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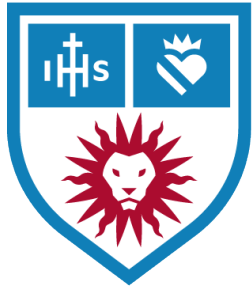
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*Administrative Law Meets Section
501(c)(3) Charitable Purpose*

Professor Ellen Aprill

Administrative Law Meets Section 501(c)(3) Charitable Purpose

ELLEN P. APRILL*

Abstract

In the past several years taxpayers have won a number of challenges to tax guidance based on violations of administrative law. Federal courts are blithely invalidating IRS and Treasury guidance, ranging from regulations to notices, because of failure to follow various administrative law doctrines. These administrative law challenges have been substantive, procedural, or both. Courts engage substantive challenges under the Chevron doctrine by determining whether guidance is inconsistent with or an unreasonable interpretation of the statutory language. Procedural challenges involve failure to satisfy requirements of the Administrative Procedures Act (APA), in particular the need for and adequacy of notice-and-comment rulemaking. The guidance nullified in recent cases includes some finalized decades ago.

To demonstrate the potential enormous consequences of these decisions, this article examines how the regulations defining “charitable” under § 501(c)(3) and the related hodge-podge of sub-regulatory guidance, especially revenue rulings, would fare under such application of current administrative law doctrine. The statute and guidance under “charitable” are very old indeed. The exempt purposes listed in § 501(c)(3) date back almost 150 years. The currently applicable regulations were promulgated in 1959. Key revenue rulings date to the 1970’s.

This examination represents a thought experiment. No court has yet invalidated the regulations or revenue rulings defining charitable purpose under § 501(c)(3) based on violations of administrative law. Such a challenge, however, could easily arise. An organization challenging denial of exemption in a declaratory judgment action under § 7428 could raise administrative law issues like those in the recent cases discussed in this piece. Challenges based on the APA have already occurred in connection with charitable deductions, a tax provision closely related to the definition of charitable purpose.

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The broad application of the regulations defining charitable purpose and related revenue rulings as well as their age makes them a particularly good vehicle for considering the implications of recent tax cases invalidating guidance based on administrative law doctrines. Moreover, most tax lawyers have at least a passing familiarity with § 501(c)(3), making this approach to recent decisions accessible.

This thought experiment serves two different purposes. First, application of administrative law doctrine to this body of tax laws exposes flaws regarding guidance not only as to charitable purpose but also to tax guidance more generally. I hope that this aspect of the article encourages the IRS to explore ways to increase public participation in the guidance process. Second, it demonstrates the enormous potential harm to the tax system from judicial invalidation of old tax guidance based on flaws in the administrative procedure. My hope in this regard is that exposing the possible consequences of this new trend will move Congress to act to limit it, perhaps by clarifying the extent to which the APA requirements apply to tax guidance. Further, I urge Congress to codify the approach of a recent district court decision, which applied a six-year statute of limitations, accruing from the date tax guidance is issued, to challenges for noncompliance with the APA. Longstanding guidance is a terrible thing to waste.

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I. Introduction

In the past several years taxpayers have won a number of challenges to tax guidance based on violations of administrative law. Federal courts are blithely invalidating Internal Revenue Service (“Service”) and Treasury guidance, ranging from regulations to notices, because of failure to follow various administrative law doctrines. These administrative law challenges have been substantive, procedural, or both. Courts engage substantive challenges under the *Chevron* doctrine¹ by determining whether guidance is inconsistent with, or an unreasonable interpretation of, the statutory language.² Procedural challenges involve failure to satisfy requirements of the Administrative Procedure Act (APA), in particular the need for and adequacy of notice-and-comment rulemaking.³ The guidance nullified in recent cases includes some finalized decades ago.

To demonstrate the potentially enormous consequences of these decisions, this Article examines how the Regulations defining “charitable” under section 501(c)(3) and the related hodge-podge of sub-regulatory guidance, especially revenue rulings, would fare under such application of current administrative law doctrine.⁴ The statute and guidance under “charitable” are very old indeed. The exempt purposes listed in section 501(c)(3) date back almost 150 years. The specified statutory purposes name “charitable,” but do so as a category equivalent to “religious,” “literary,” “educational,” etc. That is, “charitable” in the statute is clearly not a residual category or a term encompassing the other listed categories.

Regulations proposed in 1956 would have adopted the narrow, so-called “ordinary” meaning of “charitable,” that is, helping the poor or disadvantaged. Consistent with the statutory structure, such an interpretation of “charitable” would have given it a meaning distinct from, and parallel to, the other listed section 501(c)(3) purposes. Without explanation, significantly revised Regulations were proposed and promulgated in 1959. These 1959 Regulations adopted a broad meaning of “charitable,” one known as the “legal” meaning. This legal meaning, the Regulations explain, is “not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of charity as developed by judicial decisions.”⁵

In adopting this legal definition, the 1959 Regulations transformed and, at least in one plausible reading, elevated the category of charitable exempt

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

² See note 79, *infra*, and accompanying text.

³ See note 80, *infra*, and accompanying text.

⁴ All references to “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code”), and all references to Regulations are to the Treasury Regulations promulgated thereunder, unless otherwise indicated.

⁵ Reg. § 1.501(c)(3)-1(d)(2).

purpose to one of greater generality than the others listed. These Regulations also opened the door to Service guidance recognizing exempt purposes that the statute failed to include and allowing the addition of new ones, a need that statute had also ignored. Those 1959 Regulations stand unchanged to this day. They do not predate the APA, which was enacted in 1946, but they do predate key developments in administrative law on which recent cases have relied. Many instances of sub-regulatory guidance, particularly revenue rulings from the 1970's, rely on the 1959 Regulations.

This examination represents a thought experiment. No court has yet invalidated the Regulations or revenue rulings defining charitable purpose under section 501(c)(3) based on violations of administrative law. Such a challenge, however, could easily arise. An organization challenging denial of exemption in a declaratory judgment action under section 7428 could raise administrative law issues like those in the recent cases discussed in this Article.⁶ Challenges based on the APA have already occurred in connection with charitable deductions, a tax provision closely related to the definition of charitable purpose.⁷

The broad application of the Regulations defining charitable purpose and related revenue rulings, as well as their age, makes them a particularly good vehicle for considering the implications of recent tax cases invalidating guidance based on administrative law doctrines. Moreover, most tax lawyers have at least a passing familiarity with section 501(c)(3), making this approach to recent decisions generally accessible.

This thought experiment serves two different purposes. First, it demonstrates the enormous potential harm to the tax system from judicial invalidation of old tax guidance based on flaws in the administrative procedure. My hope in this regard is that exposing the possible consequences of this new trend will move Congress to act to limit it, perhaps by clarifying the extent to which the APA requirements apply to tax guidance. Further, I urge Congress to codify the approach of a recent district court decision, which applied a six-year statute of limitations, accruing from the date tax guidance is issued, to challenges for noncompliance with the APA.⁸ Second, application of administrative law doctrine to this body of tax laws exposes flaws regarding guidance not only as to charitable purpose but also to tax guidance more generally. I hope that this aspect of the Article encourages the Service to explore ways to increase public participation in the guidance process.

⁶ Section 7428 permits an organization denied exemption or for which no determination has been made 270 days from the date of an initial request for determination, to seek a declaratory judgment or decree from the Tax Court, the Court of Federal Claims, or the D.C. district court as to its classification. Reg. § 7428(b)(2).

⁷ See notes 109-135 *infra* and accompanying text.

⁸ See notes 274-277, *infra*, and accompanying text.

This Article joins the long and unusually heated debate about the extent to which these principles of administrative law should, and in fact do, apply to tax. Professor Kristin Hickman over many years and many articles has chastised the Service and Treasury for failure to follow what she believes is and should be clearly applicable law.⁹ Others strongly disagree, on both positive and normative bases. Some make a primarily positive argument, taking the position that various doctrines of administrative law do not apply generally to tax guidance under current law,¹⁰ in particular, required notice-and-comment for regulations issued under the general authority of section 7805(a).¹¹ Another strand of this scholarship focuses on the harm to the quality and quantity of tax guidance that strict adherence to the APA would produce.¹² That is, this latter category of work argues as a normative matter that various aspects of administrative law should not apply to tax guidance. Because I discuss cases taking the position that a wide variety of Service guidance documents must adhere to administrative law requirements related to notice-and-comment rulemaking, I take that application for granted. I also argue for statutory changes to limit application of administrative law doctrines to tax and, to that extent, take a normative position.

⁹ Kristin Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 466 (2013) [hereinafter, Hickman, *Unpacking*]; Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537 (2006) [hereinafter, Hickman, *The Need for Mead*]; Kristin Hickman, *Coloring Outside the Lines*, 82 NOTRE DAME L. REV. 1727 (2007) [hereinafter, Hickman, *Coloring*]; Kristin E. Hickman, *Agency-Specific Precedents: Rational Ignorance or Deliberate Strategy*, 89 TEX. L. REV. 80 (2010) [hereinafter, Hickman, *Rational Ignorance*]; Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with the Administrative Procedure Act*, 76 GEO. WASH. L. REV. 1153 (2008) [hereinafter, Hickman, *A Problem of Remedy*]; Kristin E. Hickman, *Administrative Law's Growing Influence on U.S. Tax Administration*, 3 J. TAX ADMIN. 82 (2017) [hereinafter, Hickman, *Growing Influence*]; Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239 [hereinafter, Hickman, *IRB Guidance*]. The court decisions discussed in this piece largely follow her view, and her work is cited throughout.

¹⁰ See David A. Weisbach, *Against Anti-Tax Exceptionalism*, forthcoming 77 TAX L. REV. (2023). This article makes both positive and normative arguments but has a more sustained positive argument than much work on this topic.

¹¹ See, e.g., John A. Townsend, *The Report of the Death of the Interpretive Regulation Is an Exaggeration* (Dec. 14, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3400489 [<https://perma.cc/XM2U-XBMZ>]; Jaspar L. Cummings, Jr., *Tax Exceptionalism Overblown*, 177 TAX NOTES FED. (TA) 225 (Oct. 10, 2022); Bryan T. Camp, *A History of Tax Regulation Prior to the Administrative Procedure Act*, 63 DUKE L.J. 1673 (2014). These authors criticize in particular the argument that regulations promulgated under the general authority of section 7805(a) create legislative rules subject to the APA.

¹² See, e.g., Brian D. Galle & Stephen E. Shay, *Admin Law and the Crisis of Tax Administration*, 101 N.C. L. REV. 1645 (2023); James M. Puckett, *Reasonable Tax Rules: Advancing Process Values with Remedial Restraint*, 24 FLA. TAX REV. 277 (2020); Stephanie Hunter McMahon, *The Perfect Process Is the Enemy of Good Tax*, 35 VA. TAX REV. 553 (2016).

After this introduction, the Article reviews the statutory and regulatory provisions regarding charitable purpose under section 501(c)(3), with discussion of the statutory language in Part II and the applicable regulations in Part III. Part IV then discusses the recent tax cases that have relied on both substantive and procedural doctrines of administrative law to invalidate regulations as well as the consequences of applying those doctrines to the charitable purpose regulations. Part V explains the key role revenue rulings have played in defining charitable purpose. Part VI considers judicial application of administrative law to sub-regulatory guidance. These cases turn on procedural challenges under the APA. Part VII makes recommendations as to both guidance regarding charitable purpose and application of administrative law to tax. It calls for the Service to engage a broader set of taxpayer responses not only for any proposed new charitable purposes but also for other kinds of guidance. It also urges Congress to clarify the application of the APA to tax guidance and, urgently, to enact a statute of limitations for procedural challenges to tax guidance.

II. Statutory Exempt Purposes in Section 501(c)(3) and Its Predecessors

Any study of the potential impact of administrative law on regulatory and sub-regulatory guidance regarding charitable purposes must start with discussion of the statute to which any such guidance relates. Administrative guidance must follow from, and be consistent with, relevant statutory provisions. The language of the statute can also affect which provisions of the APA apply to guidance issued under it.

Statutory language detailing exempt purposes under section 501(c)(3) has changed remarkably little since the Tariff Act of 1894, the Act which included the corporate income tax that the Supreme Court held unconstitutional in *Pollock v. Farmers' Loan & Trust. Co.*¹³ The 1894 Act had specified that the corporate tax did not apply “to corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes.”¹⁴ The Corporate Income Tax Act of 1909 repeated these three same purposes.¹⁵ Following ratification of the Sixteenth

¹³ *Pollock v. Farmers' Loan & Trust. Co.*, 158 U.S. 601 (1895).

¹⁴ Wilson-Gorman Tariff Act, 28 Stat. 509, sec. 32 (1894). A study by the Service's Statistics of Income division notes that the Tariff Act of 1894 has the earliest statutory reference to tax exemption for certain organizations. See Paul Arbsberger et al., *A History of the Tax-Exempt Sector: An SOI Perspective*, INTERNAL REVENUE SERV. STAT. OF INCOME 105, 106, last accessed Sept. 27, 2023, <https://www.irs.gov/pub/irs-soi/tehistory.pdf> [<https://perma.cc/ZB5S-3M7S>]. A Service training text observes, “[p]rior to the Act of 1894, the question of what to exempt did not arise except by virtue of statutory omission since in tax acts prior to that date the acts had specified the entities to be taxed.” *The Concept of Charity*, INTERNAL REVENUE SERV., last accessed Sept. 27, 2023, <https://www.irs.gov/pub/irs-tege/eotopicb80.pdf> [<https://perma.cc/78LN-ARQB>].

¹⁵ Corporate Income Tax Act of 1909, 36 Stat. 11, 113.

Amendment, the Revenue Act of 1913 also repeated these same purposes, adding “scientific” and reordering the named purposes.¹⁶ Congress added “prevention of cruelty to children or animals” as an exempt purpose in 1918¹⁷ and “literary” in 1921.¹⁸

Section 101(6) of the 1939 Code, the predecessor of current section 501(c)(3), exempted from taxation “[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.”¹⁹ In enacting the Internal Revenue Code of 1954, Congress added “testing for public safety” to the list of exempt purposes under section 501(c)(3),²⁰ apparently to overrule *Underwriters’ Laboratories Inc. v. Commissioner*.²¹

In the most recent change to section 501(c)(3) itself, Congress in 1976 amended it to include organizations “to foster national or international amateur sports competition (but only if no part of its activities involve [sic] the provision of athletic facilities or equipment.)”²² Congress quickly came to view the facilities and equipment prohibition as unsatisfactory. In 1982, it enacted section 501(j), retroactive to 1976, under which the facilities and equipment prohibition did not apply to “qualified organizations.”²³

So stood the exempt purposes listed in section 501(c)(3) at the adoption of the Internal Revenue Code of 1939, the Internal Revenue Code of 1954, the adoption of Internal Revenue Code of 1986, and the 2017 amendments

¹⁶ Revenue Act of 1913, ch. 16, IIG(a), 38 Stat 114, 172.

¹⁷ Revenue Act of 1918, ch. 18 § 231(6), 40 Stat. 1068. Donations to such exempt organizations have been deductible from income tax since 1917. Revenue Act of 1917, ch. 63 § 1201(2), 40 Stat. 300, 330.

¹⁸ See STAFF OF THE JOINT COMM. ON TAX’N, HISTORICAL DEVELOPMENT AND PRESENT LAW OF THE FEDERAL TAX EXEMPTION FOR CHARITIES AND OTHER TAX-EXEMPT ORGANIZATIONS 47 (2005).

¹⁹ Internal Revenue Code of 1939, 53 Stat. 4 § 101(6).

²⁰ Section 170I(1)(B), which defines the organizations for which a charitable contribution deduction is allowed, for the most part tracks the exempt purposes listed in section 501(c)(3). It does not, however, include testing for public safety. See Rev. Rul. 65-61, 1965-1 C.B. 234. G.C.M. 32399 (Sept. 21, 1962) modified by G.C.M. 32519 (Feb. 20, 1963) (confirming that there is no income tax deduction for donations to organizations testing for public safety). I thank Professor Harvey Dale for pointing me to these citations.

²¹ *Underwriters’ Lab’ys Inc. v. Commissioner*, 135 F.2d. 371 (7th Cir. 1943). The case had denied Underwriters’ Laboratories exemption as a scientific organization.

²² Tax Reform Act of 1976, Pub. L. No. 94-455, § 1313, 90 Stat. 1520, 1730.

²³ Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 286(a), 96 Stat. 570, adding section 501(j) to the Internal Revenue Code of 1954, as amended. A qualified organization under the provision is “any organization organized and operated exclusively to foster national or international amateur sports competition if such organization is also organized and operated primarily to conduct national or international competition in sport or to support and develop amateur athletes for national or international competition in sports.” *Id.*

wrought by the Tax Cuts and Jobs Act. At no time did Congress act to correct glaring omissions or recognize new purposes.²⁴ Unlike some other more recent provisions of the Internal Revenue Code or of section 501(c),²⁵ section 501(c)(3) does not give the Secretary specific authority to promulgate regulations, authority that would recognize the ability to recognize new exempt purposes. Of the purposes missing from the statutory list, perhaps most prominent is the absence of promoting health as an exempt purpose, even though this segment of the sector is the largest by revenue and expense.²⁶

Congress, to address what it sees as needed changes, has continued to follow the approach of section 501(j). It has not amended section 501(c)(3). Instead, it has added detailed provisions to section 501, such as section 501(q) for credit unions and section 501(r) for hospitals, even though neither of these categories earns mention in the statutory list of permitted purposes. Section 501(r) codifies—and complicates—the community-benefit standard established in Revenue Ruling 69-545 for hospital exemption.²⁷ Because section 501(r) relates so closely to that revenue ruling, I discuss it in Part V, the section of the Article on revenue rulings.

In addition to failing to include promotion of health as an exempt purpose, the absence of any statutory provision allowing for new section 501(c)(3) purposes or a broadly worded catch-all or residuary clause strikes me as particularly surprising. As the Supreme Court observed in *Bob Jones University v. United States*, “[t]he form and history of the charitable exemption and deduction sections of the various income tax Acts reveal that Congress was guided by the common law of charitable trusts The House Report on the Tax Reform Act of 1969 . . . described ‘charitable’ as ‘a term that has been used in the law of trusts for hundreds of years.’”²⁸

The history of charitable trusts demonstrates the importance of a residuary clause. Historians of philanthropy often trace the modern law of charitable

²⁴ Congressional inaction here contrasts with the action of the United Kingdom and Wales. Its Charities Act of 2011 updated charitable purposes, listing thirteen of them. They include the advancement of citizenship or community development; the advancement of human rights; conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity; the advancement of environmental protection or improvement; and the relief of those in need by reason of youth, age, ill-health, disability financial hardship or other disadvantage. It also includes a catch-all provision, namely, “any other charitable purposes.” Charity Commission for England and Wales, *Charitable Purposes*, Sept. 16, 2013, <https://www.gov.uk/government/publications/charitable-purposes/charitable-purposes> [https://perma.cc/6PQJ-C3UT].

²⁵ See, e.g., §§ 170(m)(10)(D), 501(r)(7), and 4960(d).

²⁶ See *infra*, Part V.

²⁷ Rev. Rul. 69-545, 1969-2 C.B. 117.

²⁸ *Bob Jones Univ. v. United States*, 461 U.S. 574, 588 (1983).

trusts to the Preamble to the Elizabethan Statute of Charitable Uses.²⁹ It listed a number of purposes that were to be considered charitable, including relief of the aged, impotent and poor people, schools of learning, and churches, along with other categories we seldom encounter today, such as relief or redemption of prisoners. It did not include a catch-all or residuary clause. But, as one historian has cautioned, “[t]he categories of charitable uses were never regarded as exclusive but as typical of the kinds of philanthropic activities which the state wished to encourage. Public benefit was the key, and the relief of poverty its principal manifestation Other uses, principally religious, fell outside the preamble but also were considered charitable.”³⁰

Scholars of philanthropy also look to *Commissioners of Income Tax v. Pemsel*. There, Lord Macnaghten explained that “charity” in the legal sense has “four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.”³¹ Section 28 of Restatement (Third) of Trusts expands this list of charitable purposes to six: “(1) the relief of poverty; (2) the advancement of knowledge or education; (3) the advancement of religion; (4) the promotion of health; (5) governmental or municipal purposes; and (6) other purposes that are beneficial to the community.”³²

The American Law Institute (ALI) Restatement of the Law, Charitable Nonprofit Organizations (ALI Restatement) adopts the list of charitable purpose found in Restatement (Third) of Trusts.³³ The ALI Restatement emphasizes that the definition includes not only longstanding specific purposes, such as relief of poverty and promotion of health, but also other “purposes that are beneficial to the community.” It remarks that the Restatement (Third) Trusts, “draws from common law by incorporating the important concept that charitable purposes evolve over time to take into account the changing needs of different communities. . . . There is a clear intent that the charitable class will evolve over time.”³⁴

Because section 501(c)(3) itself lacks both a provision explicitly authorizing new permitted purposes under section 501(c)(3) and a broad statutory catch-all, this paper looks next at whether the applicable Regulations authorize new section 501(c)(3) purposes. The Regulations both as proposed and adopted in 1959 arguably do so, although not as explicitly as they could. In contrast, it is not at all clear that the Regulations proposed

²⁹ An Act to Redress the Mis-employment of Lands, Goods, and Stocks of Money Heretofore Given to Certain Charitable Uses, 1601, 43 Eliz. 1, ch. 4 (Eng.).

³⁰ GARETH JONES, HISTORY AND THE LAW OF CHARITY 1532-1827 26-27, 56-57 (1969).

³¹ *Commissioners for Special Purposes of Income Tax v. Pemsel*, 1891 A.C. 531, 583 (1891).

³² RESTATEMENT (THIRD) OF TRUSTS, § 28 (2003).

³³ RESTATEMENT OF THE LAW, CHARITABLE NONPROFIT ORGANIZATIONS (AM. L. INST. 2021), §1.01, Comment d. (Charitable purposes in general) [hereinafter ALI RESTATEMENT].

³⁴ ALI RESTATEMENT, *supra* note 33.

in 1956 (and withdrawn by the 1959 proposed regulations) would have done so. Had the Regulations adopted in 1959 followed those proposed in 1956, with its narrow interpretation of “charitable” as relief for the poor and needy, perhaps Congress would have had no choice but to amend section 501(c)(3) from time to time.

III. Charitable Purpose in the Regulations

Professor Richard Schmalbeck has written that “the regulations under the early Revenue Acts and the 1939 Code were extremely general, and quite unhelpful in drawing the lines that the charitable sector needed.”³⁵ He also has observed: “[s]hortly after gifts were made deductible, Treasury issued in 1919 what appear to be the first regulations defining charity,” which “reflected something of a scattered attention span, mentioning a few things in some detail, and many others not.”³⁶ Organizations to aid “the general body of litigants by improving the efficient administration of justice” were deemed exempt,³⁷ but “societies to encourage the performance of first class orchestral music” were not.³⁸

Applicable Regulations issued in 1924—which remained unchanged until 1959—provided:

Corporations organized and operated exclusively for charitable purposes comprise, in general, organizations for the relief of the poor. The fact that a corporation established for the relief of indigent persons may receive voluntary contributions from the person intended to be relieved will not necessarily deprive it of exemption. An association whose sole purpose is the instruction of the public, or an association whose primary purposes is to give lectures on subjects useful to the individual and beneficial to the community may be exempt as an educational corporation, even though such an association has incidental amusement features. Associations formed to disseminate controversial or partisan propaganda are not educational within the meaning of the statute.³⁹

After adoption of the Internal Revenue Code of 1954, Treasury and the Service in 1956 proposed a Regulation “following the Service’s historically

³⁵ Richard L. Schmalbeck, *Treasury Regulations Defining “Charity”: If Only*, *Nat’l Ctr. on Philanthropy and Law*, 40 (presented at the 2015 Major Conference of the NYU National Center on Philanthropy and Law), last accessed Sept. 27, 2023, <https://ncpl.law.nyu.edu/wp-content/uploads/2016/08/Tab-B-Schmalbeck-paper.pdf> [https://perma.cc/7WV6-8GHG] [hereinafter *If Only*]. As will be obvious, I am much indebted to this paper for its discussion of the statutory provisions now codified in section 501(c)(3) and the Regulations thereunder.

³⁶ *If Only*, *supra* note 35, at 6.

³⁷ *If Only*, *supra* note 35, at 6.

³⁸ *If Only*, *supra* note 35, at 7.

³⁹ Reg. 65, art. 517., T.D. 3640, 26 Dec. Int. Rev. 745, 896 (1924).

restrictive interpretation” that “employed a ‘relief of the poor’ concept.”⁴⁰ Proposed Regulation section 1.501(c)(3)-1(b) provided that “[o]rganizations formed and operated exclusively for charitable purposes include, generally, organizations for the relief of poverty, distress, or other conditions of similar public concern.”⁴¹ That is, the Proposed Regulation took a narrow view of the meaning of “charitable.” Moreover, the Proposed Regulation included no language permitting additional charitable purposes beyond those specifically stated.

“Following an extensive study by the Service,”⁴² these Proposed Regulations were withdrawn in 1959 and new Proposed Regulations were issued.⁴³ The 1959 Proposed Regulations were adopted as final later the same year.⁴⁴ (Unlike more recent Notices of Proposed Rulemaking or Treasury Decisions today, neither the 1959 Proposed Regulations nor the Treasury Decision adopting them include any helpful discussion of the reasoning behind the choices made.) With an addition to the Regulations in order to define “scientific” two years later,⁴⁵ these 1959 Regulations have stood unchanged from the date of adoption to today.⁴⁶ Professor Schmalbeck characterized the Regulations as “hopelessly incomplete,” offering definitions of “only four of the eight statutory subcategories within the charitable realm” along with testing for public safety.⁴⁷

This Article focuses on the regulatory definition of charity. The regulatory definition begins by specifying that “[t]he term charitable is used in . . . its generally accepted legal sense.”⁴⁸ As the Joint Committee on Taxation has explained:⁴⁹

[T]here are two approaches to the meaning of the term charitable—the legal sense and the ordinary and popular sense. The legal sense is derived from the law of charitable trusts and is broader than the ordinary sense of the term, which generally means the relief of the poor and distressed. Since 1959, Treasury regulations have defined the term “charitable” in the legal sense. . . .

⁴⁰ JAMES J. FISHMAN, STEPHEN SCHWARZ, & LLOYD HITOSHI MAYER, *NONPROFIT ORGANIZATIONS: CASES AND MATERIALS* 316 (6th ed. 2020) [hereinafter FISHMAN, SCHWARZ, & MAYER].

⁴¹ Prop. Reg. § 1.501(c)(3)-1(b), 21 Fed. Reg. 460, 463 (1956).

⁴² *The Concept of Charity*, *supra* note 14, at 4.

⁴³ Prop. Reg. § 1.501(c)(3)-1(d), 24 Fed. Reg. 1421, 1422 (Feb. 26, 1959).

⁴⁴ Reg. § 1.501(c)(3)-1(d), 24 Fed. Reg. 5217 (June 26, 1959).

⁴⁵ Reg. § 1.501(c)(3)-1(d), 26 Fed. Reg. 189 (Jan. 11, 1961).

⁴⁶ See also EXEMPT ORGANIZATIONS TECHNICAL GUIDE, IRS.GOV (Mar. 20, 2023), <https://www.irs.gov/pub/irs-pdf/p5781.pdf> [https://perma.cc/X4KW-XXBP].

⁴⁷ *If Only*, *supra* note 35, at 8.

⁴⁸ Reg. § 1.501(c)(3)-1(d)(2).

⁴⁹ JOINT COMMITTEE ON TAXATION, *supra* note 18, at 61–62.

This definition is broad, encompassing several ideas that would not generally be considered as charitable in the ordinary sense.

As noted earlier, adopting the legal rather than the ordinary sense of “charitable” represents a major change from the 1956 Proposed Regulations. By endorsing such a broad meaning for “charitable,” this Regulation fills the statutory gap regarding new exempt purposes.

The Regulation, in the same sentence, goes on to assert that the term charitable “is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of charity as developed by judicial decisions.”⁵⁰ Professor Schmalbeck asked “why would one think that ‘charitable’ would limit or be limited by the other enumerated categories? They are listed in a sequence, and presumably apply independently. . . . It is speaking about the ‘subset’ usage, not the usage that applies to the entire charitable sector.”⁵¹ Unlike Professor Schmalbeck, I cannot tell whether the clause “which may fall within the broad outlines of charity as developed by judicial decisions” modifies “other exempt purposes” or the term “charitable.” Perhaps the drafters of the Regulation felt constrained by the exempt purposes listed in section 501(c)(3) and had to acknowledge these other categories as distinct, even though they could easily function as sub-categories of this now broadly defined “charitable” purposes. Alternatively, this statement may also reflect the guiding principle, as the Supreme Court recognized in *Bob Jones*, that the law of charitable trusts undergirds all categories of section 501(c)(3).⁵²

Next the Regulation parades a list of permitted charitable purposes: “[r]elief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare. . . .”⁵³ The ordinary meaning of charitable as relief of the poor has not disappeared. It remains and leads the list. Some of the other listed purposes are broad; some are narrow. The Regulations nowhere define them further, although, as discussed in a later

⁵⁰ Reg. § 1.501(c)(3)-1(d)(2).

⁵¹ *If Only*, *supra* note 35, at 13.

⁵² See 461 U.S. 574, 588 (1983). I thank Professor Harvey Dale for this suggestion. Consistent with this position, Herman T. Reiling, then Assistant Chief Counsel of the IRS and thus undoubtedly involved in drafting the 1959 Regulations, rejected in a piece for the American Bar Association what he called the “separateness theory.” This theory, he wrote, erroneously treated “all of the descriptive words in the exemption as if each were entirely separate and distinct from the other and unrelated to the legal concept of charity.” Herman T. Reiling, *What Is a Charitable Organization?* 44 ABA J. 525, 528 (1958) (on file with author). Nonetheless, to me, the 1959 Regulations read as if they are using “charitable” in both these ways at once—an umbrella of, and requirement for, all categories but also a separate category.

⁵³ Reg. § 1.501(c)(3)-1(d)(2).

section of this paper, in some cases revenue rulings do so. The inclusion of “social welfare” is particularly grating, when the next paragraph of section 501(c) explicitly exempts organizations established “for the promotion of social welfare.” The continued absence of promotion of health is notable as well.

The Regulation then offers an additional separate and enumerated list of organizations “(i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.” For Schmalbeck, this list reflects issues that were particularly salient in the late 1950’s,⁵⁴ although to me they resonate with current issues of equity and inclusion. The list, however, has never been updated.⁵⁵

The Joint Committee has written that:

[I]n general the legal definition of charitable is best understood as including activities that are intended to benefit the general welfare or public interest (including activities in the ordinary sense of the term), which itself can be construed broadly or narrowly, and which will expand and contract over time to reflect changing notions of the public interest.⁵⁶

By adopting the legal sense of the term “charitable,” the Regulation can be read as an “umbrella” category, putting other categories under its protection as subcategories. In other words, it seemingly operates to encompass the other listed purposes, some of which have additional regulatory requirements. If so, it stands in some tension with these other categories, despite the ambiguous language regarding the seeming overlap with “other exempt purposes.”

The validity of the 1959 Regulations with their broad definition is crucial to the operation of the sector. The next section examines how they would likely fare if challenged under current understandings of administrative law.

IV. Tax Regulations and Administrative Law

In 1946, the APA emerged from the New Deal.⁵⁷ It has been hailed as the “bill of rights for the new regulatory state,” striking a balance “between

⁵⁴ *If Only*, *supra* note 35, at 19–21.

⁵⁵ In contrast, the Treasury and the Service in 2016 added nine new examples in regulations under section 4944(c) that had dated back to 1972. The revision involved program-related investments (PRIs), which represent exceptions to jeopardizing investments subject to excise tax. T.D. 9762, 81 Fed. Reg. 24014 (Apr. 25, 2016), stated that the new examples, among other impacts, “demonstrated that PRIs may accomplish a variety of exempt purposes (and are not limited to situations involving economically disadvantaged individuals and deteriorated urban areas), may fund activities in one or more foreign countries, and may earn a potential high rate of return.”

⁵⁶ JOINT COMMITTEE ON TAXATION, *supra* note 18, at 62.

⁵⁷ P.L. 79-404, 60 Stat. 237 (1946), codified at 5 U.S.C. § 500 et seq.

promoting individuals' rights and maintaining agencies' policy-making flexibility."⁵⁸ Its key achievements included establishing notice-and-comment rulemaking. Section 553 of the APA requires that, in general, agencies anticipating adoption of certain kinds of binding rules give notice of the regulation as proposed, invite public comments, and consider the comments received.⁵⁹ After the required notice,

the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of relevant material presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.⁶⁰

More precisely, APA section 553 requires these procedures, including public notice-and-comment, for what are known as legislative rules.⁶¹ Legislative rules are understood as regulations that have the force of law and impose duties and obligations on affected parties.⁶² Legislative rules stand in contrast to interpretive rules, which do not bind the public but instead give an agency's view of matters under its jurisdiction. Interpretive rules do not require notice and comment.

Notice and comment, as the Court of Appeals for the D.C. Circuit has explained, "reintroduce[s] public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies."⁶³ As Supreme Court has written, "In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking [sic] require that agency decisions be made only after affording interested persons notice and an opportunity to comment."⁶⁴ Notice-and-comment procedures are intended to serve fundamental purposes of democracy as well as to improve the regulatory product by bringing to regulators' attention considerations that might be missed.⁶⁵

⁵⁸ George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1558 (1996).

⁵⁹ 5 U.S.C. § 553(c) [hereinafter APA].

⁶⁰ APA § 553(c).

⁶¹ The APA does not itself use the term "legislative," but such is the term generally used for substantive rules having "the force and effect of law," *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979) and thus requiring notice and comment. See RICHARD J. PIERCE & KRISTIN E. HICKMAN, *ADMINISTRATIVE LAW TREATISE* § 4.1.3.a (7th ed., 2023).

⁶² See Hickman, *Unpacking*, *supra* note 9.

⁶³ *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (quoting *Batterton v. Marshall*, 648 F.2d 694, 730 (D.C. Cir. 1980)).

⁶⁴ 441 U.S. 281, 316 (1979).

⁶⁵ See Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX LAW. 343, 366 (1991).

Notice and comment, of course, is not a panacea. Promulgating regulations is burdensome, such that administrative agencies may try to avoid it.⁶⁶ This effort requires many levels of review and considerable investment of administrative resources.⁶⁷ Moreover, well-funded interests affected by a proposed regulation are far more likely to comment than individuals or small entities without such resources. That is, comments may well be one-sided; attracting broad public participation in the rulemaking process is seldom achieved. Such may be a particularly acute problem for tax matters. As Professor Clint Wallace explained in a 2017 study, in contrast to financial regulation rulemaking “there are no groups that frequently and consistently submit public interest comments that are substantively sophisticated and benefit from all the tax benefits to be derived from structuring details to benefit from specific tax rules.”⁶⁸

The Regulations defining charitable in the legal sense were enacted just a little more than a decade after the APA. Perhaps at that time its provisions were salient to bureaucrats throughout the federal government, including the Treasury Department and the Service. Both the 1956 and 1959 Notices of Proposed Rulemaking (NPRM) cited the general authority of section 7805 as the statutory basis for the set of Regulations being proposed. Section 7805(a) gives the Secretary of Treasury authority “to prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.” Both sets of Proposed Regulations regarding charitable purpose acknowledged the application of the APA to regulations promulgated pursuant to the general authority of section 7805(a). They state that these Regulations are proposed, and notice is given “pursuant to the Administrative Procedure Act.” They also announced that “[n]otice is hereby given, pursuant to the Administrative Procedure Act, approved June 11, 1946, that the regulations set forth in tentative form below are proposed to

⁶⁶ See generally Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

⁶⁷ See I.R.M. 32.1.1–32.2.8.

⁶⁸ Clint Wallace, *Congressional Control of Tax Rulemaking*, 71 TAX. L. REV. 179, 222 (2017). See also Shu-Yi Oei & Leigh Ososky, *Legislation and Comment: The Making of the § 199A Regulations*, 69 EMORY L.J. 2009 (2019). The recently established Tax Law Center at NYU intends to be a “strong public interest voice” on tax issues. See *About Us*, THE TAX LAW CTR., last Accessed Oct. 2, 2023, <https://www.law.nyu.edu/centers/tax-law-center/about> [https://perma.cc/E7RT-ANG5]. Professional groups, such as the Tax Section of the American Bar Association, the New York State Bar Association Tax Section, and the AICPA, often offer disinterested technical comments but do not focus on presenting the substantive interests of those who generally lack a voice in the rulemaking process.

be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.”⁶⁹

To me, these statements strongly imply but, admittedly, do not explicitly state, that the legislative rulemaking procedures of APA section 553, with its requirement of notice and comment, apply to regulations authorized by section 7805(a). Even if such is the correct reading, the references to the APA in these Regulations from the 1950’s suggesting they required notice and comment may be a rare exception. As Peter Richman and Taylor Cranor wrote in a recent study, “[b]y the early 20th century . . . the consensus was that most tax rules were interpretive.”⁷⁰

For the several past decades, however, Treasury and the Service have explicitly taken the position that the APA does not require notice and comment for regulations promulgated under the general authority of section 7805(a). Although other executive agencies treat regulations promulgated under language similar to that of section 7805(a) as legislative rules and thus subject to section 553 of the APA,⁷¹ our tax agencies have long taken the position that regulations promulgated pursuant to the general authority of section 7805(a) “are interpretive in character and thus exempt from public notice and comment requirements by the APA’s own terms.”⁷² They deem notice and comment to be required only for the limited set of regulations that tax lawyers have deemed “legislative,” namely those promulgated pursuant to a specific grant of authority in a substantive code section, such as section 1502, section 170(a)(1), or section 337(d).⁷³ As discussed below, however, Treasury and the Service have nonetheless afforded notice-and-comment for regulations they deem interpretive.

⁶⁹ See 21 Fed. Reg. 460, 463 (1956); T.D. 6391, 24 Fed. Reg. 5217 (June 26, 1959). Both sets of Proposed Regulations also use language much like that seen in NPRMs today: “Prior to the final adoption of such regulations, consideration will be given to any data, views, or arguments pertaining there to which are submitted in writing”

⁷⁰ Peter Richman & Taylor Cranor, *Legislative and Interpretive Tax Rules and Rulemaking*, 73 TAX NOTES FED. (TA) 1149, 1153 (Feb. 20, 2023) (citing Stanley S. Surrey, *Scope and Effect of Treasury Regulations Under the Income, Estate and Gift Taxes*, 88 U. PA. L. REV. 556, 557 (1940) and Camp, *supra* note 11, at 1710).

⁷¹ See Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002).

⁷² See Hickman, *Coloring*, *supra* note 9, at 1729. See I.R.M. 32.1.5.4.7.4.1(3).

⁷³ “The Administrative Procedure Act (APA) generally requires agencies that promulgate rules to provide public notice of a proposed rulemaking in the Federal Register, permit the public to submit written comments, and include a general statement of the rule’s basis and purpose when publishing the final rules. APA § 553(b), (c). Regulations required to follow the APA’s notice and comment procedure are referred to as legislative or substantive rules.” I.R.M. 32.1.5.4.7.4.1(1), *supra* note 66. See New York State Bar, Taxation Section, Report on Legislative Grants of Regulatory Authority (2006), <https://nysba.org/app/uploads/2020/03/1121-Report.pdf> [<https://perma.cc/4SUJ-D5SF>].

Case law has expanded the requirements for notice-and-comment rulemaking. The Supreme Court 1983 decision, *Motor Vehicles Manufacturers v. State Farm Mutual Auto Insurance*, demanded “reasoned decisionmaking [sic]” from agencies in the context of an APA section 553 rulemaking.⁷⁴ The case held that an agency risks a judicial finding that a rule is invalid as arbitrary and capricious under APA section 706,⁷⁵ unless it engages in reasoned decision-making.⁷⁶ Such decision-making requires the agency to “examine the relevant data and articulate a satisfactory explanation for its action,” including a “rational connection between the facts found and the choice made.”⁷⁷ As the Court explained, an agency decision could well prove arbitrary and capricious

if the agency has 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 runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.⁷⁸

The *State Farm* requirements have come to be known as the “hard look” doctrine.⁷⁹

Apart from the strictures of the APA, judicial deference to administrative agencies is another important aspect of administrative law.⁸⁰ *Chevron v. United States*, decided in 1984, introduced the famous two steps for judicial review of actions by administrative agencies acting with the force of law in interpreting a statute. At Step One, the reviewing court determines whether Congress has answered the question at hand. If the answer is yes and the administrative action is inconsistent with the Congressional directive, the administrative action is invalid as *ultra vires*. If the answer is no, courts proceed to the second step. Under Step Two, courts defer to reasonable agency interpretation if there is silence or ambiguity in the statutory text.⁸¹

⁷⁴ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

⁷⁵ APA § 706 directs a reviewing court to find unlawful any agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

⁷⁶ 463 U.S. at 43.

⁷⁷ *Id.* (quoting *Burlington Truck Lines v. U.S.* 371 U.S. 156, 168 (1962)).

⁷⁸ *Id.*

⁷⁹ *Id.* at 9. See Wallace, *supra* note 68, at 186–87. Wallace notes that “courts have started to integrate” *State Farm* hard-look review into *Chevron* review, albeit in various ways. See also Catherine M. Sharkey, *Cutting in on the Chevron Two-Step*, 86 FORDHAM L. REV. 2359 (2018); Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 781–82 (2017).

⁸⁰ As discussed *infra*, notice and comment bears on judicial deference as well as application of APA requirements.

⁸¹ Of course, judges, scholars, and litigators do not agree on what constitutes force of law, Congressional clarity, or the level of ambiguity meriting deference to the administrative agency.

Chevron itself involved action by the Environmental Protection Agency (EPA), which, after a change in administrations, promulgated a definition of “source” under the Clean Water Act different from and stricter than the one that had been in place under the prior administration. The Court deferred to the agency’s change of position. It rejected the nondelegation doctrine and reasoned that, in making policy decisions, executive agencies, answerable to the President, are more politically accountable than federal courts.

For both the APA requirement of notice and comment and *Chevron* deference, tax law has been a late, reluctant, and less than full participant in the administrative law party. Instead, “tax exceptionalism” has long dominated. As Professor Lawrence Zelenak explained in 2014, tax exceptionalism is “the notion that tax law is somehow deeply different from other law, with the result that many of the rules that apply trans-substantively across the rest of the legal landscape do not, or should not, apply to tax.”⁸² Tax exceptionalism has been ascribed to a variety of factors. They include the insular nature of the tax bar, the lack of knowledge of administrative law within the Service after a restructuring in 1988, and the establishment of the Treasury Department procedures long before that of the many administrative agencies established by the New Deal.⁸³

The Supreme Court did not explicitly reject tax exceptionalism regarding judicial deference until 2011, many decades after *Chevron*. In *Mayo*

The scholarship on these issues is too voluminous to begin to cite in full. See generally Kristin E. Hickman & Aaron L. Nielson, *The Future of Chevron Deference*, 70 DUKE L.J. 1015, 1015–24 (2021). “Force of law” is discussed further *infra*. See generally THOMAS W. MERRILL, *THE CHEVRON DOCTRINE: ITS RISE AND FALL AND THE FUTURE OF THE ADMINISTRATIVE STATE* (2022). Recent Supreme Court cases that involve administrative action have often ignored *Chevron*. See Richard J. Pierce, Jr., *Is Chevron Deference Still Alive?*, THE REGULATORY REVIEW (July 14, 2022), <https://www.theregreview.org/2022/07/14/pierce-chevron-deference/?s=09> [<https://perma.cc/SMH6-YUF9>]. However, as a 2017 empirical study found, the federal courts of appeal rely on *Chevron* far more than does the Supreme Court. See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017). In May of 2023, the Supreme Court granted certiorari in *Loper Bright Enter. v. Raimondo* on the following question: “Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning constitutional powers expressly but narrowly granted elsewhere does not constitute an ambiguity requiring deference to the agency.” *Loper Bright Enter. v. Raimondo*, No. 22-451, 143 S. Ct. 2429 (2023). In October, the Supreme Court granted certiorari in *Relentless Inc. v. Dept. of Commerce*, No. 22-1219, on the same issue and to be argued in tandem with *Loper Bright*. Thus, there is a real possibility that *Chevron* could be overruled and much of the discussion in this Article rendered moot. As discussed *infra*, should the Supreme Court overrule *Chevron* and return to review under the *Skidmore* doctrine, longstanding Treasury guidance could have a better chance of withstanding judicial scrutiny.

⁸² Lawrence Zelenak, *Maybe Just a Little Bit Special, After All?*, 63 DUKE L.J. 1897, 1901 (2014).

⁸³ See Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499 (2011); David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187 (2010); Hickman, *Rational Ignorance*, *supra* note 9; Hickman, *A Problem of Remedy*, *supra* note 9.

Foundation for Medical Education and Research v. United States,⁸⁴ the Court clearly stated that the *Chevron* framework applied to regulations promulgated under the general authority of section 7805(a), which, as noted earlier, instructs the Secretary of Treasury to “prescribe all needful rules and regulations” for the enforcement of Title 26 of the U.S. Code. In *Mayo*, the Supreme Court applied *Chevron* to uphold a regulation promulgated under section 7805(a) subjecting medical residents to tax under the Federal Insurance Contribution Act.⁸⁵ In so doing, *Mayo* rejected an important aspect of tax exceptionalism.

Even after the date of *Chevron*, federal courts, including the Supreme Court, had continued to rely on an older, specific Supreme Court tax precedent, *National Muffler Dealers Association v. United States*,⁸⁶ when reviewing tax regulations. *National Muffler* adopted a multi-factor test less deferential than *Chevron*.⁸⁷ *Mayo* rejected such use of *National Muffler*.⁸⁸ The Supreme Court in *Mayo* wrote that absent a justification to do so, “we are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly [r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.”⁸⁹ This statement suggested, but did not hold, that the procedural aspects of the APA would also apply to regulations promulgated under the general authority of section 7805. But *Mayo* did not specifically address whether and when tax regulations had to comply with the notice-and-comment requirements of APA section 553. In particular, *Mayo* did not consider whether the APA required notice-and-comment for regulations promulgated under the general authority of section 7805(a), such as the one at issue in the case.

Nonetheless as the Internal Revenue Manual explains, “[a]lthough most IRS/Treasury regulations are interpretative, and therefore not subject to the notice-and-comment provision of the APA, the Service usually solicits public comment when it promulgates a rule.”⁹⁰ For many years the NPRMs for regulations to be promulgated pursuant to the general authority of section

⁸⁴ *Mayo Found. for Med. Educ. and Rsch. v. United States*, 526 U.S. 44, 56 (2011).

⁸⁵ 526 U.S. at 60.

⁸⁶ *Nat’l Muffler Dealers Ass’n, Inc. v. United States*, 440 U.S. 472 (1979).

⁸⁷ *Id.* at 476–77. See Ellen P. Aprill, *Muffled Chevron*, 3 FLA. TAX REV. 51 (1996). Factors considered in *National Muffler* include length of time the regulations have been in effect, their purpose, reliance on them, and consistency of application.

⁸⁸ Indeed, even before *Mayo*, some courts of appeals had recognized the disconnect between *National Muffler* and *Chevron*. See *Swallows Holding Ltd. v. Commissioner*, 515 F.3d 162, 167 (3d Cir. 2008), rev’g 126 T.C. 96 (2006) (finding Tax Court erroneously relied on *National Muffler* instead of *Chevron*).

⁸⁹ 526 U.S. at 55.

⁹⁰ I.R.M. 32.1.5.4.7.4.1(3), *supra* note 66. See also, Hickman, *The Need for Mead*, *supra* note 9.

7805 would make explicit statements echoing the IRM position, under a section of the preamble named Special Analyses: “[S]ection 553(b) of the Administrative Procedure Act (5 U.S.C. section 553) does not apply to these regulations.” The boilerplate language did not explain what the inapplicability of APA section 553 meant. Proposed regulations with this language denied the applicability of section 553(b)(1)-(3) at the same time as they followed its commands by not only giving notice of the proposed rulemaking but also seeking and pledging to consider submitted comments: “Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble.”⁹¹

Treasury and the Service affirmed this approach in a “Policy Statement on the Tax Regulatory Process” issued in March 2019.⁹² The purpose of the statement was “to clarify and affirm their commitment to sound regulatory practices.” It reiterated that the APA “exempts interpretive rules from notice-and-comment requirements.” Nonetheless, “as a matter of sound regulatory policy,” the Policy Statement announced that the agencies “will continue to adhere to their longstanding practice of using the notice-and-comment process for interpretive tax rules published in the Code of Federal Regulations.”⁹³

As best I can determine, as of December of 2016,⁹⁴ with a few discrete exceptions relating to tax shelter transactions, discussed below, NPRMs

⁹¹ See, e.g., Notice of Proposed Rulemaking, Administration Simplification of Section 481(a) Adjustment Periods in Various Regulations, 68 Fed. Reg. at 25310, 25311; Notice of Proposed Rulemaking, Remedial Actions for Tax-Exempt Bonds, 78 Fed. Reg. at 43059, 43061; Notice of Proposed Rulemaking, Golden Parachute Payments, 67 Fed. Reg. at 7630, 7635. Hickman, *Coloring*, *supra* note 9, at 1749 n.91, observes, that while the I.R.M. instructs drafters to include this language in the section of the preamble called Special Analysis and in the context of instructions regarding the Regulatory Flexibility Act, “it seems likely that including such a statement regarding the inapplicability of section 553(b) implicitly invokes the interpretive rule exception.”

⁹² Department of Treasury, *Policy Statement on the Tax Regulatory Process* (Mar. 5, 2019), <https://home.treasury.gov/system/files/131/Policy-Statement-on-the-Tax-Regulatory-Process-3-4-19.pdf> [<https://perma.cc/DC3R-NFWH>].

⁹³ *Id.*

⁹⁴ My speculation is that the change related to the Tax Court’s July 2015 *Altera* decision, discussed *infra*. Cf. Notice of Proposed Rulemaking, Dollar Value Life Regulations, 81 Fed. Reg. at 85450 (stating APA § 553(b) does not apply) and Notice of Proposed Rulemaking, Update to Minimum Present Value Requirements for Defined Benefit Plan Distributions, 81 Fed. Reg. 85190 (same) with Notice of Proposed Rulemaking, Health Insurance Providers Fee, 81 Fed. Reg. at 89017 (no mention of APA § 553(b) in Special Analyses) and Notice of Proposed Rulemaking, Tax Return Preparer Due Diligence Penalty under Section 6695(g) 83 Fed. Reg. at 55632 (same). For other examples reflecting this post-2016 change, see, e.g., Notice of Proposed Rulemaking, Requirements for Certain Foreign Persons and Certain Foreign Owned Partnership Investing in Qualified Opportunity Funds and Flexibility for Working Capital Safe Harbor Plans, 86 Fed. Reg.

invoking the authority of section 7805 have made no reference to APA section 553 whatsoever. They remain mute regarding the applicability of the APA even though the IRM has asserted and continues to assert that APA section 553 does not apply to most tax regulations. Language promising consideration of submitted comments remains unchanged. Thus, current NPRMs finesse the issue of whether or not the APA requires notice-and-comment by remaining silent regarding APA section 553.

The Service also long ignored the demands of *State Farm*. The IRM used to instruct drafters of regulations that “it [was] not necessary to justify the rules that are being proposed or adopted or alternatives that were considered.”⁹⁵ Only in 2014 was the IRM revised to require regulation drafters to “describe the substantive provisions of the regulations in clear concise plain language without restating particular rules contained in the regulatory text.”⁹⁶ The current provision of the IRM, adopted August 2, 2018, provides that “Final regulations are issued after considering the public comments on the proposed regulation. The preamble of a final rule ‘discusses and analyzes public comments received and explains the agency’s final decision.’”⁹⁷

In *Altera Corp. v. Commissioner*,⁹⁸ the Tax Court and the Court of Appeals for the Ninth Circuit considered *State Farm*’s relationship to *Chevron*. The

at 19585, 19592; Notice of Proposed Rulemaking, Certain Employee Remuneration in Excess of \$1,000,000 Under Internal Revenue Code Section 162(m), 84 Fed. Reg. at 70356, 70371; Notice of Proposed Rulemaking, Contributions in Exchange for State or Local Tax Credits, 83 Fed. Reg. at 43563, 4350. Such is the case even for very recent NPRMs. *See, e.g.* Notice of Proposed Rulemaking, Supervisory Approval of Penalties, 88 Fed. Reg. at 21564; Notice of Proposed Rulemaking, Superfund Chemical Taxes, 88 Fed. Reg. at 18446-01; Notice of Proposed Rulemaking, Required Minimum Distributions, 87 Fed. Reg. at 10504 (I congratulate anyone who has read this far in a very long and detailed footnote. The research for it took a considerable amount of time. I welcome and salute your perseverance). Recently proposed regulations that respond directly to cases invalidating guidance for violations of APA requirements, however, do cite APA provisions. *See* notes 251-256 *infra*, and accompanying text.

⁹⁵ Patrick J. Smith, *The APA’s Arbitrary and Capricious Standard and IRS Regulations*, 136 TAX NOTES 271, 274 (Jul. 16, 2012) (quoting the 2012 version of I.R.M. 32.1.5.4.7.3, dated Sept. 30, 2011).

⁹⁶ I.R.M. 32.1.5.4.7.2(1), *supra* note 67.

⁹⁷ I.R.M. 32.1.1.2.4, *supra* note 67.

⁹⁸ *Altera Corp. and Subsidiaries v. Commissioner*, 145 T.C. 91 (2015), *rev’d* *Altera Corp. and Subsidiaries v. Commissioner*, 926 F.3d 1061 (9th Cir. 2019), *en banc rehearing denied* 941 F.3d 1061 (2019), *cert. denied* (June 22, 2020). The Ninth Circuit opinion involved an unusual twist. The Ninth Circuit had issued an opinion reversing the Tax Court in 2018. Judge Stephen Reinhardt, who had heard the oral arguments, was one of two judges in the majority. *See Altera Corp. v. Commissioner*, Nos. 16-70496, 16-70497 (9th Cir. 2018). Judge Reinhardt, however, died before the opinion was published. The Ninth Circuit withdrew the opinion on August 18, 2018, in order to allow a reconstituted panel, now including Judge Susan Graber, to consider the appeal.

Regulation at issue in *Altera*, Regulation section 1.482-7(d)(2), required qualified cost-sharing agreements between related entities to include the cost of stock based-compensation in order to comply with the statutory arm's length standard. The Tax Court held the Regulation to be invalid because it did not satisfy the requirements of *Chevron* or *State Farm*. The Tax Court concluded that "whether *State Farm* or *Chevron* supplies the standard of review is immaterial because *Chevron* step 2 incorporates the reasoned decisionmaking [sic] standard of *State Farm*."⁹⁹ According to the Tax Court, the preamble to the Regulation failed to examine relevant data, failed to respond to comments submitted, and failed to provide a reasoned basis for its conclusion based on the administrative record.¹⁰⁰ The opinion also stated that "in promulgating the final rule Treasury invoked its general legislative rulemaking authority under section 7805(a)" and that the "final rule is therefore a legislative rule."¹⁰¹ That is, the Tax Court asserted that at least this general authority Regulation was subject to APA section 553.

The Tax Court's decision apparently influenced administrative practice. Professor Hickman in 2017 noted that, in three high-profile 2016 rulemakings, "Treasury and the IRS have included lengthier explanatory preambles offering greater insight into the drafters' thinking" and that "[p]racticitioners point to *Altera* as the reason."¹⁰² As noted earlier,¹⁰³ Treasury and the Service amended their language in NPRMs shortly after the Tax Court's decision in *Altera*.

In 2019, however, the Ninth Circuit reversed the Tax Court's *Altera* opinion. The appellate court distinguished *Chevron* from *State Farm*: "*State Farm* is used to evaluate whether a rule is procedurally defective as a result of flaws in the agency's decisionmaking [sic] process. . . . *Chevron*, by contrast, is generally used to evaluate whether the conclusion reached as a result of that process—agency's interpretation of a statutory provision it administers—is reasonable."¹⁰⁴ The Ninth Circuit found the *Chevron* issue to be straightforward. According to the Ninth Circuit, the statute did not speak directly to treatment of stock compensation costs. Thus, under *Chevron*, tax administrators could clarify the ambiguity so long as the clarification was

⁹⁹ 145 T.C. 91 at 120 (footnotes omitted, citing *Judulang v. Holder*, 565 U.S. 42 (2011)). *Judulang* rejected the Bureau of Immigration's criteria for deporting a resident alien for a crime of violence by relying on criteria for exclusion for entry as arbitrary and capricious and without reasoned explanation.

¹⁰⁰ As Wallace, *supra* note 68, at 189, has observed, "The regulation at issue in *Altera* received comments solely from sophisticated taxpayers facing significant tax liability under the proposed rule; no parties with broader or contrary interests participated in the notice-and-comment process."

¹⁰¹ 145 T.C. 91 at 117.

¹⁰² Hickman, *Growing Influence*, *supra* note 9, at 86.

¹⁰³ See *supra* note 94.

¹⁰⁴ 926 F.3d at 1075.

reasonable. Moreover, the Regulation met the reasonableness test of *Chevron*.¹⁰⁵

The Court of Appeals disagreed sharply with the Tax Court's application of *State Farm* and thus with the conclusion that the Regulations were invalid:

Here, Treasury gave sufficient notice of what it intended to do and why, and the submitted comments were irrelevant to the issues Treasury was considering. Because the comments had no bearing on "relevant factors" to the rulemaking, nor any bearing on the final rule, there was no APA violation. . . . Treasury's regulatory path may be reasonably discerned. Treasury understood section 482 to authorize it to employ a purely internal, commensurate with income approach in dealing with related companies. It provided adequate notice of its intent and adequately considered the objections.¹⁰⁶

The Ninth Circuit opinion noted that the Tax Court had held that the 2003 amendments to the arm's length Regulation constituted a final legislative rule subject to the requirements of the APA.¹⁰⁷ It did not otherwise comment on that holding, although it did test the Regulations under the procedures applicable to notice-and-comment rulemaking.¹⁰⁸

The opinion, however, did not confront head-on whether regulations promulgated under the authority of section 7805 are "legislative rules" under the APA and thus must—rather than may—follow APA section 553. This question remains unresolved in the Ninth Circuit, under my reading of the case, and for most other circuits.

The Eleventh and Sixth Circuits, however, have now both addressed this legislative rule issue. The cases involve the same Regulation regarding the charitable contribution deduction for conservation easements. Although they reach different conclusions as to the validity of the Regulation, they both apply current administrative law doctrine to treat the Regulation as legislative.

The Eleventh Circuit decided the first of these two cases, *Hewitt v. Commissioner*,¹⁰⁹ in December of 2021. The case held a regulation regarding conservation easements to be procedurally invalid. The appellate court determined that the regulation was arbitrary and capricious under section 706 of the APA for failure to respond, as required by *State Farm*, to significant comments on the regulations as proposed.

¹⁰⁵ *Id.* at 1078.

¹⁰⁶ *Id.* at 1083, 1086.

¹⁰⁷ *Id.* at 1074.

¹⁰⁸ *Id.* at 1080.

¹⁰⁹ *Hewitt v. Commissioner*, 21 F.4th 1336 (11th Cir. 2021).

In reaching its decision, the Eleventh Circuit reversed the Tax Court decision in the case,¹¹⁰ as well as its own decision in *TOT Property Holdings, LLC v. Commissioner*, which had upheld the particular conservation easement Regulation at issue.¹¹¹ (*Hewitt* explains that, while it did uphold the Commissioner's interpretation of the regulation in *TOT Property Holdings*, it did not consider its validity under the APA because the taxpayers had not made such a challenge.) The Eleventh Circuit also rejected the reasoning of the Tax Court's opinion in *Oakbrook Land Holdings, LLC v. Commissioner*,¹¹² which had upheld the Regulation.

The Regulation at issue involves the statutory provision requiring that deductible conservation easements exist in perpetuity.¹¹³ This statutory requirement creates a dilemma in those relatively few cases in which a court extinguishes the easement. Regulation section 1.170A-14(g)(6)(ii), which I will call "the extinguishment Regulation," addresses that possibility by providing that the perpetuity requirement remains satisfied in the case of judicial extinguishment if certain requirements are met. They include a requirement that, in the case of extinguishment, the gift provide a proportional allocation of the proceeds between the donee and the donor. That is, under the terms of the gift, the donee needs to have a property right in the sales proceeds at least equal to the proportional value of the perpetual easement at the time of the gift.

The extinguishment Regulation, along with other conservation easement regulations, was proposed on May 23, 1983,¹¹⁴ a scant month after the Supreme Court issued its *State Farm* decision. The NPRM stated that "[a]lthough this document is a notice of proposed rulemaking that solicits

¹¹⁰ *Hewitt v. Commissioner*, 119 T.C.M. (CCH) 1593, T.C.M. 2020 (RIA) ¶ 2020-089.

¹¹¹ *TOT Property Holdings, LLC v. Commissioner*, 1 F.4th 1354 (11th Cir. 2021). Because this paper focuses on appellate courts' application of administrative law principles to tax issues, it presents the textual discussion primarily according to chronological order of the appellate court decisions. Regulation section 1.170A-14(g)(6)(ii), the Regulation at issue in both the Eleventh and Sixth Circuits, has a long and complicated history of judicial review. Both the Eleventh and Sixth Circuit cases refer to the earlier cases. To ease comprehension, here is a chronology: *TOT Property Holdings, LLC v. Commissioner*, 2019 (Tax Court Bench Op., Nov. 22, 2019); *Oakbrook Land Holdings, LLC v. Commissioner*, 154 T.C. 180 (2020); *Hewitt v. Commissioner*, T.C. Memo. 2020-89 (2020); *TOT Property Holdings, LLC v. Commissioner*, 1 F.4th 1354 (11th Cir. 2021); *Hewitt v. Commissioner*, 21 F.4th 1336 (11th Cir. 2021); *Oakbrook Land Holdings, LLC v. Commissioner*, 28 F.4th 700 (6th Cir. 2022). Section 605(d)(1) of the SECURE 2.0 Act of 2022, enacted as Division T of the Consolidated Appropriations Act 2023, Pub. L. No. 117-238, 136 Stat. 4459 (2022), required safe harbor deed language for extinguishment and boundary line adjustment clauses for conservation easements. The Service provided such language in Notice 2023-30. Notice 2023-30, 2023-17 I.R.B. 766.

¹¹² 154 T.C. 180 (2020).

¹¹³ See I.R.C. § 170(h)(1).

¹¹⁴ Prop. Reg. § 1.170A-14, 48 Fed. Reg. 22940 (May 23, 1983).

public comments, the regulations proposed herein are interpretative and the notice and comment procedures of 5 U.S.C. 553 [of the APA] do not apply.”¹¹⁵ A hearing on the Proposed Regulations was held on September 15, 1983.¹¹⁶ Treasury and the Service finalized the Regulations more than two years later, on January 14, 1986.¹¹⁷ The Preamble to the Final Regulations summarized comments on seven issues raised by the Proposed Regulations, including access, third party mineral rights, and valuation, but made no mention of judicial extinguishment.¹¹⁸ In particular, it did not address whether extinguishment proceeds to the donee could be reduced by appreciation in the value of the property attributable to donor improvements.

In 2020 the Tax Court issued its opinion in *Oakbrook Land Holdings, LLC v. Commissioner*,¹¹⁹ upholding the procedural and substantive validity of the extinguishment Regulation. The Tax Court, however, rejected the government’s characterization of it as an interpretative rule. The Tax Court found that “[b]ecause the regulation imposes a requirement not explicitly set forth in the statute, it is appropriately treated as a legislative rule.”¹²⁰ As a result, *State Farm’s* requirement of responding to significant comments applied. The Tax Court found *State Farm* to be satisfied. It appeared to determine the significance of comments based in large part on quantity. It observed that “[o]f the 90 commenters only 13 mentioned the judicial extinguishment provision. Of those 13 most devoted only a few sentences to this subject, generally at the end of a submission that emphasized other matters.” Moreover, according to the Tax Court, “[m]ost of the commenters who mentioned the judicial extinguishment provision supported it.”¹²¹ It described the New York Landmarks Conservancy (NYLC) as the “only commentator to mention donor improvements.”¹²² The Tax Court also wrote that the age of the regulation gave weight to the presumption of reasonableness.¹²³ It concluded that changes to the Proposed Regulation,

¹¹⁵ Prop. Reg. § 1.170A-14, 48 Fed. Reg. 22941 (May 23, 1983).

¹¹⁶ Prop. Reg. § 1.170A-14, 51 Fed. Reg. 1496 (Jan. 14, 1986).

¹¹⁷ Reg. § 1.170A-14.

¹¹⁸ Reg. § 1.170A-14. Kristin Hickman has pointed out that the Preamble to the Regulations summarizes in only two pages 700 pages of comments. See Chandra Wallace, *Academic: Recent Losses Show Courts Holding IRS Accountable*, 176 TAX NOTES FED. (TA) 611 (July 25, 2022), <https://www.taxnotes.com/taxpractice/litigation-and-appeals/academic-recent-irs-losses-show-courts-holding-irs-accountable/2022/07/25/7dqcy?highlight=Hickman%20and%20Rothenberg> [<https://perma.cc/35ST-FYYS>].

¹¹⁹ 154 T.C. 180 (2020). The Tax Court had rejected the Hewitts’ challenge on the basis of its *Oakbrook Land Holdings* decision. See also, *Hewitt v. Commissioner*, 119 T.C.M. (CCH) 1593, T.C.M. 2020 (RIA) ¶ 2020-089.

¹²⁰ 154 T.C. at 189–190.

¹²¹ *Id.* at 186.

¹²² *Id.* at 188, 198.

¹²³ *Id.* at 199.

although involving only a slight rewording, demonstrated that comments on it had received consideration.

The Eleventh Circuit viewed the same record very differently.¹²⁴ For it, the fact that 13 of 90 commentators discussed the extinguishment Regulation argued in favor of significance. As to the significance of the NYLC comments in particular, *Hewitt* looked to Judge Toro's concurrence in the Tax Court's *Oakbrook Land Holdings*. It quoted Judge Toro's opinion that NYLC had asserted that the Proposed Regulation contradicted Congress's major policy decisions and that it had "offered comments that, 'if adopted, would require a change in an agency's proposed rule,' and that 'were both "relevant and significant," [as to] require a response,"'¹²⁵ whether the comment is made by many or only one. The appellate court pointed to committee reports describing encouraging donations as the purpose of the legislation as support for NYLC's comments. It looked to legislative history as to the importance of "preservation of our country's natural resources and cultural heritage" and the need to allow conservation easement deductions for "preservation of unique or otherwise significant land areas or structures."¹²⁶

Legislation, however, often has many different purposes, reflecting varying views of those who supported it. As Judge Harold Leventhal once famously quipped, 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."¹²⁷ Commentators can easily assert that a proposed regulation is inconsistent with one of the policies prompting legislation and should be discarded. Thus, I suggest that use of legislative history, standing alone, does not necessarily adequately distinguish significant comments requiring a response from insignificant ones that do not. For example, the Sixth Circuit opinion in *Oakbrook Land Holdings*, discussed below, emphasized a different Congressional concern—the use of conservation easements as tax avoidance transactions.

Judge Holmes's dissent in the Tax Court's *Oakbrook Land Holdings* case offered what I consider a better test for identifying significant comments than

¹²⁴ The U.S. Solicitor General did not seek certiorari in *Hewitt*. It stated so in a letter in connection with the pending appeal to the Eleventh Circuit from *Glade Creek Partners LLC v. Commissioner*, which involves another challenge to that regulation. See Kristen A. Parillo, *U.S. Won't Seek Supreme Review of Easement Reg Decision*, TAX NOTES (May 2, 2022) <https://www.taxnotes.com/taxpractice/charitable-giving/us-wont-seek-supreme-court-review-easement-reg-decision/2022/05/02/7df57> [<https://perma.cc/NY4B-TJJ7>].

¹²⁵ 21 F.4th at 1349, quoting 154 T.C. at 223, in turn quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n. 58 (D.C. Cir. 1977) and then quoting *Grand Canyon Air Tour Coal. V. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998).

¹²⁶ 21 F.4th at 1351, quoting S. Rep. No. 96-1007, at 9.

¹²⁷ Justice Scalia quotes this quip in his concurrence in *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993).

that in *Hewitt*. Judge Holmes noted that “multiple serious comments” had “identified problems with the regulation when it was proposed and explained why those problems mattered.” Moreover, he continued, “[c]omments with this level of detail and dispute among the commenters would seem enough to conclude that Treasury had before it ‘significant’ comments,” deserving responses.”¹²⁸ That is, Judge Holmes suggested a test based on detail and degree of dispute. While not all parties applying such a test would come to the same result, it offers (in my view) more guidance than the test articulated in *Hewitt*.

Ten weeks after the Eleventh Circuit’s opinion in *Hewitt*, the Sixth Circuit issued its conflicting opinion in *Oakbrook Land Holdings*.¹²⁹ The Sixth Circuit rejected a variety of APA challenges—adequacy of concise statement of basis and purpose, response to comments, reasonableness under *Chevron* Step Two, and arbitrary and capricious administrative action—to the same regulation considered in *Hewitt*. It found the “basis and purpose” of the rule to be “apparent.” The opinion emphasized that the legislative history as well as the statutory perpetuity requirement in section 170(h)(5)(A) itself reflected concern with “tax-avoidance transactions in which the taxpayer could obtain a deduction for a gift to charity of the use of part of his property.”¹³⁰ It concluded that the NPRM stated Congress’s “animating concerns” by specifying the need to provide “a workable framework for donors, donees, and the Internal Revenue Service to judge the deductibility of open space easements.”¹³¹ The petitioners had characterized the failure to address submitted comments as the “main procedural deficiency with the rule.”¹³² The Sixth Circuit, however, found that Treasury was not required to respond to the NYLC’s criticism of the Regulation or that of other commentators

¹²⁸ 154 T.C. at 238–39. *Hewitt* relied on Judge Holmes’s dissent in the Tax Court’s opinion in *Oakbrook Land Holdings*, not as to what constitutes significance but rather as to what administrative consideration required. For example, it quoted Judge Holmes’s statement that Treasury “failed to ‘even acknowledge the relevant comments or expressly state its disagreement’ such that there was not even a ‘minimal level of analysis.’” 21 F.4th at 1350, quoting 154 T.C. at 245–46 (quoting *Encino Motorcars*, 579 U.S. at 2120.) In turn, Judge Holmes’s dissent had relied in good measure on *Dominion Resources, Inc. v. United States*, which was one of the first federal appellate court opinions to apply the APA to a tax regulation, invalidating a regulation under section 263A for failure to satisfy the *State Farm* requirement of reasoned explanation. 681 F.3d 1313 (Fed. Cir. 2012).

¹²⁹ *Oakbrook Land Holdings, LLC v. Internal Revenue Serv.*, 28 F.4th 700 (6th Cir. 2022), rehearing *en banc* denied, July 6, 2022, *cert. denied* (Jan. 9, 2023).

¹³⁰ *Id.* at 712, quoting H.R. Rep. No. 96-1278, at 14 and S. Rep. No. 96-1007, at 8.

¹³¹ *Id.*, citing 48 Fed. Reg. at 22940. Judge Guy, in an opinion concurring in the judgment only, relied to a considerable extent on *Dominion Resources*. 28 F.4th at 722.

¹³² 28 F.4th at 713.

because the comments did not engage with the statutory perpetuity requirement.¹³³

Under *Chevron* Step Two, the court concluded that the extinguishment Regulation, which erred on the side of providing a greater percentage of extinguishment proceeds to the donee, represented a reasonable interpretation of section 170(h)(5)(A). It rejected the argument that Treasury was arbitrary or capricious in adopting the Regulation. Citing *State Farm* and *Judulang v. Holder*,¹³⁴ the majority also wrote that the petitioners “have not pointed to an alternative to the proceeds regulations that was both well-established and that Treasury ignored,”¹³⁵ a seemingly narrow and fact-based interpretation of arbitrary and capricious. Importantly, although the Sixth Circuit, unlike the Eleventh Circuit, upheld the Regulation, it did not hesitate to apply current APA standards to a regulation from the 1980s.

The dispute as to how judges should apply *Chevron* and *State Farm* to tax regulations also surfaced in the 2023 decision of the Tax Court in *3M v. Commissioner*.¹³⁶ The Tax Court there upheld Regulation section 1.482-1(h)(2) against both substantive and procedural challenges. Six judges joined the opinion of the Court, two judges concurred in the result only, and eight judges dissented. The Regulation at issue, promulgated in 1994 and known as the “blocked income” Regulation, established a number of requirements that must be satisfied before the Service will take foreign restrictions on payment into account for purposes of allocating income in controlled transactions. In that case, Brazil limited royalties that a Brazilian domestic company could pay a foreign parent to 1%, well below the arm’s-length price.¹³⁷ The Service mailed a notice of deficiency stating that the income of the 3M consolidated group should be increased by \$23,651,332 to reflect the arm’s-length compensation 3M Brazil should have paid for the intellectual property it received.¹³⁸ The notice stated that the Brazilian restrictions on payment would not be taken into account because the conditions for doing so under Regulation section 1.482-1(h)(2) had not been met.¹³⁹

3M challenged the validity of the Regulation on which the Service based the deficiency on both substantive and procedural grounds. A 1972 Supreme

¹³³ *Id.* at 715. In contrast, Judge Guy’s opinion concurring in the judgment found that the NYLC comment to be significant for two principal reasons. First, it showed that the Regulation “would thwart” one of the “purpose[s] of the statute by deterring prospective donors.” Second, NYLC’s comment “cast doubt on the reasonableness of the regulation’s formula.” *See also* 28 F.4th at 727–28.

¹³⁴ *See supra* note 99 for a description of *Judulang*.

¹³⁵ 28 F.4th at 722.

¹³⁶ *3M Co. and Subsidiaries v. Commissioner*, 160 T.C. No. 3 (2023).

¹³⁷ *Id.* at 53.

¹³⁸ *Id.* at 10.

¹³⁹ *Id.* at 52.

Court case, *Commissioner v. First Security Bank of Utah*,¹⁴⁰ figured prominently for both sets of challenges and in all the opinions. The Supreme Court there held that the Service could not apply section 482 to allocate to the bank insurance commissions received by an insurance agency controlled by the bank because receipt of insurance premiums by the bank would violate applicable banking law.

The Tax Court's opinion in *3M* concluded that *First Security* supported the validity of the regulation under both Step One and Step Two of *Chevron*. Because, according to the Court, *First Security* relied on a regulation no longer in effect, that very reliance showed both that the language of the statute was ambiguous and that a gap existed for the agency to fill.¹⁴¹ In contrast, Judge Buch's dissenting opinion took the position that *First Security* established an interpretation of the statutory language that was controlling and that, consequently, the Regulation did not withstand scrutiny under *Chevron* because it conflicted with that language.¹⁴² In her concurring opinion, Judge Kerrigan determined that *First Security* did not control because she found the facts of *First Security* to be distinguishable on its face and because there was a significant change to the statute in 1986, long after the Supreme Court handed down its decision in *First Security*.¹⁴³

First Security also figured prominently regarding the *State Farm* requirement that an agency must respond to significant comments. The four comments submitted regarding the proposed blocked income Regulation at issue relied on *First Security* and related cases, in particular *Proctor & Gamble Co. v. CIR*.¹⁴⁴ The Tax Court's opinion in *3M* took the position that because issues regarding the relationship of the Regulations under section 482 and those cases were longstanding, the government did not have to respond to their rehashing in issuing this Regulation.¹⁴⁵ Judge Toro in dissent strongly disagreed: "Supreme Court precedent, uniform court of appeals authorities,

¹⁴⁰ *Commissioner v. First Security Bank of Utah*, 405 U.S. 394 (1972).

¹⁴¹ 160 T.C. at 235, 256–57.

¹⁴² 160 T.C. at 301, Judge Buch looked to *National Cable & Telecomms. Ass'n v. Brand X*, which held that "a prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the state and thus leaves no room for agency discretion." 545 U.S. 967, 982 (2005).

¹⁴³ 160 T.C. at 275–76. The statutory change involved adding the following sentence to section 482: "In the case of any transfer (or license) of intangible property . . . the income with respect to such transfer or license shall be commensurate with the income attributable to the intangible." That sentence's significance was illustrated by the Ninth Circuit's decision in *Altera*, discussed earlier.

¹⁴⁴ *Procter and Gamble Co. v. Commissioner*, 95 T.C. 323 (1990), *aff'd*, 961 F.2d 1255 (6th Cir. 1992). There, the Tax Court disallowed a reallocation of royalty income by the Service under section 482 because Spanish law precluded payment of royalty payments to the taxpayer.

¹⁴⁵ 160 T.C. at 268.

and hornbook administrative law have long recognized that an agency must both explain its reasoning and respond to significant comments submitted in response to its proposed rulemaking.”¹⁴⁶ But “the record here leaves no doubt that Treasury failed to comply with these requirements.”¹⁴⁷ For example, “Treasury offered no explanation for its choices with respect to the rule. Not a single sentence.”¹⁴⁸

For purposes of this Article, the *3M* case is especially notable for the angst the judges openly expressed about the application of administrative law doctrines to the Regulation at issue there and to tax regulations more generally. Judge Kerrigan is “wary” of the approach taken in Judge Toro’s dissent. She worries that the result of the “heightened scrutiny” Judge Toro would require “would likely be the undoing of years of regulatory promulgation. This would create uncertainty for both taxpayers and Treasury, performing a disservice to the tax system as a whole.”¹⁴⁹ Judge Toro is not unsympathetic to these concerns. He realizes that it “may seem unfair” to “subject to an APA challenge regulations long on the books.” He believes, however, that current law gives him no choice. As Judge Toro sees the matter, “if the current state of the law is unsatisfactory from Treasury’s perspective, relief must come from Congress (or perhaps the Supreme Court), not us.”¹⁵⁰

The cases discussed in this Part IV have enormous implications to the validity of the Regulations defining charitable purpose, should the Regulations face challenges. Various opinions in each of these cases assume that federal courts should apply current understandings of administrative law regarding *Chevron* or *State Farm* to tax guidance issued decades ago. Nothing in the opinions suggests that regulations from the 1950’s, such as the charitable purpose Regulations, would be treated any differently from those from the 1980’s, such as the conservation easement Regulations.¹⁵¹ Moreover, even if these old charitable purpose Regulations never face

¹⁴⁶ 160 T.C. at 308 (with citation to *State Farm*).

¹⁴⁷ 160 T.C. at 308.

¹⁴⁸ 160 T.C. at 311.

¹⁴⁹ 160 T.C. at 280.

¹⁵⁰ 160 T.C. at 346.

¹⁵¹ There is one appellate case, however, that has touched on the issue, at least in the particular circumstances of that case. In *SIH Partners LLP v. Commissioner*, 923 F.3d 296 (3rd Cir. 2019), *affirming on other grounds* 150 T.C. 28 (2018), the court of appeals rejected a challenge that Regulations promulgated in 1964 were arbitrary and capricious under the APA. The court did so on the basis of a “hindsight.” It explained that “every guidance and ruling” cited by the appellant “occurred decades after the promulgation of the regulations under the Act in 1964. *Id.* at 302. “We cannot and will not find half-century old regulations arbitrary and capricious, based on insights gained in the decades after their promulgation, when the challenger, here Appellant, has not made a showing that those insights were known, or perhaps at least should have been known to the agency as the time of the regulations’ promulgation.” *Id.* (I thank Leslie Book for pointing me to this case.).

challenge, any new or amended Regulations would have to run the gauntlet of current administrative law norms.

Any regulatory re-adoption of the legal definition of charity could run afoul of either Step One or Step Two of *Chevron*. Nothing in the statutory language as to exempt purposes establishes “charitable” as an over-arching or residual category. As noted earlier, the statute also lacks a category or regulatory authority for new purposes. Thus, some judges could conclude that an expansive position taken in any new Regulations with language like that in the current Regulations fails Step One by contradicting Congress’s clear statement.¹⁵²

A 1923 ruling from the Service suggests the kind of reasoning that could be employed.¹⁵³ It determined that a civic association was not charitable because the statute required the organization to satisfy the ordinary sense of charitable, relief of the poor. The ruling relied on the structure of section 501(c)(3) to reach its conclusion: Since the Code listed “charitable” along with religious, scientific, literary and, educational, the term could not be all-inclusive; an all-inclusive meaning would have eliminated the need for the other listed purposes.¹⁵⁴

The 1959 Regulations, with their adoption of the legal definition of charity, took a far broader view of the meaning of “charity” than this 1923 ruling. Many revenue rulings published after 1959 rely on this broad definition, as discussed further in Part V below. The consequences of a judicial decision invalidating the current charitable purpose Regulations, or new ones with similar language, under Step One of *Chevron* would be enormous. Indeed, they are difficult even to contemplate.

At the same time, the ambiguity as to whether charity is to be understood in its ordinary or legal sense dates back hundreds of years, as *Pemsel* demonstrates. This ambiguity may be sufficient, for at least some judges facing the question, to move the question of regulatory validity to Step Two. If so, the current Regulations or new ones like them would likely be upheld as reasonable interpretations. That is, any new or repromulgated Regulations repeating or including the current regulatory language could well pass muster under *Chevron*’s Step Two.

Even so, if the 1959 Regulations were challenged, a court might hold the regulations invalid under the APA for failing to discuss significant comments, even though the requirement to discuss such comments did not exist at the time of the regulations’ issuance. Recent court decisions invalidating

¹⁵² Should the Supreme Court overrule *Chevron*, *Skidmore* would apply. *Skidmore* is considered less deferential than *Chevron*, see text at *infra* notes 212–214, so invalidation under it is possible as well.

¹⁵³ I.T. 1800, II-2 C.B. 152, 54 (1923).

¹⁵⁴ Of course, the 1959 Regulations rejected this position, as did the Supreme Court’s 1983 *Bob Jones* decision. See text at *supra* note 28. Thus, *Brand X*, see *supra* note 142, argues against such invalidation under *Chevron*.

regulations have not taken the age of regulations into account. Of course, a Treasury Decision adopting new or revised final regulations would also need to respond to all significant comments received on the proposed version. Such, in fact, has been recent practice, but *Hewitt* and *Oakbrook Land Holdings* may call for expanding detail even further in preambles to final regulations.

Applying these principles of administrative law to the charitable purpose Regulations under section 501(c)(3), moreover, does not exhaust inquiry. The Service has relied on revenue rulings rather than the Regulations to set forth explanation of, and requirements for, various charitable purposes, both within the categories listed in Regulation section 1.501(c)(3)-1(d)(2) and for categories that have emerged over time. Part V below considers the substance of such rulings, and Part VI the issues they pose under administrative law.

V. Charitable Purpose in Revenue Rulings

As the nature of charities has evolved over time, tax authorities have faced new exempt purposes and have had to establish new standards for exemption. The Service has done so primarily through issuing revenue rulings rather than through promulgating new regulations. Using revenue rulings to make changes to exempt purposes permits greater flexibility and potentially greater responsiveness than promulgating regulations for this purpose. Revenue rulings do not undergo the same degree of Service and Treasury review as do regulations.

The Service webpage “Understanding IRS Guidance: A Brief Primer” characterizes a revenue ruling as follows:

An official interpretation by the Service of the Internal Revenue Code, related statutes, tax treaties and regulations. It is the conclusion of the Service on how the law is applied to a specific set of facts. Revenue rulings are published in the Internal Revenue Bulletin for the information of and guidance to taxpayers, Service personnel and tax professionals.¹⁵⁵

Revenue rulings that predate the 1959 adoption of the broad, legal meaning of “charitable” in the section 501(c)(3) Regulations rely on the term’s ordinary meaning. Such rulings have remained in place as authority until long after the change in the regulations, as examples discussed below

¹⁵⁵ I.R.S., *Understanding IRS Guidance: A Brief Primer*, May 1, 2023, <https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer> [<https://perma.cc/FD4H-DUW9>] [hereinafter, *I.R.S. Primer*]. Other sources explain that a revenue ruling is “an official interpretation by the Service of the Internal Revenue Code, related statutes, tax treaties, and regulations. It is the conclusion of the Service on how the law is applied to a specific set of facts.” See I.R.M. § 32.2.2.3.1, *supra* note 67, and Reg. § 601.601(d)(2). See also Cong. Res. Serv., *Reliance on Treasury Department and IRS Guidance* (June 12, 2023), <https://crsreports.congress.gov/product/pdf/IF/IF11604> [<https://perma.cc/V6AC-WBX9>].

reveal. But over time, and especially in the 1970's, revenue rulings established new and different criteria. That is, these new criteria sometimes have little resemblance to the 1959 regulatory standards. They create new, free-standing exempt purposes. As then-Commissioner of Internal Revenue Thrower testified during the controversy regarding exemption for public interest law firms that is detailed below, "[t]he Internal Revenue Service frequently finds itself at the leading edge of the movement of charity into new and unexplored fields."¹⁵⁶ Below, I discuss some of the categories in which revenue rulings changed old or established new charitable purposes.¹⁵⁷

A. *Hospitals and Other Health Care Organizations*

The standard of exemption for health care organizations presents the most important example of movement away from (and perhaps back to) the ordinary meaning of charitable as the basis for exemption. Any rule regarding the status of health care organizations involves a large portion of the charitable sector. According to the National Center for Charitable Statistics, "Health care organizations, though accounting for only 12.2 percent of reporting public charities, accounted for nearly three-fifths of public charity revenues and expenses in 2016. . . . Hospitals, despite representing only 2.2 percent of total public charities (7,054 organizations) accounted for about half of all public charity revenues and expenses (49.8 and 50.6 percent, respectively)."¹⁵⁸ Thus, standards for exemption regarding hospitals have particular impact.

For many years, rightly or wrongly,¹⁵⁹ hospitals qualified for tax exemption only if they satisfied the ordinary meaning of charity—relief of the poor and disadvantaged. Revenue Ruling 56-185 required that, to be exempt under section 501(c)(3), a hospital had to "be operated to the extent of its financial ability for those not able to pay for the services and not exclusively for those

¹⁵⁶ *Tax Exemptions for Charitable Organizations Affecting Poverty Programs: Hearings before the Subcomm. on Employment, Manpower, and Poverty of the Senate Comm. on Labor and Public Welfare*, 91st Cong. 58 (1970) (statement of Randolph Thrower), quoted in Oliver A. Houck, *With Charity Toward All: The Qualification of Business-sponsored Law Firms as Charities under the Internal Revenue Code*, 93 YALE L.J. 1415, 1438 (1984).

¹⁵⁷ I note that several parts of this section—specifically those on aging, the environment, and public interest firms—draw on discussion from an earlier article of mine, Ellen P. Aprill, *Charitable Class, Disaster Relief, and First Responders*, 153 TAX NOTES 949 (Nov. 14, 2016).

¹⁵⁸ Nat'l Ctr. for Charitable Stats., *The Nonprofit Sector in Brief 2019*, URBAN INSTITUTE, June, 2020, <https://nccs.urban.org/publication/nonprofit-sector-brief-2019#the-nonprofit-sector-in-brief-2019> [https://perma.cc/JBH9-CXE4].

¹⁵⁹ Professor Jill Horwitz argued in a recent article that "[n]onprofit hospitals have always treated poor people, subsidizing some care to a greater or lesser degree, but they never were exclusively or even primarily organized to provide free care to indigents." JILL R. HORWITZ, CHARITABLE NONPROFITS AND THE BUSINESS OF HEALTH CARE, IN *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 431 (Ed. Walter W. Powell and Patricia Bromley 3rd Ed. 2020).

who are able and expected to pay. . . . Furthermore, if it operates with the expectation of full payment from all those to whom it renders services, it does not dispense charity merely because some of its patients fail to pay for the services rendered.”¹⁶⁰ As noted earlier, section 501(c)(3) does not specify promotion of health as a charitable purpose. Thus, hospitals had to qualify as “charitable” to qualify for exemption, and the Regulations at the time of this revenue ruling followed the ordinary meaning of charitable—that is, relief of the poor and distressed.

Allow me to emphasize this point. Section 501(c)(3) has never included “health” as its own category. The pre-1959 Regulations and revenue rulings relied on the narrow, ordinary definition of “charitable.” As a result, I think hospital exemption has continued to be haunted by requirements for charity care, even after a change in the standard and despite historical evidence that charity care has not stood out as the organizing principle for nonprofit hospitals.

Revenue Ruling 69-545¹⁶¹ changed the standard for hospital exemption by adopting the “community-benefit” test for hospital exemption. The ruling described two hospitals. The “good” hospital, Hospital A, qualified for tax exemption. It had a community board, staff privileges for all qualified physicians, and, most importantly, an open emergency room. The “bad” hospital, Hospital B, exhibited none of these. It had a board consisting of the five physicians who had previously owned the facility, limited staff privileges, and had a “relatively inactive” emergency room.¹⁶²

The ruling looked to “the general law of charity” to establish promotion of health as an exempt purpose independent of the ordinary meaning of charitable. It cited Restatement (Second), Trusts, sections 368 and 372, as well as IV Scott on Trusts (3d ed. 1967), sections 368 and 372. Based on those authorities, it stated that a “nonprofit organization whose purpose and activity are providing hospital care is promoting health and may, therefore, qualify as organized and operated in furtherance of a charitable purpose.” The ruling left no doubt about the change in standard for exemption: “Revenue Ruling 56-185 is hereby modified to remove there from the requirements relating to caring for patients without charge or at rates below cost.”¹⁶³

¹⁶⁰ Rev. Rul. 56-185, 1956-1 C.B. 202. This ruling was issued before the 1959 regulatory adoption of the legal meaning of “charitable.”

¹⁶¹ Rev. Rul. 69-545, 1969-2 C.B. 117. I thank Douglas Mancino for sharing with me background material regarding this revenue ruling and the judicial challenge to it.

¹⁶² See Rev. Rul. 83-157, 1983-2 C.B. 94, for a discussion of how hospitals without emergency rooms can qualify for exemption.

¹⁶³ For further discussion of this revenue ruling from the Service, see *1979 CPE Text, Health Care Organizations under 501(c)* (Mar. 23, 1979), <https://www.taxnotes.com/research/federal/other-documents/other-irs-documents/full-text%3a-1979-irs-exempt-organizations-cpe-technical-instruction->

According to the “definitive critical history of the ruling”¹⁶⁴ by Daniel M. Fox and Daniel C. Schaffer,¹⁶⁵ Revenue Ruling 69-545 reflected not a rethinking of policy but, rather, a successful lobbying effort by nonprofit hospitals. In particular, these authors assert, hospitals were coming to terms with Medicare and Medicaid,¹⁶⁶ although the ruling nowhere mentions Medicare or Medicaid. The Fox and Schaffer article found that “[e]minent legal commentators have apparently thought it clear that the 1969 ruling did not require a hospital to accept Medicaid patients in order to qualify as ‘charitable.’”¹⁶⁷ They continued:

It was only in 1989 and 1990 that [the Service] began to grapple with such questions as whether its ruling required a hospital to serve Medicaid patients and what relationship the ruling had to the COBRA legislation of 1985, which forbade hospitals participating in Medicare to refuse emergency room care to patients unable to pay.¹⁶⁸

The authors also asserted that “the ruling was rushed into publication in order to forestall congressional action that would have superseded the executive branch.”¹⁶⁹

In *Eastern Kentucky Welfare Rights Organization v. Shultz*, a group of organizations, advocates, and private individuals sued to challenge, under the APA, the validity of Revenue Ruling 69-545. The District Court found the challengers to have standing and rejected the revenue ruling as invalid.¹⁷⁰ The District Court’s decision relied heavily on the fact that Congress was considering legislation at the time the ruling was issued: “The IRS cannot satisfactorily demonstrate, by reason of this legislative activity, that it was supplied with a sufficiently convincing expression of Congressional intent as to warrant implementation of the sweeping policy change embodied in the Ruling.”¹⁷¹ The Court of Appeals agreed with the District Court as to standing but found the revenue ruling valid under the broad definition of

program/13t64?highlight=%22Rev.%20Rul.%2069-545%22%20%22IRS%20Exempt%20Organizations%20Continuing%20Professional%20Education%20%22 [https://perma.cc/V2B4-E6PA].

¹⁶⁴ FISHMAN, SCHWARZ, & MAYER, *supra* note 40, at 321.

¹⁶⁵ Daniel M. Fox & Daniel C. Schaffer, *Tax Administration as Health Policy: Hospitals, the Internal Revenue Service, and the Courts*, 16 J. HEALTH POL., POL’Y & LAW 251 (1991) [hereinafter Fox & Schaffer]. Of course, those representing hospitals do not agree with this characterization. See *Eastern Kentucky Welfare Right Org. v. Simon*, United States Supreme Court, October Term 1975, Brief for Amicus Curiae American Hospital Association (on file with author).

¹⁶⁶ Fox & Schaffer, *supra* note 165, at 253 (footnote omitted).

¹⁶⁷ Fox & Schaffer, *supra* note 165, at 259.

¹⁶⁸ Fox & Schaffer, *supra* note 165, at 253.

¹⁶⁹ Fox & Schaffer, *supra* note 165, at 259.

¹⁷⁰ See *Eastern Kentucky Welfare Rights Org. v. Shultz*, 370 F. Supp. 325 (D.D.C. 1973).

¹⁷¹ *Id.* at 337.

“charitable” in the 1959 regulations.¹⁷² The D.C. Circuit viewed the broad definition of charitable as permitting the Service to recognize the “changing economic, social and technological precepts and values of contemporary society.”¹⁷³

The Supreme Court, however, did not reach the merits of the changed standard. It held that the plaintiffs lacked standing to bring the suit. As the Court explained, “the ‘case or controversy’ limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court,”¹⁷⁴ in this case, the hospitals that deny services to patients unable to pay. Thus, the Court’s holding as to standing ended the challenge to the community-benefit standard.¹⁷⁵

The substance of the community-benefit standard set forth in Revenue Ruling 69-545 has continued to generate controversy. In 1988, Douglas Mancino deemed the community-benefit standard of Revenue Ruling 69-545 to represent “a viable, administrable standard” with sufficient flexibility to continue to provide a sound basis “for many decades to come.”¹⁷⁶ In contrast, John Colombo has concluded that “it has failed as a legal test for tax exemption, having been virtually abandoned in practice by the courts and the IRS, who have pretty much morphed it back into a charity-care standard for exemption.”¹⁷⁷

¹⁷² See *Eastern Kentucky Welfare Rights Org. v. Simon*, 506 F.2d 1278 (D.C. Cir. 1974). The DC Circuit also concluded that Revenue Ruling was an interpretive ruling and thus not subject to APA section 553. *Id.* at 1290.

¹⁷³ *Id.* at 1288. As discussed below, what guidance has the “force of law” requiring notice and comment has changed and evolved since the date of *Eastern Kentucky Welfare Rights*.

¹⁷⁴ See *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 27 (1976). That is, under this case and *Allen v. Wright*, 468 U.S. 737 (1984), taxpayers generally lack standing to challenge tax guidance they believe is too generous.

¹⁷⁵ Galle & Shay, *supra* note 12, pay particular attention to the impact asymmetrical standing in tax law—the inability of a taxpayer to challenge in court too generous guidance—has on tax law to argue that it is a consideration calling for applying administrative law requirements more leniently to tax. See also Jon Choi, *The Case For a Tilt Toward Revenue in Tax Administration*, JOTWELL, Apr. 18, 2023, (reviewing Galle & Shay), <https://tax.jotwell.com/the-case-for-a-tilt-toward-revenue-in-tax-administration/> [<https://perma.cc/39TN-NQKM>]. However, as discussed *infra*, notice-and-comment procedures offer parties that do not meet standing requirements the ability to object to guidance. That is, the problem of asymmetrical standing could be used in favor of increased notice-and-comment rulemaking, the opposite of Galle and Shay’s conclusion.

¹⁷⁶ Douglas M. Mancino, *Income Tax Exemption of the Contemporary Nonprofit Hospital*, 32 ST. LOUIS U. L.J. 1015, 1074 (1988).

¹⁷⁷ John D. Colombo, *The Failure of Community Benefit*, 15 HEALTH MATRIX 29, 29 (2005). He pointed in particular to cases involving HMOs, such as *Sound Health Ass’n v. Commissioner*, 71 T.C. 158 (1978) and *Geisinger Health Plan v. Commissioner*, 62 T.C.M. (CCH) 1656, 1991 T.C.M. (RIA) ¶ 91,649 (1991), *rev’d*, 985 F.2d 1210 (3d Cir. 1993), as undercutting the broad

In 2010, after various studies and hearings,¹⁷⁸ Congress sought to codify the community-benefit standard by enacting section 501(r). Section 501(r) imposes a number of special requirements for hospitals to be tax exempt under section 501(c)(3).¹⁷⁹ As Professor Roger Colinvaux has summarized, under section 501(r):

[T]o maintain charitable status, hospitals must, among other things, conduct a “community needs assessment” at least once every three years, establish a written financial assistance policy and a written policy relating to the provision of emergency medical care, limit the amount of charges to certain patients for emergency or other medically necessary care, and refrain from engaging in “extraordinary collection actions” without first making reasonable efforts to discover whether a patient is eligible for financial assistance. New reporting requirements and excise taxes also apply.¹⁸⁰

These requirements emphasize process rather than directly addressing the issue of charitable purpose.¹⁸¹ Moreover, regulations interpreting section 501(r)—in “mind numbing detail”—were issued in 2014,¹⁸² and Schedule H of Form 990 requires hospitals to supply a great deal of information annually. Thus, at least for hospitals, the current standard for exemption stands as an incoherent combination of community benefit and relief of the indigent.

B. *Relief of the Aged and Protection of the Environment*

In the case of both aiding the aged and protecting the environment, the change in standards for exemption demonstrate evolutionary change. Both categories were first determined to be exempt under longstanding categories—relief of the poor or needy for aiding the aged, and contributing to science and education for protecting the environment. The test for both changed in the 1970’s.

language of the revenue ruling regarding promoting health for the general benefit of the community. Cf. Jill R. Horwitz, *Why We Need the Independent Sector: The Behavior, Law, and Ethics of Not-for-Profit Hospitals*, 50 UCLA L. REV. 1345 (2003).

¹⁷⁸ For a list of these, see FISHMAN, SCHWARZ, & MAYER, *supra* note 40, at 334–35.

¹⁷⁹ So burdensome are these requirements that a number of government hospitals that had also been exempt under section 501(c)(3) sought to relinquish their section 501(c)(3) status, and the Service set up a special procedure for governmental entities to do so. See Ellen P. Aprill, *Revisiting Federal Tax Treatment of States, Political Subdivisions, and Their Affiliates*, 23 FLA. TAX REV. 73, 117–18 (2019).

¹⁸⁰ Roger Colinvaux, *Charity in the 21st Century: Trending Toward Decay*, 11 FLA. TAX REV. 1, 51 (2011) (footnotes omitted).

¹⁸¹ Colinvaux, *supra* note 180, at 51; FISHMAN, SCHWARZ, & MAYER, *supra* note 40, at 336.

¹⁸² FISHMAN, SCHWARZ, & MAYER, *supra* note 40, at 337.

For many years, the Service recognized organizations that provided relief to the aged as serving a charitable class only when they relieved distress, in particular, relief of poverty.¹⁸³ Revenue Ruling 57-467,¹⁸⁴ for example, concluded that a home for the elderly that accepted only paying guests and discharged those unable to pay was not charitable. This revenue ruling permitted a home for the aged to qualify as a charitable activity, but only if (1) the organization is dedicated to providing, and in fact provides, care and housing to aged individuals who would otherwise be unable to provide for themselves without hardship, (2) such services are rendered to all or a reasonable proportion of its residents at substantially below cost, to the extent of the organization's financial ability, and (3) the services are of the type that minister to the needs and relief of hardship or distress of aged individuals.¹⁸⁵

Fifteen years later, Revenue Ruling 72-124 reversed this position. It ruled that the aged, without consideration of financial hardship, are as a class highly susceptible to "unique forms of distress" because of their need for housing, health care, and financial security.¹⁸⁶ After this ruling recognizing the aged as a charitable class, a number of activities for the benefit of the elderly have been recognized as exempt.¹⁸⁷ That is, the Service now recognizes aiding the aged as an independent charitable purpose.

In making this policy change, Revenue Ruling 72-124 relied on federal legislation. It asserted that "it is now generally recognized that the aged, apart from considerations of financial need alone, are also, as a class, highly susceptible to other forms of distress in the sense that they have special needs because of their advanced years." To support this statement, the revenue ruling cites the Older Americans Act of 1965 and the National Housing Act. Neither section 501(c)(3) nor the applicable Regulations recognize such a category or such a development.

Service treatment of exemption standards for organizations organized to protect the environment showed a similar pattern. Prior to the 1970's, such organizations needed to base claims for exemption on such grounds as public

¹⁸³ See generally STAFF OF THE JOINT COMM. ON TAX'N, *supra* note 18; Elizabeth C. Kastenber & Joseph Chasin, 2004 EO CPE Text, *Elderly Housing*, IRS.GOV, last accessed Oct. 25, 2023, <https://www.irs.gov/pub/irs-tege/eotopicg04.pdf> [<https://perma.cc/C3AR-HP85>].

¹⁸⁴ Rev. Rul. 57-467, 1957-2 C.B. 313. Note that this ruling preceded promulgation of the 1959 regulations accepting the broad, legal meaning of charitable.

¹⁸⁵ *Id.* A later ruling clarified that any required entrance fees for obtaining residence and direct personal services had to be included in determining whether the home's services are rendered to all (or to a reasonable proportion of) residents below cost. Rev. Rul. 64-231, 1964-2 C.B. 139.

¹⁸⁶ Rev. Rul. 72-124, 1972-1 C.B. 145.

¹⁸⁷ As listed in STAFF OF THE JOINT COMM. ON TAX'N, *supra* note 18, at 134, they include Rev. Rul. 75-198, 1975-1 C.B. 157 (senior citizen center); Rev. Rul. 75-385, 1975-2 C.B. 205 (rural rest home); Rev. Rul. 76-244, 1976-1 C.B. 155 (meal delivery organizations); Rev. Rul. 77-2, 1977-1 C.B. 120 (broadcasting organizations); Rev. Rul. 77-246, 1977-2 C.B. 190 (transportation providers); and Rev. Rul. 81-61, 1981-1 C.B. 355 (beauty shop).

education, scientific research, or lessening the burdens of government. Revenue Ruling 67-292,¹⁸⁸ for example, concluded that an organization formed to purchase and maintain land as a sanctuary for wild bird and animals qualified for exemption because it was open to the public for educational purposes in ways similar to a museum or zoo. Revenue Ruling 70-79¹⁸⁹ determined that an organization created to assist local governments in solving such issues as “water and air pollution, waste disposal, water supply, and transportation” qualified as exempt because it lessened the burdens of government, a purpose included within the meaning of charitable under Regulation section 1.501(d)(3)-1(d)(2), and because it was educational within the meaning of Regulation section 1.501(c)(3)-1(c)(3).

Revenue Ruling 72-560,¹⁹⁰ however, began a transition in exemption standards for environmental organizations. It concluded that an organization formed to educate the public regarding environmental deterioration due to solid waste pollution qualified for exemption under section 501(c)(3). According to a Service CPE Text on environmental preservation, “[t]hough part of the rationale hinged on educating the public on environmental problems and solutions, it was also considered charitable on the basis of preventing environmental deterioration. This was an early recognition of environmental preservation as a rationale separate from government assistance, education or community recreation.”¹⁹¹

Revenue Ruling 76-204 completed the transition.¹⁹² It found a conservation organization to be eligible for section 501(c)(3) status on the basis of its pursuit of environmental protection. “It is generally recognized that efforts to preserve and protect the natural environment for the benefit of the public serve a charitable purpose.”¹⁹³ As support, the ruling cited Restatement (Second) of Trusts and a number of state cases from as far back as the mid-1800’s. In so doing, it harkened back to the language of the regulations referring to “the broad outlines of charity as developed by judicial decisions.”¹⁹⁴ But Revenue Ruling 76-204 looked as well to federal legislation as support for treating conservation and protection of natural resources as conferring public benefit and thus worthy of being deemed a charitable purpose. The ruling cited the National Environmental Policy Act of 1969, the Wilderness Act, the Estuarine Areas Act, Wild and Scenic Rivers Act, and the Water Bank Act.

¹⁸⁸ Rev. Rul. 67-292, 1967-2 C.B. 184.

¹⁸⁹ Rev. Rul. 67-292, 1970-1 C.B. 127.

¹⁹⁰ Rev. Rul. 72-560, 1972-2 C.B. 248.

¹⁹¹ Sadie Copeland & James Bloom, 1994 *EO CPE Text, Environmental Preservation Issues*, IRS.GOV, last accessed Oct. 25, 2023, <https://www.irs.gov/pub/irs-tege/eotopicb94.pdf> [<https://perma.cc/MB4Y-6DAP>].

¹⁹² Rev. Rul. 76-204, 1976-1 C.B. 152.

¹⁹³ *Id.*

¹⁹⁴ Reg. § 1.501(c)(3)-1(d)(2).

While adoption of the broad, legal definition of “charitable” in the 1959 regulations gave room for new charitable purposes, nowhere do the applicable regulations suggest federal legislation as the basis for establishing new, distinct charitable purposes. The Service nonetheless treats such legislation as one way of defining public benefit that supports a finding of charitable purpose.

C. *Public Interest Law Firms*

Revenue Ruling 75-74, which recognized a public interest law firm as exempt under section 501(c)(3), exemplifies another category of new exempt purposes established by revenue rulings.¹⁹⁵ Arguably, it goes beyond the limits of the applicable Regulations. One historical study asserted that “[p]ublic interest litigation extends the benefits of tax exemption to persons not within the classes of traditional objects of charity.”¹⁹⁶ Another study described the difficulties the Service faced in considering these kinds of organizations:

It saw itself on new and unmapped ground. The traditional practice in the field had been conducted by established charities, the NAACP and ACLU, or legal aid societies with purposes and beneficiaries long recognized as charitable—unpopular or disenfranchised minorities. As the Service saw it, these groups were not exempt by virtue of the fact they litigated, but rather by the nature of their charitable interest themselves. The newer organizations were being established in order to litigate, and for clients not restricted to recognized minorities. In fact, they often intended to deal with the interests of “diffuse majorities,” the popular movements for environmental and consumer protection most prominent among them.¹⁹⁷

The revenue ruling did not grant the public interest law firm exemption on the basis that it served a traditional charitable class. Instead, it determined that such organizations “provide a service which is of benefit to the community as a whole. They provide legal representation on issues of significant public interest where such representation is not ordinarily provided by traditional law firms.”¹⁹⁸

Recognition of public interest law firms as exempt, however, came only after considerable controversy and “a firestorm of protest” from the public interest bar.¹⁹⁹ According to work by Wiggins and Hunt as well as that by Houck, the Service in the late 1960’s recognized as exempt a number of

¹⁹⁵ Rev. Rul. 75-74, 1975-1 C.B. 152.

¹⁹⁶ A. M. Wiggins, Jr. & Bert W. Hunt, *Tax Policy Relating to Environment Activities and Public Interest Litigation*, COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS (1977) at 2045, 2069.

¹⁹⁷ Houck, *supra* note 156, at 1446-47 (footnotes omitted).

¹⁹⁸ Rev. Rul. 75-74, 1975-1 C.B. 152. Such public interest firms must also abide by a revenue procedure, now Rev. Proc. 92-59, 1992-2 C.B. 411, which regulates fees and compensation.

¹⁹⁹ Fishman, Schwarz, & Mayer, *supra* note 40, at 340.

organizations engaging in public interest litigation.²⁰⁰ In early 1970, however, the Service announced that it would be studying the subject and suspended issuance of determination letters until completion of the study. Angry Congressional press releases, newspaper editorials, and letters from the public in major newspapers followed.²⁰¹ In October of 1970, the Service issued two news releases explaining that the study was continuing.

Shortly thereafter, the Senate Subcommittee on Employment, Manpower and Poverty announced that it would hold a hearing on the issue in mid-November. The Senate Committee on Interior and Insular Affairs then published a report with "Selected Materials on Tax Exempt Status and Public Interest Litigation." On November 12, 1970, a Service news release announced development of new guidelines.²⁰² The Senate Subcommittee on Employment, Manpower and Poverty held the promised hearings on November 16 and 17, 1970. Some 36 witnesses testified, "ranging from the national Council of Churches of Christ and the Union of American Hebrew Organizations to the United Automobile Workers and a panel of former presidents of the American Bar Association."²⁰³ According to Wiggins and Hunt, while these witnesses expressed general satisfaction with the guidelines as announced, "there was lingering dissatisfaction with the manner in which the subject had been handled."²⁰⁴

Recognizing public interest law firms as charitable required more of a break with the past than did recognition of relief of the aged or protection of the environment as charitable purposes. Recognition of public interest firms

²⁰⁰ Wiggins & Hunt, *supra* note 196, at 2070-75. The history discussed throughout this paragraph relies on Houck, *supra* note 156, at 1419-25, and Wiggins & Hunt, *supra* note 196.

²⁰¹ Houck, *supra* note 156, at 1454-58.

²⁰² IR-News Rel. 1078 (Nov. 12, 1970). The Service outlined its position in the hearings; formal Guidelines were issued as revenue procedures. *See* Rev. Proc. 71-39, 1971-2 C.B. 575; Rev. Proc. 75-13, 1975-1 C.B. 662; Rev. Proc. 71-39 stated, "The engagement of the organization in litigation can reasonably be said to be in representation of a broad public interest rather than a private interest. The litigation is designed to present a position on behalf of the public at large on matters of public interest. Typical of such litigation may be class actions in the public interest, suits for injunction against action by government: or private interest broadly affecting the public, similar representation before administrative boards and agencies, test suits where the private interest is small, and the like." These revenue procedures banned the receipt of fees for services. The 1992 revenue procedure permits fees for services up to 50% of the organization's cost of operations. *See New Ruling to Public Interest Law Firms Recalls Wild History*, 92 TAX NOTES TODAY 152-4 (July 27, 1992).

²⁰³ Houck, *supra* note 156, at 1446.

²⁰⁴ Wiggins & Hunt, *supra* note 196, at 2071. The authors also write, "[w]hile the IRS indicated at the time of the promulgation of the Guidelines that there would be a study and revision of the § 501(c)(3) regulations to incorporate standards relating to litigation, with the usual procedure of public notice and hearing," there was not at the time of the study (and not subsequently) any amendment of the Regulations. *Id.*

as charitable came only after concerted efforts. Its recognition did not require identification of a charitable class but looked instead to community benefit. Achieving recognition of other very new kinds of charitable purposes, such as, perhaps, open-source software,²⁰⁵ may well require similar campaigns.

VI. Sub-Regulatory Tax Guidance and Administrative Law

As discussed immediately above, guidance regarding charitable purpose under section 501(c)(3) has often come in the form of revenue rulings. Revenue rulings, a form of sub-regulatory guidance, raise difficult but interrelated issues as to the degree of judicial deference they merit and the procedures administrative law requires of them.²⁰⁶ According to Treasury Regulation section 601.601(d)(2)(i)(a), “[a] Revenue Ruling is an official interpretation by the Service that has been published in the Internal Revenue Bulletin. Revenue Rulings are issued only by the [Service] National Office and are published for the information and guidance of taxpayers, Internal Revenue Service officials, and others concerned.”²⁰⁷ Regulation section 601.601(d)(2)(f) further specifies that “[c]omments and suggestions from taxpayers or taxpayer groups on Revenue Rulings being prepared for publication in the Bulletin may be solicited, if justified by special circumstances.” That is, the Service only occasionally solicits comments on revenue rulings. Moreover, “Revenue Rulings published in the Bulletin do not have the force and effect of Treasury Department Regulations (including Treasury decisions), but are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose.”²⁰⁸

If such is an accurate description, revenue rulings do not, on the one hand, need notice and comment and do not, on the other, receive *Chevron* deference. Whether a form of Service guidance merits judicial deference, as noted earlier, is distinct from whether such guidance requires notice and comment under the APA. Both issues, however, are related to questions of

²⁰⁵ For denials of recognition of exemption for development and development of open-source software, based primarily on lack of a charitable class, *see, e.g.*, P.L.R. 202221009 (May 7, 2022); P.L.R. 202152021 (Dec. 30, 2021); P.L.R. 202019028 (Feb. 12, 2020).

²⁰⁶ As Kristin Hickman explains, “the force of law concept plays a significant role . . . in distinguishing between legislative rules that must comply with APA notice-and-comment . . . and . . . for determining which agency rules are eligible for *Chevron* deference.” Hickman, *Unpacking*, *supra* note 9, at 472.

²⁰⁷ I.R.M. 32.2.2.3.1 states “A revenue ruling is an official interpretation by the Service of the Internal Revenue Code, related statutes, tax treaties, and regulations. It is the conclusion of the Service on how the law is applied to a specific set of facts.”

²⁰⁸ Reg. § 601.601(d)(2)(v)(d).

administrative law and tax exceptionalism.²⁰⁹ Thus, judicial discussion of deference is useful, although not determinative, for consideration of APA requirements as to notice and comment.

The Supreme Court addressed the issue of what forms of guidance call for *Chevron* deference in *United States v. Mead*.²¹⁰ The issue in the case was whether a change in tariff categorization for day planners via a letter ruling merited *Chevron* deference. The Court held that such letter rulings did not, although they represented the official position of the Customs Service with respect to the particular transaction at issue there. The Court explained that administrative guidance qualifies for *Chevron* deference “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”²¹¹

The Court in *Mead* remanded the case for a determination as to whether the letter ruling was entitled to deference under *Skidmore v. Swift & Co.*²¹² Under *Skidmore*, “the weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”²¹³ *Skidmore* is generally less deferential to administrative agencies than *Chevron* deference;²¹⁴ deference under it turns on the ability of the administrative agency to convince a reviewing court of

²⁰⁹ Another interpretive doctrine, *Auer-Seminole Rock* deference, could call for judicial deference to agencies’ readings of ambiguous regulations, such as revenue rulings, even if they themselves do not have the force of law. I do not apply that doctrine here for several reasons. First, the March 2019 Treasury Policy Statement on the Tax Regulatory Process stated that it would not seek judicial deference under *Auer* in the Tax Court, which hears most tax cases. Department of Treasury, *Policy Statement on the Tax Regulatory Process*, *supra* note 92. In particular, the mostly likely issue raised by these revenue rulings is qualification for section 501(c)(3) status, and the Tax Court has the jurisdiction to make declaratory judgments in such cases. See I.R.C. § 7428. Second, the recent Supreme Court decision in *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019), imposed a number of limitations on the use of *Auer*. The case held that *Auer* applies only if the regulation is genuinely ambiguous; the interpretation of the regulation is reasonable; the regulatory interpretation is an authoritative or official position of the agency; and the interpretation of the regulations reflects fair and considered judgment. For both these reasons, *Auer* is unlikely to play a major role in these tax issues.

²¹⁰ *United States v. Mead Corp.*, 533 U.S. 218 (2001).

²¹¹ 533 U.S. at 226–27.

²¹² *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

²¹³ 323 U.S. at 140.

²¹⁴ See Kristin Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235 (2007). Although *Skidmore* is generally considered less deferential to administrative agencies than *Chevron*, that might not be the case for tax guidance, particularly old guidance, since consistency of interpretation is a key *Skidmore* factor.

the soundness of the guidance. *Skidmore*, unlike *Chevron*, does not welcome guidance that reflects change in policy.

Revenue rulings resemble the tariff letters in several ways.²¹⁵ Revenue rulings, the Service tells us, are administrative guidance representing the official position of the agency without the force of law but, in the words of the IRM, “the conclusion of the Service on how the law is applied to a specific set of facts.”²¹⁶ *Mead*’s guidance rejecting *Chevron* deference applies to revenue rulings only if the Service is correct in asserting that they do not have the force of law.

Whether the revenue rulings described in fact carry the force of law is far from clear. Does Revenue Ruling 69-545 merely describe how the 1959 regulatory definition of charitable applies to hospitals, or does it change the law regarding requirements for hospital exemption? The District Court and the Court of Appeals disagreed on that point in *Eastern Kentucky Welfare Rights*. What does it mean that environmental organizations no longer have to rely on educational or scientific activities or relieving the burdens of government for exemption, that organizations for the aged no longer have to demonstrate that they relieve the distressed, or that public interest law firms can be exempt under section 501(c)(3)?

The answer to these questions, of course, depends on the meaning of “force of law,” an issue about which no consensus exists.²¹⁷ Suggested articulations of its meaning include whether the rule in question “create[s] by its own force, a legally binding standard of conduct”²¹⁸ or “whether the rule is necessary to provide legislative basis for an enforcement action or conferral of benefits.”²¹⁹ Under such tests, a court could well conclude that these revenue rulings have the force of law.

Importantly, courts need not accept Service characterization and the procedures it chooses in issuing sub-regulatory guidance. *Bullock v. Internal Revenue Serv.*, which involved a revenue procedure rather than a revenue ruling, is particularly apposite.²²⁰ There, the governor of Montana challenged Revenue Procedure 2018-38.²²¹ This revenue procedure eliminated the requirement that noncharitable section 501(c) organizations file Schedule B

²¹⁵ Revenue rulings, however, apply generally and not just to a single taxpayer. Thus, the tariff letter rulings at issue in *Mead* also share features with the Service’s private letter rulings, which provide guidance only to a single taxpayer.

²¹⁶ See I.R.M. 32.2.2.3.1, *supra* note 67.

²¹⁷ See Hickman, *IRB Guidance*, *supra* note 9.

²¹⁸ Hickman, *Unpacking*, *supra* note 9, at 479, quoting Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 543 (1977).

²¹⁹ Hickman, *Unpacking*, *supra* note 9, at 481, referencing *Am. Mining Cong. v. Mine Safety and Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

²²⁰ *Bullock v. Internal Revenue Serv.*, 401 F. Supp. 3d 1144 (D. Ct. Mont. 2019).

²²¹ Rev. Proc. 2018-38, 2018-31 I.R.B. 280.

with names of and addresses of major donors as part of their Form 990 Annual Information Return submitted to the Service.²²²

According to the Service Primer, “[a] revenue procedure is an official statement of a procedure that affects the rights or duties of taxpayers or other members of the public under the Internal Revenue Code, related statutes, tax treaties and regulations and that should be a matter of public knowledge.”²²³ The Primer describes revenue procedures in a way that would make them less likely than revenue rulings to have the force of law: “While a revenue ruling generally states an IRS position, a revenue procedure provides return filing or other instructions concerning an IRS position.”²²⁴

The revenue procedure at issue eliminated the disclosure requirement set forth in Regulation section 1.6033-2(a)(2)(ii)(f) that noncharitable section 501(c) organizations file Schedule B with names and addresses. The Service argued that the revenue procedure was an interpretive rule. The court rejected this argument. It characterized the Revenue Procedure as reversing a longstanding Regulation requiring disclosure of substantial donors by noncharitable as well as charitable section 501(c)(3) organizations.²²⁵ According to the opinion, the section 6033 Regulation had been adopted “following a public notice-and-comment period.”²²⁶ The court treated it as a legislative rule under the APA. As the court asserted, “The APA requires federal agencies to follow the notice-and-comment rulemaking procedures before it creates or amends legislative rules.”²²⁷ The court found the revenue procedure to be a rule with the force of law under the APA because it “effectively amends the previous rule that required tax-exempt organizations

²²² The court determined that the state of Montana had standing to challenge the absence of notice-and-comment procedures in issuing this guidance because of its reliance on the Service determination of exempt status pursuant to information sharing between the federal and the state governments under sections 6103 and 6104. *Bullock*, 401 F.Supp. 3d at 1150–54. Because of this unusual basis for standing, the case does not offer a general model for challenging Service guidance shortly after issuance.

²²³ I.R.S. Primer, *supra* note 155. See also Cong. Res. Serv., *Reliance on Treasury Department and IRS Guidance*, *supra* note 155.

²²⁴ I.R.S. Primer, *supra* note 155. Regulation section 601.601(d)(2)(i)(b) has a definition even less likely to suggest revenue procedures have the force of law: “A Revenue Procedure is a statement of procedure that affects the rights or duties of taxpayers or other members of the public under the Code and related statutes or information that, *although not necessarily affecting the rights and duties of the public*, should be a matter of public knowledge.” (emphasis added). I.R.M. 32.2.2.3.2, *supra* note 67, has the same definition as this Regulation.

²²⁵ Section 6033(b)(5) requires such disclosure for section 501(c)(3) organizations. A Regulation adopted as final in 1971 extended the requirement to noncharitable section 501(c) organizations. See T.D. 7122, 36 Fed. Reg. 11026 (June 8, 1971). This Regulation was promulgated under the general authority of section 7805(a). *Id.*

²²⁶ 401 F. Supp. 3d at 1155.

²²⁷ *Id.* at 1158.

to file substantial-donor information.”²²⁸ As a result, said the court, the Service had to follow notice-and-comment rulemaking procedures in order to change the substantial donor disclosure requirement for noncharitable section 501(c) organizations. (The Service did so after the case was decided.²²⁹)

Bullock reasoned that a Regulation with force of law and thus promulgated via notice-and-comment procedures must be amended in the same way. But there is no evidence that the Regulation had been promulgated with notice and comment. The Treasury Decision adopting it makes no such statement. It simply states that the purpose for the Regulations promulgated in it are undertaken in order to conform to various provisions of the Tax Reform Act of 1969.²³⁰ Neither I nor my reference librarians have been able to find any NPRM for the section 6033 regulation at issue in *Bullock*. In contrast, other Regulations adopted to carry out the Tax Reform Act of 1969, adopted like this one pursuant to the general authority of section 7805,²³¹ specifically refer to Proposed Regulations.²³² This seeming factual error, however, does not undermine the tests *Bullock* cites for force of law. *Bullock* admonished that rules with force of law impose “extra-statutory obligations.”²³³ It explained that rules with the force of law are those that “in the absence of the rule there would not be an adequate legislative basis for enforcement action.”²³⁴

Courts have also applied administrative law doctrines to another form of sub-regulatory guidance: Service notices. These cases further underscore that sub-regulatory guidance can create a legislative rule requiring notice and comment. Section 6707A(c)(1) established a reporting scheme designed for tax shelters. It requires information reporting for both “reportable” and

²²⁸ *Id.*

²²⁹ See Notice of Proposed Rulemaking, Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 84 Fed. Reg. 47447, and T.D. 9898, 85 Fed. Reg. 31959 (May 28, 2020).

²³⁰ T.D. 7122, 36 Fed. Reg. 11025 (June 8, 1971).

²³¹ The opinion did not discuss the source of authority for the Regulation. As discussed earlier in Part IV, the Service and Treasury took the position in the 1950’s that regulations promulgated under the general authority of section 7805 were subject to APA notice-and-comment requirements. In more recent decades, the I.R.M. has stated such general authority regulations do not require notice and comment.

²³² See, e.g., T.D. 7250, 38 Fed. Reg. 868 (Jan. 5, 1973) (adopting section 4940 Regulations and referencing 1971 Proposed Regulations); T.D. 7256, 38 Fed. Reg. 3314 (Feb. 5, 1973) (adopting section 4942 Regulations and referencing 1971 Proposed Regulations); T.D. 7270, 38 Fed. Reg. 9493 (Apr. 17, 1973) (adopting section 4941 Regulations and referencing 1971 Proposed Regulations).

²³³ 401 F. Supp. at 1157, *quoting* Reno-Sparks Indian Colony v U.S. EPA, 336 F. 3d 899, 902 (9th Cir. 2003).

²³⁴ *Id.* at 1157, *quoting* Hemp Industries, 333 F.3d 1082, 1087 (9th Cir. 2003).

“listed” transactions.²³⁵ The Service has identified such transactions through publication of notices. According to the Service Primer, a “notice is a public pronouncement that may contain guidance that involves substantive interpretations of the Internal Revenue Code or other provisions of the law. For example, notices can be used to relate what regulations will say in situations where the regulations may not be published in the immediate future.”²³⁶

Notice 2016-66 designated certain micro-captive insurance strategies as transactions of interest,²³⁷ thus triggering reporting requirement and potential penalties.²³⁸ CIC Services challenged the notice as establishing a legislative rule that failed to meet the requirement of notice and comment under the APA. Both the District Court and the Sixth Circuit held the suit premature under the Anti-Injunction Act,²³⁹ which prohibits any “suit for the purpose of restraining the assessment of collection of any tax.”²⁴⁰ The Supreme Court, however, granted certiorari on the Anti-Injunction Act issue and decided unanimously that the Anti-Injunction Act did not apply to the challenge.²⁴¹

Following the Supreme Court decision, CIC Services returned to the District Court with its APA challenge to the notice. In September 2021, the District Court for the Eastern District of Tennessee granted CIC Services’ motion for a preliminary injunction enjoining Service enforcement of the notice.²⁴² The District Court found that CIC Services had a likelihood of

²³⁵ A reportable transaction is one determined to have a potential for tax avoidance or evasion. See § 6707A(c)(1). A listed transaction is one “which is the same as, or substantially similar to,” a transaction identified as a reportable transaction. I.R.C. § 6707A(c)(2).

²³⁶ I.R.S. Primer, *supra* note 155. I.R.M. 32.2.2.3.3, *supra* note 66, has a longer definition: After including the first sentence quoted above from the I.R.S. Primer, it continues: “Notices may be used in circumstances in which a revenue ruling or revenue procedure would not be appropriate. In addition, notices may be used to solicit public comments on issues under consideration, in connection with no-regulatory guidance, such as a proposed revenue ruling. A notice can also be used to relate what regulations will say in situations in which the regulations may not be published in the immediate future.” See also Cong. Res. Serv., *Reliance on Treasury Department and IRS Guidance*, *supra* note 155.

²³⁷ Notice 2016-66, 47 I.R.B. 745.

²³⁸ See Charlene D. Luke, *Captivating Deductions*, 46 HOFSTRA L. REV. 855, 866–68 (2018).

²³⁹ CIC Services, LLC v. Internal Revenue Serv., 925 F.3d 247 (6th Cir. 2019); CIC Services, LLC v. Internal Revenue Serv., 2017 WL 5015510 (D.D. Tenn. 2017).

²⁴⁰ I.R.C. § 7421(a).

²⁴¹ CIC Services, LLC v. Internal Revenue Serv., 141 S. Ct. 1582 (2021).

²⁴² See *Injunction Granted Against IRS in Micro-Captive Notice Case*, 2021 TAX NOTES TODAY 182-22 (Sept. 21, 2021). See also Leslie Book, *Update on Service: The Scope of Relief Available if A Court Finds That An Agency’s Rulemaking Violates the APA*, TAX NOTES, Oct. 15, 2021, <https://www.taxnotes.com/procedurally-taxing/update-cic-services-scope-relief-available-if-court-finds-agencys-rulemaking-violates-apa/2021/10/15/7h5pv> [https://perma.cc/58Z2-2KX5]; Daniel Hemel, *Treasury Needs to Act Fast To Save the Tax-Shelter Disclosure Regime*, SUBSTANCE

success on the merits because Notice 2016-66 was a legislative rule requiring notice and comment. According to the court, the notice was a legislative rule because it had the force and effect of law in that created “new rights and duties regarding reporting requirements related to ‘reportable transactions.’”²⁴³

At the time, many expected that this challenge to the validity of sub-regulatory guidance would be the harbinger of more to come. Indeed, on March 3, 2022, the Sixth Circuit decided *Mann Construction v. U.S.*²⁴⁴ Like *CIC Services*, it involved a notice, here Notice 2007-83, which designated certain transactions as listed transactions, in this case employee-benefit trusts owning cash value life insurance policies. The Court of Appeals rejected the government’s argument that the notice was an interpretive rather than legislative rule. It found the notice to have the force of law and thus to be a legislative rule; it required taxpayers to report a transaction or face hefty financial penalties and criminal sanctions and thus “creates new substantive duties.”²⁴⁵ The Sixth Circuit reversed the District Court and held the notice invalid.²⁴⁶

Fewer than three weeks after the Sixth Circuit’s opinion in *Mann Construction*, the District Court for the Eastern District of Tennessee relied on it to agree with *CIC Services* and to invalidate Notice 2016-66 as applied to micro-captive insurance companies.²⁴⁷ The District Court concluded that the notice failed to engage in notice-and-comment procedures required by the APA. It also found that issuance of the notice was arbitrary and capricious for failure to include facts and data in the administrative record to support its conclusion that micro-captive insurance arrangements have the potential for tax avoidance or evasion. The District Court rejected the government’s argument for remand to the Service while leaving the rule in place pending promulgation of a new or amended rule. The court vacated the Notice in its entirety.²⁴⁸

OVER FORM, May 18, 2021, <https://substanceoverform.substack.com/p/treasury-needs-to-act-fast-to-save> [https://perma.cc/2X8Z-X6AW]. Hemel points to a useful definition of a legislative rule articulated by then-Judge Brett Kavanaugh in *National Mining Ass’n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014): “An agency action that purports to impose legally binding obligations or prohibitions on regulated parties—and that would be the basis for an enforcement action for violations of these obligations or requirements.”

²⁴³ *Injunction Granted Against IRS in Micro-Captive Notice Case*, *supra* note 242.

²⁴⁴ *Mann Constr., Inc. v. United States*, 27 F.4th 1138 (6th Cir. 2022).

²⁴⁵ 27 F.4th at 1144.

²⁴⁶ 27 F.4th at 1147. In May 2023, the District Court in *Mann* denied the government’s motion to stay its order setting aside the notice. *Mann Constr., Inc. v. United States*, 2023 WL 3175426, 131 A.F.T.R.2d 1551 (E.D. Mich. 2023).

²⁴⁷ *CIC Services, LLC v. Internal Revenue Serv.*, 592 F.Supp.3d 677 (E.D. Tenn. 2022).

²⁴⁸ *Id.*

Even more recently, the Tax Court in *Green Valley Investors, LLC v. Commissioner*, reached a similar conclusion regarding Notice 2017-10, a notice that identified certain syndicated conservation easement transactions as listed transactions.²⁴⁹ As with the other cases involving notices naming listed transactions, the Tax Court found the notice to be a legislative rule under the APA requiring notice and comment. It concluded that none of the exemptions from notice-and-comment requirements applied, emphasizing that such exemptions must be expressly stated by Congress. The District Court for the Northern District of Alabama came to the same conclusion about the syndicated conservation easement notice in February of 2023.²⁵⁰

In reaction to these cases, the Service and Treasury acted quickly to issue Proposed Regulations. Those Proposed Regulations regarding syndicated conservation easements were issued on December 8, 2022²⁵¹ and those regarding micro-captive insurance company transactions were issued on April 11, 2023.²⁵² Both sets of Proposed Regulations give section 7805, along with section 6001 and 6011, as authority for the Proposed Regulations.²⁵³ Both describe the decision in *Mann Construction* as holding that notices identifying listed transactions “violate the APA because the notice was issued without following notice-and-comment procedures required by section 553 of the APA.”²⁵⁴ Both use the same language to explain the decision to issue Proposed Regulations in light of recent the recent decisions: “The Treasury Department and the IRS disagree with the Sixth Circuit’s decision in *Mann Construction* and the Tax Court’s decision in *Green Valley*” and are continuing to defend the validity of listed transaction notices “in circuits other than the Sixth Circuit.”²⁵⁵ Nonetheless, the NPRM explains, the Treasury Department and the Service are proposing Regulations “to help allow for consistent enforcement throughout the nation.”²⁵⁶

Under the tests in *Bullock*, *CIC Services*, *Mann Construction*, and *Green Valley*, revenue rulings setting forth requirements for exempt purpose under

²⁴⁹ *Green Valley Investors, LLC v. Commissioner*, 159 T.C. No. 5. (2022).

²⁵⁰ See *Green Rock, LLC v. Internal Revenue Serv.*, No. 2:21-CV-01320-ACA, 2023 WL 1478444 (N.D. Ala. Feb. 2, 2023).

²⁵¹ Notice of Proposed Rulemaking, Syndicated Conservation Easement Transactions as Listed Transaction, 87 Fed. Reg. 75185.

²⁵² Notice of Proposed Rulemaking, Micro-Captive Listed Transactions and Micro-Captive Transactions of Interest, 88 Fed. Reg. 21547.

²⁵³ See *id.* at 21561; Notice of Proposed Rulemaking, Syndicated Conservation Easement Transactions as Listed Transactions, 87 Fed. Reg. at 75195.

²⁵⁴ See Micro-Captive Listed Transactions and Micro-Captive Transactions of Interest, 88 Fed. Reg. at 21553; Syndicated Conservation Easement Transactions as Listed Transactions, 87 Fed. Reg. at 75190. In addition, on June 7, 2023, the Service and Treasury issued Proposed Regulations treating transactions like the Maltese personal retirement scheme as listed transactions. Prop. Reg. § 106228-22, 88 Fed. Reg. 37186 (2023).

²⁵⁵ Prop. Reg. § 106228-22, 88 Fed. Reg. 37186 (2023).

²⁵⁶ *Id.*

section 501(c)(3) would have the force of law. By satisfying the standards set forth in the revenue rulings discussed in Part V, organizations become subject to both the rights and duties that follow from section 501(c)(3) status. Failure to satisfy the standards denies the entity those rights. If so, standards for charitable purpose need to be established through APA notice-and-comment rulemaking.

Notice-and-comment rulemaking for such revenue rulings would carry out not only the statutory requirements of the APA, as courts are currently interpreting it, but also its purpose of advancing democratic values, as the District, Appellate and Supreme Court cases in *Eastern Kentucky Rights Organization* demonstrate. In that trio of cases, individuals and public interest groups sought to challenge Revenue Ruling 69-545. The Supreme Court, however, held that the plaintiffs did not have standing to do so. But had the change in the standard for hospital exemption been made as a regulation with notice and comment instead of a revenue ruling, these groups and individuals would have had the opportunity to state their objections. That is, although the notice-and-comment process for tax law often fails to result in individuals and small entities actually submitting comments, their participation is at least possible and might well have taken place during the adoption of the community-benefit standards for hospital exemption.

Consideration of small entities is particularly important for the tax-exempt sector. Small organizations dominate the section 501(c)(3) space. According to the National Center for Charitable Statistics, in 2016 only 35% of nonprofits registered with the Service were required to file a Form 990, Form 990-EZ, or Form 990-PF.²⁵⁷ That is, others were too small to be required to file anything but the electronic 990-N postcard.²⁵⁸ Moreover, “[e]ven after excluding organizations with gross receipts below the \$50,000 filing threshold, small organizations comprised the majority of public charities in 2016. . . 66.6 percent had less than \$500,000 in expenses (211,782 organizations.)”²⁵⁹ Reliance by the Service on revenue rulings to announce exempt purposes denies small but sufficiently interested parties even the opportunity for notice and comment, however seldom they may take advantage of it.

Nonetheless, notice-and-comment rulemaking for revenue rulings establishing new charitable purposes would place an enormous burden on the Service and Treasury, especially given the recent decisions invoking *State Farm* calling for detailed response by the government to significant submitted comments. Moreover, as discussed above, notice-and-comment procedures often result in only well-resourced interests weighing in. Thus, other ways of

²⁵⁷ Nat’l Ctr. for Charitable Stats., *supra* note 158.

²⁵⁸ Nat’l Ctr. for Charitable Stats., *supra* note 158.

²⁵⁹ Nat’l Ctr. for Charitable Stats., *supra* note 158.

encouraging participation by individuals and small entities seem desirable, as discussed below.

VII. Recommendations and Conclusion

Applying the current understanding of administrative law to section 501(c)(3) exempt purposes exposes failures in the statute, the regulations, and applicable revenue rulings. Ideally, Congress would rewrite the purpose language of section 501(c)(3) to parallel that of the Restatement (Third) of Trusts, which the Restatement of the Law of Charitable Nonprofit Organizations also adopts. These would be: (1) the relief of poverty; (2) the advancement of knowledge or education; (3) the advancement of religion; (4) the promotion of health; (5) governmental or municipal purposes, along with a grant of regulatory authority to the Secretary to set forth “other purposes that are beneficial to the community.” Such statutory language would acknowledge the tax-exempt health care sector beyond Congressional requirements for tax-exempt hospitals in section 501(r). It would establish a clear basis for exemption for museums, orchestras, and other organizations now shoehorned into “educational.” It would clearly authorize the regulatory adoption of the broad, legal meaning of charitable that the Regulations have taken since 1959 as well as authorizing new exempt purposes, such as public interest law firms. I do not, however, expect Congress to heed my call for statutory change here.

The cases discussed in this Article have focused on the validity of administrative guidance, both regulatory and sub-regulatory. These challenges have been procedural as well as substantive. Substantive challenges relate to *Chevron*, at least for the time being, in particular reliance on notice and comment for deference under *Chevron* Step Two. Procedural challenges relate to requirements for legislative rules under the APA, particularly adequate notice and comment.

In tax, both sets of challenges can—and do—generally take place long after issuance of guidance. Such timing is an exception among administrative agencies. For most agencies, pre-enforcement review is permitted.²⁶⁰ The Anti-Injunction Act, however, generally forbids pre-enforcement action for tax guidance.²⁶¹ As a result, challenges to tax guidance, whether substantive under *Chevron* or procedural under the APA, have, with rare exceptions, generally taken place only after a notice of deficiency has been issued or

²⁶⁰ See Ellen P. Aprill, *The Impact of Agency Procedures and Judicial Review on Tax Reform*, 65 NAT'L TAX J. 917, 918–19 (2012).

²⁶¹ I.R.C. § 7421(a) (“[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.”). See Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 VA. L. REV. 1683 (2017).

assessment of taxes has taken place. For substantive review under *Chevron*,²⁶² any change to this state of delayed review would require Congressional amendment or judicial reinterpreting of the Anti-Injunction Act,²⁶³ both of which I think are unlikely to occur.

Nonetheless, agencies can take action to increase the likelihood of deference under *Chevron Step Two*. Notice-and-comment procedures serve to ensure *Chevron* deference. In *Mead*, the Court found it “fair to assume generally that Congress contemplates administrative action with the force of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”²⁶⁴ Thus, the Court acknowledged that “the overwhelming number of our cases applying *Chevron* notice have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.”²⁶⁵ The Service could ensure deference to what is now sub-regulatory guidance that create legislative rules, such as revenue rulings announcing new charitable purposes, by employing notice-and-comment procedures.

For purposes both of *Chevron* deference and APA requirements, notice and comment can be improved. Interpretive rules also could benefit from a broad range of comments. Several scholars have proposed that the role of the Taxpayer Advocate be expanded to include commenting on both regulatory and certain sub-regulatory guidance as a representative for taxpayers whose voices often go unheard.²⁶⁶ This expanded role for the Taxpayer Advocate would likely require Congressional authorization; such a duty would seem to go beyond the current duties of the office.²⁶⁷

²⁶² Should it survive *Loper Bright Enter. v. Raimondo*.

²⁶³ Hickman & Kerska, *supra* note 261, so argue. For arguments to the contrary, see Daniel Hemel, *The Living Anti-Injunction Act*, 104 VA. L. REV. ONLINE 74 (2018). But see Stephanie Hunter McMahon, *Pre-Enforcement Litigation Needed for Taxing Procedures*, 92 WASH. L. REV. 1317 (2017) (suggesting Congress enact an exception to the AIA for pre-enforcement procedural challenges).

²⁶⁴ 533 U.S. at 230.

²⁶⁵ *Id.*

²⁶⁶ See Weisbach, *supra* note 10; Leslie Book, *A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation*, 12 FLA. TAX REV. 517, 570–73 (2012). Weisbach also suggests broadening the base of lawyers in Treasury’s Office of Tax Policy beyond those typically from large firms.

²⁶⁷ Section 7803(c)(2) provides that the functions of the office shall generally include assisting taxpayers in resolving problems with the Service; identifying areas in which taxpayers have problems in dealings with the Service; to the extent possible, proposing changes in the administrative practices of the Service to mitigate problems identified; and identifying potential legislative changes which may be appropriate to mitigate such problems. Book, *supra* note 266, at 566–77, has urged that functions of the Taxpayer Advocate Service include “a statutorily-created counsel that would have broad authority to participate in the development and promulgation of IRS guidance and specific authority to submit comments with the notice and comment

In the same vein, Reuven Avi-Yonah has suggested that Treasury appoint a public advocate, someone “experienced in administrative law as well as tax law.”²⁶⁸ In a recent article, Jim Rossi and Kevin M. Stack have taken such a suggestion one step further.²⁶⁹ In rulemakings in which less powerful interests are unlikely to participate, they call for agencies to hold proxy representation contests to solicit and select an interest group or groups to serve as a representative for underserved interests.²⁷⁰ All of these suggestions merit consideration. (Even if the Supreme Court were to overrule *Chevron*, broadening the range of comments on proposed rules would strengthen the case for courts to uphold such guidance under *Skidmore* by demonstrating care and deliberation.)

Challenges to tax guidance under the APA raise two sets of issues. The first is the extent to which the APA notice-and-comment requirements apply to tax guidance—whether, for example, regulations promulgated under the general authority of section 7805 or tax shelter notices are interpretive or legislative.²⁷¹ Congress could resolve these disputes. APA section 559 specifies that a “[s]ubsequent statute may not be held to supersede or modify” APA rulemaking requirements “except to the extent in does so expressly.” Congress thus could enact amendments to section 7805 specifying that regulations promulgated under section 7805 or notices authorized by regulations are not legislative rules under APA section 553.²⁷² The history of tax guidance, the values underlying the APA, and the impact of the Anti-Injunction Act could all support such tax exceptionalism. Again, I find such action unlikely.

procedure.” He also proposes legislation that would facilitate low-income taxpayer clinicians’ participation in rulemaking by tying that activity to the clinic’s matching funding provisions. *Id.* at 577–83.

²⁶⁸ Reuven S. Avi-Yonah, *Fixing Tax Law’s APA Problem*, 177 TAX NOTES FED. (TA) 981, 982–83 (NOV. 14, 2022). He draws on Neil Komesar & Wendy Wagner, *The Administrative Process from the Bottom Up: Reflections on the Role, if Any, for Judicial Review*, 69 ADMIN. L. REV. 891, 944 (2017), for the suggestion for a public advocate tasked “with rigorously representing the diffuse public.”

²⁶⁹ Jim Rossi & Kevin M. Stack, *Representative Rulemaking*, 109 IOWA L. REV. (forthcoming 2023).

²⁷⁰ Rossi & Stack, *supra* note 269 (abstract).

²⁷¹ See notes 9–12, *supra*, and accompanying text.

²⁷² Even for interpretive rules, the Service and Treasury might choose to engage in notice-and-comment rulemaking—their current position for general authority regulations. But for purposes of *Chevron* deference, notice-and-comment may not be necessary. In *Mead*, the Supreme Court wrote that “as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.” 533 U.S. at 230–31. Thus, other methods short of notice and comment that demonstrate fairness and deliberation could produce *Chevron* deference and advance the purposes underlying the APA.

However, for APA procedural challenges, such as failure to engage in notice and comment or to discuss all significant comments received, delay between promulgation of the guidance and the challenge poses the most pressing issue. As Professor Clinton Wallace identified in commenting on *Hewitt*, there exists “a growing need for the courts to consider whether there are any remedies that can help bridge the decades of APA noncompliance with the reality that old tax regulations are an integral part of ongoing tax.”²⁷³

In *Govig & Assocs. v. United States*, the District Court of Arizona found a way to dismiss such a challenge on statute-of-limitations grounds.²⁷⁴ There, plaintiffs challenged Service Notice 2007-83, which identified certain trust arrangements using cash value life insurance policies as a listed transaction. The challengers argued that issuance of the Notice violated various provisions of the APA, including failure to follow notice-and-comment procedures.²⁷⁵ The District Court relied on 28 U.S.C. section 2401(a), which provides that “every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.” It accepted the government’s argument that the claims accrued when the notice was issued in November 2007 rather than the plaintiffs’ claim that the challenge accrued only when the Service applied the Notice to them in 2019. The court relied in good measure on the Ninth Circuit’s decision in *Wind River Mining Corporation v. United States*.²⁷⁶ There the court wrote, “If a person wishes to challenge a mere procedural violation in the adoption of a regulation or other agency action, the challenge must be brought within six years of the decision. . . . The grounds for such challenges will usually be apparent to any interested citizen with a six-year period following promulgation of the decision.”²⁷⁷

Govig has prompted Professor Susan Morse to analyze and, ultimately, endorse this interpretation of 28 section U.S.C. 2401(a) and its application to procedural challenges to tax regulations.²⁷⁸ She explains that at least seven Courts of Appeals have adopted the *Wind River* doctrine and that no Court

²⁷³ See Theresa Schliep, *Fallout from 11th Circ. Easement Ruling Could Be Blunted*, LAW360: TAX AUTHORITY, Jan. 6, 2022, <https://www-law360-com.turing.library.northwestern.edu/tax-authority/articles/1453058/fallout-from-11th-circ-easement-ruling-could-be-blunted> [https://perma.cc/GEJ9-CBVK].

²⁷⁴ *Govig & Assocs. v. United States*, No. CV-22-00579-PHX-DGC, 2023 WL 2614910 (D. Ariz. Mar. 23, 2023).

²⁷⁵ *Govig* involves the same notice as that in *Mann*. The plaintiffs in *Govig* argued that the Sixth Circuit’s *Mann* decision nullified the notice nationally. The *Govig* court rejected that contention. The *Mann* court questioned the *Govig* court’s position. See *Mann Constr., Inc.*, 2023 WL 3175426.

²⁷⁶ 946 F.2d 710 (9th Cir. 1991).

²⁷⁷ 946 F.2d at 715.

²⁷⁸ Susan C. Morse, *Old Regs*, 31 GEO. MASON. L. REV. (forthcoming 2023).

of Appeals has expressly disagreed with this analysis.²⁷⁹ To summarize only briefly her careful consideration, she acknowledges that this approach raises special difficulties with tax regulations because pre-enforcement challenges are not permitted, and enforcement may not take place for many years after promulgation of the guidance. She marshals a number of cases in which courts enforced the six-year statute of limitations, even though plaintiffs lacked standing during that period.²⁸⁰ The most apposite of those cases, *Hire Order Ltd. v. Marinos*,²⁸¹ involved a challenge in 2008 by two firearm dealers to Revenue Ruling 69-59, which provided that a firearm's dealers license covered the business premises in the license but not off-premises shows.²⁸² The Fourth Circuit affirmed the District Court's dismissal of the case under 28 U.S.C. section 2401(a), even though the firearms dealers lacked standing before expiration of the limitations period.

Morse argues for a six-year statute accruing from the date of promulgation for a variety of reasons, including the value of repose. Moreover, as she explains, "administrative procedure rights do not arise from specific interactions between governments and private persons, but rather come out of a commitment to a public, democratic-adjacent promulgation process," an observation that "helps to clarify why the relevant limitations period is not held open for a specific plaintiff whose claim arises a decade or more later."²⁸³ Further, she contends, such doctrines as equitable tolling and equitable estoppel could provide the needed protections for issues such as lack of standing within the six-year period.²⁸⁴

For Morse, the District Court decision in *Govig* sets the stage "for tax cases to develop the law relating to the exposure of old regs to administrative procedure challenge."²⁸⁵ Congress could, she writes, "enact a default limitations period for such administrative procedure claims that would specify in so many words that it would begin to run at the time 'of regulation

²⁷⁹ Morse, *supra* note 278, at manuscript at 2.

²⁸⁰ Time-barred cases to old agency rulemaking that she discusses in the article include *Texas v. Rettig*, 987 F.3d 518 (5th Cir. 2021) (challenge to 2002 HHS Certification Rule); *Sai Kwan Wong v. Doar*, 571 F.3d 274 (2nd Cir. 2009) (challenge to 1980 regulation treating certain Social Security income as required contribution for nursing home care); and *Preminger v. Sec'y of Veterans Affairs*, 517 F.3d 1299 (Fed Cir. 2008) (challenge by local Democratic party committee to 1973 election regulation).

²⁸¹ 698 F.3d 168 (4th Cir. 2012).

²⁸² Rev. Rul. 69-59, 1969-1 C.B. 360.

²⁸³ Morse, *supra* note 278, at manuscript at 30.

²⁸⁴ Morse, *supra* note 278, at manuscript at 50-51.

²⁸⁵ Morse, *supra* note 278, at manuscript at 14.

promulgation or other final agency action.”²⁸⁶ But she puts “such a legislative fix” aside as a possible “subject for future work.”²⁸⁷

In contrast, I believe that Congressional action as to procedural challenges to tax guidance is urgent. Waiting endangers our tax system. This Article chose the example of longstanding guidance regarding charitable purpose under section 501(c)(3) in order to demonstrate the potential risk to the tax system that these procedural challenges to old guidance pose. We cannot stand by to see whether other courts adopt the position of *Govig*. I thus close with a plea for Congress to enact a statute of limitations for procedural challenges to tax guidance, such as section 2401(a) in Title 26. Longstanding tax guidance is a terrible thing to waste.

²⁸⁶ Morse, *supra* note 278, at manuscript at 14. She notes that for cases related to the Hobbs Act, which relates to action taken by various agencies, including the Federal Communications Commission, the Nuclear Regulatory Commission, and the Secretary of Agriculture, provides for a 60-day limitation period that begins to run upon an agency’s “entry of a final order.” See 28 U.S.C. § 2344.

²⁸⁷ Morse, *supra* note 278, at manuscript at 14.