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In recent Terms, members of the Supreme Court have maintained an open attitude towards administrative deference doctrines. Justices have revived the "major questions" doctrine,[1] have examined the possibility of overruling *Auer* v. *Robbins*,[2] and have even retreated from *Chevron* itself.[3]

Any new Supreme Court limitations on administrative deference could affect the Internal Revenue Service's rulemaking and interpretive authority, even if those limitations arise in non-tax cases. Though it is often loathe to admit it, "[t]he IRS is not special,"[4] and general administrative law deference principles extend to the tax area.[5] However, there is one potentially evolving area of administrative deference, relating to the rule of lenity, for which the income tax laws should receive special treatment.

Under the rule of lenity, courts generally resolve statutory ambiguities in favor of the criminal defendant.[6] But under administrative deference doctrines, courts generally defer to an agency's resolution of a statutory ambigui-

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1. *See* Stephanie Hoffer & Christopher J. Walker, *Is the Chief Justice a Tax Lawyer?*, 2015 PEPP. L. REV. 33, 34 (in his opinion for the Court in *King v. Burwell*, Chief Justice Roberts "crafts a new major questions doctrine that could significantly cut back on federal agency lawmaking authority").

2. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring) ("I would therefore restore the balance originally struck by the APA with respect to an agency's interpretation of its own regulations, not by rewriting the Act in order to make up for *Auer*, but by abandoning *Auer* and applying the Act as written."); Aaron Nielson, *Visualizing Change in Administrative Law*, 49 GA. L. REV. 757, 791 (2015) ("*Seminole Rock* deference – the idea that agencies receive special deference when interpreting the regulations that they themselves write – may be on its last legs, at least according to statements of several of the Justices on the Supreme Court.").

3. Gregory Patrick, *Scholars Concerned About* Chevron *Deference 'Retreat,'* U.S.L.W. (BNA) (June 3, 2016), http://www.bna.com/scholars-concerned-chevron-n57982073856/.

4. Cohen v. United States, 650 F.3d 717, 723 (D.C. Cir. 2011) (en banc).

5. Mayo Found. for Med. Educ. & Res. v. United States, 562 U.S. 44, 55–56 (2011).

6. *See* United States v. Shabani, 513 U.S. 10, 17 (1994) (the rule of lenity "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute").

ty.[7] These two principles clash when the violation of a given statute carries both civil and criminal consequences[8] and an agency resolves an ambiguity in the "dual enforcement statute" in a way adverse to criminal defendants. When this happens, the court must decide whether it should defer to the agency or instead apply the rule of lenity.[9]

Scholars have warned that active government prosecution against those involved in tax shelter transactions could bring this interpretive question to the income tax system, with unpredictable results.[10] Tax shelters often stem from ambiguities in the tax code,[11] and to determine whether a tax shelter works, a court must usually resolve those ambiguities.[12] A taxpayer might argue that the court should use the rule of lenity to resolve the ambiguity in his favor, over any IRS claim for deference.

This Article shows that courts should reject such arguments because the rule of lenity has no place in the construction of the income tax provisions in Subtitle A of the tax code.[13] The rule of lenity makes sense when applied to a

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7. *See, e.g.*, Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992) ("If the text is ambiguous and so open to interpretation in some respects, a degree of deference is granted to the agency . . . .").

8. *See* Hosh v. Lucero, 680 F.3d 375, 383 (4th Cir. 2012) ("In some instances, as here, the rule of lenity and *Chevron* point in opposite directions. Deciding whether to apply the rule of lenity or whether to instead give deference to an agency interpretation is no small task.").

9. If a court believes that the level of ambiguity supporting agency deference is lower than the level of ambiguity needed to invoke the rule of lenity, it could avoid the interpretive conflict. But it is inevitable that some statutes, as applied to some factual scenarios, will meet ambiguity thresholds for both agency deference and lenity principles. *See generally* Frederick Liu, Chevron *as a Doctrine of Hard Cases*, 66 ADMIN. L. REV. 285 (2014).

10. *See* Kristin E. Hickman, *Of Lenity,* Chevron*, and KPMG*, 26 VA. TAX REV. 905, 941 (2007) ("[P]ursuing criminal penalties in tax shelter cases may represent the sort of scenario that could push the Court to expand its application of the rule of lenity in the civil context."); Steven A. Dean & Lawrence M. Solan, *Tax Shelters and the Code: Navigating Between Text and Intent*, 26 VA. TAX REV. 879, 903 (2007) ("Emerging developments such as the increased prominence of the rule of lenity . . . undoubtedly create a risk that courts will be marginally less likely to defer to the Treasury Department and the Service.").

11. References to the tax code are to the Internal Revenue Code of 1986, as amended, I.R.C. (the "code").

12. Sometimes, courts in the tax context skip statutory analysis altogether and announce that a transaction fails to pass muster under judge-made laws. *See, e.g.*, IRS v. CM Holdings (*In re* CM Holdings, Inc.), 301 F.3d 96, 102 (3d Cir. 2002) (describing statutory provisions at issue but concluding that "[w]e can forgo examining the intersection of these statutory details"). For criticism of this approach, see Amandeep Grewal, *Economic Substance and the Supreme Court*, 116 TAX NOTES 969 (2007) (describing how lower courts' creation of extra statutory tests conflicts with relevant Supreme Court precedents).

13. The tax code does not perfectly cabin off the income tax provisions from the procedural provisions, and parts of Subtitle A actually deal with matters other than the

statute that compels or prohibits some type of behavior, but income tax provisions do not compel or prohibit anything. Those provisions simply describe consequences associated with particular transactions. Consequently, applying the rule of lenity can lead to anomalous results.

If the Supreme Court considered how the rule of lenity applied in an income tax case, it would likely recognize these anomalies. But the Court takes few tax cases.[14] If the Court addresses the relationship between the rule of lenity and agency deference doctrines, it will likely do so in a non-tax case. And if it holds that lenity trumps deference, it might use generic language suggesting that its holding applies to all agencies, including the IRS. Taxpayers and the IRS would then struggle to apply the Court's holding, given the conceptual difficulties associated with applying the rule of lenity to the income tax provisions. To avoid this problem, the Court should explicitly exempt income tax provisions from the rule of lenity.

I. THE RULE OF LENITY IN CIVIL CASES

The Supreme Court has interpreted dual enforcement statutes on several occasions, though no opinion exhaustively addresses the interpretive difficulties surrounding them.[15] In one of the leading cases on the issues, *United States v. Thompson/Center Arms Co.*,[16] the Court applied the rule of lenity but left unanswered some key questions.[17]

Thompson/Center Arms involved a dispute over provisions of the National Firearms Act.[18] Under this Act, codified in the tax code, Congress established various pre-approval and registration requirements[19] for firearm makers. Through § 5281(a), it also imposed a $200 tax on the making of a

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determination of taxable income and tax liabilities. *See, e.g.*, I.R.C. § 1441 (West 2016) (imposing withholding obligations on persons making payments to nonresident aliens). For ease of exposition, this Article will refer to Subtitle A as measuring taxable income and determining tax liabilities and Subtitle F as dealing with procedure. *See id.* §§ 1–1564, 6001–7874. But the function of any particular tax code provision must be determined by examining its language and not through mere reference to its grouping in one subtitle or another. Also, though this Article focuses on the income tax laws, its analysis would extend to other tax regimes (like those relating to wealth transfer taxes) that contain both descriptive and prescriptive elements. *See, e.g.*, JOINT COMMITTEE ON TAXATION, JCX-52-15, HISTORY, PRESENT LAW, AND ANALYSIS OF THE FEDERAL WEALTH TRANSFER TAX SYSTEM (2015).

14. *See* Ryan Owens, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1230 (2012) ("In 1946, the Court decided 16 tax cases. In the 2008 Term, it decided none.").

15. *See* Whitman v. United States, 135 S. Ct. 352 (2014) (Scalia, J., respecting the denial of certiorari) (summarizing Court precedents on dual enforcement statutes).

16. United States v. Thompson/Ctr. Arms Co., 504 U.S. 505 (1992) (plurality).

17. *Id.* at 525–26 (Stevens, J., dissenting).

18. *See id.* at 507 (plurality opinion).

19. *See* I.R.C. § 5841 (2012) (imposing registration requirements); *id.* § 5822 (requiring pre-approval of Treasury as condition of making a firearm).

"firearm,"[20] which for purposes of the Act included short-barreled rifles but not long-barreled ones.[21] Criminal sanctions potentially applied to a failure to satisfy the Act's requirements,[22] although *Thompson/Center Arms* involved a civil tax dispute.[23]

The taxpayer in *Thompson/Center Arms* sold a package of gun components that could be assembled into a short- or a long-barreled rifle, and an ambiguity arose over whether the taxpayer had made a firearm within the meaning of the Act.[24] The taxpayer argued that it only made long-barreled rifles, if it made rifles at all,[25] and should thus escape the § 5281(a) tax. The government countered that the taxpayer's packaging of gun components that *might* be assembled into a short-barreled rifle constituted the "making of a firearm."[26]

To determine whether the taxpayer had "ma[de] a firearm" under § 5281(a), the Court first examined related provisions and the statute's legislative history.[27] However, after applying these "ordinary rules of statutory construction," it remained ambiguous whether the tax applied to the taxpayer.[28] The Court's three-member plurality, along with two concurring Justices, ultimately concluded that the rule of lenity resolved the statutory ambiguity.[29] Although *Thompson Center/Arms* involved interpreting a tax statute in a civil setting, the Act had "criminal applications that carr[ied] no additional requirement of willfulness."[30] This justified invocation of the lenity rule and a holding in the taxpayer's favor.[31]

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20. *Id.* § 5821(a).

21. *Id.* §§ 5845(a)(3)–(4) ("The term 'firearm' means . . . (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length . . . .").

22. *Id.* § 5871 ("Any person who violates or fails to comply with any provisions of [the NFA] shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both.") (I.R.C. §§ 5801–5872 is the National Firearms Act).

23. *Thompson/Ctr. Arms Co.*, 504 U.S. at 517.

24. *Id.* at 508.

25. The taxpayer argued that it could not be treated as a maker of a firearm when it simply packaged components, but the plurality rejected that argument. *See id.* at 510.

26. *See id.*; *see also* I.R.C. § 5821 ("There shall be levied, collected, and paid upon the *making of a firearm* a tax at the rate of $200 for each firearm made.") (emphasis added).

27. *Thompson/Ctr. Arms Co.*, 504 U.S. at 513–17.

28. *Id.* at 517.

29. *Id.* at 518. *See also id.* at 519 (Scalia, J., concurring) ("I agree with the plurality that the National Firearms Act . . . is sufficiently ambiguous to trigger the rule of lenity . . . .").

30. *Id.* at 517 (plurality opinion).

31. *Id.* at 518.

At first glance, it seems that *Thompson Center/Arms* definitively resolves interpretive questions surrounding dual enforcement statutes. That is, a majority of Justices agreed that the rule of lenity applies to a statute backed by criminal enforcement mechanisms, even if the interpretive dispute arises in a purely civil proceeding. This implies that the rule of lenity should always resolve ambiguities in dual enforcement statutes. However, *Thompson Center/Arms* did not address whether agency deference doctrines could displace the rule of lenity, because the government had not issued any guidance on the phrase "making a firearm."[32]

Had the government issued guidance under § 5281(a), a conflict would have arisen. The rule of lenity resolves ambiguities in favor of defendants, but deference principles resolve ambiguities in favor of the government. For example, had the government issued an interpretive rule stating that the assembly of packages like *Thompson Center/Arms* qualified as the "making of a firearm," it likely would have claimed so-called *Skidmore* deference, under which its interpretation would be "entitled to respect" to the extent that it had the "power to persuade."[33] Or, if the government had issued a legislative regulation, it likely would have claimed *Chevron* deference, which, shorn of nuance, blesses any agency view as long as it is reasonable. If the Court applied either of these deference doctrines, rather than the rule of lenity, the government would have won.

Later court cases provide no clear indication of whether agency deference doctrines trump lenity principles.[34] Numerous circuit courts defer to an agency's interpretation of dual enforcement statutes,[35] but a concurring opinion by Judge Sutton of the Sixth Circuit raises serious concerns about this practice.[36] Those concerns have advanced an active debate on the issues.[37]

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32. For a discussion of the mixed case law on whether the government obtains deference for interpretations advanced solely in litigation, see Bradley George Hubbard, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The* Chevron *Two-Step and the* Skidmore *Shuffle*, 80 U. CHI. L. REV. 447, 459–60 (2013). *See also* Mass. Mut. Life Ins. Co. v. United States, 782 F.3d 1354, 1370 (Fed. Cir. 2015) (declining to grant deference to IRS's litigating position but noting that such deference may sometimes be appropriate).

33. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

34. *See Thompson/Ctr. Arms Co.*, 504 U.S. at 519 (Scalia, J., concurring). *See also* Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1027 (6th Cir. 2016) (Sutton, concurring in part and dissenting in part) (arguing the majority erroneously believed the footnote in the Supreme Court opinion established primacy of *Chevron* over lenity rule for dual enforcement statutes).

35. *See, e.g.*, *Thompson/Ctr. Arms*, 504 U.S. at 521 (Scalia, J., concurring).

36. *See* Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 729 (6th Cir. 2013) (Sutton, J., concurring).

37. *See generally* Elliot Greenfield, *A Lenity Exception to* Chevron *Deference*, 58 BAYLOR L. REV. 1, 41 (2006) (discussing a few representative cases that illustrate some of the approaches courts have taken); Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMIGR. L.J. 515 (2003).

II. THE RULE OF LENITY AND INCOME TAX STATUTES

For ambiguities in Subtitle A of the tax code, agency deference doctrines should always trump the rule of lenity because that rule has no place in the construction of income tax statutes. To understand why this is so, first consider some hypothetical non-tax statutes that prohibit or require various behaviors. These statutes might direct that no person shall travel in excess of a reasonable speed, that manufacturers cannot emit pollutants into the environment, or that companies that sell stock must make financial disclosures.

For each of these statutes, we can easily identify potential ambiguities, which, if resolved one way rather than the other, would necessarily favor defendants rather than the government. With the traffic statute, for example, interpreting "reasonable" to incorporate a higher number rather than a lower number will favor the defendant; with the environmental statute, interpreting a narrower rather than broader definition of "pollutant" will also favor the defendant; and with the securities statute, a narrower rather than broader definition of "stock" would similarly favor the defendant. In other words, for each statute, we can easily determine which way the rule of lenity would run because each prohibits or requires specific actions.

But we cannot do that with Subtitle A of the tax code. The income tax provisions, unlike the provisions at issue in *Thompson/Center Arms*, do not actually prohibit or require any type of behavior and instead attach consequences to different actions.[38] Section 162(c), for example, states that no deduction will be allowed for bribes, kickbacks, and other illegal payments.[39] However, this statute does not criminalize the payment of a bribe or kickback. If a person makes such a payment, he will be prosecuted under the criminal laws, if at all.

To establish that someone violated the tax laws, the government could not look to § 162(c).[40] Rather, a taxpayer breaks the tax law only when violating some type of prohibition or requirement under the code.[41] For example, § 6012 (codified in Subtitle F) states that "returns with respect to income taxes under subtitle A shall be made by" the various persons subject to tax.[42] *This* provision actually requires the filing of a tax return that accurately reports taxable income,[43] and a failure to comply with § 6012, not § 162(c),

38. *See* I.R.C. §§ 7201–7217 (West 2016). *See also* 18 U.S.C. § 371 (2012).

39. I.R.C. § 162(c).

40. *Compare id.*, *with* I.R.C. §§ 7201–7217 (Chapter 75 of the Internal Revenue Code establishes when someone has violated the tax laws because it discusses crimes, other offenses, and forfeiture).

41. *See* I.R.C. §§ 7201–7217.

42. *See id.* §§ 6012(a)(1)(A)(i)–(iv).

43. Ballantyne v. Comm'r, 99 T.C.M. (CCH) 1523 (T.C. 2010) ("A taxpayer has a duty to file timely a complete and accurate return and to pay the amount shown as due on that return.") (citing § 6012 and related statutes).

creates potential criminal tax consequences.[44] And it is only statutes like § 6012, which require specific actions, to which the rule of lenity can sensibly apply.

To further illustrate this, consider a simple statute that offers nothing more than a definition of "fruit." Also suppose that it remains ambiguous whether the statute's definition reaches tomatoes. If a court were asked to determine the most lenient interpretation of this definitional statute, it would be helpless. Whether including or excluding fruits reflects a lenient interpretation would depend on the content of some other operative statute. That is, if some operative statute made it a crime to import fruits, a lenient interpretation would *exclude* tomatoes from the definition. But if the operative statute shielded the importation of fruits from criminal consequences (but criminalized, for example, the importation of vegetables), then a lenient interpretation would *include* tomatoes in the definition. And if some statutes accorded advantaged status to fruits and others accorded disadvantaged status to them, there would be no single lenient interpretation.

When it comes to the income tax laws, a similar principle applies. Most taxpayers might prefer to exclude an item from gross income under § 61, but other taxpayers might favor inclusion.[45] Also, most taxpayers might prefer to immediately deduct expenses under § 162, but other taxpayers might prefer to capitalize those expenses.[46] In other words, the income tax laws do not yield a single lenient interpretation – what might be good for one taxpayer might be bad for another.[47]

A statute that figured heavily in the recent criminal tax shelter wave further illustrates this. Whether the so-called Bond Linked Issue Premium Structure ("BLIPS") shelter generated the desired tax benefits depended, in large part, on § 752 of the tax code, which attaches consequences to partner-

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44. *See* I.R.C. § 7203. Of course, it is not enough to simply file a return showing the taxes imposed. *Id.* Rather, taxpayers must pay such taxes, and a failure to pay may also trigger criminal consequences. *See id.* § 7201.

45. *See, e.g.*, I.R.C. § 36B, under which a taxpayer must meet an income floor if he wants to claim a premium assistance tax credit. Regarding deductions for a discussion of some circumstances where a taxpayer might prefer to forgo a deduction and thereby increase taxable income, see James Edward Maule, *No Thanks, Uncle Sam, You Can Keep Your Tax Break*, 31 SETON HALL LEGIS. J. 81 (2006).

46. If a deduction would be available in the current year, when the taxpayer was in a low tax bracket, she might, depending on various things not relevant to the interpretive issues discussed here, prefer to capitalize the expense and recognize a greater loss (or smaller gain) on the sale of property in a subsequent year in which she faces a higher tax rate.

47. *See* Martin D. Ginsburg, *Making Tax Law Through the Judicial Process*, 70 ABA J. 74, 76 (1984) ("[E]very stick crafted to beat on the head of a taxpayer will metamorphose sooner or later into a large green snake and bite the commissioner on the hind part.").

partnership transactions involving "liabilities."[48] In a case decided in the 1970s, *Helmer v. Commissioner*,[49] the tax court held that contingent liabilities did not qualify as liabilities under § 752.[50] This interpretation negatively affected the taxpayer, and the IRS won that dispute.[51]

However, in the 1990s, some tax advisers realized that if § 752 did not reach contingent liabilities, they could create transactions that generated massive artificial losses.[52] They consequently advised their clients to participate in the BLIPS transaction.[53] The government, obviously upset with this, engaged in massive enforcement efforts, collecting billions of dollars in civil penalties from taxpayers and pursuing criminal prosecutions against the advisers who concocted BLIPS and similar transactions.[54]

Though the criminal litigation over BLIPS has largely wrapped up, commentators had earlier suggested that the rule of lenity could influence a court's interpretation of § 752 and, thus, the shelter's validity.[55] However, had a court done so, it would have erred. As § 752's history shows, there is no single defendant-friendly interpretation of the statute.[56] If a court tried to apply the rule of lenity to BLIPS participants, it would hold that contingent liabilities fall outside of § 752. But if it applied that holding to taxpayers situated like those in *Helmer*, its supposed rule of lenity would actually amount to a rule of severity.

One might cleverly respond that, in applying the rule of lenity, a court could tilt the statute one way in cases involving BLIPS transactions and tilt it the other way in cases involving *Helmer*-type transactions. However, the rule of lenity does not reflect a blunt, equitable tool intended to aid particular de-

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48. I.R.C. § 752. For an overview of BLIPS transactions, *see* TANINA ROSTAIN & MILTON C. REGAN, JR., CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER INDUSTRY (2016).

49. 34 T.C.M. (CCH) 727 (T.C. 1975), *superseded by regulation as stated in* Cemco Inv'rs, LLC v. United States, 515 F.3d 749, 753 (7th Cir. 2008).

50. *Id.*

51. *Id.*

52. Courts actually expressed different opinions on the relevance of *Helmer* to tax shelters involving § 752. *See* Markell Co. v. Comm'r, 107 T.C.M. (CCH) 1447, *39–40 (T.C. 2014) (describing different approaches). Resolution of that controversy is not relevant to the interpretive issues discussed here. *Id.* at *38.

53. *Id.* at *12.

54. *See* Andrew Countryman, *IRS Collects $3.2 Billion from Users of Improper Tax Shelter*, CHI. TRIB. (Mar. 25, 2005), http://articles.chicagotribune.com/2005-03-25/business/0503250211_1_bad-shelter-irs-commissioner-mark-everson-irs-officials; *IRS Collects $3.2 Billion from Son of Boss; Final Figure Should Top $3.5 Billion*, IRS NEWSWIRE (Mar. 24, 2005), https://www.irs.gov/uac/irs-collects-3-2-billion-from-son-of-boss-final-figure-should-top-3-5-billion.

55. *See* Hickman, *supra* note 10, at 925. *See also* Dean & Solan, *supra* note 10, at 903 ("Emerging developments such as the increased prominence of the rule of lenity . . . undoubtedly create a risk that courts will be marginally less likely to defer to the Treasury Department and the Service.").

56. *See* I.R.C. § 752 (2012) (referring to cases in the citing references).

fendants in particular cases. Rather, it is a canon of statutory construction intended to help determine the meaning of enacted language.[57] And the meaning of a statute's language cannot change, chameleon-like, depending on the identity of particular defendants.[58]

To determine a single lenient interpretation of an income tax provision, a court might adopt whatever construction would favor most taxpayers, most of the time. However, this approach would lead to strange results. Suppose, for example, that it is ambiguous under § 302(b)(1) whether a particular type of distribution should be treated as a payment made in exchange for stock or should instead be treated as a dividend.[59] Assume that most taxpayers, most of the time, prefer exchange treatment, and most taxpayers file their tax returns accordingly. However, some taxpayers take a cautious approach and report dividend treatment.[60] Other taxpayers find that dividend treatment actually provides benefits, and they report that treatment not out of caution, but rather with the intent to evade taxes.

If a criminal case arose involving the taxpayers who attempted to evade taxes by reporting dividend treatment, a court applying a general approach to the rule of lenity (an approach under which it adopts the interpretation that is favorable to most taxpayers, most of the time) would find that the statute mandated exchange treatment for the distribution at issue. In doing so, the court would have used the rule of lenity to find for the government – a strange result. Also, the cautious taxpayers who reported dividend treatment, without seeking any tax advantage, would be punished.

The rule of lenity should not be used in this context. If a statute affects different taxpayers differently, there will be no such thing as a universally favorable interpretation. Agency deference doctrines and other principles of construction should apply to statutes like the income tax provisions, which impose no prohibitions or requirements.

Arguably, in a future case involving a dual enforcement statute, the Court need not worry about the tax system and need not make any carve outs. Historically, administrative law pronouncements issued in non-tax cases have

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57. United States v. Santos, 553 U.S. 507, 514 (2008) (plurality).

58. Leocal v. Ashcroft, 543 U.S. 1, 11–12 (2004) (applying the rule of lenity to the construction of an immigration statute in civil proceeding "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context").

59. *See* I.R.C. § 302(a) (contemplating that a corporation's redemption of its stock may be treated as an exchange rather than a distribution under § 301). *See also id.* § 302(b)(1) (stating that redemptions that are "not essentially equivalent to a dividend" come within § 302(a)).

60. A taxpayer could prefer exchange treatment when, for example, the exchange would give rise to long-term capital gain income and the rate applied to that income would be lower than that applied to dividend income. *See generally* Comm'r v. Clark, 489 U.S. 726, 729–30 (1989). However, corporate taxpayers do not enjoy a capital gains preference and would generally prefer dividend treatment, so as to enjoy the deduction on account of dividends received. *See* I.R.C. § 243.

not disrupted or even necessarily had major effects on the tax laws.[61] Consequently, the tax laws might be insulated from any general Court holding on the rule of lenity and agency deference.

However, in light of recent developments, the Court should take a cautious approach. Specifically, in *Mayo v. United States*, the Court declined to "carve out an approach to administrative review good for tax law only" when it decided that the *Chevron* doctrine displaced tax-specific deference doctrines.[62] With that in mind, if the Court generally holds that the rule of lenity trumps agency deference doctrines, lower courts may improperly apply that holding in cases involving the IRS.

Also, the law on the rule of lenity and the income tax provisions remains underdeveloped, which would amplify the effect of any general Court guidance on the issues. Criminal tax cases have historically involved egregious transactions that do not present challenging questions of income tax law, so courts have had few occasions to construe ambiguous income tax provisions in the criminal context. And until recently, some courts cabined off criminal income tax cases from civil cases by holding that the meaning of a statute could change depending on the context.[63]

If the Court offers a limited holding – that only regulations issued under notice-and-comment procedures trump the rule of lenity – it should nonetheless act cautiously. The Court might reach that holding if it emphasizes the notice function of the rule of lenity and discounts the legislative function. That is, the rule of lenity helps ensure those subject to the law receive clear notice of the conduct that may lead to criminal sanctions (the notice function) and also encourages the legislature itself to clearly define criminal conduct (the legislative function). Because agencies usually publish regulations in the Federal Register prior to their taking effect, those regulations might satisfy

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61. Kristin E. Hickman, *Goodbye Tax Exceptionalism*, FEDERALIST SOC'Y (Dec. 1, 2011), http://www.fed-soc.org/publications/detail/goodbye-tax-exceptionalism ("In the past few decades, the practices and doctrines governing the interpretation and administration of the federal tax code have diverged somewhat from general administrative law doctrines and norms in several ways.").

62. Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 55 (2011).

63. Under § 301, a distributee generally will not recognize income on a distribution with respect to stock owned in a corporation when that corporation lacks earnings of profits. *See* I.R.C. § 301. However, in the criminal context, some courts dismissed the relevance of earnings and profits and focused on the taxpayer's intent, such that § 301 essentially meant one thing in the civil context and another thing in the criminal context. *See* United States v. Williams, 875 F.2d 846, 851 (11th Cir. 1989); United States v. Miller, 545 F.2d 1204, 1214 (9th Cir. 1976) (explaining that § 301 essentially meant one thing in the civil context and another thing in the criminal context), *abrogated by* Boulware v. United States, 552 U.S. 421, 436 (2008) (stating that the distribution rules "draw no distinction in terms of criminal or civil consequence," and that the Ninth Circuit's approach "creates a disconnect between civil and criminal liability").

the notice function, and the Court may conclude that *Chevron* trumps lenity for those regulations.[64]

That holding, however, would create a dangerous negative inference, at least for the tax laws. Under § 7805(b), many tax regulations operate retroactively, back to the date of the enactment of the statute they interpret.[65] If the Court holds that agency deference trumps lenity when an agency issues prospective rules, that might imply that retroactive regulations *are* trumped by the rule of lenity. However, for reasons already discussed, the rule of lenity should not apply to the construction of income tax provisions, whether or not any related regulations apply retroactively.[66]

This does not mean that the rule of lenity has no place in the tax laws, and nothing here contradicts the holding of *Thompson/Center Arms*. Unlike income tax statutes, § 5821(a) actually imposes requirements (anyone who undertakes "the making of a firearm" must pay a tax), and the rule of lenity sensibly applies to that provision.[67] Also, many provisions of Subtitle F create requirements for taxpayers (including obligations to file returns, pay taxes, and withhold on amounts transferred), and these provisions often are enforced by both civil and criminal measures.[68] If the Court holds that lenity trumps agency deference doctrines for dual enforcement statutes, that holding should extend to ambiguities in these procedural provisions, though not to the income tax provisions.

Putting conceptual problems aside, one might argue that without the rule of lenity, taxpayers who struggle to understand the tax code and who make honest interpretive mistakes might easily find themselves facing criminal prosecution. However, as noted by the Supreme Court in *Cheek v. United States*,[69] the tax code makes "specific intent to violate the law an element of certain federal criminal tax offenses,"[70] and a defendant's good faith miscon-

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64. Lissa N. Snyders, *When Does This Rule Go Into Effect?*, FED. REG.: OFFICE FED. REG. BLOG (Mar. 17, 2015), https://www.federalregister.gov/blog/2015/03/when-does-this-rule-go-into-effect.

65. Congress amended § 7805(b) and prohibited retroactive regulations for tax statutes enacted on or after July 30, 1996. *See* I.R.C. § 7805. However, "Under section 7805(b) [as applied to prior statutes], there is a presumption that every regulation will operate retroactively, unless the Secretary specifies otherwise." UnionBanCal Corp. v. Comm'r, 113 T.C. 309, 327 (T.C. 1999), *aff'd*, 305 F.3d 976 (9th Cir. 2002). For an argument that the § 7805(b) amendments apply to regulations issued under all tax statutes, regardless of date of enactment, see John Bunge, *Statutory Protection From IRS Reinterpretation of Old Tax Laws*, 144 TAX NOTES 1177 (2014).

66. Though the rule of lenity would not limit the government's authority to issue retroactive regulations, such regulations could be challenged under an abuse of discretion standard. *See generally* Bryan T. Camp, *The Retroactivity of Treasury Regulations: Paths to Finding Abuse of Discretion*, 7 VA. TAX REV. 509 (1988).

67. *See* I.R.C. § 5821(a).

68. *See generally* I.R.C. §§ 6001–7874.

69. 498 U.S. 192 (1991).

70. *Id.* at 199–200 ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal sys-

struction of an income tax provision provides a defense to criminal prosecutions under statutory provisions carrying a willfulness requirement.[71] For example, if a defendant misconstrues whether a particular item comes within gross income under § 61, he will be shielded from prosecution under § 7201, even if his good faith interpretation was completely wrong.[72] In this way, criminal liability (as opposed to civil liability) does not necessarily turn on the meaning of income tax statutes, at least when *Cheek* applies. Consequently, as the Court's plurality hinted in *Thompson/Center Arms*, the lenity rule may be unnecessary for prosecutions related to the income tax.[73]

III. CONCLUSION

The Symposium, *A Future Without the Administrative State?*, of which this Article is a part, allowed us to reconsider major aspects of our system of government.[74] However, while we examine legislative proposals to fundamentally change the administrative state, we should not lose sight of the various doctrines that the Court itself may reshape in coming Terms. This Article strikes a note of caution – if the Court reconsiders longstanding deference doctrines, it should act cautiously to take into account special features of the tax system and should reject the rule of lenity for income tax statutes.

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tem. . . . Congress has . . . softened the impact of the common law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses.").

71. *Id.* at 201–02.

72. *See id.*

73. United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 517 (1992) (plurality) ("The key to resolving the ambiguity lies in recognizing that although it is a tax statute that we construe now in a civil setting, the NFA has criminal applications *that carry no additional requirement of willfulness*.") (emphasis added).

74. Symposium, *A Future Without The Administrative State?*, 81 MO. L. REV. 933 (2016).