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## AUER/SEMINOLE ROCK DEFERENCE IN THE TAX COURT

*Steve R. Johnson*



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# ARTICLES

## *AUER/SEMINOLE ROCK* DEFERENCE IN THE TAX COURT

*Steve R. Johnson\**

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## INTRODUCTION

Deference doctrines involve the extent to which courts, in their interpretation of statutes and regulations, should be influenced by how the agencies charged with administering these authorities construe them. Deference doctrine has received enormous attention in case law<sup>1</sup> and commentary<sup>2</sup> during the past three decades, both in tax and in administrative law.

In *Gonzales v. Oregon*,<sup>3</sup> the Supreme Court identified three strands of deference doctrine: deference under *Chevron*,<sup>4</sup> deference under *Skidmore/Mead*,<sup>5</sup> and deference under *Auer/Seminole Rock* (hereinafter *ASR*).<sup>6</sup> The first and second strands have been well rehearsed in tax law.<sup>7</sup>

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<sup>1</sup> In tax, examples include *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836 (2012); *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704 (2011); *Swallows Holding v. Comm'r*, 126 T.C. 96 (2006) (en banc), *rev'd*, 515 F.3d 162 (3d Cir. 2008).

<sup>2</sup> In tax, examples include Kristen E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239 (2009); Steve R. Johnson, *Preserving Fairness in Tax Administration in the Mayo Era*, 32 VA. TAX REV. 269 (2013); Steve R. Johnson, *Mayo and the Future of Tax Regulations*, 130 TAX NOTES 1547 (Mar. 28, 2011), <http://taxprof.typepad.com/files/130tn1547.pdf>; Steve R. Johnson, *Intermountain and the Importance of Administrative Law in Tax Law*, 128 TAX NOTES 837 (Aug. 23, 2010), <http://taxprof.typepad.com/files/128tn0837.pdf>; Leandra Lederman, *The Fight over "Fighting Regs" and Judicial Deference in Tax Litigation*, 92 B.U.L. REV. 643 (2012).

<sup>3</sup> 546 U.S. 243, 255–56 (2006).

<sup>4</sup> *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984).

<sup>5</sup> *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

<sup>6</sup> *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

<sup>7</sup> As to *Chevron* in tax, see, e.g., Ellen P. Aprill, *Muffled Chevron: Judicial Review of Tax Regulations*, 3 FLA. TAX REV. 51 (1996); Mitchell M. Gans, *Deference and the End of Tax Practice*, 36 REAL PROP. & TR. J. 731 (2002); Kristen E. Hickman, *Of Levity, Chevron, and KPMG*, 26 VA. TAX REV. 905 (2007); Steve R. Johnson, *Swallows as It Might Have Been: Regulations Revising Case Law*, 112 TAX NOTES 773 (Aug. 28, 2006), <http://ssrn.com/abstract=926553>. As to *Skidmore/Mead* in tax, see John F. Coverdale, *Chevron's Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After Mead*, 55 ADMIN. L. REV. 39 (2003); Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537 (2006); Ellen P. Aprill, Linda Galler & Irving Salem, ABA Section of Taxation, *Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717, 769–72 (2004).

Until fairly recently, however, the third strand was relatively neglected. As a leading commentator noted:

The Chevron and [ASR] principles, which are functionally similar, could not have garnered more disparate reactions from the legal community. . . . Chevron deference has preoccupied administrative law scholarship in a way few issues ever have. Exhaustive academic commentary has scrutinized Chevron's legitimacy and explored the seemingly innumerable questions that arise from its application. [ASR] deference, however, has long been one of the least worried-about principles of administrative law.<sup>8</sup>

Although *Chevron* is the most frequently cited case in American jurisprudence,<sup>9</sup> in the first half century of its existence, the *ASR* principle largely went “unquestioned.”<sup>10</sup> More recently, however, some light has begun to be focused on this previously dim corner. In a triad of recent cases, the Supreme Court explored issues raised by *ASR* deference.<sup>11</sup> In addition, a body of *ASR* scholarship has developed.<sup>12</sup> *ASR* has become a “hot” topic in contemporary legal discourse.

However more work remains to be done on *ASR* deference. In particular, the doctrine has been insufficiently studied in tax. This article attempts to fill that gap by examining application of the *ASR* principle in

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<sup>8</sup> John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 613–14 (1996). To similar effect, see Stack, *infra* note 12, at 357–58; Stephenson & Pogoriler, *infra* note 12, at 1451–52.

<sup>9</sup> See STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 289 (5th ed. 2002). However, for an argument that *Chevron*, in fact though not in name, is collapsing into general “arbitrary and capricious” review, see Johnson, *supra* note 2, at 280–85.

<sup>10</sup> 1 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.10, at 282 (3d ed. 1994).

<sup>11</sup> *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156 (2012); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254 (2011); *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871 (2011).

<sup>12</sup> The longer works include Manning, *supra* note 8; Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515 (2011); Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355 (2012); Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449 (2011). See also Steve R. Johnson, *New Light on Auer/Seminole Rock Deference*, 61 STATE TAX NOTES 441 (Aug. 15, 2011); Steve R. Johnson, *Deference to Tax Agencies' Interpretation of Their Regulations*, 60 STATE TAX NOTES 665 (May 30, 2011); *The Supreme Court 2011 Term: Leading Cases*, 126 HARV. L. REV. 1, 357–66 (2012).

the Tax Court and comparing it to the application of the principle in other courts.

This article has three parts. Part I describes *ASR* deference generally and sketches its vitality in federal and state courts. Part II addresses *ASR* deference in the Tax Court. It concludes that the Tax Court has been far less receptive to *ASR* deference than has the Supreme Court. Moreover, it demonstrates ways in which the Tax Court has blunted or deflected attempts to assert *ASR*, and it offers possible explanations for this behavior. Despite its frequent use, there are objections to *ASR* deference. Part III explores those objections and finds them to be powerful. Part III concludes that *ASR* deference is a dubious principle of law; and thus the Tax Court's reluctance about the rule reflects greater wisdom than the Supreme Court's enthusiasm for it.

## I. *ASR* DEFERENCE GENERALLY

### A. *Origin and Prevalence of ASR Deference*

Statutes are, of course, the principal source of federal tax law.<sup>13</sup> Yet provisions of the Internal Revenue Code often contain gaps which Congress has authorized the Department of the Treasury (“Treasury”) to fill by way of regulations.<sup>14</sup> If properly promulgated and consistent with the statute,

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<sup>13</sup> Even in tax, there is a significant amount of common law rulemaking. *See, e.g.*, *Dobson v. Comm’r*, 320 U.S. 489, 497–98 (1943); RANDOLPH PAUL, *SELECTED STUDIES IN FEDERAL TAXATION* 2 n.2 (1938); Charlotte Crane, Pollock, Macomber, *and the Role of the Federal Courts in the Development of the Income Tax in the United States*, 73 *LAW & CONTEMP. PROBS.* 1, 2 (2010). However, such judicial lawmaking in tax is interstitial. *E.g.*, *Comm’r v. Beck’s Estate*, 129 F.2d 243, 245 (2d Cir. 1942); Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretations*, 47 *COLUM. L. REV.* 1259, 1271 (1947) (“supplemental law making [by the courts] should always, of course, be modest in scope”). At the core, it remains the case that “there is no natural law of . . . tax liability. . . . The amount of . . . tax a taxpayer owes . . . is determinable solely by reference to the positive provisions of the . . . tax laws . . . and the regulations . . . promulgated within the scope of [their] authority.” *Gen. Motors Corp. v. Miss. Tax Comm’n*, 510 So. 2d 498, 500 (Miss. 1987); *see also* *Masonite Corp. v. Fly*, 194 F.2d 257, 260 (5th Cir. 1952).

<sup>14</sup> In addition to hundreds, perhaps thousands of specific authority delegations within particular Code sections, § 7805(a) give Treasury authority to “prescribe all needful rules and regulations for the enforcement of [the Code].” Different observers have tallied the number of specific authorities differently. *See* N.Y. State Bar Ass’n Tax Section, *Report on Legislative Grants of Regulatory Authority*, 2006 *TNT* 215–22 (Nov. 3, 2006) (finding approximately 550 specific authority delegations

Treasury tax regulations typically have the force of law.<sup>15</sup> Yet even the regulations may be ambiguous in ways that are important to the resolution of ambiguous statutes.

*Chevron* and *Skidmore/Mead* address how much deference courts should give to agency interpretations of ambiguous statutes. *ASR* speaks to how much deference courts should accord agency interpretations of ambiguous regulations. Over 60 years ago, in *Seminole Rock*, the Supreme Court stated:

Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words is in doubt. The intention of Congress . . . in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.<sup>16</sup>

Despite its appearance in *Seminole Rock*, this strand of deference is more often identified by reference to *Auer*, a 1997 case in which the Supreme Court taught that an agency’s interpretation of its own regulation is “controlling” unless it is “plainly erroneous or inconsistent with” the regulation.<sup>17</sup> Even before *Auer*, however, the Court stated that it was “well established that an agency’s construction of its own regulations is entitled to substantial deference.”<sup>18</sup>

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in the Code). In 1940, the Code contained 56 delegations of rulemaking authority. Ellsworth C. Alvord, *Treasury Regulations and the Wilshire Oil Case*, 40 COLUM. L. REV. 252, 258 (1940).

<sup>15</sup> *E.g.*, *Boeing Co. v. United States*, 537 U.S. 437, 447–48 (2003); *Helvering v. R.J. Reynolds Tobacco Co.*, 306 U.S. 110, 115 (1939); *Lantz v. Comm’r*, 607 F.3d 479, 481 (7th Cir. 2010). For description of how tax regulations are drafted, reviewed, and issued, see IRS Proc. Reg. § 601.601(a)–(c); Mitchell Rogovin & Donald L. Korb, *The Four R’s Revisited: Regulations, Rulings, Reliance and Retroactivity in the 21st Century: A View from Within*, 87 TAXES 21 (2009).

<sup>16</sup> 325 U.S. at 413–14. *Seminole Rock* has been identified as the first case of this line. *Talk Am.*, 131 S. Ct. at 2265–66 (Scalia, J., concurring).

<sup>17</sup> 519 U.S. at 461.

<sup>18</sup> *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 150 (1991).

The Supreme Court has invoked the principle in numerous cases.<sup>19</sup> The lower federal courts have as well.<sup>20</sup> The appearance and strength of the principle varies among the states, but it has been recognized at one level of pittance or another in numerous state cases, both tax<sup>21</sup> and non-tax.<sup>22</sup>

Adherence to *ASR* deference appears to be strongest in the U.S. Supreme Court. A considerable amount of empirical work has been conducted, studying the effects of the various standards of deference. To the extent they are comparable,<sup>23</sup> the studies suggest that different standards of review often lead to similar outcomes. A 2011 article analyzed ten studies.<sup>24</sup> It found that, with one exception, federal courts at all levels uphold agency actions about 70% of the time—regardless of whether the standard applied is *Chevron*, *Skidmore*, arbitrary-and-capricious, substantial evidence, or de novo.<sup>25</sup>

The one exception is that the Supreme Court behaves extremely deferentially when reviewing agency interpretations of their own rules: upholding the agency about 91% of the time when it applies *ASR*.<sup>26</sup> A subsequent study, however, found that the federal district and circuit courts

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<sup>19</sup> *E.g.*, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988); *United States v. Larionoff*, 431 U.S. 864, 872 (1977); *Udall v. Tallman*, 380 U.S. 1, 16–17 (1965).

<sup>20</sup> *E.g.*, *Martin v. American Cyanamid Co.*, 5 F.3d 140, 144 (6th Cir. 1993).

<sup>21</sup> *E.g.*, *United Parcel Serv. Co. v. State Dep't of Revenue*, 1 P.3d 83, 84 (Alas. 2000); *Texas Citrus Exch. v. Sharp*, 995 S.W.2d 164, 169–70 (Tex. App. 1997).

<sup>22</sup> *E.g.*, *Beach v. Great W. Bank*, 692 So. 2d 146, 149 (Fla. 1997); *Buffalo Twp. v. Jones*, 778 A.2d 1269, 1276 n.8 (Pa. Commw. Ct. 2001), *aff'd*, 813 A.2d 659 (Pa. 2002), *cert. denied*, 540 U.S. 821 (2003).

<sup>23</sup> Comparability sometimes is limited because studies may consider different courts over different spans of time.

<sup>24</sup> Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77 (2011).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*; see William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1142 & tbl.15 (2008).

were less deferential: they upheld the agency about 76% of the time when applying *ASR*.<sup>27</sup>

Statistics, however, do not always tell the whole story. By the numbers, *ASR* deference seems firmly established in Supreme Court jurisprudence. Yet, there have been rumblings of discontent from time to time. In a 1994 case, Justices Thomas, Stevens, O'Connor, and Ginsburg criticized some of the underpinnings of the doctrine, although they did not repudiate it outright.<sup>28</sup> In a 1995 case, Justices O'Connor, Scalia, Souter, and Thomas voiced concern about some consequences of applying the rule.<sup>29</sup> In a 2011 case, Justice Scalia expressed substantial doubt as to the wisdom of *ASR* and announced his willingness to reexamine whether it deserves continued support.<sup>30</sup>

Yet the course of legal doctrine often depends on accidents of personal and institutional biography. Justices Stevens, O'Connor, and Souter are no longer on the Court. Justice Thomas authored a recent opinion for the Court reaffirming *ASR*, with Justice Ginsburg joining in that opinion.<sup>31</sup> Justice Scalia has not yet been presented with the vehicle through which he can act on his epiphany. Until a new tide of history rolls in, *ASR* deference remains established in the Supreme Court.

### *B. Exceptions to ASR Deference*

Despite the above statistics, even the Supreme Court can avoid or reject *ASR* deference when it thinks that wisdom walks a different path. Consider the Court's 2005 *Ballard* decision. To make short a very long

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<sup>27</sup> *Pierce & Weiss*, *supra* note 12, at 519.

<sup>28</sup> *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 517 (1994) (Thomas, J., dissenting, joined by Stevens, O'Connor, and Ginsburg, JJ.).

<sup>29</sup> *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 84, 91–102 (1995) (O'Connor, J., dissenting, joined by Scalia, Souter and Thomas, JJ.).

<sup>30</sup> *Talk Am.*, 131 S. Ct. at 2265–66 (Scalia, J., concurring) (noting that he has become “increasingly doubtful” of the validity of *ASR* deference, adding “We have not been asked to reconsider *Auer* in the present case. When we are, I will be receptive to doing so.”).

<sup>31</sup> *Id.*

story,<sup>32</sup> the issue was whether the Tax Court, in rendering its ultimate decision, had accorded sufficient deference to the findings of its special trial judge who had heard the case. The Supreme Court held that it had not and that the Tax Court had misapplied its own rules.<sup>33</sup>

In dissent, Chief Justice Rehnquist, joined by Justice Thomas, argued by analogy to *ASR*, noting that an agency’s interpretation of its own rule receives “controlling weight unless it is plainly erroneous or inconsistent with the regulation” and maintaining that the Tax Court’s interpretation of its Rule at issue was reasonable.<sup>34</sup> The dissenters recognized, of course, that the Tax Court is a court, not an agency.<sup>35</sup> However, in point of principle, they saw “no reason why *Seminole Rock* deference does not extend to the Tax Court’s interpretation of its own procedural rules.”<sup>36</sup>

The *Ballard* majority brushed this aside. It grudgingly acknowledged that “the Tax Court is not without leeway in interpreting its own rules,”<sup>37</sup> a formulation that plainly is less emphatic than *Auer* or *Seminole Rock*. Without extensive analysis of those cases or any other cases of the line—indeed without even citation to any of them—and without questioning the court-to-agency analogy, the majority dismissed the Tax Court’s view of the applicable Rule as being unreasonable.<sup>38</sup>

*Ballard* reflects the fact that *ASR* deference, although strong, is not unlimited. The current status of the rule is marked by three recent cases: *Chase Bank*,<sup>39</sup> *Talk America*,<sup>40</sup> and *SmithKline Beecham*.<sup>41</sup> In these cases,

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<sup>32</sup> The full story is told in Steve R. Johnson, *Reforming Federal Tax Litigation: An Agenda*, 41 FLA. ST. U. L. REV. \_\_\_ (forthcoming 2013).

<sup>33</sup> *Ballard v. Comm’r*, 544 U.S. 40, 59–64 (2005).

<sup>34</sup> *Id.* at 70 (Rehnquist, C.J., dissenting) (quoting *Seminole Rock*, 325 U.S. at 414).

<sup>35</sup> The first ancestors of the court were administrative units, but it has been an Article I court for generations. *See Freytag v. Comm’r*, 501 U.S. 868, 887–88 (1991); HAROLD DUBROFF, *THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS* 204–15 (1979).

<sup>36</sup> 544 U.S. at 70 n.4.

<sup>37</sup> *Id.* at 59.

<sup>38</sup> *Id.* Nor did the majority attach significance to the fact that the Tax Court’s construction of its Rule had been “consistent with its practice during the more than 20 years since Rule 183 was adopted in its current form.” *Id.* at 70 (Rehnquist, C.J., dissenting).

<sup>39</sup> *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880–84 (2011).

the Court generally reaffirmed the continuing vitality of the deference principle. It also, however, identified limits to the principle.

What are those limits? When the agency loses—9% of the time in the Supreme Court and 24% of the time in the federal district and circuit courts—why does it lose? Six main possibilities emerge from the case law.

First, *Auer* itself states that deference does not attach if the agency’s interpretation is “plainly erroneous or inconsistent with the regulation.”<sup>42</sup> Accordingly, the *SmithKline Beecham* Court withheld *ASR* deference when it found the agency’s “interpretation of its regulations quite unpersuasive.”<sup>43</sup> This limitation is a necessary incident of the *Accardi* principle. Under *Accardi*, an agency must comply with its own regulations.<sup>44</sup> “[A] court cannot determine whether an agency has failed to comply with its own regulation without interpreting the regulation itself.”<sup>45</sup> When the court’s interpretation finds the agency’s interpretation to be clearly at variance with the regulation being construed, deference must be withheld. Any other rule would effectively permit the agency “under the guise of interpreting a regulation, to create *de facto* a new regulation.”<sup>46</sup>

Second, no deference is due if the regulation being interpreted is unambiguous. This was an aspect of the doctrine from the beginning—*Seminole Rock*<sup>47</sup>—and it continues to be invoked in contemporaneous cases.<sup>48</sup> This is a common-sense condition: there is no need for

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<sup>40</sup> *Talk Am.*, 131 S. Ct. at 2260–63.

<sup>41</sup> *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2156–69 (2012).

<sup>42</sup> 519 U.S. at 461.

<sup>43</sup> 132 S. Ct. at 2169.

<sup>44</sup> *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266–68 (1954).

<sup>45</sup> *Stack*, *supra* note 12, at 359.

<sup>46</sup> *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000) (refusing to grant *ASR* deference).

<sup>47</sup> 325 U.S. at 414 (stating that deference is appropriate “if the meaning of the words used [in the regulation] is in doubt”). This condition is not expressly stated in *Auer*, 519 U.S. at 461, but the discussion in that case makes it apparent that the Court’s concern was with interpretation of regulations containing “ambiguities.” *Id.* at 462–63.

<sup>48</sup> *See, e.g., Summit Petroleum Corp. v. EPA*, 690 F.3d 733, 740–41 (6th Cir. 2012).

interpretation—and thus no need for deference to interpretation—if the regulation itself is clear.<sup>49</sup>

Third, *Auer* counsels that deference is unwarranted when there is reason to believe that the agency’s interpretation “does not reflect the agency’s fair and considered judgment on the matter in question.”<sup>50</sup> Suspicion on this score may arise from various circumstances: for instance, when the current interpretation appears to be merely a “convenient litigating position,”<sup>51</sup> when the agency’s current position appears to be a “*post hoc* rationalization advanced by an agency seeking to defend past agency action against attack,”<sup>52</sup> or when the current interpretation conflicts with the agency’s prior interpretation of the same regulation.<sup>53</sup>

However, the current significance of the last point—agency inconsistency—is less than clear. In contexts other than *ASR*, the importance of agency inconsistency has been discounted.<sup>54</sup> The 2011 *Talk America* case accorded *ASR* deference despite the novelty of an agency’s reinterpretation of a longstanding regulation.<sup>55</sup> Yet the 2012 *SmithKline*

<sup>49</sup> *Cf.* *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (“Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise. . . .”); *United States v. Wiltberger*, 18 U.S. 76, 95–96 (1820) (per Marshall, C.J.) (“Where there is no ambiguity in the words, there is no room for construction.”). “This principle is as applicable to a revenue statute as it is to any other type of legislation.” *Prudential Ins. Co. v. United States*, 319 F.2d 161, 166 (Ct. Cl. 1963); *see, e.g., Gitlitz v. Comm’r*, 531 U.S. 206, 219–20 (2001); *Freytag v. Comm’r*, 501 U.S. 868, 873 (1991) (stating that, when a statute is unambiguous, the judicial inquiry is complete “except in rare and exceptional circumstances”); *Crooks v. Harrelson*, 282 U.S. 55, 61 (1930).

<sup>50</sup> 519 U.S. at 462.

<sup>51</sup> *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988).

<sup>52</sup> *Auer*, 519 U.S. at 462 (quoting *Georgetown Hosp.*, 488 U.S. at 212); *see also* *Mississippi Gaming Comm’n v. Six Elec. Video Gambling Devices*, 792 So. 2d 321, 328–29 (Miss. App. 2001).

<sup>53</sup> *See, e.g., Thomas Jefferson Univ.*, 512 U.S. at 515.

<sup>54</sup> *See, e.g., Mayo Found.*, 131 S. Ct. at 712 (granting *Chevron* deference to a general authority tax regulation and stating that agency inconsistency does not bar such deference); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–15 (2009).

<sup>55</sup> *Talk Am.*, 131 S. Ct. at 2263 (“although the [agency] concedes that it is advancing a novel interpretation of its longstanding . . . regulations, novelty alone is not a reason to refuse deference”).

*Beecham* decision cited older law suggesting that inconsistency can thwart *ASR* deference.<sup>56</sup>

Fourth, deference will be denied if the agency's position is not settled or is not an authoritative expression of the agency's position.<sup>57</sup> The modality by which the agency's position is set forth has been a controversial aspect of this exception. A position set out in published guidance, especially if it has gone through levels of review within the agency, stands a good chance of receiving deference. Courts have sometimes questioned whether deference is due to interpretations set out in informal announcement or in briefs.<sup>58</sup> However, the agency's position was set out in a brief in *Auer*<sup>59</sup> and, in recent cases, *ASR* deference has been given to agency positions expressed in litigating briefs or *amicus* briefs filed in the case.<sup>60</sup>

Fifth, *ASR* deference is in part a function of the agency's special position: as drafter of the regulation, it presumably knows best what it meant to convey via the regulation.<sup>61</sup> Circumstances undercutting this rationale argue against deference. For instance, the Supreme Court rejected *ASR* deference when all the regulation did was to parrot or restate the language of the statute.<sup>62</sup> A number of tax regulations are "parroting regulations."<sup>63</sup>

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<sup>56</sup> 132 S. Ct. at 2166 (citing *Thomas Jefferson Univ.*, 512 U.S. at 514).

<sup>57</sup> See, e.g., *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 837–38 (Fed. Cir. 2006); *Orion Flight Serv., Inc. v. Basler Flight Serv.*, 714 N.W.2d 130, 145 (Wis. 2006); *Solis v. Postal Police Officers' Ass'n*, 2012 WL 4056074, at \* 3-4 (N.D. Ohio Sept. 17, 2012).

<sup>58</sup> See, e.g., *Eastman Kodak Co. v. STWB, Inc.*, 452 F.3d 215, 222 n.8 (2d Cir. 2006) (in which an *amicus* brief is discussed on the merits of denying deference); *Keys v. Barnhart*, 347 F.3d 990, 903–04 (7th Cir. 2003); *Houston Police Officers' Union v. City of Houston*, 330 F.3d 298, 304–05 (5th Cir. 2003) (in which the ambiguities within an accepted Chevron deference are discussed).

<sup>59</sup> 519 U.S. at 461.

<sup>60</sup> *Talk Am.*, 131 S. Ct. at 2260–61; *Chase Bank*, 131 S. Ct. at 880.

<sup>61</sup> See, e.g., *Abbott Labs v. United States*, 573 U.S. 1327, 1330 (Fed. Cir. 2009). For further discussion of this rationale, see *infra* Part IIIA.

<sup>62</sup> *Gonzales*, 546 U.S. at 256–57.

<sup>63</sup> See, e.g., Treas. Reg. § 301.6902-1 (1967); Treas. Reg. § 301.7207-1 (as amended 1985).

Sixth, the case for deference is particularly strong when the agency's interpretation was long known to, and relied upon by, the regulated community.<sup>64</sup> In its 2012 *SmithKline Beecham* decision, the Court borrowed from other administrative law contexts a principle that regulated parties are entitled to “fair warning” of the conduct that is required or prohibited by a regulation.<sup>65</sup> The Court concluded that this principle had been violated and denied *ASR* deference to the agency's interpretation of the statute. In reaching this result, the Court emphasized two facts: (1) holding for the agency would “impose potentially massive liability on [the regulated company] for conduct that occurred well before that interpretation was announced”<sup>66</sup> and (2) the “agency's announcement of its interpretation [was] preceded by a very lengthy period of conspicuous inaction [so that] the potential for unfair surprise is acute.”<sup>67</sup> Because these facts may not be present to comparable extent in other cases, the significance of this exception remains to be established by future cases.

## II. *ASR* DEFERENCE IN THE TAX COURT

Subpart A below details the Tax Court's treatment of the *ASR* principle and finds that the court has been far less deferential under it than other federal courts have been. Subpart B advances possible explanations for this phenomenon.

### A. *Extent of Tax Court Deference*

In the Tax Court, *ASR* claims do not succeed at anything like the 91% success rate they achieved in the Supreme Court—or even the 76% success

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<sup>64</sup> *Tallman*, 380 U.S. at 16–18.

<sup>65</sup> 132 S. Ct. at 2167–69 (quoting, among other cases, *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 158 (1991); *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986)).

<sup>66</sup> 132 S. Ct. at 2167.

<sup>67</sup> *Id.* at 2168. Also as to the importance of fair notice to the regulated party, see *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328–30 (D.C. Cir. 1995) (refusing to impose a fine because the company lacked fair notice of the regulatory interpretation upon which the agency relied).

rate achieved in federal district and circuit courts. Below, this article surveys recent cases in which the Tax Court has entertained *ASR* claims.

It is difficult to say with absolute confidence precisely how many times the Tax Court has dealt with the *ASR* principle. In some cases, the court addressed what is in essence the rule without citing either *Auer* or *Seminole Rock*.<sup>68</sup> Two things can be said, however. First, the Tax Court has discussed the principle over at least a third of a century in a significant number of cases—enough that reliable conclusions can likely be drawn. Second, the frequency with which the court has addressed the *ASR* principle has been increasing, with many of the decisions coming in 2009 and later years.<sup>69</sup>

### 1. Early Cases

*Southern Pacific* was an early treatment of *ASR* by the Tax Court.<sup>70</sup> The relevant issue involved amortization of the cost of emergency facilities under § 168. To qualify for favorable treatment, the taxpayer was required to show that the federal Office of Defense Mobilization (“ODM”) had duly issued a certificate confirming the necessity of the facility to the national defense.<sup>71</sup> In dispute was whether the taxpayer had obtained the certificate within the time limit imposed by ODM’s regulations.<sup>72</sup> The IRS maintained that ODM’s intent as to a timing limit was manifested in various ways, including the language of the certificate, statements made to Congress by ODM, correspondence, and testimony.<sup>73</sup>

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<sup>68</sup> See, e.g., *Honeywell Inc. v. Comm’r*, 87 T.C. 624, 635 (1986); *Woods Inv. Co. v. Comm’r*, 85 T.C. 274, 281–82 (1985) (both holding against the IRS); *Estate of Focardi v. Comm’r*, 91 T.C.M. (CCH) 936, 2006 T.C.M. (RIA) ¶ 2006-056 (2006) (invoking the principle as an alternative rationale).

<sup>69</sup> There are at least five 2009-or-later Tax Court *ASR* decisions: *Nat’l Educ. Ass’n v. Comm’r*, 137 T.C. 100, 112 (2011); *Carpenter Family Inv., LLC v. Comm’r*, 136 T.C. 373, 379 n.4 (2011); *Intermountain Ins. Serv. of Vail, LLC v. Comm’r*, 134 T.C. 211, 219 (2010), *rev’d on other grounds*, 650 F.3d 691 (D.C. Cir. 2011), *vacated*, 132 S. Ct. 2120 (2012); *Pierre v. Comm’r*, 133 T.C. 24, 40–41 (2009) (Cohen, J., concurring); *Lantz v. Comm’r*, 132 T.C. 131, 145 nn.10 & 151 (2009) (majority opinion & Halpern, J., dissenting), *rev’d on other grounds*, 607 F.3d 479 (7th Cir. 2010).

<sup>70</sup> *S. Pac. Transp. Co. v. Comm’r*, 75 T.C. 497 (1980).

<sup>71</sup> *Id.* at 534–36.

<sup>72</sup> *Id.* at 537.

<sup>73</sup> *Id.* at 538–39.

The Tax Court held, however, that “[n]one of the items . . . show that the ODM ever manifested an intent” as to a time limit as argued by the IRS.<sup>74</sup> In so doing, the court rejected the IRS’s reliance on *ASR*.<sup>75</sup> Citing *Udall v. Tallman*, the Tax Court reasoned that:

[N]either the ODM nor any delegate agency ever published any rules specifically indicating what it expected in the way of promptness . . . . Nor were any communications ever addressed to any applicant advising as to what conduct would be considered reasonable under the prescribed rules.

We believe it is a necessary corollary [of *ASR* deference] that, in order for an agency’s interpretation to be binding in a given situation, it must be clearly made a matter of public record such that all affected parties are aware of it.<sup>76</sup>

However, the Tax Court here was erecting a barrier far higher than one ever erected by the Supreme Court, in *Tallman* or subsequently. *Tallman* used the longstanding nature of the interpretation there at issue to deflect objections that the position unreasonably violated “detrimental reliance” interests.<sup>77</sup>

*Southern Pacific*’s statement that the agency’s interpretation “must be clearly made a matter of public record such that all affected parties are aware of it” makes such notoriety a precondition for *ASR* deference—and a strong one.<sup>78</sup> Notoriety was a shield to protect the agency in *Tallman* but was converted by *Southern Pacific* into a sword to strike at the agency.

Contrast *Southern Pacific* to *SmithKline Beecham*, discussed above.<sup>79</sup> The Supreme Court case rejected *ASR* deference because there had been “a very lengthy period of conspicuous inaction” by the agency, reversal of which would have caused “potentially massive liability” for the taxpayer

<sup>74</sup> *Id.* at 541.

<sup>75</sup> The IRS was urging deference to interpretation of another agency’s regulations, not its own regulations, but there is precedent for this sort of thing. *E.g.*, *Arkansas v. Oklahoma*, 503 U.S. 91, 109–14 (1992) (deferring to EPA interpretation of state pollution statute incorporated by reference into EPA regulations); *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696–97 (1991) (deferring to Labor Department’s interpretation of HEW regulations).

<sup>76</sup> *S. Pac. Transp. Co.*, 75 T.C. at 541–42 (citing *Tallman*, 380 U.S. at 16–18).

<sup>77</sup> *Tallman*, 380 U.S. at 17.

<sup>78</sup> *S. Pac. Transp. Co.*, 75 T.C. at 541–42.

<sup>79</sup> For discussion of *SmithKline Beecham*, see *supra* text accompanying notes 40–66.

for conduct occurring “well before” the reversal.<sup>80</sup> That situation-specific, extreme-circumstances exception to deference was instead rendered by the Tax Court as a blanket precondition to deference that the agency’s position had previously been “clearly made a matter of public record such that all affected parties are aware of it.” The receptivity of the Supreme Court to *ASR* deference contrasts sharply with the hostility of the Tax Court to such deference.

Fourteen years later, in *CSI*, the Tax Court again rejected *ASR* deference on the same ground. Citing *Southern Pacific*, the court stated that: “unless an agency’s interpretation of a statute or a regulation is a matter of public record and is an interpretation upon which the public is entitled to rely when planning their affairs, it will not be accorded any special deference.”<sup>81</sup> The court stressed that the interpretation of the regulation urged by the IRS had not been set out in any ruling, procedure, or practice published before the litigation.<sup>82</sup>

Again, though, the Tax Court’s formulation of the rule is more draconian than the Supreme Court’s formulation, as to agency interpretations of both statutes and regulations. As to interpretations of statutes, the Supreme Court and lower federal courts have sometimes accorded *Chevron* deference to agency positions not formally set out before the controversy at hand.<sup>83</sup> As to interpretations of regulations, this article has already noted that the Supreme Court granted *ASR* deference to agency positions set out in litigation or *amicus* briefs in *Chase Bank*, *Talk America*, and *Auer* itself.<sup>84</sup>

In several cases between *Southern Pacific* and *CSI*, the Tax Court rejected *ASR* deference on a different ground. This article has illustrated that deference will not be accorded if the interpretation is plainly contrary

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<sup>80</sup> *SmithKline Beecham*, 132 S. Ct. at 2167–68.

<sup>81</sup> *CSI Hydrostatic Testers, Inc. v. Comm’r*, 103 T.C. 398, 409 (1994), *aff’d per curiam*, 62 F.3d 136 (5th Cir. 1995).

<sup>82</sup> 103 T.C. at 409.

<sup>83</sup> *See, e.g., NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256–57 (1995).

<sup>84</sup> *See supra* text accompanying notes 58–59.

to the regulation.<sup>85</sup> The 1993 case *Phillips Petroleum* involved the sourcing of sales income under Code § 863 and the “independent factory price” concept of longstanding regulations under § 863. The court acknowledged the *ASR* principle, but it rejected the IRS’s interpretation of the regulations set out in a much later notice. The court found that the notice entailed “a plain misreading” of the regulation which “effectively reads its plain meaning out of [it].”<sup>86</sup>

The *Phillips Petroleum* court cited its 1986 *Honeywell* decision for the proposition that the IRS may not “‘override the express language of [its] regulations’ by administrative action.”<sup>87</sup> The court read *Honeywell* as a case in which the IRS had tried “by revenue ruling to restrict the meaning of a term in a regulation that had a clear meaning.”<sup>88</sup>

In its turn, *Honeywell* cited the Tax Court’s 1985 *Woods Investment* decision. *Woods Investment* involved the interplay between Code § 312 as to computation of earnings and profits and consolidated return regulations under § 1502.<sup>89</sup> The Tax Court noted that the IRS’s current position was contrary to the view taken in several technical advice memoranda and in early stages of the audit in the case at hand.<sup>90</sup> The court rejected the Commissioner’s attempt to “change [ ] his position to the one he advances herein[,] [although] he failed to amend his regulations to reflect his new position.”<sup>91</sup>

The *Woods Investment* court reasoned: “Since [the Commissioner] has not taken steps to amend his regulations, we believe his apparent reluctance to use his broad power in this area does not justify judicial interference in

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<sup>85</sup> See *supra* text accompanying notes 41–44.

<sup>86</sup> *Phillips Petroleum Co. v. Comm’r*, 101 T.C. 78, 102 (1993), *aff’d without opinion*, 70 F.3d 1282 (10th Cir. 1995).

<sup>87</sup> 101 T.C. at 99 (quoting *Honeywell, Inc. v. Comm’r*, 87 T.C. 624, 635 (1986)). *Honeywell* involved amortization of financing expenses.

<sup>88</sup> 101 T.C. at 99.

<sup>89</sup> *Woods Investment Co. v. Commissioner*, 85 T.C. 274 (1985).

<sup>90</sup> *Id.*

<sup>91</sup> *Woods Inv. Co. v. Comm’r*, 85 T.C. 274, 281 (1985). Neither *Honeywell* nor *Woods Investment* cited *Auer* or *Seminole Rock*.

what is essentially a legislative and administrative matter.”<sup>92</sup> As noted above, the significance for *ASR* purposes of agency inconsistency is somewhat unsettled.<sup>93</sup> However, the suggestion that a changed position can be made effective only by amending the regulation in question is stricter than current doctrine requires.

The situation was not entirely bleak for the *ASR* principle, however. In a memorandum opinion in a 2006 gift tax case, Judge Laro invoked the principle as an alternative rationale.<sup>94</sup> The significance of this invocation is undercut, though, by the fact that the Tax Court views its memorandum opinions as having lesser precedential weight than its “regular” opinions.<sup>95</sup>

## 2. 2009 and Later Cases

*ASR* appeared in the Tax Court’s 2009 *Lantz* decision,<sup>96</sup> but it was used by the majority as a weapon against the IRS, not for it. *Lantz* was one of a series of cases testing the validity of a regulation under § 6015(f). Section 6015 prescribes a two-year limitations period for spousal relief claims under its subsections (b) and (c), but it is silent as to a comparable period under subsection (f).<sup>97</sup> Treasury acted to fill the gaps, promulgating a regulation establishing a two-year limitations period under subsection (f).<sup>98</sup> The Tax Court repeatedly invalidated the regulation and was sometimes

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<sup>92</sup> 85 T.C. at 282.

<sup>93</sup> See *supra* text accompanying notes 53–55.

<sup>94</sup> Estate of Focardi v. Comm’r, 91 T.C.M. (CCH) 936, 941, 2006 T.C.M. (RIA) ¶ 2006-056, at 941 (“Our view is further supported by the well-established principle that the judiciary should accord substantial deference to the Commissioner’s interpretation of Treasury regulations.”). The court cited the following cases for this principle: Jewett v. Comm’r, 455 U.S. 305, 318 (1982); Ford Motor Co. v. Milhollin, 444 U.S. 555, 565–66 (1980); Blessitt v. Ret. Plan for Employees of Dixie Engine, Co., 848 F.2d 1164, 1167–68 (11th Cir. 1988) (en banc); Anderson Bros. Ford v. Valencia, 452 U.S. 205, 219 (1981).

<sup>95</sup> See, e.g., Trapp v. Comm’r, 39 T.C.M. 1085, 1087, 1980 T.C.M. (RIA) ¶ 80,049, at 262 (1980) (“memorandum opinions of this Court are not relied upon as precedent [although] we seek to treat taxpayers consistently”).

<sup>96</sup> Lantz v. Comm’r, 132 T.C. 131 (2009) (en banc), *rev’d on other grounds*, 607 F.3d 479 (7th Cir. 2010).

<sup>97</sup> I.R.C. § 6015.

<sup>98</sup> Treas. Reg. § 1.6015-5(b)(1).

reversed on appeal<sup>99</sup>—until, under considerable political and professional pressure, Treasury withdrew the regulation.

*Lantz* was one of the cases of this line, but *ASR* was invoked in *Lantz* in an unusual way. In one of the dissents,<sup>100</sup> Judge Halpern argued in part that the rigor of the two-year limitations period was mitigated by the possibility of the IRS exercising discretion under the § 9100 regulations<sup>101</sup> to grant an extension of time for the filing of a claim.<sup>102</sup>

The majority countered that both the IRS and the taxpayer agreed that § 9100 relief was unavailable. The majority accepted this mutual position, bolstering it by invoking *ASR* deference to the IRS's view of the § 9100 regulations.<sup>103</sup>

Judge Halpern made two rejoinders, harkening to both the *Southern Pacific* and *Phillips Petroleum* lines of cases. First, he argued that although *ASR* deference may be available when the IRS's position is set out in published guidance, “[h]ere, the [IRS's] position is no more than a litigating position.”<sup>104</sup> Second, that position “in my view, is without merit, or, in the language of [*Seminole Rock*] ‘plainly erroneous’ and ‘inconsistent with the regulation,’ which would cause its rejection in any event.”<sup>105</sup>

*Lantz* is revealing. The majority enlisted *ASR*, but against the IRS; that is, in the cause of invalidating the regulation in controversy in the case. Moreover, the majority's defense of *ASR* was hardly robust. The majority

<sup>99</sup> See, e.g., *Mannella v. Comm'r*, 132 T.C. 196 (2009), *rev'd*, 631 F.3d 115 (3d Cir. 2011); *Hall v. Comm'r*, 135 T.C. 374 (2010).

<sup>100</sup> Twelve Tax Court judges participated in the majority opinion invalidating the regulation. *Lantz*, 132 T.C. at 131, 150. Judge Gale dissented without opinion. Judge Halpern wrote a dissenting opinion. *Id.* Judges Thornton and Holmes wrote a separate dissent, agreed with by Judges Halpern and Morrison. *Id.* at 152, 161.

<sup>101</sup> Treas. Reg. §§ 301.9100-1(c), -3(a) (1997).

<sup>102</sup> 132 T.C. at 150–51 (Halpern, J., dissenting).

<sup>103</sup> 132 T.C. at 144 n.10 (citing *Seminole Rock*, 325 U.S. at 414; and *Phillips Petroleum*, 101 T.C. at 97).

<sup>104</sup> *Id.* at 151 (Halpern, J., dissenting).

<sup>105</sup> *Id.*

did not specifically respond to either of the two objections made by Judge Halpern.

If the majority's view of *ASR* was tepid, Judge Halpern's was positively hostile. He continued to press the "no deference without published guidance" argument despite the fact that the Supreme Court, twelve years earlier in *Auer*, had accorded deference to a position in an agency brief.<sup>106</sup> And he merely asserted without explanation, reasoning, or authority his view that the IRS's interpretation of the § 9100 regulations was without merit. A standard as high as "plainly erroneous" clearly demands more before one can say it is satisfied.

A few months after *Lantz*, *ASR* was considered in *Pierre*, another full-court-reviewed decision. The IRS had determined gift tax liability as to transactions in which the taxpayer had transferred cash and securities to a single member LLC and later transferred her LLC interests to trusts.<sup>107</sup> The majority concluded that the LLC was not to be disregarded under the "check the box" entity classification regulations under § 7701, which was central to upholding the taxpayer's valuation of the interests.<sup>108</sup>

The IRS failed to argue that its interpretation of the regulations was entitled to *ASR* deference,<sup>109</sup> but Judge Cohen considered *ASR* in her concurrence, stating: "We have no reason to believe that [the IRS's] litigating position here is an interpretation of those regulations that reflects 'the . . . fair and considered judgment [of the Secretary of the Treasury] on the matter in question.'"<sup>110</sup>

Judge Halpern dissented.<sup>111</sup> He invoked the *ASR* principle, citing it using the majority opinion in *Lantz*.<sup>112</sup> The Cohen concurrence, however,

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<sup>106</sup> *Id.*

<sup>107</sup> *Pierre v. Comm'r*, 133 T.C. 24 (2009). Ten judges participated in the majority opinion.

<sup>108</sup> *Pierre*, 133 T.C. at 35–36.

<sup>109</sup> *Id.* at 40 (Cohen, J., concurring).

<sup>110</sup> *Id.* at 40–41 (quoting *Auer*, 519 U.S. at 462). Eight other judges agreed with the concurrence.

<sup>111</sup> *Id.* at 41. Judges Kroupa and Holmes agreed with the Halpern dissent. *Id.* at 51. Judge Kroupa also filed a separate dissenting opinion with which Judges Colvin, Halpern, Gale, Holmes, and Paris agreed. *Id.* at 52, 60.

<sup>112</sup> *Id.* at 44 (Halpern, J., concurring).

dashed any thought that *Lantz* represented relaxation of the Tax Court's narrow view of *ASR*. She stated that *Lantz* did not “adopt the litigating position of the [IRS] as distinct from preexistent and consistent administrative interpretations.”<sup>113</sup>

Judge Cohen's *Pierre* concurrence continues the approach of earlier Tax Court opinions. In addition, her language stating “[w]e have no reason to believe that . . .” bears mention. For the Supreme Court, proof of “not the agency's considered judgment” creates an exception to deference. Under Judge Cohen's formulation proof of “is the agency's considered judgment” appears to be a predicate to deference.

Moreover, Judge Cohen's substitution of “of the Secretary of the Treasury” for “of the agency” is interesting. Presumably she would not require the Secretary's personal approval; approval via delegation should suffice. The authority of the Commissioner comes by delegation from the Secretary of the Treasury.<sup>114</sup> The Department of Justice represents the Commissioner in other courts, but the IRS Chief Counsel's Office represents the Commissioner in the Tax Court. That Office has always been part of the Treasury, and it has been part of the IRS since before *Pierre* was decided. Briefs filed by IRS Counsel in “regular” Tax Court cases like *Pierre* are reviewed by Chief Counsel's National Office.<sup>115</sup> One wonders how much more is required to qualify for deference under Judge Cohen's formulation.<sup>116</sup>

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<sup>113</sup> *Id.* at 41 (Cohen, J., concurring).

<sup>114</sup> I.R.C. §§ 7801(a)(1), 7803(a)(2).

<sup>115</sup> As to these structural aspects, see DAVID M. RICHARDSON, JEROME BORISON & STEVE JOHNSON, CIVIL TAX PROCEDURE ch. 1 (2d ed. 2008).

<sup>116</sup> In a prominent non-tax case, Justice Breyer would have rejected explanations given for a changed FCC policy—because the explanations had been proffered by the Solicitor General on behalf of the FCC, not by the FCC itself. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 563 (2009) (Breyer, J., dissenting). Justice Breyer was outvoted in that case, however. Moreover, because IRS Counsel is part of the IRS itself, even Justice Breyer might stop short of the position taken by Judge Cohen in *Pierre*.

In 2010, the full Tax Court decided *Intermountain Insurance*, another case involving the possibility of *ASR* deference.<sup>117</sup> This decision was part of a line of cases testing the validity of Treasury regulations extending the six-year statute of limitations of § 6501(e) to tax understatements resulting from basis overstatements. Ultimately, a divided Supreme Court held the regulation to be invalid, thus resolving a sharp split among the lower federal courts.<sup>118</sup>

In *Intermountain Insurance*, a majority of the Tax Court held against the IRS.<sup>119</sup> As relevant here, one of the issues was whether the regulations applied to the case at hand under their effective/applicability date provisions. The majority thought the regulations did not apply but chose not to rest its decision on that rationale alone.<sup>120</sup> The majority acknowledged the *ASR* principle but, based on a “plain meaning” analysis of the provisions, concluded that the IRS’s view that the regulation did apply was “erroneous and inconsistent with the regulations.”<sup>121</sup>

The *Intermountain Insurance* majority invoked *ASR* by name but discredited it in substance. As we have seen, the *Auer* standard is whether the agency’s interpretation is “plainly erroneous or inconsistent with the regulation.” This high bar was not passed. The majority’s “plain meaning” argument was not plainly right, indeed probably was not right at all.<sup>122</sup> The Halpern/Holmes concurrence convincingly dispatched the argument,<sup>123</sup> and

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<sup>117</sup> *Intermountain Ins. Serv. of Vail, LLC v. Comm’r*, 134 T.C. 211 (2010), *rev’d en banc*, 650 F.3d 691 (D.C. Cir. 2011), *vacated*, 132 S. Ct. 2120 (2012). For discussion of the case, see Johnson, *supra* note 2.

<sup>118</sup> *United States v. Home Concrete & Supply*, 132 S. Ct. 1836, 1844 (2012).

<sup>119</sup> Seven judges participated in the majority opinion. *Intermountain*, 134 T.C. at 225. Judge Cohen concurred in an opinion agreed with by Judges Gale, Thornton, and Marvel. *Id.* at 226. Judges Halpern and Holmes filed an opinion concurring in the result only. *Id.* I previously expressed my opinion that the Halpern/Holmes approach offered the best resolution of the issues. Johnson, *supra* note 2, at 841. I remain of that view.

<sup>120</sup> *Intermountain*, 134 T.C. at 218–20.

<sup>121</sup> *Id.* at 219–20.

<sup>122</sup> See Johnson, *supra* note 2, at 840.

<sup>123</sup> *Intermountain*, 134 T.C. at 227–30.

the argument typically has been rejected by other courts considering the issue.<sup>124</sup>

In 2011, the Tax Court decided *Carpenter*, another case involving the validity of the new section 6501(e) regulations.<sup>125</sup> *Carpenter* also involved final regulations which replaced the temporary regulations at issue in *Intermountain Insurance*. The preamble to the regulations restated Treasury's position as to applicability. Judge Wherry's opinion for the Tax Court concluded that the text of the regulations did not support the position in the preamble.<sup>126</sup>

Judge Wherry acknowledged the *ASR* principle<sup>127</sup> and acknowledged that a preamble to a regulation may be a pertinent interpretive source.<sup>128</sup> Nonetheless, he declined to accord *ASR* deference, reasoning that:

[W]hether a tax year in question is "open" is the very essence of these proceedings. Deferring to [the IRS's] interpretation of "open" tax years for purposes of the effective/applicability date provisions would inevitably resolve the question of legitimacy of the regulations' substance. More generally, if we were to allow the Secretary to replicate in his regulations the core of the Code provision at issue and then defer to the Commissioner's interpretation of this regulatory text, it would inappropriately imbue this text with the solidity of [*ASR*] instead of subjecting it to the two steps of *Chevron*.<sup>129</sup>

It is not surprising that this theory failed to command support from a majority of the court. *ASR* and *Chevron* operate in different spheres. *ASR* deference is considered when the meaning of the regulation is at issue.

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<sup>124</sup> See, e.g., *Grapevine Imports, Ltd. v. United States*, 636 F.3d 1368, 1381–84 (Fed. Cir. 2011), *vacated*, 132 S. Ct. 2099 (2012).

<sup>125</sup> *Carpenter Family Invs., LLC v. Comm'r*, 136 T.C. 373 (2011) (en banc).

<sup>126</sup> *Id.* at 378–80 & n.4. Three other judges agreed with this opinion. Judge Marvel, without opinion, concurred in the result only. Judges Halpern and Holmes filed a concurring opinion. Judge Thornton also wrote a concurring opinion, with which Judges Cohen, Halpern, Holmes, and Paris agreed.

<sup>127</sup> *Id.* at 379 n.4.

<sup>128</sup> *Id.* at 379–80 n.4 (quoting *Wyo. Outdoor Council v. United States Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999)) ("Although the preamble does not 'control' the meaning of the regulation, it may serve as a source of evidence concerning contemporaneous agency intent.").

<sup>129</sup> *Id.* It is not clear whether Judge Wherry, through this language, was trying to invoke the anti-parroting exception. See *supra* text accompanying notes 61–62.

Once that meaning has been determined, *Chevron* is considered to determine whether the regulation comports with the underlying statute.<sup>130</sup> The Halpern/Holmes and Thornton concurrences suggested that the case should have been resolved on the basis of the Tax Court's precedents holding the regulations invalid. They were right. Doing so would have avoided the dubious adventures in the Wherry opinion.<sup>131</sup>

Later in 2011, the Tax Court decided *NEA*.<sup>132</sup> The issue in the case was how to calculate a labor union's unrelated business taxable income, and the outcome hinged on a regulation promulgated under § 512. Although eventually holding for the IRS, the court rejected *ASR* deference. The court, citing *Auer* and *Lantz*, recognized the deference principle; however, it was unable to apply it.<sup>133</sup> It was unclear that the IRS had in fact stated a position on the critical interpretation, or, if it had, what precisely that position was.<sup>134</sup> It appears that the court was correct in declining to afford *ASR* deference in *NEA*.

### 3. Evaluation

The Tax Court typically gives at least lip-service to *ASR*. Sometimes it even applies *ASR* deference faithfully, both in cases in which the IRS prevails and cases in which it justifiably should not. However, it is hard to escape the conclusion that, in the Tax Court, the *ASR* principle often is honored more in name than in substance.

*ASR* claims succeed in the Tax Court far less often than they do in the Supreme Court or even than they do in the federal district and circuit courts. This lesser effect is sometimes achieved in the Tax Court by use of bad doctrine. Examples of this include the court's adherence to a distorted notoriety element in cases like *Southern Pacific* and *CSI*. Other times, it is achieved by ungenerous application of good doctrine. Examples of this

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<sup>130</sup> See, e.g., *Stinson v. United States*, 508 U.S. 36, 45 (1993).

<sup>131</sup> See *Carpenter*, 136 T.C. at 397–405 (Halpern & Holmes, JJ., concurring) and at 405–06 (Thornton, J., concurring).

<sup>132</sup> *Nat'l Educ. Ass'n v. Comm'r*, 137 T.C. 100 (2011).

<sup>133</sup> *Id.* at 112–13.

<sup>134</sup> *Id.* at 112–13 (“We cannot defer to a position that is not expressly articulated.”). Moreover, one possible interpretation would have ignored the actual language of the regulation. *Id.* at 113.

include Tax Court judges' harsh, "hard look"<sup>135</sup> deployment of the "interpretation contrary to the regulation" exception in *Lantz* and *Intermountain Insurance* and of the "no settled agency position" exception in *Pierre*. The record is clear that the Tax Court applies *ASR* in a much less deferential spirit than do other federal courts.

### *B. Possible Explanations*

This article has shown that the Tax Court accords less weight to the *ASR* principle than do other federal courts. What could explain this behavior? Below, four possibilities are considered: (1) advocacy gap, (2) experience gap, (3) concept of proper tax administration, and (4) tax-specialist versus generalist judicial orientation. It is possible that, with particular judges in particular cases, all of these may operate to a degree. However, the fourth explanation appears to be the most plausible and generally significant.

#### 1. Advocacy Gap

Like adjudication in the United States generally, Tax Court litigation reflects the advocacy model more than the inquisitorial model.<sup>136</sup> Thus, to a meaningful extent, the Tax Court depends on the parties to identify and develop the issues that require judicial resolution. It may be that, as to the *ASR* principle, the Tax Court has not always been well served by the parties appearing before it.

Except in odd circumstances,<sup>137</sup> the government will be the party relying on *ASR*. The IRS Chief Counsel's Office represents the Commissioner in the Tax Court. Sometimes IRS Counsel fails to raise *ASR* when it could.<sup>138</sup> The Department of Justice represents the Commissioner in

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<sup>135</sup> For discussion of "hard look" review in administrative law generally, see ALFRED C. AMAN, JR., *ADMINISTRATIVE LAW IN A GLOBAL ERA* 33–35 (1992).

<sup>136</sup> For discussion of these models generally and in tax in particular, see Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 *FLA. L. REV.* 1, 17–18 (2004).

<sup>137</sup> Such as *Lantz*, 132 T.C. 131. *See supra* text accompanying notes 89–95.

<sup>138</sup> *See, e.g., Pierre*, 133 T.C. at 40 (Cohen, J., concurring) (noting that the IRS had failed to assert *ASR* deference).

other courts. The two sets of government tax litigators sometimes approach similar cases differently.<sup>139</sup> In our context, the Department of Justice tends to be more accustomed to dealing with administrative law issues, and so may raise *ASR* more readily.<sup>140</sup> This bureaucratic difference, although real, would explain the frequent appearance of the issue in the various courts more than it would the nature of the treatment it receives when it appears. Thus, other causes should be sought.

## 2. Experience Gap

Deference is a branch of general administrative law. In the past, the tax community often tended towards insularity<sup>141</sup> and only slowly and grudgingly acknowledged the relevance of administrative law in tax controversies.<sup>142</sup>

In decades gone by, some Tax Court cases addressed some administrative law issues<sup>143</sup>—but not often and, frankly, sometimes not very well.<sup>144</sup> Perhaps the Tax Court’s out-of-step treatment of *ASR* deference reflected in part its limited experience with administrative law generally.

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<sup>139</sup> For example, the Department of Justice often makes fraudulent conveyance arguments in tax cases (usually tax collection cases) within its jurisdiction. IRS Counsel also deals with fraudulent conveyance because it is the most frequent substantive basis of transferee liability cases. The Department of Justice often premises fraudulent conveyance on the federal fraudulent conveyance statute, subpart D of the Federal Debt Collection Procedures Act of 1990, Title XXXVI of the Crime Control Act of 1990, Pub. L. 101-647, 104 Stat. 4789, 4933. IRS Counsel rarely does so, relying instead on state fraudulent conveyance law. See RICHARDSON ET AL., *supra* note 115, at 414–15.

<sup>140</sup> The Tax Court’s opinion in the *Internet* case did not address *ASR*. The circuit court’s opinion on appeal did. *Internet Corp. v. Comm’r*, 111 T.C. 294 (1998), *rev’d*, 209 F.3d 901, 904 & 906–07 (6th Cir. 2000). IRS Counsel handled the case in the Tax Court; Justice did so on appeal.

<sup>141</sup> This tendency has sometimes been called “tax myopia.” See, e.g., Paul L. Caron, *Tax Myopia, or Mamas Don’t Let Your Babies Grow up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 518 (1994). It also has been called “tax exceptionalism.” E.g., Hickman, *supra* note 7.

<sup>142</sup> See, e.g., Leandra Lederman, *Civilizing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency*, 30 U.C. DAVIS L. REV. 183, 183 (1996).

<sup>143</sup> See, e.g., *Nappi v. Comm’r*, 58 T.C. 282, 284 (1972) (discussing applicability of the Administrative Procedure Act).

<sup>144</sup> See, e.g., *Intermountain*, 134 T.C. at 245 n.15 (Halpern & Holmes, JJ., concurring) (criticizing the Tax Court’s handling of administrative law issues in *Wing v. Comm’r*, 81 T.C. 17, 26–38 (1983)).

To the extent this ever was so, however, it is self-correcting. In the last fifteen years, there has been an explosion of litigation of administrative law issues in the Tax Court. In part, this has been because of the Internal Revenue Service Restructuring and Reform Act of 1998 (“RRA”).<sup>145</sup> RRA enacted a number of provisions—such as the spousal relief rules<sup>146</sup> and especially the collection due process rules<sup>147</sup>—that have raised unavoidable administrative law issues.<sup>148</sup> RRA also had an indirect effect in this direction. It established federal funding for low-income taxpayer clinics.<sup>149</sup> The consequent expansion of such clinics and their staffing has brought to the fore new corps of advocates who often have pressed administrative law issues in the Tax Court.<sup>150</sup>

In addition, two other areas—unconnected with the RRA—have brought administrative law issues into sharper relief in the Tax Court. These areas are deference doctrine generally<sup>151</sup> and procedural challenges to the validity of Treasury regulations.<sup>152</sup> Deference doctrine generally is part of the explosion of *Chevron*-era case law and commentary. Increased procedural challenges to tax rules and regulations is inevitable as tax lawyers—slowly perhaps but inexorably—adjust to the “intrusion” of administrative law into tax law.

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<sup>145</sup> Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998) (codified in various sections of the Code).

<sup>146</sup> I.R.C. § 6015.

<sup>147</sup> I.R.C. §§ 6320, 6330.

<sup>148</sup> See, e.g., *Robinette v. Comm’r*, 123 T.C. 85 (2004), *rev’d*, 439 F.3d 455 (8th Cir. 2006) (collection due process). See also *Wilson v. Comm’r*, 99 T.C.M. (CCH) 1552, 2010 T.C.M. (RIA) ¶ 134 (2010), *aff’d*, 705 F.3d 980 (9th Cir. 2013) (spousal relief). See generally Danshera Cords, *Administrative Law and the Judicial Review of Tax Collection Decisions*, 52 ST. LOUIS U. L.J. 429 (2008); Diane L. Fahey, *Is the United States Tax Court Exempt from Administrative Law Jurisprudence when Acting as a Reviewing Court?*, 58 CLEV. ST. L. REV. 603 (2010).

<sup>149</sup> I.R.C. § 7526.

<sup>150</sup> I am indebted for this point to Professor Leandra Lederman in a comment she made at the symposium “100 Years of the Federal Income Tax” held at Florida State University College of Law on March 1 and 2, 2013.

<sup>151</sup> See, e.g., *Carlos v. Comm’r*, 123 T.C. 275, 280 (2004); *Estate of Clause v. Comm’r*, 122 T.C. 115, 119 (2004); *Square D Co. v. Comm’r*, 118 T.C. 299, 307 (2002), *aff’d*, 438 F.3d 739 (7th Cir. 2006).

<sup>152</sup> See, e.g., *Intermountain*, 134 T.C. at 222–23 (Halpern & Holmes, JJ., concurring).

Thus, whether it likes it or not, the Tax Court is being forced to confront administrative law issues more and more often. Whatever historical significance an experience gap may have had as an explanation for the Tax Court's unenthusiastic embrace of *ASR*, it is unlikely to operate powerfully in the future.

### 3. Concept of Tax Administration

Tax issues may be, or may be perceived to be, different from other types of issues in ways that make deference seem to be less justified. For instance, deference sometimes is thought to be more appropriate when agencies are engaged in policymaking than when they are engaged in purely technical administration.<sup>153</sup>

Political legitimacy and accountability is part of the rationale articulated for *Chevron* deference. The Supreme Court stated:

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency . . . . [F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones. “Our constitution vests such responsibilities in the political branches.”<sup>154</sup>

Similar considerations also form part of the foundation for *ASR* deference. In its *ASR* decisions, the Supreme Court “has displayed the same concern with political accountability that underlay . . . *Chevron*.”<sup>155</sup> Thus, in a 1980 non-tax case, the Court granted *ASR* deference to agency interpretation of regulations that involved “interstitial lawmaking.”<sup>156</sup> In a 1991 case, the Court justified *ASR* deference in part on the fact that the

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<sup>153</sup> For examples of areas of discretion in tax administration, see Steve R. Johnson, *An IRS Duty of Consistency: The Failure of Common Law Making and a Proposed Legislative Solution*, 77 TENN. L. REV. 585–88 (2010).

<sup>154</sup> *Chevron*, 467 U.S. at 865–66 (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)). Similarly, “[t]he Tax Court exercises judicial power to the exclusion of any other function. It is neither advocate nor rulemaker. . . . It does not make political decisions.” *Freytag*, 501 U.S. at 891.

<sup>155</sup> Manning, *supra* note 8, at 629.

<sup>156</sup> *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980).

agency's interpretation of its regulation could "entail the exercise of judgment grounded in policy concerns."<sup>157</sup>

It is sometimes thought that the job of the Department of Treasury and the IRS is only to execute policy determined by Congress, not to formulate policy themselves.<sup>158</sup> One who views the missions of these agencies through this lens may find the case for *ASR* deference to be weaker as to tax agencies than as to more overtly policymaking agencies.

This view of tax agencies is reminiscent of a formerly robust notion of the role of "independent" federal agencies. This notion was reflected in the famous *Humphrey's Executor* case.<sup>159</sup> There the court described the Federal Tax Commission (emblematic of independent agencies) as "charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive [and] its members are called upon to exercise the trained judgment of a body of experts."<sup>160</sup>

In the decades since that decision, however, confidence in that conception has ebbed:

It is not as obvious today as it seemed in the 1930s that there can be such things as genuinely "independent" regulatory agencies, bodies of impartial experts . . . , or indeed, that the decisions of such agencies so clearly involve scientific judgment rather than political choice that it is even theoretically desirable to insulate them from the democratic process.<sup>161</sup>

Viewing the Department of the Treasury and the IRS as being removed from making policy was probably wrong from the start. The courts from

<sup>157</sup> *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 697 (1991).

<sup>158</sup> See, e.g., Rev. Proc. 1964-22, 1964-1 C.B. 689 ("It is the duty of the Service to carry out [tax] policy by correctly applying the laws enacted by Congress; to determine the reasonable meaning of various Code provisions in light of the Congressional purpose in enacting them; and to perform this work in a fair and impartial manner, with neither a government nor a taxpayer point of view.").

<sup>159</sup> *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

<sup>160</sup> *Id.* at 624.

<sup>161</sup> *Synar v. United States*, 626 F. Supp. 1374, 1398 (D.D.C. 1986), *aff'd sub nom.* *Bowsher v. Synar*, 478 U.S. 714 (1986). *But see* *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 540 (2009) (Stevens, J., dissenting) (describing *Humphrey's Executor* as "a landmark decision").

early on accorded the tax agencies a great deal of interpretive freedom, ample space for making, not just implementing, policy.<sup>162</sup>

In any event, that view is surely wrong now. The Department of the Treasury switched entity classification for tax purposes from a mandatory regime<sup>163</sup> to a substantially elective regime when it promulgated the check-the-box rules.<sup>164</sup> Similarly, the Department of the Treasury writes the law governing consolidated income tax returns under an extremely loose congressional delegation.<sup>165</sup> These and numerous other examples make it clear that, today, the federal tax agencies do not just implement policy; they make policy. Some in the tax community may cling to a narrower conception of the proper role of the Department of the Treasury and the IRS, and give *ASR* less shrift as a result. If so, however, they invoke a “reality” that may never have existed and surely does not exist today.

#### 4. Tax Specialist Versus Generalist Orientation

Having considered and discounted three possible explanations for weak *ASR* deference in the Tax Court, this article reaches a fourth and more plausible possible explanation. The Tax Court, as a tax-specialist tribunal, may be less readily disposed to deference claims than are the generalist federal courts.

Generalist judges—even those among the most illustrious—sometimes feel out of their depth when dealing with tax issues, a mood easily

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<sup>162</sup> See, e.g., *Boske v. Comingore*, 177 U.S. 459, 470 (1900) (“Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress.”); Randolph E. Paul, *Use and Abuse of Tax Regulations in Statutory Construction*, 49 *YALE L.J.* 660, 661–62 (1940) (describing the judicial standard governing review of tax regulations as a “very flexible requirement”).

<sup>163</sup> See, e.g., *Morrissey v. Comm’r*, 296 U.S. 344 (1935); *United States v. Kintner*, 216 F.2d 418 (9th Cir. 1954).

<sup>164</sup> *Treas. Reg. §§ 301.7701-1–301.7701-3* (2013). Despite criticisms, e.g., Gregg D. Polsky, *Can Treasury Overrule the Supreme Court?*, 84 *B.U. L. REV.* 185 (2004), these regulations have been upheld, e.g., *McNamee v. Dept. of Treasury*, 488 F.3d 100, 104–05 (2d Cir. 2007); *Medical Practice Solutions, LLC v. Comm’r*, 132 T.C. 125, 125 (2009), *aff’d sub nom. Britton v. Shulman*, 106 AFTR2d 2010-6048 (1st Cir. 2010), *cert. denied*, 131 S. Ct. 2974 (2011).

<sup>165</sup> See I.R.C. § 1502.

conducive to deference. For example, Justice Frankfurter remarked on the complexities and perplexities for judicial construction of tax legislation:

For one not a specialist in this field to examine every tax question that comes before the Court independently would involve in most cases . . . an inquiry [entailing] weeks of study and reflection. Therefore, in construing a tax law it has been my rule to follow almost blindly accepted understanding of the meaning of tax legislation, when that is manifested by long-continued, uniform practice, unless a statute leaves no admissible opening for administrative construction.<sup>166</sup>

Similarly, Judge Learned Hand stated (arguably with overmuch modesty):

In my own case the words of such an act as the Income Tax . . . merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of—leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time. I know that these monsters are the result of fabulous industry and ingenuity . . . ; yet at times I cannot help recalling a saying of William James about certain passages of Hegel: that they were no doubt written with a passion of rationality; but that one cannot help wondering whether to the reader they have any significance save that the words are strung together with syntactical correctness.<sup>167</sup>

In contrast, Congress created the Tax Court<sup>168</sup> as a specialized court<sup>169</sup> in part to provide greater expertise in tax cases.<sup>170</sup> And, of course, the Tax Court does that. Most of its judges were tax attorneys before their elevation to the bench, and many had positions of responsibility in federal tax

<sup>166</sup> *Flora v. United States*, 362 U.S. 145, 177–78 (1960) (Frankfurter, J., dissenting).

<sup>167</sup> Learned Hand, *Thomas Walter Swan*, 57 YALE L.J. 167, 169 (1947).

<sup>168</sup> For the history of developments leading to the contemporary Tax Court, see David Laro, Commentary, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. ILL. L. REV. 17, 22.

<sup>169</sup> There is a large and growing literature on specialized courts. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* (2d ed. 1996); Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377; Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111 (1990); see also Steve R. Johnson, *The Phoenix and the Perils of the Second Best: Why Heightened Appellate Deference to Tax Court Decisions Is Undesirable*, 77 OR. L. REV. 235, 235–36 nn.1 & 2 (1998) (citing additional sources).

<sup>170</sup> See, e.g., *Arrowsmith v. Comm’r*, 344 U.S. 6, 12 (1952) (Jackson, J., dissenting) (“I still think the Tax Court is a more competent and steady influence toward a systematic body of tax law than our sporadic omnipotence in a field beset with invisible boomerangs.”).

agencies or congressional tax staffs.<sup>171</sup> The Tax Court’s specialized docket—consisting of only tax cases—reinforces that knowledge and experience.<sup>172</sup>

Tax Court judges often—indeed usually—have greater tax experience and knowledge than the IRS Counsel attorneys arguing the cases before them (although, of course, the positions taken by such counsel have, in all substantial cases, been coordinated with Counsel’s National Office). The seed of deference is unlikely to germinate in such soil.

Indeed, most judges of the Tax Court fought a rear-guard action against *Chevron* deference in Tax (especially as to general-authority regulations) until they were dragged along by generalist appellate courts. For example, in the 2006 *Swallows Holding* case, a majority of the Tax Court invalidated a general-authority regulation under § 882.<sup>173</sup> Instead of *Chevron*, the majority applied as the controlling standard the pre-*Chevron* *National Muffler* case.<sup>174</sup> Three dissenting opinions were filed,<sup>175</sup> and the

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<sup>171</sup> One commentator remarked that “the tax bar and the specialized tax bench form a closed community that has developed many characteristics of a Mandarin class, including a conviction of its own ability to interpret properly a document which ordinary mortals find impenetrable.” John F. Coverdale, *Text as Limit: A Plea for a Decent Respect for the Tax Code*, 71 TUL. L. REV. 1501, 1504–05 (1997). One need not subscribe to all the language of this observation to acknowledge that its kernel contains some truth.

<sup>172</sup> This is not to suggest, of course, that Tax Court judges find their cases unchallenging. Even they sometimes give vent to frustrations like those felt by generalist judges. *E.g.*, *Rhone-Poulenc Surfactants & Specialties, L.P. v. Comm’r*, 114 T.C. 533, 540 (2000) (noting the “distressingly complex and confusing” nature of the partnership audit and litigation rules); *Foxman v. Comm’r*, 41 T.C. 535, 551 n.9 (1964) (referring to the “distressingly complex and confusing nature of the provisions of subchapter K [which] present a formidable obstacle to the comprehension of these provisions without the expenditure of a disproportionate amount of time and effort even by one who is sophisticated in tax matters with many years of experience”); *Lewis v. Comm’r*, 35 T.C. 71, 76 (1960) (observing that tracking through the redemption rules is a “most exasperating task”). See also Shamik Trivedi & Jeremiah Coder, *TEFRA Raises Complex Jurisdictional Issues*, *Judge Says*, 135 TAX NOTES 985 (2012) (reporting remarks of Judge Mark V. Holmes).

<sup>173</sup> *Swallows Holding, Ltd. v. Comm’r*, 126 T.C. 96, 148 (2006), *rev’d*, 515 F.3d 162 (3d Cir. 2008).

<sup>174</sup> *Nat’l Muffler Dealers Ass’n v. United States*, 440 U.S. 476–77 (1979). However, the *Swallows Holding* majority stated they would have reached the same result had they applied *Chevron* instead. *Swallows*, 126 T.C. at 131.

<sup>175</sup> The two most relevant dissents were by Judge Stephen Swift and Judge Mark V. Holmes. *Swallows*, 126 T.C. at 148–57 and 162–82.

Third Circuit properly reversed the majority’s holding on appeal.<sup>176</sup> The issue was not put to rest until 2011 when the Supreme Court held that *Chevron* displaced the seemingly more rigorous *National Muffler* standard even as to general-authority regulations.<sup>177</sup>

Why this foot-dragging? The famous *Chevron* “two step” directs a court to determine, first, whether the statute is ambiguous, and second, if it is, whether the agency’s interpretation is “permissible.”<sup>178</sup> A permissible interpretation need not be the only or even the best possible construction; it need only be a reasonable construction.<sup>179</sup> Thus, inherent in *Chevron* is the notion that a statute may have more than one acceptable meaning.

A less pluralistic concept of law and meaning appeared to animate some Tax Court decisions.<sup>180</sup> Thus, opposition to *Chevron*—and, by association, opposition to other deference doctrines like *ASR*—may be anachronistic: “a relic of the pre-*Chevron* days, when there was thought to be only one ‘correct’ interpretation of a . . . text.”<sup>181</sup> Tax Court judges inclined to seek a single “true” meaning of a tax statute or regulation—and who see themselves equal to the IRS in this mission of discovery—may find deference uncomfortable.

### III. WHOSE VIEW IS BETTER?

This article has shown that the Tax Court is less inclined to accord *ASR* deference than are other federal courts, certainly much less than the Supreme Court. With whom walks wisdom? Below, this article considers

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<sup>176</sup> For arguments against the holding and reasoning of the *Swallows Holding* majority, see Steve R. Johnson, *Swallows Holding as It Is: The Distortion of National Muffler*, 112 TAX NOTES 351 (2006); Johnson, *supra* note 7.

<sup>177</sup> *Mayo Found.*, 131 S. Ct. at 712.

<sup>178</sup> *Chevron*, 467 U.S. at 842–43.

<sup>179</sup> *Id.* at 865.

<sup>180</sup> See, e.g., *J.C. Penney Co. v. Comm’r*, 37 T.C. 1013, 1017 (1962) (“[i]n the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress”) (emphasis added) (citing *Minor v. Mechanics’ Bank*, 26 U.S. 64,65 (1828)).

<sup>181</sup> *Barnhart v. Walton*, 535 U.S. 212, 226 (2002) (Scalia, J., concurring in part and concurring in the judgment).

both the justifications asserted for *ASR* deference and the objections offered against it. The conclusion is that the disadvantages are stronger than the advantages. *ASR* deference is a dubious rule of law. Accordingly, the Tax Court's reluctance seems more soundly based than the Supreme Court's enthusiasm. This part ends, however, on a cautionary note involving legitimacy.

### *A. Justifications*

Numerous rationales for *ASR* deference have been offered by courts and commentators. They cluster into three areas: (1) the notion that the agency wrote the regulation, so it is best positioned to say what it means, (2) a set of ideas about the institutional roles of agencies and courts, and (3) complementary policy benefits. These are considered below. This article concludes that the asserted justifications have only limited force.

#### 1. "They Wrote It, So They Best Know What It Means"

This has been the most important of the proffered justifications, because it seems to possess obvious common-sense appeal. One would think that the agency that wrote the regulations is in "a better position . . . to reconstruct the purpose of the regulations" than anyone else.<sup>182</sup> Indeed, it is sometimes thought that *ASR* deference should be even broader than *Chevron* deference "because in the latter case the agency is addressing [the legislature's] intentions, while in the former it is addressing its own."<sup>183</sup>

Others find this only "a weak justification":

[i]n many cases, the interpretation at issue was announced so long after the rule was issued that it is unlikely the agency decisionmakers who issued the interpretation played any role in the decisionmaking process that led to the issuance of the rule. Moreover, most courts . . . confer [*ASR*] deference . . . even when the agency changes its interpretation, as long as the agency acknowledges that it is making a change and gives plausible reasons for the change.<sup>184</sup>

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<sup>182</sup> *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 152. *See also* 1 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 6.11, at 532 (3d ed. 1994).

<sup>183</sup> *Abbott Labs*, 573 F.3d at 1330. *See also Tallman*, 380 U.S. at 801.

<sup>184</sup> *Pierce & Weiss*, *supra* note 12, at 516–17.

Moreover, those (like the author of this article) who incline towards textual approaches to interpretation cannot warmly embrace this rationale. The textualist asks not “what was the subjective intent of the author of this legal command” but “what objective intent does the document manifest in its language, structure, and context.”<sup>185</sup> The “they wrote it, they know it best” justification is a purely subjective approach.

Were subjective intent the touchstone for interpretation, presumably courts would receive testimony from legislators as to what the legislature meant when it drafted and enacted a statute. But Anglo-American law has rejected that approach since Blackstone at least,<sup>186</sup> and courts overwhelmingly continue to reject it today.<sup>187</sup>

## 2. Institutional Roles

This cluster of arguments revolves around the idea that courts should respect the role of agencies and recognize the realities within which agencies operate. This includes both separation-of-powers and pragmatic strands. Although he did not endorse it, one commentator described the idea: “Viewed in isolation, [ASR] may be an understandable reaction to the exigencies of modern regulatory governance; it cuts agencies helpful interpretive slack in a world in which life is short, resources are limited, and agencies must address complex issues that have unpredictable twists and turns.”<sup>188</sup>

The Court has defended ASR deference on the ground that it reflects “sensitivity to the proper roles of the political and judicial branches” of our

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<sup>185</sup> See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16–17 (1997); Steve R. Johnson, *The Two Kinds of Legislative Intent*, 51 STATE TAX NOTES 1045 (2009).

<sup>186</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES 58.

<sup>187</sup> See, e.g., Bread Political Action Comm. v. FEC, 455 U.S. 577, 582 n.3 (1982); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1890 n.195 (1998).

<sup>188</sup> Manning, *supra* note 8, at 616–17. See generally Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989). Manning rejects the quoted view, however, noting that ASR “cannot be considered in isolation.” *Id.* at 617.

government.<sup>189</sup> An important part of that, of course, is the familiar argument that agencies, by virtue of their greater technical expertise, have a comparative advantage over the courts in determining the needs of regulation.<sup>190</sup>

Courts should respect the role of agencies, no doubt. But courts have their own constitutional responsibilities as well; to act as the ultimate arbitrators of what the law means.<sup>191</sup> At some point, cutting an agency slack to do its job becomes abdication by the court of its job. Accordingly, “balancing the necessary respect for an agency’s knowledge, expertise, and constitutional office with the courts’ role as interpreter of laws can be a delicate matter.”<sup>192</sup>

Moreover, one may ask why these standard incantations justify the super-deference that the Supreme Court has extended under *ASR*. They are no more potent “in the context of agency interpretation of agency rules than in the context of agency interpretations of agency-administered statutes, agency policy decisions, or agency findings of fact.”<sup>193</sup> These other contexts are governed by standards of review which yield pro-agency results far less frequently than *ASR*.<sup>194</sup>

Super-deference is not justified by these rationales. This is particularly the case as to the Tax Court. Generalist judges know less about tax law and administration than do IRS officials. But the Tax Court is a specialized expert tribunal whose judges typically had extensive tax careers (often with the IRS) before appointment and have dockets composed exclusively of tax

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<sup>189</sup> *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991); *see also* *Thomas Jefferson Univ. v. Shalala*, 114 S. Ct. 2381, 2387 (1994).

<sup>190</sup> *E.g.*, *Martin*, 499 U.S. at 151.

<sup>191</sup> *E.g.*, *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”); *see also* *Bacher v. Office of State Eng’r*, 146 P.3d 793, 798 (Nev. 2006); *Rump v. Aetna Cas. & Sur. Co.*, 710 A.2d 1093, 1098 (Pa. 1998).

<sup>192</sup> *Gonzales*, 546 U.S. at 255.

<sup>193</sup> *Pierce & Weiss*, *supra* note 12, at 517.

<sup>194</sup> *See supra* text accompanying notes 23–24.

cases.<sup>195</sup> The comparative advantage institutional argument is no reason for *ASR* deference in the Tax Court.

### 3. Policy Benefits

Justice Scalia noted that among the “undoubted advantages to [*ASR*] deference” is that “[i]t makes the job of a reviewing court much easier.”<sup>196</sup> Perhaps this is true, but there are higher responsibilities for courts than looking to their ease.

More significantly, an often voiced argument involves uniformity and predictability of the law. Specifically,

[s]ince an agency’s jurisdiction is national and a circuit court’s jurisdiction is regional, a high degree of judicial deference to agency rules furthers the goal of maximizing national uniformity in implementing national statutes. Conversely, a low degree of deference would reduce national uniformity, since circuit courts are likely to adopt differing interpretations of agency rules.<sup>197</sup>

Once again, however, this consideration is not unique. “[I]t is no stronger in the context of agency interpretations of agency rules than in the context of agency interpretations of agency-administered statutes,”<sup>198</sup> so it does not justify a rule of super-deference. Moreover, this consideration applies with greater force with respect to geographically bounded federal district and circuit courts than with respect to the Tax Court, which has nationwide jurisdiction and was created to promote national uniformity in application of the tax laws.<sup>199</sup>

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<sup>195</sup> See *supra* text accompanying notes 153–57.

<sup>196</sup> *Talk Am.*, 131 S. Ct. at 2266 (Scalia, J., concurring). The *SmithKline Beecham* Court quoted this statement in referring to *ASR*’s “important advantages.” *SmithKline Beecham*, 132 S. Ct. at 2168 & n.17.

<sup>197</sup> *Pierce & Weiss*, *supra* note 12, at 517; see also *Talk Am.*, 131 S. Ct. at 2266; *French v. D.C. Bd. of Zoning Adjustment*, 658 A.2d 1023, 1033 (D.C. 1995).

<sup>198</sup> *Pierce & Weiss*, *supra* note 12, at 517.

<sup>199</sup> See, e.g., DUBROFF, *supra* note 35, at 389 (citing congressional sources).

## B. Objections

### 1. General Objection—Perverse Incentives

*ASR* is far from the only dimension of law in which courts are forced to grapple with the legal consequences of ambiguous drafting. Every first-year law student is familiar with the *contra proferentem* canon under which ambiguities in a contract are interpreted against the party who drafted the contract.<sup>200</sup> Some believe that this “venerable principle . . . does not apply to governmental directives,”<sup>201</sup> but cognate principles do. For instance, statutes can be unconstitutional as “void for vagueness,”<sup>202</sup> and ambiguous criminal statutes are often interpreted in favor of defendants under the rule of lenity.<sup>203</sup>

*ASR* deference seems incongruous against the backdrop. Other sloppy drafters are punished. Why should *ASR* reward agencies for their sloppy drafting of regulations by giving them an opportunity—a preferred opportunity—to clarify?

In an influential critique of *ASR*, Professor Manning has built on this foundation of incongruity by noting possibly pernicious incentive effects and constitutional ramifications. He argues that “one must assess [*ASR*’s] validity in light of the incentives that it supplies to an agency engaged in rulemaking.”<sup>204</sup> And those incentives can be perverse. “If an agency’s rules mean whatever it says they mean (unless the reading is plainly erroneous),

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<sup>200</sup> See, e.g., *Phoenix Control Sys., Inc. v. Ins. Co. of N. Am.*, 796 P.2d 463, 470 (Ariz. 1990) (Feldman, V.C.J., specially concurring).

<sup>201</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 42 (2012).

<sup>202</sup> See, e.g., *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

<sup>203</sup> See, e.g., *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion); *United States v. Cong. of Indus. Org.*, 335 U.S. 106, 142 (1948) (Rutledge, J., concurring) (“Blurred signposts to criminality will not suffice to create it.”); SCALIA & GARNER, *supra* note 201, at 296–302. There has been a debate in recent decades as to whether the rule of lenity has been downgraded. At a minimum, reports of its death have been exaggerated. See WILLIAM D. POPKIN, *MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS* 107–14 (5th ed. 2009).

<sup>204</sup> Manning, *supra* note 8, at 617.

the agency effectively has the power of self-interpretation.”<sup>205</sup> What is wrong with that? Manning answers:

This authority permits an agency to supply the meaning of regulatory gaps or ambiguities of its own making and relieves the agency of the cost of imprecision that it has produced. This state of affairs makes it that much less likely that an agency will give clear notice of its policies either to those who participate in the rulemaking process prescribed by the Administrative Procedure Act (APA)<sup>206</sup> or to the regulated public. The present arrangement also contradicts a major premise of our constitutional scheme and of contemporary separation of powers case law—that a fusion of lawmaking and law-exposition is especially dangerous to our liberties.<sup>207</sup>

This critique has gained traction. A number of judges and courts have found it persuasive.<sup>208</sup> Justice Scalia reworked the argument thusly, stating, “When Congress enacts an imprecise statute that it commits to the implementation of an executive agency, it has lost no control over that implementation . . . . The legislative and executive functions are not combined.”<sup>209</sup> In contrast, “when an agency promulgates an imprecise rule, it leaves *to itself* the implementation of that rule, and thus the initial determination of the rule’s meaning.”<sup>210</sup>

Furthermore,

though the adoption of a rule is an exercise of the executive rather than the legislative power, a properly adopted rule has fully the effect of law. It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.<sup>211</sup>

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<sup>205</sup> *Id.*

<sup>206</sup> 5 U.S.C. § 553 (2012) (prescribing notice-and-comment procedures).

<sup>207</sup> Manning, *supra* note 8, at 617.

<sup>208</sup> *See, e.g., Anderson v. State Dep’t of Natural Resources*, 693 N.W.2d 181, 186 (Minn. 2005).

<sup>209</sup> *Talk Am.*, 131 S. Ct. at 2266 (Scalia, J., concurring).

<sup>210</sup> *Id.* (emphasis in original).

<sup>211</sup> *Id.* Justice Scalia quoted Montesquieu. “When the legislative and executive powers are united in the same person . . . there can be no liberty: because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.” CHARLES DE SECONDAT & BARON DE LA BREDE ET DE MONTESQUIEU, *SPIRIT OF THE LAWS* bk. XI, ch. 6, at 151–52 (O. Piest ed., T. Nugent Trans. 1949).

Moving from constitutional first principles to doctrinal particulars, Justice Scalia concluded:

Deferring to an agency's interpretation of a statute does not encourage Congress, out of a desire to expand its power, to enact vague statutes; the vagueness effectively cedes power to the Executive. By contrast, deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.<sup>212</sup>

This concern is carefully reasoned and intriguing. However, it is not unquestionable. It makes a theoretical case, but “the proof of the pudding is in the eating.” If agencies have an incentive under *ASR* to behave strategically, are they in fact doing so? Proof of that fact is needed.<sup>213</sup>

Arguably such proof was present in the *Talk America* context.<sup>214</sup> However, it is doubtful that the Department of Treasury and the IRS engage in such strategic behavior with appreciable frequency. The tax agencies repeatedly stress that they issue regulations and rulings to provide guidance to assist taxpayers in governing their affairs.<sup>215</sup> This article accepts the sincerity of these assertions of purpose, and honoring that purpose is the counterincentive to the perverse incentive noted by Professor Manning and Justice Scalia.

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<sup>212</sup> *Talk Am.*, 131 S. Ct. at 2266 (Scalia, J., concurring).

<sup>213</sup> This is reminiscent of the clash between the majority opinion and Justice Blackman's dissent in *Bowsher v. Synar*, 478 U.S. 714 (1986). The majority invalidated the Gramm-Rudman-Hollings balanced budget act because the potential existed for a key administrator of the scheme created by the act to be removed in a fashion repugnant to the Constitution. *Id.* at 732. Instead of invalidating the whole scheme *ab initio* because the possibility existed, Justice Blackman urged a more modest remedy. “Any incompatibility [between the act and the Constitution] should be cured by refusing to allow congressional removal—if it ever is attempted—and not by striking down the central provision of the [act].” *Id.* at 777. Similarly, aware of the possibility of abuse described by Manning and Scalia, we could discard *ASR* deference entirely because of the possibility, or we could stay our hand until a convincing record has been established that the possibility turns into actuality with sufficient frequency and consequence.

<sup>214</sup> Justice Scalia appeared to think so. To the material quoted above, he added: “The seeming inappropriateness of *Auer* deference is especially evident in cases such as these, involving an agency that has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends.” *Talk Am.*, 131 S. Ct. at 2266.

<sup>215</sup> See, e.g., I.R.C. § 601.601(d)(2)(iii) (2013); Mitchell Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, 43 TAXES 756, 756, 763 & 776 (1965).

In addition, the Manning/Scalia concern is undercut by the antiparrotting exception. As noted previously, *ASR* deference does not attach when the regulation merely repeats the language of the statute.<sup>216</sup> This limits the agency's ability to issue a wholly vacuous regulation in order to preserve maximum room for subsequent maneuver. To avoid the exception, the agency must go "beyond the language of the statute by particularizing or clarifying the statutory language to some significant but uncertain extent."<sup>217</sup>

This consideration does not wholly defuse the Manning/Scalia concern. Theoretically, an agency could still use notice-and-comment procedure to promulgate "a broadly worded rule that contains many ambiguities, as long as the rule clarifies or particularizes the statutory language to the extent necessary to avoid the 'parrotting' characterization. The agency could then use the interpretive process to make most important decisions."<sup>218</sup> Although this theoretical window of strategic opportunity exists, it would be risky for an agency to try to crawl through it. It would be a delicate calculation to assess just where the antiparrotting exception ends, and thus, where the range of maximum strategic opportunity begins. An agency that made too aggressive or optimistic an estimate would wind up losing *ASR* deference.

## 2. Tax-Specific Objections

In addition to general objections to *ASR* deference, several concerns are particular to the tax context. First, no taxpayer is liable for tax unless some law affirmatively makes her liable. Typically, such "law" is a statute. In some instances, by virtue of delegated authority, a Treasury regulation may be such law in the sense that it defines or provides a predicate condition triggering the liability established by statute. But it would be an uncomfortable stretch to allow such law to be an interpretation of an unclear regulation. Tax liability should not be "imposed upon the citizen

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<sup>216</sup> See *supra* text accompanying notes 61–62.

<sup>217</sup> Pierce & Weiss, *supra* note 12, at 518.

<sup>218</sup> *Id.* at 518–19.

upon vague or doubtful interpretations.”<sup>219</sup> In particular, “the levying of taxes is the exclusive function of the Legislative branch and . . . the Executive may not exact taxes from the citizen except where the proposed exaction finds clear support in the taxing law.”<sup>220</sup>

Second, “[t]ax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them.”<sup>221</sup> Vague regulations “clarified” by explanations by the Department of Treasury or the IRS make it difficult for citizens to understand and to fulfill their obligation to pay taxes they legally owe.<sup>222</sup>

Third, *ASR* deference is in conflict with what may or may not be a canon of tax construction. A state supreme court stated that, “[i]t is a well-established rule that a taxing statute must be strictly construed against the taxing power and in favor of the taxpayer, and all doubts as to whether or not a tax has been imposed must be resolved in favor of the taxpayer.”<sup>223</sup>

State tax cases often take this approach.<sup>224</sup> The situation in federal tax cases is less clear. Hundreds of federal cases have invoked the pro-taxpayer canon.<sup>225</sup> Yet many federal cases have rejected the canon or simply ignored

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<sup>219</sup> *In re Del Busto’s Est.*, 6 Pa. C.C. 289, 297 (Pa. Orph. 1888) (quoting *Powers v. Barney*, 5 Blatchf. 202 (1863)).

<sup>220</sup> *Masonite Corp. v. Fly*, 194 F.2d 257, 260 (5th Cir. 1952).

<sup>221</sup> *Philadelphia Storage Battery Co. v. Lederer*, 21 F.2d 320, 321 (E.D. Pa. 1927).

<sup>222</sup> Supreme Court justices have repeatedly stressed the importance of protecting reliance interests against excessive agency interference in both tax, *e.g.*, *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1849 (2012) (Scalia, J., concurring in part & concurring in the judgment), and non-tax contexts, *see, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 541–42 (2009) (Stevens, J., dissenting); *id.* at 536 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>223</sup> *State Tax Comm’n v. Edmondson*, 196 So. 2d 873, 876 (Miss. 1967) (quoting *State v. Johnson*, 118 So. 2d 308, 313 (Miss. 1960)).

<sup>224</sup> *See* Steve R. Johnson, *Pro-Taxpayer Interpretation of State-Local Tax Laws*, 51 STATE TAX NOTES 441 (Feb. 9, 2009).

<sup>225</sup> *See, e.g.*, *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 93 (1934) (describing the canon as “a salutary one” but finding it inapplicable on the facts of the case); *Gould v. Gould*, 245 U.S. 151, 153 (1917).

it,<sup>226</sup> and many others have applied instead what amount to pro-IRS canons of construction.<sup>227</sup>

Broadly speaking, a pendulum has swung in our tax history. When limited-government values are in the ascendancy, courts trot out the pro-taxpayer canon. When international or domestic crises make activist government appear necessary, the canon recedes in the reported cases.<sup>228</sup> After the 1940s, the principle largely disappeared from the federal decisions, except in occasional decisions from the Court of Claims, its successors, and the Sixth Circuit.<sup>229</sup> About a decade ago, two opinions in a Supreme Court case asserted the continuing vitality of the pro-taxpayer canon,<sup>230</sup> but it has not been prominent in subsequent case law.<sup>231</sup>

If the pro-taxpayer canon exists and has vitality,<sup>232</sup> it and *ASR* deference operate at cross purposes. In cases of ambiguity, one can favor the taxpayer or one can favor Treasury and the IRS. One cannot favor both the taxpayer and the tax agencies.

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<sup>226</sup> See, e.g., *Burnet v. Guggenheim*, 288 U.S. 280, 286 (1933).

<sup>227</sup> Such as the canon that tax exemptions are construed narrowly. See, e.g., *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001); *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988).

<sup>228</sup> Steve R. Johnson, *Should Ambiguous Revenue Laws Be Interpreted in Favor of Taxpayers?*, *NEV. LAWYER*, Apr. 10, 2002, at 15 (chronicling the pendulum phenomenon).

<sup>229</sup> See, e.g., *Ellis v. United States*, 416 F.2d 894, 897 (6th Cir. 1969).

<sup>230</sup> *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 839 (2001) (Thomas, J., concurring) and *id.* at 839 n.1 (Stevens, J., dissenting).

<sup>231</sup> Justice Scalia has lamented that the pro-taxpayer canon “unfortunately can no longer be said to enjoy universal approval.” *SCALIA & GARNER*, *supra* note 201, at 299–300.

<sup>232</sup> There is always the question of whether a canon actually influences the outcome of a case or serves only as “table thumping,” *i.e.*, as a rhetorical device to justify or rationalize results reached through other means. However, it appears that the canon has been material to the outcome of at least some federal and state cases. See, e.g., *Gould v. Gould*, 245 U.S. 151, 153 (1917); *Gross Income Tax Dep’t v. Harbison-Walker Refractories Co.*, 48 N.E.2d 834, 837 (Ind. App. 1943); *Appeal of William Grove, Inc.* 56 Pa. D. & C. 2d 510, 515 (Pa. Ct. Com. Pl. Cumberland Cnty., 1972); *A.N.B. Corp. v. Comptroller of Treasury*, 1990 WL 10957, at \*6-7 (Md. Tax Ct. 1969).

### C. Evaluation

There are respectable arguments on both sides of the *ASR* controversy. For the purposes of this article, there are three relevant inquiries. The first inquiry involves one's general approach to statutory interpretation. As noted above, *ASR* deference involves an intentionalist approach.<sup>233</sup> This author shares Justice Holmes' view. To paraphrase, "[w]e do not inquire what the [agency] meant; we ask only what the [regulation] means."<sup>234</sup>

The second inquiry involves context. If one believes that *ASR* deference is good (or bad) as a general matter, are there reasons to reverse that judgment in the particular context of tax? In this author's view, the presumption should be against such reversal. Tax rules should reflect more general rules of law unless there is good reason for deviation.<sup>235</sup> The Supreme Court has endorsed this approach.<sup>236</sup> Possible relevant differences between tax and non-tax contexts are described and, for the most part, discounted above.<sup>237</sup>

The third inquiry involves legitimacy. Assume that one believes that *ASR* deference is generally unwise or that it is generally acceptable but is unwise in the tax context. Would such a conviction justify the Tax Court's ungenerous application of *ASR*? The Supreme Court has not announced a tax exception to *ASR*, and of course the Tax Court has not tried to do so

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<sup>233</sup> See *supra* text accompanying notes 159–64.

<sup>234</sup> OLIVER WENDELL HOLMES, *The Theory of Legal Interpretation*, in COLLECTED LEGAL PAPERS 203, 207 (1920) (quoted with approval in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 397 (1951) (Jackson, J., concurring)).

<sup>235</sup> See Johnson, *supra* note 2, at pt. IIIA2. See also Caron, *supra* note 141; Michael Livingston, *Practical Reason, "Purposiism," and the Interpretation of Tax Statutes*, 51 TAX L. REV. 677, 677–79 (1996) (pondering whether different methods should be used in interpreting tax as opposed to other types of statutes but noting that "the lure of uniformity remains great" and expressing "skeptical[ism] regarding the supposed uniqueness of tax law").

<sup>236</sup> The taxpayer "has not advanced any justification for applying a [different] standard of review to Treasury Department regulations than we apply to the rules of any other agency. In the absence of such justification, we are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly recognized the importance of maintaining a uniform approach to judicial review of administrative action." *Mayo Found.*, 131 S. Ct. at 713.

<sup>237</sup> See *supra* parts II.B.3., II.B.4., and III.B.2.

overtly. The Tax Court's campaign against *ASR* deference, if that description is fair, has been guerilla, not conventional, warfare.

#### CONCLUSION

Speaking of *ASR*, a recent circuit court case observed that “deferential review is not inconsequential.”<sup>238</sup> One could be forgiven for thinking that, in Tax Court *ASR* cases, “deferential review is not deferential.”

This article has shown that, in federal courts generally and in the Supreme Court especially, agencies prevail at a high rate when they assert *ASR*. That is not true in the Tax Court, where *ASR* claims lose more often than they succeed. That is not accidental. A variety of factors, including the nature of tax cases and differences between subject-matter specialist and generalist courts, interact to produce these disparate outcomes.

What are we to make of this normatively? The Tax Court might be taken to task for judicial insubordination; for applying *ASR*—surely knowingly—in a more restrictive fashion than the teaching of the Supreme Court would countenance. The Tax Court could perhaps be defended against such an accusation based on contextual differences: the “tax versus non-tax” and “specialist versus generalist” explanations for the discrepancy.

Alternatively, the Tax Court might be defended on the ground that it is right and the Supreme Court is wrong. *ASR* is an unwise principle of law. Its harms exceed its benefits, and the doctrine should be abrogated. The Tax Court's hostility to *ASR* may sound in that realization. If, as occasional rumblings inspire hope for, the Supreme Court may ultimately downgrade or dispense with *ASR* deference, it may be that the Tax Court is less insubordinate than prescient.

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<sup>238</sup> *Summit Petrol. Corp. v. EPA*, 690 F.3d 733, 741 (6th Cir. 2012).