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Granting Chevron Deference to IRS Revenue Rulings: The "Charitable" Thing to Do

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INTRODUCTION

A simple fact of life is that all people—taxpayers and evaders alike—despise taxes and the Internal Revenue Service ("IRS"). General perceptions view the IRS as having "inherent advantages over taxpayers,"[1] taking hard-earned money from and effectively irritating Americans each April. Because the main objective of the IRS is to raise money for the government, taxpayers perceive that the agency acts in a manner that calls reasonableness into question.[2] Although factually the IRS typically does not engage in excessively unreasonable practices,[3] taxpayers nonetheless may feel victimized by the IRS's rules. Organizations that associated themselves with the Tea Party certainly felt victimized in 2013 when news broke that IRS employees had been subjecting groups associated with conservative political views to more rigorous standards than non-conservative organizations.[4] What makes taxpayers feel even more wronged—often raising attitudes toward the IRS from mere distaste to raging hatred—is when one taxpayer is treated in an unequal, and presumably unfavorable, manner than his next-door neighbor.[5]

A general duty of consistency is imposed on the IRS,[6] but when courts from state to state—and even courts within states—fail to adhere to the same principles for similarly situated taxpayers, people get even angrier. Such is the case with IRS revenue rulings, which are published by the IRS

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1. Irving Salem et al., *ABA Section of Taxation Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717, 723 (2004).

2. *Id.* at 725.

3. *See* TREAS. INSP. GEN. FOR TAX ADMIN., 2015-2016 SEMIANN. REP. *passim*, https://www.treasury.gov/tigta/semiannual/semiannual_mar2016.pdf [https://perma.cc/5P47-67D8].

4. *See* TREAS. INSP. GEN. FOR TAX ADMIN., 2013-10-053, INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW (2013), https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf (last updated May 14, 2013) [https://perma.cc/E9ZT-RTG9]; *IRS Finally Reveals List of Tea Party Groups Targeted for Extra Scrutiny*, WASH. TIMES (June 5, 2016), http://www.washingtontimes.com/news/2016/jun/5/irs-reveals-list-of-tea-party-groups-targeted-for-/ [https://perma.cc/5ZR7-PM7S].

5. *See generally* Richard J. Wood, *Supreme Court Jurisprudence of Tax Fairness*, 36 SETON HALL L. REV. 421 (2006).

6. The IRS Mission is to provide United States' taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all taxpayers. IRM 1.1.1.2 (June 2, 2015); *see also* I.R.C. § 7803(a)(3) (2012); United States v. Kaiser, 363 U.S. 299, 308 (1960) (Frankfurter, J., concurring).

and are said to carry the effect of law, though they often are disregarded or applied inconsistently by courts.[7] Perhaps if the IRS provided its employees and United States' taxpayers with more robust guidance in the form of practical revenue rulings, there would not have been an opportunity for the Tea Party targeting that occurred within the IRS Exempt Organization Division.[8]

The Supreme Court of the United States has not issued a definitive opinion on the deference that reviewing courts should accord revenue rulings, but the Court has offered guidance as to how courts should interpret and defer to administrative rulings generally.[9] A circuit split exists regarding the appropriate treatment of revenue rulings.[10] Because revenue rulings are not subject to the same level of scrutiny that Treasury regulations receive[11] and because the IRS explicitly provides that revenue rulings do not carry the same force that regulations are accorded,[12] many scholars argue that revenue rulings should be afforded some lesser standard of deference.[13]

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7. *See, e.g.*, Tedokon v. Comm'r., 84 T.C.M. (CCH) 657, at 4–5 (2002) (finding revenue ruling "commanded deference"); Trinova Corp. and Subsidiaries v. Comm'r, 108 T.C. 68 (1997) (disagreeing with the Second and Ninth Circuits' level of deference to revenue rulings), *rev'd sub nom*. Aeroquip-Vickers, Inc. v. Comm'r, 347 F.3d 173, 180 (6th Cir. 2003) (reversing the Tax Court's decision and acknowledging a change in direction and that in light of recent Supreme Court cases, revenue rulings should receive some degree of deference).

8. *See* Nicholas Confessore et al., *Confusion and Staff Troubles Rife at I.R.S. Office in Ohio*, N.Y. TIMES (May 18, 2013), http://www.nytimes.com/2013/05/19/us/politics/at-irs-unprepared-office-seemed-unclear-about-the-rules.html?_r=0 [https://perma.cc/8VX4-C9MN]. The IRS Exempt Organization department administers tax law governing charities, private foundations, and other entities exempt from federal income tax. *See About Us*, IRS, https://www.irs.gov/charities-non-profits/about-irs-exempt-organizations (last visited Nov. 16, 2017) [https://perma.cc/T2M6-C2TV].

9. *See, e.g.*, Skidmore v. Swift & Co., 323 U.S. 134 (1940); Chevron U.S.A. v. Nat. Res. Def. Council, 467 U.S. 837 (1984); United States v. Mead Corp., 533 U.S. 218 (2001).

10. *See* discussion *infra* Part I.C.

11. *See* discussion *infra* Part I.

12. Treas. Reg. § 601.601(d)(2)(v)(d) (as amended in 1989) ("Revenue Rulings published in the Bulletin do not have the force and effect of Treasury Department Regulations . . . .").

13. *See, e.g.*, Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, 72 B.U. L. Rev. 841, 857–69 (1992); Peter A. Lowy & Juan F. Vasquez, Jr., *How Revenue Rulings Are Made, and the Implications of That Process For Judicial Deference*, 101 J. TAX'N 230, 234 (2004) (stating that it is abundantly clear that revenue rulings are not entitled to *Chevron* deference);

Nonetheless, the regulations also provide that revenue rulings are "published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose."[14] Controversy exists as to whether the explicit disclaimer—codified in the Federal Treasury regulations[15]—that revenue rulings do not rise to the level of Treasury regulations necessarily strips revenue rulings of the force and effect of law.[16] Nevertheless, applying any standard less than substantial deference to revenue rulings conflicts with principles of administrative law and contradicts established jurisprudence.[17] Applying a lesser standard, such as considering revenue rulings merely persuasive, effectively allows courts to inject their own analyses into the meaning of the statute at issue, only looking to agency interpretations to determine if the interpretations may persuade a court otherwise.[18]

Part I of this Comment examines the legal principles behind revenue rulings, discussing the two main standards of deference that may be afforded to administrative rulings generally and assessing how various courts have treated revenue rulings. Part II discusses applicability of the standards of deference to IRS revenue rulings in light of the Supreme Court decision in *United States v. Mead Corp*[19] and the problems that have arisen post-*Mead*. Particularly, this Part explores the standards behind agency promulgations that have the force and effect of law. Part III assesses revenue rulings and discusses the various reasons why the rulings are entitled to substantial judicial deference. Part IV offers a solution to alleviate the uncertainty of the deference afforded to revenue rulings, focusing on revenue rulings in the context of charitable organizations. Part V advocates a call for deference to revenue rulings as supported by the examination in Part IV. This Comment concludes by arguing that revenue

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Salem et al., *supra* note 1, at 744 (recommending that federal courts should give revenue rulings *Skidmore* deference).

14. Treas. Reg. § 601.601(d)(2)(v)(d).

15. *Id.*

16. *Compare* Salem et al., *supra* note 1, at 744 (providing that revenue rulings are not entitled to *Chevron* deference because they do not have the same force of law as Regulations), *with* Ryan C. Morris, *Substantially Deferring to Revenue Rulings After* Mead, 2005 B.Y.U. L. REV. 999, 1040 (2005) ("A wide variety of reasons suggest that revenue rulings are the type of administrative pronouncement that deserves *Chevron* deference . . . .").

17. *See* discussion *infra* Part IV.B.

18. *See* Russell L. Weaver, *The Emperor Has No Clothes:* Christensen, Mead*, and Dual Deference Standards*, 54 ADMIN. L. REV. 173, 174 (2002); *see also* Ronald M. Levin, Mead *and the Prospective Exercise of Discretion*, 54 ADMIN L. REV. 771, 772 (2002).

19. Mead Corp. v. United States, 533 U.S. 218 (2001).

rulings are entitled to *Chevron* deference as it is both plausible and logical given the level of certainty taxpayers desire, the expertise of the IRS, the method by which revenue rulings are generated, the penalties associated with noncompliance, and the social policies particular to charitable organizations.

I. REVENUE RULINGS AND STANDARDS OF JUDICIAL DEFERENCE

IRS revenue rulings are official interpretations of substantive tax law[20] and are the "second most important" pronouncements made by the IRS.[21] Defined as official interpretations by the IRS, revenue rulings are published to inform and provide guidance to taxpayers, IRS officials, and other parties concerned with principles of taxation.[22] The issuance of revenue rulings may offer interpretations of the Internal Revenue Code ("IRC" or "Code"), Treasury regulations, and caselaw as applied to hypothetical fact patterns.[23] Formally, these promulgations represent the IRS's position on how the law applies to a particular set of facts.[24] They are formatted in a way that discusses hypothetical facts, applies the appropriate law to the proposed facts, and sets forth the proper outcome and reasons in support of such outcome.[25]

The IRS issues revenue rulings to promote correct and uniform application of tax laws by its IRS employees and to assist taxpayers in attaining maximum voluntary compliance.[26] To those ends, the revenue rulings inform IRS personnel of the internal revenue laws, related statutes, treaties, regulations, and statements of procedures affecting the rights and duties of taxpayers.[27] The IRS instructs taxpayers to rely on revenue rulings as guidance in applying the particular tax law to substantially similar facts.[28] In the event that taxpayers choose to ignore the principles established in revenue rulings, they may face penalties associated with

20. Treas. Reg. § 601.601(d)(2)(i)(a), (v)(a); *see also* Rev. Proc. 89-14, § 3.01, 1989-1 C.B. 814.

21. Stichting Pensioenfonds Voor de Gezondheid v. United States, 129 F.3d 195, 198 (D.C. Cir. 1997).

22. Treas. Reg. § 601.201(a)(6) (1967).

23. *See* IRM 32.2.3.1 (Sept. 16, 2016) (discussing revenue rulings).

24. Rev. Proc. 2002-1, 2002-1 C.B. 1.

25. *See* Bankers Life & Cas. Co. v. United States, 142 F.3d 973, 978 (7th Cir. 1998).

26. Treas. Reg. § 601.601(d)(2)(iii) (as amended in 1989).

27. *Id.*

28. Treas. Reg. § 601.601(d)(2)(v)(e).

noncompliance for "[n]egligence or disregard of rules or regulations."[29] As revenue rulings are effectively binding to the applications of similar facts, they represent more than just pure guidance documents or policy statements by the IRS; as statements of the IRS's position on the law as applied to similar facts, revenue rulings also provide standards governing IRS taxation treatment unless and until the standard is altered by a subsequent IRS promulgation.[30]

Revenue rulings and Treasury regulations are the principal means by which taxpayers receive guidance in interpreting the IRC;[31] nonetheless, these means are far from comprehensive and still result in uncertainty regarding IRC provisions.[32] Revenue rulings differ, however, from Treasury regulations, which are authorized by IRC § 7805, and many other provisions of the IRC. Regulations are the most formal and authoritative interpretations of the IRC.[33] Regulations are issued by the Treasury Department after extensive review within both the department and the IRS[34] and are among the highest authorities in administrative pronouncements.[35] The United States Supreme Court consistently has held that courts must defer to regulations in general[36] if the regulations are "reasonable."[37] Regulations generally are afforded a force of law status.[38] Conversely, revenue rulings do not have the force and effect of regulations[39] but "are published to provide precedents to be used in the

29. Treas. Reg. § 1.6662-2 (as amended in 2003).

30. Ehren K. Wade, *Just What the Doctor Ordered?: Health Care Reform, the IRS, and Negotiated Rulemaking*, 66 ADMIN. L. REV. 199, 206 (2014).

31. Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View from Within*, 46 DUQ. L. REV. 323, 324 (2008).

32. *See* discussion *infra* Part V.B.–C.

33. Korb, *supra* note 31, at 326.

34. *See* GAIL LEVIN RICHMOND, FEDERAL TAX RESEARCH: GUIDE TO MATERIALS AND TECHNIQUES 128–29 (7th ed. 2007).

35. *See, e.g.*, United States v. Correll, 389 U.S. 299, 307 (1967).

36. Boeing Co. v. United States, 537 U.S. 437, 447–50 (2003); United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 219 (2001); Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 560–61 (1991).

37. David A. Brennen, *Treasury Regulations and Judicial Deference in the Post-*Chevron *Era*, 13 GA. ST. U. L. REV. 387, 429 (1997) (stating that typically, courts look at "long-standing interpretations that appear acceptable to Congress and reliance on historical court precedents [as] legitimate means of establishing the reasonableness of an interpretation").

38. *See* Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 51 (2011).

39. Treas. Reg. § 601.601(d)(2)(v)(d) (as amended in 1989).

disposition of other cases, and may be cited and relied upon for that purpose."[40] Although the Supreme Court has provided explicitly that Treasury regulations promulgated under notice-and-comment rulemaking[41] carry the force and effect of law sufficient to meet what is required for the highest level of deference,[42] the Court has not denied such status to revenue rulings.

A. Chevron*: The Starting Point in Any Deference Discussion*

Chevron U.S.A. v. Natural Resources Defense Council, Inc. is where any inquiry into the level of judicial deference accorded to administrative promulgations in the modern era should begin.[43] The issue before the Supreme Court in *Chevron* concerned the Environmental Protection Agency's ("EPA") interpretation of the definition of "stationary source" under the Clean Air Act Amendments of 1977.[44] Overturning the appellate court's decision and upholding the EPA's interpretation, the Supreme Court created a two-part test that became the standard for judicial review of agency decision-making.[45] This decision was based on the idea that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left . . . by Congress"[46] and creates a general

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40. *Id.*

41. The Administrative Procedure Act requires that an agency must publish notice of its proposed rulemaking and afford interested persons the opportunity to submit comments to make binding rulemaking. 5 U.S.C. § 553(b)–(d) (2012).

42. *See Mayo*, 562 U.S. at 51.

43. Chevron U.S.A. v. Nat. Res. Def. Council, 467 U.S. 837 (1984).

44. *Id.* at 840.

45. *Id.* at 842–43. The Court provided that review of an agency's promulgations begins with the following analysis:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id.

46. *Id*. at 843.

stance of deference toward an administrative agency's interpretation of the statute entrusted to that particular agency—the agency's enabling statute.[47]

Under a *Chevron* analysis, courts are instructed to undertake a two-step process: first, it must determine whether the agency's own enabling statute at issue is clear or ambiguous.[48] If the statute is clear, the analysis stops because no interpretation, and thus no deference, is necessary.[49] If, however, the statute is ambiguous, a court must defer to any reasonable interpretations of the statute promulgated by the agency.[50] If the requirements for *Chevron* deference are not met, an agency promulgation is not necessarily stripped of all deference because another standard of deference exists.[51]

B. Skidmore*: Skidding Away from Any Real Deference*

Like *Chevron*, *Skidmore v. Swift & Co.* set forth a standard of deference for administrative promulgations and required the Court to consider the validity of an agency's interpretation.[52] Specifically, the Court was tasked with defining "working time" for purposes of overtime pay under the Fair Labor Standards Act.[53] Though Congress was silent, the Court determined that the Department of Labor had the authority to investigate practices regarding overtime pay, and, as such, the Department could seek injunctions to restrain violations of the Act.[54] Pursuant to this grant of authority, the Department's Wage and Hour Division issued an interpretive bulletin that addressed "working time."[55] The Department of Labor also filed an amicus curiae brief, outlining how it would apply the standards for "working time" to the facts at bar.[56] In line with historical practice and policy, the Court found that the views of the Labor Division were neither conclusive nor binding on courts.[57] Instead, the bulletin was found to be a result of the Division's "official duty, based upon more specialized experience and broader investigations and information than is

47. Morris, *supra* note 16, at 1040.
48. *Chevron*, 467 U.S. at 842.
49. *Id.* at 843.
50. *See id.*
51. *See* Skidmore v. Swift & Co., 323 U.S. 134 (1940).
52. *Id.*
53. *Id.* at 135–36.
54. *See id.* at 137.
55. *Id.* at 138.
56. *See id.* at 139.
57. *Id.*

likely to come to a judge in a particular case."[58] In terms of a *Chevron* approach, the *Skidmore* Court essentially said that the document setting forth the agency's position being reviewed did not constitute an agency policy choice and thus was not within the scope of *Chevron*.[59] Rather, the document was an agency interpretation of the policy choices made by Congress in the statute.[60] As such, courts were not required to defer to this bulletin but could use it as guidance and accord any particular weight deemed appropriate.[61]

Skidmore provided the following factors for courts to consider in assessing the appropriate level of judicial deference toward agency views: "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[62] The *Skidmore* standard is appropriate for more informal agency interpretations and is a contingency standard for when *Chevron* fails.[63] Because Congress gave the courts express interpretive responsibility regarding the Fair Labor Standards Act via statute, as opposed to the agency administrator, the *Skidmore* Court created a standard by which certain agency rulings are considered merely persuasive.[64] This standard is much less deferential than *Chevron*.[65]

C. Comparing Chevron *and* Skidmore

The rationale that underlies according agency pronouncements *Skidmore* deference stems from the idea that agencies have specialized experience compared to the courts as well as a greater opportunity to investigate and obtain relevant information.[66] This level of deference vests the reviewing court with final arbitrating power on whether the agency's interpretation

58. *Id.*

59. John F. Cloverdale, Chevron*'s Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After* Mead, 55 ADMIN. L. REV. 39, 54–55 (2003).

60. *Id.*

61. *See Skidmore*, 323 U.S. at 140.

62. *Id.*

63. Bradley Lipton, *Accountability, Deference, and the* Skidmore *Doctrine*, 119 YALE L. J. 2096, 2123 (2010).

64. *Skidmore*, 323 U.S. at 140.

65. *See generally* Chevron U.S.A. v. Nat. Res. Def. Council, 467 U.S. 837 (1984).

66. Morris, *supra* note 16, at 1025.

is persuasive,[67] leaving a wide opportunity for courts to disregard agency interpretations completely if they so choose.[68]

Chevron rests on the presumption that Congress wanted agencies, rather than courts, to act as the primary interpreters of their respective statutory schemes.[69] As such, under *Chevron*, agency interpretations are entitled to deference as a matter of right.[70] Courts are bound by mandatory deference to the agency interpretation so long as the requisite two prongs are met.[71] Conversely, *Skidmore* involves a balancing of interests and vests the judiciary with much more discretion regarding deferential treatment of agency interpretations.[72] If the reviewing court is satisfied that an agency has demonstrated expertise and did not act in an unreasonable manner, *Skidmore* allows—but does not require—courts to defer to the agency interpretation.[73]

The test provided by *Chevron* and the presumption in favor of agency interpretations as authoritative serve as an analytic barrier against active judicial review of agency decisions unless such decisions are unreasonable.[74] Contrarily, under *Skidmore*, courts are free to adopt whatever interpretation of statutes they so choose.[75] *Skidmore* "makes clear that the weight given to the agency interpretation is always ultimately up to the court."[76] Whereas *Chevron* makes the interpretation binding on courts, *Skidmore* effectively makes the agency "earn" judicial acknowledgement of its position.[77]

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67. *See Skidmore*, 323 U.S. at 140; Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism In Judicial Deference*, 90 MINN. L. REV. 1537, 1552 (2006).

68. *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 269 (2006) (discussing how under *Skidmore*, the Court was following an agency's rule only to the extent that it is persuasive, and that in this particular case, the Attorney General's opinion was not persuasive and thus received no deference); Hall v. EPA, 273 F.3d 1146, 1156 (9th Cir. 2001) (rejecting the EPA's interpretation of the Clean Air Act).

69. *See* United States v. Mead Corp., 533 U.S. 218, 229–30 (2001).

70. Thomas W. Merrill & Kristin Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 856 (2001).

71. Chevron U.S.A. v. Nat. Res. Def. Council, 467 U.S. 837, 843–44 (1984).

72. *See* Merrill & Hickman, *supra* note 70, at 858–59.

73. *See* Hickman, *supra* note 67, at 1553.

74. Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court's Retreat from* Chevron *Principles in* United States v. Mead, 107 DICK. L. REV. 289, 301 (2002).

75. Salem et al., *supra* note 1, at 755.

76. Merrill & Hickman, *supra* note 70, at 856.

77. *Id.*

D. Historical Deference to Revenue Rulings

Although *Skidmore* and *Chevron* provide the two basic deferential standards applied to administrative promulgations of law, the historical deference accorded to revenue rulings by various courts has left the deference status of revenue rulings muddled and uncertain.[78] In particular circumstances, revenue rulings are entitled to judicial deference, such as when the revenue ruling reflects the contemporaneous and established interpretation of a statutory provision[79] or when the revenue ruling represents the interpretation by the IRS of its own regulation.[80] In other cases, the decisions are in conflict.[81]

The United States Tax Court has held that it is not bound by revenue rulings,[82] viewing revenue rulings instead as mere opinions of the IRS—with no effect of law—and claiming that revenue rulings are not binding on the Commissioner or on the courts.[83] But the Tax Court also has admitted that taxpayers should be able to rely on revenue rulings.[84]

The majority of United States appellate courts hold the opinion that, though revenue rulings are not tantamount to Treasury regulations, they nevertheless are entitled to some level of deference, including "respectful

78. *See, e.g.*, Amato v. W. Union Int'l, Inc., 773 F.2d 1402, 1411 (2d Cir. 1985) (citing numerous cases for the proposition that revenue rulings were entitled to great deference and carried "the force of legal precedents"); Carle Found. v. United States, 611 F.2d 1192, 1195 (7th Cir. 1979) (giving rulings weight). *But see* Knowlton v. Comm'r, 84 T.C. 160, 165 (1985) ("While [revenue] rulings are not binding upon us, . . . we are entitled to utilize such rulings as an aid to interpretation."), *aff'd*, 791 F.2d 1506 (11th Cir. 1986).

79. *See, e.g.*, Davis v. United States, 495 U.S. 472, 484 (1990); Jewett v. Comm'r, 455 U.S. 305, 318 (1982); Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933).

80. *See, e.g.*, Cottage Sav. Ass'n. v. Comm'r, 499 U.S. 554, 563 (1990); *Jewett*, 455 U.S. at 318; Nat'l Muffler Dealers Ass'n. v. United States, 440 U.S. 472, 484 (1979).

81. *See, e.g.*, Progressive Corp. v. United States, 970 F.2d 188, 194 (6th Cir. 1992) (stating that revenue rulings "are entitled to great deference, and have been said to 'have the force of legal precedents'"). *But see* Stubbs, Overbeck & Associates, Inc. v. United States, 445 F.2d 1142, 1146–47 (5th Cir. 1971) (noting that a revenue ruling is "merely the opinion of a lawyer in the agency" and "is not binding on the Secretary or the courts").

82. Baker v. Comm'r, 122 T.C. 143, 164 n.21 (2004), and cases cited therein.

83. *See, e.g.*, Estate of McLendon v. Comm'r, 72 T.C.M. (CCH) 42, 45 (1996).

84. *Baker*, 122 T.C. at 164 n.21, and cases cited therein.

consideration [and] some weight,"[85] "great deference,"[86] the "force of legal precedent,"[87] and "considerable weight."[88] Other circuits explicitly left open the question of which standard of deference applies to revenue rulings.[89] Conversely, the Sixth Circuit once extended *Chevron* deference to a revenue ruling,[90] although it more recently has concluded that revenue rulings may not necessarily be entitled to *Chevron* deference but should carry "at least some added persuasive force."[91] The Eighth and Ninth Circuits have held that a longstanding revenue ruling is entitled to substantial deference as long as the interpretation of the statute is reasonable,[92] which is language mirroring the deference standard set forth in *Chevron*.[93]

The United States Supreme Court also has spoken on the issue. The Court initially applied *Chevron* to revenue rulings and noted that interpretive rulings do not carry the same force and effect as Treasury regulations.[94] In *Davis v. United States*, the Court nonetheless held that agency interpretations and practices must be given considerable weight when they involve the contemporaneous construction of a statute and reflect longstanding practices.[95] Later cases—in which the Court noted that the rulings do not have the force and effect of regulations—indicate a shift in policy.[96] In *Cleveland Indians Baseball Co. v. United States*, the

85. Bankers Life & Cas. Co. v. United States, 142 F.3d 973, 978 (7th Cir. 1998).

86. *In re* Kaplan, 104 F.3d 589, 599 (3d Cir. 1997).

87. Gillespie v. United States, 23 F.3d 36, 39 (2d Cir. 1994).

88. Wood v. Comm'r, 955 F.2d 908, 913 (4th Cir. 1992).

89. *See, e.g.*, Nat'l R.R. Passenger Corp. v. United States, 431 F.3d 374, 379 (D.C. Cir. 2005) ("[A]lthough the parties discuss whether we should defer to Revenue Ruling 79-404 pursuant to [*Chevron* or *Skidmore*], we need not resolve that question."); Am. Bankers Ins. Grp. v. United States, 408 F.3d 1328, 1335 (11th Cir. 2005) ("[W]e need not determine the proper level of deference to be given [to] Revenue Ruling 79-404.").

90. Johnson City Med. Ctr. v. United States, 999 F.2d 973, 976 (6th Cir. 1993).

91. Ammex, Inc. v. United States, 367 F.3d 530, 534 n.2 (6th Cir. 2004).

92. *See, e.g.*, Ibrahim v. Comm'r, 788 F.3d 834, 840 (8th Cir. 2015); Sewards v. Comm'r, 785 F.3d 1331, 1335 (9th Cir. 2015).

93. *See* Chevron U.S.A. v. Nat. Res. Def. Council, 467 U.S. 837, 844 (1984) ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

94. *See* Davis v. United States, 495 U.S. 472, 484 (1990).

95. *Id.*

96. Comm'r v. Schleier, 515 U.S. 323, 336 n.8 (1995); United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 219 (2001).

Court concluded that, although the revenue ruling was not entitled to *Chevron* deference, "the Rulings simply reflect the agency's longstanding interpretation of its own regulations. Because that interpretation is reasonable, it attracts substantial judicial deference."[97] More recent cases, however, have avoided addressing the level of deference that should be given but seem to leave open an opportunity for revenue rulings to be entitled to *Chevron* deference by modifying the *Chevron* standard as applied to all agency promulgations and setting forth alternative ways for a promulgation to come within *Chevron*'s domain.[98]

II. *CHRISTENSEN*, *MEAD*, AND ASSOCIATED PROBLEMS

Following *Skidmore* and *Chevron*, courts across the nation were divided on the issue of whether, and to what extent, the judiciary should defer to agency interpretations of law; views ranged from affording substantial deference to giving no deference whatsoever.[99] In the wake of such confusion, the Supreme Court attempted to determine the proper deferential standard treatment.

A. Christensen v. Harris County

Amid the circuit splits and lack of clarity regarding the scope of *Chevron* application, *Christensen v. Harris County*[100] was the Supreme Court's first attempt to recognize the issue of *Chevron*'s scope and offer clarity.[101] At issue was an advisory letter written by the United States Department of Labor's Wage and Hour Division ("Wage and Hour Division") in response to an inquiry by Harris County regarding a proposed policy on compensatory time.[102] The Court reasoned that *Chevron* deference was not appropriate for the advisory opinion letter signed by an acting administrator of the Wage and Hour Division because it was "an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking."[103] The Court held that "[i]nterpretations such as those in opinion letters—like

97. *Cleveland Indians Baseball Co*., 532 U.S. at 220.

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

99. *See, e.g.*, Christensen v. Harris Cty., 529 U.S. 576 (2000); *Cleveland Indians Baseball Co*., 532 U.S. 200.

100. *Christensen*, 529 U.S. at 576.

101. *See id.*; *see also* Kristin E. Hickman, *The Three Phases of* Mead, 83 FORDHAM L. REV. 527, 531 (2014).

102. *Christensen*, 529 U.S. at 581.

103. *Id.* at 587.

interpretations contained in policy statements, agency manuals, and enforcement guidelines"—inherently lacked the force of law and thus did not warrant *Chevron* deference.[104] Rather, interpretations that are designed like opinion letters "are 'entitled to respect' under [the Court's] decision in [*Skidmore*], but only to the extent that those interpretations have the 'power to persuade.'"[105]

The Court based its reasoning on the production process that generated the letter and its lack of procedural protections.[106] *Christensen* clarified that not all agency interpretations are entitled to *Chevron* deference but offered no guidance on how to determine which interpretations qualify.[107] Thus, although *Christensen* noted the absence of particular factors—such as formal adjudication, notice-and-comment procedures, and the force of law[108]—will result in *Skidmore* deference rather than *Chevron* deference, the Court failed to produce guidelines for determining which promulgations are to be considered the force of law.

B. United States v. Mead Corp.

One year after *Christensen*, the Supreme Court again tackled the scope of *Chevron* deference in *United States v. Mead Corp*.[109] At issue was a ruling letter by the United States Customs Service that changed the classification of the Mead Corporation's day planners under the Harmonized Tariff Schedule of the United States.[110] The Tariff Act of 1930 and Treasury regulations direct the Customs Service to classify merchandise and fix the rate and amount of duty applicable.[111] Customs Service completes this task by issuing ruling letters.[112] In *Mead*, the corporation challenged a Customs Service letter ruling that reclassified day planners, thereby subjecting the corporation to a new tariff.[113] The Supreme Court granted certiorari "to consider the limits of *Chevron* deference owed to administrative practice in applying a statute" and held

104. *Id.*
105. *Id.*
106. *Id.* at 586; *see also* Womack, *supra* note 74, at 305.
107. *See Christensen*, 529 U.S. at 576, 587–88.
108. *Id.* at 587.
109. United States v. Mead Corp., 533 U.S. 218 (2001).
110. *Id.* at 222–25.
111. Tariff Act of 1930, 19 U.S.C. §§ 1202, 1500, 1502 (2012).
112. *See id.*
113. *Mead Corp*., 533 U.S. at 224–25.

that the ruling letter was not entitled to *Chevron* deference.[114] The Court reasoned that

> [t]here are, nonetheless, ample reasons to deny *Chevron* deference here. The authorization for classification rulings, and Customs's practice in making them, present a case far removed not only from notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here.[115]

Under the agency's own regulations, this type of ruling letter was limited because it applied only to a small category of goods and was determined on a case-by-case basis.[116] The ruling letters were issued quickly and without notice-and-comment, and any agency office could issue this type of ruling without detailed reasoning for its decision.[117] These ruling letters rarely set out the rationale behind the classification decision in detail.[118]

In denying *Chevron* deference to this letter ruling, the Court decided that although Congress had given the Customs Service authority to act with the force of law, no congressional intent existed for according the ruling letters such force.[119] The ruling letter could not have the force of law because the letter did not bind third parties and contained a warning against assuming any right of detrimental reliance.[120] The Court did not elaborate on what was meant by the "force of law."[121] The Court determined that the ruling letter was more akin to a policy statement, agency manual, or enforcement guideline that was outside the scope of *Chevron* deference.[122] In reversing, the Court remanded the case back to the lower court to be considered in light of the *Skidmore* standard.[123]

Per *Mead*, two conditions must be met to conclude that congressional intent warrants a grant of *Chevron* deference. *Mead* instructs courts to apply *Chevron* only when Congress has given the particular agency the authority to bind parties with "the force of law" and when the agency actually acted "in the exercise of that authority."[124] If one or both of these

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114. *Id.* at 226–27.
115. *Id.* at 231.
116. *Id.* at 223.
117. *Id.*
118. *Id.* at 224.
119. *Id.* at 231–32.
120. *Id.* at 233.
121. *See id.* at 223.
122. *Id.* at 234.
123. *Id.* at 238–39.
124. *Id.* at 226–27.

requisite conditions are not met, then *Skidmore* is the appropriate level of deference to be applied.[125] The *Mead* opinion made clear that *Skidmore* is the proper alternative when *Chevron* deference is not applicable.

Mead requires courts to look first at statutory circumstances to determine whether congressional intent "to delegate general authority to make rules with the force of law" exists.[126] This congressional intent may be evident through an express delegation of authority,[127] an agency's general authority, and other statutory circumstances that evidence an expectation of the agency to act with force of law when addressing ambiguity in the statute or filling gaps in enacted law.[128] Courts further are instructed to assess whether Congress expressly authorized the agency to engage in rulemaking or adjudication processes as a means for producing the rulings or regulations for which deference is claimed.[129] Explicit congressional authorization for these processes is helpful in determining if Congress has accorded an agency the ability to act with the force and effect of law.[130] Moreover, *Mead* noted that agencies engaging in notice-and-comment rulemaking fall under the umbrella of congressionally intended force and effect of law status.[131]

If the requisites for *Chevron* deference are not met, *Mead* obliges courts to consider the particular agency promulgation in light of *Skidmore*.[132] Courts are instructed to weigh "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[133] The majority opinion in *Mead* suggests a sliding scale of deference. Failure to meet *Chevron* vests the reviewing court with the power to determine what, if any, deference should be given to the agency action at bar.[134] Although *Skidmore* provides factors that courts must consider, ultimately a court reviewing an agency promulgation under *Skidmore* effectively considers the promulgation as just another piece of paper for review on the judge's desk.[135] Although a *Skidmore* result is troublesome, the same concern does

125. *See id.* at 227.
126. *Id.* at 237.
127. *Id.* at 227.
128. *Id.* at 229.
129. *Id.*
130. *Id.*
131. *See id.* at 227.
132. *Id.* at 235.
133. *Id.* at 219.
134. *See id.* at 234.
135. *See* Merrill & Hickman, *supra* note 70, at 855.

not arise for revenue rulings because the rulings meet the *Mead* requirements for *Chevron* applicability and should be owed substantial deference.

III. SUBSTANTIALLY DEFERRING TO REVENUE RULINGS: MEETING *MEAD*

When *Mead* was before the Court of Appeals for the Federal Circuit, the court noted in its comparison of the Customs promulgations and IRS publications that "[c]ustoms' classifications rulings are in some ways an even less formalized body of interpretations than IRS revenue rulings."[136] In *Mead*, the ruling letter, notably less formal than revenue rulings, was accorded *Skidmore* deference.[137] It follows that more formal revenue rulings are entitled to a greater level of deference: *Chevron* deference. The open-ended language of *Mead* leaves open the possibility of granting *Chevron* deference to revenue rulings because the Court abandoned the presumption that allowed courts to accept all reasonable agency action in filling gaps or clarifying ambiguities in favor of agency interpretations that have the force and effect of law.[138] The legal qualities of revenue rulings meeting the two prongs of *Mead* in addition to sound policy both support such a finding of substantial deference.

A. Force and Effect of Law: The Congressional Grant

An act or promulgation with the force and effect of law binds those who act, those acted upon, and the courts that review the agency's interpretation.[139] As demonstrated in *Mead*, an agency whose action is under review must be congressionally vested with authority to bind regulated parties with the "force of law" to receive *Chevron* deference.[140] This requisite legal force may be evidenced by notice-and-comment

136. Mead Corp. v. United States, 185 F.3d 1304, 1308 (Fed. Cir. 1999).

137. *Mead*, 533 U.S. at 238–39.

138. Cloverdale, *supra* note 59, at 53.

139. *See* Merrill & Hickman, *supra* note 70, at 882. For an agency to be eligible for *Chevron* deference, Congress must have given the agency power to produce legally binding rules or adjudications:

> [I]n determining whether Congress has delegated power to issue legally binding rules or order, the key question is whether the statute provides that a violation of the agency directive can result in the immediate imposition of sanctions unless the rule or order is set aside on review or stayed pending review.

Id.

140. *Mead Corp.*, 533 U.S. at 229.

rulemaking or by formal adjudication.[141] Although such evidence is sufficient, neither notice-and-comment nor formal adjudication is necessary for a finding of *Chevron* applicability; as such, revenue rulings are not thrust immediately from the realm of *Chevron* deference for lacking those procedural components.[142]

Mead clarified that the absence of notice-and-comment is not fatal to a finding of *Chevron* deference.[143] This idea was reiterated in *Barnhart v. Walton* when the Supreme Court, in a discussion of *Mead*, noted that just because an agency reached its interpretation through a method less formal than notice-and-comment rulemaking, the interpretation should not be deprived automatically of the judicial deference otherwise due.[144] The Court noted that *Mead* spoke to instances in which the Court has applied *Chevron* deference to agency interpretations that did not arise from notice-and-comment rulemaking and that the level of deference accorded depends largely on the interpretive method used for promulgating the action and the nature of the question at issue.[145]

Although revenue rulings are not generated through formal notice-and-comment procedures, the issuance of revenue rulings is remarkably centralized nonetheless and encompasses numerous levels of review within the IRS.[146] Contrary to the United States Customs Service ruling letter at issue in *Mead*, only the IRS National Office issues revenue rulings.[147] The Associate Chief Counsel and Assistant Commissioner "are responsible for the preparation and appropriate referral for publication of revenue rulings reflecting interpretations of substantive tax law."[148] Ultimately, the "same level of the IRS and the Treasury Department" that

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141. *Id.*

142. *See id.* at 231.

143. *Id.*

144. Barnhart v. Walton, 535 U.S. 212, 221–22 (2002).

145. *Id.*

146. Revenue rulings are prepared by attorneys in the Office of the Chief Counsel and approved by the Chief Counsel, Commissioner of Internal Revenue, and Assistant Secretary for Tax Policy. They are signed by the Chief Counsel prior to publication. *See* Chief Counsel Publications Handbook, IRM 32.2.2 (2017).

147. Treas. Reg. § 601.201(a)(6) (1967). The National Office functions to plan and direct policies and programs with respect to legislation, regulations, interpretive rulings and opinions, and advisory services pertaining to the laws administered by the IRS. The work is handled by the Office of the Special Counsel to the National Taxpayer Advocate and the Offices of the Associate Chief Counsel for a variety of departments, including income tax and accounting, procedure and administration, tax exempt and government entities, and general legal services. IRM 5.17.1.5 (2010).

148. Rev. Proc. 89-14, 1989-1 C.B. 814.

reviews Treasury regulations also writes and reviews revenue rulings.[149] Because Congress, the Treasury, and all taxpayers adhere to the understanding that Treasury regulations are legally binding on both the government and taxpayers,[150] it follows that revenue rulings, issued with relatively the same purpose and in a similar manner, should be afforded such status.

Although revenue rulings are legally binding, another concern that arises in the context of a force and effect of law analysis is whether a promulgation is legislative or interpretive in nature. In the past, scholars and courts alike have scrutinized IRS promulgations, with a focus on Treasury regulations, and debated whether such promulgations are legislative or interpretive.[151] This distinction was crucial in the past because only legislative promulgations were considered for *Chevron* deference.[152] The division between legislative and interpretive rules and regulations arose in *Chevron* in which the Court noted that the *Chevron* doctrine represented the Court's view of deference to legislative regulations, implying that non-legislative, or interpretive, regulations were entitled to the lesser *Skidmore* deference.[153]

Generally, legislative rules and regulations are promulgated pursuant to a specific statutory congressional grant of authority;[154] interpretive rules, in contrast, are generated under a more general congressional grant

149. Ammex, Inc. v. United States, 367 F.3d 530, 535 (6th Cir. 2004).

150. *See, e.g.*, Swallows Holding, Ltd. v. Comm'r, 515 F.3d 162, 168–69 (3d Cir. 2008) (holding that reasonable final Treasury regulations promulgated under I.R.C. § 7805 carry the force of law); Estate of Gerson v. Comm'r, 507 F.3d 435, 438 (6th Cir. 2007) (noting that both temporary and final general authority Treasury regulations are legally binding); Bankers Life & Cas. Co. v. United States, 142 F.3d 973, 979 (7th Cir. 1998) (recognizing that all Treasury regulations have the force of law).

151. *See, e.g.*, Water Quality Ass'n Empls. Benefit Corp. v. United States, 795 F.2d 1303, 1305 (7th Cir. 1986) ("[L]egislative regulations therefore are accorded greater deference than interpretive regulations."); Kevin W. Saunders, *Interpretive Rules with Legislative Effect: An Analysis and Proposal for Public Participation*, 1986 DUKE L.J. 346, 346–47 (1986) (discussing the recognized distinction between legislative and interpretive rules in administrative law).

152. *See, e.g.*, Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 516–24 (2011); Galler, *supra* note 13, at 862.

153. *See* Chevron U.S.A. v. Nat. Res. Def. Council, 467 U.S. 837 (1984); Jasper L. Cummings, Jr., *The Supreme Court's Deference to Tax Administrative Interpretation*, 69 TAX LAW. 419, 422 (2016).

154. *See* Mark E. Berg, *Judicial Deference to Tax Regulations: A Reconsideration in Light of* National Cable, Swallows Holding, *and Other Developments*, 61 TAX LAW. 481, 485–86 (2008).

of authority,[155] such as the authority to promulgate "all needful rules and regulations" related to the internal revenue function.[156] This distinction, however, is no longer significant because the Supreme Court has dispelled with it.[157] *Mead* noted that Congress "may not have expressly delegated authority or responsibility to implement a particular [statutory] provision or fill a particular gap."[158] It still can be apparent from the agency's generally conferred authority and other statutory circumstances that Congress intended for the agency to speak with the force of law when addressing ambiguities or filling gaps, even a statutory space or ambiguity that Congress did not intend.[159] In terms of force of law status, *Mead* failed to mention the distinction between legislative and interpretive agency acts.[160] In the most recent Supreme Court case employing a *Chevron* review in the tax realm, the Court did not analyze whether the statute was legislative versus interpretive and only asked if the statute was ambiguous such that the regulation came within the realm of *Chevron*.[161] Thus, even though many scholars argue revenue rulings are inherently interpretive[162] as opposed to legislative, the argument that only legislative rules are within the scope of *Chevron* deference fails in light of *Mead* and *Mayo*.[163] The contested interpretive versus legislative nature of revenue rulings[164] does not detract from their status as having the force and effect of law.

Congressional intent that the IRS revenue rulings carry force of law also is evidenced by the words of the IRC. Revenue rulings are

155. *See id.*

156. I.R.C. § 7805(a) (2012).

157. *See* Cummings, Jr., *supra* note 153.

158. United States v. Mead Corp., 533 U.S. 218, 229 (2001).

159. *Id.* at 231.

160. *See id.* at 218.

161. *See* Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44 (2011). Paid medical students in the Mayo Foundation residency program sought a refund of the Federal Insurance Contributions Act withholding from wages, challenging the IRS interpretation of IRC § 3121, which classified the medical residents as employees. The Court addressed the appropriate deferential standard to be applied to an agency regulation interpreting an ambiguous or silent statute and found *Chevron* as the appropriate standard of review because the principles underlying *Chevron* applied in full force to the tax context.

162. *See, e.g.*, Wing v. Comm'r, 81 T.C. 17, 27 (1983) (stating that revenue rulings have been called the "classic example" of interpretive rules).

163. *See* discussion *infra* Part III.B.

164. Levy & Glicksman, *supra* note 152, at 519 ("[A]n agency may not treat nonlegislative rules as legally binding on a party").

promulgated under an express congressional grant of general authority.[165] Congress has empowered the Secretary of the Treasury and the IRS with the broad authority to "prescribe all needful rules and regulations" to enforce the IRC, including all rules and regulations deemed necessary to carry out the various functions of the IRS.[166] Although this grant of authority most often is cited for the legal effect of Treasury regulations, revenue rulings also are promulgated pursuant to this general grant of authority.[167] Because Treasury regulations are explicitly within the realm of *Chevron* deference,[168] and revenue rulings are similar in weight, generation, and penalty provisions—thus created with the force of law status—revenue rulings accompany Treasury regulations within *Chevron*'s domain.

B. Force and Effect of Law: Owning Your Power

The second inquiry under *Mead* instructs the reviewing court to look at the specific agency action in question to determine if the agency is acting with the force of law.[169] IRC § 6662 imposes penalties on taxpayers who underreport and underpay their taxes because of "negligence or disregard of rules or regulations."[170] The rules and regulations associated with penalties include revenue rulings or notices issued by the IRS.[171] Revenue rulings have the support of a congressional penalty, which indicates that Congress intended them to carry the force and effect of law.[172] As a purely legal matter, taxpayers are subject to penalties for failing to comply with guidance published by the IRS, including revenue rulings; association with penal provisions sufficiently supports the

165. I.R.C. § 7805(a) (2012) ("[T]he Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.").

166. *Id*.

167. *See* Tualatin Valley Builders Supply, Inc. v. United States, 522 F.3d 937, 947 (9th Cir. 2008) (O'Scannlain, J., specially concurring).

168. *See, e.g.*, K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 292 (1988); Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 57 (2011) (adopting the two-step *Chevron* analysis explicitly as the appropriate standard to evaluate deference to Treasury regulations); Salem et al., *supra* note 1, at 737 (ABA recommending that Treasury regulations receive *Chevron* deference).

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

170. I.R.C. § 6662(b)(1).

171. Treas. Reg. § 1.6662-2(b)(2) (as amended in 2003).

172. *See* Morris, *supra* note 16, at 1041.

proposition that revenue rulings carry the force and effect of law.[173] Basic logic surely associates penalties for non-compliance to derive only from legally mandated rules. The authority of the IRS to subject a taxpayer to penalties for noncompliance cannot be supported by any idea other than that authority, and the rules and regulations enacted pursuant to it carry the force and effect of law. In comparison, the EPA has authority to establish thresholds for drinking water contaminants.[174] Violations of these rules may lead to penalties of up to $25,000 per day.[175] Courts have applied *Chevron* deference to these rules.[176] According to *Mayo*, there is no exceptionalism to be accorded to tax law; instead, consistency is required between tax law and other areas of the law.[177] Penalties leading to *Chevron* deference in one area of administrative law necessarily means penalties should be equated with *Chevron* deference in the tax arena.

Some scholars argue that penal provisions do not weigh in favor of promulgations having the force of law.[178] For example, if a taxpayer refuses or fails to follow guidance published by the IRS, including revenue rulings, the taxpayer is not subject to the penalty if the taxpayer's position "has a realistic possibility of being sustained on its merits," regardless of whether noncompliance is disclosed or the taxpayer intends to challenge the validity of the respective IRS guidance;[179] the lack of blanket penal enforcement suggests that a taxpayer need not disclose on his tax return that he chose to deviate from a revenue ruling. The disclosure requirement for noncompliance with revenue rulings is notably different from the requirements for Treasury regulations, in which positions adopted by taxpayers that are inconsistent with regulations must be disclosed on tax returns and the taxpayer must have a "reasonable basis" to avoid the penalty.[180] Noncompliance with a regulation also must represent "a good faith challenge to the validity of the regulation."[181] Notwithstanding the difference in penalties for disclosure of and nonconformity with regulations

173. Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239, 268 (2009).

174. *See* 42 U.S.C. § 300f (2012).

175. *See id.*

176. *See* City of Waukesha v. EPA, 320 F.3d 228, 238 (D.C. Cir. 2003).

177. *See* Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 53–56 (2011).

178. *See* Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1804–05 (2007).

179. Treas. Reg. § 1.6662-3(a) (as amended in 2003).

180. Treas. Reg. § 1.6662-3(b)(1) .

181. Treas. Reg. § 1.6662-3(c)(1) .

versus revenue rulings, penalties for noncompliance with revenue rulings still emerge from a statutory grant of authority. Considering these mandatory and disciplinary provisions as separate and distinct from the principles that carry the force and effect of law not only defies the law but also defies basic logic.

IV. THE FUTURE OF REVENUE RULINGS AND THE APPROPRIATE DEFERENCE STANDARD: EXAMINING CHARITABLE ORGANIZATIONS

For regulations and revenue rulings alike, the IRS, through various review mechanisms, acts with goals of consistency and coordination in mind.[182] Because of the countless duties of the IRS and the volume of transactions and interactions between the IRS and taxpayers, "perfection in the administration of such vast responsibilities cannot be expected."[183] Though no perfect solution exists to solve the problem of inconsistency in a way that also guarantees a mechanism for absolute taxpayer certainty, revenue rulings provide a vehicle for a near-perfect solution. Revenue rulings often contain original and core standards by which the IRS approaches taxation transactions, but if courts simply regard them as just a piece of paper with no legal weight—a position that taxpayers eventually will also take—the IRS is robbed of any incentive to issue revenue rulings.

An examination of how revenue rulings are used in tax, specifically in the context of tax-exempt organizations, highlights the need for a consistent deferential standard and supports a finding that *Chevron* deference is appropriate. A cursory glance of § 501(c) of the IRC leaves much to be desired for guidance on what exactly is required for an organization to qualify as a tax-exempt entity.[184] Outside guidance on qualification for and upkeep of exempt status is absolutely necessary[185] because over 1.5 million charitable organizations exist in the United States,[186] and the IRC provisions setting forth which entities qualify as tax exempt cover a mere one page of the incredibly voluminous Code.[187] Although the IRS has provided some substantive guides that elaborate on

182. Steve R. Johnson, *An IRS Duty of Consistency: The Failure of Common Law Making and a Proposed Legislative Solution*, 77 TENN. L. REV. 563, 565 (2010).

183. Sirbo Holdings, Inc. v. Comm'r, 509 F.2d 1220, 1225 (2d Cir. 1975).

184. *See* I.R.C. § 501(c) (2012).

185. *See* Philip T. Hackney, *Charitable Organization Oversight: Rules v. Standards*, 13 PITT. TAX REV. 83, 94 (2015).

186. *Quick Facts About Nonprofits*, NAT'L CTR. FOR CHARITABLE STATS., http://nccs.urban.org/statistics/quickfacts.cfm (last visited Nov. 16, 2017) [https://perma.cc/9QQR-N7SX].

187. *See* § 501(c)(3).

the standards of § 501(c) in the regulations,[188] the elaborative content consists of broad restatements and leaves many unanswered questions.[189] The IRS primarily has addressed these gaps in the Code with formal guidance, including revenue rulings.[190] The ensuing discussion analyzes a sample of revenue rulings issued in the context of tax exempt organizations and provides seminal standards by which the law of exempt organizations is governed. The discussion concludes by discussing the implications of failing to defer substantially to these core legal principles.

A. Hospitals

Revenue Ruling 69-545 examined whether two different nonprofit hospitals qualified for an exemption from federal income tax under § 501(c)(3)[191] of the IRC.[192] The first hospital was exempt because it had an emergency room open to everyone—in addition to providing care to all people in the community who could pay, having an open medical staff, and using surplus funds on expanding facilities, improving quality of care, medical training, education, and research.[193] Additionally, the hospital was operated by a board of trustees composed of neutral community leaders.[194] Conversely, the second hospital was not exempt from federal income tax because it was not operated for the exclusive benefit of the public but, rather significantly, operated for the private benefit of the previous

188. *See, e.g.*, Treas. Reg. § 1.501(c)(3)–1 (as amended in 2017); Treas. Reg. § 1.505(c)–1T (1986).

189. *See* Hackney, *supra* note 185, at 93–94.

190. *See, e.g.*, Rev. Rul. 69-545, 1969-2 C.B. 117 (examining charitable trust law to determine that "charitable" means what is the "generally accepted legal sense of that term" and establishing the community benefit rule for hospitals to qualify as charitable organizations); Rev. Rul. 70-585, 1970-2 C.B. 115 (establishing rules for charitable qualifications for organizations that provide housing); Rev. Rul. 67-151, 1967-1 C.B. 134 (establishing that organizations formed for the purpose of preventing children from working in hazardous conditions is charitable and thus tax exempt).

191. Section 501(c)(3) organizations are organizations, often charitable, that are exempt from federal income taxes under Section 501 of the Internal Revenue Code. To qualify for tax-exempt status, an organization must operate exclusively for one of the enumerated tax-exempt purposes, must be a non-profit organization, may not engage in electioneering, and cannot have a substantial part of activities be lobbying activities. *See* § 501(c)(3).

192. Rev. Rul. 69-545, 1969-2 C.B. 117, 117–18.

193. *Id.*

194. *Id.*

owners.[195] Though the second hospital was owned by a nonprofit organization at the time, the previous private owners still retained control of the hospital through the board of trustees and committees, using that control to limit several functions of the hospital and execute favorable rental agreements with the hospital for office space.[196]

In deciding whether a particular hospital qualified for an exemption, Revenue Ruling 69-545 established the "community benefit standard," which hospitals must meet in order to attain tax-exempt status as a charitable organization.[197] Prior to this Revenue Ruling, to obtain exemption a hospital needed to "be operated to the extent of its financial ability for those not able to pay for the services rendered and not exclusively for those who are able and expected to pay."[198]

Rather than simply standing for the proposition that a functioning emergency room satisfies the requirements of § 501(c)(3), this Ruling stands for the idea that "charitable" is defined broadly in terms of community benefit and holds that promoting health constitutes a "charitable purpose" under § 501(c)(3).[199] This widely accepted standard, which still exists today as one test required for nonprofit hospitals to achieve tax-exempt status, represents the idea that revenue rulings, as a whole, signify much more than just substantive law applied to very particular facts. Rather, revenue rulings convey sound legal reasoning and mandates that, as evident from the longevity of this specific test, have the force and effect of law.[200] For example, the express language of Revenue Ruling 69-545 states that "Revenue Ruling 56-185 is hereby modified to remove therefrom the requirements relating to caring for patients without charge or at rates below cost."[201] If Revenue Ruling 56-185 applied only to the specific factual scenario and substantially similar circumstances, modification of that specific standard would have been unnecessary. Instead, presumably recognizing the wide breadth of the standards that revenue rulings have, the IRS issued Revenue Ruling 69-545 by both building from and revising the principles of Revenue Ruling 56-185.

Revenue Ruling 89-157 revised the community benefit standard when the IRS determined that operating an emergency room open to the public

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195. *Id.*
196. *Id.*
197. *See id.*
198. Rev. Rul. 56-185, 1956-1 C.B. 202, 203 (modifying Rev. Rule. 69-545, 1969-2 C.B. 117).
199. *See* E. Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278, 1280–81 (D.C. Cir. 1974), *vacated*, 426 U.S. 26 (1976).
200. *See* discussion *supra* Part III.
201. Rev. Rul. 69-545, 1969-2 C.B. 117, 120.

was not required to meet the community benefit test, so long as other substantial factors existed signifying that the hospital operated for the public benefit.[202] This Ruling also stated that specialty hospitals, which are not expected to operate emergency rooms due to the nature of the specialized practice, also can qualify for the § 501(c)(3) exemption if similar substantial factors showing that the hospital operates exclusively for the benefit of the community are present.[203] Reading Revenue Ruling 89-157 in conjunction with Revenue Ruling 69-545, it becomes clear that a nonprofit hospital must make its services available to the entire community and provide additional community or public benefits to qualify for § 501(c)(3) exemption status.[204]

Not only is the progress of the IRS standard for exempt hospitals shown through the evolution of the discussed revenue rulings, these rulings also provide for flexibility and change.[205] Read together, these revenue rulings indicate that no single factor controls in determining exemption status and that all facts and circumstances must be weighed.[206] The IRS repeatedly has chosen to promulgate the particular hospital exemption requirements through revenue rulings; that historical pattern of decisions should not be discounted by a low standard of judicial deference.[207] In fact, these rulings, which provide the governing standard for exemption status, have withstood numerous attempts by various legislators to modify or change the community benefit standard.[208] Molding standards of charitable purposes into rigid legislative rules is difficult and often illogical because unbending standards do not take into account the flexibility and factual considerations required.[209] Because the rulings establishing and elaborating on the community benefit standard are reasonable interpretations of IRC § 501(c)(3) standards for maintaining

202. Rev. Rul. 83-157, 1983-2 C.B. 94.

203. *Id.*

204. *See* IHC Health Plans, Inc. v. Comm'r, 325 F.3d 1188, 1198 (10th Cir. 2003).

205. *See* Bobby A. Courtney, *Hospital Tax-Exemption and the Community Benefit Standard: Considerations for Future Policymaking*, 8 IND. HEALTH L. REV. 365, 368–71 (2011).

206. Nina J. Crimm, *Evolutionary Forces: Changes in For-Profit and Not-For-Profit Health Care Delivery Structures; A Regeneration of Tax Exemption Standards*, 37 B.C. L. REV. 1, 49 (1995).

207. *See* Courtney, *supra* note 205, at 393.

208. Proposed, but not passed, legislation has attempted to modify or abandon the current community benefit standard. *See, e.g.*, H.R. 790, 102d Cong. (1991) (introduced by Representative Edward R. Roybal to move toward relief of poverty or charity standard); H.R. 1374, 102d Cong. (1991) (introduced by Representative Brian J. Donnelly to move toward relief of poverty or charity standard).

209. *See* Hackney, *supra* note 185, at 115–16.

exempt status, courts should be bound to defer to the community benefit standard. For example, failure to accord the community benefit standard *Chevron* deference would call into question the exemption status of many hospitals and open the door for discrimination across the courts.[210]

B. Unrelated Business Income and the Notion of "Relatedness"

Another area of the law in which tax-exempt organizations rely on the promulgation of revenue rulings as a basis for certain criteria is unrelated business income.[211] Section 511 of the IRC states that taxes are imposed on the unrelated business income of tax-exempt organizations.[212] The purpose of taxing income that is unrelated to the organization's exempt purpose is to equalize exempt organizations and their non-exempt competitors.[213] Although the Code provides that income subject to taxation is income from a trade or business not substantially related to the organization's performance of its charitable purpose or function,[214] the Code also leaves much to be desired for specific organizations that must determine whether certain arms of their businesses trigger income tax or are protected by the § 503(c) exemption.[215] Because the IRC is not the proper forum to evaluate various entities and whether a new arm of business is sufficiently related to the exemption-related purpose, the IRS uses revenue rulings to promulgate guidance.[216] One such promulgation, Revenue Ruling 73-104, provided that an art museum's sale of greeting cards that reproduced artwork on display in these museums was exempt from income tax as an unrelated trade or business under § 513 because it contributed importantly to the accomplishment of the museum's purpose.[217] Although the cards were sold at a profit and in competition with other greeting card publishers, the sale of the cards still was related to the museum's exempt purpose.[218]

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210. *See* Confessore et al., *supra* note 8.

211. *See generally* Gail A. Lasprogata & Marya N. Cotton, *Contemplating "Enterprise": The Business and Legal Challenges of Social Entrepreneurship*, 41 AM. BUS. L.J. 67, 109 (2003).

212. *See* I.R.C. § 511(a)(1) (2012).

213. *See* H.R. REP. NO. 81-2319, at 36 (1950); S. REP. NO. 81-2375, at 28 (1950).

214. I.R.C. § 513.

215. *See* Treas. Reg. § 1.513-1(a) (1983) (providing minimal guidance on what it means to have an unrelated trade or business).

216. Treas. Reg. § 601.201(a)(6) (1967).

217. Rev. Rul. 73-104, 1973-1 C.B. 263.

218. *Id.*

The next revenue ruling issued, Revenue Ruling 73-105, further provided that an American folk art museum selling reproductions of art and books in the associated gift shop would not be subject to income tax from an unrelated trade or business because these items contributed to accomplishing the museum's exempt purpose—existing as an educational art museum on the basis of ownership, maintenance, and exhibition for public viewing of an art collection.[219] The IRS, however, reached a different result for scientific books and city-based souvenirs sold in the gift shop: these items had no causal relationship with—and did not contribute to—the museum's exempt educational purpose, so the sale constituted taxable unrelated trade or business income under § 513 of the Code.[220]

These rulings underscore the importance of carefully considering the extent to which the characteristics of items sold by a charitable organization furthers the organization's exempt purpose to determine if taxable unrelated business income has been generated or if the income is exempt under § 513.[221]

C. Political Campaign Activity

A third area of charitable organization tax law in dire need of clarity and deference involves § 501(c)(3) organizations and their involvement in political campaign activity.[222] In order for a § 501(c)(3) organization to

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219. *Id.*

220. *Id.*

221. *See* Stuart J. Lark, *Revenue From Product Sales By Religious Organizations May Be Taxable*, 13 J. TAX'N EX. ORG. 94 (2001).

222. *See, e.g.*, Bright Lines Project, Comment Letter on Political Activity Guidance for Section 501(c)(3) Organizations (May 16, 2016), http://www.citizen.org/documents/Final%20BLP%20(c)(3)%20Letter--Signed.pdf [https://perma.cc/R4XB-F3AE]; Bright Lines Project, Comment Letter on Proposed Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities (June 16, 2015), http://www.brightlinesproject.org/wp-content/uploads/2015/06/Comment-re-501c3s.pdf [https://perma.cc/XWM8-HP4E]; Bright Lines Project, Comment Letter on Proposed Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities (Feb. 27, 2014), http://www.citizen.org/documents/Bright%20Lines%20Project%20Comment%20FINAL%20with%20exhibit.pdf [https://perma.cc/ME92-DWK6]; Am. Bar Ass'n, Section of Taxation, Comment Letter on Comments on 501(c)(4) Exempt Organizations (May 7, 2014), http://www.americanbar.org/content/dam/aba/administrative/taxation/policy/050714comments.authcheckdam.pdf [https://perma.cc/ZRY8-SK3U]; Alliance for Justice, Comment Letter on Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities (Feb. 27, 2014), https://bolderadvocacy.org/wp-content/uploads/2014/02/AFJ

enjoy income tax exemption under § 501(a), the organization may not participate or intervene in any political campaign on behalf of or in opposition to any candidate for public office.[223] Although the plain language of § 501(c)(3) purports to bar involvement in political campaign activities, this interpretation has been negated by essential caselaw and revenue rulings.[224]

Complying with each requirement for tax-exempt status is paramount for § 501(c)(3) organizations because without such obedience, these organizations may face penalties[225] and/or lose their § 501(c)(3) organization status altogether, thus subjecting themselves to income taxes on revenues.[226] As such, organizations want and need robust and bright-line rules on how to avoid prohibited political campaign activities. Following the 2004 election year, § 501(c)(3) organizations had many questions regarding election year activities and the prohibition on political campaign involvement.[227] In an effort to help these organizations stay in compliance with federal tax law, the IRS issued Fact Sheet 2006-17 to enhance education and enforcement efforts while the agency drafted a more comprehensive and authoritative source of guidance.[228] This "living" document—the predecessor to Revenue Ruling 2007-41—was issued with a request and encouragement for comments from the public, which would then be, and in fact were, taken into consideration for future IRS developments and feedback.[229]

In the midst of a bare statute and minimal regulations on point, Revenue Ruling 2007-41 was issued to provide guidance on the scope of the tax law prohibition of political campaign activities by § 501(c)(3) tax-exempt organizations.[230] In an effort to delineate allowable and unallowable activities related to political campaign activities, Revenue Ruling 2007-41 set forth 21 scenarios with examples and explanations of whether the specific activity constituted participation or intervention in a

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_comments_NPRM_Guidance_for_Tax-Exempt_Social_Welfare_Organizations_on_Candidate-Related_Political_Activities.pdf [https://perma.cc/S97E-RB2T].

223. I.R.C. § 501(c)(3) (2012).

224. *See, e.g.*, St. Louis Union Trust Co. v. United States, 374 F.2d 427, 431–32 (8th Cir. 1967); Rev. Rul. 86-95, 1986-2 C.B. 73; Rev. Rul. 2007-41, 2007-1 C.B. 1427.

225. I.R.C. § 4955.

226. *See* § 501(a).

227. *See* I.R.S. Fact Sheet FS-2006-17 (Feb. 2006).

228. *Id.*

229. *Id.*

230. Rev. Rul. 2007-41, 2007-1 C.B. 1492.

political campaign.[231] Revenue Ruling 2007-41, however, also provides that the final determination of whether a § 501(c)(3) organization runs afoul to the political campaign prohibition "depends on all of the facts and circumstances of each case."[232] Furthermore, unlike other areas of tax law, the campaign intervention prohibition—and Revenue Ruling 2007-41 specifically—has been subject to very few judicial decisions.[233] As such, the meaning of factors addressed in Revenue Ruling 2007-41 is uncertain, and exempt organizations are forced to be excessively risk-averse and to avoid "even the most benign nonpartisan efforts altogether."[234]

Section 501(c)(3) organizations—the most numerous category of tax-exempt organizations in the United States[235]—have pushed repeatedly for more guidance on how to comply with the political campaign prohibition.[236] Because of the large number of organizations subject to this prohibition and the lack of clarity on it, the IRS should develop guiding rules[237] to improve compliance and provide for more predictable outcomes.[238] Advocates for comprehensive rules regarding the full range of potential activities that will or will not violate the campaign intervention prohibition realistically acknowledge that adopting Treasury regulations is not possible.[239] Rather, these advocates repeatedly have proposed a solution in the form of revenue rulings.[240] Furthermore, Revenue Ruling 2007-41 demonstrates that creating a set of rules regarding the campaign intervention prohibition is not an unattainable task; the IRS can and has given a "manageable set of categories in which political campaign intervention is most likely to arise."[241] Once these organizations become more informed under

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231. *Id.*

232. *Id.*

233. *See* Ellen P. Aprill, *Why the IRS Should Want to Develop Rules Regarding Charities and Politics*, 62 CASE W. RES. L. REV. 643, 655 (2012).

234. Comment Letter on Political Activity Guidance for Section 501(c)(3) Organizations, *supra* note 222.

235. *Quick Facts About Nonprofits*, *supra* note 186.

236. *See supra* notes 222–228 and accompanying text.

237. Aprill, *supra* note 233, at 665.

238. Comment Letter on Political Activity Guidance for Section 501(c)(3) Organizations, *supra* note 222.

239. *Id.*

240. *Id.*; *see also* Proposed Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, *supra* note 222; Proposed Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, *supra* note 222; American Bar Association, *supra* note 222; Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, *supra* note 222.

241. Aprill, *supra* note 233, at 680.

promulgated rules, scholars predict that behavior will fall more in line with legal norms,[242] which unquestionably is a goal of the IRS.[243]

Although IRS promulgations regarding the campaign intervention prohibition are desperately needed, the IRS is unlikely to devote time and resources to producing guidance if it will not be respected as binding law.[244] Although revenue rulings are undeniably the solution to elaborating on Revenue Rule 2007-41 and filling gaps in the prohibition, no reason exists for the IRS to produce such if courts fail to defer to the promulgations. Granting *Chevron* deference to these hypothetical revenue rulings—and all revenue rulings—promotes the promulgation of "administrative directives in a way that best effects compliance."[245] If the judiciary substantially defers to the hypothetical revenue rulings, it signals to the public that the rulings represent the applicable law and that § 501(c)(3) organizations can rely on the rulings without risking losing their exemption status.

D. Complexity of Charitable Organizations Tax Law as a Whole

The IRS develops guidance items, including specific revenue rulings, "in large part based on its agents' interactions with charitable organizations in adjudications."[246] There obviously is a standard that must be applied in determining whether an entity is tax exempt as a charitable organization, but the requisite standard is not necessarily one that can be encompassed in a rigid, statutory rule.[247] The idea and nature of "charity" is a fluid concept, changing over time with society and thus should exist in a manner

242. Louis Kaplow, *Rules v. Standards: An Economic Analysis*, 42 DUKE L.J. 557, 575 (1992).

243. *See generally* Treas. Reg. § 601.601(d)(2)(iii) (as amended in 1989).

244. Revenue rulings have the benefit of being promulgated frequently and expeditiously without the burden of notice-and-comment procedures. If, however, revenue rulings lack judicial deference, applicability to similar circumstances falls and the IRS lacks incentive to issue blanket guidance. Instead, the IRS may retreat to only issuing a Private Letter Ruling ("PLR"), which is a statement issued to a taxpayer interpreting and applying tax law to the taxpayers set of facts. A PLR is binding only on the particular taxpayer who requested it, and PLRs are issued at the expense of each individual taxpayer looking for guidance. *Understanding IRS Guidance*, IRS, https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer (last updated July 6, 2016) [https://perma.cc/5B GC-E7HK]. For exempt organizations, each PLR is typically issued at a fee of $28,300. *See* Rev. Proc. 2017-1, I.R.B. 2017-1.

245. Aprill, *supra* note 233, at 676.

246. Hackney, *supra* note 185, at 94.

247. *Id.* at 115–16.

easily modified[248]—a concept recognized by the Supreme Court.[249] In 1913, when the income tax was created, racial discrimination was commonly accepted among society and Congress.[250] Noting the flexible and changing nature of the charitable standard, the Court in 1983 held that such discrimination was contrary to public policy; thus, an otherwise tax-exempt organization could be denied exempt status because of racially discriminatory policies.[251] The Court's decision in *Bob Jones University v. United States* is one of many illustrations of the evolving perception of charitable purposes in the eyes of society.[252] Because of the evolving connotation of "charity," the applicable rules and regulations for charitable organizations must be open to flexibility and progression as society grows.

As seen above in the context of health care and exemption status, unrelated business income, and political campaign activity, the considerations that must be weighed in evaluating an organization's status as a § 501(c)(3) entity do not necessarily lend themselves to a rigid rule appropriate for statutory codification. The ability of revenue rulings to take the general position of the IRS and mold a concept around particular facts and circumstances, such as location-based souvenirs versus museum-content souvenirs, not only conveys the position of the IRS clearly in regard to a question of tax law but also illustrates the correct way to apply this concept. If revenue rulings are to be disregarded—or considered merely persuasive—taxpayer reliance on them may be eroded, and eventually, the IRC will become lengthier and more complex, with specific provisions like the precise designation of each individual souvenir that can be sold in a tax-exempt museum and whether the corresponding income would be excluded.[253] Because the IRS is vested with the authority to produce fact-sensitive opinions affecting many taxpayers in a quicker manner and with a broader sweep than courts, these rulings should be entitled to substantial judicial deference.

It became evident from the resulting Tea Party scandal[254] that the IRS was looking for ways to streamline some of the various processes the IRS must engage in with very little guidance.[255] Perhaps if IRS agents had

248. *See id.*
249. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983).
250. *Id.*
251. *Id.* at 605.
252. Hackney, *supra* note 185, at 121.
253. *See* discussion *supra* Part IV.B.
254. *See* TREAS. INSP. GEN. FOR TAX ADMIN., *supra* note 4.
255. *See* Confessore et al., *supra* note 8 (Former Director of the IRS Exempt Organizations Division saying that the Tea Party targeting may have resulted from specialists trying to develop a single, long survey that could be sent to many kinds

informal guidance like revenue rulings to rely on, much of the discrimination toward Tea Party organizations could have been avoided as there would have been no need for the already overworked exemption division[256] to craft its own personal methods for evaluating potentially tax-exempt organizations. Statutory provisions, due to the costs and difficulties associated with promulgation, are not necessarily appropriate for establishing the standards by which charitable rules are governed.[257] Rather, "[c]haritable tax law should instead promote a range of diverse ideas."[258] Having a statutory, rule-oriented regime precludes the promotion of ideas before they can even arise.[259] The taxation laws covering tax-exempt organizations demonstrate that revenue rulings are more suitable to address the constant fluctuation that the tax realm endures.[260]

V. A CALL FOR DEFERENCE

Though confusion among the circuit courts regarding the proper standard of review for IRS guidance documents exists, logic and experience dictate that revenue rulings should be entitled to *Chevron* deference.[261] Guiding principles of expertise, agency purpose, administrative feasibility, certainty, and consistency support this conclusion. Applying *Chevron* deference to revenue rulings is not foreign to the courts. For example, in *Tualatin Valley Builders Supply, Inc.*, a special concurrence concluded that IRS revenue procedures are entitled to *Chevron* deference.[262] Additionally, in *Aeroquip-Vickers, Inc.*, the court stated, "[W]e conclude that the underlying rationale of Revenue Ruling 82-20 is valid, 'reflect[s]

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of groups and thus make the status decision process less burdensome on the agency).

256. *Id.*

257. Hackney, *supra* note 185, at 119.

258. *Id.* at 120.

259. *Id.*

260. *See* discussion *supra* Part IV.A.

261. *See* Texaco, Inc. v. United States, 528 F.3d 703, 711 (9th Cir. 2008) (avoiding the *Chevron* question by holding that the revenue ruling at issue was in line with the plain meaning of the statute but would be worthy of deference under either *Chevron* or *Skidmore* even if the statute was unclear).

262. Tualatin Valley Builders Supply, Inc. v. United States, 522 F.3d 937, 945–46 (9th Cir. 2008) (O'Scannlain, J., specially concurring).

the agency's longstanding interpretation of its own regulations,' and thus deserves 'substantial judicial deference.'"[263]

A. The IRS as the Tax Expert

Agency expertise provides support for substantial deference to revenue rulings.[264] Under the IRC, the IRS has been tasked with not only revenue collection but also non-revenue raising functions associated with home ownership, health care, education, work incentives, and reduction of poverty.[265] Thus, Congress has recognized that the IRS is a necessary arm of the government and is at least somewhat successful in the associated field of expertise.[266] Stripping IRS revenue rulings of deference is irrational because tax law is exceedingly specialized, with a vast body of law and guidance; the subject matter specialization of the IRS should be more unescapable to reviewing courts than less specialized areas of law.[267]

Furthermore, unlike appointed federal judges, Treasury officials are democratically accountable, better situated to be receptive of taxpayer behavior and changes in policy, and possess significantly more expertise in the convoluted area of tax law.[268] In 2015, federal district courts across the nation were flooded with the filing of more than 300,000 new lawsuits.[269] Federal judges already are overworked, and litigants are stuck waiting years before their particular matters reach judicial resolution.[270] It is impractical and a waste of judicial resources for a court to interpret law

263. Aeroquip-Vickers, Inc. v. Comm'r, 347 F.3d 173, 182 (6th Cir. 2003) (quoting United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 220 (2001)).

264. *See generally* Levy & Glicksman, *supra* note 152, at 558.

265. Leslie Book, *A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation*, 12 FLA. TAX REV. 517, 531 (2012).

266. *See* Alan Cole, *The IRS Has Too Many Responsibilities*, TAX POLICY BLOG, http://taxfoundation.org/blog/irs-has-too-many-responsibilities (last visited Nov. 16, 2017) [https://perma.cc/F4N4-4R9M].

267. Kristin E. Hickman, *The Perfect Process is the Enemy of the Good Tax: Tax's Exceptional Regulatory Process*, 35 VA. TAX REV. 553, 589 (2016).

268. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism In Judicial Deference*, *supra* note 67, at 154.

269. *Federal Judicial Caseload Statistics 2015*, US COURTS, http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2015 (last visited Sept. 4, 2017) [https://perma.cc/U79T-KK9Z].

270. Jennifer Bendery, *Federal Judges Are Burned Out, Overworked And Wondering Where Congress Is*, HUFF. POST, http://www.huffingtonpost.com/entry/judge-federal-courts-vacancies_us_55d77721e4b0a40aa3aaf14b (last updated Oct. 1, 2015) [https://perma.cc/DM5M-VXWH].

that subject matter experts, the IRS, already have addressed. Revenue rulings are generated with a great deal of care and precision,[271] and substantially deferring to them is practical for the judiciary and complies with principles of administrative law as a whole.[272] *Chevron* is intended to detach the courts from the substantive act of agency lawmaking if the agency stays within legislatively defined parameters,[273] and as such, revenue rulings deserve substantial judicial deference.

A counterargument to the call for revenue ruling deference based on the expertise of IRS officials compared to federal judges arises where the jurisdiction of tax courts begins.[274] A query exists as to why—in this specialized court for this specific area of the law—the judges are not accorded a presumption of both procedural and subject matter expertise. Furthermore, scholars who oppose giving *Chevron* deference to revenue rulings take this position because of a disfavor of tax exceptionalism.[275] But carving out an exception for tax law compared to other administrative agencies is exactly what the Supreme Court denounced in *Mayo Foundation for Medical Education & Research v. United States*.[276] Holding that challenges to the validity of Treasury regulations generally are governed by *Chevron* to the same extent as any other promulgation issued by another administrative agency, *Mayo* clarified that tax law is integrated into the broad sphere of administrative law.[277] As such, the existence of the specialized Tax Court has no bearing on the judicial standard of deference accorded to any agency act, whether a particular act comes before the Tax Court or any other federal court. Furthermore, this Comment does not advocate for *Chevron* deference solely for IRS revenue

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271. *See* discussion *supra* Part III.A.

272. *See* discussion *supra* Part I.A.

273. Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 521 (2013).

274. The United States Tax Court is a court of nationwide jurisdiction physically located in Washington, D.C. The judges travel nationwide to conduct trials in designated cities. Each of the 19 Tax Court judges are appointed by the President and have special expertise in federal tax laws as compared to federal district court judges who have jurisdiction over nearly all categories of federal cases. *See About the Court*, U.S. TAX COURT, https://www.ustaxcourt.gov/about.htm (last visited Sept. 27, 2017) [https://perma.cc/7K25-MSNX].

275. *See generally* Levy & Glicksman, *supra* note 152, at 500 ("[T]o the extent that agency-specific precedents deviate from standard administrative law doctrine, they challenge the very foundations of administrative law.").

276. Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 51 (2011).

277. *Id.* at 52–54.

rulings but supports substantial deference to all agency interpretations that meet the requirements of *Chevron* and *Mead*.[278]

B. The Need for Quick Answers

The issue of democracy and lack of notice-and-comment procedures may cause many taxpayers to question whether *Chevron* deference is appropriate for revenue rulings. Though revenue rulings typically are not generated through public notice-and-comment procedures—a process that the Supreme Court has explicitly stated is not required for *Chevron* deference[279]—there remains an opportunity for public participation in the process of creating revenue rulings.[280] Public "outcry," or the need for guidance in a complex or confusing situation, is why revenue rulings exist and how the creation of one is sparked.[281] The revenue ruling program emerged in 1953 as a solution to controversy over the reluctance of the IRS to make letter rulings publically available after issuance to individual taxpayers.[282] Additionally, the IRS occasionally requests comments from the public on proposed revenue rulings.[283] Furthermore, Congress is notorious for taking lengthy amounts of time to pass legislation,[284] and

278. *See generally* discussion *supra* Part II.B.

279. Mead Corp. v. United States, 533 U.S. 218, 229 (2001).

280. *See, e.g.*, I.R.S. Fact Sheet FS-2006-17, *supra* note 227 (requesting for public comment on the IRS position regarding compliance with political campaign activity restrictions); I.R.S. Notice 2009-64, 2009-36 I.R.B. 307 (proposing a ruling that would hold tangible assets used in converting corn to fuel grade ethanol are property included in a specific asset class for depreciation); I.R.S. Notice 2002-31, 2002-1 C.B. 908 (outlining the contents of a proposed ruling regarding the employment taxation and reporting of nonqualified stock options and nonqualified deferred compensation transferred to a former spouse incident to divorce).

281. The revenue ruling program grew out of the IRS's reluctance to make letter rulings publicly available to everyone. There was initial controversy as to whether the IRS should be required to publish all rulings issued to individual taxpayers. Eventually, the IRS determined it would publish all letter rulings that established new precedents, and eventually the Internal Revenue Code was amended to mandate the public release of all letter rulings. Korb, *supra* note 31, at 333–34.

282. *Id.* at 333.

283. *See, e.g.*, I.R.S. Announcement 95-25, 1995-14 I.R.B. 11 (requesting comments on a proposed revenue ruling).

284. *See, e.g.*, Treas. Reg. § 145.4051-1 (as amended in 2000) (temporary Treasury regulation issued in response to a 1982 legislative act was only to remain

according deference to administrative positions—if and when Congress finds those positions to contradict legislative intent—may encourage Congress to draft better laws that provide more clarity and certainty.[285]

C. Revenue Rulings Actually Save Taxpayer Dollars

Moreover, administrative feasibility and costs associated with promulgating more formal statutes or regulations support increased deference to revenue rulings, along with encouraging their creation. It is neither feasible nor realistic to expect Congress to legislate, much less anticipate, every possible issue and detail that might arise, thus triggering the need for additional clarification via statutory guidance.[286] The IRS issues revenue rulings under various levels of review and authority[287] prescribed by the Internal Revenue Manual.[288] Revenue rulings also are generated in a more economical and sensible manner by not engaging in notice-and-comment procedures.[289] The notice-and-comment process consumes an enormous

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in effect until final regulations were adopted but is still in the Code as a temporary regulation today).

285. *See* Galler, *supra* note 13, at 882.

286. Daniel W. Graves, *Not So Special after All: How* Mayo *Granted the Treasury Unfettered Rule-Making Discretion*, 77 MO. L. REV. 283, 283 (2012).

287. *See* IRM 39.5.4.3 (Mar. 2000) (according to the Manual, the relevant Branch Chief reviews the revenue ruling and then forwards it to the Assistant Chief Counsel, who then forwards it to the Assistant Commissioner with a publication recommendation); *see also* Treas. Reg. § 601.601(d)(2) (as amended in 1989).

288. Susan C. Allen, *Why the Internal Revenue Manual Is Valuable to Your Clients*, TAX ADVISER (Apr. 1, 2015), http://www.thetaxadviser.com/issues/2015/apr/tpp-apr2015-02.html [https://perma.cc/4746-ECM7]. IRS employees operate under the Internal Revenue Manual:

> The Internal Revenue Manual (IRM) is essentially the IRS employee handbook. It contains instructions on how to carry out all administrative and procedural matters, such as how to audit specific tax returns, collect taxes, process returns, or assess penalties. The IRM may be the most important tool provided to IRS employees as it contains vital information to help them do their jobs.

Id.

289. Although notice-and-comment does permit some public input, it does not require full transparency. Agencies are not required to publish every alteration to a rule for public comment unless it is not a logical outgrowth of the original proposal. *See* First Am. Disc. Corp. v. Commodity Futures Trading Comm'n, 222 F.3d 1008, 1015 (D.C. Cir. 2000). Furthermore, agencies need not follow any recommendations received through public comments. *See* Chocolate Mfrs. Ass'n of U.S. v. Block, 755 F.2d 1098, 1105 (4th Cir. 1985).

amount of time and resources, with a single rule often taking five to ten years and tens of thousands of agency staff hours to promulgate.[290] Time and resource commitment associated with notice-and-comment leads to such a burdensome process that, were revenue rulings subjected to notice-and-comment, the IRS routinely would delay or defer the issuance of these rulings.[291] This potential delay is common in other agencies.[292] Notice-and-comment does not necessarily mean there will be any more public participation in generating tax guidance than already exists[293] because notice-and-comment is used primarily as a recordkeeping process and typically occurs when a rule is near its final form.[294] As such, revenue rulings as they currently exist are more ideal than other alternative sources of law, such as Treasury regulations.

Shifting to a system that relies more heavily on revenue rulings than costly and time-consuming regulations is justified by reducing the agency's burdens.[295] Conversely, denying revenue rulings substantial judicial deference will give taxpayers an indication they need not to abide by rulings. When deference is denied to authoritative pronouncements, costs and associated litigation rates likely will skyrocket, instances of noncompliance will increase, and the IRS will have to divert resources to enforcing the established law.[296] Although costs of producing guidance alone do not correlate directly to the level of deference accorded, a cursory

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290. RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS § 6.4.6b, at 336 (4th ed. 2004).

291. *See* Hickman, *The Perfect Process is the Enemy of the Good Tax: Tax's Exceptional Regulatory Process*, *supra* note 267, at 579.

292. *See, e.g.*, MAEVE P. CAREY, CONG. RESEARCH SERV., RL32240, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW (2013), https://fas.org/sgp/crs/misc/RL32240.pdf (providing that the Occupational Safety and Health Administration takes an average of ten years to develop and promulgate a health or safety standard) [https://perma.cc/82FG-DJ2K]; Wendy Wagner et al., *Rulemaking in the Shade*, 63 ADMIN L. REV. 99, 143–45 (2011) (noting that it takes the Environmental Protection Agency between five and six years to issue roughly one hundred insignificant rules); EME Homer City Generation, L.P. v. EPA, 696 F.3d 7, 24 n.18 (D.C. Cir. 2012) (stating that the Environmental Protection Agency has taken longer than 20 years to issue judicially adequate rules regarding interstate transportation of pollution).

293. *See* Hickman, *The Perfect Process is the Enemy of the Good Tax: Tax's Exceptional Regulatory Process*, *supra* note 267, at 584.

294. E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1490 (1992).

295. *See* Hickman, *The Perfect Process is the Enemy of the Good Tax: Tax's Exceptional Regulatory Process*, *supra* note 267, at 594.

296. *See id.* at 593–94.

glance over associated costs helps explain why revenue rulings require judicial deference.[297] Giving revenue rulings *Chevron* deference signals to taxpayers that compliance is mandatory and will act as a gatekeeper to would-be tax litigation, and "[t]he tax system cannot run without some level of baseline deference to the tax administrator, which has no option but to speak through something 'less' than regulations issued after notice and hearing."[298] The policy issues associated with increased costs, in addition to the legally-mandated requirements for deference being met, requires *Chevron* deference for revenue rulings because anything less, including *Skidmore* deference, is really no deference at all.[299]

D. Certainty, Reliance, and Consistency: Avoiding Incoherent Representations

Taxpayer certainty and reliance require an efficient and effective method of taxation, and "[r]obbing revenue rulings of any claim to actual deference will diminish the IRS's ability to inform taxpayers and IRS personnel of the law and ultimately to set IRS policy and ensure voluntary compliance with revenue laws."[300] Furthermore, general notions of equity indicate that taxpayers expect the IRS to comply with its self-imposed duty of consistency, which implicitly provides for taxpayer certainty.[301] Congressional rules are more appropriate for providing certainty in areas in which there is little change over time, which is not the case in either tax law or in the charitable organization context.[302] Though revenue rulings necessarily are subject to less scrutiny than regulations and statutes, often written in a conclusory style without a detailed explanation of factual significance to the outcome, and lack clear reasoning as to why both the facts and law support the finding,[303] the rough justice they provide is outweighed by many other redeeming qualities. For example, the Commissioner of the IRS has the authority to retroactively revoke a

297. *See* Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1202 n.218 (2008).

298. Cummings, Jr., *supra* note 153, at 441.

299. *See* discussion *supra* Part I.B.

300. Morris, *supra* note 16, at 1004.

301. *See generally* Stephanie Hoffer, *Hobgoblin of Little Minds No More: Justice Requires an IRS Duty of Consistency*, 2006 UTAH L. REV. 317 (2006).

302. Hackney, *supra* note 185, at 115.

303. Lowy & Vasquez, Jr., *supra* note 13, at 235.

revenue ruling that is contrary to law, in accordance with the congressional intent evidenced in IRC § 7805(b).[304]

Like certainty and reliance, consistency is another fundamental requirement for an effective tax administration to thrive. The IRS continually has affirmed that treating similarly situated taxpayers equally is an important goal of the tax system.[305] Courts also recognize that horizontal equity[306] is an important goal of the tax system.[307] Although Congress has delegated to the Treasury Department—and implicitly to the IRS—the authority to "prescribe all needful rules and regulations"[308] for enforcement of the IRC, this grant of authority rests in part on the need to "ensure that in 'this area of limitless factual variations,' . . . like cases will be treated alike."[309] Inconsistency contributes to taxpayer distrust in the IRS, which may threaten the soundness of self-reporting—a practice the IRS relies on heavily.[310] A general and rigid policy of deference would increase national uniformity regarding the meaning of tax laws by decreasing the chance that courts across the nation adopt different views when interpreting a particular provision of the IRC.[311] Establishing a policy of deference also would encourage the IRS to issue as much guidance as possible.[312]

The need for a grant of *Chevron* deference to all IRS revenue rulings that meet the requisite standard is especially pertinent in the context of charitable organizations. Charitable organizations, like every other entity regulated by law, need deliberate and principled analysis of the implicated

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304. *See generally* Auto. Club of Mich. v. Comm'r, 353 U.S. 180 (1957); *see also* Bornstein v. United States, 345 F.2d 558 (Ct. Cl. 1965).

305. I.R.S. Mission, 2007-2 C.B. ii.

306. Horizontal equity is an economic theory that states individuals with similar income and assets should pay the same amount in taxes, regardless of the tax system in place. Ira K. Lindsay, *Tax Fairness By Convention: A Defense of Horizontal Equity*, 19 FLA. TAX REV. 79, 79–81 (2016).

307. *See, e.g.*, Comm'r v. Sunnen, 333 U.S. 591, 599 (1948) ("[C]ollateral estoppel must be used with its limitations carefully in mind so as to avoid injustice."); Burnet v. Harmel, 287 U.S. 103, 110 (1932) (discussing how tax law should usually "be interpreted so as to give a uniform application to a nationwide scheme of taxation").

308. I.R.C. § 7805(a) (2012).

309. Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979) (quoting United States v. Correll, 389 U.S. 299, 307 (1967)).

310. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-567, TAX ADMINISTRATION: IRS SHOULD EVALUATE PENALTIES AND DEVELOP A PLAN TO FOCUS ITS EFFORTS (2009).

311. Salem et al., *supra* note 1, at 722.

312. *Id.*

values in tax law.[313] Because the resolution of these vast issues has significant financial implications, these organizations need a reliable set of rules that create a clear and principled approach.[314] These financial implications also affect organizational behavior; thus, having clear, concise, and reliable rules serves a broader social interest as well.[315] For example, though widely criticized, Revenue Ruling 69-545 still is cited and employed[316] for providing the standard by which hospitals rely on to achieve charitable organization status.[317] The question of realizing democratic goals also is avoided because Congress affords charitable organizations the right to challenge any IRS decision denying the organization charitable status.[318] A charitable organization also can challenge IRS decisions in court by refusing to pay a tax—after which the IRS will assess a deficiency against the organization—and then seeking a refund from the IRS based on the organization's tax-exempt status.[319] Utilizing these various mechanism of review, "courts have played a role in defining the contours of charitable organizations and healthcare."[320]

CONCLUSION

Revenue rulings deserve substantial deference because they carry the force of law and result from a formal administrative procedure. The IRS issues revenue rulings under a general grant of authority by Congress, which implicitly shows that Congress intends them to have the force of law.[321] The intent for revenue rulings to carry the force and effect of law is evidenced further by the congressionally-mandated penalties that arise when taxpayers do not comply with revenue rulings.[322] Courts also should afford revenue rulings *Chevron* deference, as such pronouncements are responsive to complicated issues in a relatively quick manner, alleviating

313. Laura B. Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201, 253 (1988).
314. *Id*.
315. *Id*.
316. *See, e.g.*, Dialysis Clinic, Inc. v. Levin, 127 Ohio St. 3d 215, 221 (Ohio 2010).
317. Cecilia M. Jardon McGregor, *The Community Benefit Standard For Non-Profit Hospitals: Which Community, and For Whose Benefit?*, 23 J. CONTEMP. HEALTH L. & POL'Y 302, 315 (2007).
318. I.R.C. § 7428 (2012).
319. *See id.* § 7422.
320. Hackney, *supra* note 185, at 95.
321. *See* Bankers Life & Cas. Co. v. United States, 142 F.3d 973, 978 (7th Cir. 1998).
322. I.R.C. § 6662(b)(1), (c).

the "cumbersome, time consuming, and expensive" problems associated with notice-and-comment practices.[323] Additionally, denying heightened deference to revenue rulings runs afoul of the explicit reason the IRS issues these pronouncements: to aid voluntary compliance with revenue laws.[324] If courts fail to defer substantially to revenue rulings, courts signal to the public that reliance may not be justified; if courts do not substantially defer to revenue rulings, such lack of deference indicates that the IRS cannot necessarily be credited with correct interpretation of the body of law over which this agency is required to exercise its enforcement power and its right to provide guidance to the public. Furthermore, as seen in the promulgation of Revenue Ruling 2007-41, revenue rulings are not created arbitrarily but rather in response to public outcry and following solicitation for public input.[325]

If the most appropriate method for promulgating governing rules is not accorded adequate deference by the courts, the whole taxation enterprise will collapse. Even though guidance in the form of revenue rulings is much needed,[326] the IRS would be stripped of any incentive to take time and resources away from other pressing issues to focus on promulgating documents that courts will toss to the side. Because they are the ideal method for shaping tax law both in the charitable organization context and tax law as a whole, revenue rulings that inherently carry the force and effect of law are entitled to substantial—or *Chevron*—deference by reviewing courts.

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323. *See* Cloverdale, *supra* note 59, at 86.

324. *See* 26 C.F.R. § 601.601(d)(2)(iii) (2005) (stating that the purpose behind revenue rulings is to "assist taxpayers in attaining maximum voluntary compliance").

325. I.R.S. Fact Sheet FS-2006-17, *supra* note 227.

326. *See* discussion *supra* Part V.

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