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Muffled *Chevron*: Judicial Review of Tax Regulations

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I. INTRODUCTION

Taxpayers and their lawyers frequently express displeasure with tax regulations. Some go further and litigate the regulations' validity. The **result** of such challenges often depends on the degree of deference that reviewing courts give to the regulations. The degree of judicial deference to administrative decision-making in turn raises questions about the division of labor between courts and agencies. It "implicates constitutional concerns about the role of the courts in a government of separated powers," perhaps most importantly, about the ability of courts to serve "as a balance for the peoples' protection against abuse of power by other branches of government."[1]

In recent years, courts facing questions of judicial deference to agency decisions have had to struggle with *Chevron U.S.A., Inc. v. National Resources Defense Council*,[2] a 1984 Supreme Court decision that has been described as creating a "revolution in administrative law" by giving controlling effect to administrative decisions.[3] This article examines the extent to which *Chevron* has influenced judicial review of tax regulations.[4] It concludes that, if *Chevron* has had any effect in this context, it may have been to decrease marginally, rather than increase, deference to Treasury regulations. The article also argues that judicial review of tax regulations provides a model for a revised *Chevron*.

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1. Alfred C. Aman, Jr. & William T. Mayton, Administrative Law 341 (1993), in part quoting United Public Workers v. Mitchell, 330 U.S. 75, 564-65 (1947).

2. 467 U.S. 837 (1984).

3. Kenneth W. Starr, Judicial Review in the Post-Chevron Era, 3 Yale J. On Reg. 283, 307 (1986). Thousands of cases have cited *Chevron*. See Paul L. Caron, Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers, 13 Va. Tax Rev. 517, 556 (1994) (locating over 2,100 case citations to *Chevron* as of June 29, 1993). I found over 3,400 case citations as of April 14, 1996. This article explores in further detail the intersection of many of the issues raised by Prof. Caron, including the impact of *Chevron*, the use of legislative history, and the choice of forum.

4. This study resembles in methodology several articles that have examined the Supreme Court's deference to administrative agencies. See Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969 (1992) [hereinafter Merrill, Judicial Deference]; Thomas W. Merrill, Textualism and the Future of the *Chevron* Doctrine, 72 Wash. U. L.Q. 351 (1994) [hereinafter Merrill, Textualism]; Patricia M. Wald, The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States, 39 Am. U. L. Rev. 227 (1990). Although this study examines decisions of several courts, it is limited to tax and regulations and thus is far narrower than the empirical study of courts of appeals decisions undertaken by Professors Schuck and Elliott. See Peter H. Schuck & Donald E. Elliott, To the *Chevron* Station: An Empirical Study of Federal Administrative Law, 1990 Duke L.J. 984 (1990). Professors Schuck and Elliott, however, excluded from their study any cases that had come "through specialized tribunals such as the U.S. Tax Court." Id. at 990 n.15. See also Linda R. Cohen & Matthew L. Spitzer, Solving the *Chevron* Puzzle, 57 Law & Contemp. Probs. 65 (1994).

In some ways, tax regulations are unusual. The regulations interpret a particularly complex, interrelated statutory scheme, which Congress frequently revisits and amends.[5] Voluminous legislative history accompanies most tax legislation.[6] The Treasury and IRS take the position that almost all tax regulations are interpretive, not legislative,[7] but in promulgating these regulations, they routinely follow the notice and comment procedures that the Administrative Procedure Act requires only for legislative regulations.[8] The Tax Court, which is a specialized, Article I court, hears most challenges to the regulations.[9]

Despite these atypical features, tax regulations represent a useful arena for examining the effects of *Chevron* on the approaches of various federal courts to agency interpretation. Tax regulations are frequently challenged, but the number of cases is not so large as to prevent consideration of all of them.[10] The Treasury and IRS take action in many ways other than promulgating regulations, and questions of *Chevron* deference thus arise in areas other than regulations.[11] As the most carefully considered and reviewed of actions within the Treasury and IRS,[12] regulations present the strongest case for deference. Furthermore, tax regulations pertain to questions of law, where courts have particular expertise, but involve a technical area, where deference to the administrator has long been counseled.[13] They thus

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5. See C. Eugene Steuerle, The Tax Decade: How Taxes Came to Dominate the Public Agenda (1992); Richard L. Doernberg & Fred S. McChesney, On the Accelerating Rate and Decreasing Durability of Tax Reform, 71 Minn. L. Rev. 913 (1987).

6. See Bradford L. Ferguson et al., Reexamining the Nature and Role of Tax Legislative History in Light of the Changing Realities of the Process, 67 Taxes 804 (1989); Michael Livingston, Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes, 69 Tex. L. Rev. 819 (1991).

7. See infra note 29 and accompanying text.

8. See infra note 30 and accompanying text.

9. See infra Part II.C.

10. This study involved approximately 400 cases.

11. See John Coverdale, One Size Does Not Fit All: Court Review of Treasury Regulations and Revenue Rulings in the Chevron Era, 64 Geo. Wash. L. Rev. ___ (1996); Linda Galler, Emerging Standards for Judicial Review of IRS Revenue Rulings, 72 B.U. L. Rev. 841 (1992) [hereinafter Galler, Emerging Standards]; Linda Galler, Judicial Deference to Revenue Rulings: Reconciling Divergent Standards, 56 Ohio St. L.J. 1037 (1995) [hereinafter Galler, Judicial Deference].

12. See Michael I. Saltzman, IRS Practice and Procedure ¶ 3.02 (2d ed. 1991 & Supp. 1993); Mitchell Rogovin, The Four R's: Regulations, Rulings, Reliance and Retroactivity, 43 Taxes 756 (1965); Paul F. Schmid, The Tax Regulations Making Process—Then and Now, 24 Tax Law. 541 (1971). Moreover, the Tax Court, which hears the vast majority of tax cases, has relied on *Chevron* only in the context of regulations. See infra Part III.D.

13. See, e.g., Dobson v. Commissioner, 320 U.S. 489 (1943). The tax law is complicated, but so are many other areas. *Chevron* itself arose in such an area, environmental law. In many important ways, tax is like other areas of law interpreted and administered by

pose neatly conflicting concerns raised by *Chevron*.

In particular, decisions regarding tax regulations test the persuasiveness of Justice Scalia's jurisprudence of interpretation. At the same time that Justice Scalia positions himself as a key proponent of *Chevron*, he has reinterpreted *Chevron* to argue that the text of the statute frequently provides the interpretive answer and that examination of legislative history should cease. In taxation, as in other areas of the law, Justice Scalia's views have had influence. Many tax opinions, especially recent ones, interpret the language of the Code without consideration of legislative history.

At the same time, although courts reviewing tax regulations generally consider the statutory text as the first step of analysis, they do not usually find the interpretive answer to be obvious from the language of the statute. As the second step in analysis, these courts undertake a thorough and detailed examination of legislative history. The more specialized the court, the more detailed and lengthy is the examination. Thus, this review of tax regulations also offers a useful gloss on theories that both *Chevron* deference and resort to plain meaning labor-saving devices for generalist courts.[14]

This article examines trial court and appellate decisions since 1984 that have upheld or struck down tax regulations. Although all the cases are post-*Chevron*, *Chevron* has been cited in tax cases only since 1989[15] and by the Tax Court only since 1992.[16] This period thus offers both pre- and post-*Chevron* approaches to testing the validity of regulatory action. What emerges from this study of challenges to tax regulations is that in the area of taxation,

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agencies. Consider, for example, how well Professor Pierce's generic description of agency-administered statutes applies to tax:

> A typical agency-administered statute consists of over one hundred pages of text, and many extend for several hundred pages. All such statutes are plagued with ambiguities, omission, and internal inconsistencies. An agency's primary task is to construct a workable national . . . program that is consistent with the statute that authorizes its creation. Many of the hundreds of provisions in an agency-administered statute, including almost all of the provisions that are the subject of litigation, relate to other provisions in complicated ways.

Richard J. Pierce, Jr., The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State, 95 Colum. L. Rev. 749, 764 (1995). See Caron, supra note 3, at 531 ("isolation of tax lawyers from their nontax counterparts has fed the . . . myth that tax law is fundamentally different from other areas of law").

Of course, there are differences as well. Other programs seek directly to regulate or grant benefits. Tax law seeks to raise revenue; it regulates only indirectly by imposing taxes with disparate impacts and grants benefits indirectly by offering tax preferences.

14. See infra Part IV.

15. See American Medical Ass'n v. United States, 887 F.2d 760, 770 (7th Cir. 1989); Knapp v. Commissioner, 867 F.2d 749, 752 (2d Cir. 1989).

16. Georgia Fed. Bank v. Commissioner, 98 T.C. 105, 107-10 (1992).

as in other areas of the law, *Chevron* has not worked the revolution in the balance of powers between agencies and the courts that some commentators feared. It has not displaced judges from a key role in the review of agency regulations.[17] Instead, as in other areas of the law, *Chevron* may have decreased deference to administrative action by encouraging courts themselves to decree the meaning of a statute.

Decisions reviewing tax regulations, however, offer a significant and promising variation on current *Chevron* doctrine. These decisions examine legislative history not to divine congressional intent, but to gauge the reasonableness of administrative interpretation. This approach accommodates a variety of concerns and each of the branches of government: It respects the significance of the text enacted by Congress, the position of the executive branch as represented by the agency, and the importance of judicial review to protect against abuses of power. That is, the approach in tax cases offers an alternative model for judicial review of agency interpretations, one that helps courts to preserve a role for legislative history and resist the siren call of resort to plain meaning.

Part II describes the distinction between legislative and interpretive regulations, doctrines of judicial deference, and the various courts that hear tax challenges. Part III sketches the development of the *Chevron* doctrine in tax cases and how it has influenced the traditional tests for the validity of tax regulations. Part IV compares plain meaning and the use of legislative history as tools of statutory construction. This study concludes by urging courts reviewing regulations, in both tax and nontax cases, to adopt a muffled *Chevron* doctrine that begins but does not end with consideration of plain meaning.

II. FRAMEWORK FOR ANALYSIS

A. *Interpretive and Legislative Regulations*

Administrative law distinguishes between legislative and interpretive rules.[18] In general, a legislative rule has the legal effect of a statute. It binds the agency promulgating it, the courts, and private parties. "It creates legally

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17. See Merrill, Judicial Deference, supra note 4; Merrill, Textualism, supra note 4.

18. For purposes of this article, the terms "rule" and "regulation" are synonymous. In other contexts, interpretive rules need not be regulations. See Robert A. Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public? 41 Duke L.J. 1311 (1992); Galler, Emerging Standards, supra note 11; Galler, Judicial Deference, supra note 11, Kevin W. Saunders, Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation, 1986 Duke L.J. 346.

enforceable duties that did not exist before the rule was promulgated."[19] Thus, asking whether a regulation creates new law or has a self-executing legal effect is one way of determining whether a rule is legislative.[20] A legislative rule, however, is valid as such only if the agency adopting it not only has congressional authority to do so, but also follows the notice and comment procedures required by the Administrative Procedure Act in adopting the regulation.[21] Interpretive rules, in contrast, do not as a legal matter bind private parties or reviewing courts.[22] They do not create new duties, but clarify existing ones, and can be promulgated without following the notice and comment rulemaking procedures.[23]

However well or badly the "legal effect" standard may work in other areas of law to distinguish legislative from interpretive regulations,[24] tax decisions have not adopted it.[25] Instead, in tax cases, the courts have distinguished between legislative and interpretive regulations according to the source of authority for promulgating the regulation.[26] Regulations promulgated under the general authority of section 7805(a) are considered interpretive,[27] and regulations promulgated pursuant to a grant of authority under a

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19. Richard J. Pierce, Jr. et al., Administrative Law and Process 284-85 (2d ed. 1992). See also Saunders, supra note 18.

20. See Michael Asimow, Public Participation in the Adoption of Temporary Tax Regulations, 44 Tax Law. 343, 353-54 (1991) [hereinafter Asimow, Public Participation]. Determination of whether regulations are interpretive or legislative has been one of the most frequently litigated administrative law issues of the last two decades. Id. See also Anthony, supra note 18; Michael Asimow, Nonlegislative Rulemaking and Regulatory Reform, 1985 Duke L.J. 381 [hereinafter Asimow, Regulatory Reform]; Michael Asimow, Public Participation in the Adoption of Interpretive Rules and Policy Statements, 75 Mich. L. Rev. 520 (1977) [hereinafter Asimow, Interpretive Rules]; Charles H. Koch, Jr., Public Procedures for the Promulgation of Interpretive Rules and General Statements of Policy, 64 Geo. L.J. 1047 (1976); Saunders, supra note 18.

21. 5 U.S.C. § 553(b) (1994); Robert A. Anthony, "Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog, 8 Admin. L.J. 1, 2 & n.5 (1994); Saunders, supra note 18, at 346-47.

22. Interpretive rules often bind parties as a practical matter. See Anthony, supra note 18; Anthony, supra note 21; Saunders, supra note 18.

23. See Asimow, Public Participation, supra note 20, at 344 & n.8. See also Anthony, supra note 21, at 1-2 & nn.2-3; Asimow, Regulatory Reform, supra note 20, at 381 & n.5; Saunders, supra note 18, at 346 & n.5.

24. See Asimow, Public Participation, supra note 20, at 355 n.61; Asimow, Regulatory Reform, supra note 20, at 394.

25. See United States v. Vogel Fertilizer Co., 455 U.S. 16 (1982); Rowan Cos. v. United States, 452 U.S. 247 (1981).

26. See Asimow, Public Participation, supra note 20, at 358 (calling this distinction a concept "now generally discarded in administrative law").

27. Section 7805(a) authorizes "the Secretary [to] prescribe all needful rules and regulations for the enforcement of this title." Some cases have suggested that regulations

particular code section are considered legislative.[28]

The IRS takes the position that tax regulations are almost always interpretive and only rarely legislative.[29] At the same time that it asserts its regulations are interpretive, however, the IRS generally follows the kind of procedures that the Administrative Procedure Act requires only for legislative regulations: notice to taxpayers and the opportunity to comment.[30] In this regard, tax regulations are unusual; the administrative agency does not claim for them the legal effect of legislative regulations, but it follows the procedures required for legislative regulations.

B. *Pre-*Chevron *Doctrines of Judicial Deference*

Traditionally, courts gave greater deference to administrative agencies construing statutes through legislative rules than through interpretive rules. Under the strong deference due legislative regulations,[31] courts tended to uphold legislative rules unless they were "arbitrary, capricious, or manifestly contrary to the statute."[32] In contrast, judicial review of interpretive rules tended to exhibit a weak deference; courts explained that they were free, if they wished, to substitute their own judgment regarding legal issues raised by interpretive rules.[33]

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adopted pursuant to general regulatory authority are not different from those adopted pursuant to specific authority. See FCC v. WNCN Listeners Guild, 450 U.S. 582, 594 (1981). Under this approach, regulations adopted pursuant to § 7805(a) are legislative. See Asimow, Public Participation, supra note 20, at 354 & n.56. The IRS, however, does not take this position.

28. For example, § 469(*l*) specifies that the Secretary "shall prescribe such regulations as may be necessary or appropriate to carry out provisions of this section." See also IRC §§ 337(d), 1504(a)(5).

29. See Internal Revenue Manual §§ 211, 212, 531.1; Asimow, Public Participation, supra note 20, at 356; Asimow, Regulatory Reform, supra note 20, at 390. Some notices of proposed rulemaking cite both § 7805(a) and a specific grant of authority.

30. See 5 U.S.C. § 553(b) (1994) (Administrative Procedure Act); Regs. § 601.601.

31. I borrow the terms "strong deference" and "weak deference" from Michael Asimow, The Scope of Judicial Review of Decision of California Administrative Agencies, 42 UCLA L. Rev. 1157, 1194 (1995).

32. 1 Kenneth C. Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 3.2, at 111 (3d ed. 1994); see Batterton v. Francis, 432 U.S. 416 (1977); Kevin W. Saunders, Agency Interpretations and Judicial Review: A Search for Limitations on the Controlling Effect Given Agency Statutory Constructions, 30 Ariz. L. Rev. 769, 770 (1988) (citing 5 U.S.C. § 706(2)(1982)). Strong deference to administrative agencies is generally known as *Hearst* review, after NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). See Pierce, et al., supra note 19, at 348-49 (explaining *Hearst* review).

33. Weak deference is sometimes referred to as *Packard* deference, after Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947), or *Skidmore* deference, after Skidmore v. Swift & Co., 323 U.S. 134 (1944). In *Skidmore*, the Supreme Court wrote that interpretive rules, "while not controlling upon the courts by reason of their authority, do constitute a body of

In practice, however, "[t]he approach was instead pragmatic and contextual," and "deference could range over a spectrum from 'great' to 'some' to 'little.'"[34] In determining the degree of deference to give to an administrative position, courts relied on a variety of factors, including the language of the statute, the legislative history, whether the interpretation was adopted contemporaneously with the statute, how consistently the agency maintained the position, how carefully agency policymakers had considered the interpretation, the extent to which Congress delegated authority to the agency, and the need for expertise in writing the rule.[35] Nonetheless, "[t]he default rule was one of independent judicial judgment. Deference to the agency interpretation was appropriate only if a court could identify some factor or factors that would supply an affirmative justification for giving special weight to the agency views."[36]

Two factors argued for courts giving special weight to interpretive tax regulations: the expertise needed to understand the complexity of the tax code and the authority given the Treasury under section 7805(a) to prescribe all needful rules. Thus, it has long been the rule that interpretive tax regulations are to be upheld if they are reasonable.[37] In *National Muffler Dealers Ass'n v. United States*,[38] the Supreme Court explained that the Court would uphold an interpretive tax regulation so long as it implemented the congressional mandate in some reasonable manner. To determine reasonableness, the opinion continues, a court should "see whether the regulation harmonizes with the plain language of the statute, its origins, and its purpose."[39] The opinion lists many of the standard factors as relevant considerations, including "the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the

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experience and informed judgment." Id. at 140. See Saunders, supra note 32, at 770, 771 & n.14. The different degrees of deference turn in part on the assumption that for interpretive rules, careful judicial review substitutes for public comment. See Galler, Emerging Standards, supra note 11, at 863 & n.123, 864.

34. Merrill, Judicial Deference, supra note 4, at 972. See Coverdall, supra note 11.

35. For further discussion of the multiple factors, see Colin S. Diver, Statutory Interpretation in the Administrative State, 133 U. Pa. L. Rev. 549, 562 & n.95 (1985); Merrill, Judicial Deference, supra note 4, at 972-75; David R. Woodward & Ronald M. Levin, In Defense of Deference: Judicial Review of Agency Action, 31 Admin. L. Rev. 329, 332-41 (1979).

36. Merrill, Judicial Deference, supra note 4, at 972.

37. The Supreme Court stated recently: "Because Congress has delegated to the Commissioner the power to promulgate 'all needful rules and regulations for the enforcement [of the Internal Revenue Code], 26 U.S.C. § 7805(a),' we must defer to his regulatory interpretations of the Code so long as they are reasonable." Cottage Sav. Ass'n v. Commissioner, 499 U.S. 554, 560-61 (1991) (citation omitted). The issue in *Cottage Savings* involved the application of a regulation, not a challenge to its validity.

38. 440 U.S. 472 (1979).

39. Id. at 477.

degree of scrutiny Congress had devoted to the regulation during subsequent re-enactments of the statute."[40]

In *National Muffler*, the Supreme Court, in upholding a regulation that defined a business league eligible for exemption under section 501(c)(6), looked principally to the history of the applicable statute and the regulation at issue. It concluded: "In short, while the Commissioner's reading of section 501(c)(6) perhaps is not the only possible one, it does bear a fair relationship to the language of the statute, it reflects the views of those who sought its enactment, and it matches the purpose they articulated. . . . The Commissioner's view therefore merits serious deference."[41]

Thus, in tax, deference to the administrative agency rather than independent judicial judgment has been the default rule. When reviewing an interpretive tax regulation, *National Muffler* instructed, courts should consider the standard factors, but should not undertake such consideration in order to justify deference. Instead, courts were to presume deference and test the presumption by examining at least some of the standard factors.

Nonetheless, while interpretive tax regulations have received more deference than other interpretive rules, courts have continued to give legislative tax regulations more deference than interpretive ones.[42] As the Supreme Court wrote in *Rowan Cos. v. United States* of an interpretive regulation promulgated under the general authority of section 7805(a), "[b]ecause we . . . can measure the Commissioner's interpretation against a specific provision in the Code, we owe the interpretation less deference than a regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision."[43] That is, legislative tax regulations, like other legislative regulations, were to be given strong deference as compared to the serious deference given to interpretive tax regulations.

TABLE I
Varieties of Judicial Deference to Administrative Interpretation

	Weak Deference	Serious Deference	Strong Deference
Interpretative Regulations Other than Tax	▬▬▬▬▬▬▬▬▬▬		
Interpretative Tax Regulations		▬▬▬▬▬▬▬▬	
Legislative Regulations (Tax and Non-Tax)			▬▬▬▬

40. Id.
41. Id. at 484.
42. See Asimow, Public Participation, supra note 20, at 357.
43. 452 U.S. 247, 253 (1981).

The difference between the strong deference due legislative tax regulations and the serious deference owed to interpretive tax regulations is small; "the distinction between legislative and interpretative regulations is often blurred in practice, and the supposedly diverse standards of judicial review tend to converge and even to coalesce."[44] Accordingly, both cases involving legislative regulations and those considering interpretive regulations cite *National Muffler*.[45] Like any multiple factor test, the *National Muffler* standard is malleable, and the results of its application are uncertain.[46] Some cases conclude that inconsistency with any one of its three factors merits invalidation of the regulation; others find consistency with any one sufficient grounds to uphold the validation. Yet other cases weigh and balance the various factors. Sometimes deference figures prominently, sometimes hardly at all.

The opinions of the trial and appellate courts in one recent case expose the flexibility and uncertainty of the *National Muffler* test. In *Nalle v. Commissioner*,[47] taxpayers challenged a regulation that denied rehabilitation tax credits to buildings that had been relocated. Both the Tax Court and the Court of Appeals for the Fifth Circuit invoked *National Muffler*.[48] Based on the legislative history of the statute, the Tax Court "conclude[d] that the regulation harmonizes with congressional intent" because "[f]rom its inception, the tax credit for rehabilitation expenditures was intended to provide an economic stimulus for those areas susceptible to economic decline and abandonment."[49] The Fifth Circuit rejected the Tax Court's reliance on what it called "selected passages from the credit's legislative history"[50] and invalidated the regulation on the basis of what it saw as the plain meaning of an unambiguous statute in which "Congress crafted a detailed and reasonably precise means for determining eligibility for the tax credit."[51]

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44. 4 Boris I. Bittker & Lawrence Lokken, Federal Taxation of Income, Estates and Gifts ¶ 110.4.2, at 110-38 (2d ed. 1992) (footnotes omitted).

45. See, e.g., Griffin Indus., Inc. v. United States, 27 Fed. Cl. 183, 196 (Cl. Ct. 1992), aff'd, 11 F.3d 1072 (Fed. Cir. 1993); Pepcol Mfg. Co. v. Commissioner, 13 F.2d 355, 357 (10th Cir. 1993), amended, 28 F.3d 1013 (10th Cir. 1994).

46. See generally Sidney A. Shapiro & Richard E. Levy, Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions, 44 Duke L.J. 1051 (1995) (describing the post-*Chevron* confusion among courts regarding judicial review of administrative decisions).

47. 99 T.C. 187 (1992), rev'd, 997 F.2d 1134 (5th Cir. 1993), aff'd, 55 F.3d 189 (5th Cir. 1995).

48. See *Nalle*, 99 T.C. at 191; *Nalle*, 997 F.2d at 1136.

49. 99 T.C. at 195.

50. 997 F.2d at 1137.

51. Id. at 1138.

In sum, despite the serious deference afforded interpretive tax regulations under *National Muffler*, the various factors used to test that deference permit courts considerable leeway. In addition, the three different forums available to a taxpayer seeking judicial review complicate application of the standards for judicial review.

C. *Options for Judicial Review*

A taxpayer denying the validity of a regulation may bring suit in any of three courts: the Tax Court, a federal district court, or the United States Court of Federal Claims.[52] Only suit in the Tax Court permits the taxpayer to litigate without first paying the tax.[53] Primarily for this reason, 95% of all substantive tax cases begin in the Tax Court.[54] The Tax Court is a national Article I court; it has its headquarters in Washington, DC, but its 19 judges travel throughout the country to hear cases.[55] The Tax Court judges, who are appointed to 15-year terms,[56] have tax backgrounds and try only tax cases.[57] The Chief Judge reviews all cases and selects certain cases for review by the full court, including any case in which an opinion proposes to invalidate a regulation.[58]

A taxpayer also has the option of paying the tax and suing for a refund in the federal district court where the taxpayer resides or in the United States Court of Federal Claims.[59] The Court of Federal Claims was created as the Claims Court by the Federal Courts Improvement Act of 1982 as a successor to the Court of Claims and became the Court of Federal Claims in 1992.[60] A national Article I court, it hears claims against the government, and tax comprises approximately one-third of its work.[61] District court judges are Article III judges, and very few of them are tax experts.[62] Only a small percentage of the docket of federal district courts consists of tax cases.

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52. See IRC § 6213; 28 U.S.C. § 1346 (1988).

53. See IRC § 6213.

54. Tax Section, Executive Comm. of New York State Bar Ass'n, Response to Proposals for a National Tax Court of Appeals, 46 Tax Notes 819, 821 (Feb. 12, 1990).

55. See IRC §§ 7441, 7443, 7445-7446; see also Bittker & Lokken, supra note 44, § 115.21, at 115-19.

56. IRC § 7443(e).

57. Tax Section, Executive Comm. of New York State Bar Ass'n, supra note 54, at 821. Some have government background, others come from private practice.

58. See Lee A. Sheppard, Should There Be A National Court of Tax Appeals? 46 Tax Notes 762, 763 (Feb. 12, 1990).

59. See IRC § 7422; 28 U.S.C. §§ 1346(a)(1), 1402(a)(1) (1988).

60. Pub. L. No. 102-572, § 902, 106 Stat. 4516. See James W. Moore, Judicial Code, Moore's Federal Practice 7-1, 7-2 (1995).

61. Sheppard, supra note 58, at 764.

62. William A. Klein & Joseph Bankman, Federal Income Taxation 47 (10th ed. 1995).

Despite the presence of two national trial courts, conflicts in the circuits do arise in tax cases. Decisions of the United States Court of Federal Claims are reviewable by the Court of Appeals for the Federal Circuit,[63] which hears cases involving claims against the government, including but not limited to taxes, as well as customs and patent cases.[64] Decisions of both the Tax Court and the district courts are reviewable by the federal court of appeals in the circuit where the taxpayer resides.[65]

Courts of appeals do not defer to the legal conclusions of the Tax Court, whose decisions are reviewable by a court of appeals in the same manner and to the same extent as decisions of the federal district courts in civil actions tried without a jury.[66] Since 1970, the Tax Court has "follow[ed] a Court of Appeals decision which is squarely in point where appeal . . . lies to that Court of Appeals and to that court alone."[67] Under this rule, the Tax Court sometimes issues inconsistent decisions.

Thus, at the trial court level, taxpayers have the choice of a specialized Article I court, a semi-specialized Article I court, or a generalist Article III court. Most tax cases go to the specialized court, which has a specialized bar and its own procedures. That is, at the trial level, most tax cases are argued and decided by specialists in the field. While these specialists have expertise in the tax law, they may not be aware of developments in administrative law generally. All appeals of tax decisions go to an Article III court, although one of those appellate courts, the Court of Appeals for the Federal Circuit, has a somewhat specialized jurisdiction.

III. THE *CHEVRON* DOCTRINE

A. *Development of the Doctrine*

Whatever the judicial forum, tax cases, like other cases reviewing administrative agencies, have distinguished between interpretive and legisla-

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63. "A favorable precedent in the Federal Circuit enables all subsequent taxpayers, by routing their cases to the Claims Court, to prevent a conflict among the circuits." Bittker & Lokken, supra note 44, ¶ 115.7, at 115-60.

64. See 28 U.S.C. § 1295 (1988 & Supp. 1994). Some of the judges on the Federal Circuit have tax backgrounds. Tax Section, Executive Comm. of New York State Bar Ass'n, supra note 54, at 827.

65. IRC § 7482(b).

66. IRC § 7482(a)(1).

67. Golsen v. Commissioner, 54 T.C. 742, 757 (1970), aff'd, 445 F.2d 985 (10th Cir. 1971), cert. denied, 404 U.S. 940 (1971). The Tax Court does not follow the *Golsen* rule if it believes the appellate decision has been outmoded by intervening judicial development or is not squarely in point. See Delta Metalforming Co. v. Commissioner, 37 T.C. Memo (CCH) 1485, 1488-89, T.C. Memo (P-H) ¶ 78,354 (1978), aff'd, 632 F.2d 442 (5th Cir. 1980), cert. denied, 455 U.S. 906 (1982); Kent v. Commissioner, 61 T.C. 133 (1973).

tive regulations and afforded less deference to the former. Some commentators on *Chevron*, however, have read that case as eviscerating this traditional distinction and substituting for it a distinction between clear and ambiguous statutes.

The Court in *Chevron* upheld a legislative regulation of the Environmental Protection Agency that permitted a plant-wide definition for stationary sources of air pollution, even though this definition changed the policy of the previous administration and made it far easier to satisfy environmental standards.[68] The Court observed:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute . . . . Sometimes the legislative delegation [to interpret the statute] . . . is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[69]

According to the *Chevron* opinion, a court should use "traditional tools of statutory construction," particularly legislative history, to determine

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68. As Pierce et al., supra note 19, at 350, explain:

> The Environmental Protection Agency (EPA) originally interpreted 'source' in a way that subjected any significant addition or modification of a plant, such as addition of a boiler, the new source review process, as long as the addition or modification produced emissions of pollutants above a relatively low threshold. In 1981, EPA changed its interpretation of 'source' to refer to an entire plant. Under this much broader definition, a company was required to go through the new source review process only if the net effect of all additions or changes proposed at a plant would be an increase in emissions above the specified threshold.

69. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-44 (1984) (footnotes omitted).

congressional intent at step one[70] and defer to an interpretation of the agency defended on any basis at step two. According to one commentator, *Chevron* made "deference an all-or-nothing matter" by transforming "a regime that allowed courts to give agencies deference along a sliding scale into a regime with an on/off switch."[71]

Chevron released a storm of comment, most of it critical. Critics believed that a strong reading of *Chevron* would eliminate the category of interpretive regulations, the category in which courts had traditionally had greater freedom to substitute their judgment for that of the administrative agency.[72] They insisted that "the decision would make administrative actors the primary interpreters of federal statutes and relegate courts to the largely inert role of enforcing unambiguous statutory terms."[73] Commentators feared that *Chevron* required courts to give at least strong deference, if not controlling weight, to all administrative interpretations. Critics expressed particular concern that *Chevron* substantially eroded judicial authority to overturn agency decisions by requiring deference to administrative decisions when the delegation is implicit or the statute silent.[74] *Chevron*, commentators believed, undermined the Administrative Procedure Act, which requires that courts "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[75]

Early commentators assumed that for most administrative rulings, congressional intent was ambiguous and thus courts would display increased deference to administrative agencies.[76] Justice Scalia, however, has both embraced *Chevron* and reshaped its distinctions to comport with his textualist theory of interpretation.[77] He has explained:

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70. 467 U.S. at 843 n.9.

71. Merrill, Judicial Deference, supra note 4, at 977.

72. Some nontax cases have applied *Chevron* in the context of interpretive rulings. See Asimow, Public Participation, supra note 20, at 352 n.46. See notes 139-176 infra and accompanying text for discussion of *Chevron* and interpretive tax regulations.

73. Merrill, Judicial Deference, supra note 4, at 969-70. See Cass Sunstein, Law and Administration after Chevron, 90 Colum. L. Rev. 2071, 2075 & n.26 (1990) ("*Chevron* has altered the distribution of national powers among courts, Congress, and administrative agencies").

74. Saunders, supra note 32, at 775-78.

75. Id. at 783 (quoting 5 U.S.C. § 706).

76. See Merrill, Textualism, supra note 4, at 360.

77. See William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621 (1990); Michael Herz, Textualism and Taboo: Interpretation and Deference for Justice Scalia, 12 Cardozo L. Rev. 1663 (1991); Pierce, supra note 13; William D. Popkin, An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation, 76 Minn. L. Rev. 1133 (1992); Nicholas S. Zeppos, Justice Scalia's Textualism: The "New" New Legal Process, 12 Cardozo L. Rev. 1597 (1991).

> In my experience, there is a fairly close correlation between the degree to which a person is (for want of a better word) a "strict constructionist" of statutes, and the degree to which that person favors *Chevron* and is willing to give it broad scope. The reason is obvious. One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists.[78]

Justice Scalia's attitude toward *Chevron* reflects his hostility to the use of legislative history as a tool of statutory construction. He has attacked legislative history on a variety of grounds. The members of Congress, he has explained, cannot have a single will or intent.[79] In his view, legislative history is not law because it is not subject to the Article II requirements of bicameralism and presentment.[80] He asserts that legislative history is not read by members of Congress and is often written by staffers under the influence of lobbyists.[81] To him, legislative history represents "legislators at their worst—promoting private interest deals, strategically posturing to mislead judges, or abdicating all responsibility to their unelected staffs."[82] For all these reasons, he advocates strict construction of statutes based on the language of the text.

As Professor Merrill has recently demonstrated, the textualist revolution led by Justice Scalia has produced a change in the Court's

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78. Hon. Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 521. Scalia continues:

> It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt. Contrariwise, one who abhors a "plain meaning" rule, and is willing to permit the apparent meaning of a statute to be impeached by the legislative history, will more frequently find agency-liberating ambiguity, and will discern a much broader range of "reasonable" interpretation that the agency may adopt and to which the courts must pay deference. The frequency with which *Chevron* will require *that* judge to accept an interpretation he thinks wrong is infinitely greater.

Id.

79. See Hirschey v. FERC, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring).

80. See Wisconsin Pub. Intervener v. Mortier, 501 U.S. 597, 615 (1991) (Scalia, J., concurring in the judgment); Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting); Pennsylvania v. Union Gas Co., 491 U.S. 1, 30 (1989) (Scalia, J., concurring in part and dissenting in part).

81. See Blanchard v. Bergeron, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring in part and concurring in judgment).

82. Daniel A. Farber & Philip P. Frickey, Legislative Intent and Public Choice, 74 Va. L. Rev. 423, 437-38 (1988).

formulation of the *Chevron* doctrine.[83] In a recent opinion for the Court, Justice Kennedy wrote:

> If the agency interpretation is not in conflict with the plain language of the statute, deference is due. In ascertaining whether the agency's interpretation is a permissible construction of the language, a court must look to the structure and language of the statute as a whole. If the text is ambiguous and so open to interpretation in some respects, a degree of deference is granted to the agency, though a reviewing court need not accept an interpretation which is unreasonable.[84]

Under this reformulation, step one no longer obligates the court to discern legislative intent through the traditional tools of statutory construction. The first step looks only to the statutory text. Neither do the traditional tools, such as legislative history, have any place in step two. In step two, under both the original and this reformulated *Chevron* doctrine, the agency is free to adopt any reasonable interpretation and to defend the interpretation on any basis, including bases asserted only in the course of litigation or bases unrelated to legislative history.

Professor Merrill concludes that *Chevron* is languishing; the Supreme Court often ignores it.[85] In contrast, textualism flourishes. In the 1992 Term, for example, over 40 decisions construing statutes contain no reference to legislative history.[86] Merrill sees an inverse relationship between textualism and use of the *Chevron* doctrine and observes that "the textualist interpreter does not *find* the meaning of the statute so much as *construct* the meaning. Such a person will very likely experience some difficulty in deferring to the meaning that other institutions have developed."[87] That is, under the reformulated *Chevron* doctrine, courts presume a meaning plain to the judge writing the opinion.

The reading of *Chevron* as a textualist manifesto can be seen in some recent cases involving tax regulations. However, as discussed in more detail below, while most tax cases reviewing regulations discuss the statute's plain meaning, the analysis seldom ends at that point. Tax Court opinions do not

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83. See Merrill, Textualism, supra note 4.

84. National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417-18 (1992) (citations omitted).

85. He notes that *Chevron*, whether or not it is cited, has not made a dramatic difference in the frequency with which the Supreme Court has deferred to agency interpretations of statutes. Merrill, Textualism, supra note 4, at 359.

86. Id. at 356.

87. Id. at 372 (emphasis added).

presume that meaning is plain. In the second step of analysis, tax cases continue to rely on legislative history. That is, unlike either the traditional or reformulated *Chevron* doctrine, tax cases use legislative history not at the first step to determine legislative intent, but at the second step of analysis, to judge whether the administrative position is reasonable. Tax cases have continued to reflect the standard of serious deference as expounded in *National Muffler*. They treat reasonableness of agency action as a likely but not foregone conclusion.

B. *Tax Court's Introduction to* Chevron

Although *Chevron* is cited in two 1989 courts of appeals decisions reviewing tax regulations,[88] it is first cited by the Tax Court in 1992 in one of a series of cases involving deductions for loan loss reserves by mutual financial institutions, such as savings banks and savings and loan institutions.[89] These opinions, written by the Tax Court and three circuit courts, all turn on the degree of deference owed to an interpretive regulation.

Section 593(b) permits mutual financial institutions to take deductions for additions to loss reserves calculated as a specified percentage of taxable income.[90] In addition, like other businesses, a mutual financial institution that suffers a net operating loss in a particular year can carry back the loss (NOL carryback) to reduce income in prior years, subject to certain limits.[91] The issue in these cases was the validity of regulations section 1.593-6A(b)(5), an interpretive regulation requiring taxable income for purposes of section 593 to be reduced by any NOL carrybacks before calculation of the addition to bad debt reserves. Thus, under the regulation, use of a NOL carryback requires recalculation and reduction of the loan loss reserve,

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88. See cases cited supra note 15.

89. As Professor Merrill wrote in his first study of the Supreme Court's use of *Chevron*:

> [A]dministrative lawyers in specialized areas like tax and labor law were late in coming to an awareness of *Chevron* . . . . [E]ven in years when *Chevron* is applied with some frequency, it tends to be invoked less often in areas where there is a particularly rich tradition of pre-*Chevron* precedent on deference. For example, in Title VII, labor, tax, social security, and environmental cases, the Court (no doubt guided to a degree by the submissions of the parties) still tends to frame the deference standard in the terms expressed in earlier decisions specific to these areas, rather than in terms of *Chevron*.

Merrill, Judicial Deference, supra note 4, at 983 & n.56. He lists *Cottage Savings* as one of those cases.

90. IRC § 593(b)(2)(A).

91. IRC § 172.

although earlier versions of the regulation specified that loan loss reserves were to be calculated without regard to net operating losses.[92]

The change in the regulation followed a statutory amendment. The Tax Reform Act of 1969 amended section 593 to reduce the percentage of income permitted for bad debt deductions.[93] In 1970, shortly after this amendment, the Treasury proposed a regulation to require that loan loss reserves be calculated after application of net operating losses.[94] The regulation was not adopted until 1978.[95]

Mutual financial institutions in several circuits challenged the validity of the regulation after deficiencies were assessed against them. The Tax Court first considered the validity of the revised regulation in a lengthy 13-5 reviewed opinion, *Pacific First Federal Savings Bank v. Commissioner.*[96] The majority invalidated the regulation, using the *National Muffler* test of harmony with plain language, origin, and purpose.[97] The opinion, however, divided this test into two parts rather than discussing each of the three parts separately. It first examined briefly the plain language of the statute. The Tax Court rejected the Commissioner's argument that the statute was unambiguous,[98] but it also denied that its inquiry was limited to the statutory language. It saw its task as determining the "will of Congress, rather than limiting the inquiry to the statutory language."[99]

Then, in a section of the opinion entitled "Origin and Purpose of the Statute," the majority undertook a detailed, chronological examination of the legislative histories relating to statutes governing such financial institutions. It quoted at length from the 1951 Senate Report, the 1962 House Report, the 1969 House Report, and the 1969 Senate Report. The majority opinion saw the legislative changes as reflecting a desire to "ensure that mutual institutions pay taxes," counterbalanced by a goal of encouraging them to maintain

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92. Regs. § 1.593-6(b)(2)(iv) (1965); see Rev. Rul. 58-10, 1958-1 C.B. 246.

93. The allowable deduction was reduced from 60% to 40% over a ten-year period. Tax Reform Act of 1969, Pub. L. No. 91-172, §§ 431(b), 432(a), 83 Stat. 488, 619-20. The 1969 Act also made other modifications to the method of calculating income for purposes of section 593 and extended the NOL carryback period from 3 to 10 years for mutual institutions and commercial banks.

94. 36 Fed. Reg. 15050 (1971).

95. T.D. 7549, 1978-1 C.B. 185, amended as to effective date by T.D. 7626, 1979-2 C.B. 239.

96. 94 T.C. 101 (1990), rev'd, 961 F.2d 800 (9th Cir.), cert. denied, 506 U.S. 873 (1992).

97. *Pacific First Fed.*, 94 T.C. at 106-07.

98. Arguing for plain meaning, the Commissioner relied on the language of § 593(b)(2)(A) limiting the deduction for additions to bad debt reserve to a percentage of taxable income and on the definition of taxable income in § 63 as gross income less deductions, including the NOL deduction. Id. at 107-08.

99. Id. at 108 (citing United States v. Vogel Fertilizer Co., 455 U.S. 16, 26 (1982)).

adequate reserves to provide for unexpected losses.[100] The opinion also pointed to the absence of any statement in the legislative history regarding an intention to change the IRS rule that NOLs were to be ignored in calculating loan loss reserves.[101] It rejected the Commissioner's argument that Congress intended the specific modifications to taxable income listed in section 593 to be exclusive. The majority decided that the ordering rule found in the challenged regulation did not harmonize with congressional intent because it increased the effective rate of tax for mutual institutions beyond the extent intended by Congress and because it reduced the value of NOL carrybacks when Congress had granted these institutions more generous NOL carrybacks.[102]

The dissent responded by pointing to the statutory framework, in particular the definition of taxable income, "the bedrock of our income tax system," as the appropriate basis for evaluating the regulation.[103] The dissenting judges believed that the statutes were unambiguous on their face and did not redefine taxable income so as to ignore the impact of NOL carrybacks. According to the dissent, the legislative history was more properly read as showing that "Congress did not intend to permit both the largest possible reserve and 7 additional years within which to carry back subsequent losses . . . . Here, in the face of unambiguous statutory provisions, the majority would redefine 'taxable income' based upon its own rationalized view of inexplicit congressional intent."[104]

While the dissent would have upheld the regulation, nothing in its opinion indicates that it would have done so on the basis of deferring to the agency. Instead, the majority and the dissent both looked at the language of the statutory provisions, the legislative history, and their understanding of the purpose of the provisions in light of the Code as a whole and the legislative history. Both make reasonable arguments about what the regulation should be if it were being written de novo. Both approach the task of whether to uphold the regulation as one of deciding whether it is the regulation the judges themselves would have adopted. Neither suggests that it is up to the Treasury to resolve ambiguities. The majority and dissenting opinions both expose how easily the multiple factors of *National Muffler* can overwhelm the presumption of serious deference.

The Sixth Circuit, the first court of appeals to review this issue, introduced the Tax Court to the *Chevron* doctrine. In *People's Federal*

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100. Id. at 110.
101. Id. at 113.
102. Id. at 112.
103. Id. at 119 (Gerber, J., dissenting).
104. Id. at 120-21.

Savings & Loan Ass'n v. Commissioner,[105] it reversed the Tax Court and chided it for ignoring *Chevron*. According to the Sixth Circuit, because the parties and the Tax Court agreed that Congress had not addressed the precise issue, the *Chevron* rule applied; the interpretive regulation issued under the authority of section 7805(a) was the kind of implicit delegation to an agency that required deference under *Chevron*.[106] The Sixth Circuit concluded that the Tax Court used the wrong standard to decide the case. "The Tax Court, employing the 'harmony' standard found in *National Muffler Dealers*, engaged in a plenary review of the legislative history of the statutory scheme without granting the Commissioner the degree of deference" required by Supreme Court precedent.[107]

Subsequently, the Ninth Circuit and the Seventh Circuit also reversed the Tax Court on this issue.[108] These two circuits, however, rejected the Sixth Circuit's reliance on *Chevron* in favor of *National Muffler's* test of harmony with the language, origin, and purpose. The Seventh Circuit, which found the choice between *National Muffler* and *Chevron* a close call, stated that "the difference between these two approaches is negligible at best," but it opted for "the more narrowly tailored holding of *National Muffler*."[109] The Ninth Circuit concluded that "the traditional rule of deference to Treasury regulations" required that the challenged regulation be upheld,[110] and it rejected what it saw as the apparent determination of the Tax Court that *National Muffler* required a plenary review of the statute and its legislative history.[111] Instead, the Ninth Circuit emphasized, the reviewing court's task under *National Muffler* is to ask whether the agency interpretation is a reasonable one.[112]

The opinions in the Seventh and Ninth Circuits begin by examining the statutory language and determining that the regulation is a reasonable interpretation of that language. Next, each opinion used legislative history to look at the origin and purpose and found the regulation a reasonable interpretation of those factors as well. Both courts determined that the Treasury had

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105. 948 F.2d 289 (6th Cir. 1991). The Tax Court had granted summary judgment in favor of *People's Federal* in a memorandum opinion based on its decision in *Pacific First Federal*. People's Fed. Sav. & Loan Ass'n v. Commissioner, 59 T.C. Memo. (CCH) 85, T.C. Memo (P-H) ¶ 90,129 (1990), rev'd, 948 F.2d 289 (6th Cir. 1991).

106. *People's Fed.*, 948 F.2d at 299-300.

107. Id. at 304.

108. See Bell Fed. Sav. & Loan Ass'n v. Commissioner, 40 F.3d 224 (7th Cir. 1994); Pacific First Fed. Sav. Bank v. Commissioner, 961 F.2d 800 (9th Cir.), cert. denied, 506 U.S. 873 (1992).

109. *Bell Fed.*, 40 F.3d at 227.

110. *Pacific First Fed.*, 961 F.2d at 803.

111. Id. at 804.

112. Id.

sufficiently considered and justified the regulatory change.

Thus, all the circuit courts that have considered the validity of the regulation by examining both the statutory language of section 593 and its legislative history have found the regulation reasonable. They have instructed the Tax Court to defer to the Commissioner and uphold the regulation. These opinions have highlighted the call to serious deference sounded in *National Muffler*. Moreover, they have organized the multiple factors outlined in *National Muffler* into two steps: first, an examination of the language of the statute and then an examination of legislative and regulatory history to gauge purpose and origin.

In a decision shortly after the Sixth Circuit opinion, the Tax Court adhered to its original position.[113] It purported to apply the *Chevron* deference principle that when a statute is silent or ambiguous with respect to a particular issue, the court must ask " 'whether the agency's answer is based on a permissible construction of the statute.' "[114] The court insisted that the deference required by the *Chevron* standard did not displace judicial review. In particular, the court continued, the reviewing court must " 'ensure that the agency engaged in reasoned decisionmaking.' "[115] The court concluded that the regulation was invalid because the basis for the change was not well-reasoned[116] and the regulation was therefore unreasonable.

This opinion adds to *Chevron*'s substantive requirements a procedural requirement of a reasoned basis for a regulation that changes an earlier one. The agency's explanation for its actions did not go unremarked in *Chevron*. Although seldom emphasized in the commentary on *Chevron*,[117] the *Chevron* court noted the explanation offered by the Environmental Protection Agency for its change in position.[118] In justifying its adoption of the plant-wide standard, the EPA had pointed out that this definition would not only

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113. Georgia Fed. Bank v. Commissioner, 98 T.C. 105 (1992), vacated and remanded by agreement of the parties (11th Cir. 1994). The Tax Court explained that in accordance with the rule of Golsen v. Commissioner, 54 T.C. 742 (1970), aff'd, 445 F.2d 985 (10th Cir.), cert. denied, 404 U.S. 940 (1971), it would follow its view that the regulation was invalid except for cases appealable to the Sixth Circuit. "After due consideration and with due respect to the Sixth Circuit, we conclude that our holding in *Pacific First Federal* was correct, and we therefore will follow it in cases not appealable to the Sixth Circuit." *Georgia Fed. Bank*, 98 T.C. at 107.

114. *Georgia Fed. Bank*, 98 T.C. at 108 (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)).

115. Id. (quoting United States v. Garner, 767 F.2d 104, 116 (5th Cir. 1985)).

116. Id. at 118.

117. Cf. Peter L. Strauss, One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action, 87 Colum. L. Rev. 1093, 1126-27 (1987).

118. *Chevron*, 467 U.S. at 855 n.27, 857-59.

act as an incentive to new investment, but also serve to reduce confusion and inconsistency.[119] The Supreme Court wrote, "we must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well."[120]

The EPA's explanation, however, received only a page of discussion. The thoroughness of the agency's explanation did not decide the issue. The Court highlighted not the agency's explanation for the change, but the inconsistent policies embodied in the statute. The Court saw in the governing statute a desire "to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality."[121] The task of resolving competing policies belonged to the administrative agency, even if a new administration struck a new balance: "When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."[122]

Thus, under *Chevron*, just as the EPA, not the Supreme Court, had the task of reconciling economic and environmental concerns in the Clean Air Act, so should the IRS and not the Tax Court resolve the conflict between encouraging loan loss reserves and increasing effective tax rates under section 593. Although purporting to follow *Chevron*, the Tax Court's approach adheres more closely to *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,[123] a Supreme Court administrative law decision decided the year before *Chevron*. In *State Farm*, the Supreme Court set out a set of inquiries for courts to use in evaluating the reasoning behind an agency's policy judgments, particularly when the agency changes its former policy. The opinion counseled courts to invalidate an agency's action if

> it relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that [ran] counter to the evidence before the agency, or [was] so implausible that it could not be ascribed to a difference in view or the product of expertise.[124]

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119. Id. at 858.
120. Id. at 863.
121. Id. at 851.
122. Id. at 866.
123. 463 U.S. 29 (1983).
124. Id. at 43.

Applying these factors, the Supreme Court invalidated the National Highway Traffic Safety Administration's revocation of a rule that would have required all new cars to be equipped with passive restraints.

Chevron's cursory review and easy acceptance of the change in the EPA's definition of stationary source is difficult to reconcile with the approach of *State Farm*.[125] As now-Justice Stephen Breyer has written, Supreme Court doctrine regarding judicial review has been anomalous. "It urges courts to defer to administrative interpretations of regulatory statutes, while also urging them to review agency decisions of regulatory policy strictly."[126]

In the case of the section 593 NOL regulation, the Tax Court shifted from strict to deferential review after three circuits upheld the regulation. In *Central Pennsylvania Savings Ass'n v. Commissioner*,[127] the Tax Court accepted with reservations the holdings of the Courts of Appeals that "because the legislative trend of section 593 was to decrease the benefit of the bad debt reserve deduction, it was a reasonable purpose, by the change in the regulation, to decrease said benefit even further."[128] The court was persuaded that it should no longer invalidate the regulation on the basis of what it saw as Congress' "implied intent."[129] Nonetheless, the court emphasized "that the legislative history of a statutory provision may be so clear that a finding of implied intent on the part of Congress would be in order in a future case involving statutory interpretation."[130] The court concluded that, in light of its rationale for upholding the regulation, it did not need to "dissect the differences, if any, between *Chevron* and *National Muffler*."[131] Thus, somewhat reluctantly, the Tax Court accepted the view of the Courts of Appeals that required it to defer to the Treasury.

C. *Range of Possible Responses*

The series of cases involving section 593 sketches out most of the

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125. As Shapiro and Levy observe, *State Farm* "has been all but ignored by agencies and the courts, including the Supreme Court." Shapiro & Levy, supra note 46, at 1052.

126. Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 364-65 (1986).

127. 104 T.C. 384 (1995).

128. Id. at 396.

129. Id.

130. Id. at 396-97. Judge Wells in dissent emphasized this point. He disagreed with "the Courts of Appeals that it was inappropriate for [the Tax Court] to engage in a plenary review of the statute and legislative history." He wrote, "[w]hile the approach adopted by the Courts of Appeals may ease disposition of difficult cases, it does not always produce just results." Id. at 400.

131. Id. at 392.

effects that *Chevron* could have on judicial review of interpretive tax regulations. *Chevron* could ratchet up the deference due to interpretive tax regulations from serious to strong deference, as the Sixth Circuit suggests.[132] *Chevron* could have no effect on review of interpretive tax regulations because its principles do not apply to interpretive regulations, as the Ninth Circuit says. *Chevron* could have no significant effect on review of any tax regulations because, as the Seventh Circuit believes, its standards differ little from those of *National Muffler*. Under the Ninth Circuit and Seventh Circuit views, courts reviewing interpretive tax regulations can blithely ignore *Chevron*.

In contrast, some readings of *Chevron* would result in less deference to IRS regulations. After reversal by the Sixth Circuit on the basis of *Chevron* deference, the Tax Court upheld its original conclusion by reading *Chevron* as heightening the responsibility of administrative agencies to explain the basis of their regulatory decisions, at least when they change previously established interpretations.[133] Such a response decreases deference by increasing judicial scrutiny.

The most important way that *Chevron* could result in decreased deference is by emphasis on the plain meaning of the text, as Justice Scalia has urged.[134] True to his principles, Justice Scalia did exactly that in *United States v. Burke*,[135] a recent case in which the validity of a regulation was not directly at issue. The issue in *Burke* was whether an award of back wages received in settlement of a class-action suit under Title VII of the Civil Rights Act of 1964 could be excluded from income under section 104(a)(2) as received "on account of personal injuries or sickness." According to the regulations, the exclusion covers only "an amount received . . . through prosecution of a legal suit or action based upon tort or tort type rights."[136] The *Burke* majority accepted the validity of the regulation without question,

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132. Johnson City Medical Ctr. v. United States, 999 F.2d 973, 977 (6th Cir. 1993). Indeed, the Sixth Circuit, unlike any other circuit, has applied *Chevron* in reviewing a revenue ruling. The dissent argued that *Skidmore* rather than *Chevron* should apply to revenue rulings. Id. at 980-83.

133. Cf. Strauss, supra note 120, at 1126:

> The problem lies in the use of the word "deference" to describe what is to occur at the second stage. That usage suggests an ultimate judicial responsibility for the outcome that the analysis in *Chevron* in other respects repudiates. Acceptance subject to reasonableness review, not deference, is the necessary posture here. A change not well explained might be rejected as unreasonable and returned to the agency for further consideration.

134. See supra note 78.

135. 504 U.S. 229 (1992).

136. Regs. § 1.104-1(c).

but, based on the congressional decision to recompense Title VII plaintiffs only for lost wages, it rejected the taxpayer's argument that a suit under Title VII of the 1964 Civil Rights Act was a tort-like claim. In a concurring opinion, Justice Scalia wrote that although the regulation had not been challenged by either party at any stage of the proceeding, it was not entitled to deference under *Chevron* because a reasonable interpretation of the statutory text would limit "personal injury" to physical or mental injuries.[137] As described below, two recent Tax Court opinions citing *Chevron* appear to adopt the Scalia approach of invalidating a regulation by invoking the plain meaning of the statute.

D. *Impact of* Chevron

As Judge Tannenwald observes in *Central Pennsylvania Savings*, "Chevron has had a checkered career in the tax arena . . . . [T]he Supreme Court, as well as other courts, has been inconsistent in applying *Chevron* and *National Muffler*, often ignoring one case and relying on the other."[138] Nonetheless, the Tax Court has come to cite *Chevron* far more than most of the appellate courts in reviewing tax regulations.

Some appellate courts do turn to *Chevron* when reviewing any tax regulations, whether the regulations are interpretive or legislative. The Sixth Circuit, as discussed above, urged the Tax Court to do so.[139] Eighth Circuit opinions, beginning as early as 1993,[140] cite *Chevron* for review of interpretive regulations. One recent Eighth Circuit opinion cites *Chevron* along with

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137. 504 U.S. at 242-43. He argued that limiting the term "personal injury" to physical injury was the "more normal meaning" of the phrase and that its pairing with "sickness" in the statutory provision strongly supported the use of the narrower meaning for "personal injury." Id. at 243-44.

138. Central Pa. Sav. Ass'n v. Commissioner, 104 T.C. 384, 391-92 (1995). As Professor Merrill has demonstrated, however, *Chevron* has had a checkered career in general, at least in the Supreme Court. Merrill, Judicial Deference, supra note 4; Merrill, Textualism, supra note 4. Some studies have found that *Chevron* signaled to lower courts the Supreme Court's desire to allow greater agency discretion. See Cohen & Spitzer, supra note 4, at 65, 105; Schuck & Elliott, supra note 4, at 1029-41 (noting initial effect of increasing deference, which has since weakened).

139. The Court of Appeals for the Federal Circuit and the United States Court of Federal Claims also have construed *Chevron* to increase deference for interpretive regulations. See Lima Surgical Assocs. Inc. v. United States, 944 F.2d 885, 888 (Fed. Cir. 1991). In Unisys Corp. v. United States, 30 Fed. Cl. 552, 565 (1994), the Claims Court concluded that under *Chevron* an interpretive regulation was entitled not simply "to deference but to controlling weight."

140. See Hefti v. Commissioner, 983 F.2d 868, 871 (8th Cir. 1993). See also Norwest Corp. v. Commissioner, 69 F.3d 1404 (citing *Chevron* along with *National Muffler* for the proposition that the Commissioner's interpretations are entitled to "substantial deference").

National Muffler as a justification for a lengthy discussion of legislative history;[141] another cites *Chevron* for the proposition that if the statutory language is clear, legislative history has no role in the analysis.[142] Both of these opinions rely on *Chevron*, but the first looks to the original *Chevron* under which the reviewing court is to look to legislative history to see whether Congress had spoken to the issue, and the second to the reformulated *Chevron* under which in which the reviewing court judges plain meaning without recourse to legislative history.

However, most appellate courts reviewing interpretive tax regulations do not rely on *Chevron*. As discussed above, the Seventh and Ninth Circuits question the applicability of *Chevron* to interpretive tax regulations. Similarly, in *Nalle v. Commissioner*,[143] the Fifth Circuit wrote that despite the inconclusiveness of the legislative history, it would have deferred to the Treasury's interpretation if the regulation at issue had been legislative, as in *Chevron*.[144] The regulation was interpretive, however, and the court, relying on *National Muffler*, concluded that the regulation was not due as much deference. The court invalidated it as inconsistent with the statute.[145] The Third Circuit in *E.I. du Pont de Nemours & Co. v. Commissioner*,[146] finessed the question of whether *Chevron* applies to interpretive tax regulations. It began with a discussion of the deference due a legislative regulation under *Chevron*,[147] but commented that even interpretive regulations are entitled to broad deference under *Cottage Savings* and *National Muffler*.[148] Other appellate opinions, both those reviewing interpretive and those reviewing legislative regulations, do not cite *Chevron* at all.[149]

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141. Miller v. United States, 65 F.3d 687 (8th Cir. 1995).

142. Western Nat'l Mut. Ins. Co. v. Commissioner, 65 F.3d 90, 93 (8th Cir. 1995). Yet another recent Eighth Circuit opinion upheld an interpretive regulation without citing *Chevron* at all. American Mutual Life Insurance Co. v. United States, 43 F.3d 1172 (8th Cir. 1994); see also Meegan M. Reilly, IRS Tries to Stem Courts' Distaste for Legislative History, 69 Tax Notes 1179 (Dec. 4, 1995).

143. 997 F.2d 1134 (5th Cir. 1993).

144. Id. at 1138.

145. Id. at 1138-39. See supra note 78.

146. 41 F.3d 130 (3d Cir. 1994).

147. Id. at 135.

148. Id. at 135-36. The court concluded that the regulation before it was legislative and upheld the regulation. Id. at 135, 140.

149. See Archer-Daniels-Midland Co. v. United States, 37 F.3d 321 (7th Cir. 1994); St. Jude Medical, Inc. v. Commissioner, 34 F.3d 1394 (8th Cir. 1994); Ann Jackson Family Found. v. Commissioner, 15 F.3d 917 (9th Cir. 1994); Pepcol Mfg. Co. v. Commissioner, 13 F.3d 355 (10th Cir. 1993); Dow Corning Corp. v. United States, 984 F.2d 416 (Fed. Cir. 1993); Goulding v. United States, 957 F.2d 1420 (7th Cir. 1992); Brown v. United States, 890 F.2d 1329 (5th Cir. 1989).

Thus, most circuits emphasize the distinction between *Chevron*'s strong deference for legislative regulations and *National Muffler*'s serious deference for interpretive regulations. They do not find *Chevron* applicable to interpretive tax regulations. Instead, the special rule of *National Muffler* governs for interpretive tax rules, whether or not *Chevron* applies to other kinds of interpretive rules.[150]

The Tax Court, in contrast, emphasizes the similarities between the strong deference of *Chevron* and the serious deference of *National Muffler*. The Tax Court has come to view *Chevron* simply as another way of phrasing the tests of *National Muffler*. As Judge Tannenwald has written, "we are inclined to the view that the impact of the traditional, i.e., *National Muffler* standard, has not been changed by *Chevron*, but has merely been restated in a practical two-part test with possibly subtle distinctions as to the role of legislative history and the degree of deference to be accorded to a regulation."[151] The Tax Court understands *Chevron* as a reminder of the deference due tax regulations. It does not see *Chevron* as a revolutionary change from the multiple factor analysis to which it was long accustomed.

A 1996 case that invalidated an interpretive regulation demonstrates nicely how the Tax Court treats *Chevron* review as indistinguishable from reasonableness review under *National Muffler*. In *Redlark v. Commissioner*,[152] the regulation at issue interpreted section 163(h)(2)(A) as denying noncorporate taxpayers any deduction for interest on federal income tax deficiencies.[153] In *Redlark*, the regulation denied a deduction for interest on a federal income tax deficiency that arose in part because of errors in computing income from business. Judge Tannenwald, writing for the

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150. As the Third Circuit noted in *du Pont*,

> [a]lthough this court and others have noted that interpretative regulations issued under the Internal Revenue Code are entitled to less deference than legislative regulations, it is not clear whether this rule applies outside the Internal Revenue Code. So far we have declined to decide whether *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, which [advised] judicial deference to agency regulations, overruled *General Electric Co. v. Gilbert*, which held that an agency's interpretative decisions required less judicial deference.

E.I. du Pont de Nemours, 41 F.3d at 135 n.23 (citations omitted). The Third Circuit thus intimates that after *Chevron*, interpretive tax regulations may receive less deference than other interpretive rules, because tax regulations continue to receive only serious deference, while interpretive rules in other areas may now be entitled to strong deference.

151. Central Pa. Sav. Ass'n v. Commissioner, 104 T.C. 384, 392 (1995). Judge Tannenwald's references to *Chevron* are to its original formulation, which uses legislative history at step one. See supra text accompanying note 70.

152. 106 T.C. No. 2 (1996).

153. See Temp. Regs. § 163-9(b)(2)(i)(A).

majority, cited United States v. Vogel Fertilizer Co.[154] for the proposition that less deference is owed to an interpretive than a legislative regulation and then immediately quoted *Chevron* for the standard of judicial review. The majority opinion, based largely on a review of cases decided before the enactment of section 163(h)(2)(A), found that such interest arose in connection with carrying on a trade or business. Thus, it concluded, the regulation was unreasonable because section 7805(a) did not give the Secretary of Treasury authority to construct an allocation formula that "excludes an entire category of interest expense in disregard of a business connection such as that which exists herein."[155] In light of ambiguous legislative history, the majority did not find the statutory language plain, but it nonetheless concluded that the regulation "constitutes an impermissible reading of the statute and is therefore unreasonable."[156] Nothing in the majority opinion indicates that the Tax Court views *Chevron* on limiting its discretion to invalidate a regulation.

Because it views *Chevron* as a rephrasing of the *National Muffler* test for the validity of tax regulations, the Tax Court has limited its reliance on *Chevron* to cases involving regulations. It has not cited *Chevron* when reviewing other forms of agency interpretation, such as rulings or notices,[157] but it has cited *Chevron*, as well as *National Muffler*, for both legislative and interpretive regulations. Since the Sixth Circuit's 1991 lecture about *Chevron*, most Tax Court cases considering the validity of regulations have worked in some kind of citation to *Chevron*,[158] often in passing as one citation among several, including *National Muffler*. In *Pepcol Manufacturing Co. v. Commissioner*, a 1992 case invalidating a legislative regulation that was decided the day after *Georgia Federal Bank*, only the concurrence cited

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154. 455 U.S. 16, 24 (1982) (quoting Rowan Cos. v. United States, 452 U.S. 247, 253 (1981).

155. Id. at 22.

156. Id. at 36.

157. One case does allow for the possibility of relying on *Chevron* for other forms of agency interpretation. In CSI Hydrostatic Testers, Inc. v. Commissioner, 103 T.C. 398, 408 (1994), aff'd, 62 F.3d 136 (5th Cir. 1995), the Commissioner argued that under *Chevron*, the courts should defer to the agency's interpretation of a regulation. The Tax Court rejected this argument, stating that deference is not the rule "in the absence of a contrary published, or at least longstanding, interpretation of the regulation in question." Id. at 409.

158. In a few recent cases upholding regulations as reasonable, the Tax Court did not cite *Chevron*. See Schaefer v. Commissioner, 105 T.C. 227 (1995); Perkin-Elmer Corp. v. Commissioner, 103 T.C. 464 (1994); E. Norman Peterson Marital Trust v. Commissioner, 102 T.C. 790 (1994), aff'd, 78 F.3d 795 (2d Cir. 1996); E.I. du Pont de Nemours v. Commissioner, 102 T.C. 1 (1994), aff'd, 41 F.3d 130 (3d Cir. 1994), aff'd sub nom., Conoco, Inc. v. Commissioner, 42 F.3d 972 (5th Cir. 1995).

Chevron.[159] An unreviewed 1993 opinion upheld an interpretive regulation in passing, but cited *Chevron* for the proposition that an agency's interpretation must be based on a permissible construction of the statute.[160] A recent decision upholding an excise tax regulation cited *Chevron* as support for the ability of an administrative agency to change its opinion.[161] One 1995 decision cites *Chevron* several times in the course of a lengthy discussion of legislative history,[162] and in another 1995 decision, *Chevron* is cited for the proposition that "it is well established that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."[163]

Chevron has played a somewhat more prominent role in two recent Tax Court cases, one invalidating a legislative regulation and the other an interpretive regulation,[164] in each case on the basis of inconsistency with plain meaning.[165] Although plain meaning is the first step of analysis under *National Muffler*, neither of these decisions goes on to consider origin and purpose of the statute. Thus, by examining the statutory language in isolation and in declining to rely on legislative history, they adhere to Justice Scalia's reformulation of *Chevron*.

In *Western National Mutual Insurance Co. v. Commissioner*,[166] the Tax Court invalidated an interpretive regulation defining "reserve strengthening" under a transition provision of the Tax Reform Act of 1986 designed to limit loan loss reserves for property and casualty insurance companies.[167]

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159. Pepcol Mfg. Co. v. Commissioner, 98 T.C. 127, 138 (1992) (Ruwe, J., concurring) (reviewed by court) (invalidating regulation that denied investment tax credit for solid waste recycling equipment), rev'd, 28 F.3d 1013 (10th Cir. 1993).

160. Cramer v. Commissioner, 101 T.C. 225, 247 (1993), aff'd, 64 F.3d 1406 (9th Cir. 1995).

161. Western Waste Indus. v. Commissioner, 104 T.C. 472, 478, 486 (1995).

162. Hachette USA, Inc. v. Commissioner, 105 T.C. 234 (1995).

163. Snap-Drape, Inc. v. Commissioner, 105 T.C. 16, 25-26 (1995).

164. Western Nat'l Mut. Ins. Co. v. Commissioner, 102 T.C. 338 (1994), aff'd, 65 F.3d (1995); Tate & Lyle, Inc. v. Commissioner, 103 T.C. 656 (1994).

165. See *Western Nat'l*, 102 T.C. at 359, 361; *Tate & Lyle*, 103 T.C. at 666, 671.

166. 102 T.C. 338 (1994), aff'd, 65 F.3d 90 (1995). See supra note 142.

167. Id. at 361. Before the Tax Reform Act of 1986, property and casualty insurance companies could deduct the full amount of their loss reserves. Id. at 344. The new provision required them to discount the loss reserves. Congress, however, enacted a transition rule that permitted a one-time exemption from the new rule for certain items, but specifically excluded "reserve strengthening" from the exemption. Id. at 345-46. The Treasury adopted a definition of reserve strengthening that included any increase to a company's prior-year reserve. Id. at 346. The taxpayer argued that in the industry, the term "reserve strengthening" had an established meaning, limited to material changes in methodology or assumptions from one valuation date to the next and applicable to aggregate year-end reserves. Id. at 346-47.

The majority cited *Chevron*[168] and asked first whether Congress, in the language of the statute, had spoken to the precise question at issue. Shortly after citing *Chevron*, it quoted some of Justice Scalia's critical observations about legislative history.[169] It concluded that despite some contradictory explanations in the legislative history, Congress chose a term of art used in an unconditional manner and that the established industry understanding of the term had to prevail over the broader regulatory interpretation.[170] Even specialized language has plain meaning; it is the meaning plain to the specialist.

In *Tate & Lyle, Inc. v. Commissioner*,[171] the Tax Court invalidated a legislative regulation deferring a U.S. subsidiary's deduction for interest accrued to a foreign parent because, according to the majority, it contradicted the statutory language. Section 267(a)(2) denies deductions for amounts payable to certain related persons until the amounts are paid if, "by reason of the method of accounting of the person to whom the payment is to be made," the recipient does not have to include the amounts in gross income until received. Although section 267(a)(2) is not limited to domestic payors and payees, Congress enacted section 267(a)(3), authorizing the Treasury to promulgate regulations applying the "matching principle" of section 267(a)(2) to cases in which the payee is not a U.S. person. The regulation at issue, promulgated pursuant to this grant of legislative authority, postponed the deduction until payment if the lender was exempted from U.S. tax by a tax treaty.[172] The court concluded that the regulation was invalid, citing *Chevron* among other authorities,[173] because a treaty exemption is not a method of accounting as required by the statute.[174]

Judge Halpern's dissents in both of these cases demonstrate how reliance on the concept of plain meaning gives judges freedom to construct meaning.[175] In *Western Mutual*,[176] Judge Halpern pointed to legislative

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168. Id. at 359. It did not cite *National Muffler* along with *Chevron*.

169. 102 T.C. at 360 (citing Hirschey v. FERC, 777 F.2d 1, 7-8 & n.1 (D.C. Cir. 1985) (Scalia, J., concurring)).

170. Id. at 355, 360. The majority wrote, "[t]his is not the type of situation which has generated the continuing debate on the amount of deference that should be afforded to the legislative history. This case presents a different perspective because the statute is neither ambiguous nor imprecise." Id. at 360 n.25.

171. 103 T.C. 656 (1994).

172. Regs. § 1.267(a)-3(c)(2).

173. 103 T.C. at 666, 672, 679. These citations appeared in the context of cases involving regulations promulgated under a specific grant of authority. *National Muffler* is not cited.

174. Id. at 670-71.

175. See also Ilyse Barkan, New Challenges to Use of the Plain Meaning Rule to Construe the IRC and Regs, 69 Tax Notes 1403 (Dec. 11, 1995).

history suggesting that Congress was not using the phrase "reserve strengthening" as a term of art. That is, the language is not so plain,[177] and, as Judge Halpern explained, *Chevron* requires that the agency regulation be upheld in such a case if reasonable.[178] In *Tate & Lyle*, Judge Halpern's dissent called attention to another provision of the same Code section,[179] which applies the matching principle to exempt income and thus calls into question the majority's conclusion that "method of accounting" cannot include exemption.[180]

Plainness of meaning often depends on narrowness of focus. In tax cases, as in other areas of law, there is a tension between those opinions emphasizing plain meaning and those emphasizing origin and purpose. Judges emphasizing the first are less likely to defer to the administrative agency than those emphasizing the second. Focus on plain meaning gives judges leeway to declare meaning and invalidate administrative action. It frees them of the obligation to defer to administrative interpretation.[181] While tax opinions that preceded *Chevron* relied on *National Muffler* to invalidate regulations on the basis of inconsistency with plain meaning, the *Chevron* doctrine as reformulated by Justice Scalia gives courts additional authority for doing so.

IV. IMPLICATIONS FOR INTERPRETATION

A. *The Role of Legislative History*

As the opinions reviewing the section 593 NOL regulations demonstrate, tax opinions often transform the *National Muffler* tripartite test of harmony with the plain language of the statute, its origin, and its purpose into

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176. Western Nat'l Mut. Inc. Co. v. Commissioner, 102 T.C. 338, 375 n.2 (1994).

177. "I believe that all the majority has shown is that, at best, Congress has unambiguously settled on an imprecise meaning." Id. at 375 n.2. Judge Halpern also criticizes the majority for failing to heed the lesson of *Chevron* in his dissent in Redlark v. Commissioner, 106 T.C. No. 2 (1996).

178. *Western Nat'l*, 103 T.C. at 376. Judge Halpern's analysis was premised on the "original" *Chevron* under which legislative history is used to discern congressional intent. See 467 U.S. at 862-64.

179. IRC § 267(b)(9). This subsection specifies that § 267(a) applies to a "person and an organization to which section 501 (relating to certain educational and charitable organizations which are exempt from tax) applies and which is controlled directly or indirectly by such person or (if such person is an individual) by members of the family of such individual."

180. Tate & Lyle, Inc. v. Commissioner, 103 T.C. 656, 692-95 (1994) (Halpern, J., dissenting). He acknowledged that it was possible that § 267(b)(9) was intended to refer only to § 267(a)(1), which denies loss recognition for sales or exchanges between related parties. Id. at 694-95.

181. See Shapiro & Levy, supra note 46, at 1063.

a two-step test. The first step looks at the statutory language. The second step considers purpose and origin through the use of legislative history. These two steps differ in important ways from both the original *Chevron* two-step and the two-step as reformulated by Justice Scalia. This "muffled *Chevron* doctrine"—a combination of *National Muffler* and *Chevron*—offers a model for statutory interpretation and regulatory review applicable beyond tax.

As described in *Chevron* itself, step one looked to the intent of Congress, discovered through the traditional tools of statutory construction. The *Chevron* Court examined legislative history to see whether Congress had spoken to the issue at hand. The first step of the reformulated *Chevron* test, in contrast, looks at the text, the "structure and language of the statute as a whole,"[182] but not the legislative history or other traditional tools of statutory construction. Moreover, Supreme Court practice under the reformulated *Chevron* doctrine suggests that reviewing courts should presume that the meaning of the statute is plain. In most cases, according to the reformulated *Chevron*, courts should be able to discern the appropriate meaning from reading the text alone.

Step one of the muffled *Chevron* doctrine resembles the first step of the reformulated *Chevron* by excluding legislative history from this stage of analysis. Step one of muffled *Chevron* moves toward what Professor Eskridge has called a "harder" plain meaning rule under which a "text's clarity is reinforced by arguments of horizontal coherence," which include the whole act and statutory analogues.[183] In the cases involving the section 593 NOL regulations, for example, the courts examined the language not only of section 593, but also of section 172 and how the two relate in the Code. Legislative history played no part in this textual, structural analysis. Like the reformulated *Chevron*, step one of the muffled *Chevron* doctrine assigns particular importance to the language and context of the text. It gives that consideration a priority not awarded it under the three-part harmony of *National Muffler*. Unlike the reformulated *Chevron* doctrine, however, step one of the muffled *Chevron* doctrine does not presume that the meaning is plain.[184] Plain meaning is the exception, not the rule,[185] and examination of legislative history at step two provides a further check against concluding too quickly that the language is plain.

The second step of muffled *Chevron* differs from the second step of both the original and reformulated *Chevron* doctrines by welcoming consider-

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182. National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992) (citation omitted).

183. Eskridge, supra note 77, at 686.

184. Id. at 685-88.

185. See Barkan, supra note 175, for a description of some of the factors the Tax Court has required before concluding that language is plain.

ations based on legislative history when judging the reasonableness of administrative action. In *Chevron*, the Court discussed the administrative decision in light of the general policy of the Clean Air Act and not in light of particular positions in the statute's legislative history. Similarly, the reformulated *Chevron* doctrine, if the court gets beyond step one, permits administrative agencies freely to formulate policy rationales for their interpretations, including post facto rationalizations.[186]

In contrast, under step two of what I have dubbed the muffled *Chevron* doctrine, courts turn to the legislative history to set the bounds for administrative action. This use of legislative history at the second step preserves a clear role for the judiciary;[187] courts must ensure that the agency does not go beyond these bounds.[188] These bounds, however, are capacious and do not constrain the agency too tightly. An examination of legislative history often confronts evidence that the intent of members of

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186. See Panel Discussion, Developments in Judicial Review with Emphasis on the Concepts of Standing and Deference to the Agency, 4 Admin. L.J. 113, 124 (1990) (comments of Judge Stephen Williams); Coverdale, supra note 11.

187. In *National Muffler*, the Court examined legislative history to discern purpose. 440 U.S. at 477-84. It discussed at length submissions of the U.S. Chamber of Commerce and the American Warehouseman's Association to the Senate Finance Committee, explaining that these submissions "assume an importance here beyond that usually afforded such documents [because they are] the only available evidence of the amendment's purpose." Id. at 478-79 n.8.

Some have argued that examination of legislative history is especially important for tax cases. Judge Posner recently wrote in a tax case:

> Legislative history is in bad odor in some influential judicial quarters . . ., but it continues to be relied on heavily by most Supreme Court Justices and lower-court judges; and in the case of statutory language as technical and arcane as that of the DISC provisions, the slogan that Congress votes on the bill and not on the report strikes us as pretty empty.

Archer-Daniels-Midland Co. v. United States, 37 F.3d 321, 323-24 (7th Cir. 1994) (citations omitted).

Because of this reliance of members and staffs on legislative history for tax, others have argued it should carry special weight for tax legislation. See Ferguson et al, supra note 6; Livingston, supra note 6, at 826-44. For a critical analysis of the extent to which Ferguson et al. would give some legislative history parity with the statute itself, compare James B. Lewis, Viewpoint: The Nature and Role of Tax Legislative History, 68 Taxes 442 (1990) with Bradford L. Ferguson et al., Response: Adapting to the Evolving Legislative Process, 68 Taxes 448 (1990). This article emphasizes the similarity between tax and other areas of law, at least other technical areas, rather than the differences. See Caron, supra note 3, at 531; Karla W. Simon, Constitutional Implications of the Tax Legislative Process, 10 Am. J. of Tax Pol'y 235, 237-41 (1992) (environmental law, like tax law, is complex).

188. "[I]ntentionalists, in contrast, believe that the text alone will yield a fairly wide range of possible meanings; admit legislative history and the range of possible meanings narrows." Merrill, Textualism, supra note 4, at 367-68.

Congress in enacting statutes is amorphous and mixed.[189] The section 593 opinions, for example, recognize that Congress sought both to encourage bad debt reserves and to lessen differences between mutual institutions and other corporate taxpayers. Under step two of the muffled *Chevron* doctrine, Treasury is free to emphasize either of these policies in its regulation, but not to promote an unrelated policy. Using legislative history to determine the origin and purposes against which administrative interpretation is tested thus preserves a wide but not unlimited range of permissible administrative action.[190]

TABLE II
Varieties of *Chevron* Two-Step

	STEP ONE	STEP TWO
Pre-*Chevron*	Not Applicable-sliding scale	Not Applicable-sliding scale
Original *Chevron*	Court determines if Congress has spoken to issue through use of traditional tools, including legislative history.	If congressional intent is ambiguous, accept any reasonable administrative interpretation, defended on any policy basis.
Reformulated *Chevron*	Court examines plain meaning of statute, through language and structure but not legislative history; apparent presumption that language is plain.	If language is not plain, accept any reasonable administrative interpretation, defended on any basis, but legislative history suspect.
Muffled *Chevron*	Court examines plain meaning of statute, through language and structure but not legislative history; presumption that language is not plain.	If language is not plain, reasonableness of administrative interpretation is judged against origin and purpose of statute, particularly as shown in legislative history.

189. Herz has described the theory of *Chevron* as accepting that in passing laws, Congress approves a range of possible interpretations. Herz, supra note 77, at 1672. A muffled *Chevron* works to ensure that administrative agencies act within that range.

190. Indeed, use of legislative history to test the reasonableness of agency action would make consideration of subsequent legislative history appropriate. Cf. Michael Livingston, What's Blue and White and Not Quite as Good as a Committee Report: General Explanations and the Role of "Subsequent" Tax Legislative History, 11 Am. J. of Tax Pol'y 91 (1994).

The use of legislative history in the muffled *Chevron* doctrine answers what Professor Eskridge has described as the three types of criticisms of the traditional use of legislative history: the realist, the historicist, and the formalist.[191] The realist criticism holds that "legislative intent is an incoherent and indeterminate concept . . . because legislatures usually have no determinate collective expectations about many (if any) of the concrete issues posed by their statutes."[192] The realities of the legislative process inevitably produce ambiguity and mixed congressional motives.[193] When legislative history is used to judge administrative action, these weaknesses become strengths. If, as Justice Scalia has suggested, use of legislative history is "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends,"[194] that is well and good under this approach. It is precisely to the administrative agencies that Congress has delegated the choice of the public's friends.[195]

Such use of legislative history also ameliorates the formalist concern that "judicial reliance on legislative history is inconsistent with the specific structures for legislation in the Constitution."[196] In the administrative state, legislative regulations promulgated formally and interpretive rules issued informally may bind the public to different degrees,[197] but neither kind requires bicameralism and presentment. Moreover, reliance on legislative history to judge the reasonableness of regulatory action helps ensure notice to the public. When the courts use legislative history to divine the intent of Congress, members of the public must be able to read the judicial and legisla-

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191. Eskridge, supra note 77, at 641-42.

192. Id.

193. See Daniel A. Farber & Philip P. Frickey, Law and Public Choice (1991); Jane S. Schacter, Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation, 108 Harv. L. Rev. 593 (1995); Symposium on the Theory of Public Choice, 74 Va. L. Rev. 167 (1988). If, as Professor Schacter has suggested, the textualist point of view should be seen as allied to public choice theory, that very theory undermines Justice Scalia's belief that legislators can enact clear laws. Schacter, supra, at 644-45. She suggests that textualists seek a "shrinking of the corpus of regulatory law by imposing an exacting burden of textual clarity that legislators are unwilling or unable to meet." Id. at 645. Under another branch of public choice theory, decision theory, use of legislative history through delegation to committees and their reports could be seen as a necessary tool for setting agendas and reaching decisions. See id. at 639.

194. Conroy v. Aniskoff, 507 U.S. 511 (1993) (Scalia, J., concurring).

195. If the agency chooses inappropriate friends, Congress can act. For one case in which Congress acted to reject a regulation, see Ellen P. Aprill, Tribal Bonds: Indian Sovereignty and the Tax Legislative Process, 46 Admin. L. Rev. 333 (1994). That study suggests that Congress expects administrative agencies to attend to the legislative history for keys to interpretation. Id. at 367-68.

196. Eskridge, supra note 77, at 649.

197. See supra notes 18-23 and accompanying text.

tive tea leaves. If legislative history serves to justify a regulation, the public is able to look to a published interpretation for guidance.[198]

And finally, use of legislative history for this purpose eliminates the historicist concern that "an historically situated collective intent cannot be completely 'reconstructed' by even the most 'imaginative' jurist" because current context influences interpretation.[199] The use of legislative history to justify administrative action does not attempt historical reconstruction. It asks instead for the administrative agency to decide how the history and current context should intersect. The muffled *Chevron* doctrine gives administrative agencies discretion but not carte blanche in choosing among possible interpretations.[200]

To some extent, my muffled *Chevron* resembles the revision of *Chevron* recently advocated by Professor Mark Seidenfeld.[201] Professor Seidenfeld and I would both exclude legislative history from step one. Seidenfeld explains: "When an agency administers a regulatory scheme, legislative intent seems too tenuous a concept for reviewing courts to use at *Chevron*'s step one to exclude *entirely* the more technically expert and politically accountable agency from the interpretive process."[202] Both of us see an important role for legislative history at step two. "A statute's legislative history can thereby provide judges with insights into the policy choices entailed by interpretation."[203] That is, both revisions of *Chevron* seek to accommodate not only the political responsiveness and technical expertise offered by administrative agencies, but also the reasoned decision-making and protection against agency abuse provided by judicial review.[204]

There are, however, some important differences between the two revisions. Professor Seidenfeld would direct courts to "require the agency to identify the concerns that the statute addresses and explain how the agency's

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198. This generalization requires qualification when retroactive regulations are involved. Under § 7805(b), "[t]he Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect." There is a large body of literature on retroactivity of tax regulations. See, e.g., Toni Robinson, Retroactivity: The Case for Better Regulation of Federal Tax Regulators, 48 Ohio State L.J. 773 (1987); John S. Nolan & Victor Thuronyi, Retroactive Application of Changes in IRS or Treasury Department Position, 61 Taxes 777, 783 (1983).

199. Eskridge, supra note 77, at 644.

200. Cf. David W. Slawson, Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law, 44 Stan. L. Rev. 383, 406 (1992) (stating that courts rarely find agency's interpretation of legislative history to be unreasonable).

201. Mark Seidenfeld, A Syncopated *Chevron*: Emphasizing Reasoned Decision-making in Reviewing Agency Interpretations of Statutes, 73 Tex. L. Rev. 83 (1994).

202. Id. at 115-16.

203. Id. at 130.

204. See Coverdall, supra note 11, describing the particular concern about abuse by tax authorities.

interpretation took those concerns into account."[205] His approach thus recalls the Tax Court's scrutiny of agency reasoning in the NOL cases. This approach, however packaged as a reworking of *Chevron*, in fact descends from *State Farm*.[206] As such, it is subject to the criticisms of the *State Farm* approach, which Justice Breyer has so well articulated.[207] As a matter of institutional competence, agencies are better able to gather the range of information needed to set policy for a variety of situations than are judges deciding a dispute between two parties.[208] Strict review of agency policy may make the agency reluctant to change the status quo.[209] "A remand of an important agency rule (several years in the making) for more thorough consideration may well mean several years of additional proceedings, with mounting costs, and the threat of further judicial review leading to abandonment or modification of the initial project irrespective of the merits."[210]

The muffled *Chevron* doctrine avoids these difficulties. Rather than mandating a detailed review of agency procedures, it calls for a limited review of the agency's substantive position. It recommends that after a careful examination of statutory language, courts should turn to legislative history and other tools of statutory construction to judge whether a regulation is consistent with the purpose and origin of a statute.[211] Often, as the tax law's experience with *National Muffler* shows, examination of legislative history suffices, and no other sources is needed to establish the regulation's consistency with the statute's origin and purpose.

B. *Burden on the Judicial Resources*

The muffled *Chevron* doctrine, however, itself raises questions regarding judicial resources and judicial expertise. By requiring the agency to demonstrate the reasonableness of agency action at step two, it calls for a more searching inquiry than simply deferring to the agency or decreeing the

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205. Seidenfeld, supra note 201, at 129.

206. Professor Seidenfeld acknowledges this kinship. Id. at 128.

207. See Stephen Breyer, Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy, 91 Harv. L. Rev. 1833 (1978); Breyer, supra note 126.

208. Breyer, supra note 126, at 388-89.

209. Id. at 391, 393.

210. Id. at 383.

211. Of course, the muffled *Chevron* doctrine leaves many difficult questions unanswered. It does not explain what a court should do if legislative history flatly contradicts a statute seemingly clear on its face. It does not give a court direction as to the extent it should use legislative history to discern purpose and origin when construing a statute in the absence of an administrative interpretation. It does not address the scope of review when the legislative history is silent on the issue or when the legislative history is old and circumstances have changed.

meaning of statutory language. Both the original *Chevron* doctrine of deference to administrative agencies and the reformulated *Chevron's* reliance on judicial declaration of plain meaning have been described as labor-saving devices for the Supreme Court. Professor Strauss has suggested that both stress on statutory language and deference to administrative agencies represent efforts by the Court to control the use of resources and the content of opinions in the lower courts. In short, they respond to a management dilemma.[212]

Although both the strong deference to administrative agencies urged by the original Chevron and the plain meaning rule promoted by the reformulated *Chevron* can relieve courts of burdens, they do so very differently. Judges, like other people, act in their own interest to maximize utility by increasing power or decreasing workload.[213] Strong deference decreases workload but does not increase power. Thus, we should expect counsels of deference to come from courts overwhelmed by burdensome dockets or less interested in the subject matter. It is not surprising then that as in the section 593 cases, the generalist appellate courts have reminded the specialized Tax Court to defer to the administrative agency.

Plain meaning also limits workload. Professor Schauer has the impression that the Supreme Court anchors decision in plain meaning when the cases are technically complex, but lack strong political, moral, or economic valence and thus are not as interesting to the Justices.[214] "[T]hese did not look like the kinds of cases to which either the Justices or their clerks had much context-sensitive expertise. Context is not for dabblers, and it is almost definitional of a context-based inquiry that the inquirer have . . . expertise . . ."[215] Plain meaning, he explains, is "a way in which people with potentially divergent views and potentially different understandings of what the context would require may still be able to agree about what the

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212. Strauss, supra note 117, at 1095.

213. See Shapiro & Levy, supra note 46, at 1053-58 and especially authorities cited in note 6. Their theories and data suggest that we will see cycles in which a court will assert authority to interpret rules until such interpretation imposes too great a burden on judicial resources and then will announce a rule that husbands resources. Over time, the rule preserving resources will decrease power, and the cycle will begin again.

214. Frederick Schauer, Statutory Construction and the Coordinating Function of Plain Meaning, 1990 Sup. Ct. Rev. 231, 247-48.

215. Id. at 253-54. He notes,

> My instinct is that these Justices with these clerks with this amount of time will make less of a hash of tax law in the long run by trying to rely on plain meaning than by trying to divine and apply the deepest purposes and equities of the Internal Revenue Code. And even if I am wrong about this, it would not surprise me if the Justices themselves thought this.

Id. at 254 n.85.

language they all share requires."[216]

Judicial decisions grounded on purpose and origin require sensitivity to context, as Professor Schauer observes. Thus, a specialized court such as the Tax Court has welcomed deep excursions into legislative history. Tax Court judges know tax law, and find it interesting. Their decisions on the validity of tax regulations are long and detailed, and because such cases are generally referred by the Chief Judge to the full court for review, often include concurring and dissenting opinions. Those of the Court of Federal Claims, where tax cases represent approximately one-third of the docket,[217] are somewhat shorter, and those of the generalist district courts shorter yet.

Yet, resort to plain meaning also depends on context.[218] It gives the court freedom to choose the extent to which the language is placed in context. The court can examine the phrase at issue, the entire section of the statute, or the place of the section in the statute as a whole. The court may or may not decide to examine changes in the statutory language over time.[219] For example, with the section 593 NOL regulation, a court with tax expertise and hearing only tax cases was far more likely than a generalist court to consider and give weight to other statutory limitations on net operating losses and loan loss reserves, the varieties of ordering rules in the code, and the way the various tax rules interact to define income.[220]

Plain meaning leaves the judge free to make this decision according to background, knowledge, and interest. The judge decrees what meaning is plain, and what is plain depends on the judge's experience. Deference to administrative interpretation—the message lower courts garnered from the original *Chevron* doctrine—relieves the court of burdens, but it does so at some cost to judicial power. Plain meaning appeals to judges because it both preserves, if not enhances judicial power, and accommodates so easily

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216. Id. at 254.

217. See Sheppard, supra note 58, at 764.

218. Thus, Professor Popkin attributes opposition to a National Court of Appeals to the likely willingness of such a court "to penetrate the statutory text to apply the statutory structure." William D. Popkin, Why a Court of Tax Appeals is So Elusive, 47 Tax Notes 1101, 1103 (May 28, 1990). He explains, "A specialized court, confident of its expertise and of not being contradicted by another appellate court, would feel more secure than generalist courts in identifying the underlying statutory structure. The appeal to statutory structure will often (though not inevitably) undermine the more or less clear text . . . ." Id. at 1104.

219. Use of statutory context can pose a difficulty in the case of a statute such as the Code because it evolves over time, and thus some provisions are far older than others. Newer provisions may reflect new understandings, such as the importance of the time value of money.

220. "Generalist courts may well fail to see connections between different parts of a statute and render decisions that create inconsistencies within the statute." Richard L. Revesz, Specialized Courts and the Administrative Lawmaking System, 138 U. Pa. L. Rev. 1111, 1168 (1990).

judicial differences in background and taste.[221] It permits but does not require judicial effort. It justifies either cursory or exhausting statutory exegesis. The judge is free to choose. Plain meaning can be as fancy as the judge chooses, and therein lies its strong, almost irresistible, appeal. Plain meaning permits judges to choose either to enhance power or decrease workload.

Plain meaning, however, sacrifices the expertise of administrative agencies to the preferences of individual judges. The muffled *Chevron* doctrine strikes a balance. It accepts the appeal and importance of the statutory language, but by presuming that language is unlikely to be plain and by preserving a role for legislative history in determining the reasonableness of administrative action, it cabins the ability of judges to use plain meaning doctrines to construct meaning.

The requirement that courts test the reasonableness of administrative action against the origin and purposes as demonstrated in the legislative history preserves a role for the judicial branch without imposing too great a burden on judicial resources. Such a test for reasonableness is narrower and less burdensome than reviewing the adequacy of agency explanations or using legislative history to determine congressional intent. If, as under the muffled *Chevron* doctrine, the court's task is limited to identifying support in the legislative history for the position the administrative agency has taken, the court need not consider all possible positions reflected in the legislative history. It need not weigh the competing concerns. Under the muffled *Chevron* doctrine, the court leaves the choice of how to balance the competing concerns to the administrative agency. Moreover, the muffled *Chevron* doctrine respects separation of powers: the courts ensure that administrative agencies act within bounds set by Congress, but let the administrative agency decide how to act within those bounds.

V. CONCLUSION

The muffled *Chevron* doctrine borrows from both *Chevron* and *National Muffler*. From *Chevron*, it learns the need to give structure to the multiple factors involved in reviewing agency interpretations of law. Like the reformulated *Chevron*, it gives the particular importance to the language of

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221. Judge Wald has written:

> When judges speak about words in "context" and the "structure" of a statute or its "object and purpose," and yet at the same time resist looking at any legislative materials to inform those inquiries, the door is inevitably left open for judicial assumptions, speculation, preferences, and notions of "sound public policy" to fill the vacuum.

Wald, supra note 4, at 304.

the statute. *National Muffler,* however, serves as a reminder that the purpose and origin of a statute merit consideration. Examination of a provision's language and the place of the particular provision in the overall statutory scheme, although important, seldom ends analysis.

Legislative history provides context that clarifies meaning, and makes what seemed plain at first glance not so plain at all. A muffled *Chevron* doctrine discourages courts from worshiping the false idol that finds meaning plain from the statutory text alone. It restores the judiciary to its important role of protecting against abuses of power by an administrative agency without encouraging the judiciary to displace the administrative agency.