

THE IRS: HAVING ITS CAKE AND EATING IT TOO

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INTRODUCTION

In February of 1913, the United States officially adopted the Sixteenth Amendment of the United States Constitution, granting Congress the power “to lay and collect taxes on income, from whatever sources derived, without apportionment from the several states and without regard to any census or enumeration.”¹ This Amendment gave Congress the ability to directly tax citizens, effectively broadening the legislative authority that reigns supreme in the Constitution,² an authority that James Madison, the Constitution’s drafter, expressed must be the strongest in a republic.³

Over seventy years after the passage of the Sixteenth Amendment, however, the Supreme Court altered this authority in its landmark, and widely criticized, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* decision,⁴ sending this area of jurisprudence down a path that will eventually place the American taxpayer in an unjust, unwinnable position. In *Chevron*, the Supreme Court granted the executive branch, acting through its agencies, broad deference in interpreting the statutes it administers, effectively eliminating the separation of power principle granted to the judiciary by the Constitution by essentially stating that “in the face of ambiguity, it is emphatically the province and duty of the *administrative* department to say

*I dedicate this comment to all of those who have helped me throughout the last three years of Baylor Law. To my parents, Lewis and Kimberly, for I would not be the man that I am now without your constant, unwavering support. To my miniature dachshund, Teddy, for lifting my spirits by always being happy to see me when I walk through the front door. To Professor Christine Robinson, for helping me get through these last three years of Baylor Law in more ways than you will ever know. Most importantly, to my beautiful fiancée, Sheridan Faith, for constantly showering me with love, filling the late nights of researching and writing with joy, and supporting me in all of my endeavors. I cannot wait to call myself your husband.

¹ U.S. CONST. amend. XVI.

² See Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 CASE W. RES. L. REV. 1129, 1132–33 (1992).

³ See THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009).

⁴ 467 U.S. 837 (1984).

what the law is.”⁵ Thirteen years later, the Court further expanded its *Chevron* decision to not only grant deference to the regulations passed by executive agencies but their publications and rulings as well.⁶

Since the passage of the Sixteenth Amendment, the Internal Revenue Service (Service) has issued such administrative publications, in the form of revenue rulings, to evidence the Service’s interpretation of binding tax statutes and give taxpayers a roadmap to assist in filing their federal income tax returns.⁷ Despite the United States’ recent policy “to alleviate unnecessary regulatory burdens placed on the American people,”⁸ some circuit courts have continued upon the path set out by the Court’s ruling in *Chevron*, and later *Auer*, by expanding the deference given to the Service once more.⁹ Thus, though the Service issues these publications to assist taxpayers in filing their federal income tax returns, a taxpayer may not be able to rely on these publications because of the seemingly unconstrained latitude granted to the Service in some circuit courts.¹⁰

By shifting the authority to define taxation from one political branch, the legislature, to another, the executive,¹¹ the Supreme Court sent this country down a path wherein the judicial branch would afford more and more leniency to these executive agencies until the American taxpayer could no longer be guided by publications created for the express purpose of guidance.¹² Thus, given the path set out by the Supreme Court in 1984 in *Chevron*, the question becomes whether the Supreme Court should continue to allow such a practice, wherein the Service may issue publications, allow taxpayers to rely on them in filing their federal income tax forms, and later argue either for or against its own administrative interpretations depending on which argument will result in a higher tax bill.

⁵Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 189 (2006).

⁶See *Auer v. Robbins*, 519 U.S. 452, 452–453 (1997).

⁷See Treas. Reg. § 601.601(d)(2)(v)(a) (1987).

⁸Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017) (revoked by Exec. Order No. 13,992, 86 Fed. Reg. 7049 (Jan. 20, 2021)).

⁹See *SIH Partners L.L.P. v. Comm’r*, 923 F.3d 296, 303–04 (3d Cir. 2019).

¹⁰See *id.*

¹¹See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978)).

¹²See *Understanding IRS Guidance – A Brief Primer*, INTERNAL REVENUE SERV., <https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer> (Sept. 24, 2020).

This comment will explore the current legal environment surrounding the deference given the Service in interpreting and administering federal income taxation provisions. Section II will provide a brief overview of the path the Supreme Court has taken, from its initial *Chevron* decision giving deference to executive agencies generally to the current deference granted the Service in tax-specific cases. Section III will explore the current circuit court split between binding the Service to the revenue rulings expressing its interpretations and allowing the Service to argue against such publications when a taxpayer has used them for guidance in filing federal tax returns. Section IV will propose to resolve this circuit court split by clarifying the dimensions of the *Chevron* doctrine and explaining why the Fifth Circuit's approach of binding the Service to its interpretations, expressed in revenue rulings, comports with administrative law and taxation as a whole.

I. BRIEF OVERVIEW OF *CHEVRON* PRINCIPLES AND ITS CURRENT RELATIONSHIP TO THE SERVICE

In *Chevron*, the Supreme Court addressed a specific interpretation of a statutory provision by an executive agency, the Environmental Protection Agency (EPA), and gave the agency significant deference when it found that it had permissibly interpreted the statute.¹³ In reversing then-Judge Ginsburg's Court of Appeals opinion, the Court held that the Court of Appeals misunderstood the nature of its role in reviewing the agency regulations when it determined that the EPA had impermissibly interpreted an undefined term in the Clean Air Act.¹⁴ Rather, the Court rejected the court of appeals' declaration that the EPA's interpretation of the undefined term was inconsistent with the purposes of the Clean Air Act, holding that the agency deserved a significant amount of deference in its interpretation of the statutory term.¹⁵

Justice Stevens, writing for the majority of the Court, explained that considerable weight has long been afforded to the executive branch's interpretation of the statutes that the legislature entrusts it to administer.¹⁶ In following that idea to executive agencies, Justice Stevens outlined a two-step

¹³ See 467 U.S. at 837.

¹⁴ *Id.* at 845.

¹⁵ *Id.* at 866.

¹⁶ *Id.* at 844.

approach for when the judiciary must give such significant deference to the executive agency's interpretation of a statute:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. 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.¹⁷

In utilizing this two-step test, Justice Stevens explained that Congress delegates its authority to interpret a specific provision when it leaves a statutory "gap" for the agency to fill.¹⁸ Essentially, the amount of weight that a court must afford to an agency's interpretation depends upon whether Congress explicitly left this "gap" to be filled by the agency or Congress's delegation to the agency to address this "gap" must be implied.¹⁹ Because Congress failed to expressly provide its intent regarding the undefined statutory term, the Court was bound to give effect to the EPA's interpretation of the term, given that it was a reasonable one.²⁰

As part of the rationale for the Court's 6-0 decision to favor deferential treatment of agency interpretations rather than independent judicial review,²¹ Justice Stevens cited the unique position of the judicial branch of the government, which is situated between the legislative branch that delegates its policy-making responsibilities and the executive branch that, through agencies, acts upon such delegation.²² In many cases, this places the non-political branch in a position to confront the competing policy interests of the other two governmental branches and attempt to reconcile those competing

¹⁷ *Id.* at 842-43.

¹⁸ *Id.* at 843-44.

¹⁹ *See id.* at 844-45.

²⁰ *Id.* at 845.

²¹ Associate Justice Marshall, Associate Justice Rehnquist, and Associate Justice O'Connor took no part in the Court's *Chevron* decision.

²² *See Chevron*, 467 U.S. at 865.

interests in fields in which the judge is not an expert.²³ As Justice Stevens's opinion illustrated, the Court favors allowing an executive agency, which has been delegated with Congress's policy-making responsibilities to resolve the competing interests over which the agency has administrative power, to make such policy decisions on behalf of the Chief Executive, who is ultimately accountable to the people, over relying on the independent judicial review of that delegated agency's conclusion.²⁴ However, apart from such broad policy observances, the Court failed to specifically address the basis for straying from the fundamental principle of judicial review as expressed in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is."²⁵

Many commenters have attempted to expand upon the policy rationales mentioned by Justice Stevens in *Chevron* with such proffered rationales ranging from the thought that agencies enjoy superior understanding and knowledge of specific subject matters to the idea that agencies have increased flexibility to respond to new circumstances and information.²⁶ But perhaps the most widely-cited of the proposed rationales comes from Justice Scalia, who attempted to explain the rationale in terms of congressional intent.²⁷ According to Justice Scalia, the mere existence of an ambiguity in a statute means one of two things, either: "(1) Congress intended a particular result, but was not clear about it; or (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency."²⁸ In Scalia's opinion, the *Chevron* decision, thus, replaced the case-by-case analysis that occurred with independent judicial review of agency regulations and created an "across-the-board presumption" that Congress intended agency delegation when an ambiguity exists.²⁹

The Supreme Court essentially blessed Justice Scalia's congressional intent justification by adding a "Step Zero" to the statutory interpretation

²³ *Id.* at 865–66.

²⁴ *See id.* at 866.

²⁵ 5 U.S. 137, 177 (1803).

²⁶ *See generally* David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201 (2001).

²⁷ *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516–17 (1989).

²⁸ *Id.* at 516.

²⁹ *See id.*

framework of *Chevron*.³⁰ In *Mead*, the Court expanded upon the *Chevron* two-part analysis by asking courts to consider whether an agency is entitled to deference for its reasonable agency interpretations when confronted with a “gap” in the statute.³¹ An agency is therefore entitled to such *Chevron* deference “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.”³² Thus, for an agency to be entitled to Scalia’s “across-the-board presumption” that *Chevron* grants,³³ a court must first confront “Step Zero” of *Mead* and determine that the agency is entitled to such a presumption.³⁴

A. Tax-Specific Deference

Prior to the Supreme Court’s adoption of the *Chevron* two-step analysis and the subsequent addition of *Mead*’s “Step Zero,” the Court applied the *National Muffler* standard when asked to review regulations.³⁵ In *National Muffler*, the Court expressed not only a willingness, but expressed its preference to defer to the Service’s interpretation of a statute, as evidenced by its Treasury regulations, when faced with an ambiguity within the statute, so long as the regulation implements the congressional mandate in a reasonable manner.³⁶ Further, the Court stated that this preference amounts to a strong presumption if the Service adopted the Treasury regulation at substantially the same time as the statute.³⁷ However, if the Treasury regulation was not adopted at substantially the same time as the statute, the Court established a factor-based standard to determine if the Service’s interpretation of a statute, communicated through its Treasury regulations, amounts to a reasonable one.³⁸ By considering the evolution of the after-adopted Treasury regulation and looking specifically at various factors, including how long the Treasury regulation has been in effect, the

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

³¹ See *id.* at 226–27.

³² *Id.*

³³ See Scalia, *supra* note 27, at 516.

³⁴ See *Mead*, 533 U.S. at 226–27.

³⁵ See *Nat’l Muffler Dealers Ass’n, Inc. v. United States*, 440 U.S. 472, 477 (1979).

³⁶ *Id.* at 476.

³⁷ *Id.* at 477.

³⁸ *Id.*

consistency of the Service's interpretation of the statute through its Treasury regulations, and the reaction of Congress to these Treasury regulations, as evidenced by Congress's response in subsequent reenactments of the statute at hand, the *National Muffler* Court held that the Service's interpretation in the form of its Treasury regulation amounted to a reasonable one.³⁹ Thus, the Court established a test to determine the reasonableness of any agency's interpretation of a statute using these factors.⁴⁰

However, the Court also expressed the presumption it gives to the Service specifically in the form of a preference to leave the choice between reasonable interpretations of an ambiguous statute to the Commissioner of the Service rather than the courts.⁴¹ Thus, *National Muffler* granted each Treasury regulation pronounced by the Service a presumption of reasonableness over that of a taxpayer's contrary argument.

B. *The Mayo Impact*

Over thirty years after the *National Muffler* decision, the Supreme Court revisited this presumption of reasonableness for all Treasury regulations when it considered the Service's interpretation of the Federal Insurance Contributions Act (FICA).⁴² In *Mayo*, the Supreme Court analyzed the exemption of "students" from FICA taxation, specifically whether doctors who serve as medical residents are classified as "students" for the purposes of this exemption.⁴³ Before the Court fully analyzed the merits of the Mayo Foundation's arguments, however, the Court had to determine which test governed the Court's analysis of the Treasury regulation in question: *Chevron*'s "two-step" analysis used by the Court to evaluate an agency's interpretation generally or *National Muffler*'s factor-based standard that the Court had previously applied to Treasury regulations specifically.⁴⁴ Ultimately, the Court sided with the *Chevron* approach, acknowledging that "filling gaps" in the Internal Revenue Code requires vast agency expertise, perhaps the leading rationale behind the Court's decision in *Chevron*.⁴⁵

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 488.

⁴² See generally *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44 (2011).

⁴³ *Id.* at 47.

⁴⁴ *Id.* at 53.

⁴⁵ *Id.* at 56.

Further, the Court explained that *Chevron* decided the standard of deferential review to be given to Treasury regulations, the same as all other agencies, and declined to accept any invitation to “carve out an approach to administrative review good for tax law only.”⁴⁶ Thus, the Court held that the deference afforded an agency under the principles of *Chevron* apply in the tax context to the interpretations of the Service.⁴⁷ However, the major development found in the Court’s holding in *Mayo* comes from the acknowledgment that Treasury regulations promulgated under the general authority to “prescribe all needful rules and regulations for the enforcement” of the Internal Revenue Code granted to the Treasury Department through 26 U.S.C. § 7805(a) deserve *Chevron* deference.⁴⁸ Thus, the true impact of *Mayo* amounts to nothing less than an extension of the deference given to the Service in the tax context and an extension of *Chevron* principles to all “rules and regulations” promulgated under the general authority granted to the Treasury Department that requires taxpayers to argue against the reasonableness of such “rules and regulations.”

C. State of the Chevron Doctrine Today

Because of the deemed expertise of the Service when it comes to interpreting tax law, one of the original rationales of granting deference to agencies proffered in *Chevron*, few lower courts are willing to accept such an argument from a taxpayer.⁴⁹ Perhaps as a result of these lower court decisions, the *Chevron* doctrine has come under fire, with commenters like Justice Neil Gorsuch calling for the “elephant in the room,” the Court’s original *Chevron* holding, to be reconsidered.⁵⁰ This “elephant” to which then-Judge Gorsuch refers happens to be the fact that “Congress vested the courts with the power to ‘interpret . . . statutory provisions’ and overturn agency action inconsistent with those interpretations” in the Administrative Procedure Act (APA).⁵¹ Justice Gorsuch went so far as to say that affording

⁴⁶ *Id.* at 55.

⁴⁷ *Id.*

⁴⁸ *See id.* at 56–57.

⁴⁹ *See* Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017) (referencing a 2014 study examining how agencies prevail at a rate of 94% in cases where lower court reaches application of Step Two of *Chevron*).

⁵⁰ *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–52 (10th Cir. 2016) (Gorsuch, J., concurring).

⁵¹ *Id.* at 1151.

agencies *Chevron* deference is “an abdication of the judicial duty,” calling for the Court to “face the behemoth” that is the *Chevron* doctrine.⁵²

Even more recently, Justice Gorsuch has again criticized the “behemoth” that is the *Chevron* doctrine, arguing that abandoning independent judicial interpretation of the law and deferring to the interpretation of the agency in line with *Chevron* in *BNSF Railway Co. v. Loos* would have amounted to the Court “throwing up our hands and letting an interested party—the federal government’s executive branch, no less—dictate an inferior interpretation of the law that may be more the product of politics than a scrupulous reading of the statute.”⁵³

Similarly, Justice Antonin Scalia, among other disenfranchised commenters, have pointed to the fact that deference doctrines like *Chevron* fly in the face of the APA’s directive that courts, not agencies, decide the interpretive answer to ambiguous statutory provisions.⁵⁴ In his concurring opinion in *Perez*, Justice Scalia went to great lengths to point out the problem with supplementing the APA’s directive with judge-made doctrines of deference.⁵⁵ Such a supplementation allows an agency to use its rules to not just advise the public, but bind them.⁵⁶ What’s more, Justice Scalia explains that giving an interpretive rule deference essentially gives the agency’s interpretation the force of law, because the “people are bound to obey it on pain of sanction.”⁵⁷ This comment explores the consequences of the people obeying that interpretive rule, but still being forced to suffer that “pain of sanction” that Justice Scalia rationalized gives the rule the force of law.

II. CURRENT CIRCUIT SPLIT BETWEEN ALLOWING THE SERVICE TO ARGUE AGAINST ITS REVENUE RULINGS AND BINDING THE SERVICE TO THOSE PUBLISHED INTERPRETATIONS

A. Approach of the Third Circuit

The circuit court split begins with the Supreme Court’s expansion of the *Chevron* deference doctrine to an agency’s interpretation of its own

⁵² *Id.* at 1149, 1152.

⁵³ 139 S. Ct. 893, 908–09 (2019).

⁵⁴ See *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 108–09 (2015) (Scalia, J., concurring).

⁵⁵ See *id.* at 109–10.

⁵⁶ See *id.*

⁵⁷ *Id.* at 110.

regulations.⁵⁸ In *Auer*, the Court reaffirmed its fifty-two-year-old holding that an agency's interpretation of its own regulation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation,"⁵⁹ while also expanding the deference afforded to agencies to include an agency's interpretation of its own rules through the reasoning in *Chevron*.⁶⁰ Over twenty-two years after their *Auer* decision, the Supreme Court undertook an extensive analysis of *Auer* deference.⁶¹ While the Court addressed the obvious issues of deferring to an agency's interpretations of its own regulations, it declined to overturn its *Auer* decision, opting instead to reinforce its limits.⁶² While the Court, through its *Kisor* decision, attempted to map out exactly when and where a court should afford *Auer* deference to an agency's interpretation of its own regulation, it declined to establish any rigid test to guide the lower courts.⁶³ Instead, the Court acknowledged that affording an agency *Auer* deference remains the "general rule" and took care to lay out potential cases where such deference is "unwarranted."⁶⁴

Applying such deference in the context of the Service's own revenue rulings, which the Service issues as evidence of its own interpretations of its Treasury regulations, common sense would dictate that *Auer* stands for the proposition that, unless the Service's revenue rulings are inconsistent with its Treasury regulations, they bind the Service, and courts must afford them deference consistent with the *Chevron* doctrine. However, the Third Circuit's recent pronouncement in *SIH Partners L.L.P. v. Commissioner* flies in the face of such logic.⁶⁵ In *SIH Partners*, the Third Circuit confronted a fifty-year-old regulation governing the tax treatment of guarantors of certain loans.⁶⁶ The regulation in question purports to "conform the Income Tax Regulations to [S]ection 956 of the Internal Revenue Code,"⁶⁷ a section wherein Congress attempted to prevent the then-common tax avoidance technique of a shareholder of a Controlled Foreign Corporation (CFC)

⁵⁸ See *Auer v. Robbins*, 519 U.S. 452 (1997).

⁵⁹ See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

⁶⁰ See *Auer*, 519 U.S. at 461.

⁶¹ See *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

⁶² See *id.* at 2400.

⁶³ See *id.* at 2414.

⁶⁴ *Id.*

⁶⁵ See 923 F.3d 296, 297 (3d Cir. 2019).

⁶⁶ *Id.* at 300–01.

⁶⁷ 29 Fed. Reg. 2599, 2599 (Feb. 20, 1964) (citation omitted).

participating in a guaranteed loan alongside that CFC, thus allowing the CFC shareholder to obtain a monetary return on a foreign investment without incurring tax liability through repatriation.⁶⁸ By citing the mere presence of a regulation addressing the subject of a CFC guaranteeing a loan, the Third Circuit felt comfortable relying on the expertise of the Service in its interpretation of Section 956 and pointing to the *Chevron* deference afforded an agency when it uses its expertise to promulgate rules and regulations.⁶⁹ Yet, the Service, by merely mirroring the statutory language, did not use its expertise to promulgate a regulation to enforce Section 956,⁷⁰ and because “[d]eference to an agency’s statutory interpretation ‘is only appropriate when the agency has exercised its *own* judgment,’ not when it believes that interpretation is compelled by Congress,” the Third Circuit’s deference to the Service here was improper.⁷¹

Rather, courts should reserve deference under Step Two of *Chevron* for “those instances when an agency recognizes that the Congress’s intent is not plain from the statute’s face,” as repeatedly pointed out by the other circuits.⁷² For when the intent of Congress behind a statute, like that of Section 956 here, is expressed ambiguously in a way relevant to the current case, courts proceed to Step Two of the *Chevron* analysis.⁷³ However, in *SIH Partners L.L.P.*, the Service made two mutually exclusive arguments, neither of which can hold up on its own.⁷⁴

First, the Service argued for the Third Circuit’s application of *Chevron* deference to its regulation, failing to recognize that it did not exercise its expertise in promulgating such a regulation, a prerequisite to obtaining *Chevron* deference.⁷⁵ On the contrary, the Service offered no adequate reasoning for taking the approach to Section 956 that it took when it first promulgated its reasoning.⁷⁶

⁶⁸ See *SIH Partners L.L.P.*, 923 F.3d at 299–300.

⁶⁹ See *id.* at 303–05.

⁷⁰ See 29 Fed. Reg. at 2599.

⁷¹ *Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002) (quoting *Phillips Petroleum Co. v. FERC*, 792 F.2d 1165, 1169 (D.C. Cir. 1986)).

⁷² See, e.g., *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2016).

⁷³ See *Am. Farm Bureau Fed’n v. EPA*, 792 F.3d 281, 294 (3d Cir. 2015).

⁷⁴ See generally, *SIH Partners L.L.P.*, 923 F.3d at 300.

⁷⁵ See *Encino Motorcars, L.L.C. v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

⁷⁶ See 29 Fed. Reg. 2599, 2599 (Feb. 20, 1964) (citation omitted).

Second, the Service expressly argues against the facts-and-circumstances determination required of it under Revenue Ruling 89-73, which it published with the intention of aiding taxpayers who hold shares in a CFC and participate alongside the CFC in loans.⁷⁷ Rather than acknowledging the reasoning behind its precedent wherein the Third Circuit itself determined it must “give weight to IRS revenue rulings and . . . not disregard them unless they ‘conflict with the statute they purport to interpret or its legislative history, or if they are otherwise unreasonable,’”⁷⁸ it simply decided to deny a taxpayer its right to rely upon revenue rulings.⁷⁹

The Third Circuit ultimately held that “[a] ruling is not a regulation and does not bind the IRS,” ignoring its precedent and that of its sister circuits and expressing that, in its view, the *Chevron* deference given to an agency, like the Service, does not have the force of law, but is merely helpful.⁸⁰ Such a view, however, fails to recognize that people are “bound to obey [the Revenue Ruling] on pain of sanction,” the main concern mentioned by Justice Scalia in his *Perez* concurring opinion, because failing to follow the Service’s interpretation of a Treasury regulation, as explained in the Revenue Ruling, is a sure-fire way to incur a penalty for failure to pay the full amount in federal taxation owed.⁸¹ By simply deferring to the judgment of the Service, the Third Circuit fails to see the absurdity displayed by the Service’s own reasoning, wherein it leaves a taxpayer with two options: either fail to respect a revenue ruling and subject himself to a virtually certain penalty, or follow a revenue ruling and subject himself to the Third Circuit’s extreme view on *Chevron* deference. Either way, it seems that, in the Third Circuit, the Service represents the idiom of “having its cake and eating it too.”

B. Approach of the Fifth Circuit

When confronted with applying this *Chevron*-like deference, the Fifth Circuit, however, has repeatedly held that a taxpayer is entitled to rely on the

⁷⁷ See Rev. Rul. 89-73, 1989-1 C.B. 258, 1989 WL 572060.

⁷⁸ *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1145 (3d Cir. 1993) (quoting *Geisinger Health Plan v. Comm’r*, 985 F.2d 1210, 1216 (3d Cir. 1993)).

⁷⁹ See 26 C.F.R. § 601.601(d)(2)(v)(e).

⁸⁰ *SIH Partners L.L.P. v. Comm’r*, 923 F.3d 296, 306 (3d Cir. 2019) (quoting *Temple Univ. v. United States.*, 769 F.2d 126, 137 (3d Cir. 1985)).

⁸¹ *Perez v. Mort. Bankers Ass’n*, 575 U.S. 92, 110 (2015) (Scalia, J., concurring).

Service's revenue rulings.⁸² In *Estate of McLendon*, Gordon B. McLendon, after a nearly ten-month bout with esophageal cancer, entered into a private annuity transaction with his son and a newly created irrevocable trust wherein McLendon transferred his remainder interest in his partnership to his son and the trust in exchange for \$250,000 and a lifetime annuity.⁸³ To properly value the remainder interest and annuity transferred, McLendon, his son, and the trustee of the trust relied upon the then-current actuarial tables for life expectancy⁸⁴ published by the Commissioner of the Service.⁸⁵ Based upon these actuarial tables, McLendon had a life expectancy of fifteen years from that date, resulting in the parties valuing the remainder interest at \$5,881,695 and the annuity at \$865,332.⁸⁶ Following his death four months later, the Service disagreed with the values gathered from the use of the actuarial tables, arguing that McLendon had not received an adequate and full consideration for the remainder interest transferred.⁸⁷ Due to McLendon's bout with an ongoing illness, the Service declared the use of the actuarial tables improper, resulting in several million dollars in gifts and estate tax deficiencies.⁸⁸

Despite the existence of an on-point revenue ruling published by the Service,⁸⁹ the Fifth Circuit had to determine whether McLendon was allowed to follow the express language in Treas. Reg. § 25.2512-5 when valuing the remainder interest and annuity.⁹⁰ In the opinion of both the Tax Court and the Fifth Circuit, which heard *Estate of McLendon*, Revenue Ruling 80-80 stated a clear standard on when the actuarial tables may be used to value annuities and remainder interest, which McLendon satisfied and, thus, his use of the tables was proper under the Revenue Ruling.⁹¹ Thus, the Fifth Circuit was confronted with an out-of-the-ordinary argument wherein a taxpayer was not arguing that a revenue ruling was contrary to law, but that the Service, the publisher of the ruling, was the party arguing to ignore or minimize its

⁸² See, e.g., *Estate of McLendon v. Comm'r*, 135 F.3d 1017 (1998).

⁸³ *Id.* at 1019–20.

⁸⁴ See Treas. Reg. § 25.2512-5(d)(2)(iv) (2009).

⁸⁵ *Estate of McLendon*, 135 F.3d at 1019–20.

⁸⁶ *Id.*

⁸⁷ *Id.* at 1020.

⁸⁸ *Id.*

⁸⁹ Rev. Rul. 80-80, 1980-1 C.B. 194, 1980 WL 129641.

⁹⁰ *Estate of McLendon*, 135 F.3d at 1021.

⁹¹ *Id.* at 1023.

effect.⁹² In resolving this unusual situation, the Fifth Circuit held to its long-standing approach⁹³ by ultimately holding that “[w]here the Commissioner has specifically approved a valuation methodology . . . in his own revenue ruling, he will not be heard to fault a taxpayer for taking advantage of the tax minimization opportunities inherent therein.”⁹⁴

Thus, the Fifth Circuit long ago detected the impossible “heads-I-win-tails-you-lose” situation a court places the taxpayer in when it affords the Service *Chevron*-like deference for the revenue rulings that it issues, while also allowing it to argue against those interpretations when it determines such an argument is necessary. Rather than allowing the Service to place a taxpayer in such an unjust, unwinnable situation, like that of the approach chosen by the Third Circuit, the Fifth Circuit recognized the absurdity of allowing the Service to argue against a taxpayer that has relied on the Service’s own publications in regard to the relevant transactions.⁹⁵

Similarly, when confronted with whether to defer to the expert judgment of agencies interpreting the statute they administer, *Chevron*’s fundamental rationale, many other circuit courts have determined that such Step Two deference is not appropriate where the agency does not bring its expertise to bear through a reasoned explanation.⁹⁶ For example, the Ninth Circuit has refused to defer to an agency’s unexplained regulation under *Chevron* when the regulation does not illustrate that the agency utilized its expertise in passing the regulation.⁹⁷ For the Ninth Circuit, “*Chevron* deference does not apply where an agency mistakenly determines that its interpretation is mandated by plain meaning, or some other binding rule.”⁹⁸ In *Gila River*, the Ninth Circuit held that the interpretation of the Gila Bend Act by the Secretary of Interior was not entitled to deference under *Chevron* Step Two because it failed to provide “any explanation for [its] decision.”⁹⁹ Because the agency failed to provide an explanation for its reasoning, the Ninth

⁹² See *id.* at 1024.

⁹³ See *Silco, Inc. v. United States*, 779 F.2d 282, 287 (5th Cir. 1986).

⁹⁴ *Estate of McLendon*, 135 F.3d at 1025.

⁹⁵ See generally *SIH Partners L.L.P. v. Comm’r*, 923 F.3d 296, 306 (3d Cir. 2019).

⁹⁶ See *Good Fortune Shipping SA v. Comm’r*, 897 F.3d 256, 264 (D.C. Cir. 2018); see also *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1150 (9th Cir. 2013); see also *Dominion Res., Inc. v. United States*, 681 F.3d 1313, 1319 (Fed. Cir. 2012).

⁹⁷ See *Gila River Indian Cmty.*, 729 F.3d at 1149.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1150.

Circuit held that “it is impossible to know whether the agency employed its expertise or simply pick[ed] a permissible interpretation out of a hat.”¹⁰⁰

When confronting one of the Service’s own regulations, the Federal Circuit, similarly, invalidated a regulation implementing a provision where the Service failed to provide “a reasoned explanation” for its adopting of the regulation in the Tax Code.¹⁰¹ Although the Service believed that the regulation comported with the relevant statute passed by Congress, the Federal Circuit refused to defer to the Service under *Chevron* Step Two because of its failure to provide any rationale or reasoned explanation behind the adoption of its regulation.¹⁰²

Likewise, the D.C. Circuit has recently refused to defer to one of the Service’s regulations because when it “promulgated the [regulation], it offered no justification for treating bearer shares differently than nominees and trustees under [the relevant statute]. That’s enough to render the distinction inadequate for purposes of *Chevron* Step Two.”¹⁰³ Therefore, the *Good Fortune* court continued the D.C. Circuit’s longstanding tradition of deferring to an agency under Step Two of *Chevron* when the agency acknowledges that Congress left the question open for agency interpretation and that agency offers a reasoned explanation for adopting its regulation.¹⁰⁴

Thus, when confronted with *Chevron*’s fundamental rationale, the Fifth Circuit, along with many other circuit courts, have determined that *Chevron* Step Two deference is reserved only for those cases where the agency has exercised its expertise in interpreting the statute.

III. THE TIME HAS COME TO REIN IN THE “BEHEMOTH”

Justice Gorsuch’s concurrence in *Gutierrez-Brizuela* calls for the Court to “face the behemoth” that is the *Chevron* doctrine and again, square the Constitution with the framers’ original intent.¹⁰⁵ By granting the ultimate interpretation of ambiguous statutes and agency regulations to the political

¹⁰⁰*Id.* (quoting *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011)).

¹⁰¹*Dominion Res.*, 681 F.3d at 1319.

¹⁰²*Id.*

¹⁰³*Good Fortune Shipping SA v. Comm’r*, 897 F.3d 256, 264 (D.C. Cir. 2018).

¹⁰⁴*See Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1353–54 (D.C. Cir. 2006).

¹⁰⁵*See* 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

branches of the government through its decisions in *Chevron*¹⁰⁶ and *Auer*,¹⁰⁷ the judiciary has abdicated away its judicial duty, one step at a time.¹⁰⁸ Allowing a scenario in which the Service has the option to either counter any argument of a taxpayer based on that taxpayer's failure to properly follow a revenue ruling or argue against the taxpayer's observation of that revenue ruling is one step too far.

Courts have consistently held that the Commissioner of the Service has a "duty of consistency between his rulings and litigation position[s];" however, such a duty means nothing when a circuit fails to hold the Commissioner to it.¹⁰⁹ For a taxpayer to confidently file his federal taxes, he must be able to rely upon the Service's own interpretations of the regulations mandating those taxes. Currently, such confidence is not possible for a taxpayer in the Third Circuit.¹¹⁰ Facing the "behemoth" that is the *Chevron* deference doctrine head-on may not be the practical approach because the efficiency, expertise, and congressional intent rationales originally offered as reasons for upholding *Chevron* live on today, but perhaps the time has come to rein in the doctrine and allow a taxpayer to rely on the Service's announced interpretations without fear of facing the "pain of sanction."¹¹¹

In apparent acceptance that courts have taken such deference too far, the Service itself has issued a new policy, and, thus, changed its stance regarding such deference, at least when arguing a case before the U.S. Tax Court.¹¹² This Policy Statement on the Tax Regulatory Process from the Department of Treasury suggests that the Service will no longer take a position inconsistent to the interpretations outlined in its administrative publications when arguing before the Tax Court.¹¹³ In so doing, however, the Service has inferentially acknowledged that seeking judicial deference under *Auer* or

¹⁰⁶ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

¹⁰⁷ See *Auer v. Robbins*, 519 U.S. 452, 457, 461–63 (1997).

¹⁰⁸ See *Gutierrez-Brizuela*, 834 F.3d at 1152.

¹⁰⁹ *Derby v. Comm'r*, 95 T.C.M. (CCH) 1177, 2008 WL 540271, at *20 (2008).

¹¹⁰ See generally *SIH Partners L.L.L.P. v. Comm'r*, 923 F.3d 296, 306 (3d Cir. 2019).

¹¹¹ See *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 110 (2015) (Scalia, J., concurring).

¹¹² See David J. Kautter & Brent J. McIntosh, U.S. DEPT. OF THE TREASURY: *Policy Statement on the Tax Regulatory Process* (March 2019), <https://home.treasury.gov/system/files/131/Policy-Statement-on-the-Tax-Regulatory-Process-3-4-19.pdf>.

¹¹³ See *id.*

Chevron has taken away the certainty taxpayers require to make informed decisions about their tax obligations.¹¹⁴

Pursuant to this policy, taxpayers may now have confidence that the Service will not take a position inconsistent with the position defined in the Service's publications *if the litigation ends up in the Tax Court*.¹¹⁵ However, taxpayers do not file federal tax returns with a guarantee that litigation incurred as a result of filing these returns will occur before the Tax Court. Generally, after filing federal tax returns, taxpayers do not anticipate incurring *any* litigation as a result of so filing. The policy outlined in the Department of Treasury's Policy Statement, therefore, does not allow a taxpayer to file a federal tax return with any more confidence that the Service will not take the same "heads-I-win-tails-you-lose" approach than the taxpayer in *SIH Partners*. In short, the Policy Statement has done little more than state the obvious, that the Service has taken *Chevron* and *Auer* deference too far and that the time has come to not only face the "behemoth," but rein it in.

IV. CONCLUSION

In closing, what must be done going forward can best be answered by looking backward and remembering the words of the great James Madison:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.¹¹⁶

Men are not angels and, sadly, angels do not currently grace the halls of our government, and, thus, the framework of government expressed by Madison is necessary. The application of the deference granted to agencies through the decision in *Chevron*, however, has altered that governing formula by moving the privilege to "say what the law is" away from the judicial branch of our government.¹¹⁷ Perhaps there is no clearer an example of how far this divide has spread between the framework presented by the framer, James Madison, and the current state of our government than the one posed

¹¹⁴ *See id.*

¹¹⁵ *See id.*

¹¹⁶ THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009).

¹¹⁷ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

in the Third Circuit, wherein the Service, an arm of the executive branch, has created a system wherein it cannot lose. Such a system, however, creates a situation wherein we all lose.