chevron U.S.A. Inc. v. NRDC*, 87 COLUM. L. REV. 986, 993-95 (1987). But see Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking under Chevron*, 6 ADMIN. L.J. AM. U. 187, 195-96 (1992) (arguing that the Court's presumption that Congress intends to delegate interpretive authority to agencies is "wholly fictional").

⁷⁶ In *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), the Court held that *Chevron* applies only where the agency is exercising delegated authority. The Court stated that "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Id.* at 649; see also *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696-98 (1991) (applying *Chevron* to Department of Labor regulations issued pursuant to congressional delegation); *Massachusetts v. Morash*, 490 U.S. 107, 116 (1989) (according *Chevron* deference to regulations promulgated by the Secretary of Labor, who was "specifically authorized" by statute to issue such regulations); cf. *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (arguing that advisory opinions issued by the Attorney General were not entitled to *Chevron* deference because the courts, not the Department, had responsibility for administering the criminal statute at issue).

⁷⁷ Merrill, *supra* note 69, at 979; Saunders, *supra* note 69, at 365-66; cf. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 471 n.79 (1989) ("*Chevron*'s articulation of the deferential model appears to be indifferent to the 'legislative/interpretive' rule construct."). But see Herz, *supra* note 75, at 203-16 (arguing that although *Chevron* literally eliminates the category of interpretive rules, the Supreme Court in practice analyzes interpretive rule and legislative rule cases under different standards); Sunstein, *supra* note 66, at 2093-94 (arguing that

Although the Supreme Court has not spoken definitively on the applicability of *Chevron* to interpretive rules,⁷⁸ it has indicated an awareness that the question is unresolved. For example, in *Chicago v. Environmental Defense Fund*,⁷⁹ the Administrator of the EPA issued a memorandum to EPA Regional Administrators directing them to act in accordance with the agency's construction of a statute. The Environmental Defense Fund (EDF) argued that *Chevron* deference applies only to agency interpretations issued pursuant to legislatively delegated lawmaking authority, e.g., legislative rules issued in accordance with APA notice and comment procedures. Because the interpretation at issue was announced in an internal agency memorandum that was circulated only to regional agency offices, EDF argued that *Chevron* did not apply.⁸⁰

The Court concluded that the statute was clear and unambiguous, and rejected the EPA's construction as incompatible with its own reading. Therefore, the Court did not reach the issue of deference.⁸¹ In a footnote, however, the Court stated:

In view of our construction of § 3001(i), we need not consider whether an agency interpretation expressed in a memorandum like the Administrator's in this case is entitled to any less deference under *Chevron* than an interpretation adopted by rule published in the Federal Register⁸²

Similarly, in *United States v. Thompson/Center Arms Co.*,⁸³ the Court expressly declined to determine the amount of deference owed to IRS revenue rulings⁸⁴ despite extensive briefing by the government.⁸⁵

Chevron should not apply to agency interpretations that are not issued through APA rulemaking procedures).

⁷⁸ But see *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring) ("In an era when our treatment of agency positions is governed by *Chevron*, the 'legislative rules vs. other action' dichotomy of [*General Electric Co. v.*] *Gilbert* is an anachronism.").

⁷⁹ 114 S. Ct. 1588 (1994).

⁸⁰ Brief for Respondents at 7, *Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588 (1994) (No. 92-1639).

⁸¹ The Court's conclusion that the statute was not ambiguous precluded any need for *Chevron* deference. Justice Scalia, who wrote the majority opinion, previously had argued that "strict constructionist" judges rarely defer to agency interpretations because they rarely find that statutes are ambiguous. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521; see also Richard J. Pierce, *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 777-78 (1995).

⁸² *Environmental Defense Fund*, 114 S. Ct. at 1594 n.5.

⁸³ 504 U.S. 505 (1992).

Without formal guidance or precedent, the courts of appeals have divided on the issue of applicability of *Chevron* to interpretive rules, including regulations. The Courts of Appeals for the D.C.,⁸⁶ Third,⁸⁷ Fourth,⁸⁸ and Sixth⁸⁹ Circuits apply *Chevron* to interpretive regulations,⁹⁰ while the Fifth,⁹¹

⁸⁴ *Id.* at 518 n.9.

⁸⁵ Brief for Petitioner at 15–17, *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992) (No. 91-164); *see also* *Commissioner v. Keystone Consol. Indus., Inc.*, 113 S. Ct. 2006, 2013 n.3 (1993) (declining to rule on deference to IRS revenue rulings and Department of Labor advisory opinions, despite strenuous briefing on the issue); Petitioner's Brief at 29, 30 n.20, *Keystone* (No. 91-1677); Respondent's Brief at 39–41, *Keystone* (No. 91-1677); *cf.* *Cottage Sav. Ass'n v. Commissioner*, 499 U.S. 554, 562 (1991) (presuming that the government had not argued for deference to two relevant revenue rulings because they were issued after the transaction at issue had occurred). In *Davis v. United States*, 495 U.S. 472 (1990), the Court analyzed the weight of IRS revenue rulings without ever mentioning *Chevron*.

⁸⁶ *Health Ins. Ass'n of America, Inc. v. Shalala*, 23 F.3d 412, 424 n.8 (D.C. Cir. 1994) (Medicare regulations issued by the Health Care Financing Administration), *cert. denied*, 115 S. Ct. 1095 (1995); *see* *Wagner Seed Co. v. Bush*, 946 F.2d 918, 920 (D.C. Cir. 1991) (denial by EPA of reimbursement for hazardous waste cleanup costs), *cert. denied*, 503 U.S. 970 (1992); *Theodus v. McLaughlin*, 852 F.2d 1380, 1383–87 (D.C. Cir. 1988) (Department of Labor interpretive regulations); *United Technologies Corp. v. EPA*, 821 F.2d 714, 723 (D.C. Cir. 1987) (EPA final rule); *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1566–67 (D.C. Cir. 1984) (EPA interpretive rule).

⁸⁷ *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 182 (3d Cir. 1995) (directive issued to state Medicaid directors by Director of Health Care Financing Administration Medicaid Bureau). In a dissenting opinion, Judge Nygaard argued that *Chevron* does not apply to interpretive rules. *Id.* at 189–94 (Nygaard, J., dissenting).

⁸⁸ *Kennedy v. Shalala*, 995 F.2d 28, 30 (4th Cir. 1993) (Social Security ruling).

⁸⁹ *CenTra, Inc. v. United States*, 953 F.2d 1051, 1055–57 (6th Cir. 1992) (interpretive Treasury regulation and revenue ruling, read together). In a dissenting opinion, Judge Batchelder questioned the application of *Chevron* to interpretive regulations. *Johnson City Medical Ctr. v. United States*, 999 F.2d 973, 978–83 (6th Cir. 1993) (Batchelder, J., dissenting). Judge Batchelder's opinion took issue with the majority's application of *Chevron* to revenue rulings. *See infra* notes 182–86 and accompanying text.

⁹⁰ In *Guadamuz v. Bowen*, 859 F.2d 762 (9th Cir. 1988), the Court of Appeals for the Ninth Circuit applied *Chevron* deference to a regulation issued by the Secretary of HHS without notice and comment. *Id.* at 767–71. In discussing deference standards, the court characterized the regulation as legislative, despite the agency's noncompliance with mandatory APA procedures. *Id.* at 768. Oddly, the court later concluded that the regulation was exempt from notice and comment requirements because it was interpretive. *Id.* at 771.

⁹¹ *Nalle v. Commissioner*, 997 F.2d 1134, 1138 (5th Cir. 1993) (interpretive Treasury regulation); *see* *Dresser Indus., Inc. v. Commissioner*, 911 F.2d 1128, 1137–38 (5th Cir. 1990) (noting, in a case involving legislative Treasury regulations, that legislative regulations are given controlling weight under *Chevron*, while interpretive regulations deserve less deference under standards prescribed in other decisions); *see also* *McKnight v. Commissioner*, 7 F.3d 447, 450–51 (5th Cir. 1993) (interpretive Treasury regulation). In

Seventh,⁹² and Tenth⁹³ Circuits do not. Although the Third Circuit recently decided that *Chevron* applies to interpretive rules,⁹⁴ it had previously asserted that interpretive Treasury regulations are somehow different from non-tax regulations, and therefore might be entitled to less weight than legislative regulations, even under *Chevron*.⁹⁵

Outside the tax area, agencies issuing interpretive regulations typically do not comply with APA notice and comment issuance procedures. Thus, with the

Griffon v. HHS, 802 F.2d 146 (5th Cir. 1986), the court declined to decide "whether *Chevron* or a less exacting standard applies to interpretative rules." *Id.* at 148 n.3. *Griffon* involved regulations issued by HHS.

⁹² Pennington v. Didrickson, 22 F.3d 1376, 1383 (7th Cir.) (draft bills provided to state legislatures by Department of Labor), *cert. denied*, 115 S. Ct. 613 (1994); Hanson v. Espy, 8 F.3d 469, 472-73 (7th Cir. 1993) (applying *Chevron* deference to regulations that the court considered legislative); Doe v. Reivitz, 830 F.2d 1441, 1445-47 (7th Cir. 1988) (HHS policy letter). *But see* Bethlehem Steel Corp. v. Bush, 918 F.2d 1323, 1327-28 (7th Cir. 1990) (denial by EPA of reimbursement for hazardous waste cleanup costs).

⁹³ *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1282 (10th Cir. 1994) (comment accompanying Department of Labor final regulations). The *Headrick* opinion was written by retired Supreme Court Justice White, who sat by designation under 28 U.S.C. § 294(a) (1988). Because Justice White was a member of the Court that issued *Chevron*, his assertions regarding the nonapplicability of *Chevron* deference to interpretive rules may reflect the understandings or intentions of that Court.

⁹⁴ *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 182 (3d Cir. 1995). Prior to *Blackwell*, the Third Circuit had explicitly declined to decide the issue. *See Reich v. Local 30*, 6 F.3d 978, 987 n.14 (3d Cir. 1993) (interpretive regulation issued by Department of Labor); *International Raw Materials, Ltd. v. Stauffer Chem. Co.*, 978 F.2d 1318 (3d Cir. 1992) (Federal Trade Commission advisory opinion), *cert. denied*, 113 S. Ct. 1588 (1993).

⁹⁵ *E.I. du Pont de Nemours & Co. v. Commissioner*, 41 F.3d 130, 135-36 & n.23 (3d Cir. 1994). The court's suggestion that tax regulations might be governed by different standards than other regulations might reflect a belief that tax law is a self-contained body of law that is distinct from other areas. The tendency among generalist judges to regard tax law as different might explain why they tend to defer to the IRS. *See infra* notes 222-24 and accompanying text.

In *Central Pa. Sav. Ass'n v. Commissioner*, 104 T.C. 384 (1995), the Tax Court cited *du Pont* in noting that there is a question as to whether *Chevron* applies to interpretive regulations. 104 T.C. at 392. The court found it unnecessary to differentiate between *Chevron* and traditional standards for purposes of the case at hand, but stated that it regards *Chevron* as merely restating the traditional standards "with possibly subtle distinctions as to the role of legislative history and the degree of deference to be accorded to a regulation." *Id.* In *Chevron Corp. v. Commissioner*, 104 T.C. 719, 728 (1995), however, the Tax Court applied *Chevron* to interpretive Treasury regulations.

exception of tax cases involving interpretive Treasury regulations,⁹⁶ all of the cases considering the application of *Chevron* to interpretive rules deal with non-notice and comment rules. One wonders how these precedents are meant to apply to the apparently unusual circumstance of notice and comment interpretive regulations,⁹⁷ and more importantly for purposes of this Article, whether compliance with notice and comment issuance procedures is the determinative factor in the application or nonapplication of *Chevron*. This point becomes particularly important when considering the weight of revenue rulings, which are distinguishable from interpretive Treasury regulations precisely because notice and comment procedures do not apply.⁹⁸

2. Revenue Rulings

Prior to the last several years, standards for judicial review of revenue rulings were not controversial. The courts generally agreed that revenue rulings were never binding on them. The Tax Court regarded rulings merely as the position of a litigating party, not as substantive authority, and most courts of appeals agreed.⁹⁹ Those courts that conferred additional weight to revenue rulings generally did so on the basis of the IRS's expertise. Thus, a court might justify according rulings some degree of special consideration because they "express the studied view of the agency whose duty it is to carry out the statute."¹⁰⁰

In recent years, the federal courts have aggressively embraced a variety of deference standards, which profoundly disturb traditional understandings of the role and weight of revenue rulings. Revenue rulings now are accorded considerable weight in some courts, although the precise status and underlying rationales differ. These diverse approaches are discussed in Part III of this Article.

⁹⁶ See, e.g., *United States v. Jefferson-Pilot Life Ins. Co.*, 49 F.3d 120 (4th Cir. 1995); *Hefti v. Commissioner*, 983 F.2d 868 (8th Cir.), *cert. denied*, 113 S. Ct. 2349 (1993); *Peoples Fed. Sav. & Loan Ass'n v. Commissioner*, 948 F.2d 289 (6th Cir. 1991).

⁹⁷ The Third Circuit has not explained why it distinguishes between interpretive Treasury regulations from interpretive regulations outside the tax area. See *du Pont*, 41 F.3d at 135-36 & n.23.

⁹⁸ See generally *Galler*, *supra* note 9, at 862-75.

⁹⁹ See cases cited in *Galler*, *supra* note 9, at 850-51 nn.57-58.

¹⁰⁰ *Anselmo v. Commissioner*, 757 F.2d 1208, 1213 n.5 (11th Cir. 1985); see cases cited in *Galler*, *supra* note 9, at 851-52 n.59.

3. Letter Rulings

By statute, letter rulings “may not be used or cited as precedent.”¹⁰¹ What is meant by “precedent” in this context is not clear. The legislative history to Internal Revenue Code section 6110(j)(3) does not portray precedent in the stare decisis sense, but rather speaks in terms of nonreliance on rulings issued to others.¹⁰² The statute was meant to prevent taxpayers from relying on rulings issued to other taxpayers¹⁰³ and to clarify that the Service cannot be compelled to issue a ruling that resembles one already issued to another similarly situated applicant.¹⁰⁴ Only the taxpayer to whom a letter ruling is issued may rely on the ruling, and the IRS must apply a letter ruling only as to the tax liability of the recipient.¹⁰⁵

The IRS Manual expressly forbids employees from relying on, using, or citing letter rulings as precedents in the disposition of cases.¹⁰⁶ Despite the

¹⁰¹ I.R.C. § 6110(j)(3) (1988); *see also* Treas. Reg. § 301.6110-7(b) (1977).

¹⁰² *See* WAYS AND MEANS COMMITTEE, TAX REFORM ACT OF 1976, H.R. REP. NO. 658, 94th Cong., 1st Sess. 312, 315, 322–23 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3208–09, 3211–12, 3218–20; FINANCE COMMITTEE, TAX REFORM ACT OF 1976, S. REP. NO. 938, 94th Cong., 2d Sess., pt.1, at 303, 311, 343 (1976), *reprinted in* 1976 U.S.C.C.A.N. pt.1, at 3732–33, 3740–41, 3772–73; *see also* Lawrence Zelenak, *Should Courts Require the Internal Revenue Service to be Consistent?*, 38 TAX L. REV. 411, 437 (1985).

¹⁰³ Zelenak, *supra* note 102, at 434. The legislative history also clarifies that taxpayers who receive rulings may not rely on those rulings with respect to subsequent similar transactions unless the ruling specifies its applicability. H.R. REP. NO. 658, *supra* note 102, at 323, *reprinted in* 1976 U.S.C.C.A.N. at 3218–20; S. REP. NO. 938, *supra* note 102, at 311, *reprinted in* 1976 U.S.C.C.A.N. at 3740–41.

¹⁰⁴ Letter from Thomas F. Field to Gerald G. Portney (March 18, 1981), *in* 12 TAX NOTES 626, 627 (1981). Of course, one would expect the IRS to act consistently by treating similarly situated taxpayers equally.

¹⁰⁵ Rev. Proc. 95-1, 1995-1 I.R.B. 9, 41. A letter ruling is binding only if the District Director ascertains that:

- (1) the conclusions stated in the letter ruling are properly reflected in the return; (2) the representations upon which the letter ruling was based reflected an accurate statement of the material facts; (3) the transaction was carried out substantially as proposed; and (4) there has [not] been any change in the law that applies to the period during which the transaction or continuing series of transactions were consummated.

Id. A letter ruling may be revoked or modified unless it is accompanied by a closing agreement. *Id.* at 41. Thus, the IRS is not bound by a letter ruling unless there is an accompanying closing agreement. *See* I.R.C. § 7121 (1988).

¹⁰⁶ INTERNAL REVENUE SERVICE MANUAL (39)153 (1992); *see also* Treas. Reg. § 601.601(d)(1), (d)(2)(v)(d) (as amended in 1983) (stating that unpublished rulings may not be relied upon, used, or cited by any IRS employee as precedent in the disposition of other

prohibition, however, the agency does rely on prior letter rulings in the disposition of subsequent ruling requests. Letter rulings that are deemed to have "reference value," as well as supporting documents, are retained in a reference file.¹⁰⁷ When consideration of a ruling request indicates that a prior letter ruling position should be reversed or substantially modified, the new ruling may be issued only after a detailed memorandum is submitted to, and approved by, the Assistant or Associate Chief Counsel.¹⁰⁸ These seemingly contradictory provisions can be reconciled only by reading the former proviso as merely precluding the citation of an earlier ruling in a later one, and not as preventing the revocation of erroneous rulings.¹⁰⁹ Reference to earlier rulings is permitted within the agency, but not in letter rulings that are sent to taxpayers.¹¹⁰

Courts have interpreted section 6110(j)(3) in *stare decisis* terms, to mean that letter rulings cannot be cited as authority.¹¹¹ Nonetheless, courts refer to letter rulings as evidence of administrative practices.¹¹²

cases); Rev. Proc. 89-14, 1989-1 C.B. 814, 815. *But see* James P. Holden & Michael S. Novey, *Legitimate Uses of Letter Rulings Issued to Other Taxpayers—A Reply to Gerald Portney*, 37 TAX LAW. 337, 345 (1984) (reporting that the then-current Internal Revenue Manual explicitly directed examining agents to use letter rulings as precedent and as a research tool in formulating district office positions); *see also* Tax Analysts & Advocates v. Internal Revenue Serv., 362 F. Supp. 1298 (D.D.C. 1973), *modified*, 505 F.2d 350 (D.C. Cir. 1974) (describing the IRS's internal use of letter rulings prior to enactment of I.R.C. § 6110).

¹⁰⁷ INTERNAL REVENUE SERVICE MANUAL 1(15)59, RECORDS DISPOSITION HANDBOOK ¶ 110(2)(b)(3), Exhibit 100-1 item no. 22 (1994); INTERNAL REVENUE SERVICE MANUAL (39)252(2)(b)(3), Exhibit (30)200-3 (1992).

¹⁰⁸ INTERNAL REVENUE SERVICE MANUAL (39)152 (1992).

¹⁰⁹ Zelenak, *supra* note 102, at 442-43.

¹¹⁰ *Id.* Messrs. Holden and Novey recount an informal statement by a former lower level IRS employee that letter rulings are persuasive to IRS staff members because "we know that the guys that wrote them were on our side." Holden & Novey, *supra* note 106, at 346.

¹¹¹ *E.g.*, Estate of Spencer v. Commissioner, 43 F.3d 226, 234 (6th Cir. 1995); *cf.* Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 280 n.2 (7th Cir.) (refusing to consider the portion of a brief that "relies exclusively on the IRS private letter ruling as authority"), *cert. denied*, 498 U.S. 820 (1990).

¹¹² *See, e.g.*, Rowan Cos. v. United States, 452 U.S. 247, 261-62 n.17 (1981); Wolpaw v. Commissioner, 47 F.3d 787, 792 (6th Cir. 1995); *Spencer*, 43 F.3d at 234; Harco Holdings Inc. v. United States, 977 F.2d 1027, 1035 n.13 (7th Cir. 1992); Transco Exploration Co. v. Commissioner, 949 F.2d 837, 840 (5th Cir. 1992); *cf.* CSI Hydrostatic Testers, Inc. v. Commissioner, 103 T.C. 398, 409 n.10 (1994) (noting that statutory interpretations set forth in letter rulings are "entitled to no more deference than a litigating position before this Court"); *see also* No Regs.? Appellate Court Cites Letter Ruling Against IRS, 82 J. TAX'N 380 (1995) (proposing a "Theorem of Authoritative Letter Rulings":

III. STANDARDS FOR REVIEW OF REVENUE RULINGS

A. Tax Court

The Tax Court is unique in its absolute refusal to yield to IRS revenue ruling positions. It regards revenue rulings as nothing more than the IRS's position with respect to the factual situations and legal issues presented, and treats rulings merely as the contention of a litigant.¹¹³ Revenue rulings are never considered binding precedent.¹¹⁴ The court may, of course, take a ruling into consideration.¹¹⁵

"although Section 6110(j) provides that letter rulings cannot be cited as 'binding precedent,' the courts will find a way to use them directly or indirectly as legal authority whenever they so desire").

¹¹³ *Pasqualini v. Commissioner*, 103 T.C. 1, 8 n.8 (1994); *Exxon Corp. v. Commissioner*, 102 T.C. 721, 726 n.8 (1994); *Spiegelman v. Commissioner*, 102 T.C. 394, 405 (1994); *Rath v. Commissioner*, 101 T.C. 196, 205 n.10 (1993); *Halliburton Co. v. Commissioner*, 100 T.C. 216, 232 (1993), *aff'd*, 25 F.3d 1043 (5th Cir.), *cert. denied*, 115 S. Ct. 486 (1994); *Sunstrand Corp. v. Commissioner*, 64 T.C.M. (CCH) 1305, 1307 (1992), *aff'd*, 17 F.3d 965 (7th Cir.), *cert. denied*, 115 S. Ct. 83 (1994); *Induni v. Commissioner*, 98 T.C. 618, 624 n.4 (1992), *aff'd*, 990 F.2d 53 (2d Cir. 1993).

¹¹⁴ *Krumhorn v. Commissioner*, 103 T.C. 29, 43 n.20 (1994); *Exxon*, 102 T.C. at 726 n.8; *Estate of Hubert v. Commissioner*, 101 T.C. 314, 325 (1993); *Halliburton*, 100 T.C. at 232; *Sunstrand*, 64 T.C.M. (CCH) at 1307; *Vulcan Materials Co. v. Commissioner*, 96 T.C. 410, 418 (1991); *cf.* *Simon v. Commissioner*, 103 T.C. 247, 263 n.14 (1994) (stating that revenue rulings are not entitled to judicial deference).

The Tax Court frequently cites a Fifth Circuit opinion, *Stubbs, Overbeck & Assoc. v. United States*, 445 F.2d 1142, 1146-47 (5th Cir. 1971), as authority for its persistent non-deference position. *See, e.g., Krumhorn*, 103 T.C. at 43 n.20; *Halliburton*, 100 T.C. at 232. On October 10, 1995, a search in the WESTLAW FTX-TCT database indicated that the Tax Court has cited *Stubbs* 67 times. Interestingly, the Court of Appeals for the Fifth Circuit does not consider *Stubbs* a controlling precedent, and in fact defers to revenue rulings with some regularity. *See infra* notes 146-49 and accompanying text.

¹¹⁵ *Martin v. Commissioner*, 64 T.C.M. (CCH) 1529, 1531 (1992); *Pepcol Mfg. Co. v. Commissioner*, 98 T.C. 127, 136 n.4 (1992), *rev'd on other grounds*, 28 F.3d 1013 (10th Cir. 1993). Although expressly noting the non-precedential status of revenue rulings, the Tax Court has occasionally taken rulings into account. *See, e.g., Spiegelman*, 102 T.C. at 394 (noting soundness of a revenue ruling's underlying rationale); *Estate of Ford v. Commissioner*, 66 T.C.M. (CCH) 1507, 1511 n.8 (1993) (taking into account principles set forth in a revenue ruling), *aff'd*, 53 F.3d 924 (8th Cir. 1995); *Bell Fed. Sav. & Loan Ass'n v. Commissioner*, 62 T.C.M. (CCH) 376, 379 (1991) (noting that longstanding revenue rulings adopt the position favored by the court), *rev'd on other grounds*, 40 F.3d 224 (7th Cir. 1994).

The Tax Court recently strayed from its customary rule of non-deference in *Geisinger Health Plan v. Commissioner*¹¹⁶ because it understood the Court of Appeals for the Third Circuit to require that the rulings at issue be given weight.¹¹⁷ The court, however, explicitly declared that its own practice is to regard revenue rulings as merely the interpretation of one of the parties to the litigation, which is entitled to no precedential effect.¹¹⁸

The Tax Court's adherence to the Third Circuit standard is consistent with the *Golsen*¹¹⁹ rule, under which the Tax Court will follow a court of appeals decision that is "squarely in point," where an appeal lies to that court of appeals.¹²⁰ It is odd, however, that the Tax Court would acquiesce in only one case of literally hundreds, particularly where its own position so clearly contradicts those of most circuit courts. One might hypothesize that the Tax Court does not consider itself bound under *Golsen* by procedural rules, perhaps because they are not "squarely in point," but historical precedents in "strong proof" cases (another procedural area in which courts of appeals have adopted conflicting standards) suggest otherwise.¹²¹

¹¹⁶ 100 T.C. 394 (1993), *aff'd*, 30 F.3d 494 (3d Cir. 1994). In comparison, see the Tax Court's original opinion. *Geisinger Health Plan v. Commissioner*, 62 T.C.M. (CCH) 1656 (1991), *rev'd*, 985 F.2d 1210 (3d Cir. 1993).

¹¹⁷ The appellate court's rationale for according weight to the revenue rulings is unclear. Although the Third Circuit explicitly recognized that revenue rulings are not binding, it applied them because neither litigant had challenged their validity. The IRS had contended merely that the Tax Court had misapplied the applicable statute, regulations, and rulings. *Geisinger*, 985 F.2d at 1215 n.2. On remand, when the Tax Court acknowledged its obligation to follow the Third Circuit, it stated that "the interpretations of the Commissioner must be given weight in this context." *Geisinger*, 100 T.C. at 405 (citing *Geisinger Health Plan v. Commissioner*, 985 F.2d 1210, 1215 n.2, 1216 (3d Cir. 1993), *rev'g* 62 T.C.M. (CCH) 1656 (1991)). Perhaps the context referred to is the qualification of hospitals for tax exempt status, an area in which revenue rulings have played a significant role. See, e.g., *Eastern Ky. Welfare Rights Org. v. Simon*, 426 U.S. 26 (1976).

¹¹⁸ *Geisinger*, 100 T.C. at 405 (citing *Geisinger Health Plan v. Commissioner*, 985 F.2d 1210, 1215 n.2, 1216 (3d Cir. 1993), *rev'g* 62 T.C.M. (CCH) 1656 (1991)).

¹¹⁹ *Golsen v. Commissioner*, 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir.), *cert. denied*, 404 U.S. 940 (1971).

¹²⁰ *Id.* at 757.

¹²¹ The strong proof doctrine provides that "when the parties to an agreement have clearly and unambiguously set out the terms of their agreement, the taxpayer must adduce *strong proof* to demonstrate that the true agreement of the parties was other than the language of the written agreement." *State Pipe & Nipple Corp. v. Commissioner*, 46 T.C.M. (CCH) 415, 418 (1983) (emphasis added). While several courts of appeals follow the "strong proof" doctrine, others have adopted a stricter test (the *Danielson* rule), under which a taxpayer may challenge the substance of an unambiguous provision "by adducing proof which in an action between the parties to the agreement would be admissible to alter that construction or to show its unenforceability because of mistake, undue influence, fraud,

B. Courts of Appeals

The courts of appeals traditionally have agreed that revenue rulings do not have the force and effect of Treasury regulations¹²² and are not binding on the

duress, etc.” Commissioner v. Danielson, 378 F.2d 771, 775 (3d Cir.), *cert. denied*, 389 U.S. 858 (1967). Although the Tax Court prefers the strong proof approach, it follows the *Danielson* rule in cases appealable to courts of appeals that follow *Danielson*. Meredith Corp. v. Commissioner, 102 T.C. 406, 438 (1994) (following the strong proof rule because the Eighth Circuit had not yet ruled on the issue); Estate of Robinson v. Commissioner, 101 T.C. 499, 513-14 (1993) (following the *Danielson* rule because the Eleventh Circuit had adopted it); *State Pipe & Nipple*, 46 T.C.M. (CCH) at 418 n.3 (following the strong proof rule because the Second Circuit had adopted it). For a historical and policy analysis of the strong proof doctrine, see Nickolas J. Kyser, *Substance, Form, and Strong Proof*, 11 AM. J. TAX POL’Y 125 (1994). See also Roman V, Inc. v. Commissioner, 52 T.C.M. (CCH) 1278, 1283 (1987) (applying Third Circuit rule on burden of proof); Graff v. Commissioner, 52 T.C.M. (CCH) 1025, 1029 (1986) (applying Ninth Circuit rule on burden of proof); cf. Platzer v. Commissioner, 43 T.C.M. (CCH) 150, 150 (1981) (declining to decide whether *Golsen* “applied to procedural issues as well as substantive legal issues”); O’Heron v. Commissioner, 43 T.C.M. (CCH) 145, 146 (1981) (declining to decide whether *Golsen* “applied to procedural issues as well as substantive legal issues”).

Of course, it might be difficult to distinguish between rules or rulings that are considered procedural and those that are considered substantive. It would seem here, however, that the distinctions drawn for purposes of diversity jurisdiction, pursuant to *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and its progeny, would be inapposite because the *Golsen* rule implicates neither issues of federalism nor the allocation of judicial power between the state and federal systems. See *Hanna v. Plumer*, 380 U.S. 460, 474-75 (1965) (Harlan, J., concurring).

¹²² *Higginson v. United States*, 238 F.2d 439, 446 (1st Cir. 1956); *Brook, Inc. v. Commissioner*, 799 F.2d 833, 836 n.4 (2d Cir. 1986); *Strick Corp. v. United States*, 714 F.2d 1194, 1196 (3d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984); *Miami Beach First Nat’l Bank v. United States*, 443 F.2d 475, 478 (5th Cir.), *cert. denied*, 404 U.S. 984 (1971); *Babin v. Commissioner*, 23 F.3d 1032, 1038 (6th Cir.), *cert. denied*, 115 S. Ct. 421 (1994); *United States v. Wisconsin Power & Light Co.*, 38 F.3d 329, 334 (7th Cir. 1994); *United States v. Eddy Bros., Inc.*, 291 F.2d 529, 531 (8th Cir. 1961); *American Stores Co. v. American Stores Co. Retirement Plan*, 928 F.2d 986, 994 (10th Cir. 1991); *Anselmo v. Commissioner*, 757 F.2d 1208, 1213 n.5 (11th Cir. 1985); *Trainer v. United States*, 800 F.2d 1086, 1090 n.7 (Fed. Cir. 1986), *cert. denied*, 480 U.S. 905 (1987); Rev. Proc. 89-14, 1989-1 C.B. 814, 815; see also *Davis v. United States*, 495 U.S. 472, 484 (1990); *Estate of Kincaid v. Commissioner*, 85 T.C. 25, 29 (1985); cf. *Watts v. United States*, 703 F.2d 346, 350 n.19 (9th Cir. 1983) (noting that unlike Treasury regulations, revenue rulings do not have “the force and effect of law”).

In *American Stores*, the court explained that revenue rulings have less weight than regulations because rulings are not issued in accordance with APA notice and comment procedures. 928 F.2d at 994; see also *Johnson City Medical Ctr. v. United States*, 999 F.2d 973, 979-80 (6th Cir. 1993) (Batchelder, J., dissenting); *Flanagan v. United States*, 810 F.2d 930, 934 (10th Cir. 1987).

courts.¹²³ Virtually every circuit court, however, has issued contradictory opinions regarding the weight of revenue rulings. In some cases, revenue rulings receive special consideration, while in others the same courts declare that rulings are entitled to none.¹²⁴ Explanations of the inconsistencies are never provided.

Prior to the last several years, courts that conferred weight or special consideration to revenue rulings typically based their determinations on the IRS's role in administering the Code. The Courts of Appeals for the Second, Fifth, and Eleventh Circuits, for example, gave weight to revenue rulings because they expressed "the studied view of the agency whose duty it is to carry out the statute."¹²⁵ The Ninth Circuit regarded rulings as "helpful in interpreting the law by indicating the trend of opinion among administrators experienced with the tax laws."¹²⁶

The courts of appeals are moving away from the Tax Court in a noticeable and substantively significant way. Decisions rendered during the last five years indicate an ardent willingness to accede to revenue rulings. The courts have not adopted a uniform deference standard, however, but utilize one of three approaches:

1. *Reasonable and Consistent*. Some courts defer to revenue rulings because the rulings are reasonable and consistent with the underlying statute.

The courts' assertion that rulings occupy a lesser status is called into question by *Chevron*. If courts are required to accept reasonable interpretations that are set forth in the revenue ruling format, then rulings effectively occupy a status equivalent to that of regulations. See generally *Galler*, *supra* note 9, at 857-69. With one exception, however, the courts of appeals thus far have not applied *Chevron* to revenue rulings. See *Johnson City*, 999 F.2d at 973; *CenTra, Inc. v. United States*, 953 F.2d 1051, 1055 (6th Cir. 1992).

¹²³ E.g., *Julia R. & Estelle L. Found. Inc. v. Commissioner*, 598 F.2d 755, 757 n.3 (2d Cir. 1979); *Babb v. Olney Paint Co.*, 764 F.2d 240, 242 (4th Cir. 1985); *Stubbs, Overbeck & Assoc., Inc. v. United States*, 445 F.2d 1142, 1147 (5th Cir. 1971); *Kaiser v. United States*, 262 F.2d 367, 370 (7th Cir. 1958), *aff'd*, 363 U.S. 299 (1960); *Mercantile Bank & Trust Co. v. United States*, 441 F.2d 364, 368 (8th Cir. 1971); *Bolker v. Commissioner*, 760 F.2d 1039, 1043 (9th Cir. 1985); *Trainer v. United States*, 800 F.2d 1086, 1090 n.7 (Fed. Cir. 1986).

¹²⁴ See cases cited in *Galler*, *supra* note 9, at 850-52 n.58.

¹²⁵ *Anselmo v. Commissioner*, 757 F.2d 1208, 1213 n.5 (11th Cir. 1985); *accord Foil v. Commissioner*, 920 F.2d 1196, 1201 (5th Cir. 1990); *Brook, Inc. v. Commissioner*, 799 F.2d 833, 836 n.4 (2d Cir. 1986).

¹²⁶ *Confederated Tribes v. Kurtz*, 691 F.2d 878, 881 n.2 (9th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983); see also *Watts v. United States*, 703 F.2d 346, 350 n.19 (9th Cir. 1983); *Ricards v. United States*, 683 F.2d 1219, 1224 n.12 (9th Cir. 1981).

2. *Deference to Administrators*. Some courts defer to revenue rulings because the rulings reflect statutory constructions by the agency charged with statutory administration.

3. *Chevron*. Some courts defer to revenue rulings because they believe that the *Chevron* decision compels deference.¹²⁷

These three justifications for deference to revenue rulings, and their evolution, are described in this section.

As a preliminary matter, however, it may be noted that the courts' eager (and historically unprecedented) adoption of deferential standards violates customary principles of intracircuit stare decisis under which the decisions of three judge panels are binding on subsequent panels unless overruled by the court en banc.¹²⁸ Circuit courts that have embraced deference have readily cited opinions rendered by other circuit courts rather than their own prior opinions, which invariably adopted a far less deferential posture.

1. *Reasonable and Consistent*

The *reasonable and consistent* standard was first applied to a revenue ruling by the District Court for the Southern District of New York in a 1979 decision, *Dunn v. United States*.¹²⁹ That court declared that revenue rulings "have the force of legal precedents unless unreasonable or inconsistent with the provisions of the Internal Revenue Code."¹³⁰ Prior to *Dunn*, the reasonable and

¹²⁷ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* is discussed at *supra* notes 65–95 and accompanying text.

¹²⁸ See 1B JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 0.402[1] (2d ed. 1993 & Supp. 1993–94); Allan D. Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies*, 55 N.C. L. REV. 123, 161–62 (1977); see also 28 U.S.C.A. RULES, pt. I, 3d Cir. app. I, IOP § 39.1 (West Supp. 1995) (The Internal Operating Procedures for the Third Circuit Court of Appeals—Chapter 9—In Banc Consideration) ("It is the tradition of this court that the holding of a panel in a reported opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a published opinion of a previous panel. Court in banc consideration is required to do so."); *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1211 (5th Cir. 1991) ("In this circuit, one panel may not overrule the decision, right or wrong, of a prior panel in the absence of an intervening contrary or superseding decision by the court en banc or the Supreme Court."), *reh'g granted*, 946 F.2d 1573 (5th Cir. 1991), *aff'd*, 959 F.2d 1283 (5th Cir.), *cert. denied*, 113 S. Ct. 191 (1992). In *Furman v. Cirrito*, 741 F.2d 524, 525 (2d Cir. 1984), *vacated*, 473 U.S. 922 (1985), a panel of the Second Circuit followed two prior decisions by other Second Circuit panels even though it strongly disagreed with the earlier opinions.

¹²⁹ 468 F. Supp. 991, 993 (S.D.N.Y. 1979).

¹³⁰ *Id.*

consistent standard had been applied only to regulations.¹³¹ Neither the district court nor the Court of Appeals for the Second Circuit had ever followed such a radical approach as to rulings, and the authorities from other judicial circuits that were cited in *Dunn* do not support the court's conclusion. Nonetheless, several circuit courts have adopted a similar standard.

a. *Second Circuit*

The Second Circuit adopted the reasonable and consistent test in 1985, in *Amato v. Western Union International, Inc.*¹³² The court ignored all prior Second Circuit precedents, under which revenue rulings were deemed to have little or no weight,¹³³ and instead cited two opinions from the District Court for the Southern District of New York, including *Dunn*,¹³⁴ and one Seventh Circuit opinion, which did not apply the reasonable and consistent standard.¹³⁵ The court stated: "Revenue rulings issued by the I.R.S. 'are entitled to great deference, and have been said to 'have the force of legal precedents unless

¹³¹ See, e.g., *B. Forman Co. v. Commissioner*, 453 F.2d 1144, 1152 (2d Cir.) ("Treasury regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes."), *cert. denied*, 407 U.S. 934 (1972); see also *Bingler v. Johnson*, 394 U.S. 741, 750 (1969); *Commissioner v. South Tex. Lumber Co.*, 333 U.S. 496, 501 (1948); *Solomon v. Commissioner*, 570 F.2d 28, 32 n.4 (2d Cir. 1977).

¹³² 773 F.2d 1402, 1411-12 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986).

¹³³ *Canisius College v. United States*, 799 F.2d 18, 22 n.8 (2d Cir. 1986) (a "revenue ruling does not have the force of law and is of little aid in interpreting a tax statute"), *cert. denied*, 481 U.S. 1014 (1987); *Nico v. Commissioner*, 565 F.2d 1234, 1237 n.4 (2d Cir. 1977) (revenue rulings "are of little aid in interpreting a tax statute"); *Miller v. Commissioner*, 327 F.2d 846, 850-51 (2d Cir.) (a revenue ruling "does not commit the Commissioner, the Tax Court, or this Court, to any particular interpretation of the law"), *cert. denied*, 379 U.S. 816 (1964); cf. *Julia R. & Estelle L. Found. Inc. v. Commissioner*, 598 F.2d 755, 757 n.3 (2d Cir. 1979) (noting "with interest" a revenue ruling, which the court concedes is not binding). But see *Weil v. Retirement Plan Admin. Comm.*, 750 F.2d 10, 12 (2d Cir. 1984) (according great weight to a revenue ruling in ERISA litigation because of IRS's role in administering that statute).

¹³⁴ *Amato*, 773 F.2d at 1411-12 (citing *Fred H. McGrath & Son, Inc. v. United States*, 549 F. Supp. 491, 493 (S.D.N.Y. 1982); *Dunn*, 468 F. Supp. at 993).

¹³⁵ *Carle Found. v. United States*, 611 F.2d 1192, 1195 (7th Cir. 1979) (stating merely that "revenue rulings are to be given weight by the court"), *cert. denied*, 449 U.S. 824 (1980). The weight accorded to the revenue ruling in *Carle* did not even reflect a consistent position on the part of the Seventh Circuit court. See *Kaiser v. United States*, 262 F.2d 367, 370 (7th Cir. 1958) (noting that revenue rulings "have no more binding or legal force than the opinion of any other lawyer") (quoting *United States v. Bennett*, 186 F.2d 407, 410 (5th Cir. 1951)); cf. *Broadview Lumber Co. v. United States*, 561 F.2d 698, 704 n.11 (7th Cir. 1977) (asserting that a court is not obliged to follow revenue rulings because they are not binding on the court).

unreasonable or inconsistent with the provisions of the Internal Revenue Code.””¹³⁶ Although the Second Circuit has not always applied the reasonable and consistent standard,¹³⁷ its most recent opinions (in 1992 and 1994) resolutely follow *Dunn*’s “force of legal precedent” status.¹³⁸

b. Third Circuit

In 1993, the Third Circuit adopted the reasonable and consistent test in two cases, but gave only “weight” (as opposed to “force of legal precedents”)¹³⁹ to the rulings at issue.¹⁴⁰ Both cases, *Geisinger Health Plan v. Commissioner*¹⁴¹ and *Gillis v. Hoechst Celanese Corp.*,¹⁴² ignore most of the rather substantial precedent case law in the circuit. Indeed, the *Geisinger* opinion cites only one prior Third Circuit decision, which neither states nor supports the test adopted by the court,¹⁴³ preferring instead to cite decisions from other circuits.¹⁴⁴ The *Gillis* opinion cites only *Geisinger*.

¹³⁶ *Amato*, 773 F.2d at 1411 (quoting *Fred H. McGrath*, 549 F. Supp. at 493 (quoting *Dunn*, 468 F. Supp. at 993)).

¹³⁷ In at least one case, the court continued to assert that a “revenue ruling does not have the force of law and is of little aid in interpreting a tax statute.” *Canisius College v. United States*, 799 F.2d 18, 22 n.8 (2d Cir. 1986).

¹³⁸ In *Salomon Inc. v. United States*, 976 F.2d 837, 841–43 (2d Cir. 1992) and *Gillespie v. United States*, 23 F.3d 36, 39 (2d Cir. 1994), the court regarded itself bound to apply revenue rulings that were both reasonable and consistent with the Code. *Accord Brook, Inc. v. Commissioner*, 799 F.2d 833, 836 n.4 (2d Cir. 1986).

¹³⁹ *Dunn v. United States*, 468 F. Supp. 991, 993 (S.D.N.Y. 1979).

¹⁴⁰ *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1145 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1369 (1994); *Geisinger Health Plan v. Commissioner*, 985 F.2d 1210, 1215 n.2, 1216 (3d Cir. 1993).

¹⁴¹ 985 F.2d at 1216.

¹⁴² 4 F.3d at 1145.

¹⁴³ In *Strick Corp. v. United States*, 714 F.2d 1194 (3d Cir. 1983), the Third Circuit Court of Appeals described the weight of revenue rulings by comparing them to treasury regulations, which may not be disturbed unless they are plainly contrary to the statute. *Id.* at 1197. Factors set forth in *National Muffler Dealers Ass’n, Inc. v. United States*, 440 U.S. 472, 477 (1979) (e.g., contemporaneous issuance, length of time in effect, reliance placed upon it, consistency of interpretation, and degree of congressional scrutiny) are considered in determining whether a regulation comports with the statute. *Id.* *Strick* expressly recognized, however, that “although a revenue ruling may provide *some guidance*, it is not entitled to the same deference which is extended to a treasury regulation.” *Id.* (emphasis added); *see also* *Commissioner v. O. Liquidating Corp.*, 292 F.2d 225, 231 (3d Cir.) (according “great weight” to a revenue ruling), *cert. denied*, 368 U.S. 898 (1961); *Ostheimer v. United States*, 264 F.2d 789, 793 (3d Cir.) (stating that a longstanding revenue ruling is entitled to great weight unless taxpayer can show that it is erroneous), *cert. denied*,

c. Fifth Circuit

The Fifth Circuit adopted the reasonable and consistent test in 1990.¹⁴⁵ Previously, the court's approach to revenue rulings had been inconsistent.¹⁴⁶ The Fifth Circuit now "will disregard"¹⁴⁷ a ruling if it is unreasonable or inconsistent with the statute or legislative history, and otherwise will accord them "special"¹⁴⁸ or "respectful consideration."¹⁴⁹

361 U.S. 818 (1959). For a critique of the statutory construction doctrines of longstanding existence and reenactment, see Galler, *supra* note 9, at 881-90.

¹⁴⁴ *Geisinger*, 985 F.2d at 1216 (citing *Threlkeld v. Commissioner*, 848 F.2d 81, 84 (6th Cir. 1988); *Brook, Inc. v. Commissioner*, 799 F.2d 833, 836 n.4 (2d Cir. 1986); *Strick*, 714 F.2d at 1197; *Carle Found. v. United States*, 611 F.2d 1192, 1195 (7th Cir. 1979)). The court arranged its citations, including *Strick*, in reverse chronological order. One would expect, however, that a prior opinion issued by the same court would be considered more helpful or authoritative than opinions from other circuits, and therefore would be cited first. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 25-26 (Columbia Law Review Assoc. et al. eds., 15th ed. 1991) (Rule 1.4(d)) (recommending that an authority be cited first if it is more helpful or authoritative than the other authorities, or if there is some other substance-related rationale).

¹⁴⁵ *Foil v. Commissioner*, 920 F.2d 1196, 1201 (5th Cir. 1990).

¹⁴⁶ Compare *United States Trust Co. v. IRS*, 803 F.2d 1363, 1370 n.9 (5th Cir. 1986) (stating that revenue rulings are entitled to deference) and *Silco, Inc. v. United States*, 779 F.2d 282, 286-87 (5th Cir. 1986) (applying revenue ruling because no court had addressed the issue) and *Treadco Tires, Inc. v. United States*, 604 F.2d 14, 16 (5th Cir. 1979) (accord great weight to a revenue ruling) and *Groves v. United States*, 533 F.2d 1376, 1380 (5th Cir.) (affirming lower court's respectful consideration of a revenue ruling), *cert. denied*, 429 U.S. 1000 (1976) and *Miami Beach First Nat'l Bank v. United States*, 443 F.2d 475, 478 (5th Cir. 1971) (giving weight to a revenue ruling) and *Macey's Jewelry Corp. v. United States*, 387 F.2d 70, 72 (5th Cir. 1967) (stating that revenue rulings should be given weight) with *Frysinger v. Commissioner*, 645 F.2d 523, 525 n.2 (5th Cir. 1981) (noting that revenue rulings are merely guidelines stating the IRS's position) and *Stubbs, Overbeck & Assoc., Inc. v. United States*, 445 F.2d 1142, 1146-47 (5th Cir. 1971) ("[A] ruling is merely the opinion of a lawyer in the agency and must be accepted as such.") and *United States v. Bennett*, 186 F.2d 407, 410 (5th Cir. 1951) (stating that rulings have no more binding or legal force than the opinion of any other lawyer). For a comparable decision, see *Redwing Carriers, Inc. v. Tomlinson*, 399 F.2d 652, 657 (5th Cir. 1968) (finding that a ruling was persuasive although it did not have the force and effect of law).

¹⁴⁷ *Foil*, 920 F.2d at 1201.

¹⁴⁸ *Id.*; see also *Guilzon v. Commissioner*, 985 F.2d 819, 822 (5th Cir. 1993).

¹⁴⁹ *Foil*, 920 F.2d at 1201.

d. Sixth Circuit

Although the Sixth Circuit first employed the reasonable and consistent test in 1988,¹⁵⁰ its application of that standard has been confused and erratic. The incoherence that is evident within this court exemplifies the prevalent confusion on the issue of judicial deference to revenue rulings and accentuates the need for a uniform solution.

The Sixth Circuit has applied the reasonable and consistent test in several cases, but has failed to specify the quantum of weight properly accorded to reasonable and consistent rulings. In some instances, "some deference" has been accorded,¹⁵¹ while "great deference" or "force of legal precedents" is the standard applied in another.¹⁵²

The court has not articulated how the test itself is applied. In some cases, the court has accorded some amount of weight or deference because it found that a revenue ruling was reasonable and consistent.¹⁵³ In another case, the court did not use the reasonable and consistent test to accord weight, but rather to justify disregarding a ruling that conflicted with a statute or was otherwise unreasonable.¹⁵⁴ In two cases in which the court purported to apply a *Chevron* deference analysis,¹⁵⁵ it articulated the reasonable and consistent test without explaining the relevance or role of the latter standard in the *Chevron* context.¹⁵⁶

e. Ninth Circuit

The Court of Appeals for the Ninth Circuit adopted the reasonable and consistent test in 1993, awarding "great deference"¹⁵⁷ to a reasonable and consistent ruling. The facts and issues presented in *Walt Disney Inc. v. Commissioner*¹⁵⁸ were essentially the same as those in a case decided by the Second Circuit the year before.¹⁵⁹ The Ninth Circuit followed the reasoning of the Second Circuit, including the standard of deference accorded to a relevant

¹⁵⁰ *Threlkeld v. Commissioner*, 848 F.2d 81, 84 (6th Cir. 1988).

¹⁵¹ *Johnson City Medical Ctr. v. United States*, 999 F.2d 973, 976 (6th Cir. 1993); *Kinnie v. United States*, 994 F.2d 279, 286 (6th Cir. 1993); *CenTra, Inc. v. United States*, 953 F.2d 1051, 1056 (6th Cir. 1992).

¹⁵² *Progressive Corp. v. United States*, 970 F.2d 188, 194 (6th Cir. 1992).

¹⁵³ *Kinnie*, 994 F.2d at 287; *Progressive*, 970 F.2d at 194.

¹⁵⁴ *Threlkeld*, 848 F.2d at 84.

¹⁵⁵ See *infra* notes 173–86 and accompanying text.

¹⁵⁶ *Johnson City Medical Ctr. v. United States*, 999 F.2d 973, 977 (6th Cir. 1993); *CenTra, Inc. v. United States*, 953 F.2d 1051, 1055–56 (6th Cir. 1992).

¹⁵⁷ *Walt Disney Inc. v. Commissioner*, 4 F.3d 735, 740 (9th Cir. 1993).

¹⁵⁸ *Id.* at 735.

¹⁵⁹ *Salomon Inc. v. United States*, 976 F.2d 837, 838–41 (2d Cir. 1992).

revenue ruling.¹⁶⁰ Thus, the *Disney* court stated that “[r]evenue rulings issued by the I.R.S. are entitled to great deference, and have been said to have the force of legal precedent unless unreasonable or inconsistent with the provisions of the Internal Revenue Code.”¹⁶¹

In applying the Second Circuit standard, the *Disney* court disregarded prior precedent in the Ninth Circuit that reflected a lesser degree of deference. The Ninth Circuit had generally regarded revenue rulings as entitled to “consideration”¹⁶² because they represent “a body of experience and informed judgment”¹⁶³ or “indicat[e] the trend of opinion among administrators experienced with the tax laws.”¹⁶⁴ The court had also expressed a willingness to accord some amount of added weight to a revenue ruling that is established, or longstanding, and that is issued pursuant to an explicit congressional mandate.¹⁶⁵

2. Deference to Administrators

Six courts of appeals at some point in time have given special treatment to revenue rulings simply because they represent constructions of the Code by the agency charged with the Code’s administration.¹⁶⁶ The Courts of Appeals for

¹⁶⁰ *Walt Disney*, 4 F.3d at 739–41.

¹⁶¹ *Id.* at 740 (quoting *Salomon*, 976 F.2d at 841).

¹⁶² *Ricards v. United States*, 683 F.2d 1219, 1224 (9th Cir. 1981).

¹⁶³ *Ricards*, 683 F.2d at 1224 n.12; *accord* *Bolker v. Commissioner*, 760 F.2d 1039, 1043 (9th Cir. 1985); *Magneson v. Commissioner*, 753 F.2d 1490, 1493 (9th Cir. 1985); *Watts v. United States*, 703 F.2d 346, 350 n.19 (9th Cir. 1983).

¹⁶⁴ *Washington State Dairy Prod. Comm’n v. United States*, 685 F.2d 298, 300–301 (9th Cir. 1982) (noting that revenue rulings “may be helpful in interpreting the law”); *accord* *Schneider v. Commissioner*, 735 F.2d 375, 377 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985); *Confederated Tribes v. Kurtz*, 691 F.2d 878, 881 n.2 (9th Cir. 1982). *But see* *Idaho Power Co. v. Commissioner*, 477 F.2d 688, 696 n.10 (9th Cir. 1973) (noting that a revenue ruling “is merely the opinion of a lawyer in an agency”), *rev’d*, 418 U.S. 1 (1974). For a critique of deference based on agency expertise, see *Galler*, *supra* note 9, at 851–56.

¹⁶⁵ *Estate of Lang v. Commissioner*, 613 F.2d 770, 776 (9th Cir. 1980); *see also* *Certified Stainless Servs., Inc. v. United States*, 736 F.2d 1383, 1386 (9th Cir. 1984) (stating that revenue rulings “will be given considerable weight when explicating the Commissioner’s authority to implement a congressional mandate”); *cf.* *Gino v. Commissioner*, 538 F.2d 833, 835 (9th Cir.) (finding the Commissioner’s view persuasive because it had been issued to solve the particular problem at issue), *cert. denied*, 429 U.S. 979 (1976).

¹⁶⁶ *E.g.*, *Brook, Inc. v. Commissioner*, 799 F.2d 833, 836 n.4 (2d Cir. 1986); *Wood v. Commissioner*, 955 F.2d 908, 913 (4th Cir. 1992); *United States Trust Co. v. IRS*, 803 F.2d 1363, 1370 n.9 (5th Cir. 1986); *Babin v. Commissioner*, 23 F.3d 1032, 1038 (6th Cir. 1994); *Anselmo v. Commissioner*, 757 F.2d 1208, 1213 n.5 (11th Cir. 1985). The Court of

the Second, Fifth, and Ninth Circuits, however, have more recently followed the *reasonable and consistent* standard.¹⁶⁷ The Sixth Circuit has adopted all three deference standards (i.e., *reasonable and consistent*, *deference to administrators*, and *Chevron deference*) during the last five years.¹⁶⁸

Courts do not explain why the agency's administrative functions should lead to judicial deference. Commentators have suggested generically that courts might believe that an agency's substantive expertise is likely to produce a correct interpretation of an ambiguous statute¹⁶⁹ or that policy questions arising from statutory ambiguities should be answered by agencies, and not by the courts.¹⁷⁰ Despite conjecture on the part of legal scholars, however, courts sitting in tax controversies that involve revenue rulings have neither articulated any reasoned basis for treating these administrative pronouncements specially, nor explained their failure to adopt consistent practices in subsequent cases.

The IRS's expertise can be examined from two perspectives: relative to other litigants and relative to the courts. As to the first, I believe that deference to the IRS is not appropriate if premised upon superior skills or knowledge possessed by agency staff members relative to private practitioners. Not only does the tax bar include many individuals with considerable ability and professional experience, but many of these lawyers have served as members of

Appeals for the Ninth Circuit has resorted to revenue rulings for guidance in the interpretation of statutes because they "constitute a body of experience and informed judgment," *Watts*, 703 F.2d at 350 n.19, and "indicat[e] the trend of opinion among administrators experienced with the tax laws." *Confederated Tribes*, 691 F.2d at 881 n.2.

¹⁶⁷ See *supra* notes 132-38, 145-49, 157-65 and accompanying text.

¹⁶⁸ See *supra* notes 150-56 and accompanying text (*reasonable and consistent* standard); *infra* notes 173-86 and accompanying text (*Chevron deference*).

¹⁶⁹ Three possible explanations for judicial deference premised upon expertise have emerged. First, judicial deference may be warranted by the superior skills of agency staff members, who are able to anticipate the impact or effects of statutes. See generally Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 577-78 (1985). Second, the practical knowledge of administrators, gained from their ongoing familiarity with regulated industries, may justify deference. See Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two*, 2 ADMIN. L.J. 255, 258 (1988); Scalia, *supra* note 81, at 514; Starr, *supra* note 70, at 309-10; see also *Watts v. United States*, 703 F.2d 346, 350 n.19 (9th Cir. 1983) (observing that revenue rulings "constitute a body of experience and informed judgment"); cf. *Washington State Dairy Prods. Comm'n v. United States*, 685 F.2d 298, 300 (9th Cir. 1982) (observing that revenue rulings indicate "the trend of opinion among administrators experienced with the tax laws"). Finally, the relationship between agency expertise and judicial deference may be based on an agency's expert ability to educe the meaning of ambiguous statutes. See Diver, *supra* at 574.

¹⁷⁰ See, e.g., Farina, *supra* note 77, at 466-67; Herz, *supra* note 75, at 194-96; Merrill, *supra* note 69, at 978; Silberman, *supra* note 73, at 822; Sunstein, *supra* note 66, at 2087-88; Braun, *supra* note 75, at 988-89.

the Treasury Department and the IRS. Therefore, I cannot conclude that the IRS lawyers are better as a group than the private bar. As to the second comparison, the IRS is more expert in the tax law than are judges, with the obvious exception of Tax Court judges (and any other judges who may happen to have substantial tax practice experience). The agency's greater proficiency in tax law, however, should not automatically give rise to deference for the reasons described in Part V of this Article.

Regardless of expertise, *Chevron* may support the notion that Congress intended agencies, and not the courts, to make policy choices.¹⁷¹ As the nation's revenue collector, however, the IRS should be expected to construe statutes in a light most favorable to the collection of tax dollars.¹⁷² Deference

¹⁷¹ See *supra* notes 72-77 and accompanying text.

¹⁷² Note, *Judicial Review of Regulations and Rulings Under the Revenue Acts*, 52 HARV. L. REV. 1163, 1163 (1939); see also Randolph E. Paul, *Use and Abuse of Tax Regulations in Statutory Construction*, in STUDIES IN FEDERAL TAXATION NO. 3, at 420-21 (1940) ("[T]he Treasury Department has the function of collecting revenue, and it would therefore be expecting too much of human nature that its executive constructions of the statutes should invariably maintain a studious impartiality."); Gary L. Rodgers, *The Commissioner "Does Not Acquiesce"*, 59 NEB. L. REV. 1001, 1024-25 (1980) (describing the IRS's role as "more closely analogous to that of a contestant than that of a[n] impartial arbiter"); Silberman, *supra* note 73, at 823 (observing that as it has become obvious that administrative agencies do not exercise neutral expertise, "the doctrine of deference based on agency expertise . . . [has become] a good deal less satisfactory"); cf. *Estate of Clayton v. Commissioner*, 976 F.2d 1486, 1499 (5th Cir. 1992) (accusing the IRS of "overzealousness in revenue collection," "deliberate disregard for the clear purpose, intent and policy behind the statute," and "overreaching").

The same issue arises with respect to the EPA in its role as enforcer of the nation's Superfund laws. Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1988 & Supp. IV 1992) (CERCLA). The EPA is seeking a legislative amendment that would give the agency authority "to issue rules to clarify or interpret" CERCLA's lender liability scheme. The Superfund Reform Act of 1995, H.R. 228, 104th Cong., 1st Sess. § 407 (amending CERCLA § 115); see also The Superfund Reform Act of 1994, S. 1834, 103d Cong., 2d Sess. § 407. Professor Craig Johnston has argued that because the EPA acts as an enforcer in CERCLA actions in which the liability scheme is at issue, "provid[ing] EPA with interpretive authority would be akin to providing criminal prosecutors (as opposed to the courts) with the ultimate authority to interpret the enforcement provisions they implement." Craig N. Johnston, *Who Decides Who's Liable Under CERCLA?: EPA Slips a Bombshell into the CERCLA Reauthorization Process*, 24 ENVTL. L. 1045, 1046-48 (1994).

in these circumstances deprives taxpayers of an opportunity to convince a neutral arbiter that the government's position is wrong.

3. Chevron Deference

The Court of Appeals for the Sixth Circuit is the only circuit court to have applied *Chevron* in the context of IRS revenue rulings, but it has not embraced *Chevron* as controlling precedent. Although the court followed *Chevron* in two recent cases, *CenTra, Inc. v. United States*,¹⁷³ and *Johnson City Medical Center v. United States*,¹⁷⁴ the *Johnson City* bench divided sharply on the applicability of *Chevron* to revenue rulings. Moreover, in several other contemporaneous cases in which *Chevron* deference principles might have applied, the Sixth Circuit instead used a variety of incompatible approaches. The court has never offered an explanation of these inconsistencies.

In *CenTra*, an IRS interpretation was set forth in a Treasury regulation and an IRS revenue ruling, which the court read together.¹⁷⁵ The court addressed *Chevron*, however, only as to the revenue ruling. Rather than concluding that the revenue ruling was reasonable and then applying it (which are the required actions after answering the threshold question under *Chevron*'s two-step analysis),¹⁷⁶ the court discussed pre-*Chevron* authorities and described the amount of deference accorded to revenue rulings variously as "some

Johnston also contends that:

[u]nder the . . . bill, EPA would replace the judiciary as the primary interpreter of CERCLA's liability scheme. As such, it would be able to resolve every ambiguity in the liability scheme in its favor so long as its interpretations pass *Chevron* muster. Its lawyers would be remiss if they did not advise their client to use this authority liberally.

Id. at 1051.

¹⁷³ 953 F.2d 1051 (6th Cir. 1992).

¹⁷⁴ 999 F.2d 973 (6th Cir. 1993). The lower court in *Johnson City* also applied *Chevron* because it regarded itself precedentially bound by the Sixth Circuit's opinion in *CenTra*. *Johnson City Medical Ctr. Hosp. v. United States*, 783 F. Supp. 1048, 1051-52 (E.D. Tenn. 1992), *aff'd*, 999 F.2d 973 (6th Cir. 1993).

¹⁷⁵ The *CenTra* opinion placed great significance on a "unified reading" of a Treasury regulation and a revenue ruling. *CenTra*, 953 F.2d at 1055; *see also id.* at 1054 (referring to a "unified and consistent" interpretation). In *Unisys Corp. v. United States*, 30 Fed. Cl. 552 (Ct. Fed. Cl.), *aff'd*, 39 F.3d 1197 (Fed. Cir. 1994), the Court of Federal Claims intimated that a Treasury regulation and consistent revenue ruling, when read together, establish a "unified agency interpretation," which merits deference under *CenTra*. *Id.* at 564.

¹⁷⁶ *See supra* notes 67-71 and accompanying text.

deference,"¹⁷⁷ "some weight,"¹⁷⁸ "respectful consideration,"¹⁷⁹ and "weight."¹⁸⁰ These standards simply are not relevant where *Chevron* applies.

The *Chevron* analysis in *Johnson City* is flawed in much the same way as the *CenTra* opinion. After finding that the statute at issue was ambiguous (*Chevron* step one), the court went on to determine whether the agency's interpretation was permissible, or reasonable (*Chevron* step two). A finding of reasonableness should have ended the matter, as the court was then required to follow the agency's interpretation. The court instead quoted *CenTra* for the proposition that "some deference" is applied unless the revenue ruling is inconsistent with the statute or its legislative history, or is otherwise unreasonable.¹⁸¹ Finding that the taxpayer had not levied a plausible argument that the revenue ruling conflicted with the statute or its legislative history, or was unreasonable, the court followed the revenue ruling.

In a dissenting opinion, Judge Batchelder argued that *Chevron* does not apply to revenue rulings because they are issued without APA notice and comment.¹⁸² Revenue rulings instead should be analyzed under standards of deference that traditionally (i.e., pre-*Chevron*) applied to interpretive rules or regulations.¹⁸³ Under *Skidmore v. Swift & Co.*,¹⁸⁴ the weight of a revenue ruling would depend "upon the thoroughness evident in the [IRS's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."¹⁸⁵ After considering a number of factors, including "the importance of agency expertise, contemporaneity of the interpretation with enactment of the statute, longstanding application and consistency of the agency interpretation, the possibility of congressional acquiescence, and numerous others,"¹⁸⁶ the judge concluded that the ruling at issue in *Johnson City* was not entitled to deference.

¹⁷⁷ *CenTra*, 953 F.2d at 1056 (quoting *Threlkeld v. Commissioner*, 848 F.2d 81, 84 (6th Cir. 1988)).

¹⁷⁸ *CenTra*, 953 F.2d at 1056 (quoting *Brook, Inc. v. Commissioner*, 799 F.2d 833, 836 n.4 (2d Cir. 1986)).

¹⁷⁹ *CenTra*, 953 F.2d at 1056 (quoting *Foil v. Commissioner*, 920 F.2d 1196, 1201 (5th Cir. 1990)).

¹⁸⁰ *CenTra*, 953 F.2d at 1056 (quoting *Foil*, 920 F.2d at 1201).

¹⁸¹ *Johnson City Medical Ctr. v. United States*, 999 F.2d 973, 976 (6th Cir. 1993).

¹⁸² *Id.* at 978-84 (Batchelder, J., dissenting).

¹⁸³ *Id.* at 980-84; see *supra* notes 61-64 and accompanying text.

¹⁸⁴ 323 U.S. 134 (1944).

¹⁸⁵ *Johnson City*, 999 F.2d at 981 (quoting *Skidmore*, 323 U.S. at 140).

¹⁸⁶ *Johnson City*, 999 F.2d at 981 (quoting Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 13-14 (1990) [hereinafter *Agency Interpretations*]).

Judge Batchelder's deference standard has never been applied to revenue rulings by the Sixth Circuit.

Since the *CenTra* decision in 1992, the Sixth Circuit has addressed the issue of deference to revenue rulings in five cases (excluding *Johnson City*). The court's approach has varied, but *Chevron* has not been applied. For example, the court has regarded a ruling merely as the IRS's position,¹⁸⁷ applied the reasonable and consistent test to accord "great deference" or "force of legal precedents,"¹⁸⁸ given "some deference" to a ruling that was reasonable and consistent and expressed the studied view of administrators,¹⁸⁹ described revenue rulings as "persuasive authority,"¹⁹⁰ and stated that rulings are entitled to "some deference" as the studied view of the IRS.¹⁹¹ Curiously, three of the five opinions were written by Judge Milburn, the author of the court's opinion in *CenTra*.¹⁹² The application of different deference standards and the obvious division within the court on applicability of *Chevron* make it difficult to predict the level of judicial scrutiny that this court will accord to revenue rulings in future cases.

C. Supreme Court

Although the Supreme Court has not ruled on the weight of revenue rulings, the Court has acknowledged their ambiguous status. In *United States v. Thompson/Center Arms Co.*,¹⁹³ the government urged the Court to defer to two revenue rulings, but the Court reached its decision without addressing the weight of the rulings. In a footnote, the Court stated, "[e]ven if they were entitled to deference, neither of the rulings . . . goes to the narrow question presented here."¹⁹⁴

Longstanding revenue rulings apparently do merit consideration. In *Davis v. United States*,¹⁹⁵ the Court gave "considerable weight" to a revenue ruling that was issued contemporaneously with the statute that it construed and that had been in long use.¹⁹⁶ In *Cottage Savings Association v. Commissioner*,¹⁹⁷

¹⁸⁷ *Disabled Am. Veterans v. Commissioner*, 942 F.2d 309, 315 (6th Cir. 1991).

¹⁸⁸ *Progressive Corp. v. United States*, 970 F.2d 188, 194 (6th Cir. 1992).

¹⁸⁹ *Kinnie v. United States*, 994 F.2d 279, 286 (6th Cir. 1993).

¹⁹⁰ *Constantino v. TRW, Inc.*, 13 F.3d 969, 981 (6th Cir. 1994).

¹⁹¹ *Babin v. Commissioner*, 23 F.3d 1032, 1038 (6th Cir. 1994).

¹⁹² *Id.* at 1033; *Kinnie*, 994 F.2d at 280; *Progressive*, 970 F.2d at 189.

¹⁹³ 504 U.S. 505 (1992).

¹⁹⁴ *Id.* at 518 n.9 (emphasis added).

¹⁹⁵ 495 U.S. 472 (1990).

¹⁹⁶ *Id.* at 484. The ruling also had survived reenactment of the statute. *Id.* at 482. The *Davis* deference standard is analyzed and criticized in *Galler*, *supra* note 9.

¹⁹⁷ 499 U.S. 554 (1991).

the Commissioner did not argue for deference to two of her revenue rulings. The Court expressly noted the Commissioner's omission and speculated that she had not raised the issue because the rulings were issued after the transactions at issue and did not purport to define the precise regulatory language at issue before the court.¹⁹⁸ The Court then cited *National Muffler Dealers Association, Inc. v. United States*,¹⁹⁹ in which the Court deferred to a position reflected in a longstanding series of revenue rulings that consistently adhered to the same position in a variety of fact patterns.²⁰⁰

The Court did not explain in *Davis* or *Cottage Savings* why "longstanding" is a significant factor in characterizing the weight of a revenue ruling.²⁰¹ The Supreme Court's failure to articulate a deference standard exacerbates the confusion among the lower courts as to the status of revenue rulings.

IV. RECONCILING THE DIVERGENT APPROACHES

Regardless of the particular approach or methodology adopted by a court of appeals, it is clear that the federal courts, as a group, are moving away from independent analyses of IRS positions where there are revenue rulings. These courts seem to *want* to defer and are actively and deliberately searching for an acceptable basis on which to premise their deferential stance. It is notable in this regard that prior precedents of a deciding court are not faithfully adhered to while other courts' positions are enthusiastically embraced. Moreover, the Tax Court's opinions are never a source of authority for deference standards. This is particularly interesting in light of the high regard customarily afforded the Tax Court because of its proficiency and consequent ability to influence jurisprudence in the generalist courts.²⁰²

¹⁹⁸ *Id.* at 563 n.7.

¹⁹⁹ 440 U.S. 472, 483-84 & nn.16-19 (1979).

²⁰⁰ The Court also cited *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965), a non-tax case in which an agency's reasonable interpretation of its own regulations was entitled to deference.

²⁰¹ In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court endorsed an agency's license to change its position. The EPA had changed its construction of the governing statute and the plaintiff argued that the EPA's interpretation was not worthy of deference because of the change. *Id.* at 840. The Court stated: "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-64; *see also Starr, supra* note 70, at 297; Sunstein, *supra* note 66, at 2102-04. *See generally* Galler, *supra* note 9, at 881-86.

²⁰² A study conducted by the Virginia Tax Review found that, between January 1, 1983 and December 31, 1987, the circuit courts affirmed approximately 73% of Tax Court decisions, while district court tax decisions were affirmed approximately 60% of the time. Special Project, *An Empirical Study of the Intercircuit Conflicts on Federal Income Tax*

This section will attempt to explain why the federal courts are moving away from the Tax Court in favor of greater deference to agency positions. I believe that the deviations flow directly from the most obvious difference between the courts, namely the generalist character of the federal courts versus the specialized nature of the Tax Court.

A. Tax Court

The judges of the Tax Court may be unwilling to summarily accept an IRS position because the judges regard themselves as capable of analyzing statutory ambiguities and related policy considerations, and see no reason to rely on someone else's analysis. Tax Court judges, after all, are experts in tax law, and have both the ability and propensity to develop a deep understanding of tax law²⁰³ and to devote their efforts to hearing and considering complex tax issues.²⁰⁴ The judges are appointed from among the ranks of tax specialists²⁰⁵ and their dockets consist solely of cases involving tax controversies.²⁰⁶ Thus,

Issues, 9 VA. TAX REV. 125, 140-41 (1989). The report suggests that "[d]eference and lack of expertise lead the circuits to affirm the Tax Court." *Id.* at 132. An earlier study covering fiscal years 1967 through 1970 reached similar conclusions. K. Martin Worthy, *The Tax Litigation Structure*, 5 GA. L. REV. 248, 253 (1971); cf. Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 B.Y.U. L. REV. 377, 380 (observing that where generalist and specialized courts share jurisdiction over similar matters, generalist courts tend to defer to the expertise of the specialized bench).

²⁰³ See Dreyfuss, *supra* note 202, at 378.

²⁰⁴ Crimm, *supra* note 8, at 74; Worthy, *supra* note 202, at 250; cf. S. Jay Plager, *The United States Courts of Appeals, the Federal Circuit, and the Non-Regional Subject Matter Concept: Reflections on the Search for a Model*, 39 AM. U. L. REV. 853, 859 (1990) (asserting that judges who serve on specialized courts "may treat the merits of each case with greater care and understanding" than judges who serve on generalist benches). Professor Crimm also notes that fewer time constraints are imposed in the Tax Court than in district courts, and the Chief Judge may appoint special trial judges in time-consuming or factually complex cases. Thus, both the judge and the attorney/advisor are able to give considerable attention and thoughtful analysis to these cases. Crimm, *supra* note 8, at 81-82.

²⁰⁵ The Tax Court consists of 19 members, or judges, who are appointed by the President for terms of 15 years. I.R.C. § 7443 (1988). In addition, the Chief Judge may appoint special trial judges. I.R.C. § 7443A (1988). Of the 17 regular judges who are currently members of the Tax Court, 12 previously served as government tax attorneys (in the Treasury Department or IRS, or as congressional staffers), and 11 practiced tax law in the private sector. See 15 Stand. Fed. Tax Rep. (CCH) ¶ 42,751 (June 23, 1994).

²⁰⁶ The Tax Court's primary function is to redetermine the correct amount of deficiencies initially determined by the IRS. I.R.C. § 6214(a) (1988). For general descriptions of the Tax Court's jurisdiction, see 4 BORIS I. BITTKER & LAWRENCE LOKKEN,

their substantial expertise is acquired before and after appointment to the court. Attorney/advisors who work in the court also have specialized knowledge and training.

Tax Court judges are well briefed on the issues presented in each case. Tax Court Rule 151 requires the filing of post-trial briefs and reply briefs, unless a presiding judge directs the parties otherwise.²⁰⁷ The briefs highlight the areas of controversy and the requirement of a reply brief ensures that arguments will receive a response. In addition to legal arguments, briefs filed by both parties must include proposed findings of facts, and reply briefs must set out and explain objections to proposed findings submitted by an opponent.²⁰⁸

Tax Court procedures regarding issuance and review of opinions²⁰⁹ offer judges the opportunity to discuss proposed findings and conclusions with colleagues, assuring "the most complete and deliberate consideration of important questions."²¹⁰ Indeed, former Chief Judge Nims has asserted that the Tax Court's review system is unlike that of any other federal court except the Supreme Court.²¹¹

The Chief Judge reviews all opinions before they are finalized.²¹² This review ensures that each proposed opinion is consistent with other opinions

FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 115.2 (2d ed. 1992 & Supp. 1995); NINA J. CRIMM, TAX COURT LITIGATION ¶ 2.2 (1993 & Supp. 1994).

²⁰⁷ TAX CT. R. PRAC. & PROC. 151(a), (b) (For the official reprint of these rules, see 94 T.C. 821, 821-1115 (1990). For a more recent version with current amendments, see CRIMM, *supra* note 206, app. A at A-11 to A-184). A judge may permit or direct the parties to make oral argument or file memoranda or statements of authorities, in lieu of or in addition to briefs. *Id.*

²⁰⁸ TAX CT. R. PRAC. & PROC. 151(e).

²⁰⁹ Judges are required to file a report with respect to each case in which a decision is rendered, I.R.C. § 7459(a) (1988), consisting of findings of fact and an opinion or memorandum opinion stating the judge's legal conclusions. I.R.C. § 7459(b). A decision is based on the report. I.R.C. § 7459(a). In small tax cases, a decision and brief summary of the underlying reasons satisfy the report requirement. I.R.C. § 7463(a). In all cases, the presiding judge may render a report orally on the record if the judge "is satisfied as to the factual conclusions to be reached in the case and that the law to be applied thereto is clear." TAX CT. R. PRAC. & PROC. 152(a); *see also* I.R.C. § 7459(b) (providing for oral reports in small tax cases).

²¹⁰ Worthy, *supra* note 202, at 252.

²¹¹ Judge Arthur L. Nims, III, Statement Before the Federal Courts Study Committee (Jan. 31, 1990), *available in* LEXIS, Fedtax Library, TNT File, search term 90 TNT 26-18 [hereinafter Testimony of Judge Arthur Nims].

²¹² I.R.C. § 7460(b). The Chief Judge or a regular Tax Court judge reviews summary opinions in small tax cases. TAX CT. R. PRAC. & PROC. 182(a). The entire court does not review oral reports because they tend to be issued in cases involving uncomplicated facts and legal principles. CRIMM, *supra* note 206, at ¶ 10.2[2][c][ii].

issued by the Tax Court.²¹³ The Chief Judge may decide to issue an opinion as written,²¹⁴ suggest modifications to the language in an opinion or to the conclusions reached,²¹⁵ or submit the opinion for consideration by the entire court.²¹⁶

The full court meets in conference to dispose of opinions referred by the Chief Judge.²¹⁷ Prior to the conference, proposed opinions are circulated and judges informally discuss the issues presented.²¹⁸ Drafts of dissenting or concurring opinions also may be circulated.²¹⁹ If an opinion is not adopted by the conference, the original judge may elect to rewrite the opinion or request that the case be reassigned.²²⁰ In either situation, the full court reviews the rewritten opinion under the same procedures as the original opinion.²²¹

B. Federal Courts

Generalist judges may be more willing to accept IRS revenue ruling positions simply because they prefer to leave tax cases alone. Professor Paul Caron has used the phrase "tax myopia" to describe the tendency of judges, lawyers, and law professors to regard tax law as a self-contained body of law

²¹³ Theodore Tannenwald, Jr., *Tax Court Trials: An Updated View from the Bench*, 47 TAX LAW. 587, 600 (1994).

²¹⁴ A proposed opinion becomes final after 30 days unless the Chief Judge directs a full court review. I.R.C. § 7460(b).

²¹⁵ Testimony of Judge Arthur Nims, *supra* note 211.

²¹⁶ I.R.C. § 7460(b). The Chief Judge must decide within 30 days whether to adopt the opinion as written or refer it to the entire court. *Id.* Judge Tannenwald has suggested that the following factors may influence, but need not control, the Chief Judge's decision to direct full court review:

The case may be one of first impression. It may involve a factual pattern of widespread interest because of the probability of recurrence. The trial judge may be proposing to declare a regulation invalid or to overrule a prior Tax Court decision; he may be refusing to follow a Court of Appeals decision; he may be distinguishing district court or prior Tax Court decisions on a basis the Chief Judge considers doubtful; or the Chief Judge may question the validity of the legal approach the trial judge has adopted.

Tannenwald, *supra* note 213, at 600 (citations omitted); *see also* Testimony of Judge Arthur Nims, *supra* note 211.

²¹⁷ I.R.C. § 7460(b).

²¹⁸ *Id.*

²¹⁹ Tannenwald, *supra* note 213, at 600-01.

²²⁰ *Id.*

²²¹ *Id.* Absentee judges are permitted to participate and vote. *Id.*

that is somehow different from other areas.²²² One might extrapolate from these observations that judges who are not tax specialists are more likely to leave the resolution of tax questions to others. Indeed, one need only recall Judge Learned Hand's celebrated commentary to understand that this conviction is shared even by eminent jurists:

In my own case the words of such an act as the Income Tax, for example, merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of—leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but which is within my power, if at all, only after the most ordinate expenditure of time.²²³

Professor Harold Bruff postulates that courts of appeals tend to defer heavily to the Tax Court because they are daunted by the complexity of the Code.²²⁴

The Supreme Court apparently shares these views. Based on interviews with Supreme Court Justices and former clerks, Professor H.W. Perry concludes that the Court denies many petitions for certiorari in tax cases because some Justices believe that the issues are too complex to justify the

²²² 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). Professor Caron's article also documents the perception that tax lawyers are different from other lawyers. He ultimately concludes that these misperceptions have impaired the development of both tax law and other fields by isolating the debates in the tax area from those in other fields. *Id.*

²²³ Learned Hand, *Thomas Walter Swan*, 57 YALE L.J. 167, 169 (1947); see also Martin D. Ginsburg, *The Federal Courts Study Committee on Claims Court Tax Jurisdiction*, 40 CATH. U. L. REV. 631, 635 (1991) ("Generalist judges live in mortal fear of tax cases, and rightly so."); J. Andrew Hoerner, *Peterson Blasts Proposal for National Court of Tax Appeals*, 46 TAX NOTES 1256, 1256 (1990) (referring to a "pervasive attitude that, 'Tax law is a special form of witchcraft and should be left to the witch doctors, and that other mortals should not mess around with it, because of the danger that, like the sorcerer's apprentice, they might flood the workshop.'" (quoting M. Carr Ferguson, Jr.'s remarks at the Federal Bar Association Section of Taxation's 14th Annual Tax Law Conference on Mar. 2, 1990)).

²²⁴ Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 337 (1991). Professor Bruff advocates the creation of an Article I Administrative Court, which would have initial review jurisdiction over selected programs and whose factual findings would, in some circumstances, be nonreviewable. The court would be semi-specialized, since it would have jurisdiction over a number of subjects. Tax cases, however, would be treated separately, as they would be presided over by a designated group of specialist judges who likely would move from the present Tax Court into the Administrative Court. Bruff asserts that special treatment of tax cases is justified by the complexity of tax law. *Id.* at 363-66.

Court's time and effort and that it is better to leave the questions to tax specialists.²²⁵ Although all of the Justices interviewed did not agree, an "overwhelming number" of the clerks did.²²⁶

The complexity of the tax laws implies that it may be wasteful of resources (namely time) for generalist judges to educate themselves on the intricacies of the issues presented.²²⁷ When faced with a complicated tax question, a judge might defer to administrative expertise either as a means of avoiding the need to familiarize herself altogether with the issues presented, or as a means of corroborating her own conclusions. In the tax area in particular, many cases cannot be adequately resolved without both an understanding of the Code section at issue and an appreciation of its relationship to other provisions and

²²⁵ H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 229-30 (1991). Two clerks are quoted as follows:

[CLERK #1:] Justice _____ thinks that the Court just should never deal with tax cases. Tax cases ought to be left to the more specialized courts that can deal with them. The Supreme Court isn't that competent unless it deals with a constitutional issue [implicated in a tax issue], or maybe if there is just a complete breakdown with a split in the circuits. But if it is purely an issue of interpretation of a tax statute, he just thinks that the Supreme Court ought not to deal with it.

[CLERK #2:] No one wanted tax or patent cases. They are technically very difficult. The Court really doesn't have the expertise developed to deal with them. They wouldn't grant them unless there was just a clear split in the circuits, and we clerks were essentially instructed to work very hard to show why in fact there was no split in circuits.

Id. at 229.

²²⁶ *Id.*

²²⁷ Cf. Michael I. Saltzman, *Should There Be a National Court of Tax Appeals?*, 8 A.B.A. SEC. TAX'N NEWSL. 61, 77 (1989) (noting that the appellate caseload makes it "both unlikely and counterproductive" for appellate judges to inform themselves about the issues presented in tax appeals). In *Deweese v. Commissioner*, 870 F.2d 21 (1st Cir. 1989), the Court of Appeals for the First Circuit affirmed a Tax Court decision that characterized as shams certain "straddle" transactions. The Tax Court had consolidated for trial and disposition over 1,000 cases presenting the same issue, and six courts of appeals had been called upon to decide appeals from the same decision. In a concurring opinion, Judge Brown stated: "Without disparaging counsel in this nationwide effort, this is a colossal waste, a squandering, of precious judicial energy of at least 18 to 21 Judges at a time in which there is great concern over the capacity of the Federal Appellate System to handle the ever-growing caseload." *Id.* at 36 (Brown, J., concurring).

concepts.²²⁸ The more intricate the issue, the more time it will take to parse through the law. Judges might choose simply not to do it.²²⁹

Without expertise, generalist judges may not appreciate the nuances of an issue, or they may not see an issue at all.²³⁰ This could result in a narrow approach and also could lead judges to accept IRS positions without appreciating the subtleties inherent in the positions of both sides.

Federal court judges are less likely than Tax Court judges to be thoroughly briefed on issues presented in tax litigation. In contrast to the Tax Court, there are no mandatory policies in federal district courts for the filing of briefs. Judges may ask counsel to submit proposed findings of fact and conclusions of law²³¹ and frequently do so, particularly in cases involving complex facts or legal issues.²³² Judges, however, are not required to request these submissions, nor are litigants bound to submit them. If a judge does not request the parties to make submissions, there may be no opportunity to present written arguments.

Local court rules might constrain counsel's ability to make timely and effective arguments. The *Federal Rules of Civil Procedure* permit individual district courts to adopt their own rules regarding submissions.²³³ Some courts

²²⁸ Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 NW. U. L. REV. 745, 747 (1981).

²²⁹ In addition, the more intricate the law, the more likely it is that a generalist judge will get things wrong. Dreyfuss, *supra* note 202, at 409. Professor Dreyfuss suggests that transferring complex cases to specialized courts will improve the quality of decisions, reduce the size of the dockets in federal courts, and decrease the number of judge-hours required to clear the docket. *Id.*

²³⁰ Plager, *supra* note 204, at 859 (stating that "[j]udges confronted with large and highly diverse caseloads may tend to stereotype the cases, seeing little of the variation within rather than across subject matter"); see also Dreyfuss, *supra* note 202, at 378; cf. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 157 (1985) (suggesting that a generalist judge sitting in a tax case "does not look beyond the particular subsections of the Internal Revenue Code that the parties cite to him and thus never understands the statutory design"). Specialist judges may be able to compensate for deficiencies in briefing or argumentation in a way that generalists cannot. *Id.*

²³¹ *United States v. Cornish*, 348 F.2d 175, 181 n.8 (9th Cir. 1965); *Featherstone v. Barash*, 345 F.2d 246, 251 (10th Cir. 1965).

²³² *Hodgson v. Humphries*, 454 F.2d 1279, 1282 (10th Cir. 1972) (action by Secretary of Labor to enjoin Fair Labor Standards Act violations and withholding of unpaid wages); *Louis Dreyfus & Cie. v. Panama Canal Co.*, 298 F.2d 733, 737-38 (5th Cir. 1962) (shipowner's action for damages allegedly sustained while ship was navigated by a pilot employed by defendant); *United States v. Livingstone*, 381 F. Supp. 607, 610 (D. Mass. 1974) (action for recovery of unpaid income taxes, penalties, and interest).

²³³ FED. R. CIV. P. 83 states in relevant part: "Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules." Individual judges adopt rules and procedures for litigation

are quite precise as to the format and content of documents that may be submitted, and these rules might preclude full presentation of the issues.²³⁴

In the federal courts, there are no provisions for centralized review, and thus a judge who is not a tax specialist is on his or her own. One might surmise that such judges might be more likely to defer to the IRS than to rule on issues with which they are not totally comfortable.

Finally, federal judges might defer to IRS revenue ruling positions as a means of deciding cases quickly, thereby reducing their caseloads. Much has been written about overcrowded dockets in the federal courts,²³⁵ and deference

conducted in their courtrooms, and practices vary from judge to judge. See Myron J. Bromberg & Jonathan M. Korn, *Individual Judges' Practices: An Inadvertent Subversion of the Federal Rules of Civil Procedure*, 68 ST. JOHN'S L. REV. 1 (1994). Indeed, each Tuesday the New York Law Journal dedicates several columns to the publication of motion practice rules issued by individual judges.

²³⁴ A striking example of differing practices regarding proposed findings of fact is presented in articles written by two eminent trial judges. Judge Robert Keeton of Massachusetts requires the party with the burden of proof to file proposed findings of fact and conclusions of law at least six weeks prior to the trial date. Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 895 (1989). He admonishes counsel "to be concise and to propose only the findings and conclusions that are essential to a claim or defense" *Id.* In multi-party litigation, he urges counsel to serve proposals jointly. *Id.* Counsel receiving proposed findings and conclusions must then file a response that is marked (as per the judge's detailed instructions regarding underlining and bracketing) to reflect items that are contested, and may file additional findings and conclusions. *Id.* Such additional findings and conclusions in turn trigger an obligation on the first party to respond. *Id.*

Judge Charles Richey of the District of Columbia reported in 1976 that he requires all parties to file proposed findings of fact and conclusions of law at least 15 days before trial. Charles R. Richey, *A Federal Judge's Reflections on the Preparation for and Trial of Civil Cases*, 52 IND. L.J. 111, 119 (1976). Upon receipt, counsel must underline in red the disputed portions, underline in blue those portions that are admitted, and underline in yellow non-disputed portions that counsel deems irrelevant. *Id.* The parties should be prepared to exchange supplemental findings and conclusions during the course of the trial. *Id.* at 120.

Although proposed findings of fact or conclusions of law may be skillfully drafted in a manner that brings out a party's arguments, such an indirect method of argumentation is likely to be less effective than a conventional, straightforward legal discussion that is typical in briefs. *But cf.* Statement of Judge Richard W. Goldberg, Tenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 146 F.R.D. 205, 395 (1992) (indicating that he does not require post-trial briefs because they are "an unnecessary expense and continuation of time").

²³⁵ See, e.g., POSNER, *supra* note 230. In 1988, at the direction of Congress, Chief Justice Rehnquist appointed a 15-member committee to study the problems of the federal courts. The Committee report begins by describing the "mounting public and professional concern with the federal courts' congestion, delay, expense, and expansion." JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE

could be a byproduct of caseload management. When courts defer to agencies, cases are disposed of quickly, without expending scarce resources on legal research and analysis and drafting of lengthy opinions.²³⁶ Moreover, the practice of deferring also might deter others from filing suit.

V. IMPLICATIONS OF DIVERGENT APPROACHES

A. *Procedural Choices Determine Substantive Outcome*

1. *Choice of Forum*

Where a contested issue is addressed in an IRS revenue ruling, the taxpayer's likelihood of success in litigation may depend largely upon the court's treatment of such rulings. Because deference standards vary markedly among the circuits (and sometimes within circuits), taxpayers and their counsel must carefully review court practices before selecting a forum. Unfortunately, prior decisions of any particular court may be of limited value in predicting both trial and appellate court behavior because the circuit courts do not faithfully follow their own precedents. Although few courts are as generous as the Tax Court in offering the taxpayer consideration of the underlying issues on their merits, success in that tribunal of course depends on the court's analysis of the substantive issues presented.

3, 4-9 (Apr. 2, 1990) [hereinafter FEDERAL COURTS REPORT]. A more recent report prepared for the Judicial Conference states that annual civil case filings increased 1,424% between 1904 and 1994, with most of that growth occurring since 1960. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE COMMITTEE ON LONG RANGE PLANNING 7 (Nov. 1, 1994). Annual cases commenced in the federal appeals courts increased 3,868% during the same period. *Id.*

Justice Scalia has advocated greater specialization among courts as a means of removing routine and relatively unimportant cases from the federal courts. Justice Antonin Scalia, Remarks Before the Fellows of the American Bar Foundation and the National Conference of Bar Presidents 9-10 (Feb. 15, 1987), reprinted in *Scalia Wants to Preserve Elite Federal Courts*, 133 CHI. DAILY L.B., Mar. 5, 1987, at 2, 4 [hereinafter Remarks of Justice Antonin Scalia].

²³⁶ Cf. POSNER, *supra* note 230, at 137 (arguing that caseload pressures impair the quality of court decisions); Bruff, *supra* note 224, at 330 (noting that judges decide many cases in a summary manner, e.g., without argument or opinion, and delegate many tasks to support personnel in order to compensate for increasing caseloads). Judge Posner also suggests that one method of increasing judicial specialization, as a means of reducing caseload pressures in the federal appellate courts, "would be simply to reduce the scope of judicial review of agency action." POSNER, *supra* note 230, at 148-49. He explains that the narrower the scope of review in the courts of appeals, the greater the role of the specialized judiciary relative to the generalist judiciary. *Id.*

In some judicial circuits, it now is the law (in fact or in practice) that courts must abide by revenue rulings that are reasonable and consistent with the statute.²³⁷ Thus, in cases where a revenue ruling addresses the relevant issue or issues, the taxpayer is almost certain to lose. In judicial circuits that require courts to give revenue rulings more weight than a litigating taxpayer's arguments, the taxpayer also is likely to lose. Only the Tax Court,²³⁸ which accords no special treatment to revenue rulings,²³⁹ offers an opportunity for full consideration of taxpayer arguments. In practical terms, then, the standard of review applied to revenue rulings must govern the litigant's choice of forum, and this procedural choice ultimately may determine the substantive outcome of the case.

2. *Treatment on Appeal*

Appellate resolution of tax controversies should be the same whether a case originates in the Tax Court or in a federal district court. This is because Tax Court and district court decisions are appealed to the same appellate tribunals, namely the eleven regional courts of appeals and, occasionally, the Court of Appeals for the District of Columbia.²⁴⁰ The courts of appeals are thought to

²³⁷ See *supra* notes 129–65 and accompanying text (reasonable and consistent deference standard), and notes 173–92 and accompanying text (*Chevron* deference).

²³⁸ Some courts of appeals, like the First Circuit, have not adopted definitive standards or guidelines. In courts within these jurisdictions, taxpayers may still have a chance of prevailing.

²³⁹ See *supra* notes 113–21 and accompanying text.

²⁴⁰ I.R.C. § 7482(a)(1) (1988). Venue rules are as follows:

1. For taxpayers other than corporations, appeals in deficiency cases must be made to the court of appeals for the circuit in which the taxpayer resides. I.R.C. § 7482(b)(1)(A).

2. For corporations, appeals in deficiency cases must be made to the circuit in which the corporation's principal place of business or principal office or agency is located. If the corporation has no principal place of business or principal office or agency in any judicial circuit, then appellate venue is in the circuit in which the corporation files its tax return. I.R.C. § 7482(b)(1)(B).

3. For partnerships, appeals in actions brought under I.R.C. § 6226 (1988 & Supp. V 1993) or I.R.C. § 6228(a) (1988 & Supp. V 1993) (partnership administrative adjustments) must be made to the circuit in which the partnership's principal place of business is located. I.R.C. § 7482(b)(1)(E) (1988).

4. Appeals in declaratory judgment actions under I.R.C. § 7476 (qualification of retirement plans) must be made to the circuit in which the employer's principal place of business or principal office or agency is located. I.R.C. § 7482(b)(1)(C).

5. Appeals in declaratory judgment actions under I.R.C. § 7428 (1988 & Supp. V 1993) (status and classification of organizations claiming to be tax exempt) must be made to the circuit in which the organization's principal office or agency is located. I.R.C. § 7482(b)(1)(D) (1988).

“defer heavily”²⁴¹ to the Tax Court’s expertise,²⁴² however, with the possible (or perhaps likely) result that a taxpayer’s chance of prevailing on appeal is better where a case originated—and where the taxpayer won—in the Tax Court. Choice of forum at the trial level, then, may predict the outcome at the appellate level as well.

It is difficult to measure empirically the impact of the appellate courts’ deference to the Tax Court in revenue ruling cases because cases typically are resolved on multiple grounds, with the revenue ruling representing only one factor taken into account by a deciding court. For example, in *Ricards v. United States*,²⁴³ the appellate court’s conclusion that IRS revenue rulings were “entitled to consideration” was one of three distinct reasons for affirming a lower court decision in favor of the government.²⁴⁴ Moreover, one of the opinions might not address a relevant revenue ruling at all. The Ninth Circuit opinion in *Walt Disney Inc. v. Commissioner*,²⁴⁵ dealt almost exclusively with a revenue ruling (e.g., applicability of the ruling to the facts of the case, the appropriate deference standard, and application of that standard to the ruling at

If none of the above apply, then appeals must be made to the Court of Appeals for the District of Columbia. I.R.C. § 7482(b). The parties may, however, agree to seek review by any federal court of appeals. I.R.C. § 7482(b)(2). Appeals in declaratory judgment actions under I.R.C. § 7478 (status of governmental debt obligations) may be reviewed only by the Court of Appeals for the District of Columbia. I.R.C. § 7482(b)(3).

Appeals from the Court of Federal Claims are made to the Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295(a)(3) (1988 & Supp. V 1993).

²⁴¹ Bruff, *supra* note 224, at 337; cf. Dreyfuss, *supra* note 202, at 380 (arguing that generalist courts tend to defer to specialized courts). The fact of considerable deference to the Tax Court lends further support to the argument made earlier that federal court judges are searching for a way to defer rather than deciding each case on its individual merits. See *supra* text accompanying notes 222–36.

²⁴² The Virginia Tax Review reported in 1989 that during the five year period commencing January 1, 1983 and ending December 31, 1987, the courts of appeals affirmed the Tax Court in 73% of the cases appealed and affirmed the district courts (in tax cases) in only 60%. Special Project, *supra* note 202, at 140–41. The Tax Court was reversed in 19% of the cases, compared with 30% of district court tax cases. *Id.* The remaining cases (8% of Tax Court cases and 10% of district court cases) were affirmed in part and reversed in part. *Id.*

²⁴³ 683 F.2d 1219 (9th Cir. 1981).

²⁴⁴ *Id.* at 1224. First, the court found that the language of the controlling statute was unequivocal, and supported the Government’s position. *Id.* at 1223–24. Second, the court found that the taxpayer’s arguments were inconsistent with IRS revenue rulings, which the court regarded as “entitled to consideration.” *Id.* at 1224. Third, the court dismissed the taxpayer’s argument that the statute at issue denied her equal protection of the laws. *Id.* at 1224–26.

²⁴⁵ 4 F.3d 735 (9th Cir. 1993).

issue). The court based its reversal squarely on the issue of deference. The Tax Court opinion, however, never mentioned the ruling.²⁴⁶

If the phenomenon of greater deference to the Tax Court does exist in revenue ruling cases, it may well exacerbate the confusion among the circuit courts regarding the status of revenue rulings. One need only imagine the following scenario to see the absurdity of the situation: an appellate court defers to the Tax Court (which in turn does not defer to revenue rulings) but does not defer to district courts (which do defer to revenue rulings). Of course, the situation gets worse when one remembers that the circuits do not follow the same standards.

The latter half of the hypothetical scenario—non-deference to a deferring district court—may seem unlikely to occur as most courts of appeals themselves are apt to defer to revenue rulings and, therefore, to uphold lower courts which do the same. As noted earlier in this Article, however, the courts of appeals have not adopted a uniform or consistent approach on this issue.²⁴⁷ The Court of Appeals for the Tenth Circuit, for example, does not accord very much weight to revenue rulings. Thus, in *Flanagan v. United States*,²⁴⁸ that court reversed a district court decision which had deferred to an IRS revenue ruling.²⁴⁹

It simply makes no sense for the courts to apply different standards of deference to revenue rulings. Inconsistent treatment of similarly situated taxpayers and the inevitable expenditure of judicial resources to correct the differences suggest that the standards followed by all courts should be homogenous.²⁵⁰

²⁴⁶ *Id.* at 738 n.6; see *Walt Disney Inc. v. Commissioner*, 97 T.C. 221 (1991), *rev'd*, 4 F.3d 735 (9th Cir. 1993).

²⁴⁷ See discussion *supra* part III.B.

²⁴⁸ 59 A.F.T.R.2d 87-1253 (W.D. Okla. 1982), *rev'd*, 810 F.2d 930 (10th Cir. 1987).

²⁴⁹ *Id.* at 1258. The court stated: "Revenue rulings are comparable to attorney general's opinions. They represent only the IRS's opinion of what the law requires, issued for the information and guidance of taxpayers, IRS officials, and others concerned. They do not have the force and effect of law, although they are entitled to consideration." *Flanagan*, 810 F.2d at 934. The court further asserted that revenue rulings "are accorded less weight than regulations, which are promulgated in accordance with the requirements of the Administrative Procedure Act and finalized only after a period for comment by concerned parties." *Id.*

²⁵⁰ A similar problem is presented when administrative agencies refuse to administer programs consistently with holdings of the courts of appeals. Where an agency has "nonacquiesced," those who pursue claims in court are granted greater rights, because they ultimately win, than those who choose to comply with agency actions. William W. Buzbee, Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 582, 603 (1985).

B. Deference Encourages Unrestrained Administrative Activity

Because IRS revenue rulings receive deference in most federal courts, the IRS obtains a significant advantage by issuing them. The availability of deference actually encourages the IRS to issue rulings because the mere existence of a relevant revenue ruling improves the likelihood of the agency prevailing in cases that present the issue and may even assure a victory. It is precisely because the position is embodied in a ruling (rather than a regulation), however, that careful judicial scrutiny is mandated. In the case of regulations, judicial deference is sensible because the public has been afforded an opportunity to participate in the issuance process. In the case of revenue rulings, judicial review should serve as a counterbalance to public nonparticipation at time of issuance.

In practical terms, public participation is important for two reasons. First, the combined expertise and knowledge of agency administrators and interested persons results in better rules.²⁵¹ Members of particular groups or industries possess a wealth of information from which agencies benefit in the drafting of rules.²⁵² Public input also offsets institutional biases in favor of or against a particular group,²⁵³ and enables affected persons to defend themselves against rules that may be detrimental to their interests.²⁵⁴ Second, the notice and comment procedure serves as a quasi-democratic process by enabling affected persons to articulate their views and by requiring agencies, who are not directly accountable to voters, to read and respond to comments.²⁵⁵ Notice and comment procedures enable those with opposing viewpoints to attempt to influence agency action in an open fashion and minimize opportunities for administrative decisionmaking behind closed doors.²⁵⁶

Interpretive rules are expressly exempt from the APA notice and comment procedures.²⁵⁷ Although Congress appreciated the benefits of public

²⁵¹ See Asimow, *supra* note 18, at 574; Galler, *supra* note 9, at 865-66.

²⁵² Galler, *supra* note 9, at 865-66.

²⁵³ See Asimow, *supra* note 18, at 574.

²⁵⁴ See Arthur E. Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the A.P.A.*, 23 ADMIN. L. REV. 101, 104 (1971). Dissenters also are more likely to accept an adverse rule, and are less likely to subvert the rule, if they have had the opportunity to participate in the drafting process. See Asimow, *supra* note 18, at 574; Arthur E. Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540, 541 (1970).

²⁵⁵ See Asimow, *supra* note 18, at 574; Galler, *supra* note 9, at 866-67.

²⁵⁶ See Asimow, *supra* note 18, at 574.

²⁵⁷ 5 U.S.C. § 553(b)(3)(A) (1994); *Chrysler Corp. v. Brown*, 441 U.S. 281, 313-14 (1979).

participation, it feared that the necessity of complying with cumbersome procedures would discourage agencies from disseminating policy statements.²⁵⁸ Thus, Congress exempted interpretive rules from the notice and comment requirements in order to encourage agencies to issue rules and policy statements²⁵⁹—that is, pronouncements that would merely interpret or explain statutes but that would not affect individual rights or obligations.²⁶⁰ What was lost by eliminating the public, however, was made up for by the prospect of meaningful judicial review;²⁶¹ the possibility of careful scrutiny by a judge was thought to compensate for the loss of public participation in the rulemaking process.

Interpretive treasury regulations do not conform to the standard paradigm because the Treasury Department voluntarily complies with APA notice and comment procedures when it issues them.²⁶² Courts nonetheless review them

²⁵⁸ See SENATE COMM. ON THE JUDICIARY, 79TH CONG., 2D SESS., ADMINISTRATIVE PROCEDURE 7 (Comm. Print 1945) [hereinafter COMM. PRINT], reprinted in SENATE COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. 18 (1946) [hereinafter APA: LEGISLATIVE HISTORY].

²⁵⁹ See Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the A.P.A.*, *supra* note 254, at 122–23. Despite the absence of notice and comment issuance procedures, interpretive rules are thought to provide a number of benefits. First, these rules afford advance notice to the public of an agency's position on substantive matters, enabling affected persons to act in reliance on government positions, and thereby to avoid surprises. See Asimow, *supra* note 18, at 529; Strauss, *supra* note 38, at 1481–82. Opportunities for later controversy also are minimized. See *id.*; cf. PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 157 (1989) (asserting that “[a]gencies issue these interpretations and opinions precisely to shape external behavior, reducing to that extent the need for regulatory enforcement”). Second, interpretive rules assist regulated persons in complying with the law. See Asimow, *supra* note 18, at 529. Third, by providing guidance to administrators, interpretive rules promote the uniform administration of a statute. See Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 385; Strauss, *supra* note 38, at 1482. Finally, the mere existence of published interpretations disposes of many issues because few agency interpretations are challenged in court and almost all are upheld. See Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, *supra*, at 385 (citing *Chevron*); see also *supra* notes 38–44 and accompanying text (describing benefits of IRS revenue rulings).

²⁶⁰ See *supra* notes 17–27 and accompanying text (defining interpretive and legislative rules).

²⁶¹ See COMM. PRINT, *supra* note 258, at 7, reprinted in APA: LEGISLATIVE HISTORY, *supra* note 258, at 18; 92 CONG. REC. 2155 (1946), reprinted in APA: LEGISLATIVE HISTORY, *supra* note 258, at 313 (statement of Sen. McCarran).

²⁶² See *supra* note 27 and accompanying text.

under interpretive standards, not legislative ones,²⁶³ although *Chevron* may have elevated the status of interpretive regulations.²⁶⁴

Revenue rulings are always issued outside of the APA process. Consistent with Congress's initial expectations, the procedural ease with which revenue rulings are issued enables the IRS to publish them frequently and promptly, thereby providing assistance to taxpayers. Should a taxpayer take issue with a revenue ruling position, however, Congress envisioned a thorough court review. By deferring to IRS revenue rulings, courts ignore the rationale underlying the APA procedures and effectively encourage the IRS to issue interpretations in the revenue ruling format rather than as regulations, which require compliance with cumbersome procedures but which offer the public an opportunity to restrain or limit arbitrary actions.

Clearly, the IRS should continue its practice of issuing revenue rulings because they provide important benefits to both taxpayers and the government. But the agency should not issue revenue rulings as a means of obtaining an advantage in litigation.²⁶⁵ The status of revenue rulings should be more like that of letter rulings, whose role is to inform taxpayers in advance of the IRS's treatment of particular transactions. Taxpayers are afforded the opportunity to complete their tax returns in conformity with IRS positions and government agents are able to enforce the laws uniformly. Taxpayers who disagree with revenue ruling positions, however, should be permitted to litigate their differences in courts that fairly consider arguments put forth by both sides.

C. Current Practices Defy Conventional Wisdom Regarding Pro-Government Bias of Specialized Courts

In scholarly debates over the virtues (or vices) of specialized courts, a principal argument made against specialized courts is that they are biased. Specialization can produce bias because the judicial selection process favors interested groups and judicial review processes favor those who litigate repeatedly in the specialized fora.²⁶⁶

²⁶³ See cases cited *supra* note 26.

²⁶⁴ See *supra* notes 65–98 and accompanying text.

²⁶⁵ In response to legislative proposals to grant the EPA interpretive authority under the CERCLA liability scheme, see *supra* note 172. Professor Craig Johnston noted the overwhelming temptation to “correct” adverse judicial opinions by promulgating rules that subsequent courts would then be bound to follow. Johnston, *supra* note 172, at 1052.

²⁶⁶ Bruff, *supra* note 224, at 331–32; see also Plager, *supra* note 204, at 858 (observing that specialist courts are likely to identify with government programs that are within their specialties); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1153 (1990) (concluding that “compared to generalist judges, specialized judges are likely to be more biased arbiters of whether an

Commentators allege that the Tax Court maintains a pro-government bias as a result of the appointment of former Treasury or IRS officials to judgeships²⁶⁷ or its cordial relationship with the IRS, which is a party to every case presented to the court.²⁶⁸ Professor Deborah Geier has compiled statistics that demonstrate “a decided pro-government trend in recent years.”²⁶⁹

Opinions are divided on the partiality of Tax Court judges, however. Former Chief Judge Tannenwald, for example, has argued that the court is not pro-government, dismissing that assertion as a longstanding “canard.”²⁷⁰

agency has strayed beyond the bounds of its delegated authority”); *cf.* POSNER, *supra* note 230, at 155 (arguing that specialists are more likely to enforce laws vigorously because they identify with the goals of government programs that represent the focus of their careers).

²⁶⁷ See HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 166 (1973) (describing the feeling that an “unduly large proportion” of the members of the Tax Court are former government attorneys who are slanted in the government’s favor); Bruff, *supra* note 224, at 336 (referring to the Tax Court’s “longstanding reputation as overstuffed with former government lawyers and, hence, biased against the taxpayer”); Revesz, *supra* note 266, at 1152–53 (describing congressional efforts to prohibit service on the Tax Court and predecessor courts by former government officials as a result of years of bias).

²⁶⁸ See Revesz, *supra* note 266, at 1152; *cf.* ABA Sec. of Tax’n, Report on the Creation of a National Court of Tax Appeals (Dec. 14, 1989), available in LEXIS, Fedtax Library, TNT File, search term 90 TNT 30-8 (arguing that taxpayers would question the fairness of conferring exclusive jurisdiction to a single tax court “before whom the government appears in every case”).

²⁶⁹ Deborah A. Geier, *The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory*, 76 CORNELL L. REV. 985, 998 (1991). Professor Geier’s statistics demonstrate that in several selected years, the government won or partially won an average of 90.4% of Tax Court cases, compared with an average of 70.5% in the district courts. *Id.* at 998. *But see* Bruff, *supra* note 224, at 337 (arguing that the Tax Court’s substantial caseload, which comprises over 90% of all tax cases, demonstrates that taxpayers regard the court as neutral). Geier argues that the Tax Court should be elevated to Article III status as a means of avoiding any potential for pro-government bias. Geier, *supra* at 998–1000.

²⁷⁰ Theodore Tannenwald, Jr., *The Tax Litigation Process: Where It Is and Where It Is Going*, 44 REC. ASS’N B. CITY OF N.Y. 825, 827 (1989). Judge Tannenwald supports his conclusion with three premises. First, the ability to file a Tax Court petition without first paying the disputed tax encourages the filing of cases with little or no merit. Statistics emanating from these cases are skewed in favor of the government. Second, because most Tax Court cases involve multiple issues, split decisions regularly occur. It is difficult to determine who wins in a case in which there is no clear victor. Third, the number of former government attorneys who serve as Tax Court judges has declined. *Id.* at 827–28; *see also* Bruff, *supra* note 224, at 336–37 (arguing that a pro-government bias in the Tax Court is unlikely). *But see* 15 Stand. Fed. Tax Rep. (CCH) ¶ 42,751 (June 23, 1994) (indicating that 12 of the 17 regular judges of the Tax Court previously served as government tax attorneys).

While a critique of the debate is beyond the scope of this Article, the fact of non-deference to revenue rulings by the Tax Court and deference by the federal courts stands conventional wisdom on its head. The accepted practice in the specialist Tax Court is to scrutinize all government arguments previously asserted in revenue rulings, while the generalist federal judges are likely to accede to government revenue ruling positions—a decidedly pro-government practice.

D. Deference by Generalist Courts Confuses Traditional Justifications for Concurrent Jurisdiction over Tax Litigation

The courts' divergent approaches to the issue of deference frustrate the underlying objectives of the jurisdictional structure in tax litigation. The trifurcated jurisdictional system in which tax controversies are litigated²⁷¹ satisfies taxpayer perceptions of fairness because specialist and generalist options are both available, and the regional appellate court system, in which generalist judges review opinions issued by specialists and generalists, offers the advantages of intercircuit dialogue and percolation. If generalist judges in the federal courts are unwilling, however, to share their own perspectives in revenue rulings cases, and choose instead to reflexively defer to the IRS, then the benefits that they are presumed to provide are not available. Although deference to revenue rulings itself is probably not enough to justify a complete reassessment of jurisdiction over tax litigation, it certainly raises the question whether some of the underlying premises are false.

In a 1990 report that advocated extensive changes to the nation's court system, the Federal Courts Study Committee of the Judicial Conference of the United States recommended restricting all tax litigation to an expanded Tax Court and creating an appellate division of the Tax Court with exclusive jurisdiction over tax appeals.²⁷² The proposal would have vested virtually exclusive tax jurisdiction in the Tax Court and would have removed all

²⁷¹ The Tax Court, federal district courts, and the Court of Federal Claims share concurrent jurisdiction over tax controversies. See *supra* note 8. For an exhaustive analysis of the issues presented by the choice of forum, see Crimm, *supra* note 8.

²⁷² FEDERAL COURTS REPORT, *supra* note 235, at 69–72. Under the proposal, district courts would retain jurisdiction over criminal tax cases, enforcement actions to fix jeopardy assessments, and actions to enforce federal tax liens. *Id.* at 70. Appeals from those cases would go to the regional courts of appeals. *Id.*

The 1990 proposal was the most recent attempt to restructure jurisdiction over tax cases. See, e.g., Gary W. Carter, *The Commissioner's Nonacquiescence: A Case for a National Court of Tax Appeals*, 59 TEMP. L.Q. 879, 910–14 (1986) (describing 1979 proposals to create a national court of tax appeals); Worthy, *supra* note 202, at 250–51 (describing 1969 proposals to alter the structure of tax litigation).

participation by generalist judges from the tax litigation process. The proposals were never acted upon, largely due to the near unanimous opposition by the tax bar, whose objections emphasized the importance of both specialist and generalist judges.²⁷³ Indeed, concern was expressed that taxpayers would consider inherently unfair a judicial system that eliminated any opportunity for generalist review.²⁷⁴

Generalist judges possess a breadth of experience that brings a wider perspective to their decisionmaking. Because their cases present a multitude of issues, generalists' decisions are informed by exposure to a wide range of problems, and questions are reviewed in a broader context than normally presented to specialists.²⁷⁵ Legal issues that emerge in more than one area present opportunities for "cross-fertilization"²⁷⁶ or "cross-pollination"²⁷⁷

²⁷³ See Remarks of Shirley D. Peterson, Asst. U.S. Att'y Gen., Tax Div., *quoted in* Hoerner, *supra* note 223, at 1256; Letter from Walter H. Beckham, Jr., Sec'y, Am. Bar Assoc. (ABA), to Kenneth Gideon, Asst. Sec'y for Tax Policy (Mar. 8, 1990), *available in* LEXIS, Fedtax Library, TNT File, search term 90 TNT 84-29; Letter from Richard G. Cohen, Chair, and James T. Chudy, Sec'y, Council on Tax'n of the Ass'n of the Bar of the City of N.Y., to Joseph F. Weis, Jr., Chair, Fed. Cts. Study Comm. (Mar. 7, 1990), *available in* LEXIS, Fedtax Library, TNT File, search term 90 TNT 63-19; Letter from C. Wells Hall, III, Vice Chair, Nat'l Ass'n of State Bar Tax Sections, to Joseph F. Weis, Jr. (Mar. 16, 1990), *available in* LEXIS, Fedtax Library, TNT File, search term 90 TNT 63-18; Letter from Arthur S. Hoffman, Chair, Fed. Tax'n Exec. Comm., Am. Inst. of Certified Pub. Accountants, to Joseph F. Weis, Jr. (Feb. 12, 1990), *available in* LEXIS, Fedtax Library, TNT File, search term 90 TNT 46-24; Letter from James P. Holden, Chair, ABA Sec. of Tax'n, to Joseph F. Weis, Jr. (Mar. 5, 1990), *available in* LEXIS, Fedtax Library, TNT File, search term 90 TNT 63-17; Testimony of Judge Arthur Nims, *supra* note 211. *But see* Ginsburg, *supra* note 223 (supporting proposals); Letter from Sheldon S. Cohen, Former Comm'r, IRS, to Joseph F. Weis, Jr. (Jan. 30, 1990), *available in* LEXIS, Fedtax Library, TNT File, search term 90 TNT 26-19 (supporting proposals).

²⁷⁴ See FEDERAL COURTS REPORT, *supra* note 235, at 72 (dissenting statement of Edward S.G. Dennis, Jr.); Letter from Hoffman, *supra* note 273; Letter from Holden, *supra* note 273. Professor Dreyfuss has argued that the success of the trifurcated tax litigation system is based in large measure on the availability of specialized and generalist courts. "Having a choice of courts diffuses suspicion that the process is stacked in favor of the government because taxpayers who are wary of specialized tribunals can usually use the district courts. At the same time, those who would like special expertise can exploit the proficiency of the Tax Court." Dreyfuss, *supra* note 202, at 436 (footnote omitted).

²⁷⁵ See Bruff, *supra* note 224, at 331; Jordan, *supra* note 228, at 748; Saltzman, *supra* note 227, at 77; Remarks by Justice Antonin Scalia, *supra* note 235, at 9-10.

²⁷⁶ Bruff, *supra* note 224, at 331.

²⁷⁷ POSNER, *supra* note 230, at 156-57; Dreyfuss, *supra* note 202, at 379.

among legal theories; the manner in which issues are resolved in one area may apply in other areas as well.²⁷⁸

Although the courts of appeals may disagree among themselves or with the Tax Court on a particular matter, these disagreements create a dialogue which leads to better decisionmaking overall. Where courts adopt dissimilar positions, the experience of persons affected by those decisions provides data or information to other courts that have yet to consider the issue. The ability to compare the effects of distinct rules aids these courts in reaching their own conclusions.²⁷⁹ The tax litigation system assures an intercircuit dialogue in which controversial issues are thoroughly considered, ultimately resulting in reasonable final resolutions.²⁸⁰ This experiential dialogue does not exist, however, where courts abdicate decisionmaking responsibility by deferring unquestioningly to one litigant.

Intercircuit dialogue also aids the Supreme Court in adjudicating cases involving intercircuit conflicts. Permitting issues to "percolate" over time before they are definitively resolved offers three distinct benefits. First, doctrinal disagreements serve to isolate issues on which appeals courts are divided, thereby assisting the Supreme Court in identifying questions that need resolution.²⁸¹ The converse is true as well. If most lower courts adopt consistent approaches to a particular subject, the Supreme Court can presume that the issue has been correctly decided and that further review is unnecessary.²⁸² Second, lower court opinions serve as ancillary briefs, which articulate and analyze the issues presented without the biases of the litigating parties.²⁸³ Thus, the Court confronts a variety of perspectives when it ultimately renders a decision.²⁸⁴ Finally, the experiences of the circuits provide

²⁷⁸ See POSNER, *supra* note 230, at 156-57; Bruff, *supra* note 224, at 331; Dreyfuss, *supra* note 202, at 379; cf. Revesz, *supra* note 266, at 1163 (arguing that because they come from narrow segments of the profession and only adjudicate cases inside their areas of specialization, specialist judges are less likely than their generalist colleagues to be exposed to a wide range of legal issues).

²⁷⁹ Revesz, *supra* note 266, at 1157; see also POSNER, *supra* note 230, at 156.

²⁸⁰ See Letter from C. Wells Hall, III, *supra* note 273.

²⁸¹ Revesz, *supra* note 266, at 1157.

²⁸² *Id.* at 1159 n.188.

²⁸³ *Id.* at 1157; cf. Todd J. Tiberi, Comment, *Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?*, 54 U. PITT. L. REV. 861, 864-66 (1993) (describing a process of "legal Darwinism" in which the weaker arguments are weeded out, leaving the Court with only the stronger ones, ensuring a proper result).

²⁸⁴ Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 633 (1989); see also Letter from William F. Burke, Chair, N.Y. State Bar Ass'n, to Prof. Daniel J. Meador, Chair, ABA Standing Comm. on Fed. Judicial Improvements, and to Joseph F. Weis, Jr., Chair, Fed. Cts. Study Comm. (Jan. 9, 1990), available in LEXIS, Fedtax Library, TNT File,

an empirical data base, which the Court can use in fashioning its own decision.²⁸⁵

It is often asserted that in matters of tax law, uniformity often trumps decisional methodology.²⁸⁶ In Justice Brandeis's words, "it is more important that the applicable rule of law be settled than that it be settled right."²⁸⁷ Where circuits apply different rules, identical transactions are taxed differently depending upon which circuit's interpretations apply.²⁸⁸ Taxpayers in one circuit, thus, do not pay the same taxes as similarly situated persons in other circuits.²⁸⁹ Moreover, these distinctions create undue opportunities for forum shopping; taxpayers may choose to litigate tax consequences of a single transaction in any of three trial level courts, with appellate jurisdiction in two courts of appeals.²⁹⁰ Transactional planning also becomes difficult, particularly where a transaction occurs in more than one circuit.²⁹¹ Indeed, the quest for uniformity is a major factor relied upon by those who advocate expanded use of specialized courts.²⁹² Decisional incoherence breeds a loss of faith in the system's fairness and may prompt taxpayers to seek unlawful means of avoiding taxes.²⁹³

search term 90 TNT 15-12. Professor Meador describes the percolation argument as "a euphemism for incoherence" when it is applied in statutory interpretation cases (as opposed to constitutional questions). He argues that courts are bound to implement congressional intent without generating uncertainties over prolonged periods, and that Congress can always set the matter right if the judiciary misspeaks congressional will. Meador, *supra* at 633-34.

²⁸⁵ Revesz, *supra* note 266, at 1157; Tiberi, *supra* note 283, at 865-66.

²⁸⁶ See, e.g., Martin D. Ginsburg, *Making Tax Law Through the Judicial Process*, 70 A.B.A. J. 74, 74 (1984); Erwin N. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153, 1159-60 (1944); Jordan, *supra* note 228, at 749-50; cf. FRIENDLY, *supra* note 267, at 167; Revesz, *supra* note 266, at 1158 (describing some cases as "trivial conflicts of the 'whether to drive on the right or drive on the left' type," in which "[i]t makes little difference which side of the road we drive on as long as we all drive on the same side"). In *First Charter Financial Corp. v. United States*, 669 F.2d 1342, 1345 (9th Cir. 1982), the court stated that "[u]niformity among the circuits is especially important in tax cases to ensure equal and certain administration of the tax system."

²⁸⁷ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

²⁸⁸ Carter, *supra* note 272, at 900; Meador, *supra* note 284, at 618. Carter argues that the IRS's nonacquiescence policies contribute to disuniformity, despite the IRS's assertions to the contrary. Carter, *supra* note 272, at 900-906.

²⁸⁹ Tiberi, *supra* note 283, at 867.

²⁹⁰ Revesz, *supra* note 266, at 1116.

²⁹¹ Meador, *supra* note 284, at 618-19.

²⁹² Bruff, *supra* note 224, at 331.

²⁹³ Carter, *supra* note 272, at 11; Jordan, *supra* note 228, at 750.

Where there is a need simply for a rule, the emergent practice of the circuit courts to defer to IRS revenue rulings does not accomplish uniformity because the courts have adopted divergent protocols. Even if all of the appellate courts were to agree on one deference standard, however, there would at best be two rules, unless the Tax Court relented from its position. Until all courts adopt conforming deference standards or the Supreme Court issues a definitive ruling, dissonance will continue to describe the prevailing state.

VI. DEFINING AN APPROPRIATE STANDARD

Taxpayers who litigate issues that are addressed in revenue rulings are confronted with an onerous choice. If they opt for the generalist federal courts, their chances for success are profoundly diminished by the likelihood that the court will defer to the IRS. The Tax Court will consider taxpayer arguments on their merits but at the cost of an arguably pro-government bias.²⁹⁴ Deference practices are procedural yet they have a substantial impact on substantive resolution of tax disputes. It simply makes no sense to treat similarly situated taxpayers differently where they engage in identical transactions, and it is surprising that such divergent practices have been tolerated.

All courts should follow one uniform standard and the judges of the circuit courts should conform their diverse approaches. In light of the variety of directions in which the courts have been moving, however, it is highly unlikely that these judges could agree on a single rule.

A seemingly logical solution might entail the Tax Court relinquishing its non-deference stance and following the circuit courts. This result seems reasonable from a policy standpoint because in theory, the Tax Court is bound by applicable circuit court precedents. Although I believe that the Tax Court's position is the correct one,²⁹⁵ it may be that non-deference is now a relic of the past. The Tax Court cannot practically follow circuit court precedent, however, because there is no single standard, and the Tax Court would end up applying a variety of rules depending upon the court to which a particular case is appealable.

I believe that the issue of deference is best resolved by the Supreme Court. The plethora of diverse and conflicting approaches followed by the lower courts suggests a need for high court resolution. The issue has percolated long enough to show that the question is ripe for review and to provide the Court with the benefit of experiential data. Indeed, the Court has hinted of its

²⁹⁴ By choosing to litigate in the Tax Court, taxpayers also give up their right to a jury trial. For a discussion of the differences among the three trial level courts with jurisdiction over civil tax controversies, see Crimm, *supra* note 8.

²⁹⁵ See Galler, *supra* note 9, at 890-92.

willingness to consider the issue and should seriously consider resolving the matter at this time.

Absent judicial resolution, the deference issue could be resolved by prohibiting citation of revenue rulings in court, as authority for substantive arguments. Of course, there is no institutional incentive for the IRS to unilaterally and voluntarily suspend this practice, as the agency is likely to prevail whenever revenue rulings are cited. Therefore, legislative action would be necessary. Congress should consider enacting a rule as to revenue rulings that is similar to Internal Revenue Code section 6110(j), which now applies to letter rulings, stating simply that revenue rulings may not be used or cited as precedent.²⁹⁶

However the matter is resolved, standards of review must be uniform so that all taxpayers receive equal treatment regardless of domicile or choice of forum. Increased deference in the federal courts has fractured the foundational basis for concurrent jurisdiction and created an untenable situation for taxpayers involved in tax disputes with the government.

²⁹⁶ It is unlikely that such a statute would violate constitutional separation of powers principles. Like the *Federal Rules of Evidence*, such a rule would represent a congressionally enacted limitation on the materials that courts may consider in rendering decisions. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2793–94 (1993) (interpreting an evidentiary rule as it would any statute); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3.5, at 50 (2d ed. 1988) (stating that Congress has the authority to prescribe rules of procedure which Article III courts must apply).

