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Emerging Standards for Judicial Review of IRS Revenue Rulings

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EMERGING STANDARDS FOR JUDICIAL REVIEW OF IRS REVENUE RULINGS

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INTRODUCTION

The language of the Internal Revenue Code[1] is subject to continuous interpretation by courts and administrators. On a seemingly daily basis, the Treasury Department and the Internal Revenue Service (IRS) issue departmental positions on selected statutory provisions.[2] Treasury pronouncements most commonly take the form of regulations[3] and revenue rulings.[4]

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[1] I.R.C. §§ 1-9602 (1988, as amended).

[2] It is the policy of the IRS to publish all substantive and procedural rulings of importance or general interest. Treas. Reg. § 601.601(d)(1) (as amended in 1987).

[3] During 1991, the Treasury Department issued 104 income tax regulations: 43 final, 1 final and temporary, 16 temporary, 17 temporary and proposed, and 27 proposed regulations. Search of WESTLAW, FTX-FR database (Nov. 4, 1992) (general search for records containing the following terms: "treasury" & "regulation" & "internal revenue" & DA(1991)) (subsequent modifications of the general search on file with the *Boston University Law Review*).

[4] In 1991, the IRS issued 70 revenue rulings. 1991-2 C.B. at v. The IRS also issued 3003 letter rulings and 273 technical advice memoranda. Search of WESTLAW, FTX-WD database (Nov. 6, 1992) (general search for sum total of records entered into FTX-WD database during 1991).

Unlike revenue rulings, which are published for guidance to all taxpayers, letter rulings are issued only to individual taxpayers, and do not represent official interpretations of the IRS. Treas. Reg. § 601.201(a)(2) (as amended in 1983). Letter rulings interpret and apply the tax laws to specific sets of facts, and must be applied by district offices only with respect to the individual to whom the letters are issued. *Id.* § 601.201(l)(2). Technical advice memoranda are issued to assist IRS personnel in closing cases under examination and to maintain consistency among IRS districts. Treas. Reg. § 601.105(b)(5)(i)(a) (1967). Like letter rulings, technical advice memoranda express the IRS's views on the application of law, regulations, and judicial precedent to the facts of a specific case, *id.*, and must be applied by district offices only with respect to the individual under audit, *id.*

Regulations are issued in accordance with formal publication, notice, and comment procedures dictated by the Administrative Procedure Act (APA).[5] Revenue rulings, however, emerge through a process that takes place solely within agency confines.[6] Free from the burden of formal issuance procedures, the IRS may promulgate revenue rulings frequently and expeditiously. These pronouncements play a vital role in statutory administration by providing uniform guidelines for administrative enforcement and voluntary public compliance.[7] Courts have traditionally accorded less consideration to revenue rulings than to regulations construing statutory ambiguities. Although courts have repeatedly stated that revenue rulings do not have the force and effect of Treasury regulations,[8] the legal status of revenue rulings has not been characterized with consistency. Most courts have regarded rev-

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§ 601.105(b)(5)(vii)(a). Although they are available for public inspection, I.R.C. § 6110 (1988), letter rulings and technical advice memoranda may not be used or cited as precedent in administrative or judicial proceedings, *id.* § 6110(j)(3); Treas. Reg. § 301.6110-7(b) (1977).

[5] 5 U.S.C. §§ 551-559, 701-706 (1988); *see also* Treas. Reg. § 601.601(a)-(c), (d)(1) (as amended in 1987). The APA requires agencies to comply with publication, notice, and comment requirements only when they issue substantive, or legislative, regulations. Although notice and comment procedures are not mandated for interpretive regulations, the Treasury Department generally follows APA procedures when it issues both legislative and interpretive regulations. *See* MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE ¶ 3.02[3] (2d ed. 1991); Mitchell Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, 43 TAXES 756, 759 n.6 (1965); Paul F. Schmid, *The Tax Regulations Making Process—Then and Now*, 24 TAX LAW. 541, 541 (1971); *cf.* Treas. Reg. § 601.601(a)(2) (as amended in 1987) (stating that notice and comment procedures are followed "[w]here required by 5 U.S.C. 553 and in such other instances as may be desirable").

[6] *See* INTERNAL REVENUE SERV., CHIEF COUNSEL DIRECTIVE MANUAL (39)920, REVENUE RULING HANDBOOK (1988) [hereinafter REVENUE RULING HANDBOOK]. Prior to issuance, revenue rulings are reviewed at several levels within the Office of the Chief Counsel, and by the Chief Counsel himself, the Commissioner, and the Treasury Department. *Id.* ¶¶ 720-725.

[7] *See* Treas. Reg. § 601.601(d)(2)(iii) (as amended in 1987); *see also* REVENUE RULING HANDBOOK, *supra* note 6, ¶ 211.

[8] Dixon v. United States, 381 U.S. 68, 73 (1965); Helvering v. New York Trust Co., 292 U.S. 455, 468 (1934); Threlkeld v. Commissioner, 848 F.2d 81, 84 (6th Cir. 1988); Flanagan v. United States, 810 F.2d 930, 934 (10th Cir. 1987); Brook, Inc. v. Commissioner, 799 F.2d 833, 836 n.4 (2d Cir. 1986); Anselmo v. Commissioner, 757 F.2d 1208, 1213 n.5 (11th Cir. 1985); Strick Corp. v. United States, 714 F.2d 1194, 1197 (3d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984); Confederated Tribes v. Kurtz, 691 F.2d 878, 881 n.2 (9th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983); Stubbs, Overbeck & Assocs. v. United States, 445 F.2d 1142, 1146-47 (5th Cir. 1971); United States v. Eddy Bros., Inc., 291 F.2d 529, 531 (8th Cir. 1961); Xerox Corp. v. United States, 656 F.2d 659, 671 n.20 (Ct. Cl. 1981); Estate of Smith v. Commissioner, 73 T.C. 307, 310 (1979). The Internal Revenue Service agrees; it introduces each of its Cumulative Bulletins with the following statement: "Rulings and procedures reported in the Bulletin do not have the force and

enue rulings as representing merely the opinion of one party to litigation, deserving no special treatment.[9] A few courts have accorded revenue rulings greater weight than taxpayers' positions, generally on the basis of the issuing agency's substantive expertise.[10] Courts, however, have rarely considered themselves bound by revenue rulings.[11]

The traditional consensus among courts that they are not compelled to follow IRS revenue rulings may no longer be an accurate reflection of the law. Two recent Supreme Court decisions raise significant questions regarding the amount of deference owed to revenue rulings. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[12] a non-tax case involving Environmental Protection Agency (EPA) interpretive regulations, the Court held that courts must accept an agency's reasonable interpretation of an ambiguous statute administered by the issuing agency. Although the breadth of the *Chevron* holding has not yet been authoritatively delineated, a likelihood exists that courts are bound by reasonable agency interpretations even though such interpretations are set forth in formats less formal than regulations.[13] To complicate matters, the Supreme Court recently considered the effect of an IRS revenue ruling position without citing *Chevron*. In *Davis v. United States*,[14] the Court applied traditional canons of statutory construction (as they pertain to agency interpretations) and concluded that an IRS revenue ruling was entitled to "considerable weight."[15]

This Article attempts to rationalize *Davis* and, in such context, to comprehensively examine both the role of revenue rulings in tax administration and the weight accorded them in litigation. It also postulates reasons for the Supreme Court's puzzling omission of *Chevron* in *Davis*, and predicts how *Chevron* may apply to revenue rulings in light of *Davis*. Together, *Chevron* and *Davis* highlight a longstanding confusion regarding the status of revenue

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effect of Treasury Department Regulations." *E.g.*, 1991-1 C.B. at iii; *see also* REVENUE RULING HANDBOOK, *supra* note 6, ¶ 320.

[9] *See infra* notes 57-58 and accompanying text.

[10] *See infra* note 59 and accompanying text.

[11] The only circumstance in which a revenue ruling has been considered binding or possessing the force of law is in connection with reenactment of the underlying statute, where Congress has left unchanged the language construed in the revenue ruling. *See* First Nat'l City Bank v. United States, 557 F.2d 1379, 1384 (Ct. Cl. 1977); McGowan v. Commissioner, 67 T.C. 599, 612 (1976). Part IV.C.3 of this Article shows that the reenactment doctrine is based on fiction, with the consequence that courts import statutory status to revenue rulings without proof of congressional intent.

[12] 467 U.S. 837 (1984).

[13] *See, e.g.*, Wagner Seed Co. v. Bush, 946 F.2d 918, 922 (D.C. Cir. 1991) (holding that *Chevron* deference applies to an EPA clean-up order), *cert. denied*, 112 S. Ct. 1584 (1992). *But see* Doe v. Reivitz, 830 F.2d 1441, 1446 (7th Cir. 1987) (holding that *Chevron* deference does not apply to interpretive rules).

[14] 495 U.S. 472 (1990).

[15] *Id.* at 484.

rulings.[16] This confusion undoubtedly will be exacerbated if courts attempt to implement the *Davis* "rule" without first reconciling *Davis* with, and disentangling it from, *Chevron*.[17]

This Article begins by examining the justifications for—and the courts' traditional treatment of—revenue rulings. Part II analyzes the possible application of *Chevron* to revenue rulings. An argument is presented that *Chevron* deference should apply only to Treasury regulations issued in compliance with APA notice and comment procedures, and that such weight is rarely justifiable in the case of revenue rulings. Part III analyzes the weight given to revenue rulings in *Davis*. This part considers several possible explanations for *Davis*'s failure to cite *Chevron* and ultimately criticizes *Davis* for misstating or misapplying traditional statutory construction principles. Finally, in Part IV, the Article proposes an appropriate role for revenue rulings, namely to provide a basis for uniform enforcement of the nation's revenue statutes and to assist voluntary compliance. Because revenue rulings ought merely to notify taxpayers and administrators of official agency positions, courts should never accord them extraordinary treatment. To assure that *Chevron* and *Davis* do not cause courts to confer greater weight to revenue rulings, Congress should consider enacting legislation to define the limited status of such rulings.

I. WHAT ARE REVENUE RULINGS?

A. *Purposes of Revenue Rulings*

The Treasury Department describes a revenue ruling as "an official interpretation by the [Internal Revenue] Service that has been published in the Internal Revenue Bulletin."[18] Revenue rulings represent legal conclusions of the IRS based on stated facts,[19] and frequently set forth the IRS's preferred constructions of statutory phraseology.[20] A variety of sources influence the adoption of revenue rulings, including letter rulings to individual taxpay-

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[16] It is interesting to note that *Chevron* has been cited by the Tax Court only twice, in two cases decided fully eight years after the Supreme Court decided *Chevron*. Pepcol Mfg. Co. v. Commissioner, 98 T.C. 127 (1992); Georgia Fed. Bank v. Commissioner, 98 T.C. 105 (1992). Both cases involved regulations, not revenue rulings. In Peoples Federal Savings & Loan Ass'n v. Commissioner, 948 F.2d 289 (6th Cir. 1991), *rev'g* T.C.M. (P-H) ¶ 90,129 (1990), the Court of Appeals for the Sixth Circuit gently criticized the Tax Court for its lack of attention to *Chevron*. 948 F.2d at 299 n.6. It appears that the Sixth Circuit's opinion finally brought the Tax Court out of the pre-*Chevron* dark ages.

[17] One court recently applied the *Chevron* rule without considering *Davis*, and found itself constrained to accept a revenue ruling. Johnson City Medical Ctr. v. United States, 783 F. Supp. 1048 (E.D. Tenn. 1992). In light of the analysis presented in this Article, the *Johnson City* court's application of the *Chevron* rule to a revenue ruling was wrong.

[18] Treas. Reg. § 601.601(d)(2)(i)(a) (as amended in 1987); *see also* Rev. Proc. 92-1, 1992-1 I.R.B. 9, 12.

[19] Rev. Proc. 92-1, 1992-1 I.R.B. at 12.

[20] For example, Rev. Rul. 88-18, 1988-1 C.B. 402 decided whether "a savings and loan

ers,[21] technical advice to IRS district offices,[22] studies undertaken by the Office of the Associate Chief Counsel (Domestic),[23] court decisions, suggestions from tax practitioner groups, and publications.[24]

The revenue rulings program began in 1953,[25] in response to criticism from Congress and private practitioners that the nonpublication of rulings permitted favoritism, protected the use of influence, and put taxpayers at an unfair disadvantage in disputes with revenue agents.[26] Under the 1953 policy, which remains in effect,[27] the IRS regularly publishes its conclusions on a variety of substantive tax law issues.[28]

The IRS originally intended the revenue rulings program to serve three purposes. First, revenue rulings would be a vehicle through which the National Office could inform field personnel of precedents or guiding positions.[29] Second, the Internal Revenue Bulletin, in which revenue rulings are

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association or a building and loan association come[s] within the meaning of a 'bank and trust company' as that term is used in section 7507 of the Internal Revenue Code."

[21] A letter ruling is "a written statement issued to a taxpayer or his authorized representative by the [IRS] National Office which interprets and applies the tax laws to a specific set of facts." Treas. Reg. § 601.201(a)(2) (as amended in 1983); *see also* Rev. Proc. 92-1, 1992-1 I.R.B. at 12.

[22] "Technical advice" refers to "advice or guidance as to the interpretation and proper application of internal revenue laws, related statutes, and regulations, to a specific set of facts, furnished by the [IRS] National Office upon request of a district office in connection with the examination of a taxpayer's return or consideration of a taxpayer's return claim for refund or credit." Treas. Reg. § 601.105(b)(5) (1967); *see also* Rev. Proc. 92-2, 1992-1 I.R.B. 39, 41.

[23] The title of Associate Chief Counsel (Technical) recently changed to Associate Chief Counsel (Domestic). I.R.S. News Release IR-91-48, 1991-1 C.B. 760; *see also* Memorandum from Abraham N.M. Shashy, Jr., Chief Counsel (Apr. 18, 1991), *in* 91 TAX NOTES TODAY, May 13, 1991, Doc. 91-3864, *available in* LEXIS, Fedtax Library, TNT File [hereinafter Shashy Memorandum].

[24] Treas. Reg. § 601.601(d)(2)(v)(a) (as amended in 1987). Other sources for revenue rulings include Technical Coordination Reports, comments and suggestions from Treasury Department and IRS personnel, prior revenue rulings in need of modification or revocation, court decisions, interpretations of substantive tax law in general counsel memoranda, and periodic updating of statistical material that affects the rights of taxpayers (e.g., interest rates). REVENUE RULING HANDBOOK, *supra* note 6, ¶ 221.1.

[25] Prior to 1953, only selected rulings deemed to be of general interest were published. Mortimer M. Caplin, *Taxpayer Rulings Policy on the Internal Revenue Service: A Statement of Principles*, 20 N.Y.U. INST. ON FED. TAX'N 1, 30 (1962).

[26] Norman A. Sugarman, *Federal Tax Rulings Procedure*, 10 TAX L. REV. 1, 37 (1954).

[27] *See* Rev. Proc. 89-14, 1989-1 C.B. 814, 815.

[28] *Id.* at 815-16; Rev. Rul. 2, 1953-1 C.B. 484, 484-85.

[29] Rev. Rul. 2, 1953-1 C.B. at 484; *see also* 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).

published, would provide a permanent, indexed reference to IRS positions.[30] Third, revenue rulings would enable the public to review interagency communications that the IRS uses as precedents or guides.[31] By 1989, the IRS described the purpose of its revenue rulings program simply as promoting uniform application of the tax laws and assisting taxpayers in attaining maximum voluntary compliance.[32] By providing uniformity and predictability, revenue rulings make it easier for taxpayers to compute their taxes correctly,[33] and reduce the incidence of tax-related controversies and litigation.[34]

Two of the accuracy-related penalty rules,[35] added to the Code during the 1980s,[36] provide the IRS with a greater incentive than ever before to issue revenue rulings. These penalty provisions impose reporting obligations on many taxpayers who take tax return positions that contravene IRS revenue rulings. I.R.C. § 6662 imposes a penalty of twenty percent on understatements of tax attributable, *inter alia*, to (1) negligence or disregard of rules or regulations, or (2) a substantial understatement of tax.[37] The Code provides that a revenue ruling is a rule or regulation, "careless, reckless, or intentional" disregard of which may result in a penalty.[38] Thus, 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.[39] Because the taxpayer

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[30] Rev. Rul. 2, 1953-1 C.B. at 484.

[31] *Id.*

[32] Rev. Proc. 89-14, 1989-1 C.B. 814, 814-15.

[33] *See* Caplin, *supra* note 25, at 7; Rogovin, *supra* note 5, at 765; Sugarman, *supra* note 26, at 5.

[34] Revenue rulings also provide certainty, enabling taxpayers to plan their affairs with advance knowledge of government positions. *See* Caplin, *supra* note 25, at 7; Rogovin, *supra* note 5, at 765.

[35] The term "accuracy related penalty" became a part of the Code in 1989, when Congress repealed provisions that had imposed penalties for negligent underpayment of tax, substantial understatement of income tax, substantial valuation overstatement, substantial overstatement of pension liabilities, and substantial estate or gift tax valuation overstatement, and replaced them with a single accuracy-related penalty. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7721, 103 Stat. 2106, 2395-97 [hereinafter OBRA 1989]. OBRA 1989, *see supra*, provided for coordination of the five penalties that had previously existed separately, but did not substantially change the substantive rules applicable to each. *See* H.R. REP. NO. 247, 101st Cong., 1st Sess. 1387-94 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1906, 2857-64.

[36] Tax Reform Act of 1986, Pub. L. No. 99-514, § 1503(a), 100 Stat. 2085, 2742 (negligence or disregard penalty); Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 323(a), 96 Stat. 324, 613-14 (substantial understatement penalty).

[37] I.R.C. § 6662(a), (b) (Supp. II 1990).

[38] *Id.* § 6662(c).

[39] *See* Treas. Reg. § 1.6662-3(b)(2) (1991). A contrary position may be taken so long as it has a realistic possibility of being sustained on its merits. *Id.* The penalty may be avoided if the relevant facts affecting the contrary position are disclosed, the position

faces significant financial consequences for failing to comply with regulations or revenue rulings, but does not face harmful consequences for failing to comply with, for example, IRS litigating positions or conclusions stated in letter rulings, the negligence or disregard penalty provisions provide the government with an incentive to issue regulations and revenue rulings.

Similarly, the taxpayer may reduce or avoid a penalty for a substantial understatement of tax if she discloses on her tax return the relevant facts affecting a questionable item's tax treatment, or if there is "substantial authority" for her position.[40] 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.[41] Revenue rulings are among the types of authorities that may be considered, although many other authorities, such as scholarly articles, are not considered.[42] Thus, where the only existing authority is a revenue ruling, taxpayers are faced with an onerous choice: disclose the transaction to the IRS, effectively inviting an audit,[43] risk a substantial penalty, or comply with the IRS position. The substantial understatement penalty provisions therefore induce the government to issue regulations and revenue rulings. As in the case of the negligence or disregard penalty, the relative procedural ease of issuing revenue rulings may encourage the government to issue its positions in the form of revenue rulings.

B. *Procedures for Issuing Revenue Rulings*

Revenue rulings are drafted and reviewed by attorneys in the office of the Chief Counsel.[44] After approval by the Chief Counsel, the Commissioner

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represents a good faith challenge to the validity of the rule or regulation, the position is not frivolous, and the taxpayer maintains adequate books and records or is otherwise able to substantiate the items. *Id.* § 1.6662-3(c)(1).

[40] I.R.C. § 6662(d)(2)(B) (Supp. II 1990).

[41] Treas. Reg. § 1.6662-4(d)(3)(i) (1991).

[42] *Id.* § 1.6662-4(d)(3)(iii).

[43] Of course, if the taxpayer's position prevails at the administrative level or in court, no penalty is owed. However, the potential costs of an audit and litigation may be significant enough to discourage taxpayers from taking positions contrary to revenue rulings, even when these positions are tenable.

[44] The Secretary of the Treasury has authority to "prescribe all needful rules and regulations" for the enforcement of the Internal Revenue Code, I.R.C. § 7805(a) (1988), but has delegated authority to issue revenue rulings to the Commissioner of Internal Revenue. Treas. Reg. § 301.7805-1(a) (1967); Treas. Reg. § 601.601(a)(1), (d)(2)(i)(a) (as amended in 1987). Although the Assistant Commissioner (Technical) is designated by regulation to administer the revenue rulings program, Treas. Reg. § 601.601(d)(2)(vii)(a), a 1982 reorganization transferred the rulings function to the Office of Chief Counsel. Announcement 82-58, 1982-16 I.R.B. 16; *see also* I.R.S. News Release IR-82-8, *reprinted in Egger Discusses Proposed IRS Organizational Changes*, 14 TAX NOTES 213 (1982). Currently, responsibilities are divided among the Associate Chief Counsel (Domestic), Associate Chief Counsel (International), and Associate Chief Counsel (Employee Benefits

and the Treasury's Assistant Secretary (Tax Policy) review the proposed rulings.[45] Revenue rulings are published in the Internal Revenue Bulletin without prior notice to the public. The IRS does not ordinarily solicit public comments.[46]

The procedure is markedly different when Treasury regulations are issued. The APA[47] requires agencies issuing substantive, or legislative, regulations[48] to provide notice to the public prior to issuance, and to accord the public an opportunity to participate in the rulemaking process by submitting written comments.[49] Final regulations must be published in the Federal Register prior to their effective date,[50] along with a general statement describing the

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and Exempt Organizations). *See generally* Shashy Memorandum, *supra* note 23. The Assistant Treasury Secretary (Tax Policy) must approve each revenue ruling prior to issuance. REVENUE RULING HANDBOOK, *supra* note 6, ¶¶ 724-725; *see also infra* note 45.

For a general overview of the review process, *see* REVENUE RULING HANDBOOK, *supra* note 6, ¶¶ 720-725.

[45] *Id.* ¶¶ 724-725. The Assistant Secretary (Tax Policy) reviews revenue rulings on behalf of the Treasury Secretary. Treas. Dep't Order No. 111-2, 1981-1 C.B. 698, 698-99; *see also* Organization and Functions of the Office of the Assistant Secretary (Tax Policy), 55 Fed. Reg. 42,532 (1990).

Treasury participation in publication of revenue rulings apparently is a relatively modern addition to the process. *See* Biddle v. Commissioner, 302 U.S. 573, 582 (1938) (rulings issued in 1925, 1926, and 1928 without Treasury approval); Sims v. United States, 252 F.2d 434, 438 (4th Cir. 1958) (ruling issued in 1928 without Treasury approval), *aff'd*, 359 U.S. 108 (1959); Browne v. Commissioner, 73 T.C. 723, 731 (1980) (Hall, J., concurring) (revenue ruling issued in 1962 without Treasury approval); *accord* Rogovin, *supra* note 5, at 766 n.49 (1965) (Treasury review only when policy issues are presented); *see also* Caplin, *supra* note 25, at 27-28 (revenue rulings reviewed in Office of Assistant Commissioner (Technical) and sometimes in Office of Chief Counsel); Norman A. Sugarman, *Tax Ruling Procedure Revisited*, 9 WM. & MARY L. REV. 1011, 1032-33 (1968) (revenue rulings reviewed in Office of Assistant Commissioner (Technical) and sometimes in Office of Chief Counsel).

[46] 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 1987).

[47] 5 U.S.C. §§ 551-559, 701-706 (1988).

[48] Legislative rules are issued by federal agencies pursuant to specific statutory authority. *E.g.*, I.R.C. § 1502 (1988) ("The Secretary shall prescribe such regulations as he may deem necessary.").

[49] 5 U.S.C. § 553(b), (c) (1988). The agency may offer the opportunity to present comments orally. *Id.* § 553(c).

[50] *Id.* § 553(b), (d). While regulations generally must be published at least thirty days prior to their effective date, the thirty day requirement may be waived for good cause found and published with the rule. *Id.* § 553(d). The thirty day requirement allows affected taxpayers an opportunity to prepare for the rule or to take other action which its adoption may necessitate.

basis and purpose of the regulations[51] and responses to objections and suggestions received from the public.[52] Although the APA does not require agencies to follow these notice and comment procedures when issuing interpretive rules,[53] the Treasury Department customarily follows the APA procedures with respect to both legislative and interpretive regulations.[54]

C. *Traditional Judicial Treatment of Revenue Rulings*

1. Revenue Rulings Generally Not Binding

Prior to the Supreme Court's decisions in *Chevron*[55] and *Davis*,[56] the standard for judicial review of revenue rulings was reasonably clear. The Tax Court consistently regarded revenue rulings as nothing more than the IRS's

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[51] *Id.* § 553(c).

[52] *See* ACLU v. FCC, 823 F.2d 1554, 1581 (D.C. Cir. 1987) (observing that the APA obligates the FCC to respond to all significant comments), *cert. denied*, 485 U.S. 959 (1988); Rodway v. United States Dep't of Agric., 514 F.2d 809, 817 (D.C. Cir. 1975) (observing that the failure to solicit comments on proposed regulations is fatal to their validity).

[53] 5 U.S.C. § 553(b)(A) (1988). Interpretive regulations are issued by federal agencies under their general authority to interpret and enforce a statute. Although it is common to find general rulemaking power in a statute, *e.g.*, I.R.C. § 7805(a) (1988) ("[T]he Secretary shall prescribe all needful rules and regulations for the enforcement of this title . . . ."), interpretive rulemaking power may also be implied by an agency's power of enforcement. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976). *See generally* KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7:8-7:11 (1979) (distinguishing interpretive and legislative rules).

It has generally been assumed that Treasury regulations adopted pursuant to I.R.C. § 7805(a) are interpretive, while Treasury regulations adopted pursuant to specific delegations of rulemaking authority are legislative. *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); Brown v. United States, 890 F.2d 1329, 1336 (5th Cir. 1989); *see also* Ellsworth C. Alvord, *Treasury Regulations and the Wilshire Oil Case*, 40 COLUM. L. REV. 252, 259-62 (1940). However, Professor Michael Asimow recently suggested that this distinction is out of line with non-tax precedents, and should be reexamined. Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX LAW. 343, 354 n.55, 358 n.75 (1991).

Revenue rulings, which have been called the "classic example" of interpretive rules, are always exempt from APA notice and comment procedures. 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).

[54] *See* Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 521, 524-25 (1977); Rogovin, *supra* note 5, at 759 n.6; Schmid, *supra* note 5, at 541; *cf.* Treas. Reg. § 601.601(a)(2) (as amended in 1987) (mandating that notice and comment procedures be followed where required by APA and "in such other instances as may be desirable").

[55] 467 U.S. 837 (1984).

[56] 495 U.S. 472 (1990).

position with respect to specific factual situations or statutory ambiguities and viewed rulings as merely the contention of one litigating party.[57] Most courts agreed with the Tax Court, and did not regard revenue rulings either as substantive authority or as binding on them.[58]

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[57] *E.g.*, Stark v. Commissioner, 86 T.C. 243, 250-51 (1986); Crow v. Commissioner, 85 T.C. 376, 389 (1985); Browne v. Commissioner, 73 T.C. 723, 731 (1980) (Hall, J., concurring); Estate of Lang v. Commissioner, 64 T.C. 404, 406-07 (1975), *aff'd in part and rev'd in part*, 613 F.2d 770 (9th Cir. 1990).

Exceptions to the Tax Court's position are rare. For example, in two cases the court stated that revenue rulings "may be helpful in interpreting a statute and may be considered on their own intrinsic merit and persuasiveness or lack thereof." Twin Oaks Community, Inc. v. Commissioner, 87 T.C. 1233, 1252 (1986); Reinhardt v. Commissioner, 85 T.C. 511, 520 (1985). Notably, Judge Parker authored both opinions. *Cf.* Knowlton v. Commissioner, 84 T.C. 160, 165 (1985) ("While revenue rulings are not binding upon us, . . . we are entitled to utilize such rulings as an aid to interpretation."), *aff'd*, 791 F.2d 1506 (11th Cir. 1986).

In his concurring opinion in Knapp v. Commissioner, 90 T.C. 430, 442 (1988) (Whitaker, J., concurring), *aff'd*, 867 F.2d 749 (2d Cir. 1989), Judge Whitaker suggested that revenue rulings might rise to the level of a statute when there is evidence of "a consistent and longstanding administrative position with prior congressional or judicial approval." *Id.* at 442. This rare assertion is questionable. *See infra* notes 207-32 and accompanying text.

[58] *E.g.*, *2d Circuit*: Canisius College v. United States, 799 F.2d 18, 22 n.8 (2d Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987). The court's statement that "statutory interpretation as reflected in a revenue ruling does not have the force of law and is of little aid in interpreting a tax statute," *id.*, directly contradicts prior decisions by the same court. *See*, *e.g.*, Brook, Inc. v. Commissioner, 799 F.2d 833, 836 n.4 (2d Cir. 1986) ("some weight" given to revenue ruling); Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1411 (2d Cir. 1985) ("Revenue rulings issued by the IRS 'are entitled to great deference, and have been said to 'have the force of legal precedents.' ' " (quoting Fred H. McGrath & Son, Inc. v. United States, 549 F. Supp. 491, 493 (S.D.N.Y. 1982) (quoting Dunn v. United States, 468 F. Supp. 991, 993 (S.D.N.Y. 1979)))), *cert. dismissed*, 474 U.S. 1113 (1986). *But see* Miller v. Commissioner, 327 F.2d 846, 850 (2d Cir.) (stating that 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). The court's most recent opinion follows *Amato* rather than the more recent *Canisius College* and *Brook* decisions. In Salomon Inc. v. United States, 976 F.2d 837, 841 (2d Cir. 1992), the Court of Appeals for the Second Circuit gave precedential weight to an IRS revenue ruling that the court regarded as reasonable and consistent with the Code. It is difficult to reconcile the inconsistencies among the various Second Circuit opinions.

3d Circuit: Bencivenga v. Western Pa. Teamsters & Employers Pension Fund, 763 F.2d 574, 580 (3d Cir. 1985); Becker v. Commissioner, 751 F.2d 146, 149 (3d Cir. 1984). *But see* 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).

4th Circuit: Oxford Orphanage, Inc. v. United States, 775 F.2d 570, 575 n.9 (4th Cir. 1985). The court suggested that a revenue ruling position may take on the force of law if the statute which it interprets is reenacted by Congress and the revenue ruling is

2. Exceptions to General Consistency in the Treatment of Revenue Rulings: Deference Premised on Agency Expertise

Only a few courts gave revenue rulings special weight or consideration, but these courts generally agreed that revenue rulings were never binding. Agency expertise constituted the primary basis for special deference to revenue rulings because revenue rulings were deemed to "express the studied view of the agency whose duty it is to carry out the statute."[59] Why agency

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expressly called to congressional attention. *Id.* *But see infra* notes 233-54 and accompanying text.

5th Circuit: Frysinger v. Commissioner, 645 F.2d 523, 525 (5th Cir. Unit B May 1981); Stubbs, Overbeck & Assocs., Inc. v. United States, 445 F.2d 1142, 1146-47 (5th Cir. 1971). In several other opinions, the Court of Appeals for the Fifth Circuit has accorded weight or deference to revenue rulings on the basis that they reflect the studied views of administrators of the tax code. *E.g.*, Foil v. Commissioner, 920 F.2d 1196, 1201 (5th Cir. 1990); United States Trust Co. v. IRS, 803 F.2d 1363, 1370 (5th Cir. 1986). While varying approaches within the same circuit are not unusual, *see, e.g.*, Second Circuit decisions discussed *supra* in this note, the Fifth Circuit's inconsistencies are notable because the Tax Court's persistent non-deference position stems in large measure from the *Stubbs* decision, which the Fifth Circuit apparently does not consider controlling. A recent search of the WESTLAW, FTX-TCT database demonstrated that the Tax Court cited *Stubbs* 54 times between 1971 and 1991, despite the Fifth Circuit's non-adherence to *Stubbs*.

6th Circuit: Disabled Am. Veterans v. Commissioner, 942 F.2d 309, 314 (6th Cir. 1991). *But see* Progressive Corp. v. United States, 970 F.2d 188, 194 (6th Cir. 1992) (revenue rulings " 'are entitled to great deference, and have been said to 'have the force of legal precedents' ' " (quoting *Amato*, 773 F.2d at 1411 (quoting Fred H. McGrath & Son, Inc. v. United States, 549 F. Supp. 491, 493 (S.D.N.Y. 1982)))).

7th Circuit: Kaiser v. United States, 262 F.2d 367, 370 (7th Cir. 1958), *aff'd*, 363 U.S. 299 (1960). *But see* Carle Found. v. United States, 611 F.2d 1192, 1195 (7th Cir. 1979) (giving weight to revenue rulings), *cert. denied*, 449 U.S. 824 (1980).

8th Circuit: Mercantile Bank & Trust Co. v. United States, 441 F.2d 364, 368 (8th Cir. 1971). *But see* Musco Sports Lighting, Inc. v. Commissioner, 943 F.2d 906, 908 (8th Cir. 1991) (stating that "reliance on Revenue Rulings for guidance in interpreting a statute is not improper"); United States v. Hall, 398 F.2d 383, 387 (8th Cir. 1968) (noting that the value of ruling that is neither contemporaneous nor of long standing is limited).

10th Circuit: Flanagan v. United States, 810 F.2d 930, 934 (10th Cir. 1987); Stahmann Farms, Inc. v. United States, 624 F.2d 958, 960 (10th Cir. 1980).

[59] Anselmo v. Commissioner, 757 F.2d 1208, 1213 n.5 (11th Cir. 1985), *aff'g* 80 T.C. 872 (1983); *see also*: *2d Circuit*: *Brook, Inc.*, 799 F.2d at 836 n.4. *But see Canisius College*, 799 F.2d at 22 n.8 (finding revenue rulings "of little aid in interpreting a tax statute").

5th Circuit: *Foil*, 920 F.2d at 1201; *United States Trust Co.*, 803 F.2d at 1370 n.9. *But see Stubbs*, 445 F.2d at 1146-47 (observing that a revenue ruling is "merely the opinion of a lawyer in the agency" and "is not binding on the Secretary or the courts"); *supra* note 58.

9th Circuit: 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). *But see* Idaho Power Co. v.

expertise should lead to judicial deference has rarely been explained. Three possible explanations 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.[60] Second, the practical knowledge of administrators,[61] gained from their ongoing familiarity with regulated industries may justify deference.[62] 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.[63]

While the IRS undoubtedly employs many intelligent, experienced, and accomplished individuals, it is far from clear that the individual or collective dexterity of this group distinguishes it from tax practitioners in the private sector. To accord special consideration to the IRS because its employees have superior skills gives the government an unwarranted advantage with no literal basis because, in the logical extreme, the same people comprise the public and private sectors. Indeed, the entrances to the Treasury and IRS buildings in Washington might be described figuratively, if not literally, as revolving doors, considering the numbers of professionals who pass through those portals on their way from private practice to government service, and then pass through once again as they return to the private sector.[64]

Commissioner, 477 F.2d 688, 695 n.10 (9th Cir. 1973) (finding a revenue ruling merely the opinion of an IRS lawyer), *rev'd on other grounds*, 418 U.S. 1 (1974).

11th Circuit: Knowlton v. Commissioner, 791 F.2d 1506, 1509 (11th Cir. 1986).

[60] *See generally* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 577-78 (1985).

[61] *See* Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 ADMIN. L.J. 255, 258 (1988); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514; *see also* International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 566 n.20 (1979); Samson v. United States, 144 F. Supp. 620, 629 (S.D.N.Y 1956).

[62] *See* Byse, *supra* note 61, at 258; Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283 (1986); *see also Watts*, 703 F.2d at 350 n.19 (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, 300-01 (9th Cir. 1982) (observing that revenue rulings indicate "the trend of opinion among administrators experienced with the tax laws"). In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), the Supreme Court deferred to procedural rules adopted by the Atomic Energy Commission in connection with the licensing of nuclear reactors. The Court reasoned that administrators are familiar with regulated industries, and are in a better position than the courts or Congress to design procedures that accommodate the peculiarities of such industries. *Id.* at 524-25.

[63] *See* Diver, *supra* note 60, at 574.

[64] During the first six months of 1992, the press reported the following high level appointments:

Treasury: Fred T. Goldberg, Commissioner of Internal Revenue, was appointed Assistant Secretary (Tax Policy). Prior to serving as Commissioner, Goldberg was a partner at Skadden, Arps, Slate, Meagher & Flom. Robert D. Hershey, Jr., *Justice Dept. Aide is*

Private practitioners who spend their careers representing clients in particular industries or who specialize in specific areas of tax law may have a

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Named to Be IRS Commissioner, N.Y. TIMES, Jan. 25, 1992, at 37. Alan J. Wilensky, a partner at Dorsey & Whitney, was named Deputy Assistant Secretary (Tax Policy). *Appointments*, WASH. POST, Mar. 16, 1992, at F8. Gary J. Gasper, an attorney at Sidley & Austin, was named Senior Advisor to the Assistant Secretary (Tax Policy). Rita L. Zeidner, *Treasury, IRS Announce Appointments*, 54 TAX NOTES 1461 (1992). Judith C. Dunn, an Attorney-Adviser with the Treasury Department, was named Deputy Tax Legislative Counsel for Regulatory Affairs. Prior to joining the government, Dunn was a partner at Ropes & Gray. *Judith Dunn Named Deputy Tax Legislative Counsel for Regulatory Issues*, DAILY REP. EXECUTIVES, Mar. 20, 1992, at G-9. Mitchell Rappaport, an attorney with the law firm of Perkins Coie, was appointed Attorney-Advisor in the Office of Tax Legislative Counsel. Prior to entering private practice, Rappaport worked in the IRS Office of Chief Counsel. *Former IRS Official to Join Treasury Office of Tax Legislative Counsel*, DAILY REP. EXECUTIVES, June 23, 1992, at D-65.

IRS: Shirley D. Peterson, Assistant Attorney General, Department of Justice, Tax Division, was appointed Commissioner of Internal Revenue. Prior to serving in the Justice Department, Peterson was a partner at Steptoe & Johnson. Hershey, *supra*, at 37. Frances M. Horner, an associate at Covington & Burling, was named Assistant to the Commissioner. *Appointment of Horner as Assistant to IRS Commissioner Announced*, DAILY REP. EXECUTIVES, Mar. 24, 1992, at G-5.

During the same six month period, the following departures from high level positions were reported:

Treasury: Kenneth W. Gideon, Assistant Secretary (Tax Policy), became a partner at Fried, Frank, Harris, Shriver & Jacobson. *Executive Changes*, N.Y. TIMES, Feb. 7, 1992, at D3. Philip D. Morrison, International Tax Counsel, became a partner at Baker & McKenzie. *Treasury Department International Tax Counsel Morrison to Join Baker & McKenzie*, DAILY REP. EXECUTIVES, June 5, 1992, at D-83. Thomas Terry, Benefits Tax Counsel, joined the law firm of Pillsbury, Madison & Sutro. *Evelyn Petschek Named Treasury Benefit Tax Counsel*, DAILY REP. EXECUTIVES, Jan. 21, 1992, at G-7. Gregory Jenner, Special Assistant, Assistant Secretary (Tax Policy), entered private practice with the law firm of McDermott, Will & Emery. *Special Assistant to Assistant Secretary for Tax Policy Jenner Leaving Post May 30*, DAILY REP. EXECUTIVES, May 20, 1992, at D-81. David Walton, an Attorney-Adviser in the Office of Chief Counsel, joined the law firm of Jones, Hall, Hill & White. *Walton to Resign Treasury Post to Join Private Firm*, DAILY REP. EXECUTIVES, Apr. 14, 1992, at G-3.

IRS: Michael J. Murphy, Deputy Commissioner, became Executive Director of Tax Executives Institute, Inc. *See* Rita L. Zeidner, *Former IRS Official Murphy Tries on New Hat at TEI*, 55 TAX NOTES 300 (1992).

See also Paul Streckfus, *Slowing the Revolving Door at IRS and Treasury*, 53 TAX NOTES 496, 496-97 (1991) (suggesting reforms to curb the "potential for mischief" caused by high turnover at the IRS and Treasury); Letter from Donald E. Osteen, Deputy Assistant Chief Counsel (Corporate) to Lawrence B. Gibbs, former Commissioner of Internal Revenue (Jan. 8, 1990), *reprinted in IRS' Osteen Says Service is Hiring Quality Attorneys*, 46 TAX NOTES 229 (1990) [hereinafter Osteen Letter]; *cf.* Jill Abramson, *Ex-Tax Collectors Help Foreign Firms Fight U.S. Efforts to Get More Funds*, WALL ST. J., Oct. 18, 1991, at A16 (observing that government may be "outgunned" by some of its

higher degree of practical knowledge than the IRS staff.[65] Several recent and notable incidents reflect the benefits of participation by these individuals in the formation of IRS policies, and illustrate that the IRS is not always able, on its own, to accurately assess the impact of its positions.

During 1990, the Treasury Department proposed regulations interpreting the statutory requirement[66] that S corporations may issue only one class of stock.[67] The regulations generated an abundance of critical commentary, most of it arguing that the drafters had gravely underestimated the repercussions of the proposed rules.[68] The IRS ultimately withdrew the regulations,

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most skilled and experienced former employees, who are representing foreign firms in complex transfer pricing controversies).

The phenomenon is not unique to the Treasury Department. Thomas Barr, a partner at Cravath, Swaine & Moore, who for thirteen years supervised the defense of IBM in a now infamous antitrust action, has described the government's changing cast of characters as a major problem in the litigation. According to Barr, "Just as a [Justice Department] lawyer got up to speed on the case, he would quit to enter private practice, and the educational process would begin again." Stephanie B. Goldberg, *Then and Now: 75 Years of Change*, A.B.A. J., Jan. 1990, at 56, 61.

Government service is viewed by many as a stepping stone toward a position in the private sector. For example, IRS Deputy Assistant Chief Counsel (Corporate) Donald E. Osteen has noted that adding "a high quality entry" to one's resume is among the primary motivations for taking a position with the IRS at a junior level or as Chief Counsel. Osteen Letter, *supra*, at 229. Mr. Osteen has also described the competition among private firms to hire IRS attorneys:

> Despite the problems caused at every firm by lateral hiring, each year there is a bidding war among top law firms and accounting firms for many of our attorneys who are finishing their commitments to us. If we were to drop our commitment period from four years to two years, you guys in the private sector would be breaking our doors down.

Id.

[65] *See* Craig W. Friedrich, *S Corporation One-Class-of-Stock Regulations Reissued: The Service Backs Off*, 19 J. CORP. TAX'N 3 (1992) (expressing concern over "the lack of familiarity with the real world that is pandemic inside the Washington Beltway"); *cf.* Abramson, *supra* note 64, at A16. Abramson reports on the current popularity of former high level IRS and Treasury employees among foreign firms engaged in complex transfer pricing controversies with U.S. tax authorities. Although several individuals interviewed for the article suggest that the IRS is outgunned by its former colleagues, one current IRS official states that the playing field has been leveled by the economic downturn, which has helped the IRS to recruit more experienced attorneys. He adds that "the fact that our alumni are good attorneys now must mean they must have been good when they were here [with the government]." Abramson, *supra* note 64, at A16.

[66] I.R.C. § 1361(b)(1)(D) (1988).

[67] Prop. Treas. Reg. § 1.1361-1(b) to -1(l), 55 Fed. Reg. 40,870, 40,872 (1990).

[68] *See, e.g.*, Richard M. Lipton, *The Proposed One Class of Stock Regulations: A First-Class Problem*, 49 TAX NOTES 695 (1990); *Comments Concerning Proposed Regulations under Section 1361(b)(1)(D) of the Internal Revenue Code of 1986*, A.B.A. SEC. TAX'N (1991), *in* 91 TAX NOTES TODAY, Mar. 7, 1991, Doc. 91-1414, *available in* LEXIS, Fedtax Library, TNT File; *Report on Proposed Subchapter S One Class of Stock Regula-*

and replaced them the following year with rules that incorporated the public comments.[69]

In 1992, the IRS issued proposed guidelines to assist its agents in determining whether corporate sponsorship payments received by exempt organizations should be treated as taxable income or nontaxable contributions.[70] The IRS did not propose the guidelines in the form of a regulation, revenue ruling, or IRS manual transmittal. Instead, a new procedure was inaugurated under which the agency's tentative views are released to the public along with an invitation for comments, which will be considered when the guidelines are put into final form.[71] According to one IRS official, the new procedure takes into account the fact that "the IRS is not all-knowing."[72]

Exercises like these reveal that the IRS, while proficient, is not omniscient. In many instances, the final products will be the result of a joint effort between the IRS and interested persons in the private sector.[73] Indeed, the IRS's request for comments on its corporate sponsorship proposals reflected

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tions, N.Y. ST. B. ASS'N TAX SEC. (1991), *in* 91 TAX NOTES TODAY, Mar. 19, 1991, Doc. 91-1925, *available in* LEXIS, Fedtax Library, TNT File; Letter from Prof. Martin D. Ginsburg to IRS (Jan. 3, 1991), *in* 50 TAX NOTES 195 (1991). According to one commentator:

> These regulations seemingly did not look to the purpose or function of the statutory requirement, to any notion of relative simplicity as desirable in the tax law, to the need for predictability that one's S election would hold (a relative to simplicity), or to common sense (a term that when referring to the current state of U.S. income tax law does not require all that much).

Friedrich, *supra* note 65, at 4.

[69] Initially, the Treasury Department addressed public comments relating only to retroactivity by announcing that final regulations would apply prospectively. I.R.S. News Release IR-91-25 (Feb. 12, 1991). A substantially revised version, which addressed the broader concerns of the public, later replaced the 1990 proposals. Prop. Treas. Reg. § 1.1361-1(b) to -1(l), 56 Fed. Reg. 38,391 (1991). Final rules were issued on May 29, 1992. T.D. 8419, 1992-27 I.R.B. 12.

[70] I.R.S. Announcement 92-15, 1992-5 I.R.B. 51.

[71] Julianne MacKinnon & Paul Streckfus, *EO Conference Focuses on Sponsorship, Hospitals, UBIT*, 54 TAX NOTES 1318, 1318 (1992); *see also* Juliann Avakian-Martin, *IRS Faces Tough Crowd at Hearing on Corporate Sponsorship Guidelines*, 56 TAX NOTES 410, 410 (1992) (reporting that the IRS sought public commentary "so that they could better familiarize themselves with the range of factual situations involved in the area").

[72] MacKinnon & Streckfus, *supra* note 71, at 1318 (quoting Marcus S. Owens, Director, Exempt Organizations Technical Division). The IRS extended the public comment period in response to requests by potentially affected charities, which "expressed a desire to work with the Service on this matter." I.R.S. Announcement 92-58, 1992-15 I.R.B. 54.

Without expressing his opinion, Mr. Owens acknowledged that the notice and comment procedure might elevate the final guidelines to "baby regs," with the precedential status of regulations. MacKinnon & Streckfus, *supra* note 71, at 1318.

[73] *See also infra* notes 129-39 and accompanying text, regarding the value of public commentary.

the agency's own appraisal of its substantive expertise, as well as its recognition that a better rule could result from the participation of practitioners outside the government.

Another possible explanation for judicial deference based on agency expertise might be the agency's proficiency in construing statutes. The overlap of personnel comprising the public and private sectors in the area of tax law, however, suggests a lack of qualitative differences in skills. Surely, the IRS's inherent ability to interpret ambiguous statutory language is neither greater nor less than that of those outside of the government. Moreover, the revenue collection function of the IRS makes it a non-neutral player; in cases of doubt it should be expected "naturally and properly [to] choose[ ] a construction most favorable to the collection of revenue."[74] Private practitioners are also biased, as they must advocate positions in their clients' best interests. But where both parties are—or, perhaps, are perceived as—prejudiced, the courts should provide neutral forums in which each side has an equal chance to persuade a judge of the correctness of its position. The court's decision, and not the agency construction, will then create the legal norm.

3. Exceptions to General Consistency in the Treatment of Revenue Rulings: Deference Premised on Other Factors

Very few cases have given special weight to revenue rulings for reasons other than IRS expertise. Two cases gave weight to rulings because a taxpayer relied on them. Estoppel-like reasoning prevented the IRS from adopting a position inconsistent with its own published interpretations.[75] These conclusions are debatable, however, in light of the IRS's ability to retroactively change its positions, for example, by retroactively revoking revenue rulings.[76]

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[74] 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."); Laurence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990) (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").

[75] Angst v. United States, No. 87-6013, 1987 WL 43373, at *18 n.13 (E.D. Wis. Aug. 31, 1987); Beneficial Found., Inc. v. United States, 8 Cl. Ct. 639, 645 (1985).

[76] *See* Dixon v. United States, 381 U.S. 68, 75 (1965) (holding that Commissioner had discretion to retroactively withdraw an acquiescence because of a mistake, regardless of taxpayer's detrimental reliance). *See generally*, BORIS I. BITTKER & LAWRENCE LOKKEN, 4 FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 110.5.4 (2d ed. 1992); David W. Ball, *Retroactive Application of Treasury Rules and Regulations*, 17 N.M. L. REV. 139 (1987).

Two other cases gave special weight to rulings, which "the Secretary or his delegate" issued pursuant to a statutory directive[77] to implement a particular provision of the Code.[78] It may be fair to assume from the statutory language that Congress intended IRS official positions to be treated with high regard. Finally, some courts[79] have concluded that the value of a revenue ruling is enhanced when it has been outstanding for a long period of time.[80]

Until recently, the District Court for the Southern District of New York was alone in holding that revenue rulings have the force of legal precedent, at least when they are reasonable and consistent with the Code.[81] The precedential basis for this position is questionable.[82] In 1992, the Courts of Appeals for the Second and Sixth Circuits adopted similar standards, without explanation.[83] Both circuits, however, had previously considered the issue, and their latest pronouncements on the weight of revenue rulings are inconsistent with their earlier ones.[84]

II. COURTS SHOULD NOT APPLY *CHEVRON* DEFERENCE TO REVENUE RULINGS

A. *Introduction to* Chevron

In *Davis v. United States*,[85] the Supreme Court affirmed an administrative

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[77] I.R.C. § 4216(b)(1) (1976) (current version at I.R.C. § 4216(b)(1) (1988)).

[78] Certified Stainless Servs., Inc. v. United States, 736 F.2d 1383, 1386 (9th Cir. 1984); Hamrick v. United States, 585 F.2d 1015, 1020 (Ct. Cl. 1978).

[79] In Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States I.R.S., 845 F.2d 139, 143 (7th Cir. 1988), the court regarded a revenue ruling as "persuasive authority" without providing a reason. The precedent cited in support of the court's treatment of the revenue ruling involved a Treasury regulation and not a revenue ruling. *See* Gehl Co. v. Commissioner, 795 F.2d 1324 (7th Cir. 1986).

[80] Farmers Coop. Co. v. Birmingham, 86 F. Supp. 201, 229 (N.D. Iowa 1949); Ridenour v. United States, 3 Cl. Ct. 128, 137 (1983); *cf.* United States v. Hall, 398 F.2d 383, 387 (8th Cir. 1968) (observing that a revenue ruling that is neither contemporaneous nor of long standing is limited in value). *See generally infra* notes 186-232 and accompanying text.

[81] Consolidated Edison Co. v. United States, No. 84 Civ. 1167, 1985 WL 484, at *2 (S.D.N.Y. Apr. 9, 1985); Wishner v. St. Luke's Hosp. Ctr., 550 F. Supp. 1016, 1019 (S.D.N.Y. 1982); Fred H. McGrath & Son, Inc. v. United States, 549 F. Supp. 491, 493 (S.D.N.Y. 1982); Dunn v. United States, 468 F. Supp. 991, 993 (S.D.N.Y. 1979); *cf.* Kinnie v. United States, 771 F. Supp. 842, 853-54 (E.D. Mich. 1991) (citing *Dunn*).

[82] The controlling precedent cited in support of the court's position is *Dunn*. *See, e.g.*, *Fred H. McGrath*, 549 F. Supp. at 491. The authorities from other judicial circuits cited in support of *Dunn*'s characterization of the legal status of revenue rulings, however, do not support the court's conclusion.

[83] *See* Salomon Inc. v. United States, 976 F.2d 837, 841 (2d Cir. 1992); Progressive Corp. v. United States, 970 F.2d 188, 194 (6th Cir. 1992).

[84] *See* cases cited *supra* note 58.

[85] 495 U.S. 472 (1990).

construction of I.R.C. § 170, which was set forth in an IRS revenue ruling. With respect to the weight of a revenue ruling, the Court stated: "Although the Service's interpretive rulings do not have the force and effect of regulations, . . . we give an agency's interpretations and practices *considerable weight* where they involve the contemporaneous construction of a statute and where they have been in long use."[86] The Court also presumed that Congress had been satisfied with the IRS interpretation because section 170 had survived the 1954 reenactment of the Code.[87] Thus, the Court said that an IRS revenue ruling is entitled to "considerable weight"[88] where it:

1. was issued contemporaneously with the statute that it construes,
2. has existed for a long period of time, and
3. has survived reenactment of the statute.

Such high regard for a revenue ruling is both surprising and disquieting. Prior to *Davis*, most courts had regarded revenue rulings merely as opinions of a litigant,[89] and those other courts that did treat revenue rulings preferentially had never embraced a standard of "considerable weight."[90] Although the three factors relied on in *Davis* have traditionally been applied by courts reviewing agency interpretations of ambiguous statutes,[91] they have rarely been applied to IRS interpretations issued in the form of revenue rulings. Thus, the *Davis* court may have created a new and elevated legal status for revenue rulings.

Davis will be considered in detail in Part III. The discussion in this Part supplies the indispensable context for understanding the significance of *Davis*'s treatment of revenue rulings by first examining *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[92] an opinion widely believed to

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[86] *Id.* at 484 (citations omitted) (emphasis added).

[87] *Id.* at 482.

[88] *Id.* at 484.

[89] *See supra* notes 57-58 and accompanying text.

[90] Prior to *Davis*, a "considerable weight" standard appears to have been applied only twice to revenue rulings. In Certified Stainless Services, Inc. v. United States, 736 F.2d 1383, 1386 (9th Cir. 1984), the Court of Appeals for the Ninth Circuit gave considerable weight to a revenue ruling issued pursuant to I.R.C. § 4216(b)(1) (1976) (current version at I.R.C. § 4216(b)(1) (1988)), which explicitly directed the Secretary to determine constructive sales prices for purposes of an excise tax. *See supra* note 78 and accompanying text. In Auto-Ordnance Corp. v. United States, 10 Cl. Ct. 281, 286 (1986), *rev'd*, 822 F.2d 1566 (Fed. Cir. 1987), the Claims Court gave considerable weight to a revenue ruling. The Court of Appeals for the Federal Circuit reversed, noting that the revenue rulings relied on by the lower court did not apply to the issues presented in the case. The appellate court explicitly declined to rule on the weight of IRS revenue rulings. 822 F.2d at 1571.

[91] *See infra* notes 186-254 and accompanying text.

[92] 467 U.S. 837 (1984).

have introduced a new era of judicial deference to agency statutory interpretations.[93]

In *Chevron*, the Supreme Court considered the validity of an EPA regulation that allowed states to treat all pollution-emitting devices within the same industrial plant as though they were encased within a single "bubble."[94] As a prelude to its analysis of the "bubble" regulations, the Court established the following two-step approach:

> 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.[95]
>
> If, however, the court determines 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.[96]

The Court then explained how to determine whether an agency's interpretation is "permissible":

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[93] *See, e.g.*, Richard J. Pierce, Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 302-03, 307-08 (1988); *see also* articles cited *infra* notes 102-03.

[94] 467 U.S. at 840. In the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified in scattered sections of 42 U.S.C.), Congress enacted rules for states that had not achieved national air quality standards established by the EPA pursuant to earlier legislation. The Clean Air Act amendments required these nonattainment states to establish permit programs regulating "new or modified major stationary sources" of air pollution. 42 U.S.C. § 7502(b)(6) (1988). A permit could not be issued for a new or modified stationary source unless certain conditions were met.

An EPA regulation promulgated to implement this permit requirement allowed states to adopt a definition of "stationary source" that would treat an entire plant as a single unit, or bubble. Under the regulation, an existing plant that contained several pollution-emitting devices could install or modify one piece of equipment without meeting the permit conditions so long as the alteration would not increase the total emissions from the plant. 40 C.F.R. § 51.18(j)(1)(i), (ii) (1983) (current version at 40 C.F.R. § 51.165(a) (1991)). The question presented to the Supreme Court in *Chevron* was whether the EPA's definition of stationary source, which treated all pollution-emitting devices within the same industrial group as if they were encased within a single "bubble," was based on a reasonable construction of the statutory term "stationary source." *Chevron*, 467 U.S. at 840.

[95] The Court employs "traditional tools of statutory construction" to ascertain congressional intent. *Chevron*, 467 U.S. at 843 n.9; *see also infra* notes 183-85 and accompanying text.

[96] *Chevron*, 467 U.S. at 842-43 (footnotes omitted).

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.[97]
>
> Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[98]

This separation of explicitly delegated rules from other rules could be interpreted as merely reflecting the historical distinction between legislative and interpretive[99] rules. *Chevron*, then, would be consistent with prior case law, under which courts reviewed legislative rules under the more deferential "arbitrary or capricious" standard, while subjecting interpretive rules to the less deferential "reasonableness" standard.[100] *Chevron*, however, arguably added the requirement that reasonable agency interpretations *must* be accepted, even when the court believes that the agency's choice among competing policies was not the best.[101]

Many courts and commentators, however, have interpreted *Chevron*'s second step as mandating the same level of judicial acceptance for both legislative and interpretive rules.[102] On this reading, *Chevron* was "both evolutionary and revolutionary,"[103] as acceptance of interpretive agency

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[97] *Id.* at 843-44 (footnotes omitted).

[98] *Id.* at 844 (footnotes omitted).

[99] *See infra* notes 112-28 and accompanying text.

[100] *E.g.*, Dresser Indus., Inc. v. Commissioner, 911 F.2d 1128, 1137-38 (5th Cir. 1990) (reviewing legislative Treasury regulation under the arbitrary and capricious standard); Rettig v. Pension Benefit Guar. Corp., 744 F.2d 133, 151 (D.C. Cir. 1984); Delaware Div. of Health & Social Servs. v. United States Dep't of Health & Human Servs., 665 F. Supp. 1104, 1119-20 (D. Del. 1987); Panzarino v. Heckler, 624 F. Supp. 350, 353-54 (S.D.N.Y. 1985); *see also* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 30 (1990).

[101] *See* Natural Resources Defense Council v. Thomas, 805 F.2d 410, 430 (D.C. Cir. 1986) ("The agency's response is also a reasonable interpretation of congressional intent, and in that situation the agency always wins under *Chevron*.").

[102] *See* Kevin W. Saunders, *Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 DUKE L.J. 346, 365-66; Note, *Judicial Review of Agency Rulemaking*, 98 HARV. L. REV. 247, 250-51 (1984); Sheldon E. Hochberg, *'Two-Step' Method of Analysis: Still in Transition After* Chevron, NAT'L L.J., May 16, 1988, at 22, 26 n.9; *see also* Anthony, *supra* note 100, at 30; Robert A. Anthony, *Which Agency Interpretations Should Get Judicial Deference—A Preliminary Inquiry*, 40 ADMIN. L. REV. 121, 134 (1988).

[103] Starr, *supra* note 62, at 284. Judge Starr characterizes *Chevron* as evolutionary because it applies and refines a long line of cases reminding judges of their obligation to defer to reasonable agency constructions. *Id.* Judge Starr regards *Chevron* as revolution-

interpretations had never before been so emphatically demanded.[104] By treating legislative and interpretive rules equally for purposes of judicial deference, courts make the presumption that, by its silence, Congress intended to delegate policymaking authority to the agency.[105] Thus, an implicit delegation is equivalent to an explicit one, and the status of legislative and interpretive rules is identical. After *Chevron*, interpretive rules effectively have legislative effect.[106]

The EPA promulgated the regulations at issue in *Chevron* pursuant to an implicit delegation, but in accordance with APA[107] notice and comment procedures.[108] Because the regulations represented a reasonable accommodation of competing interests, the Court deferred to the agency's construction.[109] The Court was not asked to address the applicability of its holding to interpretive rules that are issued without notice and comment.[110] Thus, whether one understands *Chevron* as according legislative status to interpretive rules, or merely as according enhanced (but not controlling)

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ary because it calls for equal treatment of legislative and interpretive rules, and in several other ways, as well:

> First, it removed a long-standing ambiguity in the law resulting from the existence of two distinct lines of cases, one calling for deference, the other disregarding deference altogether. Second, it eliminated much of the courts' authority to invalidate agency interpretations based on perceived inconsistencies with congressional policies. Third, it specified certain conditions under which courts are required to give controlling weight to agency interpretations. Fourth, it seemingly rendered the longevity of an agency's interpretation irrelevant in determining how much weight the interpretation should be given.

Id. at 292; *see also* Note, *supra* note 102, at 254-55. *See generally* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071 (1990).

[104] *See* Abner J. Mikva, *How Should the Courts Treat Administrative Agencies?*, 36 AM. U. L. REV. 1, 6 (1986).

[105] Anthony, *supra* note 100, at 31-33; *see also* Saunders, *supra* note 102, at 357; *cf.* Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979) ("The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to the limitations which that body imposes.").

[106] *See* Saunders, *supra* note 102, at 346.

[107] 5 U.S.C. § 553(b) (1988); *see also supra* notes 47-54 and accompanying text.

[108] *See* 46 Fed. Reg. 16,280 (1981) (proposed rule, Mar. 12, 1981); 46 Fed. Reg. 50,766 (1981) (final rule, Oct. 14, 1981, codified at 40 C.F.R. pts. 51-52). Professor Saunders asserts that *Chevron* effectively elevates interpretive rules to legislative rule status where notice and comment procedures are followed. Saunders, *supra* note 102, at 357.

[109] *Chevron*, 467 U.S. at 865-66.

[110] While distinctions traditionally drawn between Treasury regulations issued pursuant to specific delegations in discrete Code sections (legislative) and those issued pursuant to I.R.C. § 7805(a) (1988) (interpretive) may no longer rest on a firm foundation, *see supra* note 53, all Treasury regulations are distinguishable from revenue rulings from a procedural point of view. Revenue rulings are always issued without formal public participation and, thus, represent classic examples of interpretive rules. *See* Wing v. Commissioner, 81 T.C. 17, 27 (1983).

weight to interpretive rules, the *ratio decidendi* of the case is limited to agency rules that are issued pursuant to the notice and comment procedures of the APA.[111]

B. *Applying* Chevron *Deference to Non-Notice and Comment Rules Contravenes Traditional Distinctions Between Legislative and Interpretive Rules*

Chevron's elevation of the status of interpretive rules and its disregard for traditional distinctions between legislative and interpretive rules may imply that *Chevron* deference applies to revenue rulings. Thus, despite the absence of public participation in the issuance of revenue rulings, *Chevron* would require courts to apply IRS positions set forth in such rulings, if the agency's positions are reasonable. Applying *Chevron* deference to revenue rulings, however, would contravene congressional perceptions of the standard for judicial review of interpretive rules, as well as Congress's rationale for exempting interpretive rules from notice and comment issuance procedures.

In simplified terms, three factors have traditionally been thought to distinguish legislative rules from interpretive ones:[112]

1. *Enabling Authority*. Legislative rules are issued under explicit statutory authority.[113] Interpretive rules are issued under the general authority of federal agencies to interpret and enforce a particular statute.[114]

2. *Content*. Legislative rules create rights and duties in addition to those contained in the statute itself; they "complete an incomplete statute and affect rights or obligations."[115] Interpretive rules, on the other

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[111] Nonetheless, *Chevron* has been considered by several courts to require the application of interpretive agency rules that were not issued in accordance with APA notice and comment procedures. *See infra* notes 167-70 and accompanying text.

[112] Despite the existence of traditional factors for distinguishing legislative rules from interpretive rules, the distinction has been described as " 'tenuous,' " " 'fuzzy,' " " 'blurred,' " and " 'enshrouded in considerable smog.' " Community Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987) (citations omitted). *See generally* Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L. J. 381, 383-84; Saunders, *supra* note 102, at 346-56.

[113] Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981); Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *see also* DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947) [hereinafter ATTORNEY GENERAL'S MANUAL].

[114] General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976). Treasury regulations and revenue rulings issued under the general authority of I.R.C. § 7805(a) traditionally have been regarded as interpretive rules. *See* authorities cited *supra* note 53.

[115] Asimow, *supra* note 53, at 350; *see also* 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); Batterton v. Marshall, 648 F.2d 694, 701-02 (D.C. Cir. 1980); *cf.* New Jersey v. Department of Health & Human Servs., 670 F.2d 1262, 1282 (3d Cir. 1981) (observing that legislative rules create new law affecting rights and

hand, state an agency's opinions on what the statute means; they articulate rights and duties already implicit in a statute, but do not create new ones.[116]

3. *Legal Effect*. Legislative rules have the force and effect of law.[117] Courts are not bound by interpretive rules, but may accord them added weight,[118] depending 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.[119]

The legal effect of an administrative rule is largely a function of delegation. Legislative rules are entitled to legislative effect precisely because Congress has explicitly manifested its intention to delegate authority to the issuing agency to create rules that complete a statute or affect rights and obligations.[120] Interpretive rules do not issue from specific statutory deputations, and so are subject to greater scrutiny by the courts.

The APA mandates notice and comment procedures for the issuance of legislative rules,[121] but not interpretive rules.[122] When Congress enacted the APA, it regarded public participation in the legislative rulemaking process as a counterbalance to the limited judicial review afforded legislative rules, and as a means of preventing agencies from exercising their rulemaking powers unilaterally and arbitrarily.[123]

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obligations of individuals); ATTORNEY GENERAL'S MANUAL, *supra* note 113, at 30 n.3 (stating that legislative rules implement the statute).

[116] *See General Motors*, 742 F.2d at 1565; Gibson Wine Co. v. Snyder, 194 F.2d 329, 331 (D.C. Cir. 1952); *see also* Saunders, *supra* note 102, at 346; *cf.* New Jersey v. Department of Health & Human Servs., 670 F.2d at 1281-82 (observing that interpretive rules give guidance to agency staff and affected parties as to how the agency intends to administer a statute or regulation); ATTORNEY GENERAL'S MANUAL, *supra* note 113, at 30 n.3 (observing that interpretive rules advise the public of the agency's construction of the statutes and rules that it administers).

[117] *Chrysler*, 441 U.S. at 302; *Francis*, 432 U.S. at 425 n.9; ATTORNEY GENERAL'S MANUAL, *supra* note 113, at 30 n.3. Judicial review of legislative rules is limited to determining whether such rules are arbitrary or capricious, or exceed the agency's authority. *Gray Panthers*, 453 U.S. at 44; *Francis*, 432 U.S. at 426.

[118] *Francis*, 432 U.S. at 425 n.9; Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *Marshall*, 648 F.2d at 702; *cf.* Rowan Cos. v. United States, 452 U.S. 247, 253 (1981) (stating that interpretive regulations receive less deference than legislative regulations). Prior to *Chevron*, courts sustained interpretive rules unless they were unreasonable or plainly inconsistent with the statute. *See, e.g.*, Bingler v. Johnson, 394 U.S. 741, 749-50 (1969).

[119] *Skidmore*, 323 U.S. at 140.

[120] *See Chrysler*, 441 U.S. at 302-03.

[121] 5 U.S.C. § 553(b) (1988); *Chrysler*, 441 U.S. at 302-03; Morton v. Ruiz, 415 U.S. 199, 232-33 (1974).

[122] 5 U.S.C. § 553(b)(3)(A) (1988); *Chrysler*, 441 U.S. at 313-14.

[123] *Chrysler*, 441 U.S. at 313-14; *see also Morton*, 415 U.S. at 232 (observing that

Notice and comment procedures were not imperative in the case of interpretive rules, however, because of the availability of meaningful judicial review. The need for government agencies to conduct their affairs efficiently and expeditiously outweighed the benefits afforded by public participation in the rulemaking process. Congress believed that agencies should be encouraged to issue rules and policy statements as a means of alleviating public confusion,[124] and feared that the necessity of complying with cumbersome procedures each time a statement of position or policy was issued, without regard to the significance of the particular issue presented, would discourage the public distribution of agency positions in all but the most compelling situations.[125] Agencies would be motivated to operate under secret policies and procedures. The public's loss of access to the interpretive rulemaking process, however, would be compensated for by plenary judicial review.[126]

Congress adopted the APA to avoid the inherently arbitrary nature of unpublished, *ad hoc* determinations); Batterton v. Marshall, 648 F.2d 694, 703-04 (D.C. Cir. 1980) (noting that the purpose of notice and comment procedures is to "reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies"); *cf. Chrysler*, 441 U.S. at 303 (finding that the purpose of notice and comment procedures is to "assure fairness and mature consideration of rules").

[124] *See* Arthur E. Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the APA*, 23 ADMIN. L. REV. 101, 122-23 (1971).

[125] The Senate Committee print explained the reasons for exempting interpretive rules from the notice and comment procedures:

> First, it is desired to encourage the making of such rules. Secondly, those types of rules vary so greatly in their contents and the occasion for their issuance that it seems wise to leave the matter of notice and public procedures to the discretion of the agencies concerned. Thirdly, the provision for petitions contained in [5 U.S.C. § 553] subsection (c) affords an opportunity for private parties to secure a reconsideration of such rules when issued. Another reason, which might be added, is that "interpretative" rules—as merely interpretations of statutory provisions—are subject to plenary judicial review, whereas "substantive" rules involve a maximum of administrative discretion.

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].

[126] *See* COMM. PRINT, *supra* note 125, at 7, *reprinted in* APA: LEGISLATIVE HISTORY, *supra* note 125, at 18; 92 CONG. REC. 2155 (1946), *reprinted in* APA: LEGISLATIVE HISTORY, *supra* note 125, at 313 (statement of Senator McCarran). In fact, judicial review has not been precisely plenary. Interpretive regulations have often been given extra weight or respect. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (stating that the weight accorded to an administrative interpretation depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade").

Congress justified excepting interpretive rules from notice and comment procedures based on its belief that courts would provide a searching review when litigants challenged the rules. By failing to reflect or implement congressional understandings, *Chevron* effectively eliminates the requisite safeguards against excessive use of administrative power. Indeed, *Chevron* requires neither the counterbalance to exercise of rulemaking powers through interpretive rules (plenary judicial review) nor the counterbalance to exercise of rulemaking powers through legislative rules (public participation in the formulation process).[127]

Revenue rulings are issued without public participation. The relative procedural ease with which such rulings may be issued enables the IRS to publish revenue rulings frequently and to respond to matters promptly, thereby providing much-needed assistance to taxpayers. Should a taxpayer disagree with an IRS revenue ruling position, however, the APA contemplates a thorough court review with an independent judicial determination of the correctness of the IRS position. A requirement that courts defer to IRS revenue ruling positions would ignore the rationale underlying the APA procedures. Moreover, if *Chevron* deference applied to agency interpretations without regard to compliance with APA notice and comment procedures, agencies like the IRS would have little incentive to issue interpretations in formats necessitating compliance with these procedures, and the public would lose its ability to limit or restrain arbitrary and unilateral administrative action.[128]

C. *Applying* Chevron *Deference to Non-Notice and Comment Rules Neglects the Benefits of Public Participation*

Applying *Chevron* deference to agency statements that are issued without prior notice and comment of the kind required by the APA would depreciate the importance of public participation in the formulation of agency positions. Courts should not be required to apply agency interpretations that do not emanate from a public process.

The benefits of public participation may be roughly divided into two categories. First, there are advantages of a utilitarian nature. The adage "two heads are better than one" is exemplified by rules that result from the combined knowledge and expertise of agency administrators and interested

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The public might also have an opportunity to comment on agency rules after issuance. *See* 5 U.S.C. § 553(e) (1988); *see also* COMM. PRINT, *supra* note 125, at 7, *reprinted in* APA: LEGISLATIVE HISTORY, *supra* note 125, at 18.

[127] *See infra* notes 129-41 and accompanying text.

[128] Several courts have applied *Chevron* in non-tax controversies to require acceptance of non-notice and comment interpretive rules. *See infra* notes 167-70 and accompanying text. Only one court has applied *Chevron* to require acceptance of a revenue ruling. *See* Johnson City Medical Ctr. Hosp. v. United States, 783 F. Supp. 1048, 1052 (E.D. Tenn. 1992). The argument presented in this Article suggests that the *Johnson City* court's reliance on *Chevron* was wrong.

members of the public.[129] Members of particular industries, for example, or their representatives, possess a wealth of information from which agencies may benefit in the drafting of rules. Such information takes the form both of economic and social data (facts bearing on the potential impact or effects of proposed rules), as well as specialized legal expertise.

Public input also offsets "institutional biases that may exist [in the agency,] in favor of or against a particular regulated group."[130] Similarly, participation in the comment process enables affected persons to defend themselves against exercises of administrative rulemaking power that they perceive may be detrimental to their interests.[131]

Finally, dissenters are more likely to accept an unwelcome rule, and are less inclined to undermine the rule, if they have had the opportunity to participate in the formulation process.[132]

The second category of benefits from public participation relates to democratic participation in the rulemaking process. Because agencies are not directly accountable to voters, the notice and comment process alleviates the inherent lack of democratic debate both by allowing affected persons to have a voice in the process and by requiring the agency to read and respond to comments.[133] This, in turn, "enhances the legitimacy of agency actions."[134]

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[129] *See* Asimow, *supra* note 54, 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, 540-41 (1970); *see also* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 777-78 (1969) (Douglas, J., dissenting) (noting that agencies learn and benefit from suggestions of outsiders); Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983) (stating that the notice and comment procedure improves the quality of agency rulemaking by putting agency rules to the test of public commentary); Batterton v. Marshall, 648 F.2d 694, 704 (D.C. Cir. 1980) (noting that comments enable the agency to educate itself before promulgating rules that have a substantial impact on those who are regulated); BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 641 (1st Cir. 1979) (stating that diverse public comments test an agency's decisions), *cert. denied*, 444 U.S. 1096 (1980); COMM. PRINT, *supra* note 125, at 9, *reprinted in* APA: LEGISLATIVE HISTORY, *supra* note 125, at 20.

[130] *See* Asimow, *supra* note 54, at 574.

[131] *See* Bonfield, *supra* note 124, at 104; *see also* COMM. PRINT, *supra* note 125, at 9, *reprinted in* APA: LEGISLATIVE HISTORY, *supra* note 125, at 20 (stating the objective to protect private interests); ATTORNEY GENERAL'S MANUAL, *supra* note 113, at 31.

[132] Asimow, *supra* note 54, at 574; Bonfield, *supra* note 129, at 541; Bonfield, *supra* note 124, at 104.

[133] *See* Asimow, *supra* note 53, at 366; *see also* New Jersey v. Department of Health & Human Servs., 670 F.2d 1262, 1281 (3d Cir. 1981) ("[N]otice and comment procedures exist for good reason: to ensure that unelected administrators, who are not directly accountable to the populace, are forced to justify their quasi-legislative rulemaking before an informed and skeptical public.").

[134] Peter A. Appel, Note, *Administrative Procedure and the Internal Revenue Service: Delimiting the Substantial Understatement Penalty*, 98 YALE L.J. 1435, 1450-51 (1989); *see also* Community Nutrition Inst. v. Young, 818 F.2d 943, 951 (D.C. Cir. 1987) (Starr, J., concurring in part and dissenting in part).

It is in the nature of our democratic system that individuals have an adequate opportunity to present relevant information and opinion, in order to defend themselves against government actions affecting their interests.[135] Notice and comment procedures are meant to afford every constituency the opportunity to participate meaningfully in making laws that will affect it.[136] In this way, the notice and comment process mirrors the values inherent in democratic decisionmaking.[137]

Because much administrative decisionmaking takes place behind closed doors, policy choices frequently may be questioned, particularly where the public may perceive an institutional bias on the part of an agency.[138] Notice and comment procedures, however, encourage public responsiveness by facilitating democratic participation and enabling those with opposing points of view to attempt to influence the agency's actions in an open fashion.[139]

Courts have also indicated that the notice and comment procedure enhances the quality of judicial review by providing affected parties an opportunity to develop an evidentiary record to support their objections to rules.[140] In light of *Chevron*'s limits on substantive review of agency rules, however, this benefit may be of little value.

In light of the benefits emanating from public participation in the rulemaking process, Congress's decision to exempt interpretive rules from that process should not be taken lightly. Congress's decision to require compliance with notice and comment procedures in the case of legislative rules reflected an affirmation of the importance of public participation in the formation of agency policy. The decision to exempt interpretive rules from the notice and comment process reflected a trade-off between the need for democratic or quasi-democratic rulemaking processes in all cases and the importance of encouraging agencies to issue rules. But Congress's decision to forego public participation in order to encourage agencies to publicly issue statements of position was balanced by the presence of judicial review, that is, plenary review, of agency policies. If *Chevron* does in fact accord binding weight to all agency interpretations, the benefits of public participation are devalued. Moreover, the originally envisioned paradigm no longer exists:

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[135] *See* Bonfield, *supra* note 129, at 541.

[136] *See* Asimow, *supra* note 112, at 402; *see also* Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983) ("[N]otice and opportunity to be heard are an essential component of 'fairness to affected parties.' " (quoting National Ass'n of Home Health Agencies v. Schweiker, 690 F.2d 932, 949 (D.C. Cir. 1982))); Batterton v. Marshall, 648 F.2d 694, 703 (D.C. Cir. 1980) ("The essential purpose of according § 553 notice and comment opportunities is to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies.").

[137] *See* Appel, *supra* note 134, at 1451.

[138] *See* Asimow, *supra* note 54, at 574.

[139] *Id.* at 574-75.

[140] *See Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 547; Marathon Oil Co. v. EPA, 564 F.2d 1253, 1271 n.54 (9th Cir. 1977).

where notice and comment procedures are repudiated, neither the values associated with public participation nor the neutrality offered by judicial review contribute to the making of law.[141]

D. Chevron *Deference Should Not Apply to Rules Issued in the Revenue Ruling Format*

Chevron deference is a function of congressional delegation.[142] Professor Robert Anthony has argued that the process of inferring a delegation of policymaking authority when there is a statutory "gap"[143] should encompass two distinct stages: in the first, the court must find that Congress has implicitly delegated policymaking authority with respect to subject matter and, in the second, the court must find that Congress has implicitly delegated authority to issue rules in the format in which the rules have been issued.[144] Thus, *Chevron* deference is not appropriate unless both kinds of delegation are found. "If an agency head has filled a [statutory] gap with an opinion expressed in a letter or in a speech or in an amendment to the manuals, for example, should not the reviewing court at least ask whether Congress wants it to be bound by that kind of pronouncement?"[145] If agency interpretations were binding on courts without regard to format, then agencies would have little incentive to issue interpretations in formats necessitating compliance with formal procedures and the safeguards and benefits flowing from public participation would not ensue.

Morton v. Ruiz,[146] a pre-*Chevron* case, exemplifies Anthony's two-step analysis. In that case, the Bureau of Indian Affairs (BIA), had limited eligibility for general assistance benefits to Native Americans living on reservations, and had denied benefits to the plaintiffs, who lived near, but not on, a reservation. The Supreme Court ruled that the BIA had the power to limit eligibility for benefits to Native Americans living directly on reservations, but because it could affect substantial individual rights and obligations, such a limitation could be accomplished only through rules formally issued under APA procedures.[147] The BIA Manual, which set forth the BIA limitations, was not sufficient. The government itself conceded at oral argument that "for this to be a 'real legislative rule,' itself endowed with the force of law, it should be published in the Federal Register."[148] Thus, although the

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[141] One might argue that Congress could statutorily override an agency interpretation with which it disagrees. In practice, however, this may be difficult. *See infra* notes 221-25, 246-47 and accompanying text.

[142] *See supra* note 105 and accompanying text.

[143] Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984).

[144] Anthony, *supra* note 100, at 36-40.

[145] *Id.* at 36.

[146] 415 U.S. 199 (1974).

[147] *Id.* at 231-36.

[148] *Id.* at 235.

agency's interpretation of the statute filled an interpretive gap that might have been reasonable, the format for its issuance proved insufficient.

Likewise, it can generally be assumed that the IRS has the authority to fill statutory gaps in the Internal Revenue Code.[149] The existence of that authority does not disturb the assumption that revenue rulings, issued as interpretive non-notice and comment rules, do not have the force of legislative rules and therefore are subject to thorough judicial review. The format in which the IRS fills gaps in the Code, then, should be relevant in determining their legal effect.

The Treasury Department's decision to issue its interpretations of the Code in multiple formats must be taken to reflect the Department's own conclusions regarding the discrete status of each format. Indeed, each Internal Revenue Bulletin begins with the following admonition: "Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations . . . ."[150] Because of their lesser status, revenue rulings are issued without notice and comment. In contrast, the IRS complies with APA issuance procedures whenever it issues a regulation, without regard to whether the regulation is legislative or interpretive. Applying *Chevron* deference to revenue rulings would eliminate any distinction between regulations and revenue rulings, contradicting the IRS's own assumptions. Moreover, applying *Chevron* deference to rules issued in either format would effectively elevate the status of revenue rulings to that of regulations, and would alleviate the need to comply with APA issuance procedures because the same consequences would flow from interpretations in either format. The result would be diminished public participation at the pre-issuance stage.[151]

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[149] Revenue rulings are issued under the general authority of I.R.C. § 7805(a) (1988), which authorizes the issuance of needful rules and regulations for the enforcement of the Code.

[150] *E.g.*, 1992-1 I.R.B. 3; Treas. Reg. § 601.601(d)(2)(v)(d) (as amended in 1987).

[151] Comments submitted after an interpretive rule has been issued in final form are unlikely to effect changes in the agency's published position. The staff's response to comments at this stage may be a defensive one: "to dismiss all but the most compelling (or the most trivial) comments as not worth the price of trying to fix the rule." Asimow, *supra* note 53, at 367; *see also* Air Transp. Ass'n of Am. v. Department of Transp., 900 F.2d 369, 379-80 (D.C. Cir. 1990) (observing that an agency is unlikely to be receptive to suggested changes once it has put its credibility on the line in the form of final rules), *cert. granted*, 111 S. Ct. 669, *vacated*, 111 S. Ct. 944 (1991); National Tour Brokers Ass'n v. United States, 591 F.2d 896, 902 (D.C. Cir. 1978) ("People naturally tend to be more close-minded and defensive once they have made a 'final' determination." (footnote omitted)). In addition, some potential commentators might not bother to submit comments after a rule has been decided upon. *See* Asimow, *supra* note 53, at 366-67; *see also* Kelly v. United States Dep't of Interior, 339 F. Supp. 1095, 1101 (E.D. Cal. 1972) ("We doubt that persons would bother to submit their views or that the Secretary would seriously consider their suggestions after the regulations are a *fait accompli*.").

III. *DAVIS*: A NEW STANDARD FOR JUDICIAL DEFERENCE?

A. *Introduction to* Davis

In *Davis v. United States*,[152] the Supreme Court considered the weight of an IRS revenue ruling without ever mentioning *Chevron*. The Court's conclusions in this regard might have established a new standard for review of revenue rulings, which differs both from *Chevron*, and from pre-*Chevron* and *Davis* precedents.

In *Davis*, the Court ruled that parents of Mormon missionaries could not deduct as charitable contributions funds transferred directly to their children for support during periods when the children served as unpaid missionaries for the Church.[153] The controlling statute, section 170 of the Code, permits a deduction for contributions or gifts "to or for the use of" a charitable organization.[154] The taxpayers argued that while they did not make payments directly *to* the Church, they remitted the payments directly to their sons *for the use of*[155] the Church.[156]

The Court's unanimous decision that payments were not deductible rested

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[152] 495 U.S. 472 (1990).

[153] The Church of Jesus Christ of Latter-Day Saints operates a worldwide missionary program in which Church members between the ages of 19 and 22 serve. *Id.* at 474. Missionary service of this sort generally runs for a period of 18 months to two years. Rick Crosser et al., *An Analysis of the Supreme Court Ruling on the Deductibility of Payments to Mormon Missionaries*, 48 TAX NOTES 1169, 1170 (1990).

When a missionary candidate is called to service, the Missionary Department of the Church informs him of the estimated amount of money needed to support the missionary service; this amount varies according to the location of the mission. *Davis*, 495 U.S. at 474. Funds to support the missionary come, first, from the missionary's own savings. Crosser, *supra*, at 1170. If these savings are inadequate, the missionary's parents will make up the shortfall. If the missionary and his parents are unable to contribute the entire amount estimated by the Missionary Department, the Church will locate another donor or will use money donated to the Church's general missionary funds. *Id.*; *see also Davis*, 495 U.S. at 474.

[154] I.R.C. § 170(c) (1982) (current version at I.R.C. § 170(c) (1988)).

[155] If the taxpayers had made their contributions directly to the Church, and the Church had dispersed the funds for the support of the taxpayers' sons, the contributions might not have been deductible as contributions or gifts *to* the Church, because they could have been considered earmarked for particular beneficiaries, rather than for general discretionary use by the Church. *See, e.g.*, Tripp v. Commissioner, 337 F.2d 432, 435-36 (7th Cir. 1964) (holding contribution to bible college to pay tuition of a designated student not deductible even though college had no obligation to use the donated funds on the designated student's behalf). *But see* Rev. Rul. 62-113, 1962-2 C.B. 10, 11 ("[A] deduction will be allowable where it is established that a gift is intended by a donor for the use of an organization and not as a gift to an individual. The test in each case is whether the organization has full control of the donated funds, and discretion as to their use."); Winn v. Commissioner, 595 F.2d 1060 (5th Cir. 1979) (holding a gift to support a designated missionary deductible because it was donated *for the use of* the Church); Peace v. Commissioner, 43 T.C. 1, 7-8 (1964) (holding contributions to a mission for the

on three factors. First, the Court concluded that when Congress added the phrase "for the use of" to the predecessor of I.R.C. § 170,[157] it intended to allow charitable deductions for contributions to trust companies or similar donees (for example, charitable trusts, charitable foundations, and community chests), who or which could disburse donated funds for charitable purposes.[158] Second, because the terms "use" and "trust" were synonymous in common legal usage, the Court presumed that in choosing the phrase "for the use of," Congress was referring to donations made in trust or in similar legal arrangements.[159] Third, in a ruling issued two years after Congress amended section 170 to permit deductions of contributions "for the use of"

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support of designated missionaries deductible because the mission had exclusive control over the administration and distribution of the donated funds).

If the Church had established an unrestricted fund for missionary support, which was administered by the Church, contributions likely would have been deductible. *See Peace*, 43 T.C. at 7-8. The Church, however, deliberately structured its missionary program to confer financial assistance directly from families to individual missionaries. The *Davis* Court found that a program of direct support " 'fosters the Church doctrine of sacrifice and consecration in the lives of its people' as well as reducing the administrative and bookkeeping requirements which would otherwise be imposed upon the Church." 495 U.S. at 474 (quoting Application to Petition for Certiorari at 32a, *Davis* (No. 89-98)).

In its *amicus* brief, the Church offered several reasons for its preference that missionaries receive support directly from their families rather than from the Church:

1. Direct family support is consistent with the Church's tradition of involving entire families in the missionary program, which itself is a fundamental part of religious practice.
2. A family's faith is strengthened by financial sacrifices that are made in directly participating in missionary services.
3. It is unlikely that missionaries would maintain the same level of frugality if finances were provided by an impersonal institution.
4. Church-provided support could cause tax and visa problems in foreign countries.
5. A system of direct payments to missionaries, rather than to the Church for further disbursement, reduces the Church's administrative burdens and costs.
6. When a missionary is travelling, parents are more likely than the Church to become aware of changing financial needs.

Brief of the Church of Jesus Christ of Latter-Day Saints as *Amicus Curiae* at 11-14, *Davis* (No. 89-98).

[156] 495 U.S. at 478. The taxpayers argued, in the alternative, that the payments were deductible under Treas. Reg. § 1.170A-1(g) (as amended in 1984), which allows a deduction for "unreimbursed expenditures made incident to the rendition of services to an organization contributions to which are deductible." 495 U.S. at 486-87. The Court held that the regulation permits a deduction only where the unreimbursed expenditures are incurred in connection with a taxpayer's own rendition of services to a qualified organization, and not where the services are provided by another person (such as a son). 495 U.S. at 487-89.

[157] Revenue Act of 1921, ch. 136, § 214(a)(11), 42 Stat. 227, 241.

[158] 495 U.S. at 479-81.

[159] *Id.* at 481. *See* BLACK'S LAW DICTIONARY 1541-42 (6th ed. 1990) (describing "use" as constituting a "different aspect of" trust).

qualified donees,[160] the IRS construed the phrase "for the use of" to mean "in trust for."[161]

Although citation to an IRS published ruling is not unusual in judicial opinions, the type of reliance placed on this particular ruling is exceptional. According to the Court: "Although the Service's interpretive rulings do not have the force and effect of regulations, . . . we give an agency's interpretations and practices *considerable weight* where they involve the contemporaneous construction of a statute and where they have been in long use."[162] The Court also presumed that Congress had been satisfied with the IRS interpretation because section 170 had survived the 1954 amendments to the Internal Revenue Code.[163] Thus, the opinion suggested that an IRS revenue ruling is accorded "considerable weight" when it: (1) was issued contemporaneously with the statute that it construes, (2) has existed for a long period of time, and (3) has survived reenactment of the statute that it construes.

B. *Was* Chevron *at Issue in* Davis?

Several interesting implications flow from the *Davis* opinion, when viewed from an administrative law perspective. The omission of any reference to *Chevron* may imply that interpretations set forth in IRS revenue rulings do not mandate the sort of judicial non-interference prescribed in *Chevron*. It is also conceivable, however, that the *Davis* opinion did reach *Chevron*, despite the lack of any reference to the latter case, because the court used "traditional tools of statutory construction"[164] to ascertain Congressional intent and, finding such an intent, the Court implemented it. The latter interpretation of *Davis* is less plausible than the first, however, because the *Davis* opinion did not cite *Chevron* and because its deference standard, "considerable weight," was not the standard prescribed in *Chevron*.

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[160] I.T. 1867, II-2 C.B. 155 (1923). The abbreviation "I.T." indicates a pre-1954 ruling issued by the Income Tax Unit or Division of the IRS, and published in the Internal Revenue Bulletin. *See* GAIL L. RICHMOND, FEDERAL TAX RESEARCH 59-60 (4th ed. 1990). Because the Treasury Secretary did not formally approve I.T.'s, they neither committed the Department nor bound the courts. *See* Sims v. United States, 252 F.2d 434, 438 (4th Cir. 1958), *aff'd*, 359 U.S. 108 (1959); *see also* Biddle v. Commissioner, 302 U.S. 573, 582 (1938); Commissioner v. Stone's Estate, 210 F.2d 33, 35 (3d Cir. 1954); *cf.* Bartels v. Birmingham, 332 U.S. 126, 132 (1947); North Carolina Nat'l Bank v. United States, 345 F.2d 544, 546 (Ct. Cl. 1965) (holding that a ruling issued in the form of a Mimeograph, or "Mim.," without approval of the Treasury Secretary, was not binding on the court).

[161] *Davis*, 495 U.S. at 481-84. Thus, the Court treated the issue as one of interpreting whether a rule introduced to deal with "trusts" (as known to the law) should be extended to situations where there is no technical trust.

[162] *Id.* at 484 (citations omitted) (emphasis added).

[163] *Id.* at 483-84.

[164] *Chevron*, 467 U.S. at 843 n.9.

1. Failure to Cite May Imply that *Chevron* Does Not Apply to Revenue Rulings

The Court's failure to mention such a seminal case as *Chevron*, in the context of considering an agency's construction of a statutory ambiguity, strongly suggests a deliberate assessment that *Chevron* did not apply. Because the *Davis* court did not explain why it did not apply *Chevron*, questions raised by *Davis* regarding the breadth of *Chevron* remain unanswered.

Perhaps the omission of *Chevron* implies that courts are not bound by interpretive rules that are issued without notice and comment. This would be consistent with traditional, pre-*Chevron* understandings of the weight of interpretive rules.[165] Although some courts explicitly have refused to apply *Chevron* with respect to interpretive rules issued without notice and comment,[166] several post-*Chevron* opinions in the lower Federal courts have accorded binding effect to interpretive rules adopted in this manner.[167] For example, in *Wagner Seed Co. v. Bush*,[168] the Court of Appeals for the District of Columbia Circuit deferred to an interpretation of the nation's Superfund law[169] relied on by the EPA in a denial of reimbursement for cleanup expenses. The court stated that "it simply is not the law of this circuit that an interpretive regulation does not receive the *Chevron* deference accorded a legislative regulation."[170]

It is difficult to reconcile decisions like *Wagner Seed* with the reading of *Davis* suggested above, because all of the cases involve federal agency rules issued without notice and comment.[171] If *Davis* means that *Chevron* defer-

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[165] *See supra* notes 117-19 and accompanying text.

[166] *E.g.*, Doe v. Reivitz, 830 F.2d 1441, 1446-47 (7th Cir. 1987) (holding that a Department of Health and Human Services (HHS) eligibility policy issued in a policy letter without notice and comment should not receive *Chevron* deference); Flagstaff Medical Ctr., Inc. v. Sullivan, 773 F. Supp. 1325, 1343-44 (D. Ariz. 1991) (holding that HHS rule, issued without notice and comment, regarding hospitals' obligations to provide uncompensated services to persons unable to pay for them, was not entitled to *Chevron* deference), *aff'd in part and rev'd in part*, 962 F.2d 879 (9th Cir. 1992).

[167] *See, e.g.*, Wagner Seed Co., Inc. v. Bush, 946 F.2d 918, 924-25 (D.C. Cir. 1991); Bethlehem Steel Corp v. Bush, 918 F.2d 1323, 1329 (7th Cir. 1990); Guadamuz v. Bowen, 859 F.2d 762, 771 (9th Cir. 1988); *see also* Saunders, *supra* note 102, at 346. In Johnson City Medical Center Hospital v. United States, 783 F. Supp. 1048, 1052 (E.D. Tenn. 1992), the court construed *Chevron* to require the application of a revenue ruling and did not cite *Davis*.

[168] 946 F.2d at 918.

[169] 42 U.S.C. §§ 9601-9657 (1988).

[170] *Wagner Seed*, 946 F.2d at 921; *see also Guadamuz*, 859 F.2d at 762; Wisconsin v. Bowen, 797 F.2d 391 (7th Cir. 1986), *cert. dismissed*, 485 U.S. 1017 (1988).

[171] If the absence of notice and comment issuance procedures was not the basis for the *Davis* Court's ignoring *Chevron*, then the only way to reconcile *Davis* with *Wagner Seed*, *Wisconsin v. Bowen*, and *Guadamuz* would be on the basis of some unique characteristic of revenue rulings vis-à-vis other categories of interpretive rules. It is difficult, however, to envisage any meaningful differences.

ence is not required for interpretive rules issued without notice and comment, then cases like *Wagner Seed* are wrong.[172]

Application of *Chevron* to non-notice and comment interpretive rules would require courts to accept these rules absent a showing of unreasonableness, and would effectively elevate these less formal rules to the status of notice and comment rules[173] despite longstanding (pre-*Chevron*) precedent suggesting that interpretive rules are always nonbinding.[174] Thus, an agency would be able to bind a court and the public with rules that are exempt from APA notice and comment procedures.[175] Ironically, even the IRS did not consider itself bound by the revenue ruling at issue in *Davis*[176] because that ruling had not been formally approved and promulgated by the Secretary of the Treasury.[177]

On a narrower reading, *Davis*'s omission of *Chevron* may imply that *Chevron* deference is not mandated with respect to IRS revenue rulings only. Because *Chevron* deference is based on delegation, *Davis* may indicate that the Supreme Court cannot find an implicit delegation to the IRS to issue binding rules in the revenue ruling format. Such a reading of *Davis*, however, presupposes a qualitative difference between revenue rulings and other types of interpretive rules that are entitled to *Chevron* deference. But the

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[172] In Martin v. Occupational Safety & Health Review Commission, 111 S. Ct. 1171 (1991), which considered the validity of a citation issued by the Secretary of Labor for violations of the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1988), the Supreme Court did not refer to *Chevron* at all.

[173] If one subscribes to the interpretation of *Chevron* that treats interpretive rules as if they were legislative rules, *see supra* notes 102-06 and accompanying text, then a non-notice and comment interpretive rule conceivably could be treated as the equivalent of a legislative rule.

[174] *See* Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977); Skidmore v. Swift & Co., 323 U.S. 134 (1944). "Interpretative rules do not have the force of law and even though courts often defer to an agency's interpretative rule they are always free to choose otherwise." Joseph v. United States Civil Serv. Comm'n, 554 F.2d 1140, 1154 n.26 (D.C. Cir. 1977); *see also supra* notes 118-19 and accompanying text.

[175] *See* Flagstaff Medical Ctr., Inc. v. Sullivan, 773 F. Supp. 1325, 1343-44 (D. Ariz. 1991), *aff'd in part and rev'd in part*, 962 F.2d 879 (9th Cir. 1992).

[176] I.T. 1867, II-2 C.B. 155 (1923).

[177] In 1923, when the IRS issued the ruling, the Internal Revenue Bulletin contained the following admonition:

> The rulings reported in the Internal Revenue Bulletin are for the information of taxpayers and their counsel as showing the trend of official opinion in the administration of the Revenue Acts; the rulings other than Treasury Decisions have none of the force or effect of Treasury Decisions and *do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Secretary of the Treasury*. . . . It is especially to be noted that the same result will not necessarily be reached in another case unless all the material facts are identical with those of the reported case. As it is not always feasible to publish a complete statement of the facts underlying each ruling, there can be no assurance that any new case is identical with the reported case.

II-2 C.B. at i (1923) (emphasis added); *see also* cases cited *supra* note 160.

predominant (perhaps sole) distinguishing feature is the lack of notice and comment issuance procedures. For example, interpretive Treasury regulations, which are issued in accordance with APA procedures,[178] are substantively indistinguishable from revenue rulings, yet the Supreme Court considers these regulations worthy of deference under *Chevron*.[179]

2. The *Davis* Opinion May Have Applied *Chevron* Without Attribution

Chevron's second step mandates acceptance of reasonable agency constructions where Congress has explicitly or implicitly delegated to the agency the power to construe.[180] This second step applies, however, only when Congress's meaning is not apparent. Thus, in *Chevron's* first step, a court must ascertain Congress's intent.[181] The court (and the agency), then, must give effect to such intent; it is only when Congress's intent is not clear that the court must defer to the agency's reasonable construction. In ascertaining congressional intent, the court may employ "traditional tools of statutory construction."[182]

Davis may represent an application of *Chevron*'s step one, namely, an ascertainment of congressional intent utilizing traditional tools of statutory construction. *Davis* used several such traditional tools. The Court ascertained legislative intent by examining legislative history and analyzing the common usage of words used in the statute. The Court's adoption of the "considerable weight" standard to a revenue ruling that construed the statute also may have been an attempt to find legislative intent; because the ruling was issued contemporaneously with the statute's enactment, it arguably reflected congressional intent.[183] Although it is not clear that either long standing or reenactment sheds any light on the intentions of the enacting Congress,[184] both have been used by courts as aids in statutory construction and, therefore, may fit within *Chevron*'s class of "traditional tools."[185]

Although this explanation of the *Davis* opinion harmonizes *Davis* with *Chevron*, it does not resolve *Davis*'s curious omission of such an important

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[178] *See supra* notes 47-54 and accompanying text.

[179] *See* United States v. Boyle, 469 U.S. 241, 246 n.4 (1985); *accord* RJR Nabisco, Inc. v. United States, 955 F.2d 1457, 1464 (11th Cir. 1992); Peoples Fed. Sav. & Loan Ass'n v. Commissioner, 948 F.2d 289, 299-300 (6th Cir. 1991); AMA v. United States, 887 F.2d 760, 770 (7th Cir. 1989); Knapp v. Commissioner, 867 F.2d 749, 752 (2d Cir. 1989).

[180] 467 U.S. at 843-44.

[181] *Id.* at 842-43.

[182] *Id.* at 843 n.9.

[183] *But see infra* notes 186-206 and accompanying text.

[184] *See infra* notes 207-54 and accompanying text.

[185] *See* Scalia, *supra* note 61, at 518 ("[T]he existence of a 'long-standing, consistent agency interpretation' that dates to the original enactment of the statute may be relevant to the first step of *Chevron*—that is, it may be part of the evidence showing that the statute is in fact not ambiguous but has a clearly defined meaning.").

precedent, particularly if the Court had actually intended to follow the *Chevron* methodology. Moreover, the "considerable weight" standard followed by the *Davis* Court is not the standard that is mandated by *Chevron*, which would have required the *Davis* Court to apply the revenue ruling, not merely to give it special consideration or weight. Thus, the likely conclusion is that *Davis* deliberately omitted *Chevron* because *Chevron* deference does not apply to revenue rulings.

C. Davis *Creates a New Standard for Judicial Deference to Revenue Rulings*

A second implication of the *Davis* opinion is its apparent creation of a new standard for review of revenue rulings. Although courts frequently rely on the factors relied upon by the *Davis* court—contemporaneous administrative construction, longstanding existence of the construction, and legislative reenactment of the construed statute—these factors rarely have been relied upon in connection with administrative positions set forth in revenue rulings. In tax cases, these factors have generally been utilized only with respect to interpretations set forth in Treasury regulations. Use of the three factors as a rationale for deferring to agency constructions is remarkable with respect to revenue rulings, and effectively elevates their status. The following discussion suggests that these factors are intrinsically weak statutory aids and reliance on these factors is particularly inappropriate and unwarranted with respect to revenue rulings.

1. Contemporaneous Administrative Construction

Although courts traditionally have accorded weight to contemporaneous statutory constructions issued by administrative agencies, they have rarely explained the significance of contemporaneity. The most likely reason for deferring to contemporaneous constructions, which a few courts have advanced, rests on the proximity of the agency to the legislature and to the legislative process that culminated in enactment of the statute.[186] Courts have assumed that, by virtue of an agency's participation in the legislative process, administrators are familiar with congressional intentions,[187] and

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[186] *See, e.g.*, Augustus v. Commissioner, 118 F.2d 38, 43 (6th Cir.) ("The first administrative interpretation of a provision as it appears in a new act often expresses the general understanding of the time or the actual understanding of those who played an important part when the statute was drafted."), *cert. denied*, 313 U.S. 585 (1941); *see also* White v. Winchester Country Club, 315 U.S. 32, 41 (1942). *But see* Central Motor Co. v. United States, 583 F.2d 470, 490 (10th Cir. 1978) ("A [revenue] ruling is of some evidentiary value in interpreting the statute in the absence of any indication of congressional intent."). Courts generally concentrate on spatial proximity (closeness to the legislature and participation in the legislative process) and temporal proximity (timing of issuance of the administrative interpretation relative to enactment of the statute) simultaneously. *See generally* cases cited *supra*.

[187] *See, e.g.*, National Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979)

therefore, that an agency's post-enactment interpretations reflect congressional intent.[188]

Although an agency might have taken an active role in the legislative process, for example, by proposing the legislation,[189] drafting the bill,[190] or testifying before a congressional committee,[191] courts often have presumed a knowledge of congressional intent without addressing the degree, if any, of the agency's actual participation in the legislative process.[192] Perhaps such knowledge is gained by the mere presence of agency staff members on or around Capitol Hill.[193]

The assumption that congressional intent can be ascertained in the same sense that a single individual intent can be ascertained is highly questionable,[194] as is evidenced by the ongoing spirited debate among several prominent judges on the use of legislative history in judicial decisionmaking.[195]

("A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those *presumed to have been* aware of congressional intent." (emphasis added)); *accord* Georgia Fed. Bank v. Commissioner, 98 T.C. 105 (1992).

[188] Some courts give weight to contemporaneous constructions without ever considering the issuing agency's familiarity with legislative purpose. These courts view contemporaneous constructions as necessary components in the effectuation of newly enacted statutes. Thus, the responsibility for implementing a statute may compel a modicum of freedom to issue rules or guidance to carry out the statutory mandate. According to one frequently cited decision, a "practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new." Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933); *see also* Commissioner v. South Texas Lumber Co., 333 U.S. 496, 501 (1948) (Treasury regulation); Fawcus Mach. Co. v. United States, 282 U.S. 375, 378 (1931) (citing United States v. Moore, 95 U.S. 760, 763 (1877)); Burge v. Commissioner, 253 F.2d 765, 770 (4th Cir. 1958). Deference to agency interpretations based on the agency's executory responsibilities, however, has little to do with the timing of issuance.

[189] *E.g.*, Watt v. Alaska, 451 U.S. 259, 272-73 (1981); United States v. American Trucking Ass'ns, 310 U.S. 534, 549 (1940).

[190] *See, e.g.*, Hassett v. Welch, 303 U.S. 303, 310-11 (1938); *cf.* United States v. Vogel Fertilizer, 455 U.S. 16, 31 (1982) (according "great weight" to agency representations to Congress when administrators participated in drafting).

[191] *E.g.*, Zuber v. Allen, 396 U.S. 168, 192 (1969); *cf.* Zenith Radio Corp. v. United States, 437 U.S. 443, 456 (1978) (deferring to Treasury regulation where Treasury Department had contributed figures relied upon by Congress in enacting tariff statute); *Vogel Fertilizer*, 455 U.S. at 31 (according "great weight" to agency representations to Congress when administrators testified in committee hearings).

[192] *See, e.g.*, Minnesota Power & Light Co. v. United States, 6 Cl. Ct. 558, 567 (1984), *rev'd*, 782 F.2d 167 (Fed. Cir. 1986).

[193] *See* Diver, *supra* note 60, at 567.

[194] Surely, this itself is doubtful. *See* Edwards v. Aguillard, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting).

[195] *See* Abner J. Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627 (1987); Abner J. Mikva, *Statutory Interpretation: Getting the Law to Be Less Common*, 50

An interesting aspect of this debate is the consensus on both sides that there is no single purpose or design underlying most statutes. According to Judge Abner Mikva, a zealous defender of judicial use of legislative history:

> Most legislators, constitutional or otherwise, do not agree on all the consequences of a legislative result. Many consequences have not been foreseen; other consequences are fused into a hybrid result where the specific concern is neither consciously approved nor disapproved. In sum, for most law, there is no original intent.[196]

Another defender of judicial consideration of legislative history, Judge Patricia Wald, admits:

> In the time of the "great whales"—when a meeting of a few powerful House and Senate leaders and committee chairmen could control the course of legislation—it may have been easier to emit one clear signal to future jurists. But now the legislative history is more apt to be a cacophony of many voices and many themes. Too often, deals are made in corridors and behind closed doors. We really do not know from the printed record all that occurred during a bill's passage. . . . Congress is primarily interested in passing or not passing a bill. Key provisions may purposely be left vague or unsettled, or debate kept to a minimum, to achieve consensus. This may advance passage of the bill, but it makes reconstruction of what actually occurred more difficult.[197]

Perhaps the most notable opponent of the use of legislative history, Justice Antonin Scalia fervently argues that legislators' motivations for voting on a particular bill differ,[198] and that published legislative materials therefore cannot reflect the intentions of the body as a whole.[199]

OHIO ST. L.J. 979 (1989) [hereinafter Mikva, *Statutory Interpretation*]; Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371; Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 38 IOWA L. REV. 195 (1982). *See generally* Michael A. Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819 (1991).

[196] Mikva, *Statutory Interpretation*, *supra* note 195, at 980; *see also* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-48 (1983).

[197] Wald, *supra* note 195, at 206; *see also* Starr, *supra* note 195, at 375-76 (noting that unlike the statute, which represents the intent of the Congress as a whole, legislative materials reflect the intent of only that portion of Congress in which the records originated); *cf.* 137 CONG. REC. S15,346 (daily ed. Oct. 29, 1991) (statement of Sen. Danforth) ("Maybe one of the reasons it [is] possible to pass a bill is that there are differences of opinion, that there are differences of interpretation, that we have not nailed down every particular word and phrase in the legislation.").

[198] *See, e.g.*, Wisconsin Pub. Intervenor v. Mortier, 111 S. Ct. 2476, 2489-92 (1991) (Scalia, J., concurring); *Edwards*, 482 U.S. at 636-39 (Scalia, J., dissenting) ("[D]etermining the subjective intent of legislators is a perilous enterprise.").

[199] *See, e.g.*, United States v. R.L.C., 112 S. Ct. 1329, 1340 (1992) (Scalia, J., concurring) (all legislative history); Blanchard v. Bergeron, 489 U.S. 87, 98-100 (1989) (Scalia,

While a critique of the debate over judicial reliance on legislative materials in statutory construction is beyond the scope of this Article,[200] the uneasiness expressed by its esteemed participants should remind us that knowledge of congressional intent is a matter of legal argument, not historical reportage. By its very nature, the legislative process is one of mediation, compromise, and reconciliation of differing views and opinions. If a court chooses to utilize legislative history in the process of interpreting a statutory ambiguity, it is the function of the court itself, not an administrative agency, to ascertain the purpose or intent of the legislature.

Judicial reliance on contemporaneous administrative constructions presumes not only an agency's familiarity with legislative meaning or intent, but also its willingness to faithfully implement the intent of Congress. Courts, however, cannot realistically expect executive branch agencies, which do not invariably agree with Congress, to always implement or construe statutes consistently with congressional intent.[201]

In December 1991, for example, the Treasury Department issued final regulations under I.R.C. § 6694, which imposes a penalty on tax return preparers who understate a client's tax liability on a return or refund claim.[202] The statutory penalty applies when a taxpayer's understatement has no "realistic possibility of being sustained on its merits."[203] Under the regulations, a taxpayer satisfies the "realistic possibility" standard if a reasonable and well-informed analysis by a person knowledgeable in the tax law would lead to a conclusion that the position has approximately a one in three, or greater, likelihood of being sustained on its merits.[204]

The regulation defining the realistic possibility standard does not coincide with the committee report that was issued when I.R.C. § 6694 was considered by Congress. The report explains the statute's reasonable possibility standard as "generally reflect[ing] the professional conduct standards applicable to lawyers and to certified public accountants."[205] Because neither the

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J., concurring) (committee reports); United States v. Taylor, 487 U.S. 326, 344-46 (1988) (Scalia, J., concurring) (floor debates).

[200] *See* articles cited *supra* note 195.

[201] The expanded use of presidential signing statements during the Reagan and Bush administrations may illustrate a perception on the part of the executive branch that its interpretations of ambiguous statutory language often differ from those set forth in congressional committee reports. These differences presumably are sizable enough to warrant public statements by the President regarding his own views. The judicial weight accorded to presidential signing statements is as yet undetermined. *See* United States v. Story, 891 F.2d 988, 994 (2d Cir. 1989); Taylor v. Heckler, 835 F.2d 1037, 1044 n.17 (3d Cir. 1987). *See generally* Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363 (1987).

[202] Treas. Reg. § 1.6694-0 to -4 (as amended in 1991).

[203] I.R.C. § 6694(a)(1) (Supp. II 1990).

[204] Treas. Reg. § 1.6694-2(b)(1).

[205] H.R. REP. NO. 247, 101st Cong., 1st Sess. 1396 (1989), *reprinted in* 1989

American Bar Association nor the American Institute of Certified Public Accountants has recognized a one in three standard either as a minimum requirement or an aspirational ideal,[206] the regulations do not reflect the congressional committee's expressed intent.

U.S.C.C.A.N. 1906, 2866. The Senate bill, S. 1750, 101st Cong., 1st Sess. (1989), contained no preparer penalty provisions, and the conference agreement followed the House bill, H.R. 3299, 101st Cong., 1st Sess. § 11732 (1989). *See* H.R. REP. NO. 247, *supra*, at 161-65.

[206] The American Bar Association (ABA) standard, set forth in ABA Comm. on Professional Ethics and Grievances, Formal Op. 85-352 (1985), prohibits an attorney from advising a return position unless there is "some realistic possibility of success if the matter is litigated." A report entitled *Report of the Special Task Force on Formal Opinion 85-352*, 39 TAX LAW. 635 (1986), suggests that "[a] position having only a 5% or 10% likelihood of success, if litigated, should not meet the new [realistic possibility] standard. A position having a likelihood of success closely approaching one-third should meet the standard." *Id.* at 638-39. The Task Force report does not suggest that a one in three likelihood of success is the minimum standard and, in any event, the Task Force report was never adopted by the ABA Standing Committee on Ethics and Professional Responsibility, which issued Opinion 85-342, or by the ABA Tax Section. *Id.* at 635 n.*; *see also*, Letter from Gerald G. Portney, Steven M. Friedman, & Mark H. Ely, of KPMG Peat Marwick, to Commissioner of Internal Revenue (May 20, 1991), *in* 91 TAX NOTES TODAY, May 23, 1991, Doc. 113-86, *available in* LEXIS, Fedtax Library, TNT File; *cf. Response of the Civil Penalties Task Force to IRS Notice 90-20*, A.B.A. SEC. TAX'N (1990), *in* 90 TAX NOTES TODAY, Aug. 28, 1990, Doc. 178-4, *available in* LEXIS, Fedtax Library, TNT File [hereinafter A.B.A. SEC. TAX'N (Response)] ("The meaning of the 'realistic possibility' language is still debated in the Tax Section.").

Similarly, the standard adopted by the American Institute of Certified Public Accountants (AICPA) states:

> The realistic possibility standard cannot be expressed in terms of percentage odds. The realistic possibility standard is less stringent than the "substantial authority" and the "more likely than not" standards that apply under the Internal Revenue Code (the "Code") to substantial understatements of liability by taxpayers. It is stricter than the "reasonable basis" standard under regulations issued prior to the Revenue Reconciliation Act of 1989.

Statements on Responsibilities in Tax Practice, No. 1-1 ¶ .06 (Oct. 22, 1990 draft), *reprinted in* William L. Raby, *"Realistic Possibility of Success"—AICPA and IRS*, *in* 2 QUALIFIED PLANS, PCS, AND WELFARE BENEFITS 1215, 1220-21 (ALI-ABA Course of Study Materials No. C583, 1991) [hereinafter ALI-ABA Materials].

Despite the inconsistency between Treas. Reg. § 1.6694-2(b)(1) and H.R. REP. NO. 247, *supra* note 205, the regulation could be upheld on *Chevron* grounds if judicially challenged. *See* Peoples Fed. Sav. & Loan Ass'n v. Commissioner, 948 F.2d 289, 299-300 (6th Cir. 1991) (holding that *Chevron* required the court to apply an interpretive Treasury regulation). The taxpayer could argue that the regulation contradicts the "unambiguously expressed intent of Congress," as evidenced in the committee report. H.R. REP. NO. 247, *supra* note 205, at 1396. *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984) (*Chevron* step one). It may be argued, however, that the ABA standard, referred to in the committee report, itself is ambiguous and, therefore, that Congress's intent was not unambiguously expressed. *See* A.B.A. SEC. TAX'N (Response), *supra* ("[T]he meaning of the 'realistic possibility' language is still

2. Longstanding Administrative Interpretations[207]

The Court's acknowledgement in *Davis* that long standing is a significant factor in characterizing the weight of an administrative position contradicts the Court's earlier declarations in *Chevron*. In *Chevron*, 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.[208] The Supreme Court, however, expressly endorsed the agency's license to change its position, and rejected the notion that longstanding agency positions are entitled to more deference than recently adopted ones.[209] This discrepancy between the two cases is difficult to reconcile;[210]

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debated in the Tax Section."); Steven C. Salch, *Tax Practice Ethics: Practitioner Discipline and Sanctions*, ALI-ABA Materials, *supra*, at 801 (describing the Task Force Report as "somewhat controversial" and bearing "an express disclaimer of ABA Standing Committee on Professional Responsibility approval"); *cf.* Consumers Union v. Federal Reserve Bd., 938 F.2d 266 (D.C. Cir. 1991) (upholding Federal Reserve regulations regarding home equity loans despite the plaintiff's argument that the regulations contradicted the language and intent of the Home Equity Loan Consumers Protection Act of 1988, Pub. L. No. 100-709, 102 Stat. 4725).

[207] The *Davis* opinion suggests that long standing is a distinct criterion for affording special weight to an agency position. 495 U.S. at 484. Cases that confer weight to administrative constructions based on longstanding existence, however, appear never to rely solely on that factor. Rather, the long standing criterion is considered in conjunction with other principles, primarily the legislative reenactment doctrine, under which a longstanding administrative construction is deemed to receive congressional approval where Congress reenacts the underlying statute without amendment or amends the statute without altering the provision that is construed in the agency pronouncement. *See, e.g.*, Cottage Sav. Ass'n v. Commissioner, 111 S. Ct. 1503, 1508 (1991); United States v. Correll, 389 U.S. 299, 305-06 (1967); Helvering v. Winmill, 305 U.S. 79, 83 (1938). *See generally infra* notes 233-54 and accompanying text. Thus, it appears that long standing is relevant only as part of the broader reenactment doctrine. In keeping with *Davis*'s discrete consideration of the long standing and reenactment principles, however, the long standing rule will be examined separately here, as well.

[208] 467 U.S. at 863.

[209] "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 62, at 297; Sunstein, *supra* note 103, at 2102-04.

Indeed, Justice Scalia has suggested that *Chevron* acknowledges that an agency's change in position need not reflect an admission that in its prior position, the agency "got the law wrong." Rather, *Chevron* recognizes an agency's prerogative to change its position when new information surfaces or social attitudes change. Scalia, *supra* note 61, at 518-19.

[210] Justice Scalia has suggested that longstanding existence of an agency interpretation may be relevant in *Chevron*'s step one, as a traditional tool of statutory construction. Scalia, *supra* note 61, at 518. According to *Chevron*, however, such traditional tools are employed only to ascertain whether Congress had an intention on the question at issue. *Chevron*, 467 U.S. at 843 n.9. Long standing sheds no light on the intentions of the

where the *Chevron* court deliberately accorded no significance to the lifespan of an agency rule, the *Davis* court conferred extra weight on an interpretive rule precisely because of its longstanding existence.[211]

Two arguments traditionally have been offered for according deference based on the duration of an agency interpretation. First, deference to longstanding interpretations provides certainty and predictability to persons affected by the interpretations.[212] Second, deference to longstanding administrative positions encourages Congress to make better laws.[213] The validity of both approaches is questionable in light of *Chevron*'s statements regarding the importance of regulatory change and flexibility.

Deferring to longstanding administrative interpretations in order to provide certainty and predictability to affected persons reflects a reluctance by some courts to interfere with an existing legal framework or to frustrate private expectations grounded on such a framework.[214] Judicial intervention could unfairly affect persons who have justifiably relied on a consistent and longstanding administrative practice.[215] In the tax area, where transactional planning invariably takes into account IRS positions, much can be said for protecting taxpayer expectations that are founded on longstanding government policies. Where taxpayer reliance remains the principal concern, however, deference should be applied cautiously when the government, not the taxpayer, asks the court to defer to an interpretation.[216] When a taxpayer takes a position that is contrary to a longstanding IRS position, the court

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enacting Congress. *Cf. infra* notes 233-54 and accompanying text (legislative reenactment does not clarify the intent of enacting Congress).

[211] *Davis*'s respect for the age of the ruling at issue is particularly troubling because the ruling was not issued at the highest level of the Treasury Department, *see supra* note 158, or in accordance with APA notice and comment procedures. *See supra* notes 44-46 and accompanying text. The EPA issued the regulation in *Chevron* with notice and comment. *See supra* note 107-08 and accompanying text. Thus, while the *Chevron* court considered irrelevant the age of a notice and comment rule, the *Davis* court deferred to a rule of lesser status on the basis of age.

[212] *See infra* notes 214-17 and accompanying text.

[213] *See infra* notes 218-25 and accompanying text.

[214] Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1198; *see also* Erwin N. Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398, 408-10 (1941); Paul, *supra* note 74, at 430.

[215] *See* Strick Corp. v. United States, 714 F.2d 1194, 1199 (3d Cir. 1983) (observing that when a regulation had been in effect for almost twenty-five years, "[i]t may be assumed that substantial reliance was placed on it by the IRS and taxpayers alike"), *cert. denied*, 466 U.S. 971 (1984); *accord* Zenith Radio Corp. v. United States, 437 U.S. 443, 457-58 (1978); Mitchell v. Commissioner, 300 F.2d 533, 537 (4th Cir. 1962); *cf.* Griswold, *supra* note 214, at 406-07 (observing that taxpayer reliance is a rationale for judicial deference to contemporaneously issued Treasury regulations).

[216] See cases cited *supra* notes 75-76, in which the courts gave special weight to revenue rulings because the taxpayers had relied on them. The courts effectively estopped the IRS from taking a position that was inconsistent with the rulings.

should consider the arguments of both parties equally and should not grant greater weight to a government position merely because it has not yet been judicially challenged.[217]

Deferring to longstanding administrative interpretations also has been justified as a means of encouraging lawmaking by Congress.[218] Under this approach, courts defer to agency interpretations because they believe Congress should legislatively change or override agency positions if it does not approve of them.[219] The term "longstanding" in this context is a misnomer because the length of time that an administrative interpretation has been outstanding is not pertinent. Rather, the practice of according weight to longstanding positions is simply a means to encourage Congress to act.[220]

The proliferation of administrative rules minimizes the likelihood of any particular rule inducing legislative debate, unless the rule engenders the concern of an organized or organizable group that can and will solicit congressional action.[221] Because revenue rulings are promulgated without soliciting public commentary, the lack of publicity surrounding their issuance could reduce the likelihood that affected persons would hear about a ruling or comprehend its potential effects. Revenue rulings that affect well-repre-

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[217] Revenue rulings, in particular, may be outstanding for a long period before they are challenged. *See infra* notes 226-32 and accompanying text.

[218] *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 457-59 (1989).

[219] *Cf. id.* (asserting that the plain meaning rule represents an effort to encourage Congress to draft statutes more clearly). Another aspect of the argument relates to the role of the courts, vis-à-vis agencies, in making policy. If Congress has not clarified an issue through legislation, discretionary judgments should be made by the relatively more accountable agency rather than by courts. This promotes electoral accountability and reduces policymaking discretion of judges. *Id.* at 458-59; *see also* United States v. Byrum, 408 U.S. 125, 134-35 (1972); Niles v. United States, 710 F.2d 1391, 1395 (9th Cir. 1983).

[220] Another interpretive principle that falls within this group is the plain meaning principle, under which courts will not consider extrinsic evidence of meaning where the statutory language is plain or unambiguous. *See* Sunstein, *supra* note 218, at 457, 506.

[221] Public choice theorists, who analyze political behavior by means of economic analysis, have suggested that legislators' actions reflect their responses to efforts of influential and wealthy pressure groups. *E.g.*, Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 878 (1987). Groups are more likely to organize when they are small, wealthy, and well-defined. These groups tend to seek benefits for themselves rather than for society at large. *See* Richard L. Doernberg & Fred S. McChesney, *Doing Good or Doing Well?: Congress and the Tax Reform Act of 1986*, 62 N.Y.U. L. REV. 891, 896-99 (1987); Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913, 926-45 (1987) [hereinafter Doernberg & McChesney, *Durability*]. Special interest groups are likely to prevail at the expense of others. Doernberg & McChesney, *Durability*, *supra*, at 926. The legislature, then, is less likely to consider concerns of persons who are poorly organized, have modest financial resources, or lack access to relevant power circles.

sented, or wealthy, taxpayers would seem more likely to be brought to Congress's attention than rulings affecting only middle income individuals.[222]

Institutional constraints also may limit the ability of an interested Congress to address a recognized administrative problem.[223] The breadth and complexity of issues considered by each Congress necessitates a prioritized allocation of resources. Thus, a particular issue could be overlooked because other matters take precedence. Even if one house considered a provision worthy of consideration, the other house might not agree, or the provision might be compromised during negotiations.[224] Obstacles to congressional action will be discussed more extensively in connection with legislative reenactment,[225] but the point for present purposes is that deference to an administrative position, with the hope or expectation that Congress will correct it, may be an ineffectual technique for persuading Congress to act.

Relying on long standing as a basis for granting special status to a revenue ruling is particularly troubling in light of the limited avenues available for challenging these IRS positions. As a general rule, a taxpayer may not challenge a revenue ruling unless it has been directly asserted against her.[226]

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[222] By applying a seemingly even-handed approach to administrative positions, *Chevron* may in fact favor groups or persons with effective access to Congress over those without it.

Public criticism following issuance of a controversial revenue ruling affecting large corporations also could result in the withdrawal of the ruling before legislative relief is sought. However, once the IRS has publicly issued its position, the staff may be less willing to substantially alter the rule in response to commentary. *See* Asimow, *supra* note 53, at 367. In addition, wealthier taxpayers are more likely than low or middle income taxpayers to incur the costs of testing a disputed revenue ruling position through litigation. *Cf.* Michael Asimow, *Standing to Challenge Lenient Tax Rules: A Statutory Solution*, 57 TAXES 483, 486-87 (1979) (observing that erroneous, but lenient, administrative rules are not likely to receive congressional attention because challengers typically are poorly organized and thinly financed, while beneficiaries are well organized and highly motivated).

[223] *See infra* notes 252-54 and accompanying text.

[224] In a 1991 speech, House Ways and Means Committee Chairman Rostenkowski stated:

> I'd love to be able to report each of these measures out of committee, take them to the House floor, and send them to the Senate where they should be given the respect they deserve and sent off to conference virtually unamended. Yes, indeed, my friends, I'd certainly love to do that. But 33 years in the United States Congress has taught me that it doesn't pay to be a romantic. Do I really think that the Senate would leave my good government tax bills intact? Unfortunately—but realistically—I don't. You don't have to be a media junkie to have some feel for the eagerness in that other body to perform what we in the House call "tax mischief". . . . I'm afraid that if I sent a tax bill to the Senate, it would come back filled with provisions that would lose lots of revenue.

Address by Representative Dan Rostenkowski (Oct. 7, 1991), *reprinted in* 91 TAX NOTES TODAY, Oct. 9, 1991, Doc. 209-27, *available in* LEXIS, Fedtax Library, TNT File.

[225] *See infra* notes 252-54 and accompanying text.

[226] *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (challenging

Impediments are imposed by standing considerations raised in case law[227] and statutes.[228]

If a taxpayer regards an IRS revenue ruling as taking an unreasonable position, her only opportunity to challenge the ruling would be in post-assessment litigation of issues raised by her own tax return.[229] This would require the taxpayer to take a tax return position that contradicts the ruling, and await an audit in which the IRS would assert that taxes had been underpaid as a result of the return position in question. With an audit rate of less than one percent of individual returns[230] and three percent of corporate returns,[231] the likelihood of an audit is small. If the return were audited, the government and the taxpayer would have to agree that the cost and like-

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revenue ruling that allowed certain hospitals to qualify as charitable organizations); Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130 (D.C. Cir. 1977) (challenging revenue rulings that allowed foreign tax credits for payments made to foreign nations in connection with oil production).

[227] *See* cases cited *supra* note 226; *see also* Asimow, *supra* note 222, at 488-91 (1979); Paul B. Stephan III, *Nontaxpayer Litigation of Income Tax Disputes*, 3 YALE L. & POL'Y REV. 73 (1984). Indeed, in his concurring opinion in *Eastern Kentucky Welfare*, 426 U.S. at 46 (Stewart, J., concurring), Justice Stewart stated, "I cannot now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else."

[228] The Anti-Injunction Act, I.R.C. § 7421 (1988), and the federal tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201(a) (1988 & Supp. 1989), bar taxpayers from challenging revenue rulings that are not asserted against them by the IRS on audit. *See* Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962) (holding suit for injunction against IRS barred by I.R.C. § 7421(a) (1954)). *But see* South Carolina v. Regan, 465 U.S. 367 (1984). The Court, in *South Carolina v. Regan*, held that the Anti-Injunction Act did not bar the State of South Carolina from litigating the constitutionality of I.R.C. § 103(j) (1982), which denied an interest exclusion to holders of state and local bonds issued in bearer form. The Court reasoned that the Anti-Injunction Act does not apply to actions brought by aggrieved parties for whom there is no alternative remedy; for example, a suit for refund of overpayment. 465 U.S. at 378-81.

The federal tax exception to the Declaratory Judgment Act is at least as broad as the Anti-Injunction Act. *See* Alexander v. "Americans United" Inc., 416 U.S. 752, 759 n.10 (1974).

[229] If the revenue ruling represents the only authority on the issue, the taxpayer faces imposition of an accuracy-related penalty unless she adequately discloses the relevant facts in the return or an accompanying statement. I.R.C. § 6662(d)(2)(B) (Supp. II 1990); Treas. Reg. § 1.6662-4(a), (e) (1991).

[230] The audit rate for individual returns in 1990 was 0.80%. 1990 IRS ANN. REP. 7. Audit coverage has declined precipitously over the last 25 years, having dropped from a rate in excess of 6% of individual returns in 1965. Jeffrey A. Dubin et al., *The Changing Face of Tax Enforcement, 1978-1988*, 43 TAX LAW. 893, 896-99 (1990).

[231] The audit rate for corporate returns in 1990 was 2.6%. Rita L. Zeidner, *Lower Audit Rate Doesn't Mean Less Scrutiny, Official Stresses*, 53 TAX NOTES 1001, 1001 (1991).

lihood of success justified litigation.[232] Although the court would be asked to resolve the taxpayer's challenge to the revenue ruling, the case could be decided on some other ground if the litigation raised other issues.

The likelihood of all of these events occurring promptly after a revenue ruling has been issued would not appear to be great, particularly because risk-averse taxpayers are likely to follow IRS positions, whether right or wrong, and because litigation costs could exceed the contested taxes. In light of the limited access to substantive judicial review of tax-related administrative positions, courts should consider a revenue ruling's longstanding existence only as indicating that the right set of circumstances for challenge may not yet have arisen. A long life does not represent even minimal evidence of the correctness of the IRS position.

3. Legislative Reenactment

Under the doctrine of legislative reenactment, administrative pronouncements are deemed to receive congressional approval whenever Congress reenacts an interpreted statute without amendment.[233] Particularly in the tax area, where frequent legislation is the norm,[234] the legislative reenactment doctrine provides an easy rationale for affording added weight to agency positions.[235] The doctrine is often expressed as positive law: once

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[232] A taxpayer may challenge an IRS position by (1) challenging a deficiency notice in U.S. Tax Court, without first paying the tax in issue, I.R.C. § 6213 (1988 & Supp. II 1990), or (2) paying the full amount of the assessed tax, and then suing for a refund in a federal district court or the U.S. Claims Court, I.R.C. § 7422 (1988).

[233] United States v. Correll, 389 U.S. 299, 305 (1967); Helvering v. R.J. Reynolds Tobacco Co., 306 U.S. 110, 115 (1939); Helvering v. Winmill, 305 U.S. 79, 83 (1938).

The longstanding doctrine also may be analogized to legislative inaction. Thus, where an administrative interpretation has been outstanding for a long period of time, Congress's failure to correct it may imply approval. *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988).

[234] Prior to enactment of the Internal Revenue Code of 1954, Congress enacted revenue laws on an almost annual basis. During the last ten years, Congress has enacted seven significant tax statutes: Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172; Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324; Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494; Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085; Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342; Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106; and Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388.

A literal application of the legislative reenactment doctrine would accord force of law or special deference to every administrative interpretation issued prior to the reenactment of the entire Internal Revenue Code in 1986, where such interpretations related to unamended statutory provisions. Although the effect of such a sweeping action certainly would reduce judicial dockets, Congress surely could not have intended such an extreme result.

[235] Most administrative positions that receive weight by virtue of the reenactment doc-

congressional endorsement has been presumed, the courts accord the agency interpretation "force equivalent to a congressionally enacted statute."[236] It also is depicted as a presumption, which can be rebutted by demonstrating that Congress was not aware of the agency interpretation and therefore could not have tacitly approved of it,[237] or merely as an aid in statutory construction.[238]

In tax cases, courts often rely upon the legislative reenactment doctrine with respect to interpretations set forth in regulations,[239] but courts inconsistently apply the doctrine when interpretations are set forth in revenue rulings. Thus, while some courts readily apply the doctrine when an IRS revenue ruling has survived reenactment of an underlying statute,[240] others have resisted, perhaps because rulings "do not rise to the dignity of regulations."[241]

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trine have been outstanding for a long period. Thus, the courts justify deference on the ground that Congress "had sufficient time and opportunity to take action." Heard v. Commissioner, 326 F.2d 962, 966 (8th Cir.), *cert. denied*, 377 U.S. 978 (1964); *accord* Heiner v. Lewellyn, 275 U.S. 232, 235 (1927). In Hampton Roads Industrial Electronics Corp. v. United States, 178 F. Supp. 474, 477 (Ct. Cl. 1959), the court refused to apply the reenactment doctrine with respect to Treasury Regulations that had been issued twelve years before reenactment. According to the court, Congress might not have been aware of the regulation.

[236] Samson v. United States, 144 F. Supp. 620, 629 (S.D.N.Y. 1956); *accord Correll*, 389 U.S. at 305-06; Commissioner v. Estate of Noel, 380 U.S. 678, 681-82 (1965); *R.J. Reynolds*, 306 U.S. at 115; *Winmill*, 305 U.S. at 83.

[237] *See* Mitchell v. Commissioner, 300 F.2d 533, 538 (4th Cir. 1962); Sims v. United States, 252 F.2d 434, 439 (4th Cir. 1958), *aff'd*, 359 U.S. 108 (1959); Pacific Power & Light Co. v. Federal Power Comm'n, 184 F.2d 272, 275 (D.C. Cir. 1950); Ashland Oil, Inc. v. Commissioner, 95 T.C. 348, 363 (1990); *cf.* Estate of Lang v. Commissioner, 64 T.C. 404, 407 n.4 (1975) (noting that administrative interpretation achieves the force of law "when it interprets a statute which has been reenacted unchanged after such interpretation was expressly called to congressional attention").

Professor Surrey acknowledged that deference to administrative interpretations is warranted when it can be shown that an "administrative construction was actually called to the attention of Congress" and Congress had the matter in mind when it reenacted the statute without change. "But in the absence of such evidence of actual ratification, is the presumption indulged in by the Court based upon anything more than a polite gesture towards the Congress?" Stanley S. Surrey, *The Code and Effect of Treasury Regulations Under the Income, Estate, and Gift Taxes*, 88 U. PA. L. REV. 556, 563 (1940).

[238] *See* Helvering v. Reynolds, 313 U.S. 428, 432 (1941); Campbell v. Brown, 245 F.2d 662, 668 (5th Cir. 1957); Georgia Fed. Bank v. Commissioner, 98 T.C. 105, 119 (1992) (Halpern, J., concurring).

[239] *See, e.g.*, *Estate of Noel*, 380 U.S. at 681-82; *R.J. Reynolds*, 306 U.S. at 110; Redwing Carriers, Inc. v. Tomlinson, 399 F.2d 652, 656-57 (5th Cir. 1968); Vitter v. United States, 279 F.2d 445, 450 n.9 (5th Cir.), *cert. denied*, 364 U.S. 928 (1960).

[240] *E.g.*, First Nat'l City Bank v. United States, 557 F.2d 1379, 1384 (Ct. Cl. 1977); McGowan v. Commissioner, 67 T.C. 599, 612 (1976); *Estate of Lang*, 64 T.C. at 407 n.4.

[241] Paul, *supra* note 74, at 431 n. 39; *see also* Fogarty v. United States, 780 F.2d 1005,

With the exception of the relatively few courts that require proof of actual congressional awareness of the agency interpretation,[242] courts that apply the legislative reenactment doctrine do so on the basis of an unadulterated fiction.[243] These courts presume congressional awareness of the agency position and conclude that Congress's failure to correct the interpretation indicates its approval.[244] In his frequently cited analysis of legislative inaction,[245] Professor Eskridge posits two serious logical impediments to the drawing of inferences in the reenactment context, the first based on inconsistencies in applying traditional legal canons and the second based on difficulties in inferring congressional intent. Without these inferences, however, the doctrine has questionable utility, because the agency's interpretation could not be deemed to reflect any congressional truths.

Inferences regarding congressional intent are inconsistent with the traditional canon of statutory interpretation that the relevant legislative intent is that of the enacting Congress, not of subsequent Congresses.[246] Doctrinally, this issue underlies the rule that subsequent legislative history is not an authoritative source in statutory interpretation.[247]

The fiction of legislative reenactment also presumes that later Congresses knew and tacitly approved of the administrative position when they reen-

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1012 (Fed. Cir. 1986); United States v. Hall, 398 F.2d 383, 387 (8th Cir. 1968); Kaiser v. United States, 262 F.2d 367, 370 (7th Cir. 1958). There is no conceptual justification for distinguishing between regulations and rulings in this regard. Because the doctrine is premised upon surmised congressional cognizance, the same inferences may be drawn with respect to each format; regulations and revenue rulings both are officially published, widely disseminated, and readily accessible to congressional researchers.

[242] *See* cases cited *supra* note 233.

[243] Professor Paul recounted a literary analysis of the fiction reflected in the legislative reenactment doctrine:

> The doctrine reminds one of Tourtoulon, who found "grave philosophic insight in a scene from a drama of the poet Mistral, where galley slaves, as they row, believe they see the light of a fairy castle to which they seem quite near. Perhaps, however, the light is but a star. They sing: 'Castle or no castle, let us row as if it were there.' "

Paul, *supra* note 74, at 426 n.20 (quoting JEROME FRANK, LAW AND THE MODERN MIND 320 (1930)).

[244] Heard v. Commissioner, 326 F.2d 962, 966 (8th Cir. 1964); Minnesota Power & Light Co. v. United States, 6 Cl. Ct. 558, 568 (1984), *rev'd*, 782 F.2d 167 (Fed. Cir. 1986).

[245] Eskridge, *supra* note 233, at 67.

[246] *Id.* at 95; *see also* Johnson v. Transportation Agency, 480 U.S. 616, 671 (1987) (Scalia, J., dissenting).

[247] Andrus v. Shell Oil Co., 446 U.S. 657, 666 n.8 (1980) (quoting United States v. Price, 361 U.S. 304, 313 (1960)); *see also Johnson*, 480 U.S. at 671 (Scalia, J., dissenting). Judge Easterbrook has argued that courts are not obligated to interpolate legislative gaps simply because a silent or ambiguous statute is cited or relied upon by a litigant. Easterbrook, *supra* note 196, at 533. His reasoning includes a concern that inferring and implementing the original intent has the same effect as extending the term of the enacting legislature and allowing it to avoid submitting its plan to the executive for veto. *Id.* at 548-49.

acted the statute. Particularly in the case of tax legislation, which is often voluminous and invariably technically complicated, an assumption of congressional knowledge and understanding may have little basis in reality. Although one might reasonably expect Congress to familiarize itself with proposed amendments to the Code,[248] congressional representatives are unlikely to familiarize themselves with administrative interpretations of statutory provisions that are not under consideration. Furthermore, even if legislators knew of an administrative pronouncement, they might have difficulty evaluating its substantive merits or implications. Finally, congressional silence might imply a willingness to trust the courts to correct an erroneous interpretation.[249]

Professor Eskridge also questions the ability to make inferences for a large collection of people, especially where their decisionmaking is as structured as Congress's.[250] It is difficult to aggregate preferences in such a large collection of people when so few express their views in floor debates or committee reports.[251] Moreover, Congress's institutional structure itself makes it more likely that nothing will happen. Professor Eskridge notes:

> The legislative agenda is severely limited; to gain a place on that agenda, a measure must not only have substantial support, but be considered urgent by key people (such as the President and/or the party leadership in Congress). Even if a proposal finds a place on the legislative agenda, it is usually doomed if there is substantial opposition, whether or not most legislators favor it, because of the variety of procedural roadblocks opponents may erect. A bill can effectively be killed by a hostile committee or subcommittee chair in either chamber, by a hostile House or Senate leadership, by a hostile Rules Committee in the House or by a filibuster in the Senate. Consequently, even if a majority of the members of Congress disagree with a judicial or administrative interpretation of a statute, it is very unlikely that they will be able to amend the statute quickly, if at all.[252]

Recent tax legislation has been enacted under conditions of tremendous political and time pressure. For example, Congress enacted the 1988, 1989, and 1990 statutes[253] in a hurried and politically volatile environment because

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[248] Such an expectation itself might be spurious unless the term "Congress" is expanded to include congressional staffers. Surrey, *supra* note 237, at 563.

[249] *Id.* at 564.

[250] Eskridge, *supra* note 233, at 98.

[251] *See supra* text accompanying notes 194-99.

[252] Eskridge, *supra* note 233, at 99 (footnotes omitted); *cf.* Easterbrook, *supra* note 196, at 547-48 (noting that control of legislative agenda and practice of logrolling preclude realistic predictions of how a legislature would have decided issues that it did not in fact decide); *see also supra* notes 223-25 and accompanying text.

[253] Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342; Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106; Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388.

of budgetary tensions. Under circumstances like these, Congress is not likely to correct, much less contemplate, each administrative imperfection that individual members may perceive. Moreover, political and time pressures easily could induce Congress either to limit the scope of legislation, so that controversial issues can be dealt with in the future, or to establish priorities that preclude current consideration of less compelling matters. Additionally, the "very difficulty of finding a solution to a recognized problem requires that its consideration be postponed even when it is recognized that the existing situation is undesirable."[254]

IV. THE APPROPRIATE STANDARD FOR REVIEW OF REVENUE RULINGS

Prior to the Supreme Court's decisions in *Chevron* and *Davis*, the standard for judicial review of revenue rulings was moderately clear. Courts generally regarded rulings as mere opinions of the IRS that did not deserve exceptional treatment. With only a few exceptions, courts accorded revenue rulings no greater weight than taxpayer positions. *Chevron* and *Davis*, together, have placed in doubt the amount of judicial deference traditionally accorded to revenue rulings.[255]

Chevron mandates judicial acceptance of reasonable administrative rules that construe ambiguous statutes for which congressional intent is equivocal. Although this deference principle has been applied to a variety of formats, including both legislative and interpretive rules, the lower federal courts do not agree on whether the scope of *Chevron* should be limited to rules issued in accordance with the APA notice and comment protocol. A broad reading of *Chevron* might accord binding status to revenue rulings, even though they are interpretive rules issued without APA notice and comment, and thus without public or non-agency participation in the formulation process.[256]

Chevron should not apply to revenue rulings because they are issued without notice and comment. Congress justified not applying APA notice and comment procedures to interpretive rules because it understood that interpretive rules would be critically examined when challenged. A requirement that courts accept and apply interpretive rules ignores contextual congressional understanding. If agency interpretations were binding without regard to administrative process, then agencies would have little or no incentive to

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[254] Surrey, *supra* note 237, at 564. Professor Surrey also pointed out that a time lag may exist between the time that Congress becomes aware of an existing defect and the time that it is corrected. *Id.* at 563; *see also* Paul, *supra* note 74, at 428.

[255] Are courts compelled to treat revenue rulings preferentially? Does the Supreme Court regard revenue rulings as either binding or entitled to considerable weight? If so, under what circumstances do rulings merit preferential treatment? The answers to these questions could have implications outside of the tax area, with respect to non-notice and comment rules issued by other administrative agencies.

[256] At least one court has applied *Chevron* in this manner. *See* Johnson City Medical Ctr. Hosp. v. United States, 783 F. Supp. 1048, 1051-52 (E.D. Tenn. 1992).

issue interpretive rules in formats necessitating compliance with formal APA procedures.

In *Davis*, the Supreme Court considered the effect of an IRS revenue ruling without mentioning *Chevron*. This omission strongly indicates that the Court excludes revenue rulings from *Chevron* deference requirements.[257] If *Chevron* had controlled, the *Davis* case could have been dealt with summarily.

Although *Davis* reached the proper conclusion on this point, the opinion is problematic. By departing from historical precedent governing the standard for judicial review of revenue rulings, *Davis* created a new rule for measuring the weight of revenue rulings. Under *Davis*, revenue rulings are entitled to considerable weight if they are issued within a short time after Congress enacted the underlying statute. Contemporaneously issued revenue rulings gain importance with time, as Congress fails to legislatively correct the ruling positions. Congressional reenactment of statutes, without attention to administrative constructions set forth in revenue rulings, further elevates the deferential weight of the rulings.

The three factors relied upon in *Davis*—contemporaneous administrative construction, longstanding existence of the construction, and legislative reenactment of the construed statute—simply do not work in the realm of revenue rulings. Of the three factors, only contemporaneity presumes to shed light on congressional intent. However, deference based on contemporaneous issuance requires a court to make two unwarranted and usually unsubstantiated assumptions. First, a court must assume that the IRS ascertained the single, coherent congressional intent. Second, the court must assume that the agency faithfully implemented that intent.

The fictions underlying long standing and reenactment contribute to their inherent unreliability. Long standing does not warrant a presumption of accuracy, particularly in the case of revenue rulings, which typically cannot be challenged for many years after issuance. The long standing and reenactment factors relied upon in *Davis* place undue pressure on Congress to discover problems before controversies arise and effect legislative corrections. These factors also penalize taxpayers for Congress's failure to correct each and every problem engendered by a statute when Congress amends a section of the Code to correct only some of the problems.

When litigants cite a revenue ruling, a court should regard the ruling merely as the published position of the IRS on a particular issue, regardless of the timing of issuance, the elapsed time since issuance, or subsequent congressional inaction. This Article does not maintain that revenue rulings are

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[257] Without providing an explanation for the nonapplicability of *Chevron*, the *Davis* opinion provides virtually no guidance as to the formats to which *Chevron* might or might not apply in the future. Thus, with the exception of the class of revenue rulings addressed by the Court (those issued contemporaneously with the statute, which have existed for a long period, and which have survived reenactment of the Code), the questions raised by *Chevron* and *Davis* remain unanswered.

without effect. Revenue rulings play an important role in the administration of the nation's revenue statute even when they are not inflated with deferential status. By informing taxpayers of the government's position on a particular issue or its construction of an ambiguous statute, revenue rulings guide taxpayers in complying with the Code, and provide a foundation for uniform IRS enforcement. Taxpayers know the IRS's position in advance and make planning decisions in light of such positions. Government agents who review taxpayer returns have clear statements of the agency's official position, and can apply rules consistently.

If the Court's unstated purpose in treating revenue rulings specially was to force Congress to resolve statutory ambiguities, then Congress should clarify the legal status of revenue rulings by enacting a statute which simply states that revenue rulings reflect only the IRS's opinion. Alternatively, a statute could specify the procedural processes (for example, APA notice and comment procedures) that must be followed before administrative interpretations are considered worthy of deferential weight on the presumption that they effect congressional will. Nonconforming formats then would represent the agency's own opinions. With such clear congressional action, courts would no longer blindly accept IRS positions, agencies would not get mixed signals about the effects of the administrative rulemaking options that they pursue, and taxpayers would continue to have the opportunity to contest IRS opinions set forth in revenue rulings.