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Deference and The End of Tax Practice

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Editors' Synopsis: The author examines the various standards of deference the courts apply in the case of regulations, revenue rulings and the government's litigation arguments. The article first focuses on a generation skipping transfer tax issue to illustrate how the government recently relied on expanding notions of deference to resolve a conflict in the circuit courts—in effect declaring victory by regulation. It concludes with an argument for legislation that would reduce the level of deference the government currently enjoys and that would preclude it from disavowing taxpayer-friendly rulings or regulations.

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INTRODUCTION

Early in the history of the income tax, the Supreme Court indicated that when the meaning of tax legislation is uncertain, taxpayers ought to receive the benefit of the doubt.[1] Fifteen years later the Court retreated from this position, concluding that the function of the courts is to determine the meaning of ambiguous legislation and that this function should be performed without giving either party a presumptive advantage.[2] The Court has now come full circle, except that instead of granting a preference to taxpayers in the case of uncertainty,[3] it grants a preference to the government under the guise of deference—whether to a regulation,[4] a revenue

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[1] *See* United States v. Merriam, 263 U.S. 179, 188 (1923) ("If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer.").

[2] *See* White v. United States, 305 U.S. 281, 292 (1938)

> (We are not impressed by the argument that, as the question here decided is doubtful, all doubts should be resolved in favor of the taxpayer. It is the function and duty of courts to resolve doubts. We know of no reason why that function should be abdicated in a tax case more than in any other where the rights of suitors turn on the construction of a statute and it is our duty to decide what that construction fairly should be.).

Recently, however, Justice Thomas, in a concurring opinion not joined by any other member of the Court, cited *Merriam* and alluded to a traditional canon of construction that ambiguous tax legislation or regulations should be read against the government. *See* United Dominion Indus., Inc. v. United States, 121 S. Ct. 1934, 1944 (2001) (Thomas, J., concurring). Although Justice Stevens, in a dissenting opinion, acknowledged this tradition (*see id.* at 1945) neither he nor Justice Thomas mentioned that the Court in *White* subsequently abandoned the position it had taken in *Merriam*.

[3] A court occasionally will entertain the possibility of giving the taxpayer the benefit of the doubt based on reliance concerns. *See, e.g.*, Peterson Marital Trust v. Comm'r, 78 F.3d 795, 800 (2d Cir. 1996) (indicating that it might be inappropriate to give effect to a post-transaction tax regulation when taxpayers consummate the transaction based on their own reasonable resolution of an ambiguous provision in the Code). *But see* Smiley v. Citibank (South Dakota), 517 U.S. 735, 744 n.3 (1996) (indicating, in a nontax context, to disregard a post-transaction regulation in interpreting an ambiguous statute would be inappropriate).

[4] The government's advantage over the taxpayer in the case of regulations is not new in that their validity had traditionally been reviewed deferentially, but the level of deference

ruling, or perhaps even an argument made by the government during litigation.[5]

Recent developments, particularly in the transfer-tax area, suggest this transformation has not been lost on the government. Part I of the Article sets the stage for a discussion of deference in the tax context by focusing on a recently litigated generation-skipping-tax issue that resulted in a conflict in the circuit courts.[6] Rather than taking the traditional route of continuing to litigate in other circuits or seeking Supreme Court review, the government resolved the issue in its favor by promulgating an amendment to the regulations.[7] The government issued the amendment approximately fourteen years after the enactment of the underlying statute, after the government had secured a victory in one circuit by persuading the court to uphold the original regulations partly because Congress had ratified them, and after the issue already had been resolved against the government in another circuit. In effect, the government declared victory by its own regulation.

Under the traditional view, the adoption of regulations only after the outbreak of litigation or the failure to adopt regulations contemporaneously with the enactment of the statute to which they relate would have cut against deference. The deference formulation now used by the courts makes these considerations irrelevant. Under the Supreme Court's *Chevron* doctrine, the agencies are permitted to resolve questions of statutory

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the regulations now receive, as well as the wide circumstances in which deference is granted, makes the contemporary notion of deference with regard to regulations a radically different phenomenon. For a discussion of this transformation, see *infra* Part II.

[5] Deference aside, in some contexts, the government may enjoy a presumptive advantage over taxpayers. For example, in INDOPCO, Inc. v. Comm'r, 503 U.S. 79, 84 (1992), the Court referenced the rule that deductions are a matter of "legislative grace," and that the taxpayer therefore has the burden of clearly establishing that the deduction is justified. Additionally, Justice Breyer recently argued, in his dissent, that, when the Code is ambiguous, it should be construed so as to avoid creating a loophole. *See* Gitlitz v. Comm'r, 531 U.S. 206, 222 (2001). *See also United Dominion*, 121 S. Ct. at 1944-45 (Stevens, J., dissenting) (Justice Stevens intimating that he, too, would resolve ambiguity in order to defeat taxpayer abuse). Indeed, some have suggested that Congress should enact legislation to provide that, when the Code is unambiguous and a literal application would favor the taxpayer, a construction favoring the government would nevertheless be appropriate if abuse would otherwise result. *See* Alan Gunn, *The Use and Misuse of Antiabuse Rules: Lessons From the Partnership Antiabuse Regulations*, 54 SMU L. REV. 159, 162-63 (2001).

[6] *See Peterson*, 78 F.3d at 795; Simpson v. U.S., 183 F.3d 812 (8th Cir.1999).

[7] *See* Prop. Treas. Reg. § 26.2601-1, 64 Fed. Reg. 62997 (Nov. 18, 1999).

ambiguity, and the courts are required to defer to any reasonable resolution on the theory that, unlike the courts, the agencies are politically accountable.[8]

In a 1996 nontax case, the Court invoked *Chevron* and deferred to an agency interpretation issued approximately one hundred years after the enactment of the statute and after litigation in the lower courts had produced conflicting decisions about the meaning of the statute. And, in a 1997 transfer-tax case, a four-Justice plurality opinion suggested that the court's conclusion could be overturned by new regulations, even though Congress had enacted the statute some fifty years earlier (and the government issued such regulations in 2000).[9] The Court's deference formulation even permits government agencies to modify their interpretations over time if the modification is justified, with various Justices intimating that a change in administration might provide sufficient justification. Under this evolving approach, statutes no longer have a fixed meaning. Instead, statutory content can change as the administration, or the philosophy of the agencies, changes. Part II examines and critiques the new deference formulation.

Part III of the Article revisits the generation-skipping-tax issue examined in Part I. It considers whether the regulations issued by the government in the aftermath of the inter-circuit conflict can be sustained, given the government's successful argument that Congress ratified the original regulations under the so-called reenactment doctrine. Even under the expansive conception of deference currently in vogue, it is possible that regulations cannot be altered once Congress has approved them. Part III also examines the relationship between deference and the reenactment doctrine, raising the question of whether newly issued generation-skipping tax regulations are valid.

Although the Supreme Court has not spoken as definitively about the level of deference that revenue rulings are entitled to receive, recent developments suggest that the *Chevron* framework does not apply in this context. Instead, it appears, a more flexible type of deference is to be applied depending upon a variety of factors that would be irrelevant under *Chevron*. So, for example, whereas a ruling designed to influence the outcome

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[8] *See* Chevron U.S.A., Inc. v. National Res. Def. Council, 467 U.S. 837 (1984).

[9] *See* Estate of Hubert v. Comm'r, 520 U.S. 93 (1997). For the non-tax case, *see Smiley*, 517 U.S. at 735.

of pending litigation would probably receive little, or no, deference, a regulation issued in the same circumstances would, in all likelihood, be binding on the courts (assuming it otherwise satisfied *Chevron's* criteria). At the same time, the government enjoys a different kind of deference that is more analogous to *Chevron's* framework where a regulation is ambiguous. In this context, a ruling, or perhaps even a government argument made during litigation, that resolves the ambiguity in a reasonable manner may be entitled to *Chevron*-type binding deference. Part IV of this Article examines the evolving standards of deference applicable to rulings, and Part V considers the issue in the context of interpretations offered by the government with regard to ambiguous regulations.

While, as suggested, the deference standard will differ depending upon the kind of interpretation invoked by the government, the transformation in deference has a theme that cuts across all of the standards. In each case, the law appears to be developing in the direction of granting the government more deference. This is not surprising given *Chevron's* basic insight: the agencies' political accountability makes them a more appropriate repository for interpretive responsibility than the courts. In the tax context, the transformation portends the end of practice as traditionally understood. If the government can declare victory by regulation, the balance between the government and the taxpayer has been radically changed.

Part VI of the Article argues for a return to the traditional view, under which the government would receive a reduced level of deference. More specifically, it recommends that *Chevron* should not apply in tax cases. This is not to suggest that the government should receive no deference in the case of a regulation. Rather, the courts should be permitted to take into account various factors when determining the validity of a regulation, such as whether the government issued a regulation contemporaneously with the enactment of the statute or issued it in the heat of litigation. On the other hand, revenue rulings and government-proffered interpretations of ambiguous regulations should receive no deference.

Part VI also considers taxpayer-friendly regulations and rulings. The courts have indicated that, as a matter of constitutional law, a government interpretation deemed inconsistent with the statute must be disregarded when it favors the taxpayer. Because of the unfairness and inefficiency of this approach, Part VI suggests legislation that would circumvent this constitutional limitation by denying funds to the government for the enforcement of any court decision invalidating a taxpayer-friendly interpreta-

tion.

PART I. GENERATION-SKIPPING TRANSFER TAX: HISTORY, BACKGROUND, AND NEW REGULATIONS

A. History and Background

In 1976, Congress created the generation-skipping transfer tax ("GST").[10] Sensitive to concerns about wealth transfers made in reliance on preexisting law, Congress provided grandfather protection for previously created irrevocable trusts (i.e., for trusts that were irrevocable on June 11, 1976).[11] In 1986, Congress repealed the GST, making the repeal retroactive to the date of the original enactment.[12] Congress simultaneously created a new GST, similar in some respects to its predecessor but critically different in other respects. The new GST also grandfathered pre-enactment irrevocable trusts (in this case, trusts that were irrevocable on September 25, 1985).[13] The grandfather provision in both versions of the GST tax was subject to an exception: the GST would be applicable to a preexisting trust to the extent of any post-enactment addition to the trust.[14]

In 1980, the Department of the Treasury ("Treasury") finalized the effective-date regulations under the 1976 legislation.[15] In the preamble to the regulations, the Treasury discussed comments it had received regarding preexisting trusts that contain powers of appointment.[16] The commentators had argued that transfers occurring as a result of the exercise or lapse of a power should be grandfathered because the exception from the grandfather provision for post-enactment additions to a trust contemplated additions from outside sources.[17] The Treasury rejected this argument. Citing to the Conference Report and pointing to the structure of the statute, the Treasury articulated Congress' rationale for grandfather protection and the exception for additions: to exclude from tax any transfer that could not be un-

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[10] *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 2006, 1976 U.S.C.C.A.N. (90 Stat. 1520) 1879-90 (codified as amended at I.R.C. §§ 2601-2662 (2001)).

[11] *See id.* at 1889.

[12] *See* Tax Reform Act of 1986, Pub. L. No. 99-514, § 1431, 1986 U.S.C.C.A.N. 100 Stat. 2085, 2717-32 (1986).

[13] *See id.* at 2731.

[14] *See* Tax Reform Act of 1976 § 2006, 90 Stat. at 1889; Tax Reform Act of 1986 § 1433, 100 Stat. at 2731.

[15] *See* T.D. 7713, 1980-2 C.B. 283, 285.

[16] *See id.*

[17] *See id.*

done at the time of enactment (in other words, not to violate reliance interests).[18] The regulations invoked traditional estate and gift tax principles to implement this concept. Thus, under the regulations, an addition to the trust would not be viewed as occurring unless a taxable transfer (under either the estate or gift tax) had been made.[19]

Applying this concept in the context of powers of appointment, the regulations contain a constructive-addition provision.[20] Accordingly, transfers occurring as a result of the post-enactment lapse or exercise of a special power of appointment—not being a taxable event under traditional estate and gift tax principles—would not be subject to the GST.[21] However, referencing the 1976 legislative history, the Treasury observed that Congress explicitly indicated its intention to make the post-enactment exercise of a special power under a pre-enactment trust subject to the GST if exercised in a manner that violates a federalized version of the rule against perpetuities.[22] Based on this observation, the Treasury qualified the constructive-addition provision, providing that transfers made under an exercise of a special power of appointment in violation of a federalized perpetuities rule would be subject to the GST.[23]

When Congress adopted the new version of the generation skipping tax in 1986, it explicitly focused on the regulation containing the constructive-addition provision.[24] In both the House and Senate, the conclusion was

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[18] *See id.*

[19] *See id.*

[20] *See id.* at 288 (citing Treas. Reg. § 26.2601-1(e)(3) (1980)).

[21] *See id.*

[22] Congress obviously was concerned about taxpayers abusively prolonging the duration of preexisting trusts and thereby indefinitely avoiding the tax. *See id.* at 288-89.

[23] *See id.* at 288.

[24] In the House, Representative Rostenkowski (who introduced the bill), referenced the regulation under the 1976 legislation and described an agreement providing that the scope of the new effective-date provision would be given the same interpretation. *See* 132 Cong. Rec. H8362 (daily ed. Sept. 25, 1986). In the Senate, Senators Bentsen and Packwood, by way of colloquy, explicitly adopted the same agreement. *See* 132 Cong. Rec. S13952 (daily ed. Sept. 27, 1986). *See also Peterson Marital Trust*, 78 F.3d at 801, (citing government arguments that the legislative history established that Congress had given the regulation an overall endorsement and that Congress should therefore sustain the regulation under the 1986 legislation. In upholding the regulation, the court stated: "There is, if anything, some indication in the legislative history of the 1986 GST that the legislature considered the effective-date provision to be as interpreted in Treas. Reg. § 26.2601-1(e)(3)."). *See also* Gen. Explanation of the Tax Reform Act of 1986, 99th Cong. 1267 n.12 (1987) (Statement of J. Comm. on Taxation); Brief for the Commissioner of Internal Revenue at 28-30, *Peter-*

reached that the regulation accurately captured Congress' intent underlying the 1976 legislation.[25] It was agreed, moreover, that the provision should be ratified and remain viable under the new version of the tax.[26] Thus, Congress, in 1986, clearly embraced the notion that an addition would render grandfather protection unavailable only where a taxable transfer under the estate or gift tax provisions occurred (subject to the same qualification contained in the 1980 regulations regarding the exercise of a special power of appointment beyond a federalized perpetuities period).[27]

B. Conflict in the Circuit Courts

In *Peterson*,[28] the husband had created an irrevocable trust prior to the enactment of the 1986 version of the GST.[29] Under the trust, the wife had a testamentary general power of appointment.[30] If she failed to exercise the power, the corpus would remain in the trust for the benefit of the grandchildren, except for the portion necessary to pay the estate tax attributable to the inclusion of the corpus in the wife's estate.[31] In 1987, the wife died without having exercised the power.[32] The Internal Revenue Service ("Service") took the position that the lapse of the wife's power of appointment upon her death constituted a constructive addition to the trust, thereby making grandfather protection unavailable.[33]

The Service argued that one of the examples in the then temporary regulations illustrating the constructive-addition provision was directly on point.[34] In the example, the post-enactment lapse of a general power of appointment created under a pre-enactment trust negated grandfather protection.[35] The parties agreed that if the constructive-addition regulation were valid, the lapse of the power subjected the transfer to the GST.[36] Arguing against the validity of the regulation, the taxpayer made the same

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son (No. 95-4001).

[25] *See* Tax Reform Act of 1976 § 2006.

[26] *See id.*

[27] *See id.*

[28] 78 F.3d at 795.

[29] *See id.* at 797.

[30] *See id.*

[31] *See id.*

[32] *See id.*

[33] *See id.* at 798.

[34] *See id.* at 798-99.

[35] *See id.*

[36] *See id.* at 798.

argument that the Treasury had rejected in the 1980 preamble to the regulations under the 1976 legislation: the addition concept contained in the statute contemplated transactions having the effect of increasing the amount of trust corpus.[37] The Service argued that the regulation was a reasonable construction of the statute and that it could not be invalidated given that "the regulation received an overall endorsement" by Congress in 1986.[38]

After reviewing the history of the regulation, the *Peterson* court agreed with the Service.[39] The court first considered the 1980 preamble, in which the Treasury explained that a constructive addition would be deemed to occur only if a transfer taxable for estate or gift tax purposes were made.[40] The court concluded that the Treasury's decision in 1980 to ground the statutory concept of an addition in traditional transfer tax theory was appropriate.[41] Congress had used the term "added"[42] against the backdrop of the provisions in the Code and regulations that define a taxable transfer, and, therefore, must have intended to give the term content based on these provisions. Because the lapse of a general power of appointment is a taxable event under either the estate[43] or gift[44] tax, the court could have ruled for the Service on this basis and ended its analysis. The Court, however, chose not to do so. Instead, the court concluded that, Congress did

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[37] *See id.* at 800.

[38] *See* Brief for the Commissioner of Internal Revenue at 28-30, *Peterson* (No. 95-4001) p.30.

[39] *See Peterson*, 78 F.3d at 800.

[40] *See id.*; Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co. 463 U.S. 29, 46-51 (1983) (noting that the Court examined the administrative record to determine if the agency's decision to revoke its interpretation was arbitrary or capricious). *See also* Estate of Harrison v. Comm'r, 115 T.C. 161 (2000) (examining preamble to determine the intent underlying the regulation); Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255, 291 (2000) (indicating that courts typically do not give serious consideration to regulatory history, but arguing that such material should receive more attention).

[41] *See Peterson*, 78 F.3d at 800.

[42] The effective-date provision, as set forth in the legislation, is as follows: the GST will not apply to "any generation-skipping transfer under a trust which was irrevocable on September 25, 1985, but only to the extent that such transfer is not made out of corpus added to the trust after September 25, 1985." Tax Reform Act of 1986 § 1433, 100 Stat. at 2731.

[43] *See* I.R.C. § 2041.

[44] *See* I.R.C. § 2514.

not disclose any intent to overrule the regulation.[45] Indeed, according to the Court, the legislative history revealed what the Service had argued—that Congress intended to ratify the regulation and to adopt it as the governing construction of the effective-date provision under the 1986 legislation, thus immunizing the regulation from the taxpayer's attack on its validity.[46]

The court also reached the same conclusion as the Treasury in its analysis of the statute. The court read the statute as making grandfather protection available when the family cannot escape from the terms of transfer contained in the trust.[47] Because Mrs. Peterson could exercise her power of appointment to undo the transfer made by her husband, the court determined that the statute required denial of grandfather protection.[48]

In *Simpson v. United States*,[49] the facts were similar to those in *Peterson*. Unlike Mrs. Peterson, however, Mrs. Simpson did not allow her general power of appointment to lapse. Instead, she exercised it in favor of her grandchildren, which resulted in an outright distribution of the trust corpus to them upon her death.[50] Not surprisingly, the Service relied heavily on *Peterson*. The *Simpson* court, however, found the factual differences between the cases warranted a different outcome given the language of the then-temporary constructive-addition regulation.[51] Under the regulation, a constructive addition occurred "where any portion of a trust remains in the trust after the release, exercise, or lapse of a [general] power of appointment. . . ."[52] Whereas in *Peterson*, the trust corpus remained in the trust after the lapse of Mrs. Peterson's power, none of the corpus remained in the Simpson trust after Mrs. Simpson exercised her power.[53] In other words, as perceived by the *Simpson* court, the critical condition in the regulation, which was satisfied in *Peterson* but not in *Simpson,* was the requirement that the corpus remain in the trust after the exercise or lapse of the power.[54]

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[45] *See Peterson*, 78 F.3d at 801.
[46] *See id.* at 801 n.5.
[47] *See id.* at 801-02.
[48] *See id.*
[49] 183 F.3d 812 (8th Cir. 1999).
[50] *See id.* at 815-16.
[51] *See id.* at 816.
[52] *Id.* at 815 (*quoting* Temp. Treas. Reg. § 26.2601-1(b)(1)(v)(A) (1988)) (alteration in original).
[53] *See id.* at 815-16.
[54] *See id.*

The *Simpson* court's analysis of the regulation reveals a weakness in its drafting. Under the *Simpson* court's reading, in order to defeat grandfather protection, there must be a release, exercise, or lapse of a general power of appointment;[55] and trust corpus thereafter remaining in the trust.[56] Although the text of the regulation easily lent itself to this reading, the 1980 preamble strongly suggested that the Treasury intended otherwise. The preamble implied that the exercise, release, or lapse of a general power—being a taxable event under either the estate or gift tax—would be sufficient to defeat grandfather protection (without regard to whether the trust corpus remained in the trust[57]).[58]

What accounts for this apparent conflict between the regulation and the preamble? The preamble revealed the Treasury's policy-based impulse to make the availability of grandfather protection turn on taxability under the estate and gift tax.[59] The preamble explicitly offered two policy justifications for making such taxability determinative. First, where the corpus of a trust becomes the subject of a taxable event, the beneficiaries can alter or undo the terms of the initial transfer.[60] Second, introducing a rule that failed to parallel estate and gift tax principles would be inappropriate.[61] The regulation's text, on the other hand, disclosed a language-based concern that the statute might not be able to accommodate a construction focusing solely on taxability, because, ordinarily, the word "addition" contemplates an increase or augmentation.[62]

The Treasury apparently sought to resolve this conflict between the regulations and preamble by adopting a fiction: if the corpus remained in the trust after the exercise, release, or lapse, it could be viewed as if the trustee distributed the corpus to the beneficiaries who then recontributed the corpus to the trust, thus effecting an increase in the trust corpus.[63] This fiction, however, has its difficulties. Consider the difference between a lapse and an exercise. An exercise ordinarily entails a direction that the

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[55] *See id.* at 815.

[56] *See id* at 815-16.

[57] *See* T.D. 7713, 1980-2 C.B. 283, 285.

[58] The conflict could be resolved by reading the preamble as making a taxable event a necessity, but not sufficient condition to defeat grandfather protection.

[59] *See* T.D. 7713.

[60] *See id.* at 284-85.

[61] *See id.*

[62] *See id.* at 287-88.

[63] *See id.* at 288.

trustee make immediate distribution.[64] In contrast, a lapse typically results in the trustee retaining the corpus.[65] While invoking the fiction in the case of a lapse is relatively easy (given that after the lapse, the corpus remains in the hands of the trustee), how to apply the fiction when the power is exercised and, as a result, the corpus immediately leaves the trustee's hands is unclear.

Although the text of the regulation clearly contemplated that a constructive addition could occur in connection with an exercise, the only relevant example contained in the regulations involved a lapse.[66] The drafters provided no guidance with regard to how the constructive-addition concept might apply to an exercise. Faced with this lacuna, the *Simpson* court distinguished *Peterson* as a lapse case and upheld the grandfather protection based on its reading of the temporary regulation's text.[67]

The court's decision in *Simpson*, however, ultimately is not satisfying. The court fails to reconcile its reading of the regulation with the language in the regulation indicating that an exercise could create a constructive addition. The court also fails to explain the inconsistency between its reading of the regulation and the preamble. In addition, in emphasizing the text of the regulation, the court fails to appreciate the consequences in policy terms. The differentiation between an exercise and a lapse, a distinction long ago abandoned in the estate and gift tax context, makes no sense.[68] Put simply, it seems wrong to tax the Peterson family more harshly than the Simpson family merely because Mrs. Peterson's advisers recommended that she allow her power to lapse in favor of her grandchildren rather than exercise it.

The *Simpson* court was not satisfied with its regulation-based distinction, concluding that the statute itself clearly called for the result the court reached.[69] Although the *Simpson* court did not acknowledge the conflict created with the *Peterson* decision, the court did reject implicitly *Peter-*

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[64] *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 11.1 (1984).

[65] *See Peterson*, 78 F.3d at 799.

[66] *See* T.D. 7713.

[67] *See Simpson*, 183 F.3d at 815-16.

[68] In the case of a general power of appointment created before October 22, 1942, a lapse is not a taxable event. *See* I.R.C. §§ 2041(a)(1), 2514(a). But, of course, if created subsequently, a lapse does trigger either the estate tax or the gift tax. *See* I.R.C. §§ 2041(a)(2), 2514(b).

[69] *See Simpson*, 183 F.3d at 816.

son's holding that the question of grandfather protection should turn on whether a taxable transfer under the estate and gift tax provisions has occurred.[70] Contrary to the *Simpson* court's holding, under the *Peterson* court's taxable-transfer analysis, Mrs. Simpson's exercise of her general power of appointment, a taxable event for estate tax purposes,[71] would have precluded grandfather protection.

C. New Regulations

Obviously disappointed with the defeat in *Simpson*, the Treasury issued new regulations overruling *Simpson* and reaffirming *Peterson*.[72] In the preamble to the proposed regulations, the Treasury explicitly discussed the conflict between these decisions and stated its preference for *Peterson*.[73] Surprisingly, however, the regulations do not remain faithful to the taxable-transfer theory; the Treasury did not even acknowledge that the *Peterson* court had concluded that the theory, as adopted by the Treasury in 1980 and later endorsed by Congress' ratification in 1986, "would ensure that the GST was given the scope intended by Congress."[74] In the preamble to the final regulations, the Treasury rejected commentators' suggestions to make the regulations consistent with the theory.[75] As will now be discussed, the Treasury's decision to disavow the theory is crucial in terms of another aspect of grandfather protection addressed in these regulations.

The other aspect of grandfather protection deals with a technique developed after the 1986 legislation to stretch out the term of grandfathered trusts. The technique is part of an emerging pattern: lawyers seeking to achieve their clients' tax-planning objectives by prevailing upon state legislatures to enact provisions that will facilitate federal tax

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[70] If one views *Peterson* as establishing that a taxable transfer is a necessary but not a sufficient condition for denying grandfather protection, then *Simpson* could be understood as accepting *Peterson's* taxable-transfer theory and permitting the trust created by Mr. Simpson to remain grandfathered because a taxable transfer, by itself, is not a sufficient ground for denying grandfather protection. Nevertheless, that the *Peterson* decision nowhere suggests that grandfather protection can be retained once a beneficiary has made a taxable transfer should be emphasized.

[71] *See* I.R.C. § 2041.

[72] *See* Prop. Treas. Reg. § 26.2601-1, 64 Fed. Reg. 62997 (Nov. 18, 1999).

[73] *See id.* at 62999.

[74] *See Peterson*, 78 F.3d at 800.

[75] *See* T.D. 8912 2001-5 C.B. 452.

savings.[76] This technique requires state legislation that authorizes trustees who have a power to invade corpus to make the invasion in further trust.

As previously indicated, when Congress enacted the 1986 version of the GST, it embraced the provision in the regulations under the 1976 legislation applicable to powers of appointment. Thus, subject to the perpetuities limitation already discussed, a donee of a power could extend a pre-1986 trust containing a special power of appointment, without causing a loss of grandfather protection, if the donee of the power exercised it by creating a new trust with a longer duration. As a result, estate planners began to suggest that such powers be exercised in this manner in order to maximize transfer-tax savings.[77]

However, when a pre-existing trust did not contain a power contemplating the creation of a new trust, how the trust's term could be extended was not immediately clear. Ultimately, the estate planning community fashioned a solution: secure state legislation authorizing trustees with a power to invade under the instrument to make the invasion in further trust, even if the instrument did not explicitly contemplate the creation of a new trust.[78] Because a trustee's invasion power is a type of special power,[79] the theory was that trustees could, under such state legislation, exercise the power by creating new trusts with extended terms without losing grandfather protection (provided that no violation of the federalized perpetuities provision occurred).[80] This legislation would have a retroactive character

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[76] *See* Mitchell M. Gans, *Federal Transfer Taxation and the Role of State Law: Does the Marital Deduction Strike the Proper Balance?*, 48 EMORY L.J. 871, 877-83 (1999). *See also* Ira Mark Bloom, *The GST Tax Tail is Killing the Rule Against Perpetuities*, 87 TAX NOTES 569 (April 24, 2000) (discussing recent state legislation repealing or modifying the rule against perpetuities in order to create a favorable tax outcome).

[77] *See* Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities and the GST Tax: New Perils for Practitioners and New Opportunities*, 30 REAL PROP. PROB. & TR. J. 185, 205-09 (1995).

[78] *See, e.g.*, N.Y. EST. POWERS & TRUSTS § 10-6.6 (1982).

[79] *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 11.1 (1984).

[80] When Congress enacted the GST in 1986, a background principle provided that a trustee's discretionary invasion power constituted a special power of appointment. *See id.* Accordingly, one can argue that Congress contemplated that a trustee's invasion in further trust would be viewed as an exercise of a special power that would not trigger a loss of grandfather protection (assuming the exercise/invasion did not violate the federalized perpetuities rule). *See* Field v. Mans, 516 U.S. 59, 70 (1995) (referring to the Restatement of Torts as a background principle in construing a statutory term). On the other hand, at the time of the 1980 adoption of the regulation under the 1976 legislation, the background

if it was to have the desired effect: it would apply to trusts previously created.

Understandably, the Treasury found this technique offensive and adopted an approach in the new regulations designed to close it down.[81] Under the regulations, the distribution to a new trust constitutes a modification that could result in a forfeiture of grandfather protection:[82] modifications defeat grandfather protection if vesting is deferred or any beneficial interest is shifted to a lower generation.[83] In other words, the regulations will not tolerate a tax-saving invasion in further trust (i.e., an invasion having the effect of prolonging grandfather protection). However, this new modification rule does not apply if the original trust or state law in effect at the time the trust became irrevocable explicitly authorized the trustee to make distribution in further trust without the consent of the beneficiaries or the court[84] (though the terms of the new trust cannot violate the federalized perpetuities rule and still retain grandfather protection).[85]

Parenthetically, the regulations impose a rather draconian penalty where an invasion in further trust is treated as a disqualifying modification. The new trust is not entitled to grandfather protection, and the old trust loses its protection as well. The loss of grandfather protection is triggered even if the new trust is created by a partial invasion of, say, one dollar of the old trust's corpus.[86] By creating such a penalty, Treasury has created an *in terrorem* effect. Taxpayers inclined to make such an invasion will be intimidated from doing so once they realize that, if the regulations are sustained, it will result in the loss of all grandfather protection.

The Treasury could not continue to adhere to the taxable-transfer theory while, at the same time, closing down the invasion-in-further-trust technique. Under the taxable-transfer theory, a trustee's invasion in further

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principle was apparently contrary. *See* RESTATEMENT (FIRST) OF PROPERTY § 318 (1940) (suggesting that the Treasury may not have anticipated in 1980 that granting grandfather protection for the exercise of a special power of appointment would extend to a trustee's invasion in further trust).

[81] *See* T.D. 8912, 2001-5 C.B. 452.

[82] *See* Treas. Reg. § 26.2601-1 (b)(4)(i)(D)(1) (2000).

[83] *See id.*

[84] *See* Treas. Reg. § 26.2601-1(b)(4)(i)(A)(1).

[85] *See* Treas. Reg. § 26.2601-1(b)(4)(i)(A)(2).

[86] *See* Carol A. Harrington et al., *Trust Modifications Prop. Regs. and Other Significant GST Tax Developments*, 92 J. TAX'N 212, 213 (2000).

trust, not a taxable event for estate or gift tax purposes,[87] would not defeat grandfather protection. Moreover, given the policy justification the Treasury proffered when it originally adopted the theory in the regulations under the 1976 legislation—that grandfather protection should remain intact if the family cannot alter or undo the plan[88]—the technique should not result in a loss of grandfather protection because the family cannot overrule a trustee's decision to create a new trust with a longer term if state law, whenever enacted, authorizes it. Thus, to eliminate the technique, the Treasury needed to abandon the theory, as well as its policy justification.[89]

In doing so, the Treasury to a great extent ignored the terrain it had in large part created. First, although embracing in the preamble to the proposed regulations the aspect of the *Peterson* court's analysis that relies on the taxable-transfer theory's justification,[90] the Treasury nevertheless rejects the theory itself in the preamble to the final regulations.[91] Second, although the Treasury continues to endorse the policy justification in the power-of-appointment setting, it refuses to permit the justification to operate in the context of the invasion technique. Third, the decision to abandon the theory came after the government had convinced the *Peterson* court that Congress had ratified the theory in 1986. And finally, the Treasury overruled the *Simpson* decision in the new regulations, even though the court held that the statute itself clearly mandates its holding.[92] In effect, rather than continuing to litigate with taxpayers, the government declared victory by regulation, choosing to uphold the aspect of the *Peterson* decision that it found favorable, rejecting the aspect of the *Peterson* decision

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[87] The exercise of a special power of appointment, including the exercise of an invasion power by a trustee, ordinarily is not a taxable event. *See* Treas. Reg. § 25.2514-1(c) (2001).

[88] *See* T.D. 7713, 1980-2 C.B. 283, 285.

[89] In taking the position that an invasion in further trust (which, as indicated, is in effect the exercise of a special power of appointment, *see supra* note 20) should be treated as an addition, the Treasury also deviated from well-ingrained principles that the Treasury itself recently invoked in another context. *See* T.D. 8956, 2001-32 C.B. 112 (indicating that the trust, not the donee of the power, becomes subject to tax under I.R.C § 684 (West Supp. 1997) at the time the power is exercised in further trust because the donee is not, as a matter of "general principles," viewed as making a transfer).

[90] *See* GST Issues, 64 Fed. Reg. 62997, 62999 (Nov. 18, 1999).

[91] *See* T.D. 8912, 2001-5 C.B. 452.

[92] *See Simpson*, 183 F.3d at 816. As will be discussed, when a statute unambiguously requires a particular construction, an agency is precluded from adopting a contrary interpretation. *See infra* notes 268-271 and accompanying text.

that it found unfavorable, and completely disregarding the *Simpson* decision.

At one time, the courts would have frowned upon such opportunistic rewriting of regulations, but the Supreme Court's *Chevron* doctrine has had a transformative impact on the power of the agencies, including the Treasury.[93] Part II will examine the resulting expansion in agency authority, and Part III will return to a consideration of these regulations, focusing on their validity in the face of Congress' ratification of a contrary approach in 1986 and the evolving *Chevron* doctrine.

PART II. THE CHEVRON DOCTRINE

In recent years, under its *Chevron* doctrine, the Supreme Court has preferred that agencies (including the Treasury[94]), rather than the courts, resolve questions of statutory ambiguity through the writing, and rewriting, of regulations. Even prior to *Chevron,* the Court required deferential review of agency interpretations,[95] but *Chevron* made two changes.[96] First, it increased the level of deference.[97] Previously, the courts were required to examine a variety of factors in determining whether or not in any given case the interpretation was persuasive and, therefore, entitled to deference.[98] Now, *Chevron* requires courts to give controlling deference to an

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[93] Prior to *Chevron*, the courts were less deferential to the agencies, permitting, for example, the adversarial origin of an interpretation to weigh against its validity. *See infra* notes 98-99 and accompanying text.

[94] *See* United States v. Haggar Apparel Co., 526 U.S. 380 (1999) (indicating that the validity of tax regulations must be analyzed under *Chevron*). For a general discussion of *Haggar, see* Claire R. Kelly & Patrick C. Reed, *Once More Unto the Breach: Reconciling Chevron Analysis and De Novo Judicial Review After United States v. Haggar Apparel Company*, 49 AM. U.L. REV. 1167 (2000).

[95] *See Skidmore*, 323 U.S. at 140 (discussing the standard for deference for treasury and other regulations). *See also* United States v. Mead Corp., 121 S. Ct. 2164, 2171-72 (2001) (reviewing the pre-*Chevron* history).

[96] *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 615 (1995).

[97] *See id.*

[98] *See Skidmore*, 323 U.S. at 140 (demonstrating whether the courts are required to defer to an agency interpretation depends upon, inter alia, the thoroughness of the agency's analysis, the soundness of the analysis, and its consistency with earlier interpretations); Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979) (indicating that court should review tax regulations based on a variety of factors, including the consistency of the Treasury's position; whether the government issued regulations contemporaneously with the enactment of the statute; how the regulation evolved; the length of time the regula-

interpretation if the statute is ambiguous and the agency's approach constitutes a reasonable resolution of that ambiguity.[99]

Second, *Chevron* began to justify deference in a new way. No longer focusing exclusively on agency expertise as a justification, the Court began to emphasize political accountability.[100] As a part of the executive branch, agencies are more politically accountable than courts and are therefore a more suitable repository for interpretive responsibility.[101] The connection between political accountability and interpretive responsibility flows from the growing realization that law construction is often the equivalent of lawmaking.[102] Law construction entails the making of policy, a function

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tion has remained in effect; the degree of taxpayer reliance; and the level of scrutiny the regulation received from Congress during the consideration of any reenacting legislation). *See also* E.I. du Pont de Nemours & Co. v. Comm'r, 102 T.C. 1, 13 (1994), *aff'd*, 41 F.3d 130 (3rd Cir. 1994) and *aff'd sub nom.* Conoco, Inc. v. Comm'r, 42 F.3d 972 (5th Cir. 1995) (applying *Nat'l Muffler*, a pre-Chevron formulation, the court intimated that if the regulation under inquiry had been in order to gain a litigating advantage, its validity might have been questionable); Comm'r v. Sternberger's Estate, 348 U.S. 187, 199 (1955) (showing that longstanding regulations are entitled to special weight).

[99] *See Chevron*, 467 U.S. at 842-43. The courts, however, occasionally continue to refer to considerations utilized by the courts prior to *Chevron*. *See, e.g.*, Nordtvedt v. Comm'r, 116 T.C. 165, 170 (2001) (citing *Sternberger's Estate* for proposition that a "weighty" justification is required before overturning a longstanding regulation).

The Supreme Court has made a distinction in the verbal formulation it applies when reviewing legislative and interpretive regulations. In the former case, the Court inquires whether the regulation is arbitrary or capricious (*see Mead*, 121 S. Ct. at 2171 (referencing *Chevron*)), but in the latter case it examines the regulation to determine if it reasonably resolves the statutory ambiguity. *See id.* at 2172 (also referencing *Chevron*). Some courts continue to suggest that these verbal formulations create two different standards capable of producing different outcomes. *See, e.g.*, Walton v. Comm'r, 115 T.C. 589, 597 (2000) (indicating that legislative regulations are entitled to more deference than interpretive regulations). Nevertheless, as a practical reality, the two formulations seem indistinguishable and unlikely to produce different outcomes. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment) (suggesting that, when *Chevron* applies, making the pre-*Chevron* distinction between legislative and interpretive regulations is no longer useful); Boeing Co. v. United States, 258 F.3d 958 (9th Cir. 2001) (concluding that the decision whether the regulation at issue was legislative or interpretive was unnecessary because, under either standard, it would be valid). For a further discussion of the conflicting authorities on the question, see John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the Chevron Era*, 64 GEO. WASH. L. REV. 35, 48-49 (1995).

[100] *See Chevron*, 467 U.S. at 865-66 (setting forth the political-accountability theory, but also acknowledging the limited expertise of judges as compared to the agencies).

[101] *See* Schacter, *supra* note 96, at 616-17.

[102] *See Chevron*, 467 U.S. at 865-66; Schacter, *supra* note 96, at 595-96. *See also*

better served, under the Court's new theory, by the politically accountable agencies rather than by the politically insulated courts.[103] Thus, under *Chevron*, deference no longer rests solely on agency expertise for its justification but rather, as the Court stressed, on an agency's political accountability as well.[104]

This is not to suggest, however, that in the absence of deference, interpretive decisions would be politically unconstrained. On the contrary, if a judicial interpretation proved to be problematic, Congress obviously would be urged to overturn it. And, to the extent that legislative redress were not provided, Congress—as well as the President—would face political consequences. Thus, in a nondeference world the judge would have more decision-making discretion, but political accountability would nevertheless continue to exert an important influence.[105] The question, in other words, is not whether political accountability should have a role in the interpretation of statutes, but rather what king of role it should play.

Chevron's reach in the tax area had, until recently, been the subject of some question.[106] It was at first unclear whether *Chevron* applied to the Treasury's interpretive regulations, because unlike legislative regulations, there is no statutory requirement that the public be given notice and an opportunity for comment before interpretive regulations are promul-

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David Millon, *Objectivity and Democracy*, 67 N.Y.U. L. REV. 1, 16-22 (1992).

[103] While the Court also justified *Chevron* deference as a matter of separation of powers, *see, e.g., Mead*, 121 S. Ct. at 2179 (Scalia, J., dissenting), the predominant view is that it derives from a delegation by Congress. *See* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001).

[104] Although one might read *Chevron* as deemphasizing the significance of expertise as a justificatory theory for deference, the Court has made clear that expertise remains an important justificatory component. *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 651-652 (1990) (stating that "practical agency expertise is one of the principal justifications behind *Chevron* deference"). *See also* Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2088-90 (1990).

[105] The judge, moreover, is not completely free of accountability. *See* Antonin Scalia, The Rule of Law as a Law of Rules, The Oliver Wendell Holmes Bicentennial Lecture, Harvard Law School (February 14, 1989), *in* 56 U. CHI. L. REV. 1175, 1179 (1989) (indicating that judges are accountable to the criticisms of the bar and the academy).

[106] Some critics have even questioned *Chevron's* legitimacy as a general matter, suggesting it lacks consistency with the Administrative Procedure Act (APA). *See Mead*, 121 S. Ct. at 21797, n.2 (Scalia, J., dissenting) (citing Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 9-11 (1996)) (suggesting that the APA could be read as requiring that courts review statutory ambiguity *de novo*).

gated.[107] Even though the Treasury in fact provides notice and opportunity for comment in issuing interpretive regulations, some suggested that *Chevron* might not apply in this context.[108] Second, given the specialized nature of the Tax Court and its expertise, there was some doubt whether it would be appropriate to impose *Chevron* and thereby require the court to defer to the expertise of the Treasury.[109] Both of these questions, however, are now be resolved. The Supreme Court has made clear that *Chevron's* framework is applicable to interpretive regulations[110] and that the Tax Court, despite its own expertise, is required to give *Chevron* deference to the Treasury's regulations.[111] Recently, moreover, the Supreme Court held that an interpretation issued without notice and comment might nevertheless be entitled

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[107] *See, e.g.*, First Chicago NBD Corp. v. Comm'r, 135 F.3d 457, 459 (7th Cir. 1998) (no statutory requirement for public notice and comment with regard to interpretive regulations). *See also* David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327, 333 (2000) (stating that interpretive regulations, because they need not be promulgated with notice and opportunity for comment, are not binding on the courts). *See generally* Ellen P. Aprill, *Muffled Chevron: Judicial Review of Tax Regulations*, 3 FLA. TAX REV. 51, 76-78 (1996) (discussing the courts' uncertainty about applying *Chevron* in the case of interpretive regulations).

[108] *See First Chicago NBD*, 135 F.3d at 459 (quoting Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 OHIO ST. L.J. 1037, 1044 (1995) and indicating that, in the Seventh Circuit, *Chevron's* applicability with regard to interpretive regulations was an open question); *see also* Pac. First Fed. Sav. v. Comm'r, 961 F.2d 800, 803 (9th Cir. 1992) (finding that deciding whether *Chevron* applies in the tax context was unnecessary); Aprill, *supra* note 107, at 76-78.

[109] As late as 1995, the Tax Court noted that the question of the applicability of *Chevron* in the context of interpretive regulations was an unresolved question. *See* Cent. Pa. Sav. Ass'n and Subsidiaries v. Comm'r, 104 T.C. 384, 391-92 (1995).

[110] *See* Atl. Mut. Ins. Co. v. Comm'r, 523 U.S. 382, 389 (1998) (applying *Chevron* with respect to an interpretive regulation and citing as authority Cottage Sav. Assn. v. Comm'r, 499 U.S. 554, 560-61 (1991), in which an interpretive regulation also was at issue). *But see* Gen. Elec. Co. v .Comm'r, 245 F.3d 149, 154, n.8 (2d Cir. 2001) (reviewing the authorities and suggesting whether tax regulation should receive deference under *Chevron* or perhaps some other level of deference under *Nat'l Muffler*, 440 U.S. at 476-77 (1979) continues to be an open question).

[111] *See Haggar Apparel*, 526 U.S. at 394 (applying *Chevron* despite the claim that the expertise of the Court of International Trade required otherwise and indicating the Tax Court similarly was required to defer to Treasury regulations). Surprisingly, however, courts continue to question whether the *Chevron* standard applies to interpretive tax regulations, whether the standard the Court previously applied in *Nat'l Muffler*, 440 U.S. at 477, governs, and whether the two standards differ. *See Walton*, 115 T.C. at 598. *See also* Aprill, *supra* note 107, at 58-59, 63-73 (discussing and comparing the *Chevron* and *National Muffler* standards).

to *Chevron* deference.[112]

Under *Chevron*, once a court finds that a statute is ambiguous, the court is obliged to defer to any reasonable resolution of the ambiguity embodied in a regulation—provided Congress contemplated that the agency would have interpretive authority and the agency issues its interpretation in a format Congress anticipated would be binding on the courts.[113] Thus, in any case involving the construction of a statute under which an agency has interpretive authority,[114] the threshold question is whether the statute is ambiguous.[115] The lower courts' disagreement about the meaning of a statute may suggest that the statute contains the requisite ambiguity to invoke *Chevron* deference. In *Smiley v. Citibank*,[116] the Court, in making the threshold inquiry, emphasized that the different readings the statute had received in the Supreme Courts of New Jersey and California was in itself a strong indication of ambiguity.[117] If courts apply this approach at the federal level—and no apparent reason exists why disagreement in the federal courts should be viewed differently—*Chevron* may have transformed the role of the Supreme Court itself.[118] Inter-circuit conflict traditionally has been a basis for granting review of tax litigation in the Su-

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[112] *See Mead*, 121 S. Ct. at 2173 (2001).

[113] *See id.* at 2171.

[114] To invoke *Chevron*, the delegation of interpretive authority must be clear. *See Mead*, 121 S. Ct. at 2172-73 (referencing the argument made by Justice Breyer in dissent in *Christensen v. Harris County*, 529 U.S. 576 (2000), that *Chevron* should not apply when the statute leaves doubt about Congress' intent to delegate interpretive authority). In contrast, Justice Scalia asserted that Congress should be understood presumptively as delegating such authority. *See Christensen*, 529 U.S. at 591 (Scalia, J., concurring in part); *Mead*, 121 S. Ct. at 2178 (Scalia, J., dissenting).

[115] A question remains as to the appropriate use of legislative history in the context of a *Chevron* analysis. *See, e.g., Gen. Elec.*, 245 F.3d at 156 n.9 (indicating that *Chevron* itself contemplates the use of legislative history and that the Court in FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 147-48 (2000), considered legislative history, but suggesting that the appropriateness of referring to legislative history under *Chevron* remains an open question). For a decision holding that, if an examination of the legislative history can resolve the ambiguity, the agency's interpretation is not entitled to deference, see Dominion Res., Inc. v. United States, 219 F.3d 359, 366 (4th Cir. 2000). *See generally* Aprill, *supra* note 107, at 81-87 (discussing the use of legislative history in the context of *Chevron*).

[116] 517 U.S. 735, 739 (1996).

[117] *See id.* at 739.

[118] *See* Laurence H. Silberman, *Chevron: The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 822 (1990) (suggesting that the Supreme Court may be less inclined than the lower courts to grant deference under *Chevron* to an interpretation embodying a policy judgment on an issue of particular interest with which the Supreme Court disagrees).

preme Court, but such conflict may now argue in favor of deference to the Treasury's construction, resulting, as a practical matter, in a limit on the Court's authority.[119]

Indeed, it is arguable that the Court uses its resources improvidently when it grants review in a tax case to resolve an inter-circuit conflict, or, for that matter, whenever the statute is ambiguous. Under *Chevron's* logic, the Court should yield to any post-decision regulation that reasonably resolves the ambiguity, even if that regulation is contrary to the approach adopted by the Court. Although permitting an agency to replace the Court's interpretation of a statute with its own contrary interpretation is novel and inconsistent with the traditional understanding of the role of the judiciary,[120] *Chevron's* preference for agency resolution of statutory ambi-

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[119] *See* Gitlitz v. Commissioner, 531 U.S. 206, 217 n.7 (2001) (noting that a conflict in the circuit courts had developed on the issue, but concluding that the statute was unambiguous). *Gitlitz* could therefore possibly be viewed as inconsistent with *Smiley*'s notion that lower-court conflict is suggestive of ambiguity, but a distinction may be made between these cases. In *Gitlitz*, unlike *Smiley*, the Court engaged in conventional statutory construction and, therefore, did not make a *Chevron* analysis. Although the Treasury had issued a proposed regulation addressing the question before the Court in *Gitlitz*, *see* Prop. Treas. Reg. §1.1366-1(a)(2)(viii), 63 Fed. Reg. 44181 (1998), the Court not surprisingly chose to omit the proposed regulation from its discussion and was therefore left to decide the case without the assistance of any administrative interpretation. *See* LeCroy Research Sys. Corp. v. Comm'r, 751 F.2d 123, 127 (2d Cir. 1984) (granting no deference for proposed regulations). *But see* Estate of Shelfer v. Comm'r, 86 F.3d 1045, 1048 n.4 (11th Cir. 1996) (indicating that the Supreme Court has not determined definitively whether proposed regulations should receive deference). The Court was presumably anxious to find the statute unambiguous in order to avoid two points made by Justice Breyer in his dissent: the Court's analysis was inconsistent with the statute's legislative history, and an ambiguous Code section should be construed to avoid a loophole rather than to preserve it, which was the effect of the Court's holding. *See Gitlitz*, 531 U.S. at 220-24 (Breyer, J., dissenting). Perhaps, another way to read *Smiley*, in light of *Gitlitz*, is that although inter-circuit conflict presumptively leads to a finding of ambiguity, it does not necessarily do so in every case. In any event, the Treasury likely will feel somewhat intimidated by the Court's holding that the statute is unambiguous and accordingly modify the proposed regulations. *See infra* note 121.

[120] *See Mead*, 121 S. Ct. at 2182 (Scalia, J., dissenting) (indicating it would be a "landmark abdication of judicial power" for the Court to permit an agency to overturn the Court's construction of a statute, though indicating that an agency remains free to change its interpretation after the Court upholds the interpretation as a reasonable resolution of statutory ambiguity, or after the circuit courts construe the statute); *see also* Hasen, *supra* note 107, at 362 (indicating that to permit an agency to overrule Court precedent is inconsistent with "the strong policy in favor of upholding prior judicial interpretations.").

guity does lead in this direction.[121] In *Estate of Hubert v. Commissioner*,[122] though not citing *Chevron*, the three-justice concurring opinion followed this lead and invited new regulations incorporating the very argument that the government had advanced unsuccessfully before the Court.[123] Shortly after the *Hubert* decision, the Treasury accepted the invitation and overturned the Court's decision by issuing regulations.[124] From this vantage point, it would seem that the Court made an unwise commitment of resources in deciding to grant review in *Hubert*.[125]

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[121] Although in *Chevron* the Court made clear that a regulation could overrule a lower court precedent, whether the Court would uphold a regulation contrary to one of its own precedents is unclear. *See Chevron*, 467 U.S. at 841-42; Redlark v. Comm'r, 141 F.3d 936, 939-40 (9th Cir. 1998) (indicating under *Chevron*, lower court precedent could be overruled by subsequent regulation). *But see* Bankers Trust New York Corp. v. U.S., 225 F.3d 1368 (Fed. Cir. 2000) (finding that the panel of the circuit court was bound by prior circuit precedent despite intervening regulation overruling precedent). In Neal v. United States, 516 U.S. 284 (1996), the Court had construed the statute before the agency issued its contrary interpretation. The Court invalidated the agency's interpretation, indicating that the Court's prior construction was definitive as a matter of *stare decisis*, and, therefore, the Court could not sustain the agency's interpretation. *See id.* at 295. Although one might read *Neal* for the broad proposition that *Chevron* deference is made unavailable once the Supreme Court has construed a statute (*see Bankers Trust New York Corp.*, 225 F.3d at 1375), it also can be read for a narrower proposition: once the Court concludes that a statute is unambiguous, the agency is precluded from adopting an interpretation that is inconsistent with the Court's interpretation. Indeed, in both cases cited in *Neal* in support of its decision to deny deference, the Court stated: "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*. . . ." Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990); Lechmere, Inc. v. NLRB, 502 U.S. 527, 536-537 (1992) (quoting from *Maislin*) (emphasis added). *But see supra* note 120.

In Estate of Hubert v. Comm'r, 520 U.S. 93 (1997) (O'Connor, J., Souter, J., Thomas, J., concurring), as indicated in text, three Justices, in a concurring opinion, suggested that the government's argument, though rejected by the Court, could be adopted in new regulations. *See id.* at 122. Although one could view this suggestion as consistent with the narrower reading of *Neal*, it is also not necessarily inconsistent with the broader reading in that the Court in *Hubert* construed an ambiguous regulation, not a statute. *Cf. Bankers Trust New York Corp.*, 225 F.3d at 1375 (agreeing with the broader reading of *Neal* and indicating that deference to an agency interpretation overruling a lower court decision might be appropriate when the Court based its decision on an earlier agency interpretation).

[122] 520 U.S. 93 (1997).

[123] *See id.* at 122.

[124] For a discussion of these regulations, see Mitchell M. Gans, Jonathan G. Blattmachr & Carlyn S. McCaffrey, *The Anti-Hubert Regulations*, 87 TAX NOTES 969 (2000).

[125] Given the Court's inclination to permit tax issues to resolve themselves without its intervention (*see* John J. Tigue & Jeremy H. Temkin, *The Supreme Court's 1999-2000 Term*, N.Y. L.J., July 20, 2000, at 3) the decision to grant review in *Hubert* remains puz-

Chevron is potentially transformative in another important way. Given its political-accountability underpinnings, agency-administered statutes may no longer have a fixed meaning.[126] In *Smiley*[127] a regulation was promulgated approximately one hundred years after the enactment of the underlying statute.[128] After acknowledging the traditional view that a regulation issued contemporaneously with the enactment of the statute ordinarily receives deference on that account, the Court in *Smiley* concluded that the delay was of no consequence.[129] The Court reasoned that because Congress presumedly intended for ambiguities to be resolved by the politically-accountable agencies, the validity of a regulation is not undermined by a lapse in time.[130]

Because contemporaneousness is no longer necessary, the question becomes whether agencies must remain consistent. If, for example, an agency adopts one construction of an ambiguous statute, can it later adopt the opposite construction if a president with a different political philosophy is elected even though there has been no intervening legislation? Emphasizing again the political-accountability theory behind *Chevron*, the Court indicated that, in general, consistency is not required and that, absent an abuse of discretion or a failure to respect reliance interests, the agencies generally remain free to amend their regulations and alter positions previously taken.[131] Though agencies remain required to proffer a satisfactory justification for a change in position (imposing on agencies a duty to be consistent in a way that is somewhat analogous to the duty that the doctrine of *stare decisis* imposes on the courts),[132] *Chevron* has led to a greater

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[126] *See* Silberman, *supra* note 118, at 822 (indicating that statutes have become more plastic under *Chevron*); T. Alexander Aleinikoff, *Symposium: Patterson v. McLean, Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 43 (1988) (indicating that, under *Chevron*, statutes are more likely to receive an interpretation that is reflective of policy as currently formulated, rather than policy considerations at the time of enactment).

[127] 517 U.S. at 735.

[128] *See id.* at 740.

[129] *See id.*

[130] *See id.* at 740-41.

[131] *See id.* at 743. This was dicta, given that the Court also concluded that, in fact, the agency had not changed its position.

[132] *See, e.g.*, Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973) ("Whatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate."). *See also Motor Vehicle Mfrs.*, 463 U.S. at 42 (1983) (citing *Atchison*, the Court

willingness to embrace such change.[133]

Indeed, following *Chevron's* political-accountability theory to its logical conclusion, one might argue that whatever remains of the agencies' obligation to justify change ought to be eliminated. Consider, for example, the propensity to issue regulations in the waning hours of the administration. No longer facing the same intensity of political consequence, a lame duck administration understandably would be tempted to issue regulations that would have been politically unappealing at an earlier point in its tenure.[134] An incoming administration should to be able to reverse course

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said that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance"); AFL-CIO v. Brock, 835 F.2d 912, 917 (D.C. Cir. 1987) (citing *Atchison* and *Motor Vehicle Mfrs.*).

[133] In FDA v. Brown & Williamson Tobacco Corp, 529 U.S. 120 (2000), the four-justice dissent indicated that it agreed with the majority that the FDA's departure from its original interpretation was not legally significant. *See id.* at 186. The dissent cites to *Chevron* and *Smiley,* as does the majority, for the propositions that "an initial agency interpretation is not instantly carved in stone" (*Chevron*) and "change is not invalidating" (*Smiley*). *Id.* The dissent also approvingly quotes as follows from a concurring-in-part-and-dissenting-in-part opinion by Justice Rehnquist in *Motor Vehicle Mfrs.*, 463 U.S. at 59 (1983):

> The agency's changed view of the standard seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.

Brown & Williamson, 529 U.S. at 189. Thus, at least five justices (the four dissenting Justices in *Brown & Williamson* and Justice Rehnquist) apparently were prepared to validate an agency's modification in its position on the ground that a change in administration occurred, without requiring any additional justification. Although this approach is consistent with *Chevron's* political-accountability underpinnings, it does reflect a movement away from the requirement that change must be justified.

This movement has been reflected in the tax area. In Georgia Fed. Bank v. Comm'r, 98 T.C. 105, 108 (1992), citing *Motor Vehicles Mfrs.* and pointing to the government's modification in its approach and its failure to justify it adequately, the Tax Court invalidated a regulation. However, after the circuit courts began taking a contrary view (*see* Aprill, *supra* note 107, at 67-74), the Tax Court overruled its earlier decision and validated the regulation despite the government's inconsistency. *See Cent. Pa. Sav.*, 104 T.C. at 384.

[134] *See, e.g.*, Douglas Jehl, *G.O.P. To Press for Unraveling of Clinton Acts*, N.Y. TIMES, January 6, 2001, at A1 (making reference to a "blizzard" of last-minute orders issued

without needing to supply a justification, given the friction of political consequences that will ensue and the diminished level of friction facing the prior administration when it adopted the interpretation. Stated differently, why should an agency decision, once made, be viewed as presumptively valid and binding if its legitimacy rests on the erroneous premise that it was the product of full, active political calculation?[135] Moreover, even when the agency's initial position is forged under the pressure of full-blown political forces, it seems inconsistent with *Chevron* to give the courts the gate-keeping function of deciding whether the change is justified because the decision to deviate from the initial position is equally informed by political considerations.

In short, with delay irrelevant and consistency not essential, agency-administered statutes containing ambiguities become mutable[136]—or, to borrow from the constitutional lexicon,"living documents"[137]—no longer having the meaning fixed by Congress[138] at the time of their enactment.[139]

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in the Clinton administration).

[135] The emerging willingness to validate a change in agency interpretation occurring as a result of a change in administration is, therefore, not a surprising development. *See supra* note 133.

[136] For a case in the tax context in which the Court permitted the government to amend the regulations to change the position it had taken originally without any substantial justification, see *Nat'l Muffler*, 440 U.S. at 485-86 (upholding an alteration in the regulations as justified by administrative experience, although no explanation had been offered, and emphasizing the need for administrative flexibility).

[137] *See* Silberman, *supra* note 118, at 822 (suggesting that some might find it surprising that judges who subscribe to originalism in constitutional adjudication can at the same time argue for *Chevron's* implicit commitment to viewing statutes as plastic).

[138] *Chevron* creates the potential for wholesale revision in the meaning of statutes over time, but the courts, in doing conventional statutory interpretation, also give some consideration to post-enactment events and thereby permit the meaning of statutes to shift as values change. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 345-62 (1990) (indicating that courts interpret statutory language through the prism of post-enactment values). For a recent example in which the Supreme Court explicitly acknowledged the role of post-enactment change in constitutional values affecting the interpretation of a statute, see Circuit City, Inc. v. Adams, 121 S. Ct. 1302 (2001) (holding, in effect, that the reach of a statute can expand over time where the Supreme Court's jurisprudence on the contours of the commerce clause have changed since enactment). However, some scholars argue that, at least in the tax context, it is important that courts focus on the statute's underlying purpose or structure, as opposed to the various considerations suggested by Professor Eskridge and others. *See* Michael Livingston, *Practical Reason, "Purposivism," and the Interpretation of Tax Statutes*, 51 TAX L. REV. 677, 682-88 (1998) (reviewing the arguments made to this effect, but arguing to the contrary). At bottom, the difficult jurisprudential question seems to be how to

Chevron's implications, as embellished by *Smiley*, may presage the end of an inveterate aspect of tax litigation. In the past, the government's defeat in *Simpson* likely would have led to further review in other circuits, or perhaps in the Supreme Court, on the ground that it conflicted with *Peterson*. Now, the government instead simply writes a new regulation announcing the result it failed to secure in court. As indicated, rather than becoming a predicate for Supreme Court review, inter-circuit conflict becomes evidence of statutory ambiguity, making the Treasury, not the Supreme Court, the ultimate interpretive authority. If the tax bar at one time viewed the Treasury as a mere adversary, that view no longer accurately reflects the more dynamic role the Treasury now enjoys. In short, given its enhanced quasi-legislative function under *Chevron*, the government is no ordinary adversary because it can rewrite the rules in many cases rather than litigate the meaning of the rules as originally written.

Is this a salutary alteration? The answer is not clear. On the one hand, allowing the Treasury more influence is valuable because of its enormous expertise—an expertise understandably lacking in many judges sitting on tax cases.[140] Unlike the courts, the Treasury is able to bring this expertise to bear on an entire area of law at one time, facilitating an appreciation of the various ways in which the rules it promulgates interface. Also, Congress may not be able to respond as quickly as the Treasury to resolve issues not contemplated at the time of the statute's enactment.[141] Moreover, Congress may be completely disabled from acting because non-

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construe the Code when its language clearly calls for a result that is contrary to some fundamental tax theme. In Comm'r v. Tufts, 461 U.S. 300, 313 (1983), for example, the Court abandoned the interpretation of the Code it found appropriate in Crane v. Comm'r, 331 U.S. 1, 14 n.37 (1947), alluding to its concern that taxable income should be reflective of economic income. In Gitlitz v. Comm'r, 531 U.S. at 206, on the other hand, the Court, acknowledging that the result it reached would unfortunately convert economic income into tax-free income, nevertheless perceived itself as constrained by the clear language of the Code. *See id.* at 220.

[139] For an argument that the mutability *Chevron* offers is salutary, see *Mead*, 121 S. Ct. at 2178, 2182 (Scalia, J., dissenting). *See also* Sunstein, *supra* note 104, at 2089-90.

[140] Of course, Treasury expertise as a justification for *Chevron* deference is not entirely convincing as much litigation occurs in the specialized Tax Court. However, taxpayers can seek to exploit the lack of expertise in other courts by choosing to litigate elsewhere. For a discussion of these difficulties and a proposal that addresses them, see *infra* Part VI.

[141] *See Mead*, 121 S. Ct. at 2181 (Scalia, J., dissenting) (arguing that "ossification" of the law would occur if the agencies did not receive *Chevron* deference); Sunstein, *supra* note 104, at 2088 (indicating that agencies are better situated than Congress to respond to changed circumstances and new developments).

policy-based concerns trump any legitimate policy objective.[142] And, as some commentators have suggested, increased deference tends to create more uniform application of the law by reducing the potential for disagreement among the circuit courts.[143]

On the other hand, there is the question of the Treasury's bias.[144] It would, for example, be difficult to maintain that the government's loss in *Simpson* did not, in some way, affect its perspective. Indeed, the Treasury's very position as the taxpayer's adversary in tax litigation will tend to produce bias. Just as criminal prosecutors are not given the quasi-legislative responsibility of defining the elements of the crimes they prosecute, so too, one might argue, more skepticism would be appropriate regarding the scope of the Treasury's lawmaking function.[145] Although judges are certainly not free of bias,[146] at least they do not suffer the bias one acquires

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[142] *See* DANIEL SHAVIRO, WHEN RULES CHANGE: AN ECONOMIC AND POLITICAL ANALYSIS OF TRANSITION RELIEF AND RETROACTIVITY 86-88 (2001) (arguing that the public choice critique of legislation is particularly compelling in the tax context). *See also* THE FEDERALIST NO. 10, at 56 (James Madison) (Legal Classics Library ed., 1983) ("The apportionment of taxes on the various de[s]criptions of property, is an act which [s]eems to require the mo[s]t exact impartiality, yet there is perhaps no legi[s]lative act in which greater opportunity and temptation are given to a predominant party, to trample on the rules of justice.").

[143] *See* Silberman, *supra* note 118 at 824; *see also* Colin Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 585-92 (1985) (granting deference to agencies will make policy more coherent and will unify the law by locating decision-making authority in the agencies rather than in the various courts of appeals). Moreover, at least in the tax area, some sentiment favors minimizing inter-circuit conflict. *See* Popov v. Comm'r, 246 F.3d 1190, 1195 (9th Cir. 2001) (stressing the importance of uniformity in the tax area and the need to maintain consistency among the circuits). On the other hand, uniformity creates another concern: the lost opportunity for the courts to experiment with different approaches and to reflect on alternative ways of addressing the problem.

[144] *See generally* David A. Weisbach, *Cost of Departures from Formalism: Formalism in the Tax Law*, 66 U. CHI. L. REV. 860-86 (1999) (discussing bias in terms of tax administrators from a public choice perspective).

[145] *See* Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255, 294 & n.149 (2000) (citing John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 631 (1996) and Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945), and indicating that a constitutional (separation of powers) impediment possibly exists in permitting an agency to perform quasi-legislative and interpretative functions).

[146] *See, e.g.*, Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 777-830 (2001); *see generally* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000) (describing cultural myths that affect judges' decisionmaking).

as an adversary.[147] Thus, if disinterested, unbiased analysis is the objective,[148] one can make a fairly compelling argument that *Chevron's* shift of power from the courts to the agencies[149] is not entirely desirable.[150]

One might also negatively view this alteration because of the resulting diminution in the courts' authority to limit the abusive exercise of power by another branch of government.[151] The Service has recently been perceived as an unresponsive bureaucracy.[152] To the extent that a disinterested judge might be able to restrain bureaucratic power, *Chevron* can be seen as bureaucracy entrenching. This is somewhat ironic. As the percep-

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[147] *See Skidmore*, 323 U.S. at 140 (1944) (indicating that the Court gives considerable, and in some cases decisive weight to tax regulations, provided that the regulation is "not of adversary origin"). *Skidmore's* contemporary importance has been enhanced greatly. *See Christensen*, 529 U.S. at 588; *Mead*, 121 S. Ct. at 2178, 2182. Indeed, Justice Scalia has argued that the Court has in effect resurrected *Skidmore*, which in his view was supplanted by *Chevron*. *See Christensen*, 120 U.S. at 589 (Scalia, J., concurring).

[148] To the extent that one perceives the government as acting unfairly, the willingness of taxpayers to comply voluntarily will be affected adversely. *See* Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1812 (2000) (suggesting that when the Service acts unfairly, it sends a signal to taxpayers that will undermine voluntary compliance).

[149] Prior to *Chevron*, the Court was reluctant to review regulations deferentially when issued in order to gain adversarial advantage. *See supra* note 74 and accompanying text. Under *Smiley*, however, a regulation is entitled to controlling deference even if adopted for the purpose of influencing pending litigation (though in *Smiley*, the agency was not a party to the litigation, when the government is always a party in tax litigation). *See Smiley*, 517 U.S. at 741 (1996). The government's ability to influence a pending tax litigation by issuing a regulation has been constrained by the 1996 amendment to I.R.C. section 7805(b)(1) which prohibits, as a general matter, retroactive regulations. *See* Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 1101(a), 110 Stat. 1452, 1468 (1996). On the other hand, *Smiley* does contemplate that a regulation issued after a transaction has been consummated can be relevant even when the agency does not have the authority to issue regulations on a retroactive basis. *See Smiley*, 517 U.S. at 744 n.3.

[150] *See, e.g.*, Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 958, 963-65, 994-95 (1995) (discussing the incentives that lead judges to adhere to professional norms in decisionmaking rather than yielding to considerations of political expediency); DANIEL E. TROY, IN DEFENSE OF RETROACTIVE LAWS 11 (1998) (discussing the apolitical nature of the courts and the likelihood that their review will be disinterested).

[151] *See* Thomas W. Merrill, *Judicial Deference to Executive President*, 101 YALE L.J. 969, 996-97 (1992) (emphasizing the weakness of Presidential oversight and the need for judicial review to limit the potential for agency abuse of power).

[152] *See* Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the new Burden-of-Proof Rules*, 84 IOWA L. REV. 413, 446 (1999) (describing the Service as having a "fortress mentality," and as being self-protective and unresponsive).

tion of the Service has grown more negative, a corresponding popular impulse to curtail its authority has arisen.[153] Oddly, at the very time this impulse took root, the courts enhanced the government's authority through *Chevron* in the name of political accountability. In other words, the Supreme Court has, in effect, enhanced the power of an unpopular agency in the name of sensitivity to popular will.

Finally, although *Chevron's* political accountability justification has been critiqued elsewhere,[154] a few negative critical comments follow. First, the Court's recent decision in *FDA v. Brown & Williamson Tobacco Corporation*[155] raises a new question about the justification. In *Brown & Williamson*, the Court took the view that it would be inappropriate to infer that Congress had intended that the FDA could use its interpretive authority to decide whether to regulate tobacco.[156] The Court reasoned that if Congress had contemplated that the FDA could decide such an important issue, it would have said so affirmatively and clearly, rather than remain silent and assume the decision could be made under the agency's general interpretive authority.[157]

In thus limiting the agency's discretion, the Court appears to have engrafted a significant qualification onto *Chevron*.[158] Under this qualification, the more important the issue, the less likely the agency's decision will be entitled to deference. This qualification seems contrary to the very

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[153] *See, e.g.*, Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 (1996).

[154] *See* Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 B.C. L. REV. 757, 759-64, 786-815 (1991) (criticizing *Chevron* as undermining the authority of the judiciary); Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Merrill & Hickman, *supra* note 103, at 834 n.6, 840-53. It should also be noted that, to the extent that acquiring information concerning policy choices is costly or time-consuming, people may rationally choose ignorance, *see, e.g.*, MANCUR OLSON, RATIONAL IGNORANCE, PROFESSIONAL RESEARCH AND POLITICIANS' DILEMMAS, IN KNOWLEDGE, POWER AND THE CONGRESS 130 (William H. Robinson & Clay H. Wellborn eds., 1991) (discussing the notion that people may rationally choose ignorance with regard to public policy), thus undercutting *Chevron's* political-accountability premise.

[155] 529 U.S. 120 (2000).

[156] *See id.* at 161.

[157] *See id.* at 160-61.

[158] *See also* Whitman v. Am. Trucking Ass'n., 531 U.S. 457, 468 (2001) (indicating that in determining whether a statute is ambiguous, it is appropriate to assume that Congress would not delegate the authority to resolve a "highly significant issue" to an agency (quoting Christensen, 529 U.S. at 590).

premise of political accountability: that the resolution of issues by the agencies will produce a political response, and the agencies, anticipating such a response, will either behave appropriately or pay a political price. If the issue is an important and visible one, the qualification renders *Chevron* deference unavailable. If, on the other hand, the issue is unimportant and not very visible, the agency will receive deference; however, in this latter context, the probability of political consequence is greatly diminished. In short, as so qualified, *Chevron* produces deference where political consequence is least likely, a result completely contrary to its political-accountability theory.[159]

Second, the current controversy about campaign finance is also relevant to the merits of the justification. As many have argued, in the absence of reform, our system of democracy will remain in disrepair,[160] with campaign contributors influencing elected officials, who in turn, seek to influence (and, in the case of the President, direct) the decisions of administrators.[161] As long as campaign contributions are permitted to have such a negative impact on the decision-making process, the system will be better served by an approach that gives more authority to politically insulated judges than to politically vulnerable administrators.[162]

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[159] During the presidential election that concluded in 2000, pollsters suggested the electorate might select candidates without regard to the important issues, focusing instead, for example, on the personality of the candidates. *See* Andrew Kohut, *The Empty Center of Campaign 2000*, N.Y. TIMES, Oct. 20, 2000, at 31. To the extent that people choose presidents on the basis of personality, rather than on substantive issues or political philosophy, the strength of *Chevron's* political-accountability claim is diminished.

[160] *See, e.g.*, Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 826-28 (1985) (indicating that campaign contributions lead to legislation inuring to the benefit of special interest groups). *See also* James B. Repetti, *Democracy, Taxes and Wealth*, 76 N.Y.U. L. REV. 825, 843-49 (2001) (discussing the corrosive effects of campaign contributions on the political process).

[161] *See* Dominic L. Daher, *The Proposed Federal Taxation of Frequent Flyer Miles Received From Employers: Good Tax Policy But Bad Politics*, 16 AKRON TAX J. 1, 15-16 (2001) (discussing the Service's withdrawal of a technical advice memorandum after a congressperson introduced a bill that would have rendered it invalid, and the fact that no one suggested the bill was the product of campaign contributions).

[162] *See* SHAVIRO, *supra* note 142, at 86-88 (arguing that tax legislation is more problematic in public choice terms than other kinds of legislation). *See also* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 105 (1988) (making the public choice critique with regard to "subgovernments" (i.e., officials such as bureaucrats), who, because of their low visibility, are more likely to be responsive to special interest groups); *see id.* at 114 (indicating that special interest groups may be able to secure a favorable interpretation from a "captured agency").

Third, institutional differences between the courts and the agencies must be considered in assessing the justification. It would seem that an underlying premise for the justification is the assumption that the agencies and the courts, when called upon to interpret ambiguous statutes, engage in approximately the same type of activity. If this is a valid premise, the balance of *Chevron's* logic is inexorable. Because resolution of statutory uncertainty by a court or an agency is essentially the same activity, it is preferable that the more politically accountable of the two be assigned this responsibility.

However, the ways that agencies and the courts execute their interpretive function differ. First, the agencies have more expertise as well as a superior ability to engage in the kind of cost-benefit analysis that legislators make.[163] Second, judges are required to rely on canons of construction and view themselves as bound by prior decisions as a matter of *stare decisis*.[164] While agencies are obviously not oblivious to these doctrines, they remain largely unencumbered by the restrictions these doctrines impose.[165] Third, some suggest that judicial restraint requires the judge to set forth explicitly the principle that animates each decision so that the judge's opportunity to indulge a personal policy preference in future cases is constrained.[166] More generally, judges' decisions are the product of various nonpolitical incentives that narrow the range of available alternatives and lead to more principled interpretations.[167] Agency decision-making, in contrast, tends to be less principled in this sense and more responsive to policy or political considerations. Also, as discussed, agencies are influenced by a kind of self-interest that does not impinge on the judge.

Fourth, though agencies ordinarily give their interpretations prospec-

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[163] *See* STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 224-25 (1999). *See also* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 388-89 (1986) (discussing the capacity of the agencies to gather relevant information).

[164] *See* Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, STAN. L. REV. 1, 34-37 (2000) (indicating the framers anticipated that *stare decisis* and the canons of construction would constrain the judiciary and distinguish the quality of its decision-making from that of the legislature).

[165] *See supra* notes 132 - 135 and accompanying text.

[166] *See* Scalia, *supra* note 105, at 1179.

[167] *See, e.g.*, David Millon, *Objectivity and Democracy*, 67 N.Y.U. L. REV. 1, 24-27 (1992) (indicating that judges' discretion is constrained by concerns about whether the decision will be viewed by others in the legal community as a correct one).

tive effect,[168] judges are required to make their decisions on a retroactive basis.[169] Like the canons of construction and *stare decisis*, retroactivity produces more consistent decision-making over time and concomitantly limits the range of alternatives available to the judge.[170] Fifth, unlike the agencies, judges are not permitted to act in the absence of a case or controversy.[171] Sixth, judges, unlike the agencies, are required to decide cases incrementally, resolving only the issue presented and leaving for future determination the larger issues that need not necessarily be addressed immediately.[172] Both the case-or-controversy requirement and the incremental method tend to shape and limit the judge's perceptual field, thereby further constraining the scope of the judge's decisionmaking discretion.[173]

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[168] *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208-209 (1988) (indicating that in the absence of explicit statutory authorization, agencies are not permitted to issue regulations on a retroactive basis).

[169] *See* Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97 (1993) (indicating that in resolving questions of federal law, courts are required to give retroactive effect to their decisions). Parenthetically, the constitutional obligation to make decisions on a retroactive basis may even extend to the state courts, at least in the criminal context. *See* Fiore v. White, 531 U.S. 225, 228 (2001) (leaving open the question whether due process requires state courts to apply their construction of a criminal statute retroactively to convictions previously secured when, if applied, the defendant would be exonerated). Retroactivity in the criminal context may, however, conflict with the due process requirement that the state provide notice of the nature of the prohibited conduct. *See* Rogers v. Tennessee, 121 S. Ct. 1693, 1698 (2001) (indicating that due process prohibits a criminal conviction secured through retroactive application of a court's construction of a statute that is "unexpected and indefensible" relative to the law in existence at the time of the conduct). This decision is not inconsistent with the Court's emphasis in *Harper* on the constitutional requirement that no discrimination should occur between similarly situated litigants, in that a criminal defendant convicted prior to the court's construction of the statute and therefore without pre-conduct notice of the elements of the crime is very differently situated from a defendant convicted of engaging in the prohibited conduct after the court's construction. *See Harper*, 509 U.S. at 97.

[170] *See Harper*, 509 U.S. at 105-08 (Scalia, J., concurring) (indicating that the obligation to decide cases on a retroactive basis makes courts less inclined to deviate from precedent and distinguishes the interpretive function of the judiciary from the lawmaking function of the legislature).

[171] *See* U.S. CONST. art. III.

[172] Under Justice Scalia's view, however, the incrementalism of the common law method is, paradoxically, in tension with judicial restraint. *See* Scalia, *supra* note 105, at 1179-80. *See generally* Cass R. Sunstein, *Foreward: Leaving Things Undecided*, 110 HARV. L. REV. 6 (1996) (suggesting that judicial restraint requires that the judge clearly establish the contours of the rule being applied so as to diminish the role of the judge's policy preference in future cases).

[173] *See* Sunstein, *Foreword*, *supra* note 172, at 99-101.

These differences cut two ways. On the one hand, the wider scope of discretion that the agencies enjoy, as well as their enhanced ability to make legislative-type judgments, creates more flexibility and, ultimately, efficiency in the face of changing circumstances.[174] On the other hand, the constraints under which the courts operate are likely to reduce the influence of extraneous considerations such as adversarial bias or other forms of institutional self-interest that may undermine the objectivity of some agencies. In short, the premise that agencies and courts engage in the same kind of interpretive activity does not withstand comparative analysis. Perhaps it would be more accurate to say that there is an efficiency-objectivity tradeoff, and that *Chevron's* implicit choice of efficiency over objectivity due to political accountability is not without its cost.

PART III. THE REENACTMENT DOCTRINE AND ITS RELATIONSHIP TO *CHEVRON*

As discussed in Part I, the government did not issue the new GST regulations until after it had first persuaded the Second Circuit in *Peterson*[175] that Congress ratified the version of the regulations issued under the 1976 legislation when it reenacted the GST in 1986.[176] Indeed, in its brief, the government argued that the earlier "regulation received an overall endorsement" from Congress.[177] And, in upholding the regulations, the court specifically referenced the reenactment doctrine.[178]

Generally, when the courts invoke the reenactment doctrine, they view an interpretation as authoritative—as if Congress had enacted the interpretation—based on Congress' reenactment of the legislation under which it was originally issued.[179] Yet, even though Congress reenacted the GST

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[174] The constitutional constraint on the courts that limits their authority to decide cases on other than a retroactive basis (*see Harper*, 509 U.S. at 97) is paradoxical, because retroactivity generally is disfavored in the construction of statutes. *See* I.N.S. v. St. Cyr, 121 S. Ct. 2271 (2001); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). In some circumstances, retroactivity is constitutionally unavailable to Congress. *See* Eastern Enter. v. Apfel, 524 U.S. 498 (1998) (indicating that Congress' imposition of liability on a retroactive basis is not constitutionally permissible because, in the view of four Justices, it would constitute a taking, and in the view of a fifth Justice, it would violate due process).

[175] 78 F.3d at 795.

[176] *See id.* at 799-801.

[177] *See* Brief for the Commissioner of Internal Revenue at 30, *Peterson*, 78 F.3d at 795 (No. 95-4001).

[178] *See Peterson*, 78 F.3d at 801.

[179] *See infra* notes 189 - 191 and accompanying text. The doctrine may also be in-

in 1986 and, in doing so, explicitly approved of the earlier regulations, the Treasury has made the new regulations less friendly to taxpayers.[180] Part III will focus on the relationship between the reenactment doctrine and *Chevron*, ultimately raising the question of whether the new regulations are valid given the reenactment doctrine.

As suggested in Part II, *Chevron* enhances agency authority in two ways. First, *Chevron* requires the courts to defer to agency interpretations when the statute is ambiguous and the interpretation is a reasonable one. Second, it contemplates that agencies will find it necessary to change their interpretations over time as circumstances evolve and such change, even if brought about as a result of a change in administrations, may be entitled to deferential review as well.[181]

What is the relationship between *Chevron* and the reenactment doctrine? To the extent that the reenactment doctrine is available to the government as an argument in support of an agency interpretation, the doctrine seems to be consistent with *Chevron's* pro-agency stance. On the other hand, to the extent that the doctrine is used to prevent an agency from changing an interpretation, it conflicts with *Chevron's* willingness to embrace change.

A. Reenactment Doctrine Invoked By the Government

Consider first the relationship between *Chevron* and the use of the reenactment doctrine when the government invokes it. If the original statute is ambiguous, its reenactment makes a modest contribution, if any, to the argument in favor of the interpretation, for the ambiguity itself makes *Chevron* deference appropriate and thereby leads to a validation of the interpretation (although the reenactment doctrine might nevertheless have some significance in *Chevron's* second step, i.e., in determining whether the interpretation reasonably resolves the statutory ambiguity).[182] In other words, although application of the doctrine is consistent with *Chevron* in that it results in validating the agency's interpretation,[183] *Chev*

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voked when the statute under which the interpretation has been issued remains unamended. *See* U.S. v. Cleveland Indians Baseball Co., 121 S. Ct. 1433, 1445 (2001) (quoting Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 561 (1991)).

[180] *See supra* notes 38, 45, 72-75 81-89 and accompanying text.

[181] *See supra* note 130.

[182] *See Chevron*, 467 U.S. at 842-43 (1984).

[183] Note, however, the strength of the inference that Congress intended ratification is somewhat debatable when Congress simply reenacts the statute without affirmatively

ron alone would produce that outcome without any assistance from the reenactment doctrine.[184] In contrast, when the original and reenacting statutes are unambiguous and cannot accommodate the agency's interpretation, the doctrine may have more importance. On the one hand, *Chevron* seems to preclude a court from utilizing the doctrine to uphold an interpretation contrary to unambiguous statutory language.[185] On the other hand, a court might be reluctant to invalidate an interpretation when Congress reenacted the statute after having been made aware of the interpretation, irrespective of the clarity of the statutory language.[186] On the whole, the reenactment doctrine as a government argument in support of an interpretation has rather meager utility when the statute is ambiguous, but perhaps is more useful when the statute is unambiguous.

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indicating its intent with regard to the interpretation. *See* Coverdale, *supra* note 99, at 79 (arguing that reenactment is a "weak indication" that Congress intends to ratify an existing agency interpretation).

[184] Prior to *Chevron*, the reenactment doctrine had the potential to make a greater contribution when the government invoked it to support its interpretation of an ambiguous statute. *See, e.g.*, Leary v. United States, 395 U.S. 6, 24-25 (1969) (indicating that reenactment could strengthen the validity of a regulation).

[185] For a pre-*Chevron* case in which the Court refused to invoke the reenactment doctrine because it concluded that the pre-reenactment regulation was contrary to the clear meaning of the statute, see *Leary*, 395 U.S. at 24-25. *See also* Comm'r v. Acker, 361 U.S. 87, 93 (1959). However, even in the face of a clear statute an interpretation might be upheld under the reenactment doctrine if evidence exists of congressional consideration. *See* Eskridge, *supra* note 162, at 82-83 (implying negatively that Congress' awareness of the interpretation could lead to a decision upholding it).

[186] The Supreme Court has disclosed some willingness to uphold an interpretation if Congress has considered a statute and decided not to enact legislation overruling it, even though the interpretation might otherwise be viewed as contrary to the legislation. *See* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 169-70 (2001) (intimating that when Congress' failure to overturn an agency construction indicates Congressional intent to validate the construction, the "plain text" of the statute might be required to yield to that construction); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 137 (1985) (indicating that a clear showing that Congress had considered an agency's construction and chose not to overturn it may constitute "at least some evidence of the reasonableness of that construction"). *Cf.* Eskridge, *supra* note 162, at 82-83 (citing *Leary*, 395 U.S. at 24-25 for the notion that the Court might be less inclined to conclude Congress had considered the interpretation and ratified it when it is contrary to clear statutory language); Aaron v. SEC, 446 U.S. 680, 694 n.11 (1980) (refusing to uphold agency interpretation contrary to clear statutory language in the absence of a more compelling basis for inferring that Congress intended ratification). Whether the Court would be similarly inclined to uphold an interpretation otherwise at odds with the statute on the ground that Congress had reenacted it—as opposed to deciding that new legislation should *not* be enacted because it approved of the interpretation—is, of course, a different matter.

B. Reenactment Doctrine Invoked Against the Government

Consider now the use of the reenactment doctrine against the government. If an agency issues an interpretation under the original statute but then seeks to change its position after reenactment of the statute, the doctrine, if successfully invoked, will prevent the agency from making the change. Precluding an agency from reconsidering its position in this way constitutes a significant constraint on agency discretion and denies the agency the ability to respond to evolving circumstances.[187] However, agency discretion is no less constrained when Congress incorporates its scheme in unambiguous statutory language.

When the original and reenacting statutes are ambiguous and would both accommodate the pre-reenactment interpretation, one could make a plausible case for invoking the doctrine against the government.[188] Or even when the statutory language unambiguously conflicts with the interpretation, a case could possibly be made for using the doctrine if there is clear evidence that Congress endorsed the interpretation.[189] After all, if Con

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[187] *See, e.g.*, Bell Fed. Sav. and Loan Ass'n v. Comm'r, 40 F.3d 224, 229 (7th Cir. 1994) (indicating that flexibility is a crucial underpinning of administrative law).

[188] As will be discussed, as a result of *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 29, litigants seeking to invoke the doctrine against the government may bear a more onerous burden than the government does when it invokes the doctrine in support of an interpretation. *See infra* notes 197-199 and accompanying text. Nevertheless, courts have continued to indicate that the doctrine can be invoked against the government when the reenacting statute is ambiguous and could accommodate the pre-reenactment interpretation. *See, e.g.*, Peoples Fed. Sav. and Loan Ass'n of Sidney v. Comm'r, 948 F.2d 289, 302-03 (6th Cir. 1991) (intimating that application of the doctrine against the government might be appropriate in the case of an ambiguous statute if evidence exists that Congress had noted or been aware of the interpretation at the time of reenactment); Pac. First Fed. Sav. Bank v. Comm'r, 961 F.2d 800, 807 (9th Cir. 1992) (implying application of the reenactment doctrine against the government would be appropriate in the case of an ambiguous statute if evidence exists that Congress had considered the interpretation); Cent. Pa. Sav. Ass'n v. Comm'r, 104 T.C. 384, 396-97 (1995) (indicating that, if the statute is ambiguous and clear evidence exists that Congress had considered the interpretation, finding an implied intent to freeze the interpretation in place would be appropriate); Bell Fed. Sav. and Loan Ass'n v. Comm'r, 40 F.3d 224, 230 (7th Cir. 1994) (implying that in the context of an ambiguous statute it would be appropriate to apply the reenactment doctrine against the government if there were evidence that Congress scrutinized the interpretation).

[189] The Supreme Court has indicated that where Congress decides not to overrule an interpretation, the Court might uphold the interpretation under the reenactment doctrine even if it could be viewed as contrary to clear statutory language. *See supra* note 186. Perhaps this line of reasoning could be extended to apply when the doctrine is invoked against the government. However, such an extension might be foreclosed by the Court's

gress was aware of the interpretation and found it was inconsistent with the reenacting statute, presumably Congress would not have adopted the new legislation in silence, but would have disclosed its discomfort with the interpretation. However, one could also argue that Congress' silence indicates Congressional intent to ratify the interpretation, but, at the same time, leave the agency with discretion to make modifications. Yet another reading that would support a rejection of the reenactment doctrine is that Congress was unaware of the statutory interpretation, suggesting that Congress intended the agency retain its ordinary discretion under *Chevron* to resolve any ambiguity in the reenacting legislation. Ultimately, whenever the doctrine is invoked against the government, the question must be whether Congress intended not merely to embrace the interpretation, but also to preclude the agency from making any post-enactment alterations.[190]

This, in turn, leads to the normative question of how to fashion a default rule. How, in other words, should the courts presumptively interpret legislation where Congress fails to make its intent explicit with regard to a pre-reenactment interpretation?[191] On the one hand, the flexibility made

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decision in *Motor Vehicle Mfrs. Ass'n*. *See infra* notes 197-198 and accompanying text.

[190] The application of the reenactment doctrine with regard to judicial interpretations is very similar to its application in the context of an agency interpretations (*see* Eskridge, *supra* note 162, at 69), which can produce confusion. When the doctrine is applied to ratify a pre-reenactment judicial interpretation, the effect is to freeze that interpretation in place and to deny the courts the ability to modify it. *See, e.g.*, Snyder v. Harris, 394 U.S. 332, 339 (1969) (acknowledging that the application of the reenactment doctrine to a judicial interpretation "freezes" it in place). Perhaps, when courts have failed to distinguish between using the doctrine to ratify an agency interpretation and using it to freeze an agency interpretation in place (*see infra* notes 200-204 and accompanying text) they simply have overlooked the difference between applying the doctrine to a judicial interpretation (when a freeze necessarily results) and to an administrative interpretation (when Congress might intend that, as an alternative to creating a freeze, the agency retain discretion to make post-reenactment modifications).

[191] A second, related question is whether Congress should be assumed to ratify or to freeze in place an interpretation outstanding at the time of reenactment if not brought to its attention. *See* AFL-CIO v. Brock, 835 F.2d 912, 916 n.6 (D.C. Cir. 1987) (indicating that although courts often have alluded to a presumption that Congress was aware of a pre-reenactment interpretation, they typically have done so in the context of a ratification argument made by the government but not when the doctrine has been invoked against the government). For a suggestion that the Supreme Court usually makes an effort to determine whether Congress was aware of an interpretation at the time of reenactment before finding that it has been ratified, see Eskridge, *supra* note 162, at 80-81. In terms of efficiency, it would seem inappropriate to impose on Congress the burden to investigate and consider every outstanding interpretation before reenacting legislation—thus suggesting that, if

available when agencies are permitted to make changes as circumstances dictate suggests it would be more efficient to apply a default rule that allows interpretations to be modified after reenactment. Also, from a public choice perspective,[192] one can argue that if Congress fails to freeze an interpretation in place, permitting the agency to alter its position is preferable because rewarding Congress for its ambiguity is inappropriate or even counterproductive.[193] On the other hand, the concern that agencies might alter their interpretations opportunistically supports a default rule that would preclude post-reenactment modifications.[194]

The development of the law on this issue has not been linear. Long before its decision in *Chevron*, the Court, alluding to a concern about constraining agency discretion, concluded that the doctrine could not be invoked against the government.[195] However, several years before its decision in *Chevron*, the Court retreated and applied the doctrine after finding in the legislative history accompanying the reenacting legislation an intent to freeze in place an agency interpretation.[196] Then, shortly after *Chevron*, the Court in *Motor Vehicle Manufacturers Ass'n v. State Farm*

Congress is not aware of an interpretation, reenactment should not result in ratification.

[192] In the tax context, it has been suggested that the legislative deficiencies identified by the public choice theorists are particularly acute. *See supra* note 142.

[193] Ambiguity tends to lower the cost of rent-seeking special interest groups, thus creating more legislation driven by the narrow interests of the few at the expense of the many. *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 252-53 (1986) (explaining that statutory ambiguity reduces the cost of special-interest legislation). *Cf.* Aleinikoff, *supra* note 126, at 25 (indicating that the courts' adoption of rules designed to encourage Congress to be less ambiguous would possibly impose "huge costs on a legislature too busy to redraft 'unclear' statutes"). In addition, when Congress has been ambiguous, Congress likely simply failed to reach any agreement on the issue. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980). For an argument from the public choice perspective against applying reenactment doctrine whenever the pre-reenactment interpretation favors a special-interest group, see Eskridge, *supra* note 162, at 107-08.

[194] If, as suggested, the potential for the government to act opportunistically through the issuance of regulations is diminished by denying deference when this occurs (*see supra* Part VI) a default rule requiring affirmative evidence of Congress' intent to freeze an interpretation in place before the doctrine could be invoked against the government would be sensible.

[195] *See* Helvering v. Wilshire Oil Co., 308 U.S. 90, 100 (1939); Helvering v. Reynolds, 313 U.S. 428, 432 (1941); Morrissey v. Comm'r, 296 U.S. 344, 355 (1935).

[196] *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 282-84 (1974).

Mutual Automobile Insurance Co.,[197] qualified its approach yet again. Emphasizing *Chevron's* willingness to permit agencies to deviate from earlier interpretations, the Court distinguished between use of the doctrine by the government and against the government and indicated that it would be more demanding of litigants seeking to invoke it in the latter context.[198]

The Court's retreat is not surprising. After all, *Chevron* effected an expansion in agency authority not only by creating greater latitude for agencies to change their interpretations, but also by granting increased deference. The reenactment doctrine, when applied against the government, potentially conflicts with both of these *Chevron* strands. The spirit of the pro-change strand is undermined if courts apply the doctrine to prevent the agency from reconsidering its original position. Likewise, the spirit of the pro-deference strand is frustrated if the agency is so constrained. In short, although this tension between *Chevron* and the reenactment doctrine requires further clarification, one can safely conclude that ardent proponents of *Chevron* will be strongly inclined to resolve it by requiring rather clear evidence of anti-modification intent as a predicate for invoking the doctrine against the government.[199]

Recently, in *FDA v. Brown & Williamson Tobacco Corp.*,[200] the Su-

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[197] 463 U.S. 29 (1983).

[198] *See id.* at 45 (stating that "in the cases before us, even an unequivocal ratification—short of statutory incorporation—of the passive restraint standard would not connote approval or disapproval of an agency's later decision to rescind the regulation").

[199] *See* Bankers Life and Cas. Co. v. U.S., 142 F.3d 973, 988 (7th Cir. 1998) (indicating that the strength of the reenactment doctrine, though in a context in which the government sought to invoke it, is somewhat undercut by *Chevron's* pro-change strand as emphasized by the Court in *Smiley*, 517 U.S. at 740; Peoples Fed. Sav. and Loan Ass'n of Sidney, 948 F.2d at 302 (intimating that *Chevron's* pro-change strand weakens the argument for applying the reenactment doctrine against the government); *Brock*, 835 F.2d at 916 (requiring strong affirmative evidence that Congress intended to freeze an interpretation before invoking the doctrine against the government, and citing *Wilshire Oil Co.*, 308 U.S. 90, the pre-*Chevron* case indicating that reenactment is never appropriate against the government); Massachusetts v. Sec'y of Health and Human Servs., 899 F.2d 53, 61 (1st Cir. 1990) (indicating that more than Congress' ratification of an interpretation is necessary before an interpretation is frozen in place), *vacated by* 500 U.S. 949 (1991); Cent. Pa. Sav. Ass'n. v. Commissioner, 104 T.C. at 390 (acknowledging that *Chevron* gives agencies the flexibility to alter their interpretations). However, some courts continue to indicate a willingness to apply the reenactment doctrine against the government, even in the absence of any particularized showing that Congress intended to effect a freeze of the pre-reenactment interpretation. *See supra* note 185.

[200] 529 U.S. 120 (2000).

preme Court invoked the reenactment doctrine against the government, freezing in place a prior agency interpretation. The tension between the doctrine and *Chevron* surfaced in the interaction between the majority and dissenting opinions, with the majority permitting the doctrine to trump *Chevron's* pro-change principle and the dissent choosing *Chevron* over the doctrine. The majority applied the reenactment doctrine against the government in a relatively uncomplicated context and, as will be suggested, did so gratuitously. Moreover, the Court's analysis sheds little light on the kind of evidence Congress must provide before a court is justified in finding a freeze was intended.

In *Brown & Williamson*, the FDA originally had interpreted its governing statute as precluding the agency from regulating tobacco. Subsequently, Congress enacted various pieces of legislation regulating the sale of tobacco. The FDA then abandoned its original interpretation and took the position that its governing statute conferred upon it the necessary regulatory authority. The issue before the Court was whether the FDA exceeded its authority in asserting regulatory jurisdiction. Both the majority[201] and the dissent[202] appeared to be in agreement as to the proper framework for determining the validity of the FDA's new interpretation: if the assertion of jurisdiction was contrary to the statute's unambiguous mandate, *Chevron* would require that the interpretation be invalidated.

The majority then examined the FDA's governing statute and the tobacco-regulating legislation Congress enacted over the years. If the governing statute was construed as permitting the assertion of jurisdiction, the majority reasoned that the FDA necessarily would be required to ban the sale of tobacco entirely.[203] Yet, the majority found that the tobacco-regulating legislation, enacted subsequent to the governing statute, clearly and unambiguously contemplated the continued sale of tobacco.[204] Thus, the FDA's assertion of jurisdiction and the complete ban that would necessarily result could not be sustained.

Given the majority's conclusion in *Brown & Williamson* that there was a conflict between the FDA's assertion of jurisdiction and the clear tobacco-regulating legislation, one might have anticipated that a reference

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[201] *See id.* at 132-33.
[202] *See id.* at 171 (Breyer, J., dissenting).
[203] *See id.* at 137.
[204] *See id.*

to the *Chevron* notion that an agency cannot override a clear statute would suffice. However, the *Brown & Williamson* majority expanded its analysis to include the reenactment doctrine. The majority observed that Congress had enacted the tobacco-regulating legislation against the backdrop of the FDA's original interpretation that it did not have jurisdiction. Relying on one of its reenactment decisions, *Bob Jones University. v. United States*,[205] the majority concluded that Congress intended to ratify the FDA's original interpretation and, in effect, freeze it in place.[206] However, this use of the doctrine was gratuitous. The tobacco-regulating legislation, the majority concluded, unambiguously contemplated that the FDA would not have jurisdiction. Under the *Chevron* framework, an agency interpretation in conflict with such unambiguous legislation cannot be permitted to stand. Thus, the legislation should have been viewed as a bar to the FDA's assertion of jurisdiction, making any examination of the prior interpretation or the reenactment doctrine unnecessary.

It is difficult to infer from the *Brown & Williamson* majority's willingness to apply the reenactment doctrine against the FDA the circumstances in which the Court will be prepared to invoke the doctrine against the government in future cases. After all, given the majority's view of the tobacco-regulating legislation, the case was a relatively easy one in which to examine the relationship between *Chevron* and the reenactment doctrine. Once the Court found the legislation clearly precluded the assertion of jurisdiction, the agency's authority to deviate from its original interpretation could not be sustained, thus making for an easy, as well as gratuitous, application of the doctrine. In contrast, when the reenacting legislation is ambiguous, the analysis is more complicated. The Court, however, did not address the issues that arise with regard to an ambiguous reenactment: whether the doctrine is available against the government in this context; and, if so, how clearly Congress must express its intent in order to achieve this outcome.[207]

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[205] 461 U.S. 574 (1983). More accurately, *Bob Jones* did not involve reenactment but, rather, acquiescence. In *Bob Jones*, the Court concluded that Congress had ratified a revenue ruling when it failed to pass a bill that would have overturned the ruling. *See id.* at 599-601. This rather expansive variation on the reenactment doctrine apparently is reserved for special situations. *See* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 170 n.5 (2001) (reading Congress' failure to pass legislation as constituting acquiescence only when the evidence is "overwhelming").

[206] *See Brown & Williamson*, 529 U.S. at 156.

[207] *See Brock*, 835 F.2d at 915 (requiring strong affirmative indication of Congress'

Because the majority in *Brown & Williamson* did not consider these issues, it failed to address an important distinction. In invoking the reenactment doctrine, the majority relied on *Bob Jones*. However, in *Bob Jones* the government invoked the doctrine to validate an agency interpretation, not against the government to constrain an agency's authority to modify an interpretation.[208] Did the *Brown & Williamson* majority intend to imply that the same level of evidence concerning Congress' intent is required to invoke the doctrine against the government as is required when the government invokes the doctrine? Or did the *Brown & Williamson* majority simply fail to appreciate that, unlike the case under consideration, *Bob Jones* involved the use of the reenactment doctrine to validate the agency's interpretation?

Whatever one might make of this, the *Brown & Williamson* majority certainly made clear that, even under *Chevron*, the Court can invoke the reenactment doctrine against the government in order to constrain change.[209] The *Brown & Williamson* dissent, on the other hand, maintained that, given *Chevron's* pro-change principle, the Court should permit the FDA to alter its approach.[210] The majority did not dispute the validity of the pro-change principle but instead implicitly concluded that it was inapplicable because of its determination that Congress had intended to ratify the FDA's original interpretation. Therefore, although the dissent apparently took the view that the pro-change principle preempted application of the reenactment doctrine against the government,[211] the majority took the contrary view that the doctrine can be invoked against the government

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intent to freeze an agency interpretation when the legislation is ambiguous). *See also Bell Aerospace Co.*, 416 U.S. at 274-75 (1974).

[208] *See* Sec'y of Health & Human Servs., 899 F.2d at 61 (indicating that *Bob Jones* involved the use of the reenactment doctrine to uphold an agency interpretation and that, in *Motor Vehicle Mfrs.*, 463 U.S. at 45, the Court refused to conclude that reenactment had the effect of freezing in place an agency interpretation). In *Motor Vehicle Mfrs.*, the Court, after distinguishing *Bob Jones*, concluded that "short of statutory incorporation" the agency should be permitted to depart from its original interpretation, with the validity of the new interpretation determined under the arbitrary and capricious standard. *See* 463 U.S. at 45.

[209] *See Brown & Williamson*, 529 U.S. at 157-58. For a pre-*Chevron* case in which the Court constrained the government through use of the reenactment doctrine, see *Bell Aerospace Co.*, 416 U.S. at 274-75.

[210] *See Brown & Williamson*, 529 U.S. at 186 (Breyer, J., dissenting).

[211] The dissenters may have overstated their position in that they might well be prepared to permit the doctrine to trump the principle if clear evidence that Congress intended to effect a freeze were present. *See id.* at 190.

without violating the pro-change principle. Unfortunately, both the majority and the dissent failed to fully clarify their view of the relationship between the pro-change principle and the reenactment doctrine.

Curiously, neither the *Brown & Williamson* majority nor the dissent considered the Court's prior treatment of the applicability of the reenactment doctrine against the government. As previously suggested, in *Motor Vehicle Manufacturers*,[212] the Court had staked out its position on the issue by indicating that Congress should not be understood as precluding an agency from changing its position merely because it has ratified an agency interpretation, unless, in the Court's words, the reenacting legislation effects a "statutory incorporation."[213] Although the Court did not elaborate on the meaning of this phrase, it seems to contemplate a presumption in favor of permitting the agency to change its position in the absence of an affirmative indication by Congress of a contrary intent.[214] However, in *Davis v. U.S.*,[215] a tax case decided six years after *Motor Vehicle Manufacturers*, the Court appeared more willing to apply the doctrine against the government.[216] In *Brown & Williamson*, both the majority[217] and the dissent,[218] surprisingly, cited *Motor Vehicle Manufacturers* for the pro-change principle but neither opinion made any reference to the language presumptively disfavoring use of the doctrine against the government. Nor was any reference made to *Davis* or to the Court's earlier treatment of the issue.[219]

How then should the *Brown & Williamson* majority be understood? One possible reading is that the majority intended to strengthen the reenactment doctrine as applied against the government. There are, however, alternative readings that would render the doctrine less expansive. After all, the *Brown & Williamson* Court found the legislation unambigu-

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[212] 463 U.S. at 42.

[213] *See id.* at 45.

[214] Such an indication of contrary intent perhaps could be found in legislative history. *See, e.g., Bell Aerospace Co.*, 416 U.S. at 289 (precluding agency from making a change after examining legislative history).

[215] 495 U.S. 472 (1990).

[216] *See id.* at 485 (applying the reenactment doctrine at the government's request but noting that "the Service may retain some flexibility to adopt other interpretations in the future").

[217] *See Brown & Williamson*, 529 U.S. at 157.

[218] *See id.* at 189 (Breyer, J. dissenting).

[219] *See supra* notes 197-195 and accompanying text.

ous,[220] thus leaving unclear whether the Court is prepared to invoke the doctrine against the government in the context of an ambiguous reenacting statute. Perhaps when the issue arises again, the Court will seek to limit the majority opinion by claiming that the evidence that Congress intended to effect a freeze was overwhelming—tantamount to an incorporation. Or perhaps the Court will ultimately declare that in the majority's haste to bolster its analysis, it simply made a mistake in invoking the reenactment doctrine in the first place.

C. The Generation-Skipping Regulations and Reenactment

Thus, because of the distinction between the use of the reenactment doctrine by the government and against the government, the mere fact that the government successfully invoked it in *Peterson*[221] does not necessarily lead to the conclusion that the earlier regulations thereby became unalterable. Nevertheless, it is conceivable that the courts will view Congress' explicit endorsement of the regulations as sufficient to freeze them in place, making the new regulations invalid. In any event, in normative terms, Congress' endorsement of the earlier regulations, even if viewed as falling short of the standard for applying the reenactment doctrine against the government, as well as the adversarial origin of the new regulations should certainly weigh against the validity of the changes. Under *Chevron*, however, these considerations are irrelevant.

After first examining the deference issue in the context of revenue rulings and ambiguous regulations in Parts IV and V, in Part VI the argument will be made that the validity of regulations should be assessed under the so-called *Skidmore* framework.[222] This shift away from *Chevron* would make the courts less deferential and more circumspect, allowing various kinds of considerations to be taken into account that are out of bounds under *Chevron*.

PART IV. REVENUE RULINGS AND DEFERENCE

The transformation in the courts' deference to agency interpretations has not been limited to regulations. Traditionally, courts did not view revenue rulings as legally authoritative, and they received no deference,

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[220] *Brown & Williamson*, 529 U.S. at 155-56.
[221] 78 F.3d 795 (2d Cir.1996).
[222] *See Skidmore*, 323 U.S. at 134.

whether they were invoked by[223] or against the government.[224] A significant shift has occurred, however, in the post-*Chevron* years.[225] Although the Supreme Court remains unwilling to commit itself on the issue,[226] revenue rulings have been enjoying deference, with the level of deference beginning to crystallize.[227] This is true not only when the government invokes a ruling. The courts have begun treating ruling-based arguments advanced by taxpayers with more deference as well.[228] The effect of this alteration in the authoritativeness of revenue rulings is twofold: an expansion of the government's authority where it is the government invoking a ruling, and a contraction where it is the taxpayer.

In *Davis v. United States*,[229] where the government invoked the revenue ruling, the Court gave it "considerable weight," but in doing so emphasized two elements: the ruling's longstanding status, and the reenactment of the statute after it was issued.[230] This, of course, left unclear whether these elements were crucial to the Court's decision to give the ruling such deference[231] and whether *Davis'* deferential standard of review was the equivalent of *Chevron* deference was also left unclear.[232]

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[223] *See* Biddle v. Comm'r, 302 U.S. 573, 582 (1938) (citing Helvering v. New York Trust Co., 292 U.S. 455, 467-68 (1934)); Coverdale, *supra* note 99, at 81; Linda Galler, *Emerging Standards For Judicial Review of IRS Revenue Rulings*, 72 B.U. L. REV. 841, 849-50 (1992).

[224] *See* Dickman v. Comm'r, 465 U.S. 330 (1984); Dixon v. United States, 381 U.S. 68, 73 (1965); Automobile Club of Michigan v. Comm'r, 353 U.S. 180 (1957).

[225] *See* Coverdale, *supra* note 99, at 80-84; Galler, *supra* note 108, at 1038.

[226] *See* United States v. Cleveland Indians Baseball Co., 121 S. Ct. 1433, 1444 (2001) (indicating that, "We need not decide whether the [R]evenue [R]ulings themselves are entitled to deference").

[227] *See* Coverdale, *supra* note99, at 82-84; Galler, *supra* note108, at 1038. However, in the Tax Court, revenue rulings do not enjoy deference (at least when invoked by the government). *See* Alumax Inc. v. Comm'r, 109 T.C. 133, 163 n.12 (1997), *aff'd*, 165 F.3d 822 (11th Cir. 1999); Galler *supra* note 108, at 1083.

[228] *See* Weisbart v. United States Dep't of Treasury, 222 F.3d 93, 98 (2d Cir. 2000); Estate of McLendon v. Comm'r, 135 F.3d 1017, 1023, 1025 (5th Cir. 1998); Estate of Rapp v. Comm'r, 140 F.3d 1211, 1216-18 (9th Cir. 1998); Cascade Designs, Inc. v. Comm'r, 79 T.C.M. (CCH) 1542, 1553-54 (2000) (indicating that revenue rulings do not receive deference in the Tax Court when invoked by the government, but they are binding when they contain a government concession).

[229] 495 U.S. 472 (1990).

[230] *See id.* at 484.

[231] *See* Coverdale, *supra* note 99, at 88; Galler, *Emerging*, *supra* note 223, at 870 (discussing the deference that the Court conferred upon the ruling).

[232] In Cottage Sav. Ass'n. v. Comm'r, 499 U.S. 554 (1991), the Court speculated that

Five years later, although in the context of a ruling invoked by the taxpayer rather than the government, all of the Justices agreed, in *Commissioner v. Schleier*,[233] that rulings were not to be viewed as having the same effect as a regulation.[234] Although not entirely clear, this holding certainly suggested that a ruling was not entitled to *Chevron* deference (i.e., the controlling deference regulations enjoy). However, the dissent argued that rulings were entitled to "substantial" deference (citing *Davis*).[235] The majority, concluding that the ruling could not be sustained because it was contrary to the plain meaning of the statute,[236] found no need to articulate the level of deference rulings were entitled to receive, and, therefore, did not respond to the dissent on this point.

In two recent decisions, *Christensen*[237] and *Mead*,[238] the Court made clear that courts should utilize a two-tier framework to determine the validity of agency interpretations.[239] Under this framework, selecting which of two levels of deference is appropriate depends on whether Congress intended to permit the agency to exercise lawmaking responsibilities, and, if so, whether Congress intended that the responsibilities could be exercised through the particular type of interpretation issued by the agency.[240] When a court concludes that Congress intended that the agency exercise lawmaking responsibility and that it have the authority to do so in the type of interpretation at issue, controlling (*Chevron*) deference is appropriate.[241] However, when a court reaches the contrary conclusion, the interpretation is entitled to less deference under the so-called *Skidmore* standard.[242]

The *Skidmore* standard, under which tax regulations previously had

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the government's failure to seek deference for its revenue rulings was attributable to the fact that they were issued after the transaction at issue had been consummated. *See id.* at 563 n.7. The Court also cited *Nat'l Muffler*, 440 U.S. at 483-484, for the proposition that longstanding revenue rulings that maintain a consistent position across a variety of fact patterns are entitled to deference. *See id.*

[233] 515 U.S. 323 (1995).

[234] *See id.* at 336 n.8, 345.

[235] *See id.* at 345.

[236] *See id.* at 336 n.8.

[237] 529 U.S. at 576.

[238] 121 S. Ct. 2164.

[239] *See* Merrill & Hickman *supra* note 103, at 836 (citing *Christensen* and discussing two levels of deference, *Chevron* and *Skidmore*).

[240] *See Mead*, 121 S. Ct. at 2172-73.

[241] *See id.*

[242] *See Skidmore*, 323 U.S. at 134.

been analyzed,[243] requires courts to defer to a persuasive interpretation.[244] In determining whether the interpretation is persuasive (and therefore binding), the courts must make a contextualized judgment based on various factors that would be largely irrelevant under *Chevron*, including inter alia:[245] the thoroughness of the agency's decision-making process, the consistency with which the agency has maintained its position, and the validity of the agency's reasoning (which, unlike the first two factors, is relevant under *Chevron*).[246] In applying persuasiveness as the standard, both *Christensen* and *Mead* could possibly be understood as suggesting that courts remain free to reject any interpretation with which they disagree. However, when these decisions are read against the backdrop of the language referenced in *Skidmore*, such an understanding becomes untenable. For example, consider a case in which the statute is ambiguous and would accommodate either of two constructions. If the agency adopted one of these constructions after thorough and logical analysis and then remained consistently faithful to it, *Skidmore* likely would require a court to defer to the agency's construction despite the Court's preference for the alternative.[247]

Whether the Court will definitively conclude that courts should analyze revenue rulings under *Skidmore*, rather than *Chevron*, remains to be seen. But given that all of the Justices agreed in *Schleier* that rulings do not enjoy the same authoritative effect as regulations (*Chevron* deference)[248] and that *Christensen* and *Mead* make clear that interpretations are entitled to either *Chevron* or *Skidmore* deference (with no intermediate

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[243] *See id.* at 140.

[244] *Mead*, 121 S. Ct. at 2167 (quoting Skidmore, 323 U.S. at 140 (1944)); Christensen, 529 U.S. at 587 (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256-58 (1991) as well as *Skidmore*).

[245] *See supra* notes 98-99 and accompanying text.

[246] *See supra* note 244.

[247] The passage in *Skidmore* referenced by the Court in *Christensen* and *Mead* requires the courts to seek "guidance" from agency interpretations because of the "experience and informed judgment" agencies contribute to the deliberative process. *Skidmore*, 323 U.S. at 140. Moreover, in fleshing out the level of deference contemplated, the passage refers to the Court's prior decisions in which tax regulations had been given "considerable and in some cases decisive weight." *Id.* Thus, under the *Skidmore* standard, agency interpretations cannot be set aside simply because the court reaches a contrary conclusion on its own analysis. Indeed, to read *Christensen* as permitting a court to reject an interpretation with which it disagrees is tantamount to a complete denial of deference, which contradicts the *Skidmore* passage.

[248] 515 U.S. 323 (1995).

level of deference), the Court likely will eventually clarify that *Skidmore* is the appropriate framework for analyzing the validity of rulings.[249] If so, *Davis'* "considerable weight" standard could be understood as a contextualized judgment about the ruling's persuasiveness, with its long-standing status and the statute's reenactment after Congress issued it explaining the heightened level of deference the Court applied.[250]

If *Skidmore* does become the governing framework, the lower courts may well need to reconsider the formulations they employ in evaluating the authoritative effect of rulings invoked by the government.[251] The circuit courts have been applying what might be called an intermediate level of deference, not as much as *Chevron*'s controlling deference, but more than *Skidmore*'s persuasive deference (perhaps reading *Davis* as imposing a per

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[249] In *Mead*, the Court concluded that *Chevron* deference may be appropriate even when an interpretation is issued without notice and comment. *See* 121 S. Ct. at 2173. Revenue rulings (issued without notice and comment, *see, e.g.*, Galler, *supra* note 223, at 890) might therefore become eligible for *Chevron* deference. At the same time, the Court's recent refusal to specify whether *Chevron* or *Skidmore* applies to revenue rulings, in *Cleveland Indians Baseball Co.*, 121 S. Ct. at 1444, suggests that the Court was somewhat uncertain, and perhaps conflicted, about the issue. Nevertheless, as indicated in the text, it seems more likely the Court will establish ultimately that *Skidmore* governs in this context—although under the mode of analysis favored by Justice Scalia which was rejected by the majority in *Mead*, revenue rulings would presumably be entitled to analysis under *Chevron* because they represent the authoritative view of the agency reached after full deliberation. *See Mead*, 121 S. Ct. at 2179-85 (Scalia, J., dissenting). Indeed, in the aftermath of the Court's decision in *Christensen*, the circuit courts have begun applying *Skidmore* to revenue rulings. *See, e.g.*, Dominion Res., Inc. v. U.S., 219 F.3d 359, 366 (4th Cir. 2000) (citing *Christensen* in support of its conclusion that revenue rulings are entitled to much less than *Chevron* deference); Wells Fargo & Co. v. Comm'r, 224 F.3d 874, 886 (8th Cir. 2000) (indicating that a revenue ruling is entitled to persuasive deference, citing to an earlier decision in this circuit, Oetting v. United States, 712 F.2d 358, 362 (8th Cir. 1983), rather than *Christensen*); Matz v. Household Int'l Tax Reduction Inv. Plan, 265 F.3d 572 (7th Cir. 2001), *cert. granted*, 121 S. Ct. 2545 (2001) (intimating that revenue rulings should be analyzed under the *Skidmore* framework); American Express Co. v. U.S., 262 F.3d 1376 (Fed. Cir. 2001) (intimating to the same effect).

[250] In setting forth its deference formulation, the *Skidmore* Court indicated that considerable weight, or even decisive weight in some circumstances, would be appropriate. 323 U.S. at 140. *Compare* Cottage Sav. Ass'n, 499 U.S. at 563 n.7 (suggesting a level of deference with regard to revenue rulings that one could view as consistent with *Skidmore*, e.g., deference is perhaps inappropriate because the rulings were issued after the transaction), *with Smiley*, 517 U.S. at 741 (concluding that in terms of *Chevron* deference, the fact that the government issued the regulation during the litigation was not relevant).

[251] *See Dominion*, 219 F.3d at 366 (questioning the importance of *Christensen* in terms of revenue rulings).

se rule of intermediate deference that is insensitive to context).[252] Thus, if *Skidmore* is held applicable to rulings, a cutback in the level of deference will likely ensue in the circuit courts. Yet, it is also possible that any alteration in the deference formulation as a result of applying *Skidmore* might have little impact in these courts. Given the pressure of other matters, generalist judges lacking tax expertise may well find sufficient flexibility in the *Skidmore* standard to justify adopting the position taken in a ruling without engaging in a complete and independent analysis.[253]

The Tax Court, unlike the circuit courts, has adhered to the traditional view that rulings are entitled to no deference.[254] Although reconsideration of this view would seem necessary in light of *Christensen* and *Mead*, the Tax Court is not likely to undertake this task eagerly. One way of understanding the court's no-deference stance is as a reflection of its own sense of expertise and, perhaps, "institutional ego." If this description of the court's approach is correct, the court presumably will resist taking *Christensen* and *Mead* seriously. The Tax Court could express this resistance in either of two ways: (1) by misreading *Skidmore* to require no deference whenever its own analysis leads to a conclusion that is inconsistent with the ruling, or (2) by adopting its own conclusion on the substantive issue and then framing it in terms that are compatible with the *Skidmore* standard. The court has already intimated an inclination to take the first of these two paths.[255]

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[252] *See, e.g.*, Coverdale, *supra* note 99, at 82 (indicating that in recent years, in the circuit courts, revenue rulings have been receiving "significant deference").

[253] *See, e.g.*, Del Commercial Props., Inc. v. Comm'r, 251 F.3d 210, 214 (D.C. Cir. 2001) (giving *Skidmore* deference to revenue rulings, citing *Christensen*, and upholding them after making a conclusory reference to the plain meaning of the Code as informed by an early Supreme Court decision); Rebecca K. Crown Income Charitable Fund v. Comm'r, 8 F.3d 571, 576 (7th Cir. 1993) (indicating that "generalist judges should be loath to lay down the law on the question without the Treasury's view, which has not yet crystallized"). *See also* Aprill, *supra* note 107, at 88 (indicating that generalist judges prefer deference). On the other hand, generalist federal judges arguably tend to dislike an expansive conception of deference because it threatens their self-image. *See* Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481, 516 (1990) (discussing judicial bias against deference). *See also* Matz, 265 F.3d at 575-76 (applying *Skidmore* and nevertheless rejecting the government's argument).

[254] *See, e.g.*, Sklar, Greenstein & Scheer, P.C. v. Comm'r, 113 T.C. 135, 142 (1999). *See also* Dominion Res., Inc. v. U.S., 219 F.3d 359, 366 (4th Cir. 2000) (indicating that the Tax Court gives no deference to revenue rulings).

[255] In Johnson v. Comm'r, 115 T.C. 210 (2000), the court's first encounter with

In those cases where the government is able to prevail because its ruling-based argument is reviewed deferentially, its authority is obviously expanded. Given the deference rulings enjoy (though perhaps a cutback will occur as a result of *Christensen* and *Mead*[256]), it would not be surprising if the government sought to expand its authority further by incorporating arguments it contemplates making in future litigation in a present ruling and then claiming the ruling as precedent.[257] Moreover, as a practical matter, the government may frequently be able to secure controlling deference for its rulings, rather than mere *Skidmore* deference. For as discussed in Part V, the Supreme Court has made clear that an agency's interpretation resolving an ambiguity in its regulations is determinative "unless plainly erroneous or inconsistent with the regulation."[258] Indeed, the Court recently deferred to the government's construction of an ambiguous regulation on the ground that longstanding rulings had adopted the same construction.[259] Because so many tax disputes revolve around the meaning of the regulations, and since it is likely that, as a result of Chev-

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Christensen, the court dismissed a ruling-based argument advanced by the taxpayer on the ground that rulings are not binding. *See id.* at 224. Interestingly, after reiterating its traditional no-deference stance, the court cited *Christensen* with the following parenthetical description: "the interpretation that an agency reaches without formal notice and comment rulemaking is entitled to 'respect' only when it has the 'power to persuade.'" *Id. See also* McLaulin v. Comm'r, 115 T.C. 255, 263-64 (2000) (alluding to the general rule that rulings do not receive any deference, the Court indicated that taking into account the longstanding nature of the ruling was not necessary because it agreed with the ruling's conclusion).

[256] However, as indicated in text *Christensen* and *Mead* could result in an increase in deference in the Tax Court. *See* supra notes 254-255 and accompanying text.

[257] Justice Scalia has suggested that agencies will tend to tailor their pronouncements in order to secure more deferential review. *See Mead*, 121 S. Ct. 2164, 2182 (Scalia, J., dissenting). However, if the ruling is issued in connection with litigation, this may affect the court's willingness to grant deference. *See Cottage Savings Ass'n*, 499 U.S. at 563 n.7 (implying that deference might be appropriate when the revenue ruling is issued after the transaction). On the other hand, courts have granted deference to a ruling issued at the time of litigation. *See, e.g.*, First Chicago NBD Corp. v. Comm'r, 135 F.3d 457, 459 (7th Cir. 1998) (giving deference to a revenue ruling even though it was issued at the same time the Service asserted the deficiency against the taxpayer). In addition, the Supreme Court has granted *Chevron* deference, as distinguished from *Skidmore* deference, even though the interpretation was issued as a result of litigation. *See Smiley*, 517 U.S. at 740.

[258] *See* Auer v. Robbins, 519 U.S. 452, 461 (1997) (internal quotes omitted); *see also* Connor v. Comm'r, 218 F.3d 733, 738 (7th Cir. 2000) (applying deference with regard to the Service's interpretation of an ambiguity in the regulations).

[259] *See Cleveland Indians Baseball Co.*, 121 S. Ct. at 1444-45 (indicating that the Service's consistent position in longstanding revenue rulings as to the meaning of an ambiguous regulation is entitled to "substantial judicial deference").

ron, an increasing number of issues will be addressed in the regulations, the potential for the government to dictate the outcome of litigation through rulings that resolve ambiguities in the regulations is quite considerable—any cutback that *Christensen* and *Mead* may precipitate notwithstanding. This expansion in the government's authority,[260] though perhaps not as problematic as in the context of regulations because rulings will not universally enjoy the same level of deference as regulations, nevertheless raises the same kinds of questions about the failure to provide a disinterested check on governmental bias or bureaucratic abuse.[261]

The Supreme Court has not offered any more concrete guidance on the deference issue when the taxpayer invokes a ruling, but two decisions reveal a trend in the direction of binding the government by its rulings—a trend that is even more discernible in the circuit courts.[262] In *Commissioner of Internal Revenue v. Estate of Hubert*,[263] although none of the various opinions explicitly addressed the deference issue, the three-Justice concurring opinion predicated its rejection of the Service's argument on a concession made in a ruling with regard to the meaning of an ambiguous regulation.[264] The two-Justice dissent did not disagree in terms of deference, but rather argued that the concurring opinion misread the scope of

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[260] Controlling deference possibly may be secured for a revenue ruling if a regulation provides that the approach taken in rulings is determinative. *See* Estate of Harrison v. Comm'r, 115 T.C. 161, 165-66 (2000) (intimating that a revenue ruling would be entitled to controlling deference when the regulation provided that the ruling issued pursuant to the regulation would govern).

[261] *See supra* note 173 and accompanying text.

[262] *See* Estate of Rapp v. Comm'r, 140 F.3d 1211, 1216-17 (9th Cir. 1998) (indicating that a two-tier deference standard is appropriate for revenue rulings and that, although they are not binding on the taxpayer, the government's ability to disavow a taxpayer friendly ruling is limited); Estate of Kosow v. Comm'r, 45 F.3d 1524, 1528 n.4 (11th Cir. 1995) (indicating that although revenue rulings are not binding on the courts, taxpayers may assert them as a "shield"); Hawkins v. United States, 30 F.3d 1077, 1081 (9th Cir. 1994) (distinguishing one of its prior pro-government decisions on the ground that it had given deference to a revenue ruling and now holding for the government on the ground that the ruling had since been revoked). The Tax Court has also, on occasion, held the government to its revenue ruling, *see, e.g.* Cascasde, TC Memo 2000-58 (indicating that concessions in rulings are binding on the Service). *See also* Coverdale, *supra* note 95, at 83-84. *But see* Frazier v. Comm'r, 111 T.C. 243, 248 (1998) (indicating that revenue rulings are not binding on the court).

[263] 520 U.S. 93 (1997).

[264] *See id.* at 117-18.

the concession.[265] Thus, when the concurring and dissenting opinions in *Hubert* are read together, it appears that fives Justices may be prepared to take the view that rulings invoked by a taxpayer are authoritative and binding on the government[266] (at least when the ruling clarifies the meaning of an ambiguous regulation[267]).

In *Schleier*, the Court concluded that a concession made in a ruling was not binding on the government because it was contrary to an unambiguous statute.[268] Though not entirely clear, the negative implication is that the Court is prepared to hold a ruling binding on the government when the statute is ambiguous[269] and the ruling adopts a reasonable construction in light of that ambiguity.[270] In any event, whatever one may make of *Hubert's* concurring and dissenting opinions and *Schleier's* negative implication, the Court apparently has established an outer boundary for deference and authoritativeness in this context: the government is not bound by a ruling if it can establish that the statute unambiguously calls for a contrary result.[271]

When a court concludes that the government is bound by a ruling, the government's authority obviously is contracted. Because taxpayers rely on

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[265] *See id.* at 129-30.

[266] *See generally* Gans et al, *supra* note 124, at 969 (discussing the various opinions in *Hubert*, as well as the regulations proposed in response to the decision).

[267] Justice Scalia made the point in his dissent that rulings that resolve an ambiguity in a regulation are entitled to deference (*see Estate of Hubert*, 520 U.S. at 127 (Scalia, J., dissenting)). Accordingly, he might take a different approach in the absence of such ambiguity.

[268] *See Schleier*, 515 U.S. at 336 n.8.

[269] Did the majority intend to imply this? Apparently so, given that the dissent argued that the ruling was not an unreasonable interpretation of the statute and should therefore be viewed as binding, *see id.* at 345, and the majority's only response was that the ruling was invalid because the statute called unambiguously for a contrary result. *See id.* at 336 n.8. In other words, the majority's failure to argue in response that the ruling would not be binding even if the statute were ambiguous strongly implies it would reject such an argument.

[270] *See* Estate of McLendon v. Comm'r, 135 F.3d 1017, 1024-25 (5th Cir. 1998); Silco, Inc. v. United States, 779 F.2d 282, 286-87 (5th Cir. 1986).

[271] Notably, the Court left open the question of whether, in these circumstances, the government would be bound by a concession contained in a regulation. *See Schleier*, 515 U.S. at 334. On the other hand, see United States v. Burke, 504 U.S. 229, 245-46 (1992) (Scalia, J. concurring) (maintaining that the government does not have the authority to reduce the impact of a tax imposed by Congress through the promulgation of a regulation that goes beyond the clear parameters of the statute).

rulings and because one important function that rulings serve is to facilitate transactions by making clear in advance the tax consequences they will generate, it is unfair[272] and inefficient to permit the government to disavow a ruling after a taxpayer has consummated a transaction on the basis of the ruling.[273] Thus, the contraction of the government's authority, resulting from the emerging view that rulings are authoritative and binding on the government, is constructive. While *Hubert* and the negative implication in *Schleier* are positive developments, the majority's unqualified assertion in *Schleier* that a court must disregard any ruling that is inconsistent with an unambiguous statute—apparently even in the face of taxpayer reliance[274]—raises fairness and efficiency concerns. Indeed, in the aftermath of *Schleier*, the Service implicitly acknowledged its discomfort with the Court's decision to invalidate the ruling and thereby ignore the concession it contained, thus suggesting that the Service recognizes the salutary effect of standing behind its rulings.[275]

In sum, however the deference standard is formulated, revenue rulings now enjoy more deference than they did traditionally. The resulting expansion of government authority when a pro-government ruling is reviewed deferentially is problematic. On the other hand, when a pro-taxpayer ruling receives deference precluding the government from changing

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[272] In Dixon v. United States, 381 U.S. 68, 72-73 (1965), the Court addressed the fairness issue by emphasizing that the Service had not invited reliance, but instead had indicated that it would not necessarily adhere to a position taken in a revenue ruling.

[273] *See Estate of McLendon*, 135 F.3d at 1024-25 & n.13; *Silco*, 779 F.2d at 286; *Dixon*, 381 U.S. 68.

[274] No argument could be made that the taxpayer in *Schleier* had relied on the ruling. In arguing that the damage award he had received in 1986 should not be included in gross income, the taxpayer cited a 1993 revenue ruling, Rev. Rul. 93-88, 1993-2 C.B. 61 but the Court concluded the ruling was invalid. Obviously, the taxpayer did not rely on the ruling at the time of the 1986 settlement. *See Schleier*, 515 U.S. at 327.

[275] *See* Rev. Rul. 96-65, 1996-2 C.B. 6 (revoking Rev. Rul. 93-88, 1993-2 C.B. 61, the ruling that *Schleier* invalidated, but only with regard to transactions occurring after the Court's decision). Although the Service's limiting of a Supreme Court decision is surprising, the Service does have the authority to make rulings (including judicial rulings) prospective in operation. *See* I.R.C. § 7805(b)(8) (2001). However, this raises the question of whether the Service's, or the Treasury's, altering the impact of a Supreme Court decision is constitutionally permissible. *See infra* note 342. Moreover, it is somewhat ironic that the Court in *Schleier* concluded that a ruling cannot overturn an unambiguous statute only to have the Service respond by overturning the Court's decision (at least in the sense that the Service limited the decision so that it would have prospective effect only). *See Schleier*, 515 U.S. at 336 n.8.

a position on which a taxpayer has relied, the constraint on government authority makes sense in terms of fairness and efficiency.

PART V. *AUER* DEFERENCE: AMBIGUOUS REGULATIONS

The deference transformation has been extended beyond the interpretation of statutes. The way that courts police agencies that interpret their own regulations has undergone change as well. Until recently, how deference applied in this context was somewhat unclear.[276] However, the Supreme Court has now clarified that a type of deference analogous to *Chevron*-type deference is appropriate. In *Auer v. Robbins*,[277] the Court held that a court, when required to determine the meaning of an ambiguous regulation, must give controlling deference to an interpretation proffered by the agency if it is not plainly erroneous or inconsistent with the regulation.[278]

However, deference is not required if the interpretation does not represent the agency's considered view.[279] For example, when the agency's appellate counsel argues in a brief that a court should construe a regulation in favor of the government, deference is inappropriate.[280] But when the brief reflects that the proffered interpretation represents the official view of the agency, and not simply the view of appellate counsel, the interpretation is entitled to controlling deference.[281]

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[276] *See generally* Manning, *supra* note 145, at 680-81 (reviewing the uncertain status of the law regarding the deference that a court gives an agency when it proffers an interpretation of its own ambiguous regulation).

[277] 519 U.S. 452, 457 (1997), *vacated by* 519 U.S. 1145 (1997).

[278] *See id.* at 461.

[279] *See id.* at 462-63.

[280] *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988) (refusing to defer to an argument made by appellate counsel in a brief as to the meaning of the statute, because it did not indicate that it represented the views of the agency). In *Bowen*, the meaning of a statute, rather than a regulation, was at issue. However, the *Auer* Court's citation to *Bowen* and the language in *Bowen* (as well as in *Auer*) suggesting that a court can only apply deference when an agency has taken a considered position indicate that deference under *Auer* cannot be invoked on the basis of an argument made by appellate counsel in a brief.

[281] *See Auer*, 519 U.S. at 461-62 (finding the Secretary of Labor's interpretation of an ambiguous regulation contained in an amicus brief entitled to controlling deference); *Cleveland Indians Baseball Co.*, 121 S. Ct. at 1444-45 (giving deference to the government's interpretation of a tax regulation based on longstanding revenue rulings adopting the same interpretation). *See also Estate of Hubert*, 520 U.S. at 129 (entitling government's interpretation of regulation to "considerable deference") (Scalia, J. dissenting); Connor v.

The rationale is that, as long as the agency's interpretation is not inconsistent with the statute, any revised draft of the regulation containing the interpretation would necessarily be valid.[282] It makes no sense, the argument goes, to reject as invalid an interpretation that could be validated so easily. The premise that the interpretation could in all cases be adopted by amendment is, however, open to some question. While, under *Chevron*, agencies are given great latitude to amend their regulations, this authority may nevertheless be subject to limitations beyond the requirement that the interpretation fall within the scope of the statute.[283] On the other hand, under *Auer*, the only limitations on the agencies' authority are the parameters of the statute under interpretation (as well as the requirement, of course, that the regulation be ambiguous and the government's resolution be reasonable).[284]

Two critical difficulties arise with what will presumably become known as *Auer*-type deference.[285] First, under *Auer*, the problem of adversarial bias is most acute. There is little question but that the government's ability to determine objectively the most appropriate construction of a regulation will be less than optimal if the government must make the decision at the very moment of engaging in litigation with a taxpayer. Second, whenever a court upholds an agency's construction under *Auer*, the court implicitly applies that construction on a retroactive basis. In other words, while an agency might be able to amend an ambiguous regula-

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Comm'r, 218 F.3d 733, 738 (7th Cir. 2000) (granting deference to the Service's interpretation of ambiguous regulation). In *Schleier*, 515 U.S. at 334 n.7, the Court refused to give deference to an interpretation of an ambiguous regulation offered by the government because the government had, in the past, interpreted the regulation differently. The Court implied that the interpretation would have been controlling had the government been consistent. *See also* U.S. Freightways Corp. v. Comm'r, 270 F.3d 1137,1139 (7th Cir. 2001) (refusing to invoke *Auer* deference where the government had been inconsistent and there was no "sound basis" for the government's position).

[282] *See Auer*, 519 U.S. at 463.

[283] *See supra* notes 134-135 and accompanying text.

[284] *See Auer*, 519 U.S. at 461.

[285] Justice Scalia suggests that, given the combination of *Auer* deference and the restrictive approach taken by the Court in *Mead* (relegating various kinds of interpretations to *Skidmore* deference, rather than *Chevron's* controlling deference, even if they represent the authoritative and deliberative view of the agency), agencies will have the incentive to issue regulations that are not very detailed. Agencies will then issue interpretations that resolve the ambiguities in the regulations on a case-by-case basis, claiming that the interpretation is entitled to controlling deference under *Auer*. *See Mead*, 121 S. Ct. at 2183-84 (Scalia, J., dissenting).

tion to incorporate a favored construction, that amendment would need to be adopted on a prospective basis if the agency did not have authority to adopt regulations retroactively.[286] Thus, in the case of tax regulations, which can no longer be adopted on a retroactive basis,[287] *Auer* permits the government to do indirectly what it cannot do directly.[288]

Another form of deference is closely related to *Auer* deference. When the meaning of a statute, rather than a regulation, is at issue and the agency argues in litigation that its interpretation should prevail, the question arises whether courts should defer to the agency's argument. Although the Supreme Court has not definitively resolved the issue, it appears to contemplate that an agency's litigating position is entitled to deference if: (1) the agency's interpretation represents the view of the agency (as opposed, for example, to the view of appellate counsel); and (2) the interpretation is supported by administrative practice.[289]

Assuming these two conditions are satisfied and, as a result, deference is appropriate, the question then becomes what level of deference should be applied. While further clarification of the issue is needed, the Court has implied strongly that an agency's litigating position should be analyzed under *Skidmore*.[290] Thus, in contrast to regulations (which are entitled to

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[286] *See Bowen*, 488 U.S. at 208-09 (1988) (indicating that agencies do not have authority to issue regulations on a retroactive basis unless the statute explicitly authorizes it).

[287] *See* I.R.C. § 7805(b) (West Supp. 2001).

[288] Some commentators have suggested that, depending on one's perspective, retroactivity can be seen as creating positive or negative effects. *See* SHAVIRO, *supra* note 142, at 116-17. If one takes the view that the Treasury will use any authority it is given to act on a retroactive basis to close down abusive transactions, then the case for retroactivity would be compelling. *See id.* However, if one takes the view that the Treasury will use any such authority in a self-interested way to maximize revenue, one would be inclined to reach the opposite conclusion. *See id.* Under either view, the government's bias as an adversary seems to argue against permitting it the authority to adopt with retroactive effect interpretations proffered in the middle of litigation.

[289] *See Bowen*, 488 U.S. at 212. The *Bowen* Court did not elaborate as to the kind of administrative practice that would be entitled to receive deference.

[290] *See id.* at 212-13 (indicating that an agency litigation position would only be entitled to deference if it were reasoned and consistently maintained). The two factors that the Court emphasized, whether the interpretation is well reasoned and whether the agency has been consistent, would be relevant under *Skidmore* but not under *Chevron* or *Auer*. *See id. See also* Jewett v. Comm'r, 455 U.S. 305, 318 (2000) (indicating that the Service's consistent interpretation of the Code is entitled to deference); *Mead*, 121 S. Ct. at 2177 n.19 (2001) (refusing to grant *Chevron* deference in the case of a position taken by the government in its brief); Household Int'l Tax Reduction Inv. Plan v. Matz, 121 S. Ct. 2545 (2001)

Chevron- or *Auer*-type deference), an agency's litigating position, while perhaps entitled to some deference, is not entitled to controlling deference. Again, the questions of adversarial bias and retroactivity are implicated, although they are less critical in this context because, under the *Skidmore* framework, the courts have more discretion to reject an agency's litigating position.[291]

PART VI. A PROPOSAL

The alteration in deference has had, and will continue to have, a very significant impact on tax practice, as well as on other areas of law. The Treasury's expanded regulation-writing authority under *Chevron*, which it used to overturn the Supreme Court's decision in *Hubert*[292] and to resolve the *Peterson/Simpson* issue,[293] indicates that the Treasury's role is undergoing a radical revision. The Supreme Court's decision in *Auer* also expands the government's influence by requiring that the courts defer to agencies' reasonable resolution of ambiguity in their regulations. At the same time, the increased deference given revenue rulings under the *Skidmore* framework[294] contributes, as well, to the changing dynamic in tax litigation, by further strengthening the government's hand.[295]

Whatever view one may take of the persuasiveness of *Chevron's* political accountability theory—and of deference in general—granting increased deference to the government raises two tax-specific issues. One relates to expertise, and the other to the government's position as an adversary in tax litigation.

First, deference ordinarily is justified not solely on the basis of political accountability, but also on the basis of agency expertise.[296] However, in the tax context, the government's expertise does not have the same importance as it does in other areas of the law. Because tax litigation often

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(granting certiorari and remanding for reconsideration the level of deference owed to an amicus brief filed by the Service on a question of statutory interpretation in light of the Court's decision in *Mead*).

[291] *See, e.g.*, Callaway v. Comm'r, 231 F.3d 106, 132 (2d Cir. 2000) (citing *Bowen* and refusing to defer to the Service's litigating position).

[292] *See supra* note 124 and accompanying text.

[293] *See supra* notes 72-73, 90-92 and accompanying text.

[294] *See supra* notes 243-253 and accompanying text.

[295] Revenue Rulings which construe an ambiguous regulation can become the predicate for *Auer*-type deference. *See supra* note 259 and accompanying text.

[296] *See supra* notes 100-104 and accompanying text.

occurs in the Tax Court, which has its own substantial expertise, the danger that a decision will be either insensitive to relevant policies or the Code's structure is greatly diminished. In other words, to the extent that deference is driven by the concern that courts might otherwise undermine the agencies' expertise-based decisions, deference cannot be justified in areas of law when specialized courts are in place.

Under current law, however, the Tax Court does not have exclusive jurisdiction over tax cases. Although much tax litigation occurs in the Tax Court, generalist judges having less tax expertise than the government very frequently decide whether the government's interpretive position should be sustained. Taxpayers have the option of litigating tax cases in the District Court or the Court of Federal Claims,[297] and the Courts of Appeals exercise appellate jurisdiction in all tax cases[298] (with regard to questions of law) on a *de novo* basis.[299] If this disparity in tax expertise between generalist judges and the government could be reduced, the case for increased deference in the tax area would be much diminished.

The question of how to reform the tax litigation process has been discussed elsewhere and is beyond the scope of this Article.[300] Nevertheless, two basic approaches that address this disparity in expertise are briefly considered. Under both approaches, one court, such as the Tax Court, would have exclusive jurisdiction over all tax cases.[301] Where the two approaches differ is in terms of appellate review. One approach would create a new circuit court with jurisdiction to hear all appeals in tax matters.[302] Under the other approach, as under current law, one of the existing circuit courts would conduct appellate review. But, because under the

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[297] *See* 28 U.S.C. § 1346 (a)(1) (2001).

[298] *See* I.R.C. § 7482. For a discussion of the inclination of some courts to defer to the Tax Court on questions of law, see David F. Shores, *Deferential Review of Tax Court Decisions: Dobson Revisited*, 49 TAX LAW. 629 (1996).

[299] *See* Comm'r v. Duberstein, 363 U.S. 278, 289-91 (1960).

[300] *See, e.g.*, Erwin N. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944); Erwin N. Griswold, *Speech: Is the Tax Law Going to Seed?*, 11 AM. J. TAX POL'Y 1, 7 (1994). *See also* William D. Popkin, *Why a Court of Tax Appeals is So Elusive*, 47 TAX NOTES 1101 (May 28, 1990).

[301] The court would need to resolve questions about the right to a jury and the need to pay in advance.

[302] For a general discussion, see Steve R. Johnson, *The Phoenix and the Perils of the Second Best: Why Heightened Appellate Deference to Tax Court Decisions is Undesirable*, 77 OR. L. REV. 235 (1998); Shores, *supra* note 298.

latter approach, generalist judges would review the work product of specialists—the lower court judges and tax administrators—limiting the scope of appellate review would be appropriate (otherwise, the disparity in expertise produced under current law would continue). Such a limitation on the scope of review could be achieved by requiring that the lower court's decision receive deference on questions of law as well as fact, making reversal on legal questions appropriate only where the ruling is unreasonable.[303]

Not only would these two approaches ameliorate the disparity-in-expertise problem, thereby weakening the case for increased deference, they also would create a salutary by-product. Under either approach, taxpayers would have less opportunity to engage in forum shopping; indeed, the former approach would completely eliminate forum shopping. In addition, the former approach would eliminate, and the latter approach diminish, the potential for non-uniform application of the law inherent in the current system (i.e., disagreements between the Tax Court and the circuit courts[304] and disagreements among the various circuit courts).[305]

Second, the case for applying increased deference in the tax context is further undercut by another important distinction between tax and some other agency-administered areas of law. In tax cases, the government is the taxpayer's adversary. As the government's response to its defeat in *Simpson* suggests, adversarial bias is not easily put aside.[306] Therefore, although the government's litigation with a particular taxpayer has ended, the views formulated in the litigation take on a life of their own. In contrast, in other areas of law when the government is not a litigant and not suffering the burden of adversarial bias, the government can be trusted to

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[303] This limitation appears somewhat novel, but Congress adopted the limitation in the context of habeas corpus. *See* Williams v. Taylor, 529 U.S. 362, 399 (2000) (interpreting the new criminal statutes' requirement that relief only be granted if the decision invalidated "an unreasonable application of clearly established Federal law . . ."). *See generally*, Shores, *supra* note 298 (discussing the deference given to the Tax Court by the appellate courts).

[304] *See, e.g.*, Golsen v. Comm'r, 54 T.C. 742, 756-57 (1970) (indicating that the Tax Court will follow circuit court precedent when appeal is to be taken to that circuit).

[305] Although de novo review ordinarily tends to unify precedent (*see* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 121 S. Ct. 1678, 1682-83 (2001) (holding the appropriate standard of review for determining whether punitive damage award exceeds constitutional limits is de novo because, in part, such review will unify precedent)) the limitation on appellate review suggested in the text would create more uniformity.

[306] *See supra* notes 72-73 and accompanying text.

make interpretive decisions that are not influenced by self-interest.

Consider the Supreme Court's treatment of the regulation in *Smiley*.[307] The Court gave controlling *(Chevron)* deference to a regulation issued by the Comptroller of the Currency one hundred years after the enactment of the underlying statute and during the litigation that led to the Court's decision.[308] Unlike the role the Treasury plays in the tax area, the Comptroller of the Currency was not a party to the litigation and, therefore, had no direct interest in its outcome.[309] If the government were to issue a regulation resolving an issue in a pending tax litigation, permitting such a resolution to be binding under *Chevron* on the taxpayer would seem unjust. Indeed, Congress acknowledged as much by amending Code section 7805(b) in 1996 to eliminate the Treasury's authority to issue regulations on a retroactive basis.[310] As a result of the amendment, the government is no longer permitted to determine the outcome of pending tax litigation by regulation.[311] Nevertheless, subject to the proviso that the Treasury make any new regulation prospective, it remains free in many instances to rewrite the outcome of a decision it loses, as it did in the aftermath of its defeat in *Simpson* and *Hubert*.[312] And, under *Chevron*, the government's adversarial bias is irrelevant in determining the validity of such a regulation. Moreover, *Smiley* suggests that, despite any statutory limitation on an agency's ability to make regulations retroactive, it would be inappropriate for a court interpreting a statute to give no deference to a regulation simply because it was issued after the consummation of the transaction under inquiry (though the Court presumably contemplates less than controlling deference in this context).[313]

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[307] *See supra* notes 127-130 and accompanying text.

[308] *See Smiley*, 517 U.S. at 740-41.

[309] *See id.* at 739 (noting that the deference that Courts give to agencies extends to the Comptroller of the Currency).

[310] *See* I.R.C. § 7805 (b) (Supp. 2001); Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1101, 110 Stat. 1452, 1468-69 (1996). Although one might argue in favor of retroactivity on the ground that it would deter taxpayer abuse, *see* Shaviro, *supra* note 142, remedies more narrowly tailored to such abuse could be fashioned without creating the potential for government abuse inherent in a general rule of retroactivity. *See, e.g.*, Gunn, *supra* note 5, at 162-63 (suggesting legislation that would permit courts to disregard an abusive transaction even if it literally satisfied the terms of the Code).

[311] Retroactive regulations continue to be permissible if issued within eighteen months of the enactment of the underlying statute. *See* I.R.C. § 7805 (b)(2) (Supp. 2001).

[312] *See supra* note 124 and accompanying text.

[313] *See Smiley*, 517 U.S. at 744 n.3. *But see Peterson*, 78 F.3d at 800 (intimating that

Even more disconcerting, *Auer* requires the court to defer to an agency's interpretation when an ambiguous regulation is at issue.[314] This has the effect of permitting the government to prevail whenever the litigation revolves around an ambiguous regulation—a common occurrence in the tax area. In contrast, when the government is not a party to the litigation but merely files an amicus brief offering its interpretation, *Auer* deference is obviously less troubling. *Auer*, in effect, permits the government to make its newly announced position applicable on a retroactive basis, in violation of the spirit of the 1996 amendment to section 7805(b).[315] Not only does *Auer* contemplate that interpretations will be binding when issued after the transaction is consummated, it even contemplates that the interpretations will be binding when issued during the process of litigating the transaction's tax consequences. Permitting the government to declare its own victory when it appears as a party in the litigation undermines the effectiveness of the courts as a check on bureaucratic abuse and is fundamentally unfair.

In short, given the government's role in tax litigation, a compelling case can be made for reducing the level of deference it enjoys in tax matters. And should the disparity-in-expertise issue be resolved in one of the ways suggested, the case for reducing deference would become even stronger. The question, therefore, is how deference might be ratcheted downward in the tax area.[316]

In terms of regulations, whether interpretive or legislative, it would seem that *Skidmore's* framework would be preferable over *Chevron's*. Under *Skidmore* the court is permitted to consider a variety of factors in determining the validity of an agency interpretation,[317] unlike the binding deference that *Chevron* requires.[318] Thus, for example, a regulation issued

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disregarding a post-transaction regulation when the taxpayers rely on their own justifiable interpretation of the statute might be appropriate).

[314] *See supra* notes 276-284 and accompanying text.

[315] *See supra* note 287 and accompanying text.

[316] If *Chevron* deference were constitutionally mandatory, as some have suggested, *see, e.g., Mead*, 121 S. Ct. at 2179 (2001) (Scalia, J., dissenting), any proposal that would ratchet it down obviously would be impermissible. As the majority in *Mead* makes clear, however, the prevailing view is that the applicability of *Chevron* turns on Congress' intent. *See id.* at 2171-74; *see also* Merrill & Hickman *supra* note 103, at 836.

[317] *See supra* note 99 and accompanying text.

[318] Under *Skidmore*, the legislative character of a regulation might favor deference, but not the kind of controlling deference *Chevron* requires.

long after the statute's enactment, or one having an adversarial origin, might be of questionable validity under *Skidmore*,[319] although as *Smiley* indicates, such considerations are irrelevant under *Chevron*.[320] Or perhaps, the new generation-skipping regulations might be vulnerable under *Skidmore* because of Congress' ratification of the earlier regulation, even if it is assumed that the standard for applying the reenactment doctrine against the government has not been satisfied.

One could argue that, as an alternative to adopting the *Skidmore* framework, tax regulations should receive no deference. However, the difficulty with this approach is that the Code is complex and, as a consequence, there is a need for legislative-type rules that a court cannot easily supply. Given this institutional limitation, and given that *Skidmore* should provide sufficient protection against bureaucratic abuse, the no-deference alternative is not particularly appealing.[321] Thus, Congress should enact legislation adopting the *Skidmore* framework as the controlling standard for evaluating tax regulations.

The deference required under *Auer* is perhaps most pernicious. The consequences of adversarial bias are at their worst in this context because the courts are, in essence, precluded from exercising any check on what amounts to the government's declaration of victory by retroactive regulation. Therefore, Congress should overrule *Auer*, eliminating all deference for the interpretations of ambiguous tax regulations proffered by the government during litigation.[322] Similarly, Congress should overrule *Smiley's* conclusion that the courts must consult regulations even where issued after the transaction has been consummated and even if the agency does not have the authority to issue regulations retroactively.[323]

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[319] *See Skidmore*, 323 U.S. at 140.

[320] *See Smiley*, 517 U.S. at 740.

[321] *See* Merrill, *supra* note 151, at 1019-20 (suggesting that the validity of all regulations, tax and nontax alike, should be tested by their persuasiveness).

[322] *See* Manning, *supra* note 145, at 687 (arguing that applying controlling deference in this context is inappropriate and instead, the government's interpretation of its ambiguous regulations should only receive *Skidmore*-type deference).

[323] *See* Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 MICH. L. REV. 1129, 1131 (1996) (arguing that if the government is permitted opportunistically to alter its position on a retroactive basis, inefficiency will result); Kyle D. Logue, *If Taxpayers Can't Be Fooled, Maybe Congress Can: A Public Choice Perspective on the Tax Transition Debate*, 67 U. CHI. L. REV. 1507 (2000). *But see* Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 551-52 (1986) (arguing in favor of retroactivity because of efficiency); Michael J. Graetz,

As indicated, while it appears that the government's litigation position regarding an ambiguous Code section's meaning does not receive as much deference as its interpretation of an ambiguous regulation,[324] the same concerns about adversarial bias and retroactivity are implicated.[325] Any deference-altering legislation should, therefore, also deny the government deference for its interpretations of ambiguous Code sections offered during litigation.[326]

Revenue rulings are more troubling. On the one hand, treating them differently from regulations is difficult to justify.[327] After all, both revenue rulings and regulations are the product of the government's careful deliberation.[328] It is, of course, true that regulations, unlike rulings, are issued only after the public has been given an opportunity for comment.[329] Nevertheless, this distinction is not a satisfactory basis for requiring deference in one case but not in the other.[330] While the public-comment process entails some additional deliberation, the difference in the level of deliberation is not sufficiently substantial to warrant the discrimination. Furthermore, the government continues to consider its rulings after issuing them, qualifying, modifying, or revoking them based on the public's adverse reaction. This post-issuance deliberation of rulings appears roughly equivalent to the deliberation that occurs in response to the pre-issuance public comment in

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Legal Transitions: The Case of Retroactivity in Income Tax Revision, 126 U. PA. L. REV. 47, 87 (1977).

[324] *See* Jewett v. Comm'r, 455 U.S. 305, 318 (1982) (indicating that the deference owed to the Commissioner's consistent construction of a regulation is even more forceful than the deference owed in the case of a Code section).

[325] For a discussion of deference regarding the government's litigation position, see *supra* note 289 and accompanying text.

[326] The denial of deference in the case of an ambiguous Code section or regulation should not create much potential for court-created taxpayer windfalls. Courts will presumably resolve any ambiguity to avoid such an outcome. *See Gitlitz*, 531 U.S. at 220 (Breyer, J., dissenting) (arguing that, in the face of an ambiguous Code section, courts should strive to avoid a construction that would produce an inappropriate taxpayer victory).

[327] For a review of the process, *see generally* Galler, *supra* note 108.

[328] Even under *Skidmore*, an interpretation is entitled to greater weight if it is the product of the agency's thorough and careful deliberation. *See Skidmore*, 323 U.S. at 140.

[329] *See, e.g.*, First Chicago NBD Corp. v. Comm'r, 135 F.3d 457, 459 (7th Cir. 2000) (indicating that interpretive rules do not require notice and opportunity for public comment).

[330] *See Mead*, 121 S. Ct. at 2173 (indicating that the applicability of *Chevron* should not turn on whether notice and comment is required or provided).

the context of regulations.[331]

On the other hand, rulings often are issued long after the enactment of the statute they interpret and, sometimes in anticipation of, during, or in the aftermath of the government's litigation with a taxpayer.[332] This practice, together with the government's direct interest in the outcome of tax litigation and the adversarial bias thereby engendered, weigh against deference—even *Skidmore* deference—for revenue rulings. Eliminating such deference would strengthen the courts' authority to check bureaucratic abuse arising from a desire to win.

The danger in taking this kind of bifurcated approach (*Skidmore* deference for regulations and no deference for rulings), not unlike the bifurcation effected under current law (*Chevron* deference for regulations and, apparently, *Skidmore* deference for rulings), is that it may simply result in the government's incorporating more interpretations in amendments to the regulations, rather than in rulings, in order to secure deferential review. The response is twofold. First, the suggested bifurcation will not create any more incentive for the government to act opportunistically than it has under the current law's bifurcation. Second, to the extent that the government begins to incorporate its interpretations opportunistically in regulations, this could lead to less, or even no, deference for such regulations under *Skidmore*. On balance, reverting to the traditional view that revenue rulings are not entitled to deference is preferable.[333]

The final question is whether the government should be able to argue in litigation that a taxpayer-friendly ruling or regulation should be denied effect. The issue can arise in either of two ways: (1) where the government argues that the ruling or regulation is invalid because it is inconsistent with the statute, or (2) where the government argues that, although the ruling or regulation is not invalid, it should nevertheless be rejected in favor of a

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[331] Under Justice Scalia's approach, courts presumably would treat revenue rulings as the equivalent of regulations and therefore receive the same level of deference, given that the rulings represent the government's official position. *See Christensen*, 529 U.S. at 589 (Scalia, J., concurring) (maintaining that *Chevron* deference should apply to an opinion letter issued by an agency if it represents the agency's official position); *Mead*, 121 S. Ct. at 2177 (Scalia, J., dissenting) (reiterating the position he held in *Christensen*).

[332] *See, e.g., First Chicago NBD Corp.*, 135 F.3d at 459 (entitling a revenue ruling deference although issued in connection with the case under inquiry).

[333] *See* Coverdale, *supra* note 99, at 82-83; Galler, *supra* note 108, at 1068-73 (arguing that revenue rulings should receive no deference).

newly proffered construction of the statute. In either case, as a matter of fairness, taxpayers who rely on such rulings or regulations should not face the possibility that the government will disavow them.[334]

Efficiency concerns also favor the taxpayer. The uncertainty created by permitting the government to disavow its own rulings and regulations unquestionably impedes planning and makes transactions more difficult to consummate.[335] Indeed, where the government disavows a ruling or regulation in court after the taxpayer consummates a transaction on the basis of it, the government is, in effect, making its new position operative on a retroactive basis—in violation of the spirit of the 1996 amendment to Code section 7805(b).[336]

Thus, those decisions that have precluded the government from disavowing its interpretation of an ambiguous statute are a welcome development.[337] Legislation should be enacted confirming the validity of such corrective decisions and extending their reach so that the government is denied the authority to argue against an outstanding interpretation even when the government claims that the statute unambiguously renders the interpretation invalid.

As indicated, in *Schleier*,[338] the Supreme Court concluded that courts are required to invalidate a revenue ruling if the ruling is found to be contrary to the plain meaning of a Code section at issue.[339] Although the taxpayer in *Schleier* had not consummated the transaction on the basis of the ruling (it was issued after the taxpayer had completed the transaction),[340] the government nevertheless felt obliged to use its authority under Code section 7805(b)(8) to limit the Court's decision so that the declaration of the ruling's invalidity would have prospective effect only (i.e., would not become effective until the date of the Court's decision).[341] However, the government's sensitivity to the plight of taxpayers who

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[334] *See, e.g.*, I.N.S. v. St. Cyr, 121 S. Ct. 2271, 2288 (2001) (indicating that, "[e]lementary considerations of fairness" dictate that people should be able to determine the consequences of their actions before taking them).

[335] *See Jewett*, 455 U.S. at 305.

[336] *See supra* notes 287, 315 and accompanying text.

[337] *See supra* note 262 and accompanying text.

[338] *See supra* note 268 and accompanying text.

[339] *See Schleier*, 515 U.S. at 336 n.8.

[340] *See supra* note 274 and accompanying text.

[341] *See* Rev. Rul. 96-65, 1996-2 C.B. 6; *see also supra* note 275 and accompanying text.

otherwise would have been adversely affected by the decision is not sufficiently reassuring to taxpayers in general. In other cases, the government may well prevail in litigation by arguing against one of its rulings and then refusing to limit the decision's retroactive effect.

In *Schleier*, the Court also raised, but did not answer, the question of whether a taxpayer-friendly regulation that is found to be invalid should similarly be disregarded.[342] However, Justice Scalia has indicated that such a regulation cannot constitutionally be permitted to have effect.[343] Under Justice Scalia's view, the Constitution vests the power to enact legislation in Congress, and therefore precludes an agency such as the Treasury from denying a statute the effect Congress intended.[344]

Interestingly, the government's decision to limit the *Schleier* Court's invalidation of the revenue ruling by invoking its authority under Code section 7805(b)(8)[345] might raise constitutional questions as well. Once the Court declared that the ruling was contrary to the clear meaning of the statute, its conclusion became binding for all outstanding cases.[346] In the absence of new legislation, it would be impermissible for the executive

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[342] *See Schleier*, 515 U.S. at 334.

[343] *See* United States v. Burke, 504 U.S. 229, 245-46 (1992) (Scalia, J., concurring) (arguing that agencies cannot rewrite legislation, and suggesting that sympathy for a taxpayer in these circumstances could be demonstrated by reducing any penalty otherwise applicable). *See also* Manhattan Gen. Equip. Co. v. Comm'r, 297 U.S. 129, 134-35 (1936) (disregarding an invalid regulation as a nullity, though not explicitly predicating its decision on constitutional grounds).

[344] Justice Scalia's argument is analogous to the traditional notion that the government cannot be estopped by the act of an agent. Indeed, in *Burke*, 504 U.S. at 246 (Scalia, J., concurring), Justice Scalia cited Office of Personnel Management v. Richmond, 496 U.S. 414, 427-28 (1990) (holding that estopping the government would be unconstitutional).

[345] In making the *Schleier* holding prospective, the government implicitly utilized its authority under this provision, which allows it to limit the effect of a ruling, including a judicial ruling, so that it will have prospective effect only.

[346] *See* Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 97 (1993) (indicating that Court decisions with respect to questions of federal law are retroactively applicable to pending cases); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 214 (1995) (indicating that the Court had applied its decision construing a statute on a retroactive basis in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991)). For a different approach in the habeas corpus setting, *see* Teague v. Lane, 490 U.S. 1031 (1989) (applying a different rule in the habeas corpus context on the rationale that, once a criminal conviction becomes final, the case is no longer pending and, therefore, any new rule subsequently announced by the Court cannot be invoked); Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 758 (1995) (explaining that the *Teague* rule is a reflection of the fact that the criminal conviction becomes final before the habeas corpus proceeding is brought).

branch to alter or suspend the Court's decision.[347] Indeed, even with regard to new cases, any agency interpretation that is contrary to the clear meaning of the statute, as found by the Court, cannot be valid.[348] Therefore, it would appear that Code section 7805(b)(8) may be unconstitutionally applied whenever, as in the aftermath of *Schleier*, the government seeks to revive a ruling declared invalid by the courts.[349] As a practical matter where the government revives a taxpayer-friendly ruling, any constitutional defect might well go unaddressed given the fact that no taxpayer is aggrieved.[350] The lack of any challenge to the government's decision to make the *Schleier* holding prospective reflects this reality.[351]

As indicated, if the courts can resolve constitutional questions, fairness and efficiency would dictate that the government not be permitted to disavow its rulings or regulations. Once the government determines that adhering to its original position is no longer appropriate, the government should be required to effect any modification by revoking the ruling or

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[347] The Court has made clear that Congress has the authority to enact legislation overturning the Court's interpretation of a statute on a retroactive basis without violating the separation of powers. *See Plaut*, 514 U.S. at 226-27 (indicating that Congress can overturn courts' decision for all outstanding cases as long as it does not reverse the outcome in any particular case that has reached final judgment).

[348] *See supra* notes 120-121.

[349] *But see* Benjamin J. Cohen & Catherine A. Harrington, *Is the Internal Revenue Service Bound By Its Own Regulations and Rulings?*, 51 TAX LAW. 675, 704 (1998) (arguing that the government should be bound by an invalid regulation).

[350] *See* Alison H. Eaton, Comment, *Can the IRS Overrule the Supreme Court?*, 45 EMORY L.J. 987 (1996) (discussing the standing question in this context).

[351] In contrast, when the Court merely determines the best construction of an ambiguous statute, the situation is not the same. In this context, there is presumably no constitutional impediment to a post-decision regulation or ruling that overturns the Court's decision, although such a post-decision ruling or regulation arguably would undermine the Court's statutory-interpretation function and therefore constitute a violation of the separation of powers (*see* French v. Miller, 530 U.S. 327, 341 (2000) (indicating that one branch cannot encroach on the "central prerogatives" of another branch); *Plaut*, 514 U.S. at 218 (citing Hayburn's Case, 2 Dall. 409, 1 L. Ed. 436 (1792), for the proposition that the executive branch cannot be given the authority to review decisions issued by the judicial branch)). The three-Justice concurring opinion in *Estate of Hubert*, 520 U.S. at 122 (1997), explicitly invited the government to overturn the Court's decision by regulation (though it should be noted that, in *Hubert*, the Court had construed a ruling and a regulation, not the statute). *See supra* notes 122-125, 263-267 and accompanying text. In the case of statutory ambiguity, the government may be permitted constitutionally to issue a ruling that rejects the Court's interpretation and makes it applicable for pending, as well as new, cases (though the Treasury could only act on a prospective basis by regulation given Code section 7805(b)). *But see supra* notes 120-121 and accompanying text.

regulation on a prospective basis. The government should not be permitted to leave a ruling or regulation intact and then ask the court to invalidate it. Thus, in policy terms, legislation denying retroactive effect to a court decision declaring a taxpayer-friendly ruling or regulation invalid would be salutary.[352]

The question then becomes whether—and if so, how—legislation accomplishing this objective could be fashioned on a constitutionally sound basis. One must consider two constitutional constraints. First, as indicated, the Supreme Court has concluded that the federal judiciary is constitutionally required to issue decisions on a retroactive basis.[353] Therefore, any decision determining the meaning of a statute becomes binding upon all pending and future cases, as well as the case under consideration.[354] In adopting this approach, the Court has emphasized two rationales: the inappropriateness of discriminating among similarly situated litigants;[355] and the institutional limitations inherent in the judicial function that require court decisions, unlike legislative decisions, to be forged in the concrete context of the pending case and all possible outstanding cases.[356] Second, the executive branch cannot constitutionally be given the authority to displace the judicially determined clear meaning of a statute.[357]

Given the first constraint, whether legislation could preclude the courts from giving retroactive effect to a decision overruling an agency interpreta-

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[352] Drafters of such legislation consideration would need to consider the kind of situation that arose in *Schleier*. As indicated, in *Schleier*, the revenue ruling invalidated by the Court had been issued after the taxpayer had consummated the transaction. Given the lack of taxpayer reliance in this context, one might conclude that applying a court decision that invalidates a taxpayer-friendly ruling or regulation to a taxpayer like *Schleier* is appropriate. Nevertheless, even in the absence of taxpayer reliance, a taxpayer's expectation that a friendly ruling will not be disavowed seems necessary to be taken into account. Therefore, although the issue is a close one, the legislation should preclude the government from disavowing a ruling or regulation regardless of whether it was issued before or after the transaction. It should be noted that, even under current law, the government cannot disavow a taxpayer-friendly revenue ruling or regulation with impunity. Should the ruling or regulation be upheld in the courts, the government could become responsible for the taxpayer's legal fees. *See* I.R.C. § 7430(c)(4)(B)(ii). And if the government prevails in the courts, the ruling or regulation may be viewed as constituting sufficiently substantial authority so as to eliminate the substantial-understatement penalty. *See* I.R.C. § 6662(d)(2)(B)(i).

[353] *See supra* note 346.

[354] *See id.*

[355] *See* Harper, 509 U.S. at 97 (1993).

[356] *See id.* at 106-10 (Scalia, J., concurring).

[357] *See supra* notes 120-121 .

tion is questionable. Nevertheless, the concern about discrimination does not seem insurmountable. After all, it is not invidious or unreasonable to distinguish between taxpayers who engage in a transaction before a ruling or regulation is declared invalid from those who do so after the courts decide the issue. Although the institutional-limitation rationale is somewhat more troubling, one can make a compelling argument that it should yield in order to avoid the harshness of applying a newly declared interpretation that is inconsistent with a ruling or regulation on which the taxpayer has relied. However, the second constraint presents a more formidable obstacle. That Congress could constitutionally mandate that an agency's misinterpretation be binding during the period prior to a court's decision declaring it invalid is doubtful (unless new legislation were enacted after the court's decision making the invalidated interpretation valid on a retroactive basis[358]). Thus, any legislation directing that agencies only give prospective effect to a court decision declaring a ruling or regulation invalid likely would not be sustained.

If, on the other hand, legislation were drafted to deny the Treasury funds to maintain any litigation designed to produce a result inconsistent with an outstanding ruling or regulation, the Treasury would not be placed in the position of rewriting the statute, but simply precluded from seeking a judicial interpretation contrary to its own outstanding interpretation. And if the legislation also denied the Treasury the authority to issue or revoke rulings or regulations on a retroactive basis,[359] it would no longer be possi

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[358] Such legislation would not violate the separation of powers. *See* Eaton, *supra* note 350, at 987.

[359] Under prior law, the Treasury clearly had the authority to revoke a regulation on a retroactive basis, subject to an abuse-of-discretion standard,(*see* Cohen & Harrington, *supra* note 349, at 676), but the 1996 amendment to Code section 7805(b) may have eliminated this authority. *See* Act of July 30, 1996 Pub. L. No. 104-168, 110 Stat. 1452, 1468 (1996). The section, as amended, makes clear that, generally the Treasury has no authority to *issue* regulations on a retroactive basis, but the section does not affirmatively address the question of the Treasury's authority to *revoke* a regulation retroactively. Nevertheless, the better reading of the current version of the section is that the Treasury no longer has the authority to revoke a regulation retroactively, for the portion of the section now authorizing revocation on a retroactive basis (subsection (b)(8)) deals, unlike its predecessor, only with rulings. *See* Cohen & Harrington, *supra* note 349, at 702 (arguing the better view is that the Treasury lacks authority to revoke regulations retroactively). However, this would not preclude the Treasury from maintaining that a regulation is invalid because it is inconsistent with the Code and that it should therefore be denied effect with regard to all pending cases. *See* Manhattan Gen. Equip. Co. v. Comm'r, 297 U.S. 129, 134 (1936) (holding that an invalid regulation is a nullity). *But see* Cohen & Harrington, *supra* note 349, at 704 (argu-

ble, as a practical matter, for a court to declare a taxpayer-friendly ruling or regulation invalid. Because this legislative proposal would neither authorize the Treasury to nullify the courts' interpretation of a statute nor interfere with the requirement inherent in the judiciary's function that courts make decisions on a retroactive basis, it would presumably survive constitutional analysis.[360]

Nevertheless, other objections might be made to this proposal. First, it might be argued that the proposal seeks to achieve through indirect means what could not be achieved directly. In other words, because Congress cannot authorize an agency to rewrite a statute, an agency should not be permitted to accomplish that objective indirectly through the use of its appropriations power. Second, an objection might be made that the executive branch is charged with the responsibility of faithfully executing the laws and Congress cannot, having enacted a statute, deny the executive branch the funds to enforce it.[361] Although not entirely free from doubt, the answer to these objections would appear to be that Congress ought to be able to qualify the rights and obligations that it creates.[362] So, for example, if Congress were to determine that the Service should no longer audit income tax returns, it should be able to refuse to appropriate funds for this purpose without repealing the Code.[363] And if Congress could create such

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ing that the 1996 amendment to Code section 7805 overrules *Manhattan Gen. Equip.*).

[360] The Service recently fashioned its own procedure to bypass, in effect, a court decision that had disregarded a taxpayer-friendly revenue ruling. *See* Chief Counsel Notice, CC-2001-019 (March 22, 2001) (directing IRS counsel not to make arguments based on a Ninth Circuit decision that was contrary to an earlier revenue ruling, and directing that administrative settlements and refunds be effectuated where possible in those cases that would be appealable to the Ninth Circuit).

[361] *See* U.S. CONST. art. II, § 3.

[362] *Cf.* Train v. City of N.Y., 420 U.S. 35 (1975) (implying that Congress could constitutionally give the president the discretion to decline to spend legislatively appropriated funds); Clinton v. City of N.Y., 524 U.S. 417, 468-9 (1998) (Scalia, J., dissenting) (reading *Train* as implying the same). *But see* Bean v. Bureau of Alcohol, Tobacco and Firearms, 234 F.3d 234, 239 (5th Cir. 2001), *cert. granted,* 70 U.S.L.W. 3373 (U.S. Jan. 22, 2002) (No. 01-704) (indicating that legislation denying funding to an agency would be unconstitutional if it eviscerated a statutory right otherwise left intact).

[363] *See* Envtl. Def. Ctr. v. Babbitt, 73 F.3d 867, 871-72 (9th Cir. 1995) (holding that, although Congress had not repealed the substantive law, its subsequent enactment of legislation cutting off funding prevented the agency from carrying out the substantive provision). *But see* Forest Guardians v. Babbitt, 174 F.3d 1178, 1188 n.14 (10th Cir. 1999) (disagreeing with the Ninth Circuit in *Environmental Defense Center* and indicating that legislation that denies funding should be viewed as a modification to the substantive law). Perhaps

a substantial impediment to the Code's enforcement, why should it be precluded from imposing the more limited constraint on enforcement of denying the government funds to seek a court decision that is contrary to an outstanding ruling or regulation?[364] Thus, it would appear that there is no constitutional impediment to legislation that would deny the government funds necessary to maintain litigation seeking an outcome contrary to an outstanding ruling or regulation.

CONCLUSION

The transformation in deference has radically altered the role of the government in tax litigation. The government's declaration of victory by regulation in the *Peterson/Simpson* conflict, rather than following the traditional route of continuing to litigate, instantiates the government's enhanced authority. Given its bias as an adversary and the corresponding need for a disinterested check on bureaucratic abuse, a strong case can be made for reducing the level of deference the government enjoys in the tax context. The reduction should be made on an across-the-board basis. That is, regulations should no longer receive *Chevron* deference. Instead, courts should analyze their validity under the *Skidmore* framework. In the case of ambiguous regulations, a construction proffered by the government should receive no deference. Nor should the government enjoy any deference for a position it takes with regard to an ambiguous Code section during litiga-

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relying on *Environmental Defense Center*, the Bush administration recently proposed legislation that would deny funding to the Fish and Wildlife Service so that it would be unable to carry out new court orders issued under the substantive provisions of the governing law, which will not be amended. *See* Douglas Jehl, *Moratorium Asked on Suits that Seek to Protect Species*, N.Y. TIMES, April 12, 2001, at A1. For a suggestion that the substantive law should be modified, rather than simply denying the agency the funding necessary to implement it, see Bruce Babbitt, *Bush Isn't All Wrong About the Endangered Species Act*, N.Y. TIMES, April 15, 2001, Section 4, at 11.

[364] In Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001), the Court struck down on First Amendment grounds a restriction on the ability of private attorneys funded by the government to raise certain legal arguments. *See id.* at 549. In doing so, the Court emphasized that separation-of-powers questions are implicated when Congress seeks to limit the types of arguments that can be made in court. *See id.* at 536. Presumably, however, such separation-of-powers concerns would not be present if the argument-limiting legislation is aimed at government, rather than private, attorneys. The Court made clear that, in the case of a "government speaker," Congress could constitutionally circumscribe the message. *See id.* at 548. The four-Justice dissent, moreover, perceived no separation-of-powers deficiency in a decision by Congress to fund certain kinds of legal arguments but not others (indicating that such legislation, whether aimed at a private or government speaker, would not interfere inappropriately with the judicial branch). *See id.* at 559 (Scalia, J., dissenting).

tion. Lastly, deference should be denied revenue rulings as well. On the other hand, once the government has issued a taxpayer-friendly ruling (or regulation), fairness and efficiency require that it not be revoked retroactively. Thus, the government should not be permitted to pursue a position in litigation designed to produce an outcome contrary to one of its outstanding interpretations.