The Rise And Fall of *Chevron* in tax: From the Early Days to *King* and Beyond

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INTRODUCTION

In the third of a century since it was handed down, *Chevron*[1] has become by far the most widely cited case in U.S. legal history.[2] This fact may cause one to view *Chevron* as an independent phenomenon. Yet deference doctrine generally and *Chevron* in particular are better understood as part of the ocean of administrative law. They are moved by the same gales as roil that ocean.

Chevron rose in tax over several decades. It is now receding in tax. *King v. Burwell*[3] is part of that recession and may well contribute to its acceleration.

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

2. *See, e.g.*, STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 247 (6th ed. 2006). The gap has widened in the years since.

3. 135 S. Ct. 2480 (2015).

These phenomena are not random. Both the flood tide and the neap tide resulted from the pull of broader administrative law currents. *Chevron*'s level rose in tax because of the bankruptcy of tax parochialism, the view that tax is unique and so should fall largely outside of administrative law rules.

Chevron's level is falling in tax for the same reason it is falling generally. Administrative law is an ever-shifting balance of practical expediency and constitutional legitimacy.[4] This leaves many administrative law doctrines with roots too shallow to thrive.

So it is with *Chevron*. Internal inconsistencies in *Chevron* have become more, not less, glaring over time. *Chevron* was murky from the start and has become murkier with passing years.[5] It is hardly surprising, therefore, that a rising chorus has elaborated *Chevron*'s inadequacies,[6] called for its abrogation,[7] and charted its decline.[8]

I added my voice to that chorus in a 2012 article.[9] That article noted that "there appears to be a move afoot to downplay *Chevron*, not in name but in fact,"[10] and it predicted that, rather than *Chevron* being expressly overturned, the likeliest outcome would be that the courts would "continue to honor *Chevron* in name but apply it so that, in substance, it is no longer an independently operative principle of law."[11] Those drawn to honest labeling might prefer that the Court formally overturn *Chevron*. But, although the Court sometimes does overrule its precedents,[12] its preference is to keep things fluid, in order to facilitate coalition building and preserve room for

4. *E.g.*, Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 245 (1991) ("[O]ne cannot conclude that there is one ideal and elegant allocation of power between court and agency where administrative law will necessarily have to rest.").

5. An excellent report noted: "[T]he degree of deference that federal courts owe to administrative pronouncements is a vexing issue, one frequently scrutinized by the Supreme Court. Regular attention from the Supreme Court, however, has failed to produce clarity for administrative law, in general, or for tax law, in particular." *ABA Section of Taxation Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717, 719–20 (2004).

6. *E.g.*, Ann Graham, *Searching for* Chevron *in Muddy* Watters: *The Roberts Court and Judicial Review of Agency Regulations*, 60 ADMIN. L. REV. 229 (2008).

7. *E.g.*, Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010); Bryan T. Camp, *Interpreting Statutory Silence*, 128 TAX NOTES 501, 507 (2010); Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567 (1992).

8. *E.g.*, Linda Jellum, Chevron*'s Demise: A Survey of* Chevron *from Infancy to Senescence*, 59 ADMIN. L. REV. 725 (2007).

9. Steve R. Johnson, *Preserving Fairness in Tax Administration in the* Mayo *Era*, 32 VA. TAX REV. 269, 280 (2012).

10. *Id.* at 280–81.

11. *Id.* at 283.

12. *See, e.g.*, William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988) (identifying numerous such cases).

maneuver in future cases.[13] Given this preference, keeping *Chevron* alive in name only may be the best reasonably attainable outcome.

Part I of this article sketches the rise of *Chevron* in tax, culminating in the Supreme Court's *Mayo* decision in 2011,[14] rejecting tax exceptionalism. A recurring note is ambiguity—uncertainty as to the reach and meaning of *Chevron*.

Part II explores the fall of *Chevron* in tax. *Chevron* has receded in tax because it, at least in its original form, is receding everywhere. Realization of *Chevron*'s inadequacies is causing the courts to multiply exceptions to *Chevron* and to apply it in ways that rob *Chevron* of its original deferential nature.

Part III concludes. It opines that the rise and fall of *Chevron* in tax do not represent wasted motion leaving us in the same place as where we started. Instead, by opening to a wider world of administrative law, tax practice has the potential to improve.[15]

I. *CHEVRON*'S RISE IN TAX

A. Before Chevron

Deference issues did not begin with *Chevron*. In tax and other areas, the courts have wrestled for centuries with the weight to accord to agency rules and interpretations.[16]

These cases instructed that tax regulations should be upheld "unless unreasonable and plainly inconsistent with the revenue statutes."[17] Thus, in their verbal formulation at least, the pre-*Chevron* tax cases remind one of the deferential part of *Chevron*: its step two.

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13. *See generally* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 817–30 (1982).

14. Mayo Found. for Educ. Research v. United States, 562 U.S. 44 (2011); *see* Steve R. Johnson, Mayo *and the Future of Tax Regulations*, 130 TAX NOTES 1547 (Mar. 28, 2011).

15. For a discussion of the opportunities created for taxpayers by the entry of administrative law into tax, see Johnson, *supra* note 9, at 300–25.

16. *E.g.*, Fawcus Mach. Co. v. United States, 282 U.S. 375, 378 (1931) (stating that tax regulations "are valid unless unreasonable or inconsistent with the statute"); *cf.* International Ry. Co. v. Davidson, 257 U.S. 506, 514 (1922) (stating the same as to customs duties the Court called "virtually [the] laying [of] a tax"). For discussion of pre-*Chevron* cases outside of tax, see Mark Seidenfeld, *A Syncopated* Chevron: *Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 87–94 (1994).

17. Comm'r v. S. Tex. Lumber Co., 333 U.S. 496, 501 (1948); *see also* Manhattan Gen. Equip. Co. v. Comm'r, 297 U.S. 129, 134 (1936) (to be valid, a regulation must "be consistent with the statute, [and] it must be reasonable"). For discussion of prominent pre-*Chevron* tax cases, see Steve R. Johnson, Swallows Holding *as It Is: The Distortion of* National Muffler, 112 TAX NOTES 351, 362–65 (July 24, 2006).

The most frequently cited case of the line, *National Muffler*, used the same general reasonableness formulation.[18] It also distilled prior cases to identify six considerations potentially relevant to the reasonableness inquiry.[19]

B. Chevron *and Its Immediate Aftermath*

In 1984 in *Chevron*, the Court unanimously upheld an EPA regulation.[20] Based on notions of expertise, political responsiveness, and delegation, the Court concluded that Congress usually wants agencies, not courts, to fill statutory gaps.[21] It announced the famous "two step" under which a court asks first whether the statute is ambiguous.[22] If it is, the court asks second whether the agency's position is at least reasonable.[23]

It was initially unclear whether *Chevron* applied to all agency actions. Subsequent cases, most prominently *Mead*,[24] answered the question in the negative. *Mead* held that an agency's interpretation "qualifies for *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 . . . was promulgated in the exercise of that authority."[25] *Mead* converted the *Chevron* two step into a three step, the new step (step zero because it necessarily precedes step one) being determining whether *Chevron* applies at all to the case at hand.[26]

Agency interpretations not satisfying *Mead* are evaluated under the *Skidmore* "standard,"[27] which is neither a standard nor deferential.[28] Unsurprisingly, therefore, *Skidmore* "has produced a spectrum of judicial

18. Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477–78, 488 (1979).

19. *Id*. at 477 (rehearsing contemporaneity of the regulation and the statute, the manner of evolution of non-contemporaneous regulations, the tenure of the regulation, the reliance placed upon it, the consistency of interpretation, and the degree of congressional scrutiny during reenactments).

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

21. *Id*. at 843–45, 865–66.

22. *Id*. at 842–43, 865.

23. *Id*.

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

25. *Id*. at 226–27.

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

27. *Mead*, 533 U.S. at 227–28; *see* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

28. According to *Skidmore*, "[t]he weight [accorded to the agency's position] 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." *Id*.

Ultimately, an undifferentiated "all factors" test is not a test at all. *E.g*., Oregon v. Kennedy, 456 U.S. 667, 675 n.5 (1982). And, upholding the agency only if the court agrees with "the validity of [the agency's] reasoning" can hardly be described as deference. *Skidmore*, 323 U.S. at 140.

responses, from great respect at one end . . . to near indifference at the other."[29]

Chevron's domain seemed to expand in 2005 in *Brand X,* which held that agencies can often, in effect, overrule judicial decisions. "A court's prior construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[30]

C. Mayo

Views differed as to whether *Chevron* did and should apply to tax.[31] Some took an understandable but regrettable view that "tax is special; the normal administrative law rules don't apply to us."[32]

The Supreme Court had frequent opportunities to settle this question in the 1980s through early 2000s. Unfortunately, the Court at first compounded the confusion rather than dispelling it. In the 1985 *Boyle* case, the Court cited *Chevron* but not *National Muffler*.[33] In the 1991 *Cottage Savings* case, the Court cited *National Muffler*'s general language but not its six particular considerations and not *Chevron*.[34] In 1998 in *Atlantic Mutual*, the Court cited both *Chevron* and *Cottage Savings* but not *National Muffler*.[35] In 2001 in *Cleveland Indians,* the Court cited *National Muffler* but not *Chevron*.[36] In 2003 in *Boeing*, the Court cited *Cottage Savings* but neither *Chevron* nor *National Muffler*.[37] In none of these cases did the Court explain why it applied or eschewed the various precedents.

Nonetheless, it was widely accepted that *Chevron* did supply the governing standard when specific authority tax regulations are challenged.[38]

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29. *Mead*, 533 U.S. at 228.

30. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

31. Among early commentary, see Ellen P. Aprill, *Muffled* Chevron: *Judicial Review of Tax Regulations*, 3 FLA. TAX REV. 51 (1996); John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the* Chevron *Era,* 64 GEO. WASH. L. REV. 35 (1995); Mitchell M. Gans, *Deference and the End of Tax Practice*, 36 REAL PROP. PROB. & TR. J. 731 (2002).

32. For denunciations of such "tax exceptionalism," see Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX. REV. 517 (1994); Kristin E. Hickman, *The Need for* Mead: *Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537 (2006).

33. United States v. Boyle, 469 U.S. 241, 246 n.4 (1985).

34. Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 560–61 (1992).

35. Atlantic Mut. Ins. Co. v. Comm'r, 523 U.S. 382, 387, 389 (1998).

36. United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 219 (2001).

37. Boeing Co. v. United States, 537 U.S. 437, 448 (2003).

38. *E.g.*, E.I. du Pont de Nemours & Co. v. Comm'r, 41 F.3d 130, 135–36 (3d Cir. 1994); Carlos v. Comm'r, 123 T.C. 275, 280 (2004).

The majority view was that *Chevron* also controlled challenges to general authority tax regulations.[39]

Any lingering doubt was—or should have been—dispelled by the Court's 2011 *Mayo* decision.[40] *Mayo* is significant for three reasons. First, dealing a mortal blow to tax exceptionalism, the Court stressed "the importance of maintaining a uniform approach to judicial review of administrative action."[41] The Court did preface this statement with the observation that the taxpayer had failed to offer a justification for departing from the administrative law norm. "In the absence of such justification, we are not inclined to carve out an approach to administrative review good for tax law only."[42] Taken literally, this might leave an opening for taxpayers to develop justifications in future cases challenging tax regulations. However, it is likely that this ship has already sailed.

Second, the *Mayo* Court made clear that "[t]he principles underlying our decision in *Chevron* apply with full force in the tax context. . . . We see no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations."[43] Thus, the Court held—and *Mayo* was decided unanimously—that *Chevron*, rather than *National Muffler*, "provide[s] the appropriate framework."[44]

Some commentators still urge that *National Muffler* be resurrected in whole or in part.[45] Life is endlessly surprising. Nonetheless, I expect that *National Muffler* will be revived around the time the Romanovs regain the throne of Russia. Not only was *Mayo* a unanimous decision, it also—far from being a radical doctrinal revision—is consistent with ample post-*National Muffler* precedents. *Mayo* specifically rejected several *National Muffler* factors, such as consistency, antiquity, and contemporaneity.[46] Previous cases had done so as well.[47]

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39. *See, e.g.*, Bankers Life & Cas. Co. v. United States, 142 F.3d 973, 982 (7th Cir. 1998), *cert. denied*, 525 U.S. 961 (1998); Swallows Holding Ltd. v. Comm'r, 126 T.C. 96, 180–81 (2006) (Holmes, J., dissenting) (surveying the circuits), *vacated & remanded*, 515 F.3d 162 (3d Cir. 2008).

40. Mayo Found. for Educ. Research v. United States, 562 U.S. 44 (2011).

41. *Id.* at 55 (quoting Dickinson v. Zurko, 527 U.S. 150, 154 (1999)).

42. *Id.*

43. *Id.* at 55–56.

44. *Id.* at 57.

45. *E.g.*, Leslie Boodry, *Judicial Deference Post-*Mayo Foundation: *Why the* National Muffler *Factors Should Be Incorporated into Step Two of* Chevron, 8 FED. CTS. L. REV. 1 (2014); Matthew H. Friedman, *Reviving* National Muffler*: Analyzing the Effect of* Mayo Foundation *on Judicial Deference as Applied to General Authority Tax Guidance*, 107 NW. U. L. REV. COLLOQUY 115 (2012).

46. *Mayo*, 562 U.S. at 54–55.

47. *E.g.*, United States v. Eurodif S.A., 555 U.S. 305, 316 (2009) (consistency); Smiley v.

Third, the Court made clear that the same standard applies to general authority regulations as applies to specific authority regulations. The regulation at issue in *Mayo* had been promulgated under I.R.C. § 7805(a), not under a delegation within a specific section.[48] The Court noted both pre-*Chevron* cases stating that specific authority tax regulations receive greater deference than general authority tax regulations and post-*Chevron* cases according deference to general authority regulations.[49] The Court stated that "the administrative landscape has changed significantly" since the pre-*Chevron* tax cases and that, especially when the regulation has gone through notice-and-comment procedures,[50] the policies behind *Chevron* are engaged no less by general authority delegations than by specific authority delegations.[51]

However, *Chevron* does not control when the IRS's position is embodied in a pronouncement of less stature than regulations.[52] Revenue rulings, notices, and the like typically are not submitted for notice and comment and do not have the force of law.[53] It is now essentially settled that the validity of such positions is measured under *Skidmore*, not *Chevron*.[54]

Citibank (S.D.) N.A., 517 U.S. 735, 740 (1996) (antiquity, contemporaneity, and consistency). The regulation upheld in *Chevron* was promulgated years after the statute was enacted, and it reversed an earlier regulation. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 857–58 (1984).

48. For decades, the IRS has been calling general authority regulations "interpretive regulations" and calling specific authority regulations "legislative regulations." For decades, they have been wrong. *See, e.g.*, Steve R. Johnson, Intermountain *and the Importance of Administrative Law in Tax Law*, 128 TAX NOTES 837, 843–46 (Aug. 23, 2010).

The tax community generally marched under this banner of error. Fortunately, the Tax Court recently recanted. Altera Corp. v. Comm'r, 145 T.C. No. 3, slip op. at *14 n.10 (2015) (unanimous en banc opinion). It remains to be seen how long Treasury/IRS will cling to error in increasing isolation before their inevitable surrender.

49. *Mayo*, 562 U.S. at 56–57 (citing cases).

50. *See* 5 U.S.C. § 553(a) (2012). Use of the notice-and-comment procedures is a "significant" indication that *Chevron* applies. *E.g.*, Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 173–174 (2007); United States v. Mead Corp., 533 U.S. 218, 230–31 (2001).

51. *Mayo*, 562 U.S. at 55–57 ("Our inquiry . . . does not turn on whether Congress's delegation of authority was general or specific.").

52. For description of such pronouncements, see DAVID M. RICHARDSON, JEROME BORISON & STEVE JOHNSON, CIVIL TAX PROCEDURE 17–32 (2d ed. 2008); Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239, 242–52 (2009).

53. For an argument that the force of law concept is hard to apply in tax, see Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465 (2013).

54. *E.g.,* Voss v. Comm'r, 796 F.3d 1051, 1066 (9th Cir. 2015); *id.* at 1071 (Ikuta, J., dissenting) (agreeing on this point with the majority); Taproot Admin. Servs., Inc. v. Comm'r, 133 T.C. 202, 212 (2009), *aff'd*, 679 F.3d 1109 (9th Cir. 2012).

II. THE FALL OF *CHEVRON* IN TAX (AND ELSEWHERE)

The Supreme Court considered *Chevron* in two tax cases after *Mayo*: *Home Concrete*[55] and *King*.[56] As discussed below, *Chevron* was of no help to the IRS either time. *Chevron* still occasionally supports pro-agency outcomes at the Supreme Court[57] and lower court levels.[58] On the whole, however, the Court has shown itself adept at finding ways to undercut *Chevron*.

Below, we first note the "why" of limiting *Chevron*, that is, the deficiencies of *Chevron* that inspire caution about applying the case robustly. Given space constraints, this endeavor will involve enumeration, not detailed exploration. Thereafter, we will address the "how" of limitation, that is, the variety of doctrinal devices courts have used since *Mayo* to avoid *Chevron* or to limit its effect.

A. The Why of Limitation

The complaint most frequently lodged against *Chevron* involves its unpredictability, both as to when it will be applied and what results it will produce when applied.[59] Part of the confusion is the persistent use of "deference" to refer to both force-of-law regulations and mere non-binding guidance documents, two different kinds of agency positions.[60]

But there are deeper problems. *Chevron* lacks an adequate theoretical foundation.[61] One problem is that the notion of delegation—which, as we have seen, is a major prop of *Chevron*—is an unhelpful fiction.[62]

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55. United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836 (2012).

56. King v. Burwell, 135 S. Ct. 2480 (2015).

57. *E.g.*, EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 1603–09 (2014).

58. *E.g.*, Schafer v. Astrue, 641 F.3d 49, 61–63 (4th Cir. 2011).

59. *E.g.*, Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, 557 U.S. 261, 295 (2009) (Scalia, J., concurring); *Thirty Years of* Chevron v. NRDC *and the Administrative Law Review: A Letter from the Executive Board*, 66 ADMIN. L. REV. 235, 238 (2014) (noting the "strikingly contradictory Supreme Court decisions which continually led academia to question [*Chevron*'s] relevance") [hereinafter *Executive Board*].

60. *See* Johnson, *supra* note 9, at 282–83; Cooley L. Howarth Jr., United States v. Mead Corp.: *More Pieces for the* Chevron/Skidmore *Deference Puzzle*, 54 ADMIN. L. REV. 699, 701 (2002). *But see* Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 351 (2011) (noting that, although they are not legally binding, guidance documents can have great practical consequence).

61. *E.g.*, Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN L. REV. 673 (2007). For discussion of the political theory underpinnings of *Chevron*, see Seidenfeld, *supra* note 16, at 94–103.

62. *See, e.g.*, Frederick Liu, Chevron *as a Doctrine of Hard Cases*, 66 ADMIN L. REV. 285 (2014); Mark Seidenfeld, Chevron*'s Foundation*, 86 NOTRE DAME L. REV. 273, 276–88 (2011).

Another fundamental problem is the failure of *Chevron* to deal convincingly with an old problem. The Vesting Clause of Article I of the Constitution[63] confers the lawmaking power upon Congress. Congress cannot delegate that power.[64] The Vesting Clause of Article III[65] confers upon the courts the power to "say what the law is."[66] This power too may not be delegated.[67] Why then can agencies create binding law to fill in statutory gaps, and why will courts defer to agency interpretations that the courts believe are wrong though not so obviously wrong as to be unreasonable?[68]

Various attempts have been made to square the power *Chevron* seemingly gives to agencies with these constitutional provisions,[69] but no durable consensus has yet emerged. Doubts on this score are never far beneath the surface and have been powerfully voiced by some justices in recent cases.[70]

Such concerns are compounded by the fact that *Chevron* created a judicial rule to allocate power when a statutory rule doing just that already existed. The Administrative Procedure Act ("APA") includes provisions governing judicial review of agency actions. It empowers federal courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, [or] in excess of statutory . . . authority."[71] Yet, in the view of some, "[h]eedless of the original design of the APA, [the Supreme Court has] developed an elaborate law of deference to agencies' interpretations," expanding the power of agencies beyond the balance

63. U.S. CONST. art. I, § 1.

64. *E.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001); Wayman v. Southard, 23 U.S. 1, 42–43 (1825).

65. U.S. CONST. art. III, § 1.

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

67. *E.g.*, Stern v. Marshall, 131 S. Ct. 2594, 2608–09 (2011).

68. *E.g.*, Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 826 (2013) (Ginsburg, J., writing for the Court) ("A court must uphold the [agency's] judgment as long as it is a permissible construction of the statute, even if it differs from how the court would have interpreted the statute in the absence of an agency regulation.").

69. As to the Article I problem, see J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 410–11 (1928) (noting that the three branches share the various powers, and stating that, when Congress lays down an intelligible principle to guide the agency, the agency does not make law but is merely the agent of Congress).

Leading scholars have proposed different solutions to the Article I problem. *See* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 26 (1983); Seidenfeld, *supra* note 62, at 289–311; Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L. J. 2580, 2589–98 (2006).

70. *E.g.*, DOT v. Ass'n of Am. R.R.s, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring); *id.* at 1240–52 (Thomas, J., concurring).

71. 5 U.S.C. § 706(2)(A), (C) (2012).

Congress struck in the APA.[72]

Underlying these objections is concern that deference doctrine has abetted fundamental transformation of the American constitutional structure. "The Framers could hardly have envisioned today's vast and varied federal bureaucracy and the authority administrative agencies now hold over our economic, social, and political activities."[73] Deference doctrine, some justices believe, has been one of the culprits.

> Perhaps there is some unique historical justification for deferring to federal agencies, but [the] cases reveal how paltry an effort we have made to understand it or to confine ourselves to its boundaries. . . . [W]e seem to be straying further and further from the Constitution without so much as pausing to ask why. We should stop to consider that document before blithely giving the force of law to any other agency "interpretations" of federal statutes.[74]

B. The How of Limitation

All of the justices of the Supreme Court have written or joined opinions expressing the above or other concerns about *Chevron*. Yet the justices diverge as to which concerns are substantial and the weight to be accorded each. As a result, recent cases drain *Chevron* of vitality through an accumulation of exceptions rather than eviscerating *Chevron* with a single blow. Consider the following four avenues of erosion of *Chevron* on display in tax and non-tax cases decided since *Mayo*.

1. Ignoring *Chevron*

We have seen that, before *Mayo*, the Supreme Court sometimes applied *Chevron* or other deference doctrines in tax cases and sometimes did not, without explaining its choices.[75] Something similar happened in 2015 in *Inclusive Communities*, a non-tax case.[76] A community group sued a state

72. Perez v. Mortgage Bankers' Ass'n, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in the judgment); *see also id*. at 1212 (remarking that this problem is "perhaps insoluble if *Chevron* is not to be uprooted"); *see also* William R. Andersen, *Against* Chevron*—A Modest Proposal*, 56 ADMIN. L. REV. 957, 972 (2004).

73. City of Arlington v. FCC, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., joined by Kennedy & Alito, JJ., dissenting).

74. Michigan v. EPA, 135 S. Ct. 2699, 2713–14 (2015) (Thomas, J., concurring) (citations omitted).

75. *See supra* text accompanying notes 33 to 37.

76. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015).

housing agency, challenging the agency's allocation of low income housing tax credits. As the case was wending its way through litigation, the federal Department of Housing and Urban Affairs ("HUD") promulgated a regulation supporting the community group's interpretation of the key statute, the Fair Housing Act.[77] By five to four, the Supreme Court held for the community group.[78]

Chevron had no impact on the resolution of the case. The four dissenters thought the HUD regulation was invalid because it was contrary to the statute and did not represent HUD's considered view of the matter.[79] The majority was even less interested in *Chevron*. It resolved the case on the basis of statutory interpretation, without invoking *Chevron*.[80]

2. Fashioning Exceptions

In 2001, the Supreme Court in *Mead* carved a major exception out of *Chevron*,[81] and other exceptions also exist. Two of them were rehearsed in 2015 in the high profile *King* case, which considered the availability of tax credits for insurance purchased on federally created insurance exchanges.[82] The Court refused to defer to a Treasury regulation because of two recognized exceptions to *Chevron*: (1) the agency lacked expertise in the particular area[83] and (2) absent clear indication in the statute, courts presume that Congress did not intend to delegate to agencies matters of deep economic or social significance fundamental to the statutory regime.[84] Depending on how their contours are defined in future cases, both exceptions have the potential to significantly limit the ambit of *Chevron*.

And the common law task of forging new exceptions to deference doctrine continues. For example, one recent circuit court case questioned whether *Chevron* could apply to an excise tax regulation absence evidence

77. Implementation of the Fair Hous. Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013).

78. *Inclusive Communities*, 135 S. Ct. at 2525–26.

79. *Id*. at 2542–43 (Alito, J., dissenting).

80. *Id*. at 2525 ("The Court holds that [the requirements of the HUD regulation] are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court's interpretation of similar language in Title VII and the ADEA, Congress' ratification . . . , and the statutory purpose.").

81. *See supra* text accompanying notes 24 to 29.

82. King v. Burwell, 135 S. Ct. 2480 (2015).

83. *Id*. at 2489 (citing Gonzales v. Oregon, 546 U.S. 243, 266–67 (2006)).

84. *Id*. (citing Util. Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2444 (2014) and FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)); *see* Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593 (2008).

that Treasury had taken into consideration the interpretational principle against extraterritorial application of U.S. law.[85] Given the plethora of canons of construction littering the landscape, this sort of approach could have major implications if it becomes popular.

Similarly, another post-*Mayo* tax case limited *Brand X* deference. In the *Home Concrete* case in 2012, the Supreme Court invalidated a Treasury regulation involving the extended statute of limitations on assessment provided by I.R.C. § 6501(e).[86] Although *Brand X* had held that *Chevron*-qualified regulations can trump judicial precedents, the plurality in *Home Concrete* held that a decision preceding the regulation had so narrowed the interpretational space that there was no statutory gap for Treasury to fill via regulation.[87]

3. Conflating *Chevron* and Other Standards

Chevron can continue to be cited but be deprived of generative power if it is collapsed into or merged with other doctrines. This appears to be occurring. First, I and others have argued that step one logically is subsumed in step two, reducing *Chevron* to a simple reasonableness test.[88] Some case law support for this approach is emerging.[89] Similarly, an increasing number of cases are conflating *Chevron*'s step two with arbitrary-and-capricious analysis under the APA.[90]

4. Applying the Standard Non-Deferentially

Doctrines of law always have two aspects: their verbal formulation and the spirit in which they are applied. Of the two, the latter is far more important to the outcomes of controversies. The spirit in which *Chevron* is applied has changed. *Chevron* originally was indulgent and friendly towards

85. Validus Reinsurance, Ltd. v. United States, 786 F.3d 1039, 1049 (D.C. Cir. 2015) (dictum).

86. United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836 (2012).

87. *Id*. at 1842–44. For discussion of *Home Concrete*, see Steve R. Johnson, *Reflections on* Home Concrete*: Writing Tax Regulations and Interpreting Tax Statutes*, 13 FLA. ST. U. BUS. REV. 77 (2014).

88. *E.g*., Johnson, *supra* note 9, at 284–85; Matthew Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009).

89. *E.g*., Michigan v. EPA, 135 S. Ct. 2699, 2706–11 (2015) (invalidating a regulation as being an unreasonable interpretation of the statute without locating its analysis under either step one or step two); *Utility Air*, 134 S. Ct. at 2442–49 (ruling similar to *Michigan*); *Home Concrete,* 132 S. Ct. at 1846 n.1 (Scalia, J., concurring) ("'Step 1' has never been an essential part of *Chevron* analysis.").

90. *E.g*., *Michigan*, 135 S. Ct. at 2706–07; Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 826 (2013); Judulang v. Holder, 132 S. Ct. 476, 483 n.7 (2011). For discussion of judicial review under the arbitrary-and-capricious standard, see Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review,* 90 WASH. U. L. REV. 141 (2012).

agency action, and it is still spoken of that way by some.[91] But that characterization often is no longer accurate. Now, many cases are applying *Chevron* in a searching, rigorous fashion, converting it from a shield to protect agency actions into a sword with which to assail them.[92]

This is evident in *City of Arlington*, a 2013 *Chevron* case in which the Court instructed: "No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*."[93] The Court urged judges to "tak[e] seriously, and apply[] rigorously, in all cases, statutory limits on agencies' authority."[94]

This rigor was in display in the 2014 *Utility Air* case in which the Court, citing *City of Arlington*, invalidated a non-tax regulation.[95] In tax, it also was evident in the widely discussed *Loving*[96] and *Ridgely*[97] cases invalidating Treasury regulations governing practice before the IRS,[98] and in the Supreme Court's 2015 state tax *Brohl* case.[99]

CONCLUSION

We have seen the rise of *Chevron* in tax, culminating in *Mayo* in 2011, and its fall in tax and elsewhere; a fall in substantive significance, although perhaps not frequency of citation. We have located the causes of the fall in *Chevron*'s own inconsistencies and inadequate conceptualization. And, we have sketched the forms the downgrading of *Chevron*'s significance have taken in recent cases.[100]

Has this all been wasted judicial effort going around in a doctrinal circle? Does it leave us in the same place we were before *Chevron* was

91. *E.g.*, *Michigan*, 135 S. Ct. at 2707.

92. *See, e.g.*, Steve R. Johnson, Loving *and Legitimacy: IRS Regulation of Tax Return Preparation*, 59 VILL. L. REV. 515, 528–29 (2014); *Executive Board*, *supra* note 59, at 239 ("Many modern scholars conclude that contrary to the view that *Chevron* mandated deference . . . , it has in fact given the judiciary additional power to determine the legitimacy of agency rulemaking.").

93. City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013).

94. *Id.* at 1874.

95. Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2442–49 (2014).

96. Loving v. IRS, 917 F. Supp. 2d 67 (D.D.C. 2013), *aff'd*, 742 F.3d 1013 (D.C. Cir. 2014).

97. Ridgely v. Lew, 55 F. Supp. 3d 89 (D.D.C. 2014).

98. For discussion of these cases, see Steve R. Johnson, *How Far Does Circular 230 Exceed Treasury's Statutory Authority?*, 146 TAX NOTES 221 (Jan. 12, 2015).

99. Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124 (2015); *see* Steve R. Johnson, *How Would the Supreme Court Decide* Loving *and* Ridgely*?*, 147 TAX NOTES 559, 561–63 (May 4, 2015).

100. Not all agree with my description of the trajectory. Some maintain that *Chevron* is merely evolving, not diminishing. *E.g.*, *Executive Board*, *supra* note 59, at 240. This is hardly surprising. The history of *Chevron* has been marked by disagreement and "consistent shifts in . . . scholarship." *Id.* at 235.

handed down, with no recompense for the journey? No. We are better off in two ways. First, despite a few whose conversion remains in the future, the center of gravity of the tax community now understands that returning to the cloister of tax parochialism is not an option.

Second, both in tax and other areas, jurists and commentators find it increasingly difficult to ignore or paper over the serious flaws of *Chevron*. Adopting a wider angle of vision, we see that the flaws are not those of *Chevron* alone. They infect deference doctrine generally[101] and are the rot at the core of the separation of powers doctrine on which general administrative law is based. Seeing that more clearly, ours will be the opportunity and the obligation to mend these rents in the fabric of American law.

101. Thus, concurrent with the assault on *Chevron* is growing uneasiness about the doctrine granting great deference to agencies' interpretation of their own ambiguous regulations. *E.g.*, Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1338–39 (Roberts, CJ., concurring) & *id.* at 1339–44 (Scalia, J., concurring in part & dissenting in part). This uneasiness will eventually lead, I believe, to abrogation of Auer v. Robbins, 519 U.S. 452 (1997), and Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945). *See* Steve R. Johnson, Auer/Seminole Rock *Deference in the Tax Court*, 11 PITT. TAX REV. 1 (2013); Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449 (2011).