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Embracing the Queen of Hearts: Deference to Retroactive Tax Rules

James Puckett

EMBRACING THE QUEEN OF HEARTS: DEFERENCE TO RETROACTIVE TAX RULES

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ABSTRACT

The Supreme Court's decision in Mayo Foundation for Medical Education and Research v. United States *underscored the importance of a uniform approach to judicial review of administrative action; accordingly, the Court clarified that tax administration is generally subject to the same review as other kinds of administrative action by other federal agencies. Tax guidance from the IRS and Treasury Department serves an important role in clarifying the tax law so that taxpayers may report their tax liability accurately and plan their affairs. Meanwhile, aggressive attempts by a relatively small number of taxpayers to avoid tax liability by exploiting arguable ambiguities in the tax law present a perennial challenge for tax administration. In either case, as long as statutory and regulatory ambiguities exist, some surprises in the form of retroactive resolutions of uncertain tax positions are inevitable; the issue is who decides? Because of the Internal Revenue Code's unusual grant of retroactive rulemaking power to the Treasury Department, tax administration cannot simply be collapsed with all other administrative action into a uniform framework of judicial review. This Article attempts to shed light on judicial review of more typical prospective tax guidance in part by drawing from the special case of retroactive tax guidance. This Article also argues that the general approach to judicial review of administrative action, as infused by the Code's express grants of retroactive rulemaking power, affords the IRS and Treasury flexibility to make policy retroactively through rulemaking and receive deference from the courts. Moreover, though some constitutional limitations on retroactivity exist, the retroactive administrative clarification of an ambiguity should not be unconstitutional. Finally, this Article briefly assesses strengths and weaknesses of the current regime and the principal alternatives.*

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I. INTRODUCTION

The Supreme Court's recent decisions concerning tax administration in *Mayo Foundation for Medical Education & Research v. United States*[1] and *United States v. Home Concrete & Supply, LLC*[2] have attracted considerable scholarly attention.[3] Though the move in *Mayo* was somewhat anticipated by an extensive prior literature,[4] it is now clear that tax scholars and practitioners cannot escape mining the relatively opaque doctrines that lie at the heart of general administrative law. In *Mayo*, the Court rejected the idea of a tax-specific approach to judicial review.[5] This clarification calls for a fresh look at a variety of issues of tax administration, because the IRS historically has operated on the assumption that tax administration is special.[6]

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1. Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704 (2011).

2. United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836 (2012).

3. *See* Matthew H. Friedman, *Reviving* National Muffler*: Analyzing the Effect of* Mayo Foundation *on Judicial Deference as Applied to General Authority Tax Guidance*, 107 Nw. U. L. Rev. COLLOQUY 115 (2012); Steve R. Johnson, Mayo *and the Future of Tax Regulations*, 130 TAX NOTES 1547, 1547 (2011) [hereinafter Johnson, *Future of Tax Regulations*]; Steve R. Johnson, *Preserving Fairness in Tax Administration in the* Mayo *Era*, 32 VA. TAX REV. (forthcoming 2013); Leandra Lederman, *The Fight Over "Fighting Regs" and Judicial Deference in Tax Litigation*, 92 B.U. L. REV. 643 (2012); Andrew Pruitt, *Judicial Deference to Retroactive Interpretative Treasury Regulations*, 79 GEO. WASH. L. REV. 1558 (2011); Patrick J. Smith, *Omissions from Gross Income and Retroactivity*, 131 TAX NOTES 57 (2011); *see also* Brief of Amicus Curiae Professor Kristin E. Hickman in Support of Respondents, United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836 (2012) (No. 11-139) [hereinafter "Hickman Brief"].

4. *See* Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX LAW. 343 (1991); Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153 (2008); Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1740-59 (2007) [hereinafter Hickman, *Coloring Outside the Lines*]; Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239; Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 6 (2006).

5. 131 S. Ct. at 713 ("Mayo has not advanced any justification for applying a less deferential standard of review to Treasury Department regulations than we apply to the rules of any other agency. In the absence of such justification, we are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly '[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.' " (quoting Dickinson v. Zurko, 527 U.S. 150, 154 (1999))).

6. *See* Jeremiah Coder, *Tax Law's Vanity Mirror Shattered*, 134 TAX NOTES 35, 35 (2012) ("The tax world finally recognized a stark fact of life in 2011: Tax law is not special. It took an explicit Supreme Court statement for the tax bar to become aware of its run-of-the-mill status, but that statement has prompted soul-searching on what litigation and administrative rules must be learned and followed."). As Professor Hickman has established in detail, the IRS often fails to give notice and comment, may not make a plain statement of the regulation or respond adequately to comments, has overused APA exceptions to notice and comment, inappropriately labeled legislative regulations as interpretative, and has often purported to cure deficiencies retroactively by undertaking notice and comment at final stage of regulations. *See* Hickman, *Coloring Outside the Lines*, *supra* note 4, at 1740-59 (discussing methodology and results of empirical study of Treasury regulations).

A year after *Mayo*, the Supreme Court in *Home Concrete*[7] had another opportunity to clarify issues at the intersection of tax and administrative law. The Court's narrow opinion does little to squarely answer broader questions relating to tax administration.[8] Nevertheless, *Home Concrete* does provide insight into the thinking of at least four Supreme Court justices on temporary Treasury regulations and retroactivity issues.

Issues left open by *Home Concrete* include questions surrounding the validity and force of retroactive tax rules. For example, should courts apply *Chevron* deference[9] to retroactive[10] Treasury regulations and *Auer*[11] deference to IRS interpretations of existing tax guidance? In addition, after *Mayo*, the uncertain application of general administrative law doctrines carries over to prospective rules enacted by the IRS and Treasury. Given the unusual provisions of the Internal Revenue Code concerning the retroactivity of tax rules,[12] a complete analysis of prospective tax rules must be entwined to some extent with an analysis of retroactive rules.

Prospective tax guidance provides notice and clarity to taxpayers planning their affairs and must anticipate a bewildering variety of transactions. Tax guidance takes many forms, compounding the complexity of the framework for judicial review of such guidance. Inevitably, however, there are gaps in the guidance. A recurring theme in tax administration that intersects with retroactivity issues is how to

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7. 132 S. Ct. 1836 (2012).

8. *See infra* text accompanying notes 153-65.

9. When *Chevron* deference applies, a reviewing court must uphold an agency's reasonable resolution of an ambiguity or gap in the relevant law, even if the agency's interpretation is not the best possible interpretation. *See infra* text accompanying notes 73-86.

10. Courts and commentators have struggled to define "retroactivity." This Article's use of the term relates to "primary" retroactivity, as opposed to "secondary" retroactivity, as explained in the following typology:

> 1. Imposition of new legal standards with regard to past transactions or occurrences in the context of determining:
> a. the legal consequences of those past transactions or occurrences for the period up to the effective date of the new statute or agency rule ("primary retroactivity"); and
> b. the legal consequences of those past transactions or occurrences for the period beyond the effective date of the new statute or rule. Justice Scalia characterized this variety of retroactivity as "secondary retroactivity."
> 2. Imposition of new legal standards for transactions or occurrences after the effective date of the statute or rule for the purpose of determining legal consequences for the future (also included within Justice Scalia's notion of "secondary retroactivity").

William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, 157.

11. The *Auer* deference doctrine requires a court to defer to the agency's interpretation of its own regulations unless plainly erroneous, even when adopted in a relatively informal manner, such as in a brief filed during litigation. *See infra* text accompanying notes 98-107.

12. *See* I.R.C. § 7805(b) (2012).

deal with taxpayers who attempt to exploit the ambiguities of the tax law by engaging in transactions with little or no purpose beyond generating tax benefits.[13] Such a taxpayer would hope to use an aggressive, literalistic reading of the Code or other authorities to produce a deduction or generate deferral where none is intended by Congress.[14] There are also, of course, many situations in which taxpayers take aggressive interpretations of the tax law with respect to non-tax motivated transactions.

Retroactive guidance can prevent unfair windfalls that are arguably permitted by gaps in prospective guidance. Obviously, another method of filling gaps in prospective guidance is for a court to decide a question. Judicial clarification of the law will generally take effect retroactively. However, an aggressive taxpayer would hope for a generalist court to substitute its judgment for the expert judgment of the IRS. If, however, it is established that retroactive Treasury regulations are entitled to *Chevron* deference, the mere threat of such retroactive regulations may deter abuse.

There is also a potential for overreaching by the government, and some observers will object to *Chevron* deference for retroactive rules.[15] That approach is too skeptical, but a completely permissive approach to retroactivity also is unwarranted.[16] Perhaps some regulatory tools that are appropriate to use against a tax shelter participant are not fitting for the average taxpayer,[17] nor do our concerns for the average taxpayer equally map onto tax shelter participants. Although some attempts at retroactive tax administration would be unlawful or unconstitutional, there is flexibility for a good deal of retroactive tax rulemaking. Accordingly, this Article sketches options to limit deference to retroactive tax rules.

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13. *See* Joshua D. Blank and Nancy Staudt, *Corporate Shams*, 87 N.Y.U. L. REV. 1641, 1647 (2012) (providing a brief overview of corporate tax abuse).

14. *See id.*

15. *See* Patrick J. Smith, *Life After* Mayo*: Silver Linings*, 131 TAX NOTES 1251, 1253 (2011) (criticizing the tax bar's myopia in ignoring retroactivity jurisprudence); *supra* note 3, at 1578 (proposing that Congress eliminate *Chevron* deference for retroactive Treasury regulations).

16. *See* Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L. J. 1015 (2006) (noting ambivalence of courts and scholars toward retroactivity despite "modern approach" embracing retroactivity). *But see* Michael J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47, 49-63 (1977) (both prospective and retroactive tax changes alter asset values and upset expectations); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 517-19 (1986) (generally equating economic effect of prospective and retroactive change).

17. *Cf.* Emily Cauble, *Making Partnerships Work for Mom and Pop and Everyone Else*, 2 COLUM. TAX J. 247, 250-51 (2011) (proposing simplified partnership tax regime, which would be "more suitable for unsophisticated partnerships and make the law less prone to exploitation by sophisticated partnerships," noting that "undue focus on the needs of unsophisticated partnerships leads to rules that are ripe for manipulation by sophisticated taxpayers").

Part II describes certain general administrative law requirements governing agency action and the principles of judicial review of agency action. Part III discusses the implications of these fundamental principles for tax rules (including regulations, temporary regulations, and revenue rulings). The analysis takes into account the Code's unusual grant of retroactive rulemaking power to the Treasury Department. Part III concludes that final Treasury regulations should ordinarily receive *Chevron* deference; temporary Treasury regulations and revenue rulings should be reviewed under the less deferential *Skidmore* standard. The conclusion remains the same whether or not the rule is retroactive. Part IV anticipates potential constitutional challenges to retroactivity, observing that the Constitution affords agencies, including the IRS, substantial flexibility to make policy retroactively. Part V sketches a tentative appraisal of the current state of affairs as well as the principal alternatives.

II. GENERAL PRINCIPLES OF AGENCY ACTION AND JUDICIAL REVIEW

This Part summarizes certain fundamental principles governing agency action and judicial review of agency action. This broader administrative law context is key to examining the implications of *Mayo*'s mandate to apply uniform principles of judicial review of agency action to tax administration.

A. Modalities of Administrative Action and Procedural Requirements

Under the Administrative Procedure Act ("APA"), agency action is generally quite flexible.[18] The modalities of agency action include rulemaking and adjudication.[19] Rulemaking includes formulating interpretations of general applicability and future effect implementing, prescribing, or interpreting law or policy.[20] Adjudication includes trial-like determinations as well as a variety of actions that are not trial-like; the residual category of agency action that is not rulemaking is adjudication.[21]

1. Procedures

Rulemaking and adjudication may be conducted informally, unless a hearing on the record is specifically required by statute.[22] Where a

18. Administrative Procedure Act, 5 U.S.C. §§ 500-596 (2006).
19. 5 U.S.C. § 551(5), (7) (2006).
20. *Id.* § 551(4)-(5).
21. *Id.* § 551(6)-(7).
22. *Id.* §§ 553(c) (rulemaking), 554(a) (adjudication), 555 (ancillary matters); Florida E. Coast Ry. Co. v. United States, 410 U.S. 224, 237 (1973) (noting that a "hearing" requirement, without more, does not trigger formal procedures); Chem. Waste Mgmt., Inc. v. EPA, 873 F.2d 1477, 1482 (D.C. Cir. 1989) ("We will henceforth make no presumption that

statute requires a hearing on the record, the APA imposes a variety of trial-type procedures on the agency, such as fact finding by an independent administrative law judge (or the head of the agency itself), a ban on *ex parte* contacts, and a requirement that facts must be adduced exclusively from the record established in the hearing.[23]

Rules further divide into two principal categories: interpretative rules and legislative rules. Legislative rules must be promulgated through procedures allowing for prior notice and comment by the public, while interpretative rules as well as general statements of policy need not undergo notice and comment.[24]

The distinction between legislative rules and interpretative rules has always been fuzzy.[25] This Article's working definition is that both types of rules bind the agency and the public, but interpretative rules could fairly be described as construing the relevant statutory text or pre-existing agency guidance, rather than setting forth a new rule that could not fairly be deduced from the statute or pre-existing guidance.[26]

This working definition appears to be the modern trend in cases and general administrative law scholarship.[27] Professor Hickman, however, appears to reject this distinction as unconvincing "rhetoric"[28]

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a statutory 'hearing' requirement does or does not compel the agency to undertake a formal 'hearing on the record,' thereby leaving it to the agency, as an initial matter, to resolve the ambiguity."). *But see* Marathon Oil Co. v. EPA, 564 F.2d 1253, 1264 (9th Cir. 1977) ("In summary, the crucial question is not whether particular talismanic language was used but whether the proceedings under review fall within that category of quasi-judicial proceedings deserving of special procedural protections.").

23. *Id.* §§ 556-557.

24. *Id.* § 553(b).

25. Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1 (1994) (noting "ineradicable confusion" in the area of legislative versus non-legislative rules); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 382 ("The nonlegislative rule exemptions in the federal APA have proved difficult to apply in practice and have been the subject of constant litigation."); Morgan Douglas Mitchell, Note, *Wolf or Sheep?: Is an Agency Pronouncement a Legislative Rule, Interpretive Rule, or Policy Statement?*, 62 ALA. L. REV. 839 (2011) (surveying cases).

26. *See* Dismas Charities, Inc. v. U.S. Dep't of Justice, 401 F.3d 666 (6th Cir. 2005); Warder v. Shalala, 149 F.3d 73 (1st Cir. 1998); Hoctor v. U.S. Dep't of Agric., 82 F.3d 165 (7th Cir. 1996); Anthony, *supra* note 25, at 12-14. *Cf.* Am. Mining Cong. v. Mine Health & Safety Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993) (articulating a four-part test, an important factor of which is "whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties"); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547 (2000) (approving of *American Mining* factors). *But see* Mada-Luna v. Fitzpatrick, 813 F.2d 1006 (9th Cir. 1987) (testing for binding effect on the agency).

27. *See* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 73-74 (5th ed. 2012) ("More recent decisions have taken the more literal view . . . that the test for invoking the interpretive rule exemption is whether the pronouncement really interprets existing legislation (or a pre-existing legislative rule).").

28. *See* Hickman, *Coloring Outside the Lines*, *supra* note 4, at 1770 ("Some who defend the interpretative label . . . turn to rhetoric often employed by the courts that legislative rules

and would instead put controlling weight on whether a rule is binding on the agency and the public.[29] Professor Manning, however, explains that if "an agency wishes to promulgate a more binding directive, it may use an 'interpretative rule.' "[30] Moreover, Manning classifies the policymaking-versus-interpretation distinction as fundamentally a "question of degree."[31]

2. *Choice of Modality*

These APA categories sketch a general administrative law skeleton, while various organic enactments specify the role, powers, and limitations of the various executive agencies.[32] Congress often allows an agency to use all the basic modalities (i.e., rulemaking or adjudication, of either formal or informal cast) to enforce the law and make policy.[33] On the other hand, an act may instead require a specific modality for certain kinds of agency action, mandate hybrid procedures, or disallow certain modalities entirely.[34]

Under longstanding precedent, courts have allowed agencies to choose freely the modality (rulemaking or adjudication) through which to make policy where consistent with the relevant organic act.[35] Procedural play in the joints is extremely helpful, if not absolutely necessary, in the administration of complex laws. This flexibility has another side, however. In some sense, executive agencies are effectively exercising executive, quasi-legislative, and quasi-judicial powers.[36] This concentration of power in one body is in tension with separation of powers values. The Supreme Court, however, has allowed the concentration of quasi-legislative and quasi-judicial powers in an agency.[37] This may be due to judicially unmanageable line-drawing issues.[38]

'create new law, rights or duties,' while interpretative rules merely state 'what the agency thinks the statute means.' ").

29. *Id.* at 1771.

30. *See* Manning, *infra* note 38, at 916.

31. *Id.* (comparing to the nondelegation and rulemaking-versus-adjudication inquiries).

32. Timothy A. Wilkins & Terrell E. Hunt, *Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Community as a Model for the Congress-Agency Relationship*, 63 GEO. WASH. L. REV. 479, 506-15 (1995) (classifying statutory limitations on agency discretion, e.g., purposive limits, subject-matter limits, procedural prerequisites and limits, limits on standard setting, and limits on regulatory method).

33. *See* LUBBERS, *supra* note 27, at 4-6.

34. *See* Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW & CONTEMP. PROBS. 185, 205 (1994) (finding that Congress sometimes requires rulemaking in hopes of avoiding agency capture); Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 256 (1986) (noting a modern trend toward rulemaking).

35. *See* SEC v. Chenery Corp., 332 U.S. 194, 209 (1947).

36. *See* Wilkins & Hunt, *supra* note 32, at 539-42 (summarizing how separation of powers theory has shaped the structure of administrative law).

37. In *Withrow v. Larkin*, the Court explained:

Delegation of "breathtakingly broad" quasi-legislative power to an agency is common in organic acts.[39] This has not always been uncontroversial. As Professor Manning writes, "proponents of a strong nondelegation doctrine maintain that important legislative policies should have to survive the more democratic, deliberation-enhancing process of bicameralism and presentment prescribed by Article I, Section 7."[40] Indeed, in the early days of the administrative state, the Court invalidated statutes on the ground that Congress impermissibly delegated legislative authority to an executive agency.[41] Later decisions have, however, made clear that Congress may delegate to agencies the power to make policy so long as there is an "intelligible principle" limiting the delegation.[42]

Moreover, many agencies may also exercise broad adjudicatory powers consistent with their organic act. An agency adjudication may involve finding facts, applying existing rules, and formulating new policies. Such powers are a standard feature of modern agencies

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> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

421 U.S. 35, 47 (1975); *see also* FTC v. Cement Inst., 333 U.S. 683, 701 (1948) (observing that "the fact that the Commission had entertained such views as the result of its prior ex parte investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices"); Wilkins & Hunt, *supra* note 32, at 541-42 ("The nondelegation doctrine by itself is of limited significance, as are the principal vestiges of the strict separation-of-powers view remaining in our administrative jurisprudence.").

38. *See* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 894-95 (2004) ("Lacking any judicially manageable standards to determine how much conferred discretion is too much, the Court essentially leaves it to Congress to determine how precise or vague its organic acts should be. Second, similar considerations emerge (though less explicitly) from the Court's cases governing an agency's choice between rulemaking and adjudication.").

39. *See* Manning, *supra* note 38, at 897; *see also* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 866 (2001).

40. Manning, *supra* note 38, at 897.

41. *See* Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

42. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474-75 (2001) ("In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.' . . . In short, we have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.' ") (citations omitted).

despite potential objections concerning separation of powers, procedural due process, and retroactivity.[43]

3. Retroactivity Issues

The drawbacks of this latter potential feature of adjudication—the agency's formulation of a new rule simultaneously applied to a party that has already undertaken conduct burdened by the new rule—is an old theme in administrative law. In theory, agencies could be required to announce new policies only prospectively, but the Supreme Court has never suggested that such a requirement exists.

In the classic *Chenery II* case, the Court considered whether the SEC could adopt a new policy through adjudication or whether the policy could only be adopted through rulemaking.[44] The Court acknowledged that all other things being equal, rulemaking would be preferable; the choice, however, was left with agencies:

> [A]ny rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.[45]

Thus, *Chenery II* clearly chose agency flexibility over a general norm against retroactivity.[46]

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43. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 680 (1996) (arguing that the Supreme Court's deference to an agency's interpretation of its own guidance "has inverted a basic feature of our constitutional structure by presuming that Congress's delegation of lawmaking power to agencies intrinsically includes a delegation of agency power to say what its own 'laws' (i.e., regulations) mean."); Wilkins & Hunt, *supra* note 32, at 540 ("[T]here is a strong sense in traditional administrative theory that where the same body has simultaneous executive, legislative, and judicial power over the same subject matter, or where a non-legislative body gains substantial policymaking power, it creates serious unaccountability or even tyranny."); *see also* Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 488-89 (2010) ("Although the Court has rejected the claim that combining investigative and adjudicatory functions necessarily violates due process, it has also acknowledged the possibility that such a combination may undermine an individual's due process right to an unbiased decision-maker.").

44. SEC v. Chenery Corp., 332 U.S. 194 (1947). In *Chenery I*, the Court had remanded the matter to the SEC, refusing to uphold the SEC's order on grounds that the agency did not actually rely upon in reaching its conclusion. *Id.* at 196. The SEC then reexamined the matter, reaching the same conclusion on different grounds. *Id.*

45. *Id.* at 202 (citation omitted).

46. *See id.*

Retroactivity more typically arises from agency adjudications or enforcement decisions, but retroactive rulemaking is another possibility.[47] Although an agency's authority to adjudicate can be inferred from a broad delegation of responsibility to an agency, retroactive rulemaking authority must be expressly authorized.[48] Thus, agencies one way or another will often have occasion to make policy retroactively, and may be able to do so through adjudication or rulemaking—or simply by deciding what circumstances merit enforcement of an unclear provision.

It is unclear whether retroactivity should present an additional administrative law hurdle or only a potential constitutional claim.[49] Courts have certainly found retroactive application of new rules to be an abuse of discretion by the agency. For example, the D.C. Circuit in *Retail, Wholesale & Dep't Store Union v. NLRB* denied retroactive enforcement of an order of reinstatement and back pay based on the following factors:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.[50]

The Supreme Court's signals have been mixed, but this multifactor approach to retroactivity in agency adjudication seems out of step with the Court's latest pronouncements on the issue. In *Bell Aerospace*, the Court permitted the NLRB to determine through adjudication—contrary to the Board's prior decisions—that buyers constituted a collective bargaining unit and direct a representation election.[51] However, the Court in dictum observed that retroactivity could be precluded in a case where a party suffers "substantial" harm for actions taken in "good-faith reliance on Board pronouncements."[52] On the other hand, in *Vermont Yankee*, the Supreme Court held that

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47. Indeed, tax rules were initially retroactive by default. *See* Mitchell Rogovin & Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance and Retroactivity in the 21st Century—A View from Within*, 87 TAXES 21, 23 (2009).

48. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

49. *See infra* Part IV for a discussion of constitutional issues raised by retroactive tax guidance.

50. Retail, Wholesale, and Dep't Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972).

51. NLRB v. Bell Aerospace Co., 416 U.S. 267, 291-92 (1974).

52. *Id.* at 295; *see also* Heckler v. Cmty. Health Servs., 467 U.S. 51, 60 n.12 (1984) (refusing to adopt a "flat rule that estoppel may not in any circumstances run against the Government" and noting that this "principle also underlies the doctrine that an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests.").

courts may not require agencies to follow additional procedures beyond what Congress has required in the APA and the organic act.[53] Moreover, the Court's first decision in *FCC v. Fox*[54] indicates clearly that courts should not subject administrative action to higher scrutiny than the APA requires in order to avoid reaching constitutional issues.[55]

Fox I involved the FCC's departure from a past policy of leniency with regard to fleeting expletives in broadcasts.[56] Among other incidents of indecency at issue, Fox broadcast the 2003 Billboard Music Awards, in which Nicole Ritchie made indecent remarks.[57] The FCC announced a new policy in adjudication that even fleeting expletives would not be tolerated. The Court held that "the Commission's new enforcement policy and its order finding the broadcasts actionably indecent were neither arbitrary nor capricious. . . ."[58] The Court found "no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review."[59]

The Court remanded the case for further consideration of First Amendment issues.[60] But the Court clearly indicated that the "arbitrary and capricious" standard should not be transformed, even in light of potential First Amendment concerns. "If [broadcasters] mean to invite us to apply a more stringent arbitrary-and-capricious review to agency actions that implicate constitutional liberties, we reject the invitation."[61]

When the case reached the Supreme Court again, the Court invalidated the Commission's standard on vagueness grounds without reaching the First Amendment issues.[62] As the Court explained, "A fundamental principle in our legal system is that laws . . . must give fair notice of conduct that is forbidden or required."[63] Vagueness, accordingly, violates the Due Process Clause of the Fifth Amendment when "conviction or punishment" is obtained under a "statute or regulation" that "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or

53. Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 523-24, 543-44 (1978) (refusing to require additional procedures for informal rulemaking beyond those specified in the APA).

54. FCC v. Fox Television Stations, Inc. (*Fox I*), 556 U.S. 502 (2009).

55. *See* Metzger, *supra* note 43, at 483 (noting that "the Court expressly refused to link ordinary administrative law to constitutional concerns").

56. *Fox I*, 556 U.S. at 510.

57. In the words of Nicole Ritchie, "Have you ever tried to get cow s*** out of a Prada purse? It's not so f***ing simple." *Id.*

58. *Id.* at 517.

59. *Id.* at 514.

60. *Id.* at 530.

61. *Id.* at 516.

62. FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2320 (2012).

63. *Id.* at 2317.

encourages seriously discriminatory enforcement."[64] This standard would, however, appear to leave leeway for agency changes of position if there is no "punishment," or if change is more in the nature of clarification or otherwise foreseeable.

4. Arbitrary and Capricious Limitation

The arbitrary and capricious standard[65] is a general limitation on all agency action, but it is "narrow."[66] As the Court explains in *Fox I*, the arbitrary and capricious standard is not a license for the court to substitute judgment for an agency's weighing of various factors.[67] It is, instead, a requirement that an agency consider relevant factors and arrive at a conclusion in a reasonable manner. An agency's failure to consider relevant facts would lead to a finding of arbitrary and capriciousness, but a reasonable—even if not the most desirable—conclusion is not arbitrary and capricious.[68] To be sure, arbitrary and capricious review of agency action is less deferential than the rationality review that courts apply when considering due process challenges to economic legislation. Courts will not supply reasons that the agency did not actually rely upon in making its decision, and the level of scrutiny more generally has evolved to what scholars call "hard look."[69] Nevertheless, the arbitrary and capricious standard of review remains an extremely deferential one.

The arbitrary and capricious standard serves as a useful transition from the present discussion of general principles of agency action under the APA to the following discussion of principles of judicial review of agency action. The arbitrary and capricious standard lies between the primarily procedural APA requirements and the primarily substantive judicial review doctrines. The standard is primarily

64. *Id.* (quoting United States v. Williams, 553 U.S. 285, 304 (2008)).

65. 5 U.S.C. § 706(2)(A) (2006).

66. *Fox I*, 556 U.S. at 513. ("Under what we have called this 'narrow' standard of review, we insist that an agency 'examine the relevant data and articulate a satisfactory explanation for its action.' ") (quoting Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

67. *Id.* at 513-14 ("We have made clear, however, that 'a court is not to substitute its judgment for that of the agency,' and should 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.' ") (quoting Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)).

68. *Id.* at 515-16 ("Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." (citations omitted)); *see also* Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (providing the standard definition of what the arbitrary and capricious standard of review requires of an agency).

69. *See* Metzger, *supra* note 43, at 490-94 (summarizing "hard look" review).

process-oriented (did the agency consider relevant factors?) but also incorporates narrow substantive elements (was the consideration reasonable?). Moreover, the arbitrary and capricious standard reappears as part of *Chevron* deference. Nevertheless, it may be useful to think of the arbitrary and capricious standard as a limitation on validity of agency action *ab initio*; if an agency action is arbitrary and capricious, it is invalid under the APA. Nevertheless, even if an agency action is valid under the APA, depending on the applicable deference regime, a court may reject the agency's position.

B. Judicial Review of Agency Action

If an agency has acted validly under the APA, the next question is whether a court will accept or reject the agency's interpretation. Congress regularly delegates authority to executive agencies either explicitly or by enacting ambiguous laws. Courts have typically afforded some degree of deference to the positions of an agency charged with implementing the relevant statute. This deference regime to some extent respects separation of powers and comparative institutional advantage at policymaking.[70] There is a continuum of judicial deference to agency action. Some types of agency interpretations will be entitled to little or no deference, while other types of agency interpretations merit near absolute deference.

1. Scope of Chevron *and* Skidmore *Deference*

Skidmore deference lies toward the weak end of the deference continuum.[71] In *Skidmore*, the Supreme Court held that the position of an agency is entitled to deference to the extent the position is persuasive, taking into account such factors as "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[72] The weight of these factors for or against an agency is highly dependent on the context surrounding an agency's adoption of a position. Thus, *Skidmore* deference is on a "sliding scale" and could be quite strong.

While *Skidmore* establishes the baseline for judicial deference to agency interpretations, certain types of agency interpretations merit stronger deference. In *Chevron*,[73] the Court set forth[74] a more

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70. *See generally* NEIL KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 124-25, 139-49 (1994) (comparing advantages of agencies versus courts); *cf.* Merrill & Hickman, *supra* note 39, at 865-66 (discussing the idea that deference is a second-best solution to the nondelegation doctrine).

71. *See* Skidmore v. Swift & Co., 323 U.S. 134 (1944).

72. *Id.* at 140.

73. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

deferential two-step framework, the precise scope of which remains unclear almost three decades later.[75] Under *Chevron*, a reviewing court must first consider whether Congress has "directly addressed the precise question at issue."[76] If the statute does not directly address the precise question, then at step two the court defers to an agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute."[77]

When *Chevron* deference applies, the court's review virtually collapses into arbitrary and capricious review.[78] Arbitrary and capricious review generally interrogates whether an agency has engaged in reasoned consideration of the factors relevant to the matter at hand. The agency must always consider what the relevant statute provides; an interpretation that is contrary to the statute would not be a reasonable one. Thus, although the Court's doctrine as well as the APA[79] separately state inconsistency with the statute as grounds for invalidation of agency action, an agency position manifestly contrary to the statute should be analytically merged into the concept of arbitrary and capricious.

The scope of *Chevron* deference remains unclear.[80] As the Court explained in *Mead*, *Chevron* deference applies when "Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[81] Moreover, the delegation to the agency may be express or implied. As the Court explained, even in the absence of an express delegation to implement a particular provision, "it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law . . . ."[82]

The Court appears to have supplied a *Chevron* safe harbor to agency action undertaken in the form of notice and comment rulemaking as

74. This may overstate the Court's move; some would say that the Court to some extent clarified a pre-existing deference regime and expanded it to additional types of agency action. *See* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1241-42 (2007).

75. *See infra* text accompanying notes 80-93.

76. *Chevron*, 467 U.S. at 842-43.

77. *Id.* at 844.

78. *See* Judulang v. Holder, 132 S. Ct. 476, 483 n.7 (2011) (stating "analysis would be the same" under *Chevron* step two and APA arbitrary and capricious review).

79. *See* 5 U.S.C. § 706(2)(C) (2006) (reviewing court shall set agency action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right").

80. Hickman & Krueger, *supra* note 74, at 1246-48.

81. United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).

82. *Id.* at 229.

well as formal adjudication.[83] But, the Court has never adopted a bright-line rule that *Chevron* deference only applies to notice and comment rulemaking and formal adjudication. Although the Court's repeated praise for those modalities is difficult to dismiss, it is just as difficult to dismiss the Court's explicit disavowal of a bright-line rule.[84] Indeed, the Court has deferred to other types of agency action.[85]

The central thesis of *Mead* is that *Chevron* deference respects a legislative intent to delegate primary interpretive power to an executive agency rather than the courts.[86] Accordingly, it would seem that notice and comment rulemaking and formal adjudication may really just be shortcuts for finding a delegation of gap-filling authority. In *Barnhart v. Walton*, the Court specified other factors that tend to show delegation deserving of *Chevron* deference: "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time . . . ."[87]

Professor Lisa Schultz Bressman's examination of *Mead* and *Barnhart* as applied by the lower federal courts reveals that

> some courts concentrate on whether an interpretation binds more than the parties at hand; some broaden this analysis to ask whether, in addition to binding effect, the interpretation reflects public participation; some limit their focus to whether an agency interpretation reflects careful consideration; and some expand this focus, weighing careful consideration along with agency expertise and statutory complexity.[88]

Bressman persuasively argues that these readings are only "half right"; the analysis should partake of both binding effect (the promise of consistency underlying *Mead*) and careful consideration (factors stressed in *Barnhart*).[89] Crisply stated, "we should restrict *Chevron*

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83. *See Mead*, 533 U.S. at 230-31.

84. *See id.* ("[A]s significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded." (footnote omitted) (citation omitted)).

85. *See* NationsBank of N.C. N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 251 (1995) (Comptroller of Currency's informal determination granted *Chevron* deference); *see also* Merrill & Hickman, *supra* note 39, at 884 ("However, the Court has not explained in any of these decisions why, consistent with the underlying logic of delegation, an agency should be entitled to mandatory deference when it interprets a statute in a procedural format that does not otherwise have the force of law."); *id.* at n.250 (citing additional cases).

86. *See Mead*, 533 U.S. at 230.

87. *See* 535 U.S. 212, 222 (2002).

88. *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1459 (2005).

89. *Id.* at 1488.

deference to procedures or interpretations that reflect transparency, rationality, and consistency."[90]

Binding agency authority will often emerge through notice and comment rulemaking or formal adjudication, but not necessarily. For example, an APA exception for "good cause" allows an agency to delay notice and comment otherwise required for the promulgation of legislative rules.[91] In addition, a rule that binds the agency and the public might be interpretative and therefore not necessitate notice and comment.[92] Such an interpretative rule might, depending on the agency's procedures, undergo substantial consideration at the agency that fosters "fairness and deliberation" even if not notice and comment under the APA.[93]

2. *Changes in an Agency's Position*

A related line of cases concern the implications for judicial deference to changes in an agency's position—from an agency or a court's prior interpretation of a statute. It is irrelevant to *Chevron*'s scope whether an agency's position has changed over time.[94] Moreover, an agency's interpretation is entitled to deference even if it is contrary to a prior decision of a court so long as the relevant statute is ambiguous as to the precise question at issue.[95] If the court has held that the statute is unambiguous, then the agency has no power to change the interpretation. It is an open question whether even a Supreme Court decision can be reversed by a new agency interpretation.[96] Taken together, these rules prevent "ossification" of initial decisions by an

90. *Id.* at 1492.

91. *See* 5 U.S.C. § 553(d)(3) (2006).

92. *See* sources cited *supra* note 26 (discussing difficulty of distinguishing interpretative rules from legislative rules).

93. *Cf. Mead*, 533 U.S. at 232-34 (finding that classification rulings were somewhat precedential, but subject to further agency review, did not apply to the public, and were being "churned out" at the rate of 10,000 per year); Krzalic v. Republic Tile Co., 314 F.3d 875, 881-82 (7th Cir. 2002) (distinguishing a "perfunctory" HUD policy statement from an earlier HUD policy statement that was the product of "meeting with government representatives plus a broad range of consumer and industry groups").

94. Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 712-13 ("[W]e have found it immaterial to our analysis that a 'regulation was prompted by litigation.' Indeed, in United Dominion Industries, Inc. v. United States, 532 U.S. 822, 838 (2001), we expressly invited the Treasury Department to 'amend its regulations' if troubled by the consequences of our resolution of the case." (citations omitted) (quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740 (1996).

95. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

96. *See infra* text accompanying notes 153-61 (explaining why *Home Concrete* has not changed this understanding of *Brand X*).

agency or a court, and allow agencies the flexibility to adapt policy over time without seeking statutory change.[97]

3. Deference to an Agency's Interpretation of its Own Guidance

Courts also defer to an agency's interpretation of the agency's prior guidance that is offered in the course of litigation, unless the interpretation is "plainly erroneous or inconsistent."[98] In *Auer*, the Court deferred to the Secretary of Labor's interpretation presented in an amicus brief.[99] The Court held that adoption of the interpretation in a brief did not, "in the circumstances of this case, make it unworthy of deference."[100] The Court noted that "[t]he Secretary's position is in no sense a 'post hoc rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack."[101] As the Court explained, "There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question."[102]

Auer deference has been criticized for allowing self-delegation by agencies and creating improper incentives against careful rulemaking. For example, Professor Manning argues that *Auer* deference allows agencies to substitute statutory ambiguity with regulatory ambiguity and conflates lawmaking with law exposition.[103] Moreover, Justice Scalia also appears to have embraced that critique:

> When Congress enacts an imprecise statute that it commits to the implementation of an executive agency, it has no control over that implementation (except, of course, through further, more precise, legislation). The legislative and executive functions are not combined. But when an agency promulgates an imprecise rule, it leaves *to itself* the implementation of that rule, and thus the initial determination of the rule's meaning.[104]

The agency's interpretation may not undergo any formal process or be open to comment from the public.[105] Thus, these interpretations

97. *See* Michael C. Harper, *Judicial Control of the National Labor Relations Board's Lawmaking in the Age of* Chevron *and* Brand X, 89 B.U. L. REV. 189, 206 (2009); Thomas O. McGarity, *Some Thoughts on "Deossifying" The Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

98. Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

99. *Id.* at 461-62.

100. *Id.* at 462.

101. *Id.* (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988)).

102. *Id.*

103. *See* Manning, *supra* note 43, at 654-74.

104. *See* Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring).

105. Matthew C. Stephenson & Miri Pogoriler, Seminole Rock's *Domain*, 79 GEO. WASH. L. REV. 1449, 1483-84 (2011) (discussing the "wide variety of forms" in which agencies have adopted interpretations of prior interpretations of a statute).

may avoid the "pay me now or pay me later" principle;[106] they also raise retroactivity issues.

Nevertheless, *Auer* deference has been affirmed many times, including in recent Supreme Court opinions.[107] Perhaps this should come as no surprise, given the Court's refusal to limit *Chevron* deference to relatively formal agency guidance. If nonlegislative rules and informal adjudications may sometimes receive *Chevron* deference,[108] then the avoidance of the "pay me now or pay me later" principle is a much larger phenomenon.

III. APPLICATION OF GENERAL ADMINISTRATIVE LAW PRINCIPLES TO TAX RULES

This Part integrates the general administrative law principles previously discussed into the specific context of tax administration, especially retroactive or litigation oriented guidance. The Supreme Court recently had occasion in *Mayo*[109] and *Home Concrete*[110] to clarify several issues of tax administration. In *Mayo*, the Court signaled an end to tax exceptionalism in administrative law, absent special justifications.[111] *Home Concrete*, as will be explained, was narrowly decided and left unanswered many of the important questions presented.

The discussion proceeds by type of guidance, including final regulations, temporary regulations, revenue rulings, and position statements in briefs filed during litigation. I assume that general statements of policy and other non-binding guidance, such as private letter rulings, technical advice memoranda, and the like are not eligible for any deference.

A. Final Regulations

Pre-*Mayo*, it was unclear whether *Chevron* or the tax-specific *National Muffler* precedent applied to judicial review of Treasury regulations.[112] *National Muffler*, unlike *Chevron* and essentially like *Skidmore*,[113] applied a sliding scale of deference based in part on the

106. *Id.* at 1464 ("This 'pay me now or pay me later' principle has gradually emerged as a crucial feature of the doctrine, one that allows courts to avoid direct regulation of agency choice of policymaking form while retaining some form of meaningful check—either ex ante procedural safeguards or ex post judicial scrutiny—on administrative decisions.").

107. *See, e.g.*, *Talk Am.*, 131 S. Ct. at 2261 (2011); Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 880 (2011). However, the *Auer* precedent has recently shown signs of weakening. *See* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166-67 (2012) (holding *Auer* does not apply when there is unfair surprise from the agency reversing its position).

108. *See supra* text accompanying notes 80-93.

109. Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704 (2011).

110. United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836 (2012).

111. *Mayo*, 131 S. Ct. at 713.

112. *Id.* at 712.

113. *See supra* text accompanying notes 71-79.

consistency of an agency's interpretation over time and whether it was adopted in response to litigation.[114] Therefore, retroactive or litigation-prompted tax rules would have fared comparatively poorly under the standard articulated in *National Muffler*.[115] *Mayo*, in contrast, disavows tax exceptionalism and holds that *Chevron* deference applies to notice and comment Treasury regulations.[116]

In addition, the IRS has historically claimed that many of its rules are interpretative; however, *Mayo* rejects the general authority-specific authority distinction that the IRS typically has cited in promulgating regulations.[117] After *Mayo*, it is clear that notice and comment final regulations should receive *Chevron* deference. *Mayo* does not, however, hold that all regulations are legislative rules. The leading test, though a question of degree and subject to much valid criticism, is whether the authority really interprets an existing statute or guidance, or whether instead the agency's position cannot follow from a process of interpretation.[118]

Mayo does not reject that test; it does indicate that general authority versus specific authority is not the correct inquiry under *Chevron*.[119] Professor Lubbers writes that it is entirely consistent with *Mead* for an interpretative rule to be bootstrapped into Chevron eligibility when the agency voluntarily uses procedures that Congress would intend to generate deference.[120] As a unanimous Supreme Court explained in *Long Island Care at Home*, when a rule

> sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses

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114. *See* Nat'l Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472, 477 (1979) ("In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute."); *see also* Bankers Life & Cas. Co. v. United States, 142 F.3d 973, 983 (7th Cir. 1998) (explaining that *National Muffler* was less deferential than *Chevron*).

115. *But see* Johnson, *Future of Tax Regulations*, *supra* note 3, at 1552 (arguing that the application of these factors could only increase, not decrease, deference to the government's interpretation).

116. *Mayo*, 131 S. Ct. at 712-13 ("[W]e have found it immaterial to our analysis that a 'regulation was prompted by litigation.' Indeed, in *United Dominion Industries, Inc. v. United States*, 532 U.S. 822, 838 (2001), we expressly invited the Treasury Department to 'amend its regulations' if troubled by the consequences of our resolution of the case." (citation omitted)).

117. *Mayo*, 131 S. Ct. at 713.

118. *See supra* text accompanying notes 27-31.

119. *Mayo*, 131 S. Ct. at 713.

120. *See* LUBBERS, *supra* note 27, at 467.

> full notice-and-comment procedures to promulgate a rule . . . and where the rule itself is reasonable, then a court ordinarily assumes that Congress intended it to defer to the agency's determination.[121]

Thus, the Court reversed the Second Circuit's holding that a rule was interpretative and therefore ineligible for *Chevron* deference.[122] It is not entirely clear, however, whether the Court agreed with the Second Circuit that the rule was interpretative.

Mayo clearly approves of agency changes in position over time, even when prompted by litigation, but what about the problem, not presented in *Mayo*, of retroactivity? What if, for example, the regulations defining "student" status had been made effective beginning two years prior to the promulgation of the rule?

At a glance, Section 7805(b)(1) appears to establish a general rule against regulations taking effect before the public has notice of the expected contents of the rules the regulations will contain.[123] The current version of Section 7805(b), however, only applies to "regulations which relate to statutory provisions enacted on or after [July 30, 1996,] the date of enactment of this Act."[124] Prior to amendment, Section 7805(b) expressly allowed the Treasury to "prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect."[125] Although the effective date clause's meaning is contested,[126] the IRS's position is that this permissive standard applies to regulations relating to much of the Code.[127] Moreover, even in the case of regulations relating to post-1996 Code sections, regulations may take effect retroactively to "prevent abuse."[128]

There is a circuit split as to whether an agency's interpretation of jurisdictional rules receives deference.[129] Thus, it is an open question whether the IRS and Treasury's decision to apply regulations retro-

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121. Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 173 (2007).

122. *Id.* at 172.

123. In general, tax regulations may not take effect before the earlier of: the date on which such regulation is filed with the Federal Register; the date on which any proposed or temporary regulation to which such final regulation relates was filed with the Federal Register; or the date on which any notice substantially describing the expected contents of any temporary, proposed, or final regulation is issued to the public. I.R.C. § 7805(b)(1) (2012).

124. Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1101(b), 110 Stat. 1468 (1996).

125. I.R.C. § 7805(b)(1) (1994).

126. *See* Lederman, *supra* note 3, at 674 n.179 (noting ambiguity as to whether the date modifies the enactment of regulations, or the enactment of statutes).

127. *See* T.D. 9511, 2011-1 C.B. 455.

128. I.R.C. § 7805(b)(3) (2012).

129. *See* Arlington v. FCC, 688 F.3d 229, 248 (5th Cir. 2012) (noting circuit split on the question), *cert. granted*, 2012 U.S. LEXIS 7807 (2012); Bressman, *supra* note 87, at 1472-74. The Supreme Court has not given direct guidance on the issue, but in at least two cases has answered arguably jurisdictional questions on plain meaning grounds, thereby obviating the deference question. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 142 (2000); MCI Telecomm. Corp. v. AT&T Co., 512 U.S. 218, 229 (1994).

actively under pre-1996 Section 7805(b) or under the prevention of abuse standard would receive deference.

One might object that the notion of a retroactive rule is simply nonsensical. Justice Scalia's concurring opinion in *Bowen* asserts that under the APA there is no such thing as a retroactive rule.[130] As Justice Scalia argues, adjudication is retroactive, whereas rulemaking has prospective effect.[131] What this dichotomy misses is the possibility of overlap. If guidance is of general applicability and both retroactive and prospective effect, then it does have prospective effect. In any event, it should not be necessary to pigeonhole the idea of a retroactive tax rule into the APA's definition of rulemaking. The Court has held that Congress may choose the procedures for agency action, creating hybrid procedures distinct from the APA. For example, in *Florida East Coast Railway*, the Court approved of a procedure for certain boxcar tolls requiring both rulemaking and a hearing.[132] Section 7805(b) clearly contemplates the possibility of a rule the effective date of which precedes the rule's promulgation.

Assuming a retroactive regulation is procedurally valid, what standard of judicial deference applies? The central thesis of *Mead* is that if Congress would expect courts to defer to the agency's filling a gap with the type of guidance at issue *Chevron* applies.[133] *Mayo* has held that notice and comment Treasury regulations merit *Chevron* deference.[134] It makes little sense that Congress would not expect the same deference for the retroactive regulations that it has authorized in Section 7805(b). Indeed, retroactivity in and of itself has not been a reason to withhold deference outside the tax context: courts defer to an agency's position adopted in formal adjudications and to an agency's interpretation of its own guidance adopted in a brief filed in litigation.[135]

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130. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 216-17 (1988) (Scalia, J., concurring) ("The only plausible reading of the italicized phrase is that rules have legal consequences only for the future. It could not possibly mean that merely *some* of their legal consequences must be for the future, though they may also have legal consequences for the past, since that description would not enable rules to be distinguished from 'orders,' and would thus destroy the entire dichotomy upon which the most significant portions of the APA are based. (Adjudication—the process for formulating orders—has future as well as past legal consequences, since the principles announced in an adjudication cannot be departed from in future adjudications without reason.") (citation omitted)).

131. *Bowen*, 488 U.S. at 216-19.

132. United States v. Florida E. Coast Ry., 410 U.S. 224, 245-46 (1973) ("Here, the incentive payments proposed by the Commission in its tentative order, and later adopted in its final order, were applicable across the board to all of the common carriers by railroad subject to the Interstate Commerce Act. No effort was made to single out any particular railroad for special consideration based on its own peculiar circumstances. . . . The factual inferences were used in the formulation of a basically legislative-type judgment, for prospective application only, rather than in adjudicating a particular set of disputed facts.").

133. *See supra* text accompanying notes 88-90.

134. *See* Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 712-13 (2011).

135. *See* United States v. Mead Corp., 533 U.S. 218, 230 (2001).

Professor Lederman proposes that the facts surrounding the issuance of guidance, including retroactivity and unfair delay, should be a factor in arbitrary and capricious review under either *Skidmore* or *Chevron*, whichever is applicable.[136] In the context of *Chevron* deference, which would apply to notice and comment regulations, Lederman would take this into account as part of the arbitrary and capricious review of Step 2.[137] Though the proposal is analytically sound, I would emphasize the limits of the test. It is unlikely that a clarification, even if retroactive, would be invalid.[138] The principal challenge for the Treasury would appear to be changing a clear and firmly-established interpretation retroactively; in some instances, this could be arbitrary and capricious or, possibly, void for vagueness.[139]

B. Temporary Regulations

The IRS often has issued temporary regulations without notice and comment, finalizing the regulations after subsequently receiving comments (the "interim-final" method).[140] Professor Hickman has criticized the interim-final method, arguing that it ordinarily violates the APA's requirement of prior notice and comment.[141] Hickman also has argued not only that a temporary regulation is invalid, but that it may taint the final regulation to which it relates, assuming no APA exception applies, such as for "good cause" or interpretative rules.[142]

As Hickman explains, some courts have excused APA procedural flaws where post-promulgation comments evidenced an "open mind" toward comments or where undoing the regulations would not make a substantive difference.[143] Nevertheless, other courts are more concerned that making exceptions will gut the APA's notice and comment requirement.[144] Hickman argues that the Court should not engender chaos by invalidating hundreds of regulations that have been adopted in this manner.[145] Nevertheless, Hickman persuasively observes that a temporary regulation adopted in the midst of litigation

136. *See* Lederman, *supra* note 3, at 700.

137. *Id.* at 697-98.

138. *See* United States v. Home Concrete & Supply, LLC, 1836, 1852 (2012) (Kennedy, J., dissenting) (no impermissible retroactivity if "interpretation" of a provision "without an established meaning" rather than "change" occurs).

139. *See supra* text accompanying notes 62-64.

140. *See* Hickman, *Coloring Outside the Lines*, *supra* note 4, at 1759.

141. *See id.* at 1760.

142. *See* Hickman Brief, *supra* note 3, at 26. The good cause exception is intended to be very narrow. As Hickman explains, "the good cause exception exists principally to give agencies flexibility in dealing with emergencies and typographical errors, plus the occasional situation in which advance notice would be counterproductive." *See* Hickman, *supra* note 4, at 1782.

143. *See* Hickman Brief, *supra* note 3, at 27.

144. *See id.*

145. *See id.* at 28.

is too fundamentally flawed, because it will not foster meaningful public participation in the rulemaking process.[146]

Although I generally agree with Hickman's position, there is a stronger argument for upholding temporary regulations, and it would not invalidate litigation-oriented temporary regulations. The APA's notice and comment procedure[147] makes perfect sense under a working assumption that a rule cannot be retroactive. Indeed, the APA requires publication of a rule before the "effective date" of the rule.[148] This is flatly inconsistent with the Code's grant of retroactive rulemaking power. Under the current general grant to the Treasury of rulemaking authority, regulations ordinarily may apply to periods as early as the public has notice of the expected contents of the regulation.[149] Moreover, under the old grant, retroactivity was the default. If the IRS's position is correct, the old grant applies to regulations relating to most sections of the Code.[150]

If most tax regulations are legislative and the APA's good cause exception rarely applies, then a literal reading of the APA's notice and comment requirements would practically obliterate Section 7805(b). For example, the literal reading of the APA would imply that regulations under a brand new code section cannot take effect before the comment process has been completed and a final regulation issues, unless they are interpretative or qualify for the good cause exception, neither of which is likely. A more persuasive reading, in my view, is that in the context of tax administration, Congress wishes to incentivize notice to taxpayers of the rules to which they will be subject. Accordingly, the IRS should not be penalized for giving notice of its intentions early if it then solicits comments in a reasonable manner.

To approach the matter from a different angle, consider that agencies other than the Treasury Department generally have not been granted the authority to promulgate retroactive regulations.[151] For those agencies, the invalidation of a regulation on procedural grounds would have more impact. Under the APA, absent a court's exercise of remedial discretion, the fact that the public has notice of an agency's intentions to make a rule is irrelevant to the permissible effective date of the rule.[152] However, this is a situation where tax is exceptional, because the Code explicitly provides for tax regulations with an effective date prior to the enactment of final regulations.

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146. *See id.* at 30.

147. *See* 5 U.S.C. § 553(b)-(d) (2006).

148. *Id.*

149. *See* I.R.C. § 7805(b)(1)(C) (2012).

150. *See supra* text accompanying notes 126-28.

151. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

152. *See* Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 299 (2003) (noting that courts have sometimes exercised discretion to avoid disruptions when a rule falls to a procedural challenge).

Assuming temporary regulations are valid, what standard of judicial deference would apply? Temporary regulations, at least for a time, are binding. However, while the regulation is still temporary, it will implicitly not have gone through meaningful public participation that could be reflected in the rule. Therefore, *Skidmore* is probably the correct standard of judicial deference to apply to a temporary regulation.

Home Concrete and several other cases involved a common fact pattern.[153] The taxpayers engaged in tax shelter transactions leading to an overstatement of basis.[154] In general, the statute of limitations on assessment of tax is three years, but in the case of a substantial understatement of income, a six-year statute of limitations applies.[155] The IRS issued retroactive temporary regulations on this matter, which were finalized after receiving only one comment.[156] The regulations specified that an overstatement of basis constitutes an omission from gross income for purposes of the six-year statute of limitations.[157] Effectively, this reopened tax years that were closed, assuming that the three-year statute of limitations applied before the regulations were finalized.

The Supreme Court in 1958 had held that overstated basis was not an omission for purposes of the predecessor to the current statute of limitations on assessment.[158] However, the IRS claimed *Chevron* deference under *Brand X*.[159] As discussed above, *Brand X* allows an agency to adopt a construction of a statute, even if it differs from the construction that a court has previously adopted, so long as the statute is not unambiguous. Thus, an initial issue is whether the statute of limitations is ambiguous. Circuits split on this Chevron step 1 issue of ambiguity.[160]

The Court, however, decided the case at step 1, relying on the *Colony* precedent.[161] Invalidating the regulations as contrary to statute rendered questions under the APA procedural rules and judicial deference doctrines superfluous. Thus, it remains unclear what the Court thinks about validity of and deference applicable to temporary regulations in general, or retroactive temporary regulations in particular.

Justice Kennedy, writing in dissent for four justices, focused primarily on the issue of whether there was statutory ambiguity.[162] Justice Kennedy argued that statutory amendments not considered in

153. *See* Lederman, *supra* note 3, at 679.
154. *See* United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1836 (2012).
155. I.R.C. § 6501(a), (e)(1)(A) (2012).
156. *See* Hickman Brief, *supra* note 3, at 31.
157. *Home Concrete*, 132 S. Ct. at 1842.
158. *See id.*
159. *Id.* at 255-56.
160. *See* Lederman, *supra* note 3, at 681-87 (describing the holdings of the Circuit courts).
161. *Home Concrete*, 132 S. Ct. at 1836-37.
162. *Id.* at 1849.

Colony left interpretive space for the Treasury's new interpretation.[163] After concluding that the statute was ambiguous, Justice Kennedy tersely observed that the Treasury's interpretation was "reasonable," citing *Mayo*.[164] Moreover, as a "clarification" or "interpretation," the interpretation did not "upset legitimate settled expectations" or "have an impermissible retroactive effect."[165]

Thus, at least four justices in *Home Concrete* would have held that *Chevron* deference applied to interim-final regulations that clarified rules applying to prior tax years. However, Justice Kennedy's opinion provides very little insight into the reasoning behind the dissent's conclusions concerning the APA and deference doctrines, and the majority opinion does not address these issues at all.

C. Revenue Rulings

Revenue rulings are interpretations published in the Internal Revenue Bulletin by the IRS, without undergoing notice and comment. Revenue rulings generally apply rules to specific factual situations. The IRS does not claim the same authority for revenue rulings as Treasury regulations, yet they are still binding to some degree. In general, revenue rulings apply retroactively and prospectively, unless the IRS exercises its discretion to apply the authority prospectively only.[166]

Because disregard of a revenue ruling may lead to penalties, it makes sense to think of a revenue ruling as binding, even if the IRS labels a revenue ruling as being less binding than a regulation.[167] Therefore, a revenue ruling should be procedurally valid only if it is interpretative rather than legislative, because the ruling will not undergo APA notice and comment or a similar procedure.

The appropriate standard of judicial deference for a revenue ruling is *Skidmore*. Although revenue rulings probably have enough force of law to qualify under *Chevron*, they do not undergo the kind of process that Congress would expect to receive deference.

D. Litigating Positions

The Supreme Court repeatedly has applied *Auer* deference to an agency's interpretations of an agency's own authorities, even if the interpretation is advanced in a brief in litigation. In *Auer*, the Supreme Court held that a reviewing court owed deference to the Secre-

163. *Id.* at 1850-51.
164. *Id.* at 1852.
165. *Id.* at 1853.
166. I.R.C. § 7805(b)(8) (2012).
167. *See* I.R.C. § 6662(a), (b)(1) (2012).

tary of Labor's interpretation of a regulation, unless the interpretation was "plainly erroneous."[168]

A key issue is whether the agency claiming *Auer* deference is really interpreting preexisting guidance rather than generating new guidance. An agency cannot simply "parrot" the statute it is charged with implementing in a regulation and then claim *Auer* deference for its interpretation of the statute; the agency must use its expertise to enact an interpretation that it subsequently interprets.[169] In the tax context, some regulations do little more than repeat the relevant Code section; subsequent interpretations of those regulations should not be eligible for *Auer* deference.[170]

IV. CONSTITUTIONAL LIMITATIONS ON RETROACTIVITY

As this Article has discussed, certain IRS modalities may validly—at least under the Code—take effect retroactively. This Part examines whether this statutory flexibility is unconstitutional. In short, although there may be outlier examples, retroactivity generally has not been suspect under the Constitution. Since the early twentieth century *Lochner*-era high water mark of judicial review of economic legislation, the Supreme Court has not found a tax unconstitutional on account of retroactivity. In addition, more generally beyond tax, the Supreme Court's review of retroactivity has been extremely deferential.

Two analytical frameworks may be relevant where retroactive tax rules impose an economic burden on a taxpayer: substantive due process and regulatory takings.[171] Although the matter is not free from doubt, the proper doctrine within which to situate review is the substantive guarantee of the Due Process Clause. That said, it makes little difference whether one looks to substantive due process or regulatory takings jurisprudence. Under either framework, the post-*Lochner* era decisions of the Court have invalidated only shockingly unfair retroactivity involving arguably unforeseeable liabilities.

168. *See supra* text accompanying notes 98-102.

169. *See* Gonzales v. Oregon, 546 U.S. 243, 257 (2006).

170. *See, e.g.*, Treas. Reg. § 1.61-1(a). Just because the Treasury has summarized the Section 61 definition of "gross income" in a final regulation does not mean that its litigating positions with respect to what constitutes income will be reviewed on a "plainly erroneous" standard.

171. *See generally* Ronald J. Krotoszynski, *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713 (2002). Additional constitutional guarantees limit the government's ability to impose criminal liability for tax misconduct. Although it is beyond the scope of this Article, the Ex Post Facto Clause and vagueness doctrines will probably limit retroactivity in criminal matters far more than in civil matters.

A. Substantive Due Process

The latest pronouncement from the Supreme Court on the question whether substantive due process is violated by retroactivity is *Eastern Enterprises v. Apfel*.[172] The Supreme Court's decision in *Eastern Enterprises* is also the perfect showcase for the question of which analytical framework applies when new rules deprive a person of money but not a specific property or use of property. Piecing together the opinions in the 4-1-4 decision, five justices embraced substantive due process as the correct analytical framework,[173] but only Justice Kennedy was convinced that the guarantee was violated by the retroactive imposition of a liability.[174] The four other justices that applied substantive due process analysis concluded that even reaching back over multiple decades to impose a new multimillion-dollar liability was foreseeable and constitutionally unassailable.[175] Only four justices looked to regulatory takings doctrine, but combined with Justice Kennedy's substantive due process vote, a majority held in favor of Eastern Enterprises.[176]

Justice Kennedy dismissed the Coal Act's imposition of "a staggering financial burden" on Eastern Enterprises as a trigger for the Takings Clause, because the law did not "operate upon or alter an identified property interest, and it [was] not applicable to or measured by a property interest."[177] Similarly, the Coal Act did not "encumber an estate in land . . . , a valuable interest in an intangible . . . , or even a bank account or accrued interest."[178] Because the Coal Act was "indifferent as to how the regulated entity elects to comply or the property it uses to do so,"[179] there was no issue under the Takings Clause.[180] As Professor Krotoszynski writes, Justice Kennedy's test for a takings claim appears to search for "a specific res that the government seeks to seize or control."[181]

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172. 524 U.S. 498 (1998).
173. *Id.* at 504.
174. *See infra* text accompanying notes 177-81.
175. *See infra* text accompanying notes 201-06.
176. *E. Enters.*, 524 U.S. at 503-51.
177. *Id.* at 540. (Kennedy, J., concurring).
178. *Id.*
179. *Id.*
180. *Id.* ("To the extent it affects property interests, it does so in a manner similar to many laws; but until today, none were thought to constitute takings. To call this sort of governmental action a taking as a matter of constitutional interpretation is both imprecise and, with all due respect, unwise.").
181. *See* Krotoszynski, *supra* note 171, at 745. Krotoszynski persuasively defends Justice Kennedy's approach and explains what is really at stake:

> In Justice Kennedy's view, the Supreme Court should avoid an open-ended approach to the Takings Clause because it would require federal courts routinely to engage in "normative considerations about the wisdom of government decisions." As Justice Kennedy properly notes, the Takings Clause does not limit

As the facts will demonstrate, it is telling about the narrow scope of substantive due process that *Eastern Enterprises* was such a close decision. In 1992, Congress enacted the Coal Industry Retiree Health Benefit Act, imposing health benefit funding obligations on entities that employed or had employed coal miners, even in the distant past.[182] Before the act, a series of voluntary industry agreements negotiated with unions were responsible for funding health benefits beginning in the 1940s.[183] By the 1970s, the market negotiated funding proved inadequate to providing benefits to which the miners believed they were entitled.[184] In 1988, Congress, the industry, and unions began working on a plan to reform the area.[185] Congress ultimately required any signatory to the prior health benefit agreements to fund comprehensive benefits for retirees; this was true even if the company no longer operated in the coal industry.[186] The requirement was particularly a surprise for many companies because their agreements had expressly conditioned benefits on adequate funding under the pre-existing mechanism.[187]

Writing for four dissenters, Justice Breyer agreed with Justice Kennedy that substantive due process is the correct analytical framework: "there is no need to torture the Takings Clause to fit this case" because "the question involved—the potential unfairness of retroactive liability—finds a natural home in the Due Process Clause, a Fifth Amendment neighbor."[188] Applying the Due Process Clause, Justice Breyer did not find the Coal Act's funding provisions to be sufficiently arbitrary or unfair to warrant invalidation. He reached this conclusion because "the relationship between Eastern

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> the scope of permissible government action; rather, it merely requires the government to pay for the property interests that it takes. If the question presented goes to the basic fairness or legitimacy of the government's policy, rather than the question of compensation, a reviewing court should employ the Due Process Clause rather than the Takings Clause.
>
> Justice Kennedy's policy arguments are quite sound and his demarcation of the line between takings claims and substantive due process claims makes a great deal of sense. When government acts in a way that affects a particular property interest, and does so intentionally, expropriatory intent may well be present. But the specificity of the government's action vis-a-vis a property interest will not invariably indicate a government action that is tantamount to an expropriation. Moreover, as will be discussed in greater detail below, a regulatory takings doctrine focused on the specificity of the government's demand could be easily evaded. Thus, Justice Kennedy's definition of a taking does not entirely foreclose the plurality's analysis of the Coal Act.

Id. at 745-46 (footnotes omitted).

182. *E. Enters.*, 524 U.S. at 513.
183. *Id.* at 504-06.
184. *Id.* at 508-10.
185. *Id.* at 511-12.
186. *Id.* at 514.
187. *Id.* at 507-08.
188. *Id.* at 556 (Breyer, J., dissenting).

and the payments demanded by the Coal Act is special enough to pass the Constitution's fundamental fairness test."[189] The special relationship was due to the fact that Eastern Enterprises arguably benefited from the miners' labor and had made promises to them to provide health benefits, notwithstanding the fact that the promises were legally unenforceable.[190]

Justice Kennedy's concurrence, in contrast, purports to apply rationality review, but clearly does so with somewhat more bite than typical rationality review. Justice Kennedy notes that due process prevents retroactivity from being imposed in an "arbitrary and irrational way."[191] Although this may sound exactly like the lenient standard of review typically applied to prospective economic legislation, Justice Kennedy suggests cryptically that "justifications for the latter may not suffice for the former."[192] Ultimately, Justice Kennedy finds the Coal Act's retroactive imposition of liability "bears no legitimate relation to the interest which the Government asserts in the support of the statute."[193] The thirty-five year time frame appears to be key to this conclusion; Justice Kennedy reminds, "Statutes may be invalidated on due process grounds only under the most egregious of circumstances. This case represents one of the rare instances in which even such a permissive standard has been violated."[194]

Tax cases in the post-*Lochner* era have sounded the same permissive substantive due process themes. In the latest Supreme Court case on retroactive taxation, the Court held that a retroactive amendment of the estate tax did not violate substantive due process.[195] In 1985, before a later amendment, the Code allowed a deduction of half the proceeds of a sale of securities to an employee stock ownership plan.[196] The scope of the deduction was a mistake; Congress had intended to limit the deduction to stock already owned by the decedent.[197] Wilmetta Kay's executor, Jerry Carlton, purchased millions of dollars worth of stock, which he then sold, thereby reducing Kay's estate tax due by approximately $2.5 million.[198] The IRS published a policy of disallowing the deduction where the decedent had not owned stock prior to death, and Congress followed by retroactively enacting the "decedent ownership requirement."[199] Thus, assuming

189. *Id.* at 559.
190. *Id.* at 559-61.
191. *Id.* at 547 (Kennedy, J., concurring).
192. *Id.* at 548 (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16-17 (1976)).
193. *Id.* at 549.
194. *Id.* at 549-50.
195. United States v. Carlton, 512 U.S. 26, 35 (1994).
196. *Id.* at 28.
197. *Id.* at 29.
198. *Id.* at 28.
199. *Id.* at 29.

the revision was constitutional, Kay's estate owed a large additional estate tax liability.

Carlton's due process challenge failed in district court but succeeded on appeal in the Ninth Circuit.[200] The Ninth Circuit placed substantial weight on the taxpayer's actual reliance on the loophole and lack of notice.[201] The Supreme Court reversed, noting that the "due process standard to be applied to tax statutes with retroactive effect, therefore, is the same as that generally applicable to retroactive economic legislation."[202] Specifically, "[p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches."[203]

The Court found Congress' purpose of correcting a mistake legitimate, and observed that a period of a little more than a year was a "modest" period of retroactivity.[204] Presumably, the period of retroactivity relates to the rationality of the means of effecting a legitimate purpose. The short period at issue in *Carlton* made the decision easy, in light of *Welch v. Henry*, which approved of a two-year period of retroactivity for a state income tax amendment, taxing previously tax-exempt dividends.[205] *Carlton* was, perhaps, even easier because it involved a correction rather than a wholly new tax, as in *Welch v. Henry*. Moreover, the Court disavowed *Lochner*-era retroactivity cases invalidating retroactive taxes: "Those cases were decided during an era characterized by exacting review of economic legislation under an approach that 'has long since been discarded.' "[206]

Although the Court has repeatedly blessed "modest" retroactivity, it has not decided a tax case involving more than modest retroactivity.[207] There is much play in the joints between two years' retroactivity and two decades' retroactivity that the Court's precedents do not squarely address. Justice Scalia observes, however, that the majority's approach will allow any retroactive tax:

> The reasoning the Court applies to uphold the statute in this case guarantees that *all* retroactive tax laws will henceforth be valid.

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200. *Id.*

201. *Id.* at 29-30.

202. *Id.*

203. *Id.* at 30-31 (quoting Pension Benefit Guar. Co. v. R.A. Gray & Co., 467 U.S. 717, 729-30 (1984)).

204. *Id.* at 32.

205. 305 U.S. 134, 150 (1938).

206. *Carlton*, 512 U.S. at 34 (quoting Ferguson v. Skrupa, 372 U.S. 726, 730 (1963)).

207. *See* Robert R. Gunning, *Back from the Dead: The Resurgence of Due Process Challenges to Retroactive Tax Legislation*, 47 DUQ. L. REV. 291, 312-22 (2009) (surveying lower federal and state court cases, which have split on whether to allow multiyear retroactivity in taxation).

> To pass constitutional muster the retroactive aspects of the statute need only be "rationally related to a legitimate legislative purpose." Revenue raising is certainly a legitimate legislative purpose, and any law that retroactively adds a tax, removes a deduction, or increases a rate rationally furthers that goal.[208]

Nevertheless, Justice Scalia is probably exaggerating the weakness of the narrow tailoring prong; the majority may not be imposing much bite, but surely there is a nibble at the margins.

It is impossible to be sure whether Justice Scalia's warning is correct—that there is no substantive due process in taxation. This Article posits that there are limits, but they are yet to be discovered. The Court's existing jurisprudence seems to envision a sliding scale where there is more latitude to make clarifications and amendments than wholly new taxes, and where pre-tax profit expectations reduce the scope of retroactivity. For example, could a new national sales tax constitutionally attach to transactions occurring within the last ten years? Probably not, but the political process presumably would keep a wholly new retroactive tax from reaching far back to burden commonplace non-tax motivated transactions. In borderline cases, where there is simply an amendment within an existing scheme of taxation (e.g., income, estate and gift, excise, etc.) or where there is little or no reason absent a tax benefit to engage in a transaction, the reach of retroactivity is less clear; moreover, it is less clear that the political process can be relied upon to protect the taxpayer.[209] Yet the Court's substantive due process jurisprudence on retroactivity, grounded in its permissive review of economic legislation, seems to invite just that: the taxpayer's protection is the political process in all cases but those featuring the most shocking government action.

Just this year, the Court reaffirmed that a very narrow standard of review applies to classifications in taxation. Although not precisely on point, *Armour v. City of Indianapolis*[210] may be telling for the Court's receptivity—or lack thereof—to due process claims based on retroactivity. In 2005, Indianapolis adopted a new assessment and payment method and forgave any Barrett Law installments (related to apportioned costs of sewer improvements) that lot owners still owed.[211] Owners who had prepaid their entire assessment claimed that the city's refusal to provide a refund violated the Equal Protec-

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208. *Carlton*, 512 U.S. at 40 (Scalia, J., concurring) (citations omitted).

209. Although the Supreme Court's denial of certiorari is not precedential, one cannot help but consider the recent case of Miller v. Johnson Controls, 296 S.W.3d 392 (Ky. 2009), *cert. denied*, 130 S. Ct. 3324 (2010). In *Johnson Controls*, corporate taxpayers challenged a retroactive abolition of consolidated return filing, stretching back up to 9 years, effectively denying the taxpayers' refund claims. 296 S.W.3d at 394; *see also* Gunning, *supra* note 207, at 321-22.

210. 132 S. Ct. 2073 (2012).

211. *Id.* at 2078-79.

tion Clause.[212] Applying rational basis review (without bite), the Court concluded that administrative convenience justified failure to provide a refund of prepaid assessments.[213] Three justices, in dissent, would have held that the gross differential taxation, weighed against the ease of processing a refund, was a violation of the Equal Protection Clause.[214]

The *Armour* dissenters' concern with gross differences in taxation is actually a reason that supports retroactive rules—they apply the same rules to similarly situated taxpayers.[215] Prospective-only rules give more notice, but treat similarly situated taxpayers differently. Perhaps it is impossible to perfectly balance the values of equal protection with due process values in taxation. The Supreme Court appears to have left these trade-offs largely to the discretion of Congress, states, and agencies.

B. Regulatory Taking

As discussed above, although there is a shaky doctrinal basis for doing so, in *Eastern Enterprises* Justice O'Connor's four-justice plurality opinion applied the three-part test for regulatory takings first enunciated in *Penn Central* to a retroactive liability for health benefits imposed on a coal mining company.[216] It is unclear whether this is simply *sui generis* or whether the Court will again embrace this unusual application of the Takings Clause. As Justice Kennedy noted, the Court had never applied *Penn Central* except where a "specific property right or interest has been at stake."[217]

Under the *Penn Central* regulatory takings test, a reviewing court must consider "the economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action."[218] Surprisingly, given this landscape, Justice O'Connor regarded the Supreme Court's essential task as making an inquiry into basic notions of "justice and fairness,"[219] which is tradi-

212. *Id.* at 2079.

213. *Id.* at 2079-82.

214. *See id.* at 2087 (Roberts, C.J., dissenting) ("Our precedents do not ask for much from government in this area—only 'rough equality in tax treatment.' The Court reminds us that *Allegheny Pittsburgh* is a 'rare case.' It is and should be; we give great leeway to taxing authorities in this area, for good and sufficient reasons. But every generation or so a case comes along when this Court needs to say enough is enough, if the Equal Protection Clause is to retain any force in this context.") (quoting Allegheny Pittsburgh Coal Co. v. Comm'n of Webster Cnty., 488 U.S. 336, 343 (1989) (citations omitted)).

215. *Id.* at 2085.

216. E. Enters. v. Apfel, 524 U.S. 498, 529 (1998).

217. *Id.* at 541 (Kennedy, J., concurring).

218. *E. Enters*, 524 U.S. at 518, 523-24.

219. *Id.* at 523.

tionally the domain of substantive due process.[220] In this regard, Justice O'Connor observes, if "severe retroactive liability [is imposed] on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience," it violates the Takings Clause.[221]

Justice O'Connor's plurality opinion summarily checks off each element of the *Penn Central* test.[222] First, the Coal Act's multimillion-dollar economic impact on Eastern Enterprises was "considerable" and "substantial."[223] Moreover, "the company is clearly deprived of the amounts it must pay the Combined Fund."[224] This observation about deprivation is clearly and always true of financial exactions, and obscures the prior history of regulatory takings cases inquiring into the extent of a deprivation of property or the use of property. The opinion concludes that the Coal Act interferes with "reasonable investment backed expectations" and that the "nature of the governmental action" is "quite unusual."[225] These conclusions appear to be simultaneous with one another; the action is quite unusual because it is retroactive, and it interferes with reasonable expectations because it is retroactive. What is conspicuously omitted is an inquiry into what expectations are "reasonable." One could have simultaneously found that it is foreseeable to have liability from an employment relationship in a high-risk industry, and therefore the action was not all that unusual.

Justice O'Connor underscores that even under the Takings Clause, the plaintiff bears a "substantial" burden.[226] The trouble for the government, or the opportunity for the plaintiff, is that in the analysis of regulatory takings of money, the courts are in essentially uncharted waters. Even if the burden under the regulatory takings analysis should be approximately the same as under the due process analysis, a court applying the test will be left with far more discretion. The institutional effect of switching from a precedent-laden area to a new and unsettled area is, as Professor Krotoszynski explains, potentially great:

> Over time, precedents would develop that delimit how and when government acts with expropriatory intent. As these cases begin to accrue, judges wishing to depart from earlier precedents arbitrarily will find undertaking such a task increasingly difficult. Because the essence of the art of judging is giving reasons in support of results, the de facto discretion of judges to apply the expropriatory

220. *See* Krotoszynski, *supra* note 171, at 724-25.
221. *E. Enters.*, 524 U.S. at 528-29.
222. *Id.* at 518.
223. *Id.* at 529.
224. *Id.*
225. *Id.* at 532, 537.
226. *Id.* at 523.

> intent requirement in an arbitrary fashion would recede over time as the precedents defining and applying the standard became more numerous. In the end, as Justice Frankfurter once explained, "The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work."[227]

Thus, for deprivations of money, a regulatory taking claim may be more powerful than a substantive due process claim. It bears repeating, however, that *Eastern Enterprise*'s regulatory takings analysis did not garner five votes.

C. The Presumption Against Retroactive Application of Statutes

The Supreme Court has developed common law principles concerning whether to apply an unclear statute retroactively or only prospectively. By all accounts, the Supreme Court's jurisprudence in this area is confusing, including continual U-turns and backpedaling over the years. Professor Basset writes, "A careful analysis of the Court's decisions reveals a consistent approach to retroactive legislation—an approach ultimately based in fundamental principles of fairness, but which has been masked by the Court's terminology."[228] One confusing aspect of the decisions is superficially mandatory language that is sometimes taken out of context.

As an example, the Supreme Court has suggested that a statute "may not" be applied retroactively to revive an old and cold claim that is time barred. In *Hughes Aircraft*, the Court in dictum approvingly referenced the conclusion of *Chenault*, a Ninth Circuit case that "a newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme because to do so would alter the substantive rights of a party and increase a party's liability."[229] Neither of these cases, however, involved a constitutional claim. The words "may not" sometimes mean simply that an interpretation is foreclosed under a statute being interpreted, not that the effect, if it had been clearly legislated, would be unconstitutional.

The statutory interpretation cases were not directed toward, and should not be imported into, substantive due process or arbitrary and capricious analysis.[230] Congress has clearly provided authority for

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227. Krotoszynski, *supra* note 171, at 767 (footnotes omitted).

228. Debra Lyn Basset, *In the Wake of* Schooner Peggy*: Deconstructing Legislative Retroactivity Analysis*, 69 U. CIN. L. REV. 453, 454 (2001).

229. Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 950 (1997) (citing Chenault v. U.S. Postal Service, 37 F.3d 535, 537, 539 (9th Cir. 1994).

230. *But see, e.g.*, Smith, *supra* note 3, at 62-64 (arguing that factors from statutory interpretation cases involving retroactivity should be applied to tax analysis).

retroactive tax rules in Section 7805(b).[231] Moreover, the IRS is generally punctilious about specifying the effective date for a section of the Regulations, sometimes applying different effective dates for different paragraphs. If a tax rule is retroactive, arbitrary and capricious review should require an explanation of the need for retroactivity, and in extreme cases constitutional claims may be successful.

In sum, the Court has rejected, under one theory or another, constitutional challenges against all but the most shocking and egregious retroactivity. That is true even when the rules are completely new. There is, to be sure, a gray area between cases that have clearly approved two years of tax retroactivity and cases that have barely struck down decades of non-tax retroactivity. The signals from a majority of the Court, however, suggest that a few years of tax retroactivity would be acceptable, even for a wholly new rule. Moreover, in many situations, retroactivity will not come in the form of a wholly new rule, but will instead be more in the nature of a clarification of an unclear area. There may also be bad faith on the part of the taxpayer, which could lead a court to conclude that retroactivity is not conscience shocking, fundamentally unfair, or unforeseeable under the circumstances.

V. OUTLINE OF REFORM OPTIONS

Although the idea of combining functions in agencies is nothing new,[232] it is likely that the public would object especially to reducing the role of the courts in the adjudication of tax controversies. To the extent that the IRS receives deference for tax guidance—particularly retroactive tax guidance—the role of courts diminishes. Accordingly, this Part briefly sketches a comparison of potential reforms of the current system.

A. No Change

The strength of judicial review as a protection for the taxpayer depends on the government's process in creating and disseminating tax guidance. As discussed above, the IRS and Treasury have at their disposal a variety of modalities in which to make policy, but some of these modalities will receive less judicial deference than others. Although the proposition is not entirely free from doubt, tax guidance issued without notice and comment should probably receive only *Skidmore* deference rather than *Chevron* deference. Of course, the government is free to use notice and comment procedures and receive *Chevron* deference. Thus, at least in this respect, the taxpayer's protection from abuse primarily lies outside of the courts.

231. 26 U.S.C. § 7805(b) (2006).
232. *See* sources cited *supra* note 37.

Even though the Treasury's use of notice and comment rulemaking process will often limit the role of judicial review of tax controversies, this does not leave the taxpayer completely unprotected. The rights to notice and to make comments do not guarantee the best outcome to any particular taxpayer, but they do afford interested parties a chance to air their views and to build a record more favorable to their position. The government, in turn, must consider the comments and have a reasoned explanation in order to survive an arbitrary and capricious challenge. The IRS's past procedures have been deficient,[233] but the IRS has acknowledged that it will need to internalize *Mayo*'s command to follow general principles of administrative law.[234] Assuming that the IRS does adhere to the APA more diligently in the future, taxpayers will have a better chance to have their views heard, but this is no guarantee they will be pleased with the decision the IRS adopts. And again, assuming the IRS makes better use of notice and comment rulemaking, its actions should receive *Chevron* deference from reviewing courts.

Perhaps the most powerful constraint on unfair action by the IRS is the political process. Unlike courts, agencies are subject to oversight by Congress and supervision by the President. Therefore, the public can indirectly bring pressure to bear on the IRS through elected officials, even though the public does not have direct influence on the IRS. Congress has often threatened, at least implicitly, to de-fund an agency that is not responsive to its concerns.[235] Indeed, the notice and comment rulemaking process serves an important function in facilitating congressional supervision of the agency.[236] These constraints limit the extent to which the IRS would engage in truly arbitrary enforcement of the tax laws.

Retaining the status quo has the benefit of allowing the IRS flexibility to respond to unanticipated abuse of the tax system. But that flexibility is at the same time its curse; it is often said that American

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233. *See* Hickman, *Coloring Outside the Lines*, *supra* note 4, at 1748.

234. *See* INTERNAL REVENUE MANUAL, § 32.1.2.3 (2011) *available at* http://www.irs.gov/irm/part32/irm_32-001-002.html (outlining administrative law requirements).

235. *See* Alan L. Feld, *The Shrunken Power of the Purse*, 89 B.U. L. REV. 487, 493 (2009). As Feld explains:

> Congressional committees can review how an agency has used appropriated funds, but Congress cannot retrieve funds the agency has spent or committed. Frequently, the agency and the relevant committees are continuing players, and the threat of reduced funding in subsequent years may constrain agency action that strays too far from congressional intent. Thus, in some cases formal discretion over spending devolves from Congress to the executive agency with continuing informal oversight from one or more congressional committees. The threat the committees hold concerns the power to appropriate funds for the future.

Id.

236. *See* Lisa Schultz Bressman, Chevron's *Mistake*, 58 DUKE L.J. 549, 580-83 (2009) (discussing how administrative procedures facilitate legislative monitoring).

culture is distrustful of government, and particularly distrustful of the taxing power.[237] Given how cumbersome the federal political process is, taxpayers may not be satisfied with a political check on the IRS. Thus, it is worthwhile to consider other potential solutions. By process of elimination—if agency processes and the political process are bracketed as not completely satisfactory—a solution must involve shifting responsibility for the tax laws to the courts.

B. Restructure Tax Litigation

The current tax litigation process is byzantine, leads to forum shopping, and obtains different results for similarly situated taxpayers.[238] After the IRS has identified a deficiency in income reported on the taxpayer's tax return and notified the taxpayer of its finding, the taxpayer has essentially two routes available. One option is to contest the deficiency without paying the additional tax liability; in this situation, the taxpayer must litigate in Tax Court.[239] The other option is to pay the deficiency and then sue for a refund. The taxpayer may sue for a refund in district court or the Court of Federal Claims.[240] In many cases, the primary reason for suing for a refund rather than litigating in Tax Court is to benefit from having a non-specialist judge in district court hear the case, or to be bound by the precedents of the Federal Circuit, which apply in the Court of Federal Claims.[241]

In Tax Court, specialist judges will adjudicate; in refund court, generalist judges will adjudicate. Presumably, the decision reached by a tax specialist will often differ from the decision reached by a generalist. Though not empirically proven, this is certainly received wisdom among tax lawyers.[242] Assuming that a drawback of allowing courts to exercise primary decisionmaking authority is lack of expertise, that concern is less forceful in the case of the Tax Court. In other words, its institutional advantages include independence and expertise.

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237. *See* Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L.J. 239, 243 (2005) ("Whatever the merits of delegation in other contexts, however, one should view with skepticism delegations of authority over the ability to raise and expend revenue.").

238. *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 69 (1990).

239. *See* Thomas D. Greenaway, *Choice of Forum in Federal Civil Tax Litigation*, 62 TAX LAW. 311 (2009).

240. *See id.* at 311.

241. *See* David B. Porter, *Where Can You Litigate Your Federal Tax Case?*, 98 TAX NOTES 558, 559-60 (2003). Other factors influence the choice of forum. All three forums have different procedural rules. *See* Greenaway, *supra* note 239, at 319-22 (discussing pleading, statute of limitations, and other rules).

242. *Cf.* Greenaway, *supra* note 239, at 331 ("Moreover, at risk of stating the obvious, counsel should always consider whether they want their case decided by a tax specialist, a specialist in money disputes with the government, or a generalist—that is, a Tax Court judge, a Court of Federal Claims judge, or a district court judge.").

Given these differences in Tax Court and refund courts, Congress might enact legislation consolidating tax controversies in the Tax Court, ending or limiting deference by the Tax Court to the IRS and Treasury's guidance, and instructing appellate courts to defer to Tax Court's decisions.[243] In the 1940s, before *Dobson v. Commissioner*[244] was legislatively overruled,[245] appellate courts were instructed to defer to the Tax Court on legal questions, but the courts resisted doing so.[246] Moreover, tax and nontax law may be able to benefit from one another; this cross-pollination would arguably be hindered by removing trials of tax controversies from generalist courts.[247]

Even if appellate courts were to defer to Tax Court decisions, there would still be a range of discretion. There is a risk that an appellate court would erroneously conclude that a Tax Court decision was unreasonable. Another option would be to simplify the appellate system by creating a United States Court of Tax Appeals, which would hear appeals from the Tax Court, and remove tax cases from district court and the Court of Claims. This was proposed for other reasons by the Federal Courts Commission in 1990.[248] Besides the benefit of additional expertise in the court, taxpayers living in different areas of the country would be subject to the same tax precedents.

Finally, another option would be to limit deference to the IRS in small tax controversies. Income and asset limitations would need to be considered. As the sophistication of the taxpayer increases, it is more reasonable to charge the taxpayer with anticipating administrative change and clarification, and to cooperate proactively with the tax administration. There may be a compliance benefit in having average taxpayers feel that they have a real chance to contest tax matters in court.

VI. CONCLUSION

This Article has drawn from general principles of administrative law to inform questions surrounding the validity of and deference owed to various forms of tax guidance. A focus on the unusual case of

243. *Cf.* Mitchell M. Gans, *Deference and the End of Tax Practice*, 36 REAL PROP. PROB. & TR. J. 731, 789-90 (2002) (proposing a single tax trial court and limiting the scope of appellate review or creating a new circuit court with jurisdiction over all tax appeals). A discussion of the constitutionality of "statutory directives" is beyond the scope of this Article. For a discussion of this problem, see Linda D. Jellum, *"Which is to be Master," The Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837 (2009).

244. Dobson v. Comm'r, 320 U.S. 489 (1943).

245. *See* I.R.C. § 7482(a) (2012).

246. *See* Lederman, *supra* note 3, at 669-70.

247. *See* Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 590 (1994); Lederman, *supra* note 3, at 670.

248. *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 69 (1990).

retroactive tax rules sheds new light on more typical prospective tax guidance. Treasury regulations promulgated with notice and comment, even retroactive regulations, ordinarily should receive *Chevron* deference. Other binding authorities, such as revenue rulings and regulations issued without notice and comment, ordinarily should receive *Skidmore* deference.

The Internal Revenue Code's unusual grant of retroactive rulemaking power to the Treasury Department means that tax administration can be more flexible procedurally than administrative action in general. This flexibility, of course, presents a potential for abuse. Accordingly, this Article has considered potential constitutional limitations on retroactive tax rules and has sketched potential reforms to shift decisionmaking power back to the courts. No solution will eliminate the potential for upset expectations in the tax administration; the question is really what institution will be the source of clarification and change?