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PRAGMATIC ADMINISTRATIVE LAW AND TAX EXCEPTIONALISM

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“[W]e are not inclined to carve out an approach to administrative review good for tax only.”¹

“[T]he standard doctrines of administrative law . . . should not be taken too rigidly.”²

INTRODUCTION

“Tax exceptionalism” holds that, like the animals of an island long cut off from a continent, the administrative law of tax has evolved into different forms than those found in general administrative law. Critics of tax exceptionalism take a dim view of this diversity, contending that general principles of administrative law should apply in the tax context just as they do in other contexts. This approach’s virtues include simplicity, elegance, and commitment to the rule-of-law concept that the law should be the same everywhere and for everyone. It runs the risk, however, of downplaying the virtues of pragmatism, flexibility, and realism. An objective look at the evolution of administrative law in the United States indicates that it is, and will likely forever remain, a muddled mess in important

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1. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011).
2. *Wos v. E.M.A. ex rel. Johnson*, 133 S. Ct. 1391, 1403 (2013) (Breyer, J., concurring) (quoting Louis Jaffe, *Administrative Law: Burden of Proof and Scope of Review*, 79 HARV. L. REV. 914, 918 (1966)).

respects. This Essay's simple contention is that courts and other commentators should give due weight to the history and virtues of this mess—and consider embracing the pragmatism and flexibility that it enables—before killing off more mutations from the island of misfit tax administrative law doctrines.

Two of the most prominent examples of tax exceptionalism implicate the authority of the Treasury Department (Treasury) to promulgate “general authority” regulations pursuant to 26 U.S.C. § 7805(a), which authorizes Treasury to “prescribe all needful rules and regulations for the enforcement” of the Internal Revenue Code (IRC). Controversy has existed regarding whether Treasury's general authority regulations may be eligible for *Chevron* deference, which requires courts to defer to an agency's reasonable interpretation of a statute that it administers.³ Also, until recently, Treasury had long maintained that its general authority regulations were categorically “interpretative,” and therefore did not require notice-and-comment procedures under the Administrative Procedure Act (APA).⁴ Scholars, led by Professor Kristin Hickman, have made powerful arguments to the contrary.⁵ Notably, both the *Chevron* gap and the notice-and-comment gap implicate one of the most slippery and confusing phrases in administrative law—the “force of law.” *Chevron* deference applies to agency statutory constructions that carry the force of law, and agencies are generally supposed to use the notice-and-comment process to promulgate legislative rules carrying the force of law.

In 2011, the Supreme Court put an end to the *Chevron* gap by holding in *Mayo Foundation for Medical Education & Research v. United States*⁶ that *Chevron* deference does indeed apply to certain general authority Treasury regulations—which therefore must possess

3. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 839–40 (1984). For a discussion of the evolution of the *Chevron* doctrine, see *infra* Part I.

4. See Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 495 (2013) (observing that Treasury has long taken the view that rules promulgated pursuant to its general authority are interpretative rules); *id.* (noting that the Internal Revenue Service recently “has amended the Internal Revenue Manual (“IRM”) to acknowledge that at least some general authority regulations may be legislative rules”); *id.* (noting that notwithstanding this amendment, Treasury continues to assert that notice-and-comment procedures are not required for general authority rulemaking).

5. See generally 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 (2007).

6. *Mayo Found. for Med. Educ. and Research v. United States*, 131 S. Ct. 704 (2011).

the force of law.⁷ This closing of the *Chevron* gap might suggest a speedy end to the notice-and-comment gap, too. The argument might run as follows: *Mayo* establishes that at least some general authority regulations carry the force of law; interpretative rules do not carry the force of law; and Treasury must therefore have been wrong to claim that its general authority rules are categorically interpretative rather than legislative. It should follow that Treasury should, contrary to its longstanding practice, use notice-and-comment procedures to issue at least those general authority regulations that carry the force of law.⁸ In short, it is tempting to read *Mayo* as a sign that Treasury has badly misunderstood the APA's rulemaking requirements for many decades and had better start using notice-and-comment procedures for at least some of its general authority rules.

This Essay does not defend its own definitive resolution to the notice-and-comment gap; instead, it proposes an attitude. As courts assess an important administrative practice that is many decades old, they should be at once pragmatic and conservative. The consequences of aggressive application of notice-and-comment requirements to Treasury's general authority rules could be substantial and unfortunate.⁹ Due respect for both historical practice and the law of unintended consequences suggests that courts should, if they properly can, avoid such a result. Of course, courts cannot ignore clear law even if it has unfortunate policy consequences. The pertinent administrative law does not, however, seem so clear as to exclude room for courts to shape and implement this law in a pragmatic spirit that cares about consequences.

This Essay proceeds in two parts. Part I sets the stage for further discussion by examining the Supreme Court's recent fix of the *Chevron* gap in *Mayo*. Two lessons emerge from this examination. First, the *Chevron* doctrine, on brief inspection, provides an excellent

7. *Id.* at 713 (citation omitted).

8. See Hickman, *supra* note 4, at 468 (noting this tension).

9. See generally Richard J. Pierce, Jr., *Which Institution Should Determine Whether an Agency's Explanation of a Tax Decision is Adequate?: A Response to Steve Johnson*, 64 DUKE L.J. ONLINE 1, 12 (2014) (describing the consequences of forcing Treasury to use modern notice-and-comment as "devastating"). Later in his essay, Professor Pierce explains that judicial enforcement of statutory bars on pre-enforcement review of tax rules could mitigate this damage. *Id.* at 16–18. Even if courts applied these statutory bars to full effect, however, Treasury would have to expect judicial review of its rules as a defense in enforcement actions. As such, the unavailability of pre-enforcement review might do little to reduce the upfront investment that Treasury would need to make as it promulgates rules through notice-and-comment.

demonstration of the courts' flexible approach to the APA—which they sometimes “interpret” with marvelous aggression, and sometimes ignore. Second, viewed from one angle, *Mayo* represents a formalist impulse to simplify deference doctrine with a one-size-fits-all approach. Viewed from another, broader angle, however, *Mayo* is consistent with administrative law's pragmatic impulses—it fixes an unnecessary doctrinal complication at a very cheap price. In Part II, the focus turns to the notice-and-comment gap. Here, again, we see strong evidence of judicial creativity regarding administrative law. Courts have essentially rewritten the APA's notice-and-comment provisions, transforming them from an easy and straightforward mechanism in 1946 into their current monstrous form. Aggressive application to Treasury of notice-and-comment rulemaking *à la* 2014 could prove very costly. Moreover, a decision to do so would necessarily turn on administrative law's famously murky attempts to draw the line between “interpretative” and “legislative” rules. Given the law's lack of clarity, the potential costs of fixing the notice-and-comment gap, and the courts' integral role in creating these costs, courts should, at the least, give Treasury the benefit of any doubt on the issue of whether its general authority regulations are “interpretative”—even if it takes quite a bit of interpretative effort by the courts to do so.

I. IGNORING THE APA, *CHEVRON* DEFERENCE, AND *MAYO'S* CHEAP FIX

Section 706(2) of the APA instructs reviewing courts that they shall:

hold unlawful and set aside agency action, findings, and conclusions found to be—

. . .

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law¹⁰

A naïve reader might be forgiven for thinking that this provision makes plain that courts, not agencies, are to determine issues of law

10. 5 U.S.C. § 706(2) (2012).

embedded in agency actions. This straightforward reading of the APA is consistent with centuries of judicial declarations of interpretative supremacy, *Marbury v. Madison*¹¹ foremost among them, to the effect that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”¹²

This reading is also consistent, however, with centuries of sensible judicial declarations that courts should defer to reasonable agency statutory interpretations.¹³ These two ideas do not need to contradict. The courts can be in charge of determining statutory meaning but, as they do so, can also choose to give substantial weight to an agency’s statutory interpretation as a source of helpful information. Often, courts have justified deference based on agency expertise. For instance, courts have stated that deference to agency statutory constructions devised near the time of a statute’s adoption may be proper because the agency officials possess valuable information regarding legislative intent—they may even have helped draft the language at issue.¹⁴ Other justifications have related to systemic concerns about protecting legal stability and reliance interests. Thus, longstanding, consistent agency statutory constructions have been entitled to great weight and should not be “overturned except for cogent reasons.”¹⁵

Over time, various forms of judicial deference have come to be associated with the names of influential cases. *Skidmore v. Swift & Co.*,¹⁶ which was decided in 1944 just two years before the APA’s adoption, has provided a particularly durable moniker.¹⁷ Regarding judicial review of agency statutory constructions, Justice Jackson famously advised in *Skidmore* that

[w]e consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may

11. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

12. *Id.* at 177.

13. *See, e.g.*, *United States v. Vowell*, 9 U.S. (5 Cranch) 368, 372 (1810) (“If the question had been doubtful, the court would have respected the uniform construction which it is understood has been given by the treasury department of the United States upon similar questions.”).

14. *United States v. Moore*, 95 U.S. 760, 763 (1877).

15. *United States v. Chi., N. Shore & Milwaukee R.R. Co.*, 288 U.S. 1, 13 (1933).

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

17. *Id.* at 134.

properly resort for guidance. The weight of such a judgment in a particular case will depend upon 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.¹⁸

In the parlance of general administrative law, “*Skidmore* deference” or, equivalently, “*Skidmore* respect,” thus stands for the idea that courts should pay attention to an agency’s construction of a statute that it administers, giving the agency’s analysis whatever weight it reasonably deserves.

In the field of tax, a similar idea has applied but gone by another case name. In 1979, just five years before *Chevron*, the Court decided *National Muffler Dealers Ass’n v. United States*.¹⁹ In it, the Court offered the following guide for review:

A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner’s interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.²⁰

“*National Muffler* deference” thus combines, among other threads: (a) the traditional idea that a statutory construction adopted shortly after the enactment of the underlying statute merits special weight, and (b) concepts from *Skidmore* deference.

In 1984, the Court unleashed *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*²¹ Its two-step test commands courts reviewing an agency’s construction of a statute it administers to check whether Congress has spoken directly to the precise issue in question and, if Congress has not, to affirm the agency’s construction so long as it is “permissible”—*i.e.*, reasonable.²² The Court gave two different types of explanation for this deference—one rooted in authority and the other in competence. First, it declared that ambiguous language in

18. *Id.* at 140.

19. *Nat’l Muffler Dealers Ass’n v. United States* 440 U.S. 472, 477 (1979).

20. *Id.* at 477 (citation omitted).

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

22. *Id.* at 842–43 (1984).

an agency's enabling act signals an implicit delegation by Congress of agency authority to resolve it.²³ Second, the Court noted that it makes sense for courts to defer to reasonable agency statutory constructions because agencies have greater policy expertise and political accountability than courts.²⁴

By relying on an implicit delegation premise, *Chevron* purported to shift responsibility for judicial deference from the courts to Congress. In other words, courts must apply rationality review because Congress told them to do so (though not out loud), rather than because the courts themselves have concluded that it would be a good idea to defer to an expert agency. Viewed from this angle, one might say that *Chevron* imputes to Congress an implicit intent to amend the APA's instruction in § 706(2) that courts should determine issues of law. This characterization is problematic for at least two reasons. First, at no point in the *Chevron* decision did the Court discuss or even cite the APA.²⁵ Second, the APA itself instructs courts that they should refrain from holding that a later statute has amended the APA unless the later statute does so expressly.²⁶

Empirical investigation suggests that the Court's flexible and creative approach to judicial deference doctrines, though catnip for administrative-law scholars, may not actually affect case outcomes very often. Courts affirm agencies at similar rates regardless of whether they purport to apply *Skidmore* or *Chevron* deference.²⁷ Still, *Chevron* has been regarded in many quarters as very strong medicine—stripping from courts their *Marbury* power to declare definitive interpretations of law and ceding it to agencies. Accordingly, the Court has devised a set of threshold tests for determining which agency statutory constructions deserve *Chevron* deference. Commentators christened these inquiries “Step Zero.”²⁸

23. *Id.* at 844.

24. *Id.* at 865–66.

25. *Cf.* *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) (noting “[t]here is some question whether *Chevron* was faithful to the text of the Administrative Procedure Act (APA), which it did not even bother to cite”).

26. 5 U.S.C. § 559 (2012).

27. *See* David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 173–76 (2010) (summarizing empirical studies showing that the ostensible standard of review does not seem to affect agency affirmance rates on judicial review to any great degree).

28. *See, e.g.*, Cass Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 190–91 (2006).

The lead Step Zero case is *United States v. Mead Corp.*,²⁹ which strongly reiterated that *Chevron* deference turns on congressional intent. It declared that *Chevron* should apply “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”³⁰ A year later, however, in *Barnhart v. Walton*,³¹ the Court explained that the applicability of *Chevron* should turn on factors including “the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time.”³² Thus, the true test for applying *Chevron* is whether, under all the relevant circumstances, the Court thinks it would be a good idea to do so. As many have recognized, the implicit delegation of *Chevron* is an obvious fiction.³³

In *Mayo*, the Court confronted the issue of whether *National Muffler* deference—a cousin of *Skidmore*—or the *Chevron* framework should apply to a regulation that Treasury had adopted pursuant to its general authority but after the notice-and-comment process.³⁴ The Court made short work of abandoning *National Muffler*, noting that it was “not inclined to carve out an approach to administrative review good for tax law only.”³⁵ Applying *Chevron*’s Step Zero, the Court concluded that Congress had delegated authority to Treasury to imbue its statutory constructions with the force of law, and Treasury had invoked this authority by using notice-and-comment procedures to issue the rule in question.³⁶ *Chevron* deference therefore applied to the statutory interpretation embedded in the rule.

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

30. *Id.* at 226–27.

31. *Barnhart v. Walton*, 535 U.S. 212 (2002).

32. *Id.* at 222.

33. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2379 (2001) (characterizing the implicit delegation underlying *Chevron* deference as a “fictional presumption”); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989) (characterizing *Chevron* deference as based on a “fictional, presumed intent”).

34. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011).

35. *Id.*

36. *Id.* at 713–14.

The Court's decision to abandon *National Muffler* in favor of *Chevron* was eminently sensible. Judicial review doctrines are needlessly complex, and they do not seem to influence case outcomes much. The Court might as well simplify the law of scope of review by abandoning doctrinal variations as long as the costs do not seem high. Here, the *Mayo* fix was cheap and easy. Applying the *Chevron* framework rather than *National Muffler* to Treasury's general authority regulations will likely change nothing in the real world other than simplifying brief and opinion writing. Of course, this cheap and easy fix also expanded, a little, the long *Chevron* tradition of ignoring the APA.

II. COURTS SHOULD THINK HARD BEFORE IMPOSING A COSTLY FIX FOR THE NOTICE-AND-COMMENT GAP

Mayo establishes that the *Chevron* framework applies to Treasury's general authority regulations just as it applies in other contexts of administrative law. This conclusion might in turn suggest a broader "no exceptions" approach to the applicability of doctrines of general administrative law. Following this approach, the general principles governing when an agency should have to use notice-and-comment procedures to promulgate a rule should apply without change to Treasury. That *Mayo* rested on a determination that general authority regulations can carry the force of law strengthens this argument insofar as regulations that carry the force of law generally require notice-and-comment procedures.

Courts should nonetheless think long and hard before aggressively applying notice-and-comment requirements to Treasury's general authority rules without adjusting to their special context. As discussed below, whereas closing the *Chevron* gap was very cheap, closing the notice-and-comment gap could prove quite costly. Moreover, the primary reason for this cost is that the courts, through extremely creative construction of the APA, have made notice-and-comment procedures very expensive. Worsening matters, these same courts have never been able to devise a clear test for determining which rules require notice-and-comment and which do not. It might therefore behoove courts to apply the creativity and flexibility that they have applied in other contexts of administrative law to avoid imposing dubious procedural burdens on Treasury's efforts to implement our magnificently complex tax code.

A. *The Judicial Rewrite of Notice-and-Comment Rulemaking*

Perhaps the best example of the courts' creative approach to fashioning modern administrative law is their rewrite of the APA's notice-and-comment procedures. In 1946, the APA contemplated a simple, undemanding system for gathering information concerning legislative rules from interested persons. Modern notice-and-comment rulemaking, in all its baroque glory, bears only a distant resemblance to this original model.³⁷ Very briefly, a few highlights of the judicial rewrite include: drastically expanded obligations for notices of proposed rulemaking; an extra-statutory duty to respond to any comments a court deems material; "concise" explanations of rules that are anything but concise; and an intrusive form of arbitrariness review.

1. *Notice.* Section 553 of the APA provides that an agency initiating legislative rulemaking must give notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved."³⁸ These days, the idea that an agency would try to get away with a notice that merely offers a "description of the subjects and issues involved" borders on the comical. Courts have long insisted that agencies publish in their notices all of the technical and scientific information upon which they relied in forming their proposed rules.³⁹

2. *Comments and the Concise General Statement of Basis and Purpose.* Section 553 instructs agencies to give "interested persons an opportunity to participate in rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."⁴⁰ The APA does not tell agencies what to do with these comments other than to consider "relevant matter presented."⁴¹ When issuing rules, agencies must incorporate a "concise general statement of their basis and purpose."⁴²

37. For more details on this transformation, see generally Pierce, *supra* note 9.

38. 5 U.S.C. § 553(b)(3) (2012).

39. *See, e.g.*, United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 251 (2d Cir. 1977); *see also* Pierce, *supra* note 9, at 13 (detailing judicial transformation of the notice requirement for notice-and-comment rulemaking).

40. 5 U.S.C. § 553(c).

41. *Id.*

42. *Id.*

The “concise” part of this requirement is another bit of comedy. Agency explanations for their rules are famously long, detailed, and complex.⁴³ One of the main reasons why agencies ignore this APA requirement is that courts require these explanations to include a response to any “significant” comment—and courts have the final call on what is significant.⁴⁴

3. *Arbitrariness review.* Under § 706(2), the factual and policy determinations underlying rules promulgated through notice-and-comment are subject to arbitrariness review. At the time of the APA’s adoption, arbitrariness review was understood to be extremely lax. For example, in *Pacific States Box & Basket Co. v. White*,⁴⁵ the Supreme Court declared that a rule should survive review for arbitrariness under the Due Process Clause so long as “any state of facts reasonably can be conceived that would sustain it.”⁴⁶ Modern arbitrariness review, by contrast, insists that an agency’s contemporaneous explanation for a rule (*i.e.*, its not-so-concise general statement) demonstrate to a reviewing court’s satisfaction that the agency based its action on consideration of relevant factors and avoided any clear error of judgment.⁴⁷ Not to put too fine a point on it, this is a lot harder than it sounds.

The upshot of this judicial rewrite is that notice-and-comment rulemaking is no longer a simple effort to take reasonable steps to ensure that interested persons have a chance to share information they deem pertinent with an agency.⁴⁸ “Informal” rulemaking has

43. See Richard Parker, *The Empirical Roots of the “Regulatory Reform” Movement: A Critical Appraisal*, 58 ADMIN. L. REV. 359, 397 (2006) (observing that agencies offer “extremely long explanations densely packed with technical detail and responsive to a host of comments but targeted only at an insider audience” rather than the concise, general statement required by the APA).

44. See, e.g., *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973) (explaining agency obligation to respond to “significant” comments submitted during the notice-and-comment process).

45. *Pac. States Box & Basket Co. v. White*, 296 U.S. 176 (1935).

46. *Id.* at 185 (quoting *Borden’s Farm Prods. v. Baldwin*, 293 U.S. 194, 209 (1934)) (internal quotation marks omitted).

47. See *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)) (internal quotation marks omitted) (providing the modern, canonical description of arbitrariness review of policy decisions); see also Stephen R. Johnson, *Reasoned Explanation and IRS Adjudication*, 63 DUKE L.J. 1771, 1783–86 (2014) (providing more details on the evolution of arbitrariness review).

48. *Pierce*, *supra* note 9, at 12 (observing that the “judicial version of APA section 553 bears no relationship to the requirements imposed by statute”).

been formalized into a type of on-the-record proceeding that is highly complex and burdensome. Due in large part to this judicially driven transformation, ending the notice-and-comment gap—unlike *Mayo*'s fix of the *Chevron* gap—could prove very expensive.⁴⁹

B. It Is Not Easy to Tell Interpretative from Legislative Rules

Resolving the notice-and-comment gap turns on one of the most lasting and tricky problems presented by the APA—drawing the line between interpretative rules (which do not require notice-and-comment procedures), and legislative rules (which generally do require them). Reflecting this difficulty, the D.C. Circuit has said on more than one occasion that these distinctions are “enshrouded in considerable smog.”⁵⁰ Although a full exploration of this problem is far beyond the scope of this short essay, a few details follow.

One of the most influential efforts to pierce through the smog came in *American Mining Congress v. Mine Safety & Health Administration*,⁵¹ authored by Judge Williams, a former professor of administrative law. He noted that the court's inquiry had generally hinged on whether a rule had the force of law.⁵² An agency rule will carry the force of law so long as Congress has delegated legislative rulemaking authority to the agency, and the agency has invoked it.⁵³ Judge Williams identified several ways to determine if an agency has invoked legislative rulemaking authority. The easiest case is where an agency expressly states that it has done so. In addition, a rule is legislative where “in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties.”⁵⁴ This type of situation exists where, for example, a statute imposes no obligations on a regulated party other than to obey such rules as the Secretary might promulgate: without the rules, there is nothing to enforce, so the rules must be legislative. Also, a rule must be

49. See *id.* at 15 (describing potentially “devastating” costs of imposing full-blown notice-and-comment procedures on Treasury's general authority regulations). *But cf. id.* at 20–23 (suggesting a potential means to mitigate these costs).

50. *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc) (quoting *Am. Bus. Ass'n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980)) (internal quotation marks omitted).

51. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106 (D.C. Cir. 1993).

52. *Id.* at 1109.

53. *Id.*

54. *Id.* at 1112.

legislative if it “effectively amends a prior legislative rule,” because the two are irreconcilable.⁵⁵ At bottom, the *American Mining Congress* approach thus asks whether a rule makes new law or, in a variation on this same theme, changes old law. Applying this approach in a given case can remain, of course, very difficult.

Another influential line of analysis approaches the problem from the opposite direction, inquiring whether a rule can be fairly said to interpret another statute or rule.⁵⁶ This approach is naturally problematic insofar as the line between interpreting law and creating law is fuzzy. One guide that appears in the cases is that glosses on extremely vague language (e.g., the term “reasonable”) tend to be legislative.⁵⁷ Another guide is that an agency may find difficulty interpreting its way from general, qualitative language to precise, quantitative rules.⁵⁸

Another approach, which Professor Hickman favors, focuses on whether a rule binds both the promulgating agency and regulated parties, and also imposes penalties for noncompliance.⁵⁹ Professor Hickman has concluded, quite broadly, that “all Treasury regulations are legislative rules—whether they were promulgated under specific authority or I.R.C. § 7805(a) general authority—for the simple reason that they are legally binding on taxpayers and the government alike.”⁶⁰ On this view, absent application of some other exception, these rules require notice-and-comment procedures.

55. *Id.*

56. *See, e.g.,* *Air Transp. Ass’n of Am., Inc. v. FAA*, 291 F.3d 49, 55–56 (D.C. Cir. 2002) (explaining that one factor determining whether a rule is interpretative is whether it spells out a “duty fairly encompassed within the regulation that the interpretation purports to construe” (quoting *Paralyzed Veterans of Am. v. D.C. Arena LP*, 117 F.3d 579, 588 (D.C. Cir. 1997) (internal quotation marks omitted)); *Paralyzed Veterans of Am.*, 117 F.3d at 588 (“The distinction between an interpretative and substantive rule more likely turns on how tightly the agency’s interpretation is drawn linguistically from the actual language of the statute or rule.”).

57. *See* *United Techs. Corp. v. EPA*, 821 F.2d 714, 719–20 (D.C. Cir. 1987) (“If, however, the rule is based on an agency’s power to exercise its judgment as to how best to implement a general statutory mandate, the rule is likely a legislative one.”).

58. *See* *Hoctor v. U.S. Dep’t of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996) (concluding that requirement of an eight-foot fence could not be fairly characterized as an interpretation of general duty of secure containment).

59. *See* Hickman, *supra* note 4, at 529; *see generally* Thomas Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002).

60. *See* Hickman, *supra* note 5, at 1773.

C. *Due (and Pragmatic) Regard to History*

Invoking “smoggy” doctrine to end the notice-and-comment gap could require a major and costly change in Treasury’s rulemaking procedures, in large part due to the courts’ creative rewrite of the APA. If these points have any merit, perhaps they counsel that courts should, if confronted with this problem, devote a bit of their judicial creativity to characterizing Treasury’s general authority rules, or at least many of them, as interpretative—even if this requires some fumbling through the smog.

This general approach would be consonant with a long judicial tradition that accords great weight to longstanding administrative statutory constructions and practices, counseling that they should not be “overturned except for cogent reasons.”⁶¹ As Professor Bryan T. Camp’s contribution to this symposium explains, Treasury’s categorization of its general authority rules as interpretative evolved before the courts accepted that agencies could engage in subordinate legislation.⁶² Under this conceptual framework, an agency rule could not be legislative because it would then usurp legislative authority, violating separation of powers.⁶³ Even though Treasury could not legislate, however, it nonetheless had to issue the rules necessary to implement tax law sensibly. This circumstance naturally necessitated a very generous understanding of the scope of the concept of an interpretative rule.

One might think that adoption of the APA, with its ringing endorsement of the existence of legislative rules, should have led courts and commentators to revisit this issue. They might have reasoned that, now that the law recognized agency power to impose legislative rules, Treasury no longer needed speciously to characterize rules that actually make law into an overly expansive “interpretative”

61. *United States v. Chi., N. Shore & Milwaukee R.R. Co.*, 288 U.S. 1, 13 (1933); *see also supra* note 15 and accompanying text.

62. *See* Bryan T. Camp, *A History of Tax Regulation Prior to the Administrative Procedure Act*, 63 *DUKE L.J.* 1673, 1710 (2014) (explaining that tax regulations circa 1920 had to be regarded as interpretative to be legitimate because, if they were legislative, they would necessarily be “invalid exercises of power”).

63. *See id.* (stating that “[r]egulations that went beyond interpretations were invalid exercises of power precisely because they were legislative in character”); *see also* Hickman, *supra* note 5, at 1761–62 (observing that “[i]n the first part of the twentieth century, the general consensus among courts and scholars held that a general authority grant that authorized legally binding regulations would violate the nondelegation doctrine and thus be constitutionally invalid”).

pigeonhole, which could be suitably contracted. They did not, however, seize this opportunity. The common view after adoption of the APA, shared by Professor Kenneth Culp Davis, continued to be that most Treasury regulations were interpretative.⁶⁴ The persistence of this view is, of course, itself strong evidence that rational minds can accept a capacious understanding of interpretative rules.

Courts confronting the notice-and-comment gap will face a choice. Following the path suggested by *Mayo* and advised by Professor Hickman, they might aggressively apply “modern” and “general” law to determine that Treasury’s general authority rules are legislative and, thus, only legal if they were promulgated via notice-and-comment procedures. Alternatively, courts can give weight to tax’s particular history and needs in order to justify a generous, flexible approach to the category of interpretative rules. This Essay suggests that courts take the latter stance, which is consistent with the pragmatic, flexible approach that administrative law has often followed in the past.

CONCLUSION

Treasury’s treatment of its general authority regulations as interpretative has come under sustained and powerful scholarly fire for violating generally applicable administrative law. This Essay does not attempt to give a definitive response to this critique. Instead, it merely suggests that courts, when they address this problem, adopt a pragmatic and conservative attitude consistent with the better angels of administrative law’s nature. The traditions of administrative law leave room for a generous interpretation of the term “interpretative.” Courts should consider that, unlike *Mayo*’s fix of the *Chevron* gap, closing the notice-and-comment gap could prove extremely costly. Given that the courts played a major role in creating these costs through creative interpretation of the APA, one might even go so far as to say that they owe Treasury a bit of interpretative generosity.

64. Camp, *supra* note 62, at 1714.