Chapter 1

Deference: When the Court Must Yield to the Government's Interpretation

§ 1:1 Introduction

In the past twenty-two years, the Supreme Court has significantly altered the principles of administrative law. In general, the alteration has resulted in a transfer of interpretive authority away from the courts and in favor administrative agencies. In the jargon of administrative law, courts are now required to give more deference to agency interpretations. Under the Supreme Court's administrative law jurisprudence, there are now four different strands of deference. The courts are required to employ one of these four standards depending on the type of interpretation the agency invokes. The four strands are:

- the arbitrary-and-capricious standard, applicable to so-called legislative regulations;
- the *Chevron* standard, applicable to certain other types of agency interpretations;

- the *Skidmore* standard, applicable where the agency interpretation is subject to neither the arbitrary-and-capricious standard nor the *Chevron* standard; and
- the *Auer* standard, applicable where the agency's interpretation, as distinguished from the statute, is ambiguous.

Each of these strands is considered in this chapter.

§ 1:1.1 Legislative Regulations

In the tax context, a regulation is deemed to be legislative in nature where it is promulgated under a specific grant of authority contained in the Code rather than under the general authority of section 7805.[1] The courts are required to give such a regulation more deference than any other type of agency interpretation. As long as the agency has not been arbitrary or capricious or adopted an interpretation that is manifestly contrary to the underlying statute, the courts are required to sustain the regulation.[2] Taxpayers therefore confront a very high standard when challenging such a regulation.

§ 1:2 *Chevron* Deference

Where the *Chevron*[3] standard is applicable, the courts are required to give controlling deference to an agency interpretation if the statute is ambiguous and the interpretation reasonably resolves the ambiguity.[4] Thus, even if the court were inclined to read the statute differently, it must nonetheless defer to the agency's interpretation where *Chevron* applies and these two elements are satisfied. While the Supreme Court articulates the *Chevron* standard differently from the standard it applies to legislative regulations, the two standards, as a matter of practical application, are probably

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1. *See, e.g.*, Irving Salem et al., *Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717 (2004) (making this distinction). *See also* Kristin E. Hickman, *Need for* Mead, 90 MINN. L. REV. 1537 (2006).
2. *See, e.g.*, Krukowski v. Comm'r, 279 F.3d 547, 551 (7th Cir. 2002) (upholding a regulation issued under a specific grant of authority contained in I.R.C. § 469 because not arbitrary, capricious or manifestly contrary to the statute); *see also* United States v. Mead, 533 U.S. 218, 227 (2001) (indicating that such a "regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute").
3. Chevron U.S.A, Inc. v. Nat'l Res. Def. Council, 467 U.S. 837 (1984).
4. *See id.* at 842–43.

equivalent.[5] Once the statute is found to be ambiguous, in other words, an argument that the agency's interpretation is invalid becomes exceedingly difficult under either standard.

In determining whether a statute is ambiguous, conflict in the lower courts could prove to be critical. In *Smiley v. Citibank*,[6] 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.[7] If this approach is generalized and applied at the federal level—and no apparent reason exists why disagreement in the federal courts should be treated differently—*Chevron* may transform the role of the Supreme Court itself. Inter-circuit conflict traditionally has been a basis for granting review of tax litigation in the Supreme Court, but such conflict may now argue in favor of deference to the Treasury's construction. As a result, there may be less occasion for the Supreme Court to grant review in tax cases.[8]

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5. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment) (suggesting that it is no longer useful to distinguish between the legislative-regulation standard and the *Chevron* standard); Boeing Co. v. United States, 258 F.3d 958 (9th Cir. 2001) (concluding that deciding whether the regulation was legislative or interpretive was unnecessary because it would be valid under either standard); *but see* Walton v. Comm'r, 115 T.C. 589, 597 (2000) (indicating that legislative regulations are entitled to more deference than interpretive regulations).
6. Smiley v. Citibank, 517 U.S. 735 (1996).
7. *See id.* at 739.
8. *But see* Gitlitz v. Comm'r, 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 be read 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. 44,181 (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* Boeing Co. v. United States, 537 U.S. 437, 453 n.13 (indicating that proposed regulations are of little consequence). The Court was presumably anxious to find the statute unambiguous in order to avoid two points made by Justice Breyer in his dissent: that the Court's analysis was inconsistent with the statute's legislative history, and that 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. Parenthetically, note that *Gitlitz* has been overruled by Congress. *See* Job Creation and Worker Assistance Act of 2002. *See also* I.R.C. § 108(d)(7).

In *Estate of Hubert v. Commissioner*,[9] without citing *Chevron*, a three-justice concurring opinion invited new regulations incorporating the very argument that the government had advanced unsuccessfully before the Court.[10] Shortly after the *Hubert* decision, the Treasury accepted the invitation and overturned the Court's decision by issuing regulations.[11] From this vantage point, it would seem that the Court made an unwise commitment of resources in deciding to grant review in *Hubert*. And given the Supreme Court's more recent endorsement of the notion that court decisions, including those from the Court itself, can be overturned by agency interpretation (which will be discussed below), it is unlikely that the Court will devote much of its resources to tax questions in the future.

Prior to *Chevron*, agency interpretations also received deference.[12] In essence, however, *Chevron* made two important changes. First, it increased the level of deference.[13] 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.[14] Now, as suggested, *Chevron*

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9. Estate of Hubert v. Comm'r, 520 U.S. 93 (1997).
10. *See id.* at 122.
11. 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).
12. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (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).
13. *See id.*; *see also* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 615 (1995).
14. *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 regulation 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, *aff'd*, 41 F.3d 130 (3d Cir. 1994), *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 made 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).

requires courts to give controlling deference to an interpretation if its two elements are satisfied without regard to whether the court finds it to be the best or most persuasive reading of the statute.[15]

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.[16] As a part of the executive branch, agencies are more politically accountable than courts and are therefore a more suitable repository for interpretive responsibility.[17] The connection between political accountability and interpretive responsibility flows from the growing realization that law construction is often the equivalent of lawmaking.[18] Law construction entails the making of policy, a function better served, under the Court's new theory, by the politically accountable agencies rather than by the politically insulated courts.[19] 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.[20]

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15. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (upholding an interpretation under *Chevron* even if the court were to conclude that the agency's reading of the statute is not the best reading).
16. *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).
17. *See* Schacter, *supra* note 13, at 616–17.
18. *See Chevron*, 467 U.S. at 865–66; Schacter, *supra* note 13, at 595–96. *See also* David Millon, *Objectivity and Democracy*, 67 N.Y.U. L. REV. 1, 16–22 (1992).
19. While *Chevron* deference has also been justified 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 GEORGIA. L. J. 833, 836 (2001). Indeed, in making *Chevron*'s applicability turn on whether Congress intended the agency to have the authority to invoke it, United States v. Mead, 533 U.S. 218 (2001), makes clear that Congress could constitutionally eliminate the *Chevron* standard.
20. 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 COLUMBIA. L. REV. 2071, 2088–90 (1990).

This shift in theory translates into important practical consequences. For, under a theory of political accountability, agencies should have more discretion to change their position about the meaning of a statute: Since the administration must pay a political price if it allows an unpopular interpretation to stand, it should have the latitude to change position as circumstances warrant. Thus, not surprisingly, *Chevron* itself contemplates that agencies be given more flexibility to change their interpretations over time.[21] Whereas, prior to *Chevron*, a change in agency position would weaken its claim of deference,[22] such inconsistency is largely irrelevant under *Chevron*.[23] For example, in *Central Laborers' Pension Fund v. Heinz*,[24] the Supreme Court upheld the validity of a regulation even though the IRS had maintained a longstanding contrary position.[25]

Chevron similarly makes the contemporaneousness of a regulation irrelevant. Indeed, given *Chevron*'s political-accountability underpinnings, agency-administered statutes may no longer have a fixed meaning.[26] In *Smiley v. Citibank*,[27] a regulation was promulgated approximately one hundred years after the enactment of the underlying statute.[28] 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.[29] The

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21. *See Chevron*, 467 U.S. at 863–64 ("The fact that the agency has from time to time changed its interpretation of the term 'source' does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.").
22. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).
23. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 125 S. Ct. 2688, 2711 n.4 (2005) (indicating that a lack of consistency does not undermine an agency's deference claim under *Chevron* as long as it has offered some reasoned explanation for changing position).
24. Cent. Laborers' Pension Fund v. Heinz, 541 U.S. 739 (2004).
25. *See id.* at 748.
26. *See* Laurence H. Silberman, Chevron: *The Intersection of Law & Policy*, 58 GEORGE WASH. L. REV. 821, 822 (1990) (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).
27. Smiley v. Citibank, 517 U.S. 735 (1996).
28. *See id.* at 740.
29. *See id.*

Court reasoned that because Congress intended for ambiguities to be resolved by the politically accountable agencies, the validity of a regulation is not undermined by a lapse in time.[30]

In short, with delay irrelevant and consistency not essential, agency-administered statutes containing ambiguities become mutable—or, to borrow from the constitutional lexicon, "living documents"[31]—no longer having the meaning fixed by Congress[32] at the time of their enactment.[33]

In *National Cable and Telecommunications Ass'n v. Brand X Internet Services*,[34] the Supreme Court confirmed that agencies acting under *Chevron* have the authority to overrule court decisions. In doing so, the Court further expanded the interpretive authority of the agencies under *Chevron*. In *National Cable*, the Ninth Circuit had first construed the statute. Subsequently, the FCC, acting under its authority to issue interpretations under *Chevron*, adopted a construction of the statute that was contrary to the Ninth Circuit's construction. When a case raising the validity of the FCC's interpretation reached the Ninth Circuit, the court held that it was bound by its earlier decision as a matter of stare decisis. It therefore concluded that the FCC's interpretation was invalid.

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30. *See id.* at 740–41.
31. *See* Silberman, *supra* note 26, 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).
32. While *Chevron*, at first blush, appears rather radical in its willingness to allow the current administration to employ a policy analysis based on considerations at the time the interpretation is promulgated when the statute was enacted years earlier, courts use a similar approach when doing conventional statutory construction. *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 an example where 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, 532 U.S. 105 (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).
33. For an argument that the mutability *Chevron* offers is salutary, *see Mead*, 121 S. Ct. at 2178, 2182 (Scalia, J., dissenting). *See also* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUMBIA L. REV. 2071, 2088-90 (1990).
34. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

The Supreme Court reversed. It held that, since the earlier decision did not hold that the statute was unambiguous, the FCC was permitted to adopt a different interpretation and thereby in effect overturn the court's decision. Citing its decision in *Smiley*, the Court emphasized that *Chevron* contemplates that the discretion to resolve questions of statutory ambiguity reside in the agency having jurisdiction over the statute rather than the courts. Significantly, the same analysis would apply even in the case of a Supreme Court decision. So, for example, if the Supreme Court were to construe a statute, the decision would not preclude the agency from adopting a regulation that in effect overruled the decision as long as the Court did not hold that its construction was unambiguously required by the statute.[35]

Perhaps recognizing the significant shift in power away from the courts and in favor of the government that the combination of *Chevron* and *National Cable* has the potential to effect, the Tax Court has determined that interpretive tax regulations cannot overturn judicial precedent (that is, regulations issued under the general authority of section 7805 rather than under a specific section). In *Swallows Holding v. Commissioner*,[36] the court, over dissenting opinions, refused to apply the framework that the Supreme Court adopted in *National Cable*. In essence, the court offered two rationales for rejecting the framework. First, in *National Cable*, the FCC interpretation overturning the Ninth Circuit decision was entitled to deference under the Chevron standard. In contrast, according to the Swallows Holding court, it was not clear whether interpretive tax regulations qualify for the Chevron standard. (This aspect of the court's analysis will be further considered below.)

Second, and more important, the FCC had not been a party to the earlier litigation in the Ninth Circuit. In the perception of the Tax Court, had it been a party, the Supreme Court would have reached the opposite conclusion: not permitting the FCC's interpretation to overturn the decision. Thus, in tax litigation, where the government is necessarily a party, the *National Cable* framework is unavailable. While there is no hint of a suggestion in the Supreme

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35. In Estate of Hubert v. Comm'r, 520 U.S. 93 (1997), the three-justice plurality opinion suggested that Treasury promulgate a new regulation incorporating the approach that the Court rejected. The Court's holding in *National Cable* goes much further. Whereas in *Hubert* the Court was required to decide the merely meaning of an unclear regulation, the meaning of the statute itself was at issue in *National Cable*.

36. Swallows Holding v. Comm'r, 126 T.C. No. 6 (2006).

Court's decision in *National Cable* that it is to be read in this limited fashion, the Tax Court will presumably continue to maintain its position that the government cannot overturn adverse precedent.[36.1]

Assuming the Tax Court's approach is not sustained, *Chevron*'s implications, as embellished by *National Cable*, may presage the end of a traditional aspect of tax litigation. In the past, the government's defeat in a circuit court would likely lead to further review in other circuits, or perhaps in the Supreme Court on the ground that there is inter-circuit conflict. Now, the government can instead simply write 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

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36.1. Note, however, that in Estate of Gerson v. Comm'r, 127 T.C. No. 11 (2006), the majority sustained a GST regulation designed to overturn circuit court precedent. Without acknowledging its shift, the majority deviated from its decision in *Swallows Holding*. It concluded that, under the *National Cable* framework, where, as in *Gerson*, the courts are in conflict about the meaning of a Code section, an interpretive regulation can resolve the conflict. Thus, unlike *Swallows Holding*, *Gerson* contemplates that *National Cable* can apply to interpretive tax regulations. Unfortunately, however, *Gerson* fails to recognize that only a *Chevron*-type interpretation can overturn a court decision. *See National Cable*, 125 S. Ct. at 2701 (indicating that "the court's prior ruling remains binding law" in the case of an "agency interpretation to which *Chevron* is inapplicable"). Thus, given the majority's failure to embrace *Chevron*—in both *Swallows Holding* and *Gerson*—its conclusion that an interpretive tax regulation can overturn court precedent cannot be reconciled with *National Cable*. *Gerson* is problematic on a second ground: the regulation seeks to overturn an Eighth Circuit decision finding the statute unambiguous. *See* Simpson v. United States, 183 F.3d 812 (8th Cir. 1999); *see also* Bachler v. United States, 281 F.3d 1078 (9th Cir. 2002) (following Simpson but, unlike Simpson, not indicating that the statute is unambiguous). Contrary to the majority's intimation that the regulation supersedes the prior cases, the Eighth Circuit should not yield. For, as indicated, under *National Cable*, not even a *Chevron*-type regulation can overturn a court's conclusion that the statute is unambiguous. This is not to suggest, however, that the Tax Court should have viewed itself as bound by Eighth Circuit's decision in *Simpson*. It was certainly permissible for the Tax Court to find, unlike the Eighth Circuit, ambiguity in the statute and then to conclude that the regulation appropriately resolves the ambiguity. But, unless the Eighth Circuit overturns its decision in *Simpson* and now concludes that the statute is ambiguous, the regulation can have no effect in that circuit. For a discussion of the deference issues with regard to the GST regulation sustained by the court in *Gerson*, see Mitchell M. Gans, *Deference and the End of Tax Practice*, 36 REAL PROP. PROB. & TR. J. 731 (2002).

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 in that 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.[37] 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.[38] Moreover, Congress may be completely disabled from acting because nonpolicy-based concerns trump any legitimate policy objective.[39] 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.[40]

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37. 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.
38. *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 20, at 2088 (indicating that agencies are better situated than Congress to respond to changed circumstances and new developments).
39. *See* DANIEL SHAVIRO, WHEN RULES CHANGES: 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.").
40. *See* Silberman, *supra* note 26, 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.

On the other hand, there is the question of the Treasury's bias. Where the government is defeated, it would be surprising if its perspective were unaffected. 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. Although judges are certainly not free of bias,[41] at least they do not suffer the bias one acquires as an adversary.[42] Thus, if disinterested, unbiased analysis is the objective,[43] one can make a fairly compelling argument that *Chevron's* shift of power from the courts to the agencies[44] is not entirely desirable.

One might also take a negative view of this alteration because of the resulting diminution in the courts' authority to limit the abusive exercise of power by another branch of government.[45] The Service has recently been perceived as an unresponsive bureaucracy.[46]

41. *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).
42. *See* Skidmore v. Swift & Co., 323 U.S. 134, 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").
43. 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).
44. Prior to *Chevron*, the Court was reluctant to review regulations deferentially when issued in order to gain adversarial advantage. *See Skidmore*, 323 U.S. at 140. Under *Chevron*, however, a regulation is entitled to controlling deference even if adopted for the purpose of influencing pending litigation. *See* Smiley v. Citibank, 517 U.S. 735 (1996) (granting *Chevron* deference even though the interpretation was issued during the litigation). 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. § 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.
45. *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).
46. *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).

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 perception of the Service has grown more negative, a corresponding popular impulse to curtail its authority has arisen.[47] 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.[48]

§ 1:3 *Skidmore* Deference

In *United States v. Mead*,[49] the Supreme Court clarified *Chevron*'s scope as well as the kind of deference non-*Chevron* interpretations are entitled to receive. In terms of *Chevron*'s scope, the Court indicated that two conditions must be satisfied in for *Chevron* to apply: (i) Congress must have intended to confer the authority on the agency to issue interpretations having force-of-law effect (that is, the authority to invoke the *Chevron* standard), and (ii) the particular interpretation must be issued in the type of format that Congress contemplated would be eligible for the *Chevron* standard.[50] If it is assumed Congress did intend to confer such authority on Treasury—an issue that will be considered shortly—the question whether it could be invoked through the issuance of guidance less formal than a regulation would remain. The consensus view is that revenue rulings do not qualify for *Chevron* treatment,[51] thus leaving only regulations as a possible candidate for such treatment.

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47. *See, e.g.*, Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 (1996).
48. For a contrary view, *see* Hickman, *supra* note 19.
49. United States v. Mead, 533 U.S. 218 (2001).
50. *See id.* at 226–27.
51. *See, e.g.*, Aeroquip-Vickers, Inc. v. Comm'r, 347 F.3d 173, 181 (6th Cir. 2003) (stating "When promulgating revenue rulings, the IRS does not invoke its authority to make rules with the force of law"); McLaulin v. Comm'r, 276 F.3d 1269, 1275 n.12 (11th Cir. 2001) (considering the level of deference a revenue ruling should receive); Del Commercial Props., Inc. v. Comm'r, 251 F.3d 210 (D.C. Cir. 2001) (applying *Skidmore*, not *Chevron*, in the case of a revenue ruling); Med. Emergency Care Assocs., S.C. v. Comm'r, 120 T.C. 436 (2003) (same); Anderson v. Comm'r, 123 T.C. 219 (2004) (citing *Skidmore*); Omohundro v. United States, 300 F.3d 1065 (9th Cir. 2002) (applying *Skidmore* to a revenue ruling). Indeed, *Mead* itself appears to signal that revenue rulings are not entitled to *Chevron* deference. *See* 533 U.S. at 229 (discussing the fact that, under the *Chevron* decision, the Court of Federal Claims had not been giving any deference to revenue rulings).

In *Mead*, the Court held that any interpretation not eligible for the *Chevron* standard is to be analyzed under *Skidmore v. Swift & Co.*[52] Under the *Skidmore* standard, the court must determine whether the interpretation is persuasive.[53] In making this judgment, the court must consider a number of factors: whether the agency has consistently maintained its position; how thoroughly the agency considered its position; whether the agency's reasoning is valid; and whether other factors make the interpretation persuasive.[54] To illustrate the very significant difference between the *Chevron* and *Skidmore* standards, consider again the Court's decision in *Smiley*.[55] In *Smiley*, the Court upheld an interpretation even though it was issued one hundred years after the enactment of the underlying statute, the agency had been inconsistent and it was issued after litigation had already broken out about the meaning of the statute. Applying *Chevron*, the Court did not permit any of these considerations to undermine the validity of the interpretation. Under the *Skidmore* standard, in contrast, the interpretation would have presumably been invalidated. Indeed, the cumulative effect of the cited considerations aside, any one of them would have likely led to such a conclusion.

§ 1:3.1 Revenue Rulings

With revenue rulings seemingly ineligible for the *Chevron* standard, they necessarily become subject to *Skidmore*.[56] This raises the question whether pro-government and pro-taxpayer revenue rulings should be treated alike. In a series of cases, the Tax Court has begun

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52. Skidmore v. Swift & Co., 323 U.S. 134 (1944).
53. *See Mead*, 533 U.S. at 228.
54. *See id.*
55. Smiley v. Citibank, 517 U.S. 735 (1996).
56. For authorities applying *Skidmore* to revenue rulings, *see* note 51, *supra*. Note that, prior to *Mead*, some courts had given *Chevron*-like deference to pro-government revenue rulings. *See* Salomon, Inc. v. Comm'r, 976 F.2d 837 (2d Cir. 1992). In the aftermath of *Mead*, courts will presumably retreat from granting this much deference and will instead apply the *Skidmore* methodology. On the other hand, where Congress reenacts a section of the Code after a pro-government revenue ruling has been issued, *Skidmore* will not apply. Instead, the reenactment may be viewed as a ratification of the ruling, thus rendering it invulnerable to taxpayer challenge. *See, e.g.*, Davis v. United States, 495 U.S. 472, 482 (1990). On the other hand, in the case of reenactment, the government is not necessarily precluded from revoking the ruling and adopting a new, post-reenactment interpretation. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (permitting agencies to adopt a different interpretation despite reenactment unless Congress unambiguously indicated its intent to freeze the interpretation in place).

to give more binding effect to pro-taxpayer revenue rulings.[57] In other words, while applying *Skidmore* to pro-government revenue rulings—inquiring whether they are persuasive based on *Skidmore*'s relevant considerations—it has refused to permit the Service to disavow pro-taxpayer revenue rulings without regard to their persuasiveness.[58]

The principle established in these cases is subject to two qualifications. First, as the Supreme Court has indicated, where a Code provision is unambiguous, the Service cannot rewrite it by making a taxpayer-friendly concession in a revenue ruling.[59] Thus, if the Service were to able convince the court that the Code unambiguously calls for result contrary to the one set forth in the revenue ruling, the court would be required to apply the Code without regard to the ruling. This qualification is driven by constitutional concerns: While the executive branch may have interpretive discretion under Chevron or Skidmore, it does not have the authority to alter the meaning of an unambiguous statute that Congress has enacted.[60]

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57. Rauenhorst v. Comm'r, 119 T.C. 157 (2002); Baker v. Comm'r, 122 T.C. 143 (2004); Dover Corp. & Subsidiaries v. Comm'r, 122 T.C. 324 (2004). It should be noted that the court emphasized in these cases that the Service had consistently followed the taxpayer-friendly ruling in private letter rulings. Whether the outcome might be different in the case of a revenue ruling never cited by the Service is an interesting question.

58. It remains to be seen whether other courts will follow the Tax Court's approach. For cases where the court appeared to be willing to permit the Service to disavow a taxpayer-friendly ruling, *see* Black & Decker Corp. v. United States, 436 F.3d 431 (4th Cir. 2006); Vons Cos., Inc. v. United States, 55 Fed. Cl. 709, 718 (2003); Omohundro v. United States, 300 F.3d 1065 (9th Cir. 2002) (applying *Skidmore* in upholding a taxpayer-friendly revenue ruling without acknowledging that in Estate of Rapp v. Comm'r, 140 F.3d 1211 (9th Cir. 1998), an earlier Ninth Circuit panel had indicated in dicta that taxpayers may use a taxpayer-friendly revenue ruling as a shield). On the other hand, under the Fifth Circuit's approach, which the Tax Court cited, the Service is deemed bound by taxpayer-friendly revenue rulings. *See* Estate of McLendon v. Comm'r, 135 F.3d 1017, 1024 n.15 (5th Cir. 1998). The Second Circuit's approach is similar to the Fifth Circuit's. *See* Weisbart v. United States Dep't of Treasury, 222 F.3d 93, 98 (2d Cir. 2000). The Second Circuit has, however, called into question the continuing viability of *Weisbart*, intimating that all revenue rulings are to be analyzed under *Skidmore*. *See* Reimels v. Comm'r, 436 F.3d 344, 347 n.2 (2d Cir. 2006).

59. *See* Schleier v. Comm'r, 515 U.S. 323, n.9 (1995).

60. United States v. Burke, 504 U.S. 229, 246 (1992) (Scalia, J. concurring) ("the Secretary of the Treasury would effectively be empowered to repeal taxes that the Congress enacts" if a taxpayer-friendly interpretation were upheld, even if contrary to the Code); Dixon v. United States, 381 U.S. 68 (1965); Auto. Club of Mich. v. Comm'r, 353 U.S. 180 (1957); 381 U.S. 68 (1965); Manhattan Gen. Equip. Co. v. Comm'r, 297 U.S. 129 (1936). *See also* Mitchell M. Gans, *Deference and the End of Tax Practice*, 36 REAL PROP. PROB. & TR. J. 731, 797–98 (2002).

The second qualification is that, in each of the cases in which the court held the Service bound by its concession, the ruling was still outstanding at the time of the litigation. In effect, the court would not permit the Service to argue against its own extant, published position. If, however, the Service were to revoke its ruling before the court issued its decision, these cases would presumably no longer be relevant. The question would rather become whether the revocation constituted an abuse of discretion. If, for example, the taxpayer consummated a transaction in reliance on the revenue ruling, could the Service revoke the ruling retroactively and then apply its new position to the taxpayer?[61] As a practical matter, the Service tends to exercise its authority under section 7805 to revoke on a retroactive basis sparingly, typically providing that the revocation is to be given prospective effect.[62] Practitioners may take some comfort from the Service's unwillingness to use its authority too aggressively.

Nonetheless, the abuse-of-discretion question remains an important one. Given the extent to which practitioners rely on taxpayer-friendly revenue rulings in structuring transactions, a change in the Service's practice would radically affect the ability of practitioners to give advice and the ability of taxpayers to engage in transactions with a sense of certainty about the tax consequences. If in fact the Service can retroactively revoke a taxpayer-friendly revenue ruling, might it not be prudent for practitioners to inform clients of this possibility where their advice is based on a taxpayer-friendly revenue ruling—just as a practitioner who relies on private letter rulings will ordinarily inform the client that they are not entitled to precedential effect?

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61. While, as a general matter, regulations can no longer be revoked retroactively (*see* I.R.C. § 7805(b)(1)), revenue rulings may be revoked on this basis. *See* I.R.C. § 7805(b)(8). In Burleson v. Comm'r, T.C. Memo 1994-364, after the taxpayer and the Service had entered into a stipulation in the Tax Court, the Service revoked and clarified a relevant taxpayer-friendly revenue ruling. Emphasizing the fact that the revocation occurred after the stipulation had been executed, the court found that the revocation was an abuse of discretion and refused to permit the Service to disavow its earlier ruling.

62. I.R.C. § 7805(b)(8) authorizes the Service to make any ruling, even including a judicial ruling, prospective. Thus, in Cent. Laborers' Pension v. Heinz, 541 U.S. 739, 748 n.4 (2004), the Court held that the Service could make the Court's ruling prospective.

In *Dixon v. United States*,[63] the Service revoked a ruling retroactively. Even though the taxpayer had acquired an investment in reliance on the ruling, the Court held that there was no abuse of discretion. Emphasizing the Service's statutory authority to revoke a ruling retroactively and the statement in the controlling revenue procedure concerning revocation policy, the Court concluded that the taxpayer's reliance was not justifiable and that the Service could therefore correct its mistake of law.[64] Thus, the Service was not precluded from maintaining a position that was contrary to the revoked ruling.

Questions have, however, been raised about *Dixon's* significance. In *Estate of McLendon v. Commissioner*,[65] the court raised two such questions. First, the court suggested the possibility that the Supreme Court's refusal to hold the Service bound by the revoked ruling was based on its conclusion that the ruling was contrary to a clear Code section and that the Service could not be permitted to rewrite such a section by concession (or otherwise).[66] If this reading of Dixon is correct, then its import is rather limited. For in the vast majority of cases where the Service has issued a taxpayer-friendly revenue ruling, it will not be found to be inconsistent with unambiguous statutory language. Second, the *McLendon* court discerned a change in the Service's revocation-policy language, reading the controlling revenue procedure as inviting more taxpayer reliance than the revenue procedure at issue in *Dixon*.[67] Thus, were the Service to revoke a revenue ruling retroactively, a taxpayer seeking to establish justifiable reliance could perhaps point to this change in language (but if the ruling were contrary to a clear Code section, this argument would fail).[68] In short, while there is a trend in the direction of holding the Service bound by an unrevoked revenue ruling, questions do remain about its ability to revoke after the transaction is consummated but before the court rules on the issue.

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63. Dixon v. United States, 381 U.S. 68 (1965). *See also* Auto. Club of Mich. v. Comm'r, 353 U.S. 180 (1957).
64. *See Dixon*, 381 U.S. at 72–76.
65. Estate of McLendon v. Comm'r, 135 F.3d 1017 (5th Cir. 1998)
66. *See id.* at 1024 n.15.
67. *See id.*
68. *See* Schleier v. Comm'r, 515 U.S. 323, n.9 (1995) (indicating that a revenue ruling contrary to an unambiguous Code provision is invalid).

§ 1:3.2 Interpretive Regulations: Skidmore *or* Chevron*?*

In the case of interpretive regulations (that is, those issued under the general authority of Code section 7805 rather than under a specific grant of authority), it would seem that *Chevron* applies. Recently, however, the Tax Court, in *Swallows Holding v. Commissioner*,[69] invalidated an interpretive regulation. In doing so, it refused to decide whether the *Chevron* standard or the deference standard articulated by the Supreme Court in *National Muffler v. Commissioner*[70] applies to interpretive tax regulations.[70.1] Under either standard, the court ruled, the regulation was invalid.[70.2]

In *National Muffler*, decided before *Chevron*, the Court found this inquiry controlling in determining the validity of a regulation: whether it "harmonizes with the plain language of the statute, its origin and its purpose."[71] The Court indicated that various factors are to be considered in reaching a resolution: whether the regulation was adopted at the time the statute was enacted; whether the regulation is a longstanding one; whether taxpayers have relied on the regulation; whether the Service has consistently adhered to the position taken in the regulation; and whether Congress has considered the regulation in adopting subsequent legislation.[72]

The *National Muffler* standard is very similar, if not equivalent, to the *Skidmore* standard. Both set forth an ultimate question—whether the regulation is persuasive in the case of *Skidmore* and whether it harmonizes with the statute in the case of *National Muffler*—and both go on to require that the ultimate question be answered based on an examination of similar second-order considerations. Thus, at least in the Tax Court, the possibility remains that the *National Muffler* standard, a *Skidmore*-like standard, will govern where the validity of an interpretive regulation is at

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69. Swallows Holding v. Comm'r, 126 T.C. No. 6 (2006).
70. Nat'l Muffler v. Comm'r, 440 U.S. 442 (1979).
70.1. It should be noted that the court's deference analysis in *Swallows Holding* is largely, if not entirely, dicta. Once the court concluded that the Code section was unambiguous, there was no need to consider the level of deference to which the regulation was entitled. *See* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004) (indicating that there is no need to consider the deference question if the statute is determined to be unambiguous). For a further discussion of *Swallow, see* Mitchell M. Gans & Jay A. Soled, *A New Model for Identifying Basis in Life Insurance Policies: Implementation and Deference*, __ FLA. TAX REV. __ (forthcoming).
70.2. *See also* Estate of Gerson v. Comm'r, 127 T.C. No. 11 (2006) (again refusing to decided whether *Chevron* or *National Muffler* applies, but concluding, unlike *Swallows Holding*, that the challenged regulation was valid).
71. *See id.* at 476–77.
72. *See id.*

issue. Given the Supreme Court's decision in *United States v. Mead*,[73] however, the Tax Court's conclusion that the *National Muffler* standard may continue to be viable is rather surprising. After all, *Mead* established a two-tier framework, under which agency interpretations are to be analyzed under either the *Chevron* or *Skidmore* standard. *Mead* certainly does not contemplate the possibility of a third standard. Thus, to the extent the Tax Court in *Swallows Holding* holds open the possibility that the *National Muffler* standard has not been supplanted, it is questionable.[74]

In sum, the viability of the *National Muffler* standard may well prove to be critical in that, as suggested, the differences between the *Chevron* and *Skidmore* standards are substantial. If the *National Muffler* standard, a *Skidmore*-like standard, is ultimately determined to be the controlling standard, taxpayers will bear a much

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73. United States v. Mead, 533 U.S. 218, 227 (2001).

74. Commentators have also questioned whether the *National Muffler* standard remains viable. For a sample of the literature, *see* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002); Coverdale, Chevron's *Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After Mead*, 55 ADMIN. L. REV. 39 (2003); Irving Salem *et al.*, *Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717 (2004); Ellen P. Aprill, *The Interpretive Voice*, 38 LOY. L.A. L. REV. 2081 (2005); Noel Cunningham & James Repetti, *Textualism and Tax Shelters*, 24 VA. TAX REV. 1 (2004); Gregg D. Polsky, *Can Treasury Overrule the Supreme Court?*, 84 B.U. L. REV. 185 (2004); Kristin E. Hickman, *Need for Mead*, 90 MINN. L. REV. 1537 (2006); Mitchell M. Gans, *Deference and the End of Tax Practice*, 36 REAL PROP. PROB. & TR. J. 731 (2002).

Speculation about the fate of *National Muffler* can be attributed to the Supreme Court's tax cases. While the Court has cited to *Chevron* in some of its tax cases (*see Mead*, 533 U.S. at 230, indicating that it had applied *Chevron* to an interpretive tax regulation in Atl. Mut. Ins. Co. v. Comm'r, 523 U.S. 382 (1998); United States v. Haggar Apparel Co., 526 U.S. 380 (1999)), it has failed to do so in others. *See* Boeing Co. v. United States, 537 U.S. 437 (2003). *See also* United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001) (citing *National Muffler*). In its most recent tax case, Cent. Laborer's Pension v. Heinz, 541 U.S. 739 (2004), although it did not cite *Chevron*, it held in the context of an ERISA litigation that an interpretive tax regulation had force-of-law effect. Since the Court uses force-of-law nomenclature only when it invokes *Chevron* (*see Mead*, 533 U.S. at 221), any argument that it contemplates the continuing use of the *National Muffler* standard has become rather weak. Interestingly, however, the Tax Court in *Swallows Holding* apparently overlooked Supreme Court's decision in *Central Laborers' Pension*, with neither the majority nor dissenting opinions citing it.

easier burden when challenging the validity of interpretive regulations.[75]

§ 1:4 *Auer* Deference

Finally, an entirely different strand of deference has been applied by the Supreme Court where the agency's interpretation as distinguished from the statute, is ambiguous. In *Auer v. Robbins*,[76] a non-tax case, the Court held that an agency's interpretation of an ambiguous regulation is entitled to controlling deference as long as it is not plainly inconsistent with the regulation or plainly erroneous.[77] The courts have begun applying *Auer* in tax cases as well.[78] *Auer* is similar to *Chevron* in that it also uses a two-step analysis: first inquiring whether the regulation is ambiguous (in *Chevron*, in the first step, inquiry is made as to whether the statute is ambiguous), and then inquiring whether the agency's proffered resolution of the ambiguity in its regulation is abusive or clearly inappropriate (in *Chevron*, in the second step, inquiry is made as to whether the regulation reasonably resolves the ambiguity in the statute).

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75. It should be noted that, in Barnhart v. Thomas, 540 U.S. 20 (2003), the Court granted *Chevron* deference to agency interpretation issued without notice and comment. Given the fact that interpretive regulations are not issued without such formality, it would be surprising if the Court found them ineligible for the *Chevron* standard. For a further discussion of *Swallows Holding* and its refusal to decide whether *Chevron* applies, *see* Mitchell M. Gans & Jay A. Soled, *A New Model for Identifying Basis in Life Insurance Policies: Implementation and Basis*, __ FLA. TAX REV. __ (2006) (forthcoming).
76. Auer v. Robbins, 519 U.S. 452 (1997).
77. *See id.* at 461.
78. In United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001), the Court gave what it called "substantial judicial deference" based on a longstanding revenue ruling that resolved an ambiguity in the regulation. *See id.* at 219. The Court's emphasis on the longstanding nature of the ruling is difficult to understand: in *Auer*, it deferred to the agency's construction without inquiring whether it was a longstanding one. For lower court cases applying *Auer* in the tax context, *see, e.g.*, Am. Express Co. v. United States, 262 F.3d 1376 (Fed. Cir. 2001) (applying *Auer* in the case of an ambiguous revenue procedure); Cinema '84 v. Comm'r, 294 F.3d 432, 439 (2d Cir. 2003) (applying substantial deference unless the interpretation is plainly erroneous); Kurzet v. Comm'r, 222 F.3d 830 (10th Cir. 2000); Focardi v. Comm'r, T.C. Memo 2006-56 (indicating that great deference is appropriate in this context); Schott v. Comm'r, 319 F.3d 1203 (9th Cir. 2003) (indicating that the Service's interpretation of an ambiguous regulation is to be respected unless it is an unreasonable one and then concluding, however, that the Service's interpretation was unreasonable).

A problematic aspect of *Auer* deference is the retroactive effect that it creates. In general, regulations must be issued on a prospective basis,[79] thus giving taxpayers an opportunity to understand the consequences of a transaction before undertaking it. Under *Auer*, in contrast, the Service could suggest in its brief how an ambiguous regulation should be construed[80] and thereby make its construction applicable to the very transaction at issue in the litigation, even

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79. *See* I.R.C. § 7805(b). Note, however, that apparently, in the case of a Code section enacted before the 1996 amendment to section 7805, regulations can be issued on a retroactive basis. *See* Howard E. Clendenen, Inc. v. Comm'r, 207 F.3d 1071 (8th Cir. 2000). Note also that Code authorizes retroactive regulations in a case where abuse would otherwise result. *See* I.R.C. § 7805(b)(3). Finally, even though an agency does not have the authority to issue a regulation on a retroactive basis, a court might consider a post-transaction regulation and even defer to it under *Chevron* as long as it does not modify a prior regulation. *See* Smiley v. Citibank, 517 U.S. 735, 744 n.3 (1996); *see also* Focardi v. Comm'r, T.C. Memo 2006-56 (considering a post-transaction regulation in upholding the Service's position).

80. In Keys v. Barnhart, 347 F.3d 990 (7th Cir. 2003), Judge Posner, in dicta, questioned whether it is appropriate to defer under *Auer* based on a brief written by an agency staff attorney. He went on to question whether *Auer* can be reconciled with *Chevron*, suggesting that *Chevron*'s delegation-of-lawmaking rationale does not comfortably accommodate the grant of deference under *Auer* in the case of such a brief. *See also* Matz v. Household Int'l Tax Reduction Inv. Plan, 265 F.3d 572, 574 (7th Cir. 2001); Eastman Kodak Co. v. STWB, Inc., 452 F.3d 215 (2d Cir. 2006) (citing *Keys* and raising the question whether *Auer* deference, rather than *Skidmore* deference, should be granted where an agency proffered a construction of its regulation in an amicus brief filed in the circuit court). *But see* Edsen (granting *Auer* deference to a Notice resolving an ambiguity in a regulation). While, as Judge Posner suggests, there may be some tension between *Chevron* and *Auer*, the Supreme Court does appear to contemplate two different forms of deference: *Chevron* deference in the case of an ambiguous statute and *Auer* deference in the case of an ambiguous regulation. As distinct doctrines, with each having its own rationale, it is not surprising that each has its own, different contours. Indeed, in *Auer* itself, the Court granted deference based on an interpretation proffered in the agency's Supreme Court brief (Judge Posner acknowledges this aspect of *Auer* in *Keys*, but suggests that *Auer* should not apply in the case of an interpretation proffered in a lower courts brief). For a further discussion of *Auer* and its relationship to *Chevron*, *see* Coverdale, Chevron's *Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After* Mead, 55 ADMIN. L. REV. 39 (2003); Irving Salem *et al.*, *Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717 (2004).

though the transaction had occurred long before the Service proffered its construction.[81]

Given *Auer,* practitioners should be cautious about giving advice whenever a regulation appears to be ambiguous. Prudent practitioners will disclose to the client the possibility that the Service might proffer a resolution of the ambiguity at the time of litigation and that, under *Auer,* the court would be required to defer if is determined not to be plainly erroneous or plainly inconsistent with the regulation. In short, with tax advice so often based on the meaning of regulations, practitioners must be sensitive to *Auer* and its implications.

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81. To the extent that the agency has not been consistent in its interpretation of the ambiguity, it may not be entitled to any deference. *See* Schleier v. Comm'r, 515 U.S. 323, 334 n.7 (1995). *See also* U.S. Freightways Corp. v. Comm'r, 270 F.3d 1137 (7th Cir. 2001 (refusing to grant deference where the agency had been inconsistent); Green Forest Mfg. Inc., TC Memo 2003-75 (applying *Skidmore*-type analysis in determining whether court should defer to Service's interpretation). These cases raise an interesting question: whether a court must apply a *Skidmore*-type or *Chevron*-type analysis in the second step of inquiry under *Auer.* In other words, if the agency's interpretation of its regulation is not plainly erroneous or plainly inconsistent with the regulation, must the court defer even if it concludes that the interpretation is not persuasive based on an analysis of the *Skidmore* factors? For example, an interpretation issued while the litigation is pending would presumably receive little deference under *Skidmore. See* Cottage Sav. Ass'n, v. Comm'r, 499 U.S. 554, 563 n.7 (1991) (speculating that the Service might not have claimed deference for a revenue ruling because it was issued during the litigation). Thus, if the *Skidmore* factors must be consulted in the second step of inquiry under *Auer,* an interpretation proffered during the litigation would never be entitled to *Auer* deference. Yet *Auer* seems to contemplate that deference is appropriate in just these circumstances. Perhaps, given the Supreme Court's decision in *Schleier,* agency inconsistency is relevant under *Auer*'s second step while the other *Skidmore* factors, like the fact that the interpretation is issued during the litigation, are not. For a further discussion of this issue, *see* Irving Salem et al., *Report of the Task Force on Judicial Deference,* 57 TAX LAW. 717 (2004); *see also* Coverdale, Chevron's *Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After* Mead, 55 ADMIN. L. REV. 39, 64 (2003).