Tax Myopia Meets Tax Hyperopia: The Unproven Case Of Increased Judicial Deference To Revenue Rulings

PAUL L. CARON*

I. INTRODUCTION

I previously have criticized what I call "tax myopia"[1]—the tendency of the tax law to view itself as an isolated body of law separate from other areas of law.[2] I have argued that this tax-centric thinking has adverse consequences in a variety of situations where the tax cognoscenti too often slight nontax learning.[3] Among those I have criticized for their myopic view of tax law is Professor Linda Galler.

---

* Professor of Law, University of Cincinnati College of Law. Georgetown University, A.B. 1979; Cornell Law School, J.D. 1983; Boston University, LL.M. (Taxation) 1988. I want to thank John Applegate, Jean Braucher, Dorothy Brown, J. Shepard Bryan III, Karen Burke, Tom Eisele, Grayson McCouch, Joe Tomain, and Glen Weissenberger for their comments on earlier drafts of this article. I am grateful for the heroic research assistance provided by Jim Hart and Frank Rieman.

[1] Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to be Tax Lawyers*, 13 VA. TAX REV. 517 (1994) [hereinafter Caron, *Tax Myopia*]; *see also* Paul L. Caron, *When Does Life Begin for Tax Purposes?*, 68 TAX NOTES 320, 320 (1995) [hereinafter Caron, *When Does Life Begin?*].

[2] Other commentators have embraced this "provocative . . . comment on the relationship between tax and other legal disciplines." Michael Livingston, *Confessions of an Economist Killer: A Reply to Kronman's "Lost Lawyer,"* 89 NW. U. L. REV. 1592, 1602 n.27 (1995) (book review); *see also* Jeffrey L. Jacobs, *Tax Planning for a Religious Jihad*, 64 TAX NOTES 1626, 1626 (1994).

[3] *See* Paul L. Caron, *Estate Planning Implications of the Right of Publicity*, 68 TAX NOTES 95, 95-96 (1995) (criticizing courts for subjecting right of publicity embodied in famous decedent's name to federal estate tax without consideration of how such interests are treated under state property law); Paul L. Caron, *The Role of State Court Decisions in Federal Tax Litigation:* Bosch, Erie, *and Beyond*, 71 OR. L. REV. 781 (1992) (criticizing courts and commentators for inadequate attention to principles of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), in debate over appropriate mechanism to determine meaning of state law in federal tax litigation); Caron, *Tax Myopia*, *supra* note 1, at 531-54 (criticizing courts and commentators for ignoring nontax developments in statutory construction and legislative process theory in advocating unique role for legislative history in construing Internal Revenue Code (the "Code")); Caron, *When Does Life Begin?*, *supra* note 1, at 324 (criticizing courts and Internal Revenue Service (the "Service") for grappling over definition of "person" for tax purposes without consideration of how issue has been addressed in other areas of law).

In a 1992 article,[4] Galler used *Davis v. United States*[5] as a vehicle for examining the appropriate amount of deference that courts should give to revenue rulings issued by the Internal Revenue Service.[6] According to Galler, the Court in *Davis*: (i) endorsed a new and dramatically heightened standard of judicial deference in directing that "considerable weight" be given to revenue rulings;[7] and (ii) spawned confusion in the lower courts by not discussing the applicability of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[8] the seminal Supreme Court decision dealing with judicial deference to an executive agency's construction of a statute it is charged with administering.[9] I previously have contended that Galler's criticisms reflected a misunderstanding of both tax and nontax principles.[10]

On the tax front, Galler misstated the law prior to *Chevron* and *Davis*. According to Galler, the law was "reasonably clear" that "most" courts refused to give any weight to revenue rulings and treated them as merely the "litigation position" of one of the parties;[11] only a "few" courts gave "some consideration" to revenue rulings.[12] My view, as supported by the case law cited in Galler's own article,[13] is that courts' attitudes toward revenue rulings in the pre-*Chevron* and pre-*Davis* periods depended on their position on the underlying substantive tax issue in the case. Where courts agreed with the Service's position in the revenue ruling, they would claim to give it greater weight in their decision; where courts disagreed with the Service's position,

[4] Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, 72 B.U. L. REV. 841 (1992).

[5] 495 U.S. 472, 478-86 (1990) (relying on several revenue rulings in denying charitable contribution deduction for parents' support payments to their children serving as unpaid Mormon missionaries).

[6] "A 'revenue ruling' is an interpretation by the Service that has been published in the *Internal Revenue Bulletin*. It is the conclusion of the Service on how the law is applied to a specific set of facts." Rev. Proc. 96-1, § 2.05, 1996-1 I.R.B. 8, 13 (emphasis added); *see also* Treas. Reg. § 601.201(a)(6) (as amended in 1983); *id.* § 601.601(d)(2)(i)(a) (as amended in 1983); Rev. Proc. 89-14, 1989-1 C.B. 814.

[7] Galler, *supra* note 4, at 870-72, 876.

[8] 467 U.S. 837 (1984).

[9] Galler, *supra* note 4, at 872-76. Under *Chevron's* two-step inquiry, a court must first determine whether statutory language is unambiguous. If it is, a court must reject an agency's interpretation that does not conform to that language. However, if the statute is ambiguous, the court must defer to an agency's "reasonable" interpretation of the language. 467 U.S. at 842-44.

[10] Caron, *Tax Myopia*, *supra* note 1, at 558-63.

[11] Galler, *supra* note 4, at 849-50.

[12] *Id.* at 851.

[13] Caron, *Tax Myopia*, *supra* note 1, at 559 n.198.

they would give the ruling little or no weight.[14]

On the nontax front, Galler unhesitatingly embraced the view of *Chevron* as sparking "a revolution in administrative law"[15] by demanding wholesale judicial abdication to executive agencies. As a result of her fealty to this conventional wisdom, Galler strained to rework revenue rulings within the *Chevron* framework to justify giving them no deference in judicial proceedings.[16] Moreover, since the publication of her article, more sophisticated administrative law scholarship had emerged arguing that the "major transfer of interpretative power from courts to agencies" portended by *Chevron* simply had not occurred.[17]

More recently, this journal carried an article by Galler which tries to construct an elaborate theory of the role of revenue rulings in the post-*Chevron* environment on a similarly flawed tax and nontax foundation.[18] According to Galler, the 1990s have witnessed a discernible campaign in the federal courts to give controlling weight to revenue rulings. There is "an ardent willingness [on the part of federal courts of appeals] to accede to revenue rulings,"[19] and Galler has unearthed three distinct judicial approaches for granting such untrammeled discretion to the Service.[20] In her world, the Tax Court alone is willing to stand up to the barbarians at the gate through "its absolute refusal to yield to IRS revenue ruling positions."[21] Based on this analysis, Galler envisions "profound consequences" to the practice of tax law.[22]

The taxpayer's choice of forum will now "categorically determine the substantive outcome of a case. If the IRS can be expected to cite a revenue ruling, taxpayers are likely to lose in federal court because federal judges defer to rulings. Only the Tax Court offers an opportunity for full consideration of taxpayer arguments."[23] But if taxpayers seek refuge in the Tax Court, they will

---

[14] *Id.* at 558–59, 563.

[15] Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 307 (1986).

[16] Caron, *Tax Myopia*, *supra* note 1, at 559–61 (criticizing Galler's argument that second step of *Chevron* was not applicable to interpretive rules like revenue rulings that are issued without satisfaction of public notice and comment requirements).

[17] Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 981 (1992).

[18] Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 OHIO ST. L.J. 1037, 1077–78 (1995).

[19] *Id.* at 1062.

[20] *Id.* at 1061–74.

[21] *Id.* at 1059.

[22] *Id.* at 1039.

[23] *Id.*

be confronted by the pro-government bias of that court.[24] According to Galler, "[i]ncreased deference in the federal courts has fractured the foundational basis for concurrent jurisdiction and created an untenable situation for taxpayers involved in tax disputes with the government."[25] Indeed, the doctrinal disarray in the courts of appeals "breeds a loss of faith in the system's fairness and may prompt taxpayers to seek unlawful means of avoiding taxes."[26] The only hope to avoid this cataclysm is for either the Supreme Court to categorically hold that revenue rulings carry absolutely no weight in a judicial proceeding or Congress to prohibit their citation.[27]

I argue in this article that, as in her earlier work, Galler is afflicted with both hyperopia and myopia; she sees neither the tax trees nor the nontax forest. Part II of this article focuses on the tax trees and disputes the claim that there has been a dramatic increase in the amount of deference that federal courts give to revenue rulings. This part criticizes Galler's reliance on the courts' descriptions of the deference standard without considering whether these different verbal formulations have had any real impact on the results in the cases. This part examines the available data and finds *no* support for the increased judicial deference thesis.

Part III focuses on the nontax forest and argues that the post-*Chevron* revisionist scholarship and the distinction between the decision-making and decision-justifying functions of judging provide helpful lenses through which to view the federal courts' treatment of revenue rulings. This part explores the developing consensus among courts and commentators debunking the myth that *Chevron* has significantly affected the actual results of administrative law cases. This part contends that revenue rulings are used by federal judges primarily to explain their decision to construe a Code provision in a particular way. These nontax authorities help illuminate our very different views of the tax landscape. Galler sees a new tax order in which an omnipotent Service uses revenue rulings to beat taxpayers into submission before compliant federal judges unwilling to intercede. In contrast, I see merely a continuation of the historic practice of federal courts using a variety of tools at their disposal, including revenue rulings, to interpret the language of the Code.

II. THE TAX TREES

Galler argues that the federal courts of appeals in the 1990s give far more deference to revenue rulings than they have in the past, and that they employ

[24] *Id.* at 1089.
[25] *Id.* at 1095.
[26] *Id.* at 1093.
[27] *Id.* at 1094–95.

three distinct doctrinal approaches to do so.[28] Unfortunately, the evidence she cites does not support her view, and other evidence indicates that there has been *no* shift in how federal courts treat revenue rulings.

A. *Increased Deference to Revenue Rulings*

Galler sees a "noticeable and substantively significant"[29] difference in the amount of judicial deference afforded revenue rulings by the Tax Court and by the courts of appeals: "The Tax Court is unique in its absolute refusal to yield to IRS revenue ruling[s],"[30] while the courts of appeals possess "an ardent willingness to accede to revenue rulings."[31] However, the evidence both in her article and elsewhere demonstrates that this is a false dichotomy.

Galler's own work belies the view of the Tax Court as a bastion against marauding revenue rulings. In her earlier article, she argued that the Tax Court "consistently" regarded revenue rulings as nothing more than the "litigation position" of one of the parties,[32] yet she cited an equal number of cases for both this general rule[33] and the supposedly "rare exceptions" where the Tax Court gave revenue rulings "some consideration."[34] In her later article, Galler transmutes the Tax Court's embrace of the "litigation position" rule into a "customary rule of no-deference."[35] She cites seven newer cases for the "litigation position" rule,[36] but concedes through the citation of six other

[28] The choice of 1990 as the triggering date for the overhaul in the federal courts of appeals' treatment of revenue rulings is a curious one. Apparently it took the courts of appeals over five years to apply the lessons of *Chevron* in the tax context, and the trend was not yet apparent at the time of her 1992 article.

[29] Galler, *supra* note 18, at 1062.

[30] *Id.* at 1059.

[31] *Id.* at 1062.

[32] Galler, *supra* note 4, at 849-50.

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

[34] Knapp v. Commissioner, 90 T.C. 430, 442 (1988) (Whitaker, J., concurring), *aff'd on other grounds*, 867 F.2d 749 (2d Cir. 1989); Twin Oaks Community, Inc. v. Commissioner, 87 T.C. 1233, 1252 (1986); Reinhardt v. Commissioner, 85 T.C. 511, 520 (1985); Knowlton v. Commissioner, 84 T.C. 160, 165 (1985), *aff'd on other grounds*, 791 F.2d 1506 (11th Cir. 1986).

[35] Galler, *supra* note 18, at 1060.

[36] Pasqualini v. Commissioner, 103 T.C. 1, 8 (1994); Exxon Corp. v. Commissioner, 102 T.C. 721, 726 n.8 (1994); Spiegelman v. Commissioner, 102 T.C. 394, 405 (1994); Rath v. Commissioner, 101 T.C. 196, 205 n.120 (1993); Halliburton Co. v. Commissioner,

newer cases that the Tax Court "occasionally" gives "some consideration" to revenue rulings.[37]

Galler also presents an unconvincing case for abdication by the courts of appeals during the 1990s. In her earlier article, she contended that "most" courts of appeals adhered to the "litigation position" rule while only a "few" courts followed the "some consideration" exception,[38] yet she cited an equal number of cases for both the general rule[39] and the exception[40] to the rule.[41]

---

100 T.C. 216, 232 (1993), *aff'd on other grounds*, 25 F.3d 1043 (5th Cir.), *cert. denied*, 115 S. Ct. 486 (1994); Sunstrand Corp. v. Commissioner, 64 T.C.M. (CCH) 1305, 1307 (1992), *aff'd on other grounds*, 17 F.3d 965 (7th Cir.), *cert. denied*, 115 S. Ct. 83 (1994); Induni v. Commissioner, 98 T.C. 618, 624 n.4 (1992), *aff'd on other grounds*, 990 F.2d 53 (2d Cir. 1993).

[37] Spiegelman v. Commissioner, 102 T.C. 394, 397–98 (1994); Geisinger Health Plan v. Commissioner, 100 T.C. 394, 405 (1993), *aff'd on other grounds*, 30 F.3d 494 (3d Cir. 1994); Pepcol Mfg. Co. v. Commissioner, 98 T.C. 127, 136 n.4 (1992), *rev'd on other grounds*, 28 F.3d 1013 (10th Cir. 1994); Estate of Ford v. Commissioner, 66 T.C.M. (CCH) 1507, 1511 n.8 (1993), *aff'd on other grounds*, 53 F.3d 924 (8th Cir. 1995); Martin v. Commissioner, 64 T.C.M. (CCH) 1529, 1531 (1992); Bell Fed. Sav. & Loan Ass'n v. Commissioner, 62 T.C.M. (CCH) 376, 379 (1991), *rev'd on other grounds*, 40 F.3d 224 (7th Cir. 1994); *see also* Burton v. Commissioner, 99 T.C. 622, 629 (1992) ("Although revenue rulings are not binding on this Court, they may be useful in interpreting a statute based on their own intrinsic value.").

[38] Galler, *supra* note 4, at 850–51.

[39] Disabled Am. Veterans v. Commissioner, 942 F.2d 309, 314 (6th Cir. 1991); Flanagan v. United States, 810 F.2d 930, 934 (10th Cir. 1987); Canisius College v. United States, 799 F.2d 18, 22 n.8 (2d Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987); Oxford Orphanage, Inc. v. United States, 775 F.2d 570, 575 n.9 (4th Cir. 1985); Bencivenga v. Western Pa. Teamsters & Employers Pension Fund, 763 F.2d 574, 580 (3d Cir. 1985); Becker v. Commissioner, 751 F.2d 146, 149 (3d Cir. 1984); Frysinger v. Commissioner, 645 F.2d 523, 525 (5th Cir. Unit B 1981); Stahmann Farms, Inc. v. United States, 624 F.2d 958, 960 (10th Cir. 1980); Idaho Power Co. v. Commissioner, 477 F.2d 688, 695 n.10 (9th Cir. 1973), *rev'd on other grounds*, 418 U.S. 1 (1974); Stubbs, Overbeck & Assocs. Inc. v. United States, 445 F.2d 1142, 1142–47 (5th Cir. 1971); Miller v. Commissioner, 327 F.2d 846, 850 (2d Cir.), *cert. denied*, 379 U.S. 816 (1964); Kaiser v. United States, 262 F.2d 367, 370 (7th Cir. 1958), *aff'd on other grounds*, 363 U.S. 299 (1960).

[40] Salomon, Inc. v. United States, 976 F.2d 837, 841 (2d Cir. 1992); Progressive Corp. v. United States, 970 F.2d 188, 194 (6th Cir. 1992); Musco Sports Lighting, Inc. v. Commissioner, 943 F.2d 906, 908 (8th Cir. 1991); Foil v. Commissioner, 920 F.2d 1196, 1201 (5th Cir. 1990); United States Trust Co. v. IRS, 803 F.2d 1363, 1370 (5th Cir. 1986); Brook, Inc. v. Commissioner, 799 F.2d 833, 836 n.4 (2d Cir. 1986); Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1411 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986); Anselmo v. Commissioner, 757 F.2d 1208, 1213 n.5 (11th Cir. 1985); Watts v. United States, 703 F.2d 346, 350 n.19 (9th Cir. 1983); Ricards v. United States, 683 F.2d

Three years later, she reversed course, recognizing that virtually every circuit during the pre-1990 period had "issued contradictory opinions regarding the weight of revenue rulings. In some cases, revenue rulings receive[d] special consideration, while in others the same courts declare[d] that rulings are entitled to none."[42] Galler then describes a sea change during the 1990s stemming from the courts of appeals' "eager (and historically unprecedented) adoption of deferential standards."[43]

There are several flaws in Galler's analysis. As I explain in detail in Part III of this article, Galler fails to distinguish between the decision-making and decision-justifying functions of judging.[44] For example, she fanatically pursues her "litigation position" or "some consideration" distinction, describing in detail each instance when a court that has supposedly adopted one approach has used the other in a later case.[45] Because Galler mistakenly believes that these

---

1219, 1224 n.12 (9th Cir. 1981); Carle Found. v. United States, 611 F.2d 1192, 1195 (7th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980); United States v. Hall, 398 F.2d 383, 387 (8th Cir. 1968); Commissioner v. O. Liquidating Corp., 292 F.2d 225, 231 (3d Cir.), *cert. denied*, 368 U.S. 898 (1961).

[41] Indeed, Galler's circuit-by-circuit breakdown of the "litigation position" or "some consideration" distinction presents, without explanation, the anomalous result that in four circuits (the Second, Eighth, Ninth, and Eleventh Circuits) the number of cases cited for the exception exceeds the number of cases cited for the general rule. Galler, *supra* note 4, at 850–51 nn.58–59. In addition, for three circuits (the Fifth, Sixth, and Seventh Circuits), an equal number of cases is cited for each rule. *Id.* In only three circuits (the Third, Fourth, and Tenth Circuits) are more cases cited for the general rule than for the exception. *Id.* Galler does not present any information on the D.C. and First Circuits.

[42] Galler, *supra* note 18, at 1062. Galler also complained that "[e]xplanations of the inconsistencies [were] never provided." *Id.*

[43] *Id.* at 1063.

[44] *See infra* notes 127–30, 150–55 and accompanying text.

[45] A particularly illuminating example is Galler's treatment of Geisinger Health Plan v. Commissioner, 62 T.C.M. (CCH) 1656 (1991), *rev'd*, 985 F.2d 1210 (3d Cir.), *on remand*, 100 T.C. 394 (1993), *aff'd*, 30 F.3d 494 (3d Cir. 1994). The issue in the case was whether an HMO qualified for tax-exempt status under I.R.C. § 501(c)(3). The parties agreed on the applicable legal standards in regulations and revenue rulings for determining when the promotion of health constitutes a qualified charitable purpose and differed only as to the application of those standards to the facts of the taxpayer's case. The four opinions rendered in the case each rely, in varying degrees, on several revenue rulings in making this fact-specific determination. 30 F.3d at 500–02; 985 F.2d at 1216–19; 100 T.C. at 400–05; 62 T.C.M. at 1661–64.

Galler converts this pedestrian tax controversy into an example of the Tax Court "stray[ing] from its customary rule of non-deference . . . because it understood the Court of Appeals for the Third Circuit to require that the rulings at issue be given weight." Galler, *supra* note 18, at 1060. She contends that the Tax Court reaffirmed its commitment to the

different rhetorical flourishes somehow affect the ultimate tax result, she contends that a court is guilty of an improper judicial zig-zag each time it employs an approach different from the one used in a prior case. In contrast, a proper understanding of the decision-making and decision-justifying distinction reveals that courts use the "litigation position" or "some consideration" approaches merely as tools to explain and add support to their decisions reached on other grounds. Thus, in cases where the courts have decided to reject the Service's position, the revenue ruling is downplayed as nothing more than a party's "litigation position"; in other cases, where the courts have decided to accept the Service's position, "some consideration" is given to the revenue ruling.[46] The precise verbal formulation used by a court is mere

---

"litigation position" approach, but that it was required by Golsen v. Commissioner, 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir.), *cert. denied*, 404 U.S. 940 (1971), to follow "a court of appeals decision that is 'squarely in point,' where an appeal lies to that court of appeals." Galler, *supra* note 18, at 1060. She then speculates as to why the Tax Court in the second case, out of "literally hundreds" of cases involving revenue rulings, would adopt the anathematical "some consideration" approach. After a journey that meanders through the "strong proof" doctrine, the substance or procedure distinction, federalism, comity, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and *Hanna v. Plumer*, 380 U.S. 460 (1965), Galler discovers the uniqueness of *Geisinger Health Plan* in the "significant role" that revenue rulings historically have played in the qualification of hospitals for tax-exempt status. Galler, *supra* note 18, at 1060 n.117. Her analysis is deficient in a number of respects.

The Tax Court rightly did not cite the *Golsen* rule because it is simply not applicable to cases such as *Geisinger Health Plan* that are remanded back to the Tax Court by the court of appeals for reconsideration. *See, e.g.*, MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 85 (3d ed. 1995); *see generally* Jeffrey L. Patterson & Susan B. Hughes, *The* Golsen *Rule 18 Years Later*, 20 TAX ADV. 123 (1989). Moreover, as discussed in *infra* note 46 and accompanying text, the "litigation position" or "some deference" positions are merely two sides of the same coin. As Galler herself recognizes elsewhere (*see supra* notes 34 & 37), *Geisinger Heath Plan* is merely one of many cases in which the Tax Court has given some deference to revenue rulings.

[46] Indeed, courts often refer to both positions in the same opinion. *See, e.g.*, Lucky Stores, Inc. v. Commissioner, 105 T.C.__, __ (1995) (although neither party cited revenue ruling and it represented merely one party's litigation position, court "deem[ed] it necessary to consider it"); Krumhorn v. Commissioner, 103 T.C. 29, 59 n.20 (1994) (although revenue ruling represented merely one party's litigation position, facts of case "justif[ied] skepticism of the type manifested by the Commissioner in [the revenue ruling]"); Spiegelman v. Commissioner, 102 T.C. 394, 405 (1994) (although revenue ruling represented merely one party's litigation position, court considered revenue ruling because its "underlying rationale . . . [was] sound"); Roth v. Commissioner, 101 T.C. 196, 207 n.10 (1993) (although revenue ruling represented merely one party's litigation position, court considered revenue ruling "in special circumstances"); Cato v. Commissioner, 99 T.C. 633, 647 (1992) (although revenue ruling represented merely one party's litigation

window-dressing that does not have any effect on the ultimate resolution of the case.

Despite her emphasis on the decision-making function, Galler does not support her grandiose claim of increased judicial deference with any hard data. This failure is particularly troubling in light of the visibility given recently to the need for empirical support of such doctrinal assertions[47] and the special

position, court gave revenue ruling "particular scrutiny" because it was cited in legislative history); St. Jude Medical, Inc. v. Commissioner, 97 T.C. 457, 471 (1991) (although revenue ruling represented merely one party's litigation position, court concluded that revenue ruling was correct), *aff'd in part and rev'd in part on other grounds*, 34 F.3d 1394 (8th Cir. 1994); Rome I, Ltd. v. Commissioner, 96 T.C. 697, 702 (1991) (although revenue ruling represented merely one party's litigation position, "court may adopt the conclusion and rationale of a revenue ruling"); Texas Learning Technology Group v. Commissioner, 96 T.C. 686, 697 (1991) (although revenue ruling represented merely one party's litigation position, revenue ruling did not contradict court's analysis), *aff'd on other grounds*, 958 F.2d 122 (5th Cir. 1992); Julien v. Commissioner, 82 T.C. 492, 501–02 (1984) (although revenue ruling represented merely one party's litigation position, facts of case "justif[ied] skepticism of the type manifested by the Commissioner in [the revenue ruling]"); First Chicago Corp. v. Commissioner, 69 T.C.M. (CCH) 2089, 2100 n.10 (1995) (although revenue ruling represented merely one party's litigation position, court felt "compelled to consider and reconcile this ruling with the facts and circumstances of this case").

[47] Judge Posner has reignited this debate with his customary élan by advocating that law professors undertake "detailed empirical inquiries into the presuppositions of legal doctrines." RICHARD A. POSNER, OVERCOMING LAW 210 (1995); *see also* David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 602 (1991) ("The Court retains legitimacy only so long as it remains within accepted bounds when exercising its discretion. Empirical research assists in the definition and enforcement of those boundaries."); Robert W. Gordon, *Lawyers, Scholars, & the "Middle Ground,"* 91 MICH. L. REV. 2075, 2087 (1993) ("If I had the power . . . I would use it to try to promote more empirical work, institutional description, and law-in-action studies. Sometimes I think I would happily trade a whole year's worth of the doctrinal output turned out regularly by smart law review editors and law teachers for a single solid piece describing how some court, agency, enforcement process, or legal transaction actually works."); Vicki C. Jackson, *Empiricism, Gender, and Legal Pedagogy: An Experiment in a Federal Courts Seminar at Georgetown University Law Center*, 83 GEO. L.J. 461, 469 (1994) ("Much ink has been spilled on the benefits of quantitative empirical research on legal problems . . . ."); Craig A. Nard, *Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and the Profession*, 30 WAKE FOREST L. REV. 347, 349, 368 (1995) (bemoaning that "legal profession is bereft of empirical scholarship" and calling for more of such scholarship to furnish "the profession with a compass in our sometimes foggy legal waters"); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1890 (1988) ("[J]udges are increasingly concerned with the empirical basis and the real world effects of their decisions."). For criticism of Judge Posner's view, see Clark Freshman,

suitability of the heightened judicial deference thesis to empirical testing.[48] Galler focuses merely on the words courts use to purportedly describe their treatment of revenue rulings. She does not attempt to measure whether these words have any real effect on the outcome of tax cases. If she did, she would find that the shifting verbal formulations have not had any discernible impact on how judges actually decide tax cases.

For example, the results of the cases cited in Galler's own article contradict her increased judicial deference thesis.[49] In the eleven years since *Chevron*,[50] the courts of appeals have accepted the Service's revenue ruling position in a *lesser* percentage of cases than they had done in the eleven years preceding *Chevron*:[51]

Were Patricia Williams and Ronald Dworkin Separated at Birth?, 95 COLUM. L. REV. 1568, 1573 (1995) (book review) (describing Posner's brand of empiricism as "drive-by judging and scholarship"); Jeffrey Rosen, *Overcoming Posner*, 105 YALE L.J. 581, 599 (1995) (book review) (arguing that type of empirical work envisioned by Posner "is beyond the range of the most gifted scholars, let alone the most gifted federal judges").

[48] There are three reasons why the data reported in this article cannot simply be dismissed as either "bean-counting" or "drive-by empiricism." First, where the central question is whether a court should defer to an agency's statutory interpretation, the actual results in the cases should be a paramount consideration. Second, the major administrative law empirical works on *Chevron*, discussed in *infra* notes 103–36 and accompanying text, have been universally applauded by commentators and courts for their focus on the real-world effects of the doctrine. Third, Galler herself has raised the statistical issue by claiming, without any empirical support, that a taxpayer's choice to litigate a tax controversy in district court rather than in Tax Court "may categorically determine the substantive outcome of a case." Galler, *supra* note 18, at 1039. Empirical data thus is properly brought to bear to test Galler's view that "taxpayers are likely to lose in federal court because federal judges defer to [revenue] rulings." *Id.*

[49] For a comparison of how these tax results compare with the results in other nontax administrative law studies, see *infra* notes 134–36 and accompanying text.

[50] Although *Chevron* was decided on June 25, 1984, I have included the three 1984 cases in the pre-*Chevron* period because they were decided either before or soon after that date.

[51] For these purposes, I have included only those cases where the position in the revenue ruling dealt with an underlying issue in the case. I gave Galler the benefit of the doubt by excluding cases that arguably indicated a willingness by the courts to reject the Service's position during the 1985–95 period. *See* Guilzon v. Commissioner, 985 F.2d 819, 822–23 (5th Cir. 1993) (rejecting position in notice); American Stores Co. v. American Stores Co., 928 F.2d 986, 993 (10th Cir. 1991) (stating court's willingness to reject revenue ruling, but did not need to do so on facts before it).

TABLE ONE: TREATMENT OF REVENUE RULINGS IN FEDERAL COURTS OF APPEALS CASES CITED BY GALLER		
Period	Court Accepts Ruling	Court Rejects Ruling
1985-95	71%[52]	29%[53]
1974-84	92%[54]	8%[55]

Of course, a more complete test of Galler's claim of increased judicial deference should consider the results in *all* cases over a lengthy period in

[52] United States v. Wisconsin Power & Light Co., 38 F.3d 329, 334-36 (7th Cir. 1994); Gillespie v. United States, 23 F.3d 36, 39-41 (2d Cir. 1994); Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1145-47 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1369 *and* 114 S. Ct. 1540 (1994); Walt Disney, Inc. v. Commissioner, 4 F.3d 735, 738-41 (9th Cir. 1993); Johnson City Medical Ctr. v. United States, 999 F.2d 973, 975-77 (6th Cir. 1993); Kinnie v. United States, 994 F.2d 279, 286-87 (6th Cir. 1993); Geisinger Health Plan v. Commissioner, 985 F.2d 1210, 1215 n.2 (3d Cir. 1993); Salomon, Inc. v. United States, 976 F.2d 837, 841-43 (2d Cir. 1992); Progressive Corp. v. Commissioner, 970 F.2d 188, 193-94 (6th Cir. 1992); Wood v. Commissioner, 955 F.2d 908, 913-14 (4th Cir.), *cert. dismissed*, 505 U.S. 1231 (1992); CenTra, Inc. v. United States, 953 F.2d 1051, 1053-57 (6th Cir. 1992); Foil v. United States, 920 F.2d 1196, 1201-03 (5th Cir. 1990); United States Trust Co. v. Internal Revenue Service, 803 F.2d 1363, 1370 & n.9 (5th Cir. 1986); Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1411-12 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986); Anselmo v. Commissioner, 757 F.2d 1208, 1213 n.5 (11th Cir. 1985).

[53] Costantino v. TRW, Inc., 13 F.3d 969, 980-82 (6th Cir. 1994); American Stores Co. v. American Stores Co. Retirement Plan, 928 F.2d 986, 994 (10th Cir. 1991); Threlkeld v. Commissioner, 848 F.2d 81, 84 (6th Cir. 1988); Flanagan v. United States, 810 F.2d 930, 934 (10th Cir. 1987); Brook, Inc. v. Commissioner, 799 F.2d 833, 835-38 (2d Cir. 1986); Canisius College v. United States, 799 F.2d 18, 22-23 (2d Cir. 1986).

[54] Weil v. Retirement Plan Admin. Comm., 750 F.2d 10, 12-13 (2d Cir. 1984); Certified Stainless Services Inc. v. United States, 736 F.2d 1383, 1386-87 (9th Cir. 1984); Schneier v. Commissioner, 735 F.2d 375, 376-77 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985); Strick Corp. v. United States, 714 F.2d 1194, 1195-1202 (3d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984); Confederated Tribes v. Kurtz, 691 F.2d 878, 881 (9th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983); Washington State Dairy Products Comm'n v. United States, 685 F.2d 298, 300-01 (9th Cir. 1982); Ricards v. United States, 683 F.2d 1219, 1224 (9th Cir. 1981); Carle Found. v. United States, 611 F.2d 1192, 1194-1200 (7th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980); Treadco Tires, Inc. v. United States, 604 F.2d 14, 16-17 (5th Cir. 1979); Julio R. & Estelle L. Found., Inc. v. Commissioner, 598 F.2d 755, 757 n.3 (2d Cir. 1979); Gino v. Commissioner, 538 F.2d 833, 835 (9th Cir.), *cert. denied*, 429 U.S. 979 (1976); Groves v. United States, 533 F.2d 1376, 1380-81 (5th Cir.), *cert. denied*, 429 U.S. 1000 (1976).

[55] Estate of Lang v. Commissioner, 613 F.2d 770, 776 (9th Cir. 1980).

which the federal courts of appeals have cited revenue rulings in their opinions. Given space and time constraints, however, I have compared data from a randomly selected year[56] in both the post-*Chevron* (1992) and pre-*Chevron* (1982) periods[57] and again have found no evidence that the courts of appeals have increased the rate at which they accept the Service's position articulated in revenue rulings:[58]

TABLE TWO: TREATMENT OF REVENUE RULINGS IN FEDERAL COURTS OF APPEALS CASES		
Year	Court Accepts Ruling	Court Rejects Ruling
1992	75%[59]	25%[60]
1982	78%[61]	22%[62]

In addition, the alleged increased deference by the courts of appeals is not reflected in the data from the *Annual Report of the Commissioner of Internal Revenue*.[63] For example, in 1990—the last year for which these data are

[56] I again gave Galler the benefit of the doubt by choosing a post-*Chevron* year that, based on the cases cited in her article, *supra* note 53, would not be overrepresented with cases that rejected the Service's position in revenue rulings.

[57] The cases were culled from Lexis (USAPP file, FEDTAX library) and Westlaw (CTA file, FTX library) searches for all references to revenue rulings in the federal courts of appeals during the two years.

[58] I again have included only those cases where the position in the revenue ruling dealt with an underlying issue in the case.

[59] *See* Indiana Nat'l Corp. v. United States, 980 F.2d 1098, 1102 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2335 (1993); Salomon, Inc. v. United States, 976 F.2d 837, 841–43 (2d Cir. 1992); Estate of Vak v. Commissioner, 973 F.2d 1409, 1413–14 (8th Cir. 1992); Progressive Corp. v. United States, 970 F.2d 188, 193–94 (6th Cir. 1992); Wood v. Commissioner, 955 F.2d 908, 913–14 (4th Cir.), *cert. dismissed*, 505 U.S. 1231 (1992); CenTra, Inc. v. United States, 953 F.2d 1051, 1053–57 (6th Cir. 1991).

[60] *See* Amerco, Inc. v. Commissioner, 979 F.2d 162, 165–68 (9th Cir. 1992); Sears, Roebuck & Co. v. Commissioner, 972 F.2d 858, 860–64 (7th Cir. 1992).

[61] *See* Briggs v. Commissioner, 694 F.2d 614, 615 (9th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); Confederated Tribes v. Kurtz, 691 F.2d 878, 881 (9th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983); City Gas Co. v. Commissioner, 689 F.2d 943, 946 (11th Cir. 1982); Schenk v. Commissioner, 686 F.2d 315, 318–19 (5th Cir. 1982); Washington State Dairy Products Comm'n v. United States, 685 F.2d 298, 300–01 (9th Cir. 1982); Ferrill v. United States, 684 F.2d 261, 264 (3d Cir. 1982); Bank of Cal. v. United States, 672 F.2d 758, 760 (9th Cir. 1982).

[62] *See* Hutchinson Baseball Enterprises, Inc. v. Commissioner, 696 F.2d 757, 760–63 (10th Cir. 1982); Propstra v. United States, 680 F.2d 1248, 1256–57 (9th Cir. 1982).

[63] In years where the *Annual Report of the Commissioner of Internal Revenue* was not

available[64] and the first year of alleged revenue ruling ascendancy—the percentage of cases decided in favor of the taxpayer actually *increased* to their highest percentage of the prior ten years:

TABLE THREE: TAXPAYER SUCCESS RATES IN FEDERAL COURTS OF APPEALS CASES	
Year	Taxpayer Success Rate[65]
1990	20.0%
1989	9.7%
1988	18.7%
1987	11.9%
1986	9.9%
1985	12.1%
1984	11.3%
1983	15.3%
1982	15.4%
1981	18.1%
1980	17.0%

Similarly, the district courts have not adhered to the alleged increased judicial deference required by the courts of appeals during the 1990s. Two sources of data in the *Annual Report* indicate that taxpayers were *more* successful in district court litigation over the 1990–94 period than they were in the prior five-year period. The percentage of cases decided in the taxpayer's favor of the taxpayer increased substantially over the prior five-year period,[66]

---

available, I used information from the *Annual Report of the Office of Chief Counsel* or the *Data Book of the Commissioner of Internal Revenue.*

[64] Although this information is no longer included in the *Annual Report,* I have filed a Freedom of Information Act request for the release of the 1991–94 data. The request was pending as this article went to press.

[65] I have excluded those cases in which the decisions were partially in the taxpayer's favor and partially in the government's favor because there is no way to tell whether these partial dispositions favored one party or the other. *See* Caron, *Tax Myopia, supra* note 1, at 578 n.280.

[66]

TABLE FOUR: TAXPAYER SUCCESS RATES IN FEDERAL DISTRICT COURT CASES	
Five-Year Period	Taxpayer Success Rate
1990–94	26.3%
1985–89	20.6%

as did the taxpayer's monetary savings.[67]

The data thus paint a very different picture than that sketched by Galler. She simply has not demonstrated that anything has changed in how the federal courts use revenue rulings to decide tax cases. The courts employ the same rhetorical flourishes in either following or rejecting revenue rulings that they have used for decades, and there has been no discernible increase in judicial forbearance in the federal courts of appeals and the federal district courts. Indeed, Galler's thesis unravels further as she criticizes the courts of appeals for not adopting a "uniform deference standard"[68] and instead propagating "*three* separate approaches"[69] for giving increased deference to revenue rulings.

B. *Three Approaches to Increased Deference*

As discussed earlier,[70] Galler implicitly concedes that in her earlier article she wrongly ascribed a neat dichotomy to the courts of appeals during the pre-1990 period, with most courts properly hewing the "litigation position" approach and only a few unenlightened courts giving "some consideration" to revenue rulings. Yet, Galler magnifies her error in her 1995 article by identifying three divergent approaches to giving complete deference to revenue

I again have excluded those cases in which the decisions were partially in the taxpayer's favor and partially in the government's favor because there is no way to tell whether these partial dispositions favored one party or the other. The only reported data on taxpayer success rates for the 1990–94 period is for 1990; my pending Freedom of Information Act request, *supra* note 64, seeks the release of the 1991–94 data.

67

TABLE FIVE: TAXPAYER MONETARY SAVINGS IN FEDERAL DISTRICT COURT CASES	
Five-Year Period	Taxpayer Monetary Savings
1990–94	29.0%
1985–89	20.0%

I have used five-year periods to minimize year-to-year variations and to protect against the skewing effect of cases with particularly high stakes. *See* Caron, *Tax Myopia*, *supra* note 1, at 580 n.284. Monetary savings are defined as the taxpayer's overall savings in taxes, penalties, and interest as a percentage of the overall amounts at issue. They include all cases disposed of during the period, whether by dismissal, trial, or settlement. There is an inexplicable gap in the data in the *Annual Reports* for 1986; my pending Freedom of Information Act request, *supra* note 64, seeks the release of the 1986 data.

68 *See* Galler, *supra* note 18, at 1062–63.

69 *Id.* at 1038–39 (emphasis added).

70 *See supra* note 42 and accompanying text.

rulings as support for her theory that the 1990s constitute the decade of judicial abdication.[71]

Under the first approach, courts defer to revenue rulings that are "reasonable and consistent" with the underlying Code provision at issue.[72] Under the second approach, courts defer to revenue rulings as the product of the agency charged with interpreting the Code.[73] Under the third approach, courts defer to revenue rulings because they believe they are required to do so under *Chevron*.[74] Galler parses the case and reports the following Circuit-by-

---

[71] *See* Galler, *supra* note 18, at 1063-73.

[72] Galler wrongly characterizes this as a "radical approach," first adopted in a 1979 district court opinion (Dunn v. United States, 468 F. Supp. 991, 993 (S.D.N.Y. 1979)). Galler, *supra* note 18, at 1063-64. In fact, the "reasonable and consistent" language has a long pedigree as applied to revenue rulings. *See, e.g.*, Conway County Farmers Ass'n v. United States, 588 F.2d 592, 600 (8th Cir. 1978); First Nat'l Bank v. Commissioner, 546 F.2d 759, 761 (7th Cir. 1976), *cert denied*, 431 U.S. 915 (1977); Akron Nat'l Bank & Trust Co. v. United States, 510 F.2d 1157, 1161 (6th Cir. 1975); Eastern Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278, 1286 (D.C. Cir. 1974), *vacated and remanded on other grounds*, 426 U.S. 26 (1976); Economy Finance Corp. v. United States, 501 F.2d 466, 482 (7th Cir. 1974), *cert. denied*, 420 U.S. 947 (1975); Lincoln Sav. & Loan Ass'n v. Commissioner, 422 F.2d 90, 94 (9th Cir. 1970), *rev'd on other grounds*, 403 U.S. 345 (1971); United States Gypsum Co. v. United States, 253 F.2d 738, 744 (7th Cir. 1958); Investment Annuity, Inc. v. Blumenthal, 442 F. Supp. 681, 688 (D.D.C. 1977), *rev'd on other grounds*, 609 F.2d 1 (D.C. Cir.), *cert. denied*, 446 U.S. 981 (1980); Reinstein v. United States, 359 F. Supp. 428, 430 (C.D. Cal. 1973); Blass v. United States, 344 F. Supp. 669, 670 (E.D. Ark. 1972); Transport Equipment Co. v. United States, 331 F. Supp. 769, 770 (W.D. Wash. 1971); Herren v. United States, 317 F. Supp. 1198, 1207 (S.D. Tex. 1970), *aff'd*, 443 F.2d 1363 (5th Cir. 1971). The Tax Court also has applied the "reasonable and consistent" language to revenue rulings in several cases. *See, e.g.*, Butka v. Commissioner, 91 T.C. 110, 129 (1988), *aff'd on other grounds*, 886 F.2d 442 (D.C. Cir. 1989); Pollack v. Commissioner, 69 T.C. 142, 147 (1977); Satrum v. Commissioner, 62 T.C. 413, 419 (1974); Catron v. Commissioner, 50 T.C. 306, 315 (1968).

[73] Galler criticizes the courts that have embraced this approach for not explaining why the Service's tax expertise justifies deference to revenue rulings. First, Galler challenges the notion that the tax lawyers at the Service are "better as a group than the [tax lawyers in the] private bar." Galler, *supra* note 18, at 1069-70. Second, although Galler concedes the Service's greater tax expertise compared to judges (with the notable exception of Tax Court judges), she contends that this expertise "should not automatically give rise to deference." *Id.* at 1070. Of course, these considerations apply equally to questions of deference to administrative agencies generally, and I criticize, *infra* notes 99-155 and accompanying text, Galler's inattention to, and misreading of, much of the administrative law scholarship on these issues.

[74] For my criticism of Galler's application of the *Chevron* doctrine, see *infra* notes 99-155 and accompanying text.

Circuit "adoption" of these three approaches:

TABLE SIX: CIRCUIT-BY-CIRCUIT ADOPTION OF GALLER'S THREE "APPROACHES" TO INCREASED JUDICIAL DEFERENCE TO REVENUE RULINGS			
Circuit	Approach # 1	Approach # 2	Approach # 3
D.C.			
First			
Second	X[75]	X[76]	
Third	X[77]		
Fourth		X[78]	
Fifth	X[79]	X[80]	
Sixth	X[81]	X[82]	X[83]
Seventh			

[75] Gillespie v. United States, 23 F.3d 36, 39 (2d Cir. 1994); Salomon Inc. v. United States, 976 F.2d 837, 841–43 (2d Cir. 1992); Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1411-12 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986).

[76] Brook, Inc. v. United States, 799 F.2d 833, 836 n.4 (2d Cir. 1986).

[77] Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1145 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1369 *and* 114 S.Ct. 1540 (1994); Geisenger Health Plan v. Commissioner, 985 F.2d 1210, 1215 n.2, 1216 (3d Cir. 1993).

[78] Wood v. Commissioner, 955 F.2d 908, 913 (4th Cir. 1992), *cert. dimissed*, 505 U.S. 1231 (1992).

[79] Guilzon v. Commissioner, 985 F.2d 819, 822 (5th Cir. 1993); Foil v. Commissioner, 920 F.2d 1196, 1201 (5th Cir. 1990).

[80] United States Trust Co. v. Internal Revenue Service, 803 F.2d 1363, 1370 n.9 (5th Cir. 1986).

[81] Johnson City Medical Ctr. v. United States, 999 F.2d 973, 976 (6th Cir. 1993); Kinnie v. United States, 994 F.2d 279, 286 (6th Cir. 1993); CenTra, Inc. v. United States, 953 F.2d 1051, 1056 (6th Cir. 1992); Threlkeld v. Commissioner, 848 F.2d 81, 84 (6th Cir. 1988).

[82] Babin v. Commissioner, 23 F.3d 1032, 1038 (6th Cir. 1994).

[83] Johnson City Medical Ctr. v. United States, 999 F.2d 973 (6th Cir. 1993); CenTra, Inc. v. United States, 953 F.2d 1051 (6th Cir. 1992).

TABLE SIX (con't): CIRCUIT-BY-CIRCUIT ADOPTION OF GALLER'S THREE "APPROACHES" TO INCREASED JUDICIAL DEFERENCE TO REVENUE RULINGS			
Circuit	Approach # 1	Approach # 2	Approach # 3
Eighth			
Ninth	X[84]	X[85]	
Tenth			
Eleventh		X[86]	
Federal			

Galler is unfazed that of the seven circuits that have purportedly "adopted" one of these approaches, four have adopted more than one and the Sixth Circuit has adopted all three. She attributes this to widespread judicial lawlessness, with the courts violating "customary principles of intracircuit stare decisis under which the decisions of three judge panels are binding on subsequent panels unless overruled by the court en banc."[87] She reserves special ire for the "confused and erratic" Sixth Circuit,[88] and heaps scorn on Judge Milburn for embracing all three approaches in separate opinions.[89] She bemoans the difficulty of predicting the level of scrutiny that the Sixth Circuit will give to future revenue rulings because it has failed to quantify with precision the exact degree of deference required. In Galler's world, the difference between "great deference,"[90] "some deference,"[91] and "persuasive authority"[92] is all-important.

Galler's analysis can be faulted on both narrow and broad grounds. She does not accurately state the "position" of various circuits; many circuits that she claims have not staked out a position have in fact embraced one or more of these approaches,[93] and other circuits to which she attributes a position have

---

[84] Walt Disney, Inc. v. Commissioner, 4 F.3d 735, 740 (9th Cir. 1993).

[85] Washington State Dairy Prod. Comm'n v. United States, 685 F.2d 298, 300–01 (9th Cir. 1982); Ricards v. United States, 683 F.2d 1219, 1224 (9th Cir. 1981).

[86] Anselmo v. Commissioner, 757 F.2d 1208, 1213 n.5 (11th Cir. 1985).

[87] Galler, *supra* note 18, at 1063.

[88] *Id.* at 1067.

[89] *Id.* at 1073.

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

[91] Kinnie v. United States, 994 F.2d 279, 286 (6th Cir. 1993).

[92] Costantino v. TRW, Inc., 13 F.3d 969, 981 (6th Cir. 1994).

[93] *See, e.g.*, Foutz v. United States, 72 F.3d 802, 805 (10th Cir. 1995) (*Chevron* approach); Eastern Inv. Corp. v. United States, 49 F.3d 651, 657 (10th Cir. 1995) (reasonableness approach); United States v. Wisconsin Power & Light Co., 38 F.3d 329, 334–35 (7th Cir. 1994) (reasonableness and agency expertise approaches); Phillips v.

also endorsed other approaches.[94] A more fundamental criticism is that these three approaches have absolutely no bearing on a court's ultimate decision whether to defer to a revenue ruling. It thus should not be surprising that courts pick and choose among these approaches in justifying their decisions. Because opinion writing is art rather than science, courts vary their use of these three approaches to fit different situations, "much as a golfer selects the proper club when he gauges the distance to the pin and the contours of the course."[95] Galler's plea that "[t]he plethora of diverse and conflicting approaches followed by the lower courts suggests a need for high court resolution"[96] thus rings hollow.[97] There is no need for the Supreme Court to dictate club selection to the lower federal courts as they craft opinions to explain their construction of the Code in light of the available interpretive evidence, including revenue rulings.

III. THE NONTAX FOREST

Galler's thesis of increased judicial deference to revenue rulings also is undercut as she either misreads or ignores nontax evidence that is contrary to her position. In light of her failure to support her theory with empirical tax data as described above,[98] it is not surprising that she similarly slights nontax empirical research from the administrative law and litigation fronts.

A. Chevron

In her earlier article,[99] Galler unhesitatingly embraced the conventional view of *Chevron* as "markedly alter[ing] the Court's approach to the allocation of interpretive authority between federal courts and administrative agencies"[100]

Commissioner, 851 F.2d 1492, 1496 (D.C. Cir. 1988) (*Chevron* approach); Eastern Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278, 1286–87 (D.C. Cir. 1974) (agency expertise approach), *vacated and remanded on other grounds*, 426 U.S. 26 (1976).

[94] *See, e.g.*, Geisinger Health Plan v. Commissioner, 985 F.2d 1210, 1214 (3d Cir. 1993) (agency expertise approach).

[95] Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 215–16 (1983).

[96] Galler, *supra* note 18, at 1094.

[97] Galler's claim in the next sentence that "[t]he issue has percolated long enough to show that the question is ripe for review and to provide the Court with the benefit of experiential data," *id.*, is amazing given the complete lack of data presented in her article.

[98] *See supra* notes 47–67 and accompanying text.

[99] Galler, *supra* note 4, at 860–61.

[100] Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of*

by requiring courts to defer more often to agencies.[101] I previously criticized Galler's questionable placement of revenue rulings within the *Chevron* framework to justify giving them no deference in judicial proceedings.[102] In any event, more sophisticated administrative law scholarship had begun to emerge debunking the myth that *Chevron* in practice had dramatically affected the actual results of administrative law cases.

In my earlier article,[103] I explored Professor Thomas W. Merrill's contention that *Chevron* had not significantly altered the frequency with which the Supreme Court deferred to agency interpretations of statutes.[104] Merrill found that the percentage of cases in which the Court accepted an agency's statutory interpretation actually *decreased* in the post-*Chevron* 1984-90 Terms compared with the pre-*Chevron* 1981-83 Terms.[105] Moreover, the percentage of cases in which the Court accepted the agency's interpretation in the 1984-90 Terms was *lower* in cases that applied *Chevron*.[106] Although an earlier study[107] suggested that "[s]ome lower courts, especially the D.C. Circuit, had treated *Chevron* like the *magna carta* of deference, mandating greater respect for

---

Statutes?: A New Doctrinal Basis for Chevron U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275, 1275-76; *see also* 1 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 110 (3d ed. 1994) (describing *Chevron* as "one of the most important decisions in the history of administrative law"); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2075 (1990) (characterizing *Chevron* as "one of the very few defining cases in the last twenty years of American public law"); Rebecca H. White, *The Stare Decisis "Exception" to the* Chevron *Deference Rule*, 44 FLA. L. REV. 723, 723 (1992) (claiming that *Chevron* initiated a "new era of judicial review of agency lawmaking").

[101] Curiously, Galler did not cite the major empirical work reporting that deference to agency interpretations increased sharply in the lower federal courts following *Chevron*. Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984. The Schuck and Elliott study received heady praise soon after its release. *See, e.g.*, William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, 147 n.222 ("path-breaking study"); S. Jay Plager, *The United States Courts of Appeals, the Federal Circuit, and the Non-Regional Subject Matter Concept: Reflections on the Search for a Model*, 39 AM. U. L. REV. 853, 861 n.22 (1990) ("an excellent example of the contribution empirically-based work can make to an understanding of the legal system").

[102] Caron, *Tax Myopia*, *supra* note 1, at 559-61 (criticizing Galler's argument that second step of *Chevron* was not applicable to interpretive rules like revenue rulings that are issued without satisfaction of public notice and comment requirements).

[103] *Id.* at 561-63.

[104] Merrill, *supra* note 17, at 970.

[105] *Id.* at 981-82 (70% post-*Chevron* v. 75% pre-*Chevron*).

[106] *Id.* at 981 (59% of *Chevron* cases v. 70% of total number of cases).

[107] Schuck & Elliott, *supra* note 101.

administrative interpretations than had theretofore been the case,"[108] Merrill noted evidence in the prior study that "the '*Chevron* effect' in the lower courts may have been only temporary."[109] He also predicted that *Chevron* would have little impact on the amount of deference given to agency interpretations in the lower federal courts as the Court's indifference to *Chevron* became apparent.[110] I noted that other commentators and courts soon confirmed the accuracy of this prediction.[111]

For example, Professor Russell L. Weaver agreed that "*Chevron's* importance has been exaggerated. *Chevron* did not profoundly alter either the Supreme Court's conduct, or that of the lower federal courts."[112] The Sixth Circuit also surveyed the *Chevron* landscape and concluded that the courts had "travel[led] far without going anywhere:"[113]

> Quite frankly, the degree to which courts are bound by agency interpretations of law have been like quicksand. The standard has been constantly shifting, steadily sinking, and, from the perspective of the intermediate appellate courts, frustrating. . . . So, after all these years of debate and after much judicial ink has been spilled, we are back to essentially the old rule that courts are not bound by agency interpretations of law and that courts are to apply laws based on the court's interpretation of the law's reasonable meaning.[114]

In her 1995 article, Galler cites Merrill on *six* different occasions in discussing judicial deference to administrative agencies,[115] yet she fails to mention that Merrill's thesis is directly contrary to her claim of increased judicial deference to revenue rulings after *Chevron*.[116] She also refers to my

[108] Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 358 (1994). For a similar view, see Gary J. Edles, *Has* Steelworkers *Burst* Chevron's *Bubble? Some Practical Implications of Judicial Deference*, 10 REV. LITIG. 695, 699 (1991).

[109] Merrill, *supra* note 17, at 984.

[110] *Id.*

[111] Caron, *Tax Myopia*, *supra* note 1, at 562.

[112] Russell L. Weaver, *Some Realism About* Chevron, 58 MO. L. REV. 129, 131 (1993).

[113] Ohio State Univ. v. Secretary, United States Dep't of Health & Human Servs., 996 F.2d 122, 123-24 n.1 (6th Cir. 1993), *vacated and remanded on other grounds*, 114 S. Ct. 2731 (1994).

[114] *Id.*

[115] Galler, *supra* note 18, at 1051 nn.69, 71 & 72, 1052 nn.75 & 77, 1069 n.170.

[116] The closest Galler comes to conceding this point is in an odd footnote discussing the impact of *Chevron* on deference to tax regulations:

> Of course, the standards for judicial review of regulations are themselves subject

Tax Myopia diagnosis[117] without mentioning that I had identified her as one of the most afflicted; she does not respond to, or even acknowledge, my criticism of her failure to consider the application of this general administrative law thinking to the subject of judicial deference to revenue rulings. These omissions are troubling in light of the developing consensus among commentators and courts endorsing Merrill's thesis.

Merrill recently extended his study to include the 1991 and 1992 Terms and observed "more-or-less business as usual on the *Chevron* front."[118] The overall rate of acceptance of agency interpretations rose slightly to match that in the pre-*Chevron* period.[119] Although the percentage of deference cases employing *Chevron* was "roughly consistent" with the trend in the prior study,[120] Merrill found that *Chevron* appeared to be playing "an increasingly peripheral role in the decisions,"[121] and was used like "just another pair of pliers in the statutory interpretation tool chest."[122] Other commentators have

---

> to vigorous debates, particularly as to the repercussions of [*Chevron*]. That dialogue, however, is taking place in leading law reviews among noted scholars and jurists, so that judges know well which sources to consult for advice in answering questions that may arise in tax litigation. Moreover, the participants in the regulation debate are experts in a variety of substantive areas.

Id. at 1042 n.16; *see also infra* note 194.

117 *Id.* at 1077–78 ("Professor Paul Caron has used the phrase 'tax myopia' to describe the tendency of judges, lawyers, and law professors to regard tax law as a self-contained body of law that is somehow different from other areas."); *see also id.* at 1078 n.222 ("Professor Caron's article also documents the perception that tax lawyers are different from other lawyers. He ultimately concludes that these misperceptions have impaired the development of both tax law and other fields by isolating the debates in the tax area from those in other fields.").

118 Merrill, *supra* note 108, at 360.

119 *Id.* at 359–60 (from 70% to 75%). For statistics on the pre-*Chevron* period see Merrill, *supra* note 17, at 982.

120 Merrill, *supra* note 108, at 361.

121 *Id.*

122 *Id.* at 362. Merrill concluded that "the apparent marginalization of the deference doctrine in the last Term means that it is still not possible to say that *Chevron* has had any lasting impact on the Supreme Court, at least in terms of pressing the Court toward greater deference to agency views." *Id.* at 363. For other empirical *Chevron* work, see Linda R. Cohen & Matthew L. Spritzer, *Solving the* Chevron *Puzzle*, LAW & CONTEMP. PROBS., Spring 1994, at 65, 105–06 (observing "no retreat from *Chevron*" by Court through 1988, with possibility of "some retreat" in 1990); William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 72 (1994) (federal agencies prevailed in 62% of civil cases during 1993 Term).

noted this revisionist view of *Chevron*,[123] although there remain some holdouts.[124] Last year, a symposium in the *Duke Law Journal*[125] viewed the failure of the *Chevron* revolution through the prism of judges, focusing on the decision-making and decision-justifying norms I have referred to earlier.[126]

In the lead article, Professors Sidney A. Shapiro and Richard E. Levy argued that *Chevron* has not resulted in the predicted increase in judicial deference to agency determinations because it is an inherently indeterminate

---

[123] *See, e.g.*, Robert S. Adler & Richard A. Mann, *Preemption and Medical Devices: The Courts Run Amok*, 59 MO. L. REV. 895, 937 (1994); Daniel J. Bussel, *Power, Authority, and Precedent in Interpreting the Bankruptcy Code*, 41 UCLA L. REV. 1063, 1085 n.88 (1994); Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 436 (1995); Harold J. Krent, *Explaining One-Way Fee Shifting*, 79 VA. L. REV. 2039, 2047 n.34 (1993); Harold J. Krent, *The Failed Promise of Regulatory Variables*, 73 WASH. U. L.Q. 1117, 1119 (1995); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 615–16 (1995); Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 16 (1992); Jeffery M. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 721 n.224 (1993); Donald W. Stever, et al., *The Supreme Court, EPA, and* Chevron*: The Uncertain Status of Deference to Agency Interpretations of Statutes*, 25 ENVTL. L. REP. 10127, 10133 (1995); Nicholas S. Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 NW. U. L. REV. 296, 322–24 (1993); *The Supreme Court, 1994 Term—Leading Cases*, 109 HARV. L. REV. 111, 304 (1995).

[124] *See, e.g.*, Ernest Gellhorn, *Justice Breyer on Statutory Review and Interpretation*, 8 ADMIN. L.J. AM. U. 755, 764 (1995) ("The application of *Chevron* in the lower courts has reduced substantially the degree of inconsistency in the meanings assigned to agency-administered national statutes."); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 749–50 (1995) ("The *Chevron* test has largely realized its potential at the circuit court level. Appellate courts routinely accord deference to agency constructions of ambiguous language in agency-administered statutes."); Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 84 n.5 (1995) ("Although [Merrill's study] has led some commentators to question whether *Chevron* represents the revolution in administrative law that many have proclaimed, the lower courts' consistent application probably has a greater day-to-day impact on the administrative operation of the state.") (citations omitted); *cf.* 1 DAVIS & PIERCE, *supra* note 100, at § 3.6 (1995 Supp.) ("If the trends in the Supreme Court opinions reviewing agency interpretations of agency-administered statutes persist, their spread to the circuit courts is inevitable.").

[125] *See generally* Symposium, *Twenty-Sixth Annual Administrative Law Issue*, 44 DUKE L.J. 1051 (1995).

[126] *See supra* notes 44–46, 95–97 and accompanying text.

and manipulable doctrine.[127] As a result, "a court often can write an opinion that reverses a major agency action as easily as it can write an opinion that upholds the same action."[128] Shapiro and Levy posit a model of judicial behavior as a function of two variables: outcomes (or what I have called decision-making) and craft norms (or what I have called decision-justifying). According to Shapiro and Levy, judges manipulate *Chevron* in crafting their opinions to justify decisions reached on the basis of their ideological beliefs.[129] The other participants in the symposium supported Shapiro and Levy's views in varying degrees.[130]

Moreover, other courts have joined the Sixth Circuit[131] in casting a wary eye on *Chevron*. For example, the Fifth Circuit has observed that "*Chevron* is not quite the 'agency deference' case that it is commonly thought to be by

---

[127] Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051 (1995).

[128] Richard J. Pierce, Jr., *Legislative Reform of Judicial Review of Agency Actions*, 44 DUKE L.J. 1110, 1110 (1995).

[129] Another participant in the symposium, Professor Richard J. Pierce, Jr., offered two compelling anecdotes of this practice in which judges "*Chevron*" a case and uphold an agency's action when they do not have the time or inclination to write the sort of detailed opinion thought necessary to reverse the agency's action. *Id.* at 1125-26. Professor Joan Flynn has made a similar point:

> [T]he courts are all too prone to substitute their views for those of the agency—deference be damned. A central problem is that doctrines of judicial review of agency action are extremely malleable; as with the canons of statutory construction, judges can generally find one that gets them where they want to go. The combination of the courts' tendency toward overreaching and these varied and flexible doctrines is so lethal, according to some, that whether the agency's policy stands or falls often turns on little more than the circuit panel's ideological bias.

Flynn, *supra* note 123, at 433-34 (footnotes omitted); *see also* Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1333-34 n.179 (1990) ("[T]he effect of *Chevron* may have been more in the area of judicial rhetoric than actual judicial decision-making.").

[130] *See* Ronald M. Levin, *Judicial Review and the Uncertain Appeal of Certainty on Appeal*, 44 DUKE L.J. 1081 (1995); Thomas O. McGarity, *On Making Judges Do the Right Thing*, 44 DUKE L.J. 1104 (1995); Pierce, *supra* note 128; Nicholas S. Zeppos, *Judicial Review of Agency Action: The Problems of Commitment, Non-Contractibility, and the Proper Incentives*, 44 DUKE L.J. 1133 (1995).

[131] Ohio State Univ. v. Secretary, United States Dep't of Health & Human Servs., 996 F.2d 122, 123 n.1 (6th Cir. 1993), *vacated and remanded on other grounds*, 114 S. Ct. 2731 (1994).

many of its supporters (and detractors)."[132] Another court has agreed that "the *Chevron* doctrine has been followed only sporadically."[133]

Galler may believe that the *Chevron* revisionists are incorrect, but she should not blithely ignore their views. She also may think that their conclusions are somehow inapplicable in the tax context, but the burden again is on her to explain why. The burden likely would be insurmountable, given the similarity of the data reported in this article with Merrill's data. The earlier comparison of the treatment of revenue rulings in the federal courts of appeals cases during various post-*Chevron* and pre-*Chevron* periods, with respect to both the selective citation of cases by Galler[134] as well as the comprehensive review of cases during the random years examined in this article,[135] confirms Merrill's finding that the percentage of cases in which the court accepted the agency's determination actually *decreased* in the post-*Chevron* period. Indeed, three of the four percentages reported with respect to tax cases are virtually identical to Merrill's administrative law data.[136]

Galler's failure to see either the tax trees or the nontax forest is apparent in her withering criticism of the Sixth Circuit's treatment of revenue rulings. As discussed earlier,[137] she misses the tax trees by excoriating the Sixth Circuit for adopting three different approaches[138] without seeing that they have no bearing on a court's ultimate decision whether to defer to a revenue ruling. She misses the nontax forest by ignoring the Sixth Circuit's observation in a nontax case that *Chevron* simply has not affected the degree of judicial deference to agency

---

[132] Mississippi Poultry Ass'n v. Madigan, 31 F.3d 293, 299 n.34 (5th Cir. 1994). The Fifth Circuit noted Merrill's finding of decreased judicial deference through the 1989–90 Term, and then independently examined cases from the 1993–94 Term and concluded that "this pattern still holds." *Id.*

[133] Combee v. Brown, 5 Vet. App. 248, 257–58 n.22 (1993), *rev'd on other grounds*, 34 F.3d 1039 (Fed. Cir. 1994). The court relied on Merrill's "comprehensive and insightful" article. *Id.*

[134] *See supra* notes 52–55.

[135] *See supra* notes 59–62.

[136]

TABLE SEVEN: PERCENTAGE OF CASES IN WHICH COURT ACCEPTS AGENCY'S DETERMINATION			
Period	Merrill's Admin. Law Cases	Galler's Tax Cases	Caron's Tax Cases
Post-*Chevron*	71%	71%	75%
Pre-*Chevron*	75%	92%	78%

[137] *See supra* notes 88–92 and accompanying text.

[138] Galler, *supra* note 18, at 1067, 1071–73.

statutory interpretations.[139] Galler also ignores the importance of a recent tax case in which the Sixth Circuit brought its *Chevron* skepticism to bear on a question involving judicial deference to the Service's interpretation of the Code.[140]

In *Wolpaw v. Commissioner*,[141] the narrow tax issue was whether the value of a graduate school tuition waiver provided to the wife of a medical school faculty member was excludable from income as a "scholarship" under transition relief provided in the Tax Reform Act of 1986.[142] Although there was no revenue ruling on point, the parties relied on the definition of scholarship in regulations[143] and a private letter ruling.[144] The Sixth Circuit distilled the language from its prior nontax case questioning *Chevron's* impact into the following standard for judicial deference to agency statutory interpretations:

> The degree of deference to be accorded an agency's interpretation of a statute Congress has charged it with administering varies, depending on several factors, including the existence of a statute mandating a standard of review, the form and formality of the interpretation, and the consistency of the agency's interpretation over time.[145]

The Sixth Circuit then adapted this general standard to the tax context and stated that it would "defer to any consistently held, reasonable agency position that is not contrary to statutory or case law."[146] After an extensive examination,[147] the court deferred to the Service's statutory interpretation expressed in the regulations and letter ruling because they represented a "consistently held and reasonable view."[148] It is Galler's approach to judicial deference to agency statutory interpretations, not the Sixth Circuit's, that is

---

[139] Ohio State Univ. v. Secretary, United States Dep't of Health & Human Servs., 996 F.2d 122, 123 n.1 (6th Cir. 1993), *vacated and remanded on other grounds*, 114 S. Ct. 2731 (1994).

[140] Galler only cites the case, Wolpaw v. Commissioner, 47 F.3d 787 (6th Cir. 1995), in her discussion of letter rulings. Galler, *supra* note 18, at 1058 n.112.

[141] 47 F.3d 787 (6th Cir. 1995).

[142] Pub. L. No. 99-514, § 1885(f)(3), 100 Stat. 2085, 2872 (1986) (codified at 26 U.S.C. § 117 (note) (1988)).

[143] Treas. Reg. § 1.117-1 (as amended in 1960); *id.* § 1.117-3 (prior to its amendment in 1985); *id.* § 1.117-4 (prior to its amendment in 1985).

[144] *Wopaw*, 47 F.3d at 792.

[145] *Id.* at 790.

[146] *Id.* at 791.

[147] *Id.* at 791-94.

[148] *Id.* at 794.

"confused and erratic."[149]

Galler does not appreciate the distinction between the decision-making and decision-justifying functions of judging. As chronicled by Karl Llewellyn[150] and others,[151] there is a crucial difference between the making of the decision and the reasoned explanation of that decision given in the written opinion. Galler's theory of increased judicial deference to revenue rulings goes astray because it fails to acknowledge that *Chevron* and prior deference doctrines[152]

---

149 Galler, *supra* note 18, at 1067.

150 KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 56–59 (1960).

151 *See, e.g.*, RUGGERO J. ALDISERT, THE JUDICIAL PROCESS 524–603 (*The Judging Process: Making the Decision*), 604–75 (*The Judging Process: Justifying the Decision*) (2d ed. 1996). BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 59–61 (1928); FRANK COFFIN, THE WAYS OF A JUDGE 155–66 (1980); RICHARD A. WASSERSTROM, THE JUDICIAL DECISION 25–29 (1961); Joseph C. Hutchinson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 274–87 (1929); Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721, 721-27 (1979); Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 817-19 (1961); Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 26–34 (1993). For a recent debate on the value of candor in judicial opinions, see Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990); Gail Heriot, *Way Beyond Candor*, 89 MICH. L. REV. 1945 (1991); Scott C. Idelman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307 (1995); John J. Kircher, *Judicial Candor: Do As We Say, Not As We Do*, 73 MARQ. L. REV. 421 (1990); David L. Schapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987); Robert L. Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213 (1983); Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989); Alan Hirsch, *Candor and Prudence in Constitutional Adjudication*, 61 GEO. WASH. L. REV. 858 (1993) (book review). For recent commentary on judicial opinion writing, see the following articles from a recent symposium in the *University of Chicago Law Review*: Martha C. Nussbaum, *Poets as Judges: Judicial Rhetoric and the Literary Imagination*, 62 U. CHI. L. REV. 1477 (1995); Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421 (1995); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371 (1995) [hereinafter Wald, *Judicial Writings*]; Patricia M. Wald, *A Reply to Judge Posner*, 62 U. CHI. L. REV. 1451 (1995); James Boyd White, *What's an Opinion For?*, 62 U. CHI. L. REV. 1363 (1995); *see also* Ronald A. Cass, *Judging: Norms and Incentives for Retrospective Decision-Making*, 75 B.U. L. REV. 941 (1995).

152 For example, Judge Friendly described the ad hoc character of the determination whether to defer to an agency's statutory interpretation as follows:

> [T]here are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more

are primarily used by judges to justify their decisions reached on other grounds. As Judge Wald[153] and others[154] have suggested, courts fashion their description of the deference standard in crafting their opinions, emphasizing pro-deference language when they have decided to accede to the Service's statutory interpretation and anti-deference language when they have decided to read the Code differently than the Service.[155] The Sixth Circuit and other courts thus properly invoke various formulations of the deference standard in crafting opinions to justify their interpretation of the Code, using all of the

> appropriate for the case at hand. [There are l]eading cases supporting the view that great deference must be given to the decision of an administrative agency applying a statute .... However, there [also] is an impressive body of law sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term.

Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976) (footnote omitted), *aff'd sub. nom. on other grounds*, Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977); *see also* Mayburg v. Secretary, 740 F.2d 100, 105 (1st Cir. 1984); Ho-Craft Clothing Co. v. United States, 660 F.2d 910, 913–14 (3d Cir. 1981); William Powell Co. v. United States, 524 F. Supp. 841, 844 (S.D. Ohio 1981); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 551 (1985).

[153] Judge Wald has noted that "[a] shrewd observer can usually tell the way the case will come out by the way the review standard is described." Wald, *Judicial Writings*, *supra* note 151, at 1391. Judge Wald quoted the deference standard in two opinions written by the same D.C. Circuit judge involving the review of actions taken by the National Labor Relations Board. Synergy Gas Corp v. NLRB, 19 F.3d 649, 651 (D.C. Cir. 1994) (Sentelle, J.) (citation omitted) ("This Court will not disturb an order of the NLRB unless, reviewing the record as a whole, it appears that the Board's factual findings are not supported by substantial evidence or that the Board acted arbitrarily or otherwise erred in applying established law to the facts at issue. ... We will not 'merely rubber stamp NLRB decisions.'"); United Steelworkers of America Local Union 14534 v. NLRB, 983 F.2d 240, 244 (D.C. Cir. 1993) (Sentelle, J.) (citation omitted) ("The courts accord a very high degree of deference to administrative adjudications by the NLRB. ... It is not necessary that we agree that the Board reached the best outcome in order to sustain its decisions. ... The Supreme Court has recently instructed that a decision of an agency such as the Board is to be reversed only when the record is 'so compelling that no reasonable factfinder could fail to find' to the contrary."). The agency prevailed in one case but not the other, and Judge Wald asked whimsically, "[g]uess which case the agency won." Wald, *Judicial Writings*, *supra* note 151, at 1392.

[154] *See, e.g.*, *supra* note 129 (noting practice of judges who "*Chevron*" a case and uphold an agency's action when they do not have the time or inclination to write the sort of detailed opinion thought necessary to reverse the agency's action).

[155] For a perceptive account of the role of judicial interpretation in tax cases, see John A. Miller, *Indeterminacy, Complexity, and Fairness: Justifying Rule Simplification in the Law of Taxation*, 68 WASH. L. REV. 1, 44–49 (1993).

interpretive tools at their disposal, including revenue rulings.

B. *Implications for Tax Litigation*

After demonstrating the fatal flaws in Galler's theory of increased judicial deference, I want to conclude by discussing the implications of the role of revenue rulings in tax litigation.[156] These implications again demonstrate the importance of correctly bringing nontax principles to bear on tax issues.

Galler believes that her theory has "profound consequences"[157] to the practice of tax law. She draws on the specialized courts literature[158] in describing a wholesale upheaval in tax litigation. Her vision of the Tax Court as the only court willing to stand up to the Service and independently examine revenue rulings is explained as a natural by-product of the court's specialist status.[159] In contrast, the federal courts of appeals are naturally predisposed to "reflexively defer"[160] to revenue rulings as generalist judges without any tax expertise.[161] Although Galler concedes that "deference to revenue rulings itself is probably not enough to justify a complete reassessment of jurisdiction over tax litigation, it certainly raises the question whether some of the underlying premises are false."[162] Her theory supposedly will revolutionize the choice of forum in which to litigate tax controversies.

Galler believes that in any case where the Service can be expected to cite a revenue ruling, the only hope for the taxpayer is to litigate the case in the Tax Court; litigation in a federal district court will be hopeless.[163] Litigation in the

---

[156] Galler, *supra* note 18, at 1074–95.

[157] *Id.* at 1039.

[158] *See, e.g.*, Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329 (1991); Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1 (1995); Rochelle C. Dreyfuss, *Specialized Adjudication*, 1990 B.Y.U. L. REV. 377; Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 NW. U. L. REV. 745 (1981); Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603 (1989); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111 (1990).

[159] Galler, *supra* note 18, at 1075–77.

[160] *Id.* at 1090.

[161] *Id.* at 1077–82.

[162] *Id.* at 1090.

[163] *Id.* at 1082–83. I am not exaggerating: "[T]he choice of forum may categorically determine the substantive outcome of a case. If the IRS can be expected to cite a revenue ruling, taxpayers are likely to lose in federal court because federal judges defer to rulings. Only the Tax Court offers an opportunity for full consideration of taxpayer arguments." *Id.* at 1039. Galler concedes that "[s]ome courts of appeals, like the First Circuit, have not

Tax Court also will improve the taxpayer's appellate chances because a generalist court of appeals is more likely to defer to the specialist Tax Court than to a generalist federal district court.[164] Yet if taxpayers pursue this litigation strategy, they are confronted by the Tax Court's pro-government bias.[165] Galler bemoans the doctrinal dissonance and calls on either the Supreme Court to hold that revenue rulings carry absolutely no weight or Congress to prevent their citation. Galler raises the specter of the militia movement storming the tax ramparts in concluding that "[d]ecisional incoherence breeds a loss of faith in the system's fairness and may prompt taxpayers to seek unlawful means of avoiding taxes."[166]

There are a number of difficulties with the tax armageddon scenario sketched by Galler. Her continued comparison of the Tax Court's position on revenue rulings with that of the courts of appeals may be a comparison of apples and oranges; she does not explain the nuances involved in comparing results in a trial court with those in an appellate court. If, as I have argued, the proper focus is on the *results* in cases rather than on the window-dressing courts use to justify their decisions, Galler needs to account for the deference standards applied by the appellate court to the Tax Court's decision.[167] Galler cannot automatically compare trial court results (raising a single question of deference to the Service) with appellate court results (raising two deference issues—deference to the Service and deference to the trial court). It would be better to compare Tax Court results with those of the other tax trial forums, or at least to differentiate among the appellate court results based on the

---

adopted definitive standards or guidelines. In courts within these jurisdictions, taxpayers may still have a chance of prevailing." *Id.* at 1083 n.238. For criticism of Galler for ignoring the third forum for litigating tax controversies (trial in the Court of Federal Claims, with appeal to the Court of Appeals for the Federal Circuit), see *infra* notes 169–72 and accompanying text.

[164] According to Galler, "an appellate court defers to the Tax Court (which in turn does not defer to revenue rulings) but does not defer to district courts (which do defer to revenue rulings)." Galler, *supra* note 18, at 1085.

[165] *Id.* at 1088–90. Galler concedes that her theory of increased deference to revenue rulings in the courts of appeals but not the Tax Court "stands conventional wisdom on its head. The accepted practice in the specialist Tax Court is to scrutinize all government arguments previously asserted in revenue rulings, while the generalist federal judges are likely to accede to government revenue ruling positions—a decidedly pro-government practice." *Id.* at 1090.

[166] *Id.* at 1093.

[167] Galler acknowledges the issue of appellate court deference to Tax Court cases at one point in her article, *id.* at 1084–85, but does not explain why the issue does not dog her entire inquiry.

originating trial forum.[168]

Galler's description of the tax litigation process as a clear dichotomy between the specialist Tax Court and the generalist district courts and courts of appeals ignores the role of other tax forums. For example, the Court of Federal Claims[169] is the third trial court option available to taxpayers, with appeal to the Federal Circuit.[170] As I have argued elsewhere,[171] these courts are properly viewed as hybrid courts, possessing features of both specialist courts and generalist courts.[172] Moreover, the Bankruptcy Court has emerged in recent

---

[168] Although Galler claims that the courts of appeals defer heavily to the Tax Court in light of its specialized court status, *id.* at 1083–84, such deference, of course, is not appropriate in matters of statutory interpretation. *See, e.g.*, Qantas Airways Ltd. v. United States, 62 F.3d 385, 387 (Fed. Cir. 1995), *cert. denied*, 116 S. Ct. 910 (1996); Bruner v. United States, 55 F.3d 195, 197 (5th Cir. 1995); United States v. Jefferson-Pilot Life Ins. Co., 49 F.3d 1020, 1021 (4th Cir. 1995); Wolpaw v. Commissioner, 47 F.3d 787, 790 (6th Cir. 1995); Vinson & Elkins v. Commissioner, 7 F.3d 1235, 1237 (5th Cir. 1993). Nevertheless, breaking down the appellate court results by the status of the originating court may be desirable in light of empirical evidence of a higher rate of affirmance for Tax Court cases than for cases arising from the other tax forums. *See* K. Martin Worthy, *The Tax Litigation Structure*, 5 GA. L. REV. 248, 253 (1971); Special Project, *An Empirical Study of the Intercircuit Conflicts on Federal Income Tax Issues*, 9 VA. TAX REV. 125, 140–41 (1989).

[169] Prior to 1992, the Court of Federal Claims was called the Claims Court. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506. Prior to 1982, the Claims Court was called the Court of Claims. The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

[170] For a description of various factors to consider in choosing a tax litigation forum, see ROBERT C. CARLSON, HOW TO HANDLE AND WIN A FEDERAL TAX APPEAL ¶¶ 3.01–3.17 (1988); NINA J. CRIMM, TAX COURT LITIGATION: PRACTICE AND PROCEDURE ¶¶ 2.1–2.4 (1992); Nina J. Crimm, *Tax Controversies: Choice of Forum*, 9 B.U. J. TAX L. 1 (1991); Marshall W. Taylor, et al., *How to Choose the Right Forum in Tax Litigation*, PRAC. LAW., June 1991, at 39.

[171] Caron, *Tax Myopia*, *supra* note 1, at 585 n.*.

[172] For further discussion of the hybrid character of the Court of Federal Claims and the Federal Circuit, see Rochelle C. Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989); Martin D. Ginsburg, *The Federal Courts Study Committee on Claims Court Tax Jurisdiction*, 40 CATH. U. L. REV. 631 (1991); Larry Kramer, *Jurisdiction Over Civil Tax Cases*, 1990 B.Y.U. L. REV. 443; Pauline Newman, *The Federal Circuit: Judicial Stability or Judicial Activism*, 42 AM. U. L. REV. 683 (1993); Helen W. Nies, *Celebrating the Tenth Anniversary of the United States Court of Appeals for the Federal Circuit*, 14 GEO. MASON L. REV. 505 (1992); S. Jay Plager, *The United States Courts of Appeals, the Federal Circuit, and the Non-Regional Subject Matter Concept: Reflections on the Search for a Model*, 39 AM. U. L. REV. 853 (1990). Randall R. Rader, *Specialized Courts: The Legislative Response*, 40 AM. U. L. REV. 1003 (1991).

years as a fourth forum for litigating tax disputes.[173] Any discussion of the tax litigation process thus must account for these alternative forums.

Galler also spouts the "conventional wisdom"[174] that taxpayers who act on her theory and litigate in the Tax Court in order to escape the clutches of a revenue ruling will confront pro-government bias. She cites empirical data from Professor Deborah A. Geier allegedly evidencing such pro-government bias in the form of greater taxpayer success rates in the district court compared to the Tax Court.[175] Although Galler acknowledges that other commentators do not subscribe to the pro-government camp,[176] she ignores other empirical data available in the *Annual Report of the Commissioner of Internal Revenue* that bear on this question. As I have argued elsewhere,[177] data over a long period[178] indicate that the taxpayer has prevailed approximately one-half as often in the Tax Court as compared to the District Court and the Court of

---

[173] *See, e.g.*, Francis M. Allegra, *Bankruptcy Courts, The Tax Forum for the 90s*, 38 FED. BAR NEWS & J. 338 (1991); Grover Hartt III, *Tax Jurisdiction of the Bankruptcy Courts*, 50 N.Y.U. INST. ON FED. TAX'N 35-1 (1992); Robert A. Jacobs, *The Bankruptcy Court Emerges as Tax Dispute Arbiter of Choice*, 45 TAX LAW. 971 (1992).

[174] Galler, *supra* note 18, at 1088.

[175] Deborah A. Geier, *The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory*, 76 CORNELL L. REV. 985, 998 (1991).

[176] Galler rightly does not rely on a study purporting to show that for the 1980-85 period, nine Tax Court judges had a pro-government bias, seven judges had a pro-taxpayer bias, and six judges were "neutral." B. Anthony Billings, et al., *Are U.S. Tax Court Judges Decisions Subject to the Bias of the Judge?*, 55 TAX NOTES 1259, 1265 (1992). Some commentators have relied on this study. Miller, *supra* note 155, at 44-45 n.206. Others have raised "serious doubts about the authors' premises, methodology, assumptions, and conclusions." James E. Maule, *Are Tax Court Decisions Subject to Bias?*, 55 TAX NOTES 1554, 1554 (1992).

[177] Caron, *Tax Myopia*, *supra* note 1, at 578-81.

[178] My *Tax Myopia* article focused on the 1968-92 period. I have updated these figures to include information from the 1993 and 1994 *Annual Reports*.

Federal Claims,[179] while the taxpayer's overall savings in taxes, penalties, and interest as a percentage of the amounts at issue were approximately one-half higher in the Tax Court than in the District Court and Court of Federal Claims.[180] Although "[t]he *Annual Reports* do not explain the apparent anomaly that the taxpayer success rate is approximately one-half *lower* in the Tax Court while the taxpayer's monetary savings are approximately one-half *higher* in the Tax Court,"[181] I have suggested several possible explanations for this discrepancy.[182] Galler's reliance on Geier's incomplete data is particularly troubling because Tax Court Judge David Laro has recently used my data to refute Geier's claim of pro-government bias in the Tax Court.[183]

Finally, Galler's proposed cure is worse than the alleged disease. Galler contends that the Supreme Court has acknowledged the "ambiguous status"[184] of revenue rulings, and that the "Court's failure to articulate a deference standard exacerbates the confusion among the lower courts as to the status of revenue rulings."[185] As I have argued, Galler is the one confused about the status of revenue rulings. The Court, like the lower federal courts, has

---

179

TABLE EIGHT: TAXPAYER SUCCESS RATES IN TAX LITIGATION: 1968–94		
Tax Court	District Court	Court of Federal Claims
16.2%	30.6%	32.7%

My pending Freedom of Information Act request, *supra* note 64, seeks the release of the missing 1991–94 data for the district court and the Court of Federal Claims.

180

TABLE NINE: TAXPAYER MONETARY SAVINGS IN TAX LITIGATION: 1968–94		
Tax Court	District Court	Court of Federal Claims
68.1%	41.4%	43.7%

My pending Freedom of Information Act request, *supra* note 64, seeks the release of the missing 1986 data for the district court and the Court of Federal Claims.

181 Caron, *Tax Myopia*, *supra* note 1, at 579.

182 For example, the taxpayer success rate uses only cases that produced a court opinion while the taxpayer monetary savings uses all cases disposed of during the year (by dismissal, settlement, or trial). *Id.* at 580. In addition, the Service's loss in a few high stakes Tax Court cases could skew the data. *Id.* at 580 & n.284.

183 *See* David Laro, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. ILL. L. REV. 17, 25 n.16.

184 Galler, *supra* note 18, at 1073.

185 *Id.* at 1074.

historically used revenue rulings in crafting opinions justifying its decisions reached on other grounds. The window-dressing du jour simply has no effect on the Court's decision-making.[186]

Similarly, Galler's call for Congress to extend section 6110(j)(3)'s declaration that letter rulings "may not be used or cited as precedent"[187] to revenue rulings would not have any real-world consequences.[188] As Galler herself recognizes,[189] taxpayers and the Service nevertheless cite letter rulings in their arguments, and courts often refer to letter rulings in the course of their opinions.[190] For example, in the recent *Wolpaw v. Commissioner*[191] case discussed earlier,[192] the Sixth Circuit devoted considerable attention to a twenty-four year old letter ruling, as well as to the regulations, in the course of its opinion. The expansion of section 6110(j)(3) thus would not stop a future court from referring to revenue rulings in crafting its opinion. Indeed, the proper judicial attitude toward revenue rulings, as well as toward letter rulings, was there for Galler to see in one of her own footnotes quoting the views of two leading tax attorneys on the *Wolpaw* case:[193] "Our Theorem of Authoritative Letter Rulings is that although Section 6110(j) provides that letter rulings cannot be cited as 'binding precedent,' the courts will find a way to use them directly or indirectly as legal authority whenever they so desire."[194] Like

---

[186] In its most recent formulation, the Court declared that revenue rulings "do not have the force and effect of regulations" and "may not be used to overturn the plain language of a statute." Commissioner v. Schleier, 115 S. Ct. 2159, 2167 n.8 (1995).

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

[188] Galler, *supra* note 18, at 1095.

[189] *Id.* at 1058.

[190] *See, e.g.*, United States v. Hill, 506 U.S. 546, 564 n.12 (1993); Rowan Cos. v. United States, 452 U.S. 247, 261-62 n.17 (1981); Hospital Resource Personnel, Inc. v. United States, 68 F.3d 421, 428 n.11 (11th Cir. 1995); Estate of Spencer v. Commissioner, 43 F.3d 226, 234 (6th Cir. 1995); Beck v. Commissioner, 95-2 U.S.T.C. (CCH) ¶ 50,474, at 89,250 (4th Cir. 1995); Julius M. Israel Lodge of B'Nai B'Rith No. 2113 v. Commissioner, 70 T.C.M. (CCH) 673, 676 (1995); Thompson Elec., Inc. v. Commissioner, 69 T.C.M. (CCH) 3045, 3050 (1995); Estate of Pidgeon v. Commissioner, 69 T.C.M. (CCH) 2638, 2640 (1995).

[191] 47 F.3d 787 (6th Cir. 1995).

[192] *See supra* notes 141–49 and accompanying text.

[193] Galler, *supra* note 18, at 1058–59 n.112.

[194] *Shop Talk: No Regs.? Appellate Court Cites Letter Ruling Against IRS*, 82 J. TAX'N 380, 380 (Sheldon I. Banoff & Richard M. Lipton eds., 1995). *Wolpaw* illustrates the real-world limitations of the conventional view that "regulations, revenue rulings, and letter rulings . . . generally are ranked in descending order for purposes of weight or importance." Galler, *supra* note 18, at 1041. Although this view is certainly supported by judicial rhetoric, *Wolpaw* suggests that in practice judges refer to all three categories of

a person who stands in front of a mirror that she mistakes for a window,[195] Galler sees only her own reflection, not what is outside in the tax and nontax worlds.

---

interpretive guidance in fashioning opinions to justify their own construction of the Code. The leading tax treatise supports treating revenue rulings much like regulations:

> [Courts often state] that a revenue ruling in conflict with the statute is "without any force, which is true but is equally true of regulations and is usually beside the point. The issue ordinarily is whether a revenue ruling's interpretation of an ambiguous statute should be given weight in deciding the disputed issue. As considered expressions of the IRS' views, revenue rulings and regulation differ more in degree than in kind, and it is not clear that a sharp distinction in their weight is warranted.

4 BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS 110-56 (2d ed. 1992).

[195] *Cf.* Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 76 (1990) (coining this metaphor).