A NEW ERA OF TAX EXCEPTIONALISM

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INTRODUCTION

Tax exceptionalism, the idea that tax law is a special area of law deserving special treatment, has a long history.[1] Specifically, the Supreme Court developed a unique standard of deference when reviewing the Treasury Department's interpretations of the Internal Revenue Code (IRC), published as Treasury regulations. This standard was given a definitive expression as *National Muffler* deference. Tax exceptionalism persisted for decades but eventually came to an end when the Supreme Court held that *Chevron* applied equally to the Treasury regulations as to other agency interpretations.

However, *Chevron* deference itself was overturned when the Supreme Court decided *Loper Bright.* Although the Court rejected the practice of extending deference to agencies' interpretations of law in *Loper Bright,* it did not foreclose courts from showing respect to the agencies, especially when their interpretation is grounded in experience or a congressional delegation of discretionary authority. Both of these factors apply with particular force to the Treasury regulations, making them especially deserving of respect from the courts. The resulting treatment will resemble the historical practice of tax exceptionalism, though it will be based on the factors laid out in *Loper Bright* rather than an explicit acknowledgement that tax law is special. Still, this natural outcome of an objective test will reaffirm the notion that special treatment is indeed warranted in an area as important and convoluted as tax law.

In this Note, I will discuss courts' historical practice of giving special treatment to the Treasury regulations and the likely approach they will take after *Loper Bright.* I will argue that courts should show great respect, if not deference, to the Treasury regulations and that this uniquely powerful respect will resemble the previous practice of tax

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1 *See* James M. Puckett, *Structural Tax Exceptionalism*, 49 GA. L. REV. 1067, 1069 (2015).

exceptionalism. I will focus my discussion on the Treasury regulations[2] and primarily use Tax Court cases as demonstrative and prognosticative examples at the trial level,[3] as the Tax Court is a specialty court that has expertise in and deals solely with tax law.[4]

I. A BRIEF HISTORY OF TAX LAW

The IRC occupies an entire title of the United States Code, spread across four volumes, and consists of thousands of sections of law.[5] Representing the comprehensive collection of the United States' tax law, it was originally created in 1939 and given major overhauls twice since then, in 1954 and 1986.[6] The IRC is a complex lattice of statutes that sets out the law of taxation in the United States.[7] Furthermore, these statutes are deeply interconnected, so any change to one section is certain to reverberate through many others.[8] Perhaps the only feat more ambitious than composing the IRC is understanding it, especially for

2 There are other forms of guidance issued by tax agencies. *See* MILAN N. BALL, CONG. RSCH. SERV., IF11604, RELIANCE ON TREASURY DEPARTMENT AND IRS TAX GUIDANCE 1–2 (2025). My argument here cannot necessarily be extended to these other sources, as there have historically been unique considerations leading courts to grant them differing treatment. *See* Leandra Lederman, *The Fight over "Fighting Regs" and Judicial Deference in Tax Litigation*, 92 B.U. L. REV. 643, 659–71 (2012).

3 Challenges to the IRS can also be brought in district court or the Court of Federal Claims, but these three courts have slightly different standing requirements. *See Taxpayer Bill of Rights 5: The Right to Appeal an IRS Decision in an Independent Forum*, IRS (Jan. 23, 2026), https://www.irs.gov/newsroom/taxpayer-bill-of-rights-5 [https://perma.cc/3E4K-BXU8].

4 *See Guidance for Petitioners: About the Court*, U.S. TAX CT., https://www.ustaxcourt.gov/petitioners-about [https://perma.cc/6Y7F-PRML] (last visited Mar. 24, 2025).

5 *See* I.R.C. §§ 1–9834 (2018). There are, of course, amendments since 2018 in the Code supplements taking up hundreds of more pages. The expanse in the 2018 Code alone serves to illustrate the size and complexity of the IRC.

6 *Title 26, U.S. Code*, U.S. CENSUS BUREAU (Aug. 3, 2023), https://www.census.gov/about/history/bureau-history/agency-history-timeline/title-26.html [https://perma.cc/K6X3-DHCU].

7 *See* TAX SECTION, N.Y. STATE BAR ASS'N, REPORT NO. 1508, COMMENT ON TAX IMPLICATIONS OF *LOPER BRIGHT* 13 (2025) (describing tax law as a "notoriously arcane field").

8 For example, § 61 defines income, which includes gains from dealings in property. *See* I.R.C. § 61(a)(3) (2018). Section 1001 defines gain from property as the difference of the amount realized and adjusted basis. *See id.* § 1001(a). Adjusted basis is in turn defined in § 1011. *See id.* § 1011(a). This definition itself relies on the definition of basis given in § 1012 and adjustments laid out in § 1016. *See id.* §§ 1012(a), 1016(a). The first two of many adjustments to basis are for taxes, defined in § 266, and expenditures, defined in § 173, and these sections themselves implicate other sections of the IRC. *See id.* §§ 173(a), 266. But § 164 allows for a deduction for property taxes to be factored into the calculation. *See id.* § 164(a)(1). And there is a completely different calculation for basis if the property was transferred by a decedent's estate. *See id.* § 1014(a). This example could go on, but the foregoing shows the importance of taking a holistic view of the IRC even when interpreting even a single section.

the average citizen who does not have expertise in tax law but is nevertheless obligated to calculate and pay his share of taxes. The difficulties inherent in composing and implementing such a convoluted scheme are emphasized in an area as essential to government functioning as taxation, as the smallest oversight could open a loophole jeopardizing billions of dollars in lost revenue.

To solve these problems, Congress delegates authority to the Treasury Department to interpret the IRC and offer guidance to taxpayers. The Treasury has been responsible for administering tax law since the First Congress created it in 1789.[9] The Treasury's interpretation of the IRC is published as the Treasury regulations, which are issued under normal notice and comment procedure and compiled in Title 26 of the Code of Federal Regulations.[10] It derives its authority to issue regulations from two sources, specific grants of authority in a particular section of the IRC, which empower the Treasury to issue regulations specifically for that section,[11] and the general grant of authority in § 7805, which grants it authority to "prescribe all needful rules and regulations for the enforcement of" the IRC as a whole.[12] Whether regulations issued under the general grant of authority will receive different treatment than those issued under a specific grant after *Loper Bright* is an unsettled question.[13] In addition to issuing regulations, the Treasury also plays a direct role in drafting the IRC, making yearly proposals to Congress based on the country's revenue needs.[14]

II. THE HISTORY OF DEFERENCE FOR THE TREASURY REGULATIONS

The history of tax exceptionalism, under which courts gave great weight to the Treasury regulations, stretches back nearly a century.[15] This tradition was strengthened in the last forty-five years, when the

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9 *See* An Act to Establish the Treasury Department, ch. 12, 1 Stat. 65 (1789).

10 *Tax Research*, B.C. L. LIBR. (Jan. 8, 2024), https://lawguides.bc.edu/c.php?g=350876&p=2367406 [https://perma.cc/7B2R-W7F7]; *Tax Code, Regulations and Official Guidance*, IRS (Feb. 12, 2025), https://www.irs.gov/privacy-disclosure/tax-code-regulations-and-official-guidance [https://perma.cc/GDY4-MX2F].

11 *E.g.*, I.R.C. § 245A(g) (2018). There are several hundred such grants of specific authority throughout the IRC. Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1735 & n.37 (2007).

12 I.R.C. § 7805(a) (2018).

13 N.Y. STATE BAR ASS'N, *supra* note 7, at 27.

14 *See, e.g.*, DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2025 REVENUE PROPOSALS 1 (2024).

15 *See, e.g.*, United States v. Correll, 389 U.S. 299, 305–06 (1967); Helvering v. Winmill, 305 U.S. 79, 83 (1938); *see also* Jasper L. Cummings, Jr., *The Supreme Court's Deference to Tax Administrative Interpretation*, 69 TAX LAW. 419, 428 (2016) (discussing the infrequency with which the Supreme Court overrules Treasury regulations).

Supreme Court began extending formal deference. This deferential treatment came to be embodied in two forms, a tax-specific standard expressed in *National Muffler*, and the general standard extended to all agencies expressed in *Chevron*.[16] Uncertainty over what form of deference the Treasury regulations should enjoy would plague tax jurisprudence in the decades following these opinions.[17]

It is also worth briefly mentioning two other forms of deference which are relevant to tax law. *State Farm* requires an agency "to supply a reasoned analysis" before making a rule change.[18] However, *State Farm*'s applicability to the Treasury regulations has been called into question.[19] *Skidmore* in turn extends deference to agencies based on their expertise.[20] *Skidmore* was largely subsumed under *Chevron* in the context of Treasury regulations,[21] but it may have renewed significance after *Loper Bright*.[22] While these cases remain important in the realm of tax law generally, a deep discussion of them is beyond the purview of this Note.

A. *The Origins of Tax Exceptionalism*

Tax exceptionalism originally grew out of the reenactment doctrine, which states that when a statute is given a prominent interpretation by an agency with responsibility to administer it, and Congress reenacts the statute with no or minor changes, courts should understand that Congress has adopted the interpretation given by the agency.[23] This doctrine has a long history in tax law with the Supreme Court expressing a version of it as early as the nineteenth century.[24] It would continue to be developed through the coming decades.[25]

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16 *Cf.* Lederman, *supra* note 2, at 646.

17 *See infra* Section III.A.

18 Motor Vehicles Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).

19 *See, e.g.*, SIH Partners, LLLP v. Comm'r, 150 T.C. 28, 44 (T.C. 2018) (stating that the "Treasury's rulemaking . . . differs fundamentally from the agency action in *State Farm* because" it "reflect[s] . . . a policy judgment" rather than "findings of fact"), *aff'd*, 923 F.3d 296 (3d Cir. 2019).

20 *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). *Skidmore*, however, established a lower level of deference than *National Muffler* or *Chevron*. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1109 (2008).

21 *See* Lederman, *supra* note 2, at 648.

22 *See infra* notes 186–91 and accompanying text.

23 *See generally* Robert C. Brown, *Regulations, Reenactment, and the Revenue Acts*, 54 HARV. L. REV. 377, 380 (1941).

24 *See, e.g.*, Robertson v. Downing, 127 U.S. 607, 613 (1888).

25 *See, e.g.*, United States v. Cerecedo Hermanos y Compañia, 209 U.S. 337, 339 (1908). This case is also notable because the Court remarked that great weight should be

The reenactment doctrine would gradually be molded into a more deferential standard towards the Treasury Department. The first large step would come in *Winmill*.[26] There, the Court applied the reenactment doctrine and made the additional move to hold that Treasury regulations which were deemed to enjoy congressional approval under the doctrine would have the effect of law.[27] Previous articulations of the reenactment doctrine only gave weight to the Treasury's interpretation of the IRC, not legal authority.[28] The Court would slightly modify its treatment of the Treasury regulations in *Cartwright*, where it recognized a congressional delegation of authority to the Treasury and stated that the regulations must be upheld so long as they implement the congressional mandate in a reasonable manner.[29] This standard, combined with the legal effect the Treasury regulations could have under *Winmill*, came close to formal deference, but the Court had not yet acknowledged an explicitly deferential standard. On the contrary, the Court in *Cartwright* emphasized that these principles set the framework for the court's analysis rather than displacing it.[30]

B. National Muffler *Deference*

Full deference to the Treasury regulations would not come until 1979, when the Court decided *National Muffler*.[31] This standard was the complete realization of tax exceptionalism, as it extended full deference solely to the Treasury Department's interpretation of the IRC.[32] In reviewing § 501 of the IRC, the Supreme Court noted the vagueness of the statutory language and turned immediately to a discussion of the Treasury regulations,[33] stating that the "Court customarily defer[red] to the regulation" in these situations, so long as they were reasonable.[34]

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given to agencies' interpretations of statutes when the statute's meaning is ambiguous, which was echoed in *National Muffler* and *Chevron*. *Id.* However, this idea would still take seven more decades to reach full acceptance. *See infra* Sections II.B, C.

26 *See* Helvering v. Winmill, 305 U.S. 79, 83 (1938).

27 *See id.*

28 *See, e.g.*, United States v. Dakota-Montana Oil Co., 288 U.S. 459, 466 (1933).

29 United States v. Cartwright, 411 U.S. 546, 550 (1973).

30 *Id.*

31 Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 476–77 (1979).

32 *See* Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 524 (2011).

33 *See Nat'l Muffler*, 440 U.S. at 476–77. The Supreme Court's immediate consideration of the Treasury regulations differed from the Second Circuit's, which relied primarily on *noscitur a sociis*. *See* Nat'l Muffler Dealers Ass'n v. United States, 565 F.2d 845, 846 (2d Cir. 1977), *aff'd*, 440 U.S. 472 (1979).

34 *Nat'l Muffler*, 440 U.S. at 476.

In its reasoning, the Court emphasized the § 7805(a) general grant of rulemaking authority.[35]

Although the Supreme Court characterized this deference as a familiar move, it was not formalized until this case. The Court had previously recognized in *Cartwright* the Treasury's role of administering the IRC and its authority to promulgate regulations, but it clarified there that the regulations "set the framework for judicial analysis; [they do] not displace it."[36] The Court also gave weight to the Treasury regulations in *Correll*, building off of *Winmill*, without reaching full deference, stating that "[a]lternatives to the Commissioner's . . . rule are of course available. . . . But we do not sit as a committee of revision to perfect the administration of the tax laws."[37] The Court there limited its role to ensuring that the interpretation was reasonable but did not set a method for making this determination.[38] The Court primarily cited these two cases in extending full deference in *National Muffler*.[39]

National Muffler's test for deference looked to whether a Treasury regulation was a reasonable interpretation of the IRC in light of the statute's plain language, origin, and purpose.[40] The Court gave additional weight to a regulation if it was issued substantially contemporaneously with the statute it interpreted and noted that, if the regulation was promulgated later than the statute, its development warranted inquiry.[41] Lastly, the Court laid out several other relevant factors in evaluating a regulation: the length of time it has been in effect, reliance placed on it, consistency of interpretation, and the degree of scrutiny Congress gave to it in subsequent reenactments of the statute.[42] This standard afforded deference to the Treasury while enabling the reviewing court to consider a range of evidence to ensure the regulation accorded with Congress's intent.[43] Applying this framework, the Court in *National Muffler* upheld the Treasury regulation.[44]

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35 *See id.* at 477.

36 United States v. Cartwright, 411 U.S. 546, 550 (1973).

37 United States v. Correll, 389 U.S. 299, 306–07 (1967).

38 *See id.* at 307.

39 *See Nat'l Muffler*, 440 U.S. at 476–77.

40 *See id.* at 477.

41 *Id.*

42 *Id.* For a deeper discussion of several of the factors the Court considered and their applicability to tax law, see John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the* Chevron *Era*, 64 GEO. WASH. L. REV. 35, 74–79 (1995).

43 *Cf.* Coverdale, *supra* note 42, at 74 (discussing how the factors in *National Muffler* are applied); Peoples Fed. Sav. & Loan Ass'n of Sidney v. Comm'r, 948 F.2d 289, 304 (6th Cir. 1991) (criticizing *National Muffler* for allowing plenary review of the Treasury regulations).

44 *See Nat'l Muffler*, 440 U.S. at 488–89.

C. Chevron *Deference*

Chevron, unlike *National Muffler*, is generally applicable to all administrative rulemaking.[45] *Chevron* deference has been extensively discussed with greater ability than your author could manage in this Note.[46] It suffices here to give a summary of *Chevron*'s two-step test and briefly compare it to *National Muffler*.

The Court in *Chevron* broke review of agency rules down into two steps.[47] In the first step, the reviewing court asks "whether Congress has directly spoken to the precise question at issue."[48] If it has, the court's review is at an end, and it must give effect to the Congress's intent.[49] If there is ambiguity, the court proceeds to the second step, where it asks whether the agency's interpretation of the statute is a "permissible construction."[50] At this step, the court shows deference to the agency, accepting the permissible construction.[51]

Although *Chevron* did not immediately revolutionize the landscape of administrative law, it would grow to be a controlling precedent,[52] proving a difficult hurdle in any attempt to overturn agency action.[53] It was also a break, though a subtle one, from *National Muffler*. Apart from being generally applicable rather than confined to tax law, *Chevron* instituted a slightly stronger standard of deference than *National Muffler*.[54] The standards are separated by fine distinctions,[55] but *National Muffler* allowed for a broader review of the reasonableness of the Treasury regulations than did *Chevron*.[56]

45 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984), *overruled by*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024); *cf.* Kelsey C. Mellette, Note, *The Service and the APA in* Dominion Resources, Inc. v. United States*: A Chance at Redefinition and Mandating Administrative Law Universality*, 66 TAX LAW. 819, 831 (2013) (arguing that universal standards should be applied in administrative law).

46 *See, e.g.*, Coverdale, *supra* note 42, at 36 n.3 (listing the "enormous body of scholarly literature on *Chevron*," *id.* at 36).

47 *See Chevron*, 467 U.S. at 842–43.

48 *Id.* at 842.

49 *Id.* at 842–43.

50 *Id.* at 843.

51 *Id.* at 844.

52 *See* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 275–76 (2014); Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2264 (2024).

53 *See Loper Bright*, 144 S. Ct. at 2265.

54 *See* David A. Weisbach, *Tax Exceptionalism*, 77 TAX L. REV. 1, 1 (2023).

55 *See* Bankers Life & Cas. Co. v. United States, 142 F.3d 973, 982 (7th Cir. 1998); *see also* Cummings, *supra* note 15, at 427 (noting the similarity between *National Muffler* and the second step of *Chevron*'s analysis); Eskridge & Baer, *supra* note 20, at 1121 ("*National Muffler* sound[s] a lot like *Chevron* . . . .").

56 *See* Cummings, *supra* note 15, at 422 n.10; Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 54–55 (2011) (noting that *National Muffler* allowed courts to

III. THE END OF TAX EXCEPTIONALISM

The Tax Court quickly adopted *National Muffler* deference, applying it within a year,[57] and did not seem to consider it a great break from previous precedent.[58] This comes as no surprise; *National Muffler* applied specifically to the Treasury regulations,[59] so it was natural, and even necessary, for the Tax Court to apply it. The same could not be said for *Chevron*. Although it would prove to have a dramatic impact on administrative law, its immediate implications for judicial review of the Treasury regulations were not clear. *Chevron* was not cited by the Tax Court until 1992, nearly eight years after it was decided.[60] Even this acknowledgement was not self-motivated; the Tax Court was instead required to consider *Chevron* by the courts of appeals.[61] Despite this initial reluctance, the Tax Court would grow accustomed to *Chevron* and cite it at roughly the same frequency as *National Muffler* in the following years with several cases citing both.[62]

A. *Uneasy Coexistence of* National Muffler *and* Chevron

Instead of replacing *National Muffler*, *Chevron* initially existed alongside it.[63] Twenty years of uncertainty ensued as the courts would remain undecided on whether *National Muffler* or *Chevron* provided the proper standard of deference for the Treasury regulations.[64] Several circuits held that *Chevron* provided the sole test for all administrative

consider factors such as the Treasury regulation's consistency over time and the way it evolved whereas *Chevron* did not); Peoples Fed. Sav. & Loan Ass'n of Sidney v. Comm'r, 948 F.2d 289, 304 (6th Cir. 1991) ("Entirely ignoring *Chevron* . . . the Tax Court employed the standard in *National Muffler Dealers* which seemed to allow a plenary review of the legislative history without the deference requirements found in *Chevron* . . . .").

57 *See* Associated Hosp. Servs., Inc. v. Comm'r, 74 T.C. 213, 230 (T.C. 1980). The Tax Court cited *National Muffler* in two other cases that year. *See* Engineered Timber Sales, Inc. v. Comm'r, 74 T.C. 808, 825 (T.C. 1980); Est. of Crafts v. Comm'r, 74 T.C. 1439, 1452 n.17 (T.C. 1980).

58 *See Associated Hosp. Servs.*, 74 T.C. at 230 (stating that *National Muffler* "demonstrated the continuing vitality of the reenactment doctrine").

59 *See* Mellette, *supra* note 45, at 823–24.

60 *See* Ga. Fed. Bank, F.S.B. v. Comm'r, 98 T.C. 105, 107–10 (T.C. 1992). This case is a good example of the Tax Court's reluctance to adopt *Chevron*, as the court would hold that the Treasury regulations "contravene[d] Congress' intent" and were thus not entitled to deference. *Id.* at 111.

61 *See, e.g.*, *Peoples Fed.*, 948 F.2d at 304–05.

62 *See, e.g.*, Cent. Pa. Sav. Ass'n v. Comm'r, 104 T.C. 384, 390–94 (T.C. 1995); W. Waste Indus. & Subsidiaries v. Comm'r, 104 T.C. 472, 484–86 (T.C. 1995).

63 *See* Lederman, *supra* note 2, at 646; Levy & Glicksman, *supra* note 32, at 524.

64 *See* Mellette, *supra* note 45, at 823–24.

interpretations of law, displacing *National Muffler*.[65] These courts generally saw *Chevron* as providing slightly stronger deference than *National Muffler* and valued uniformity in administrative law and among the circuits.[66] Other circuits, however, continued to apply *National Muffler* alongside *Chevron* and questioned whether there was any real difference between the two standards.[67] The Supreme Court did not provide much guidance, alternately citing *Chevron* and *National Muffler* when reviewing the Treasury regulations.[68]

B. *Resolution of the Uncertainty*

This confusion among the courts was resolved in favor of *Chevron* in 2011, twenty years after it began.[69] The Court's decision to eschew *National Muffler* was motivated by several considerations. Firstly, the Court found no good reason to maintain a standard of deference unique to tax law.[70] Secondly, the Court placed great importance on the uniform review of administrative actions.[71] And lastly, the Court viewed agency expertise as the better guide for administering complex statutes rather than court adjudication.[72] The Court also discussed changes in administrative law since the confusion arose that obviated the need for two standards of deference.[73] *Mayo* established *Chevron* as the sole framework that governed courts' review of the Treasury regulations. Tax exceptionalism was, for the time being, over.

IV. THE END OF *CHEVRON*

Chevron stood as the sole standard of deference for reviewing the Treasury regulations for thirteen years, but this came to an end with *Loper Bright*.[74] The Court's argument for doing away with deference to administrative agencies proceeded in three parts. The Court first

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65 *See, e.g.*, *Peoples Fed.*, 948 F.2d at 304–05; Bankers Life & Cas. Co. v. United States, 142 F.3d 973, 982 (7th Cir. 1998).

66 *See Peoples Fed.*, 948 F.2d at 304–05; *Bankers Life*, 142 F.3d at 982–83.

67 *See* Pac. First Fed. Sav. Bank v. Comm'r, 961 F.2d 800, 803 (9th Cir. 1992); *see also Cent. Pa. Sav. Ass'n*, 104 T.C. at 392.

68 *See, e.g.*, Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 560–61 (1991) (citing only *National Muffler*); Atl. Mut. Ins. Co. v. Comm'r, 523 U.S. 382, 387–89 (1998) (citing both *Chevron* and *Cottage Savings*).

69 *See* Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 55 (2011).

70 *See id.* at 55 ("In the absence of such justification, we are not inclined to carve out an approach to administrative review good for tax law only.").

71 *See id.* at 55–56.

72 *See id.* at 56.

73 *See id.* at 56–57 (disclaiming different standards of review for agency rules based on general and specific delegations of authority from Congress).

74 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

turned to the structure of the federal government.[75] Article III assigns to the courts, not agencies, the authority and duty to interpret laws.[76] This position is supported by the Framers' arguments during the Founding and longstanding Supreme Court precedent.[77] The Court then turned to precedent in the decades preceding *Chevron*.[78] The Court emphasized that, while it had held that agency determinations of fact were owed deference, questions of law remained the sole province of the courts.[79] The Court lastly turned to the Administrative Procedure Act (APA).[80] The Court concluded that the APA's purpose was to limit administrative agencies, and that it restated traditional judicial review: one without deference.[81] Extending deference to administrative agencies was thus counter to Congress's instructions.[82]

Although the Court rejected deference to administrative agencies in matters of law, it did not conclude that courts should not show agencies respect. Indeed, the tradition of showing respect to the executive branch is as longstanding as the tradition of judicial review expressed in *Marbury*.[83] The executive branch is due not only respect, but "very great respect" when it gives a construction of an ambiguous law it was appointed to enact.[84] Respect was especially warranted for interpretations that were both issued contemporaneously with the statute and had remained consistent over time.[85] This was a recognition that administrative agencies are staffed with masters of the laws they administer who themselves often draft the laws.[86] The courts are permitted to take advantage of the expertise of administrative agencies in interpreting statutes, even under the APA.[87]

The Court additionally recognized that the proper interpretation of a statute may be that Congress authorized the agency which was to administer it to exercise discretion.[88] This can be an express delegation to an agency to give meaning to the statutory terms or empowerment

75 *See id.* at 2257–58.

76 *See id.* at 2257; U.S. CONST. art. III.

77 *See, e.g.*, THE FEDERALIST NO. 78 (Alexander Hamilton); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

78 *See Loper Bright*, 144 S. Ct. at 2258–60.

79 *See id.* at 2258.

80 *See id.* at 2261–63; Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701–706).

81 *See Loper Bright*, 144 S. Ct. at 2261–62.

82 *Id.* at 2263.

83 *Id.* at 2257 (citing Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206 (1827)).

84 *Id.* (quoting *Edwards' Lessee*, 25 U.S. (12 Wheat.) at 210).

85 *Id.* at 2258. This language echoes *National Muffler*'s standard for extending deference. *See* Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979).

86 *See Loper Bright*, 144 S. Ct. at 2258.

87 *See id.* at 2262, 2267.

88 *See id.* at 2263, 2268.

to fill in the details of the statutory scheme.[89] In such cases, courts are required under the APA to recognize the delegation and fix its boundaries, but must otherwise respect Congress's delegation of authority to the agency.[90] The Court's discussion throughout *Loper Bright* makes clear that the deference it was concerned with was that which *Chevron* extended universally to agencies to interpret ambiguous statutes, not that shown to agencies which were given an explicit grant of authority by Congress to give meaning to or fill in the gaps of a statute.[91]

V. REVIEW OF TREASURY REGULATIONS UNDER *LOPER BRIGHT*

The position of the Treasury regulations after *Loper Bright* is not entirely certain. While it is clear that courts will no longer apply the highly deferential standard of *Chevron*, *Loper Bright* did not forbid courts from showing respect to administrative regulations and even seemed to encourage it in the proper circumstances.[92] It will take time for the courts to fully explore the implications of *Loper Bright*, so for now we can only predict its consequences based on the Supreme Court's reasoning, the structure of the Treasury regulations, and initial readings given by lower courts.

A. *Probable Effects*

The Court characterized its decision in *Loper Bright* as a return to courts' traditional role as the sole interpreters of law,[93] but some commentators foresee that the Treasury regulations will continue to enjoy *Chevron* deference in fact if not in name.[94] According to them, in many circumstances, courts will extend to agencies the same level of deference that *Chevron* afforded because the best reading of the statute is that Congress delegated authority to the agency to interpret it.[95] Recognition of congressional delegations has special applicability to the IRC, which contains hundreds of specific grants of authority to the Treasury Department to issue regulations.[96] This is in addition to the general grant of authority in § 7805.[97] Furthermore, the Treasury is an expert

89 *Id.* at 2263.

90 *See id.* at 2263, 2273.

91 *See id.* at 2254, 2264–66, 2268, 2272.

92 *See id.* at 2262, 2267.

93 *See id.* at 2268.

94 *See, e.g.*, Adrian Vermeule, *Chevron by Any Other Name*, NEW DIG. (June 28, 2024), https://thenewdigest.substack.com/p/chevron-by-any-other-name [https://perma.cc/Q8TK-K66L].

95 *Id.*

96 Hickman, *supra* note 11, at 1735 & n.37.

97 *See* I.R.C. § 7805 (2018). *But see infra* notes 101–04 and accompanying text.

on a notoriously convoluted subject,[98] so its interpretations of the IRC would be owed respect by courts under *Loper Bright* even without a delegation of rulemaking authority.[99]

On the other end of the spectrum, some litigants have argued that the Treasury does not enjoy priority before any other party in interpreting the IRC.[100] It is unlikely that courts will refuse to grant any respect to the Treasury's interpretation of the IRC, but there is a possibility that a large swathe of Treasury regulations will be afforded little respect. While the Court recognized that there are genuine delegations of authority that Congress extends to administrative agencies,[101] the requirements to find such a delegation under *Loper Bright* are unclear. Specifically, it is unclear if regulations issued under the Treasury's § 7805 general authority to make rules are entitled to the heightened respect that a specific delegation from Congress implies.[102] *Mayo* held that both general-authority and specific-authority regulations were entitled to the same standard of review from courts, but this was based on the assumption that they both enjoyed *Chevron* deference.[103] It is possible that under *Loper Bright* only specific grants of authority will be considered valid delegations of discretionary authority and regulations issued under the general grant of authority will be more susceptible to overruling.[104]

This question raises several others. What language must Congress use to effectively delegate authority to an administrative agency? If there is a delegation, what is the scope of authority Congress granted to the Treasury? Would holding that § 7805 is a delegation of authority render any specific grants of authority superfluous? Would holding that § 7805 is a delegation of authority reinstitute *Chevron*'s rule of deference? Only time will provide the answers to these questions. But it seems likely that specific-authority regulations will be upheld as genuine delegations of rulemaking authority by Congress,[105] and it is almost certain that even general-authority regulations would at least be entitled to respect as interpretations by an expert agency.[106]

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98 *See* N.Y. STATE BAR ASS'N, *supra* note 7, at 13.

99 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2267 (2024).

100 *See, e.g.*, Appellant's Supplemental Brief at 5–18, 3M Co. v. Comm'r, 154 F.4th 574 (8th Cir. 2025) (No. 23-3772).

101 *See Loper Bright*, 144 S. Ct. at 2263, 2268.

102 *See* I.R.C. § 7805 (2018).

103 *See* Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 57 (2011).

104 *See* N.Y. STATE BAR ASS'N, *supra* note 7, at 32.

105 *See id.* at 22.

106 *See Loper Bright*, 144 S. Ct. at 2257–58.

B. *Early Reactions from Courts of Appeals*

The Supreme Court has thus far given little guidance beyond *Loper Bright* itself as to how courts are to treat agencies' interpretations of statutes. Three opinions, though, demonstrate that it is not done with deference completely.[107] But the Supreme Court has not revisited the Treasury regulations since deciding *Loper Bright*. The Court has, however, remanded several cases for further consideration in light of *Loper Bright*, including one originating in the Tax Court.[108] Both the Tax Court and the D.C. Circuit in *Lissack* originally extended *Chevron* deference to uphold Treasury regulation section 301.7623-2.[109] Upon remand, the D.C. Circuit again upheld the Treasury regulation, this time without applying deference, at least not explicitly.[110] The court first reviewed one of two challenged definitions and a challenged illustrative example.[111] It began its analysis of the IRC provision using familiar tools of statutory interpretation, reviewing the text according to the ordinary meaning of the phrases and the context in which it was written.[112] The court concluded that the Treasury regulation's interpretation accurately carried out the statute's meaning.[113] In reaching this conclusion, the court recognized that the statute granted the IRS discretion in implementing the statute, but it only considered the Treasury regulation to determine whether the Treasury's interpretation accorded with the meaning of the statute, not to determine the meaning of the statute itself.[114]

To this point, it seems that the D.C. Circuit's opinion is an unsurprising implementation of *Loper Bright*. However, the court changed to a highly respectful standard when it turned to the issue of whether the

107 *See* Urias-Orellana v. Bondi, 146 S. Ct. 845, 854 n.6 (2026) (noting that 8 U.S.C. § 1252(b)(4)(B) (2018) "sets forth a deferential standard of review"); Seven Cnty. Infrastructure Coal. v. Eagle County, 145 S. Ct. 1497, 1515 (2025) ("The bedrock principle of judicial review in NEPA cases can be stated in a word: Deference."); Bondi v. VanDerStok, 145 S. Ct. 857, 874 (2025). Several non-majority opinions have also cited *Loper Bright*, including a sharp criticism in Justice Jackson's dissent in *Corner Post*, but these do not shed much light on its practical application. *See, e.g.*, Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2482 (2024) (Jackson, J., dissenting).

108 *See* Lissack v. Comm'r, 144 S. Ct. 2707 (2024) (mem.); Lissack v. Comm'r, 157 T.C. 63 (T.C. 2021), *aff'd*, 68 F.4th 1312 (D.C. Cir. 2023), *vacated*, 144 S. Ct. 2707 (2024).

109 *See Lissack*, 157 T.C. at 68, 71, 75–76; *Lissack*, 68 F.4th at 1322–23. Treasury Regulation section 301.7623-2 interprets § 7623 of the IRC, which provides for rewards to individuals who help the Treasury Department detect tax fraud. *See* I.R.C. § 7623 (2018).

110 Lissack v. Comm'r, 125 F.4th 245, 249 (D.C. Cir. 2025).

111 *Id.* at 256.

112 *See id.* at 257.

113 *See id.* at 257–58.

114 *See id.* at 258.

other challenged definition was correct.[115] In searching for a definition, the court began not with plain meaning or context but with the regulation itself, recognizing the persuasive value it had.[116] Noting *Loper Bright*'s approval of benefiting from agency interpretations where appropriate, the D.C. Circuit reviewed the Treasury's definition under the respectful—for deference has fallen out of favor—standard of *Skidmore*.[117] While the court wrote that agency interpretations are no longer controlling, it was quick to be persuaded by the Treasury regulation's definition.[118] The court in *Lissack* upheld both the Treasury's definitions and the regulation's implementation, but it extended different levels of respect to different parts of the regulation. It is not entirely clear why the court extended greater respect to the second definition, but it is certain that the D.C. Circuit saw it as an instance where a court should rely on and accept an agency's interpretation of a statute even in light of *Loper Bright*.

The Second, Fifth, and Sixth Circuits have also ruled on the Treasury regulations since *Loper Bright*. The Sixth Circuit's cases are not incredibly elucidating, as the court either readily agreed that the Treasury regulation accurately reflected the meaning of the statute after a brief independent review,[119] or the case dealt with a Treasury regulation that a litigant used for analogous support to interpret ERISA, not to argue the meaning of the IRC section the regulation interpreted.[120]

The Second Circuit's case, however, warrants a closer look.[121] It too concluded that the Treasury regulation accurately reflected the meaning of the statute.[122] But it placed a heavy emphasis on the limits of the Treasury Department's statutory authority[123] and fully interpreted the IRC provision at issue before granting its approval to the regulation.[124] The Second Circuit went so far as to state that the

115 *See id.* at 259–60.

116 *See id.* at 259.

117 *See id.* (first citing Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2262 (2024); and then citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

118 *See id.* at 259–60.

119 *See* Fitzgerald Truck Parts & Sales, LLC v. United States, 132 F.4th 937, 949 (6th Cir. 2025); McGowan v. United States, 143 F.4th 686, 700–03 (6th Cir. 2025).

120 *See* Kramer v. Am. Elec. Power Exec. Severance Plan, 128 F.4th 739, 747 (6th Cir. 2025); Reichert v. Kellogg Co., 170 F.4th 473, 483 (6th Cir. 2026).

121 This case dealt with a scheme by several states enabling their residents to make charitable contributions to a state fund that would allow them to enjoy both a deduction from federal income taxes and a tax credit at the state level when they filed a return. *See* New Jersey v. Bessent, 149 F.4th 127, 135 (2d Cir. 2025); I.R.C. § 170 (2018). The Treasury regulation at issue foreclosed this double benefit. *See* Treas. Reg. § 1.170A-1(h)(3)(i) (2025).

122 *See Bessent*, 149 F.4th at 144.

123 *See id.*

124 *See id.* at 145–48.

regulation was "entitled to no deference."[125] But the court claimed to do more than it actually accomplished, for, in the next paragraph, it recognized that the Treasury Department's interpretation of the IRC can be informative and even persuasive given its expertise.[126] Furthermore, the court later in its opinion looked to a regulation interpreting an analogous section of the IRC for help in interpreting the section at issue.[127] This respect the Second Circuit showed to the regulations in practice, combined with the fact that it did ultimately uphold the regulation, outweighs its strong assertion that it would show no deference to the Treasury.

The Fifth Circuit's case also offers insight into the post-*Loper Bright* world of Treasury regulation review.[128] This case was odd as the IRS argued that a test provided by the Treasury regulations had been displaced by a judicial test whereas the taxpayer argued that the regulation's test was still effective.[129] The court sided with the IRS, noting that *Chevron* deference was no longer owed to the Treasury regulations, and instead looked to the interpretation given by the Supreme Court to similar language in an adjacent IRC section.[130] In rejecting the Treasury regulation, the Fifth Circuit noted that "the IRS's embrace of a legal standard cannot supplant [the court's] independent interpretation of the statutory text."[131] This may sound like a clear indication that *Loper Bright* heralds the full return of courts as the sole interpreters of the IRC. However, a major caveat to this conclusion is that the Treasury Department itself, through the IRS, advocated that its test provided in the regulations should not apply,[132] and the Fifth Circuit seemed to give weight to that opinion.[133]

While these two cases do indicate that courts will exercise more independent review after *Loper Bright*, one could argue that the Fifth Circuit continued to show deference to the Treasury by heeding its

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125 *Id.* at 145.

126 *See id.* (quoting Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2267 (2024)).

127 *See id.* at 151.

128 In this case, Memorial Hermann claimed tax-exempt status under § 501(c)(4). *See* Mem'l Hermann Accountable Care Org. v. Comm'r, 120 F.4th 215, 217 (5th Cir. 2024); *see also* I.R.C. § 501(c)(4) (2018). The court took issue with the different interpretation the Treasury regulations gave to the same term in adjacent sections of the IRC. *See Mem'l Hermann*, 120 F.4th at 219. *Compare* I.R.C. § 501(c)(3) (2018), *and* Treas. Reg. § 1.501(c)(3)-1(b)(1)(i) (2024), *with* I.R.C. § 501(c)(4) (2018), *and* Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (2024).

129 *See Mem'l Hermann*, 120 F.4th at 219.

130 *See id.* However, the court acknowledged that the Treasury regulation could be considered. *See id.*

131 *Id.* at 220.

132 *See id.* at 219.

133 *See id.*

most recent interpretation given in the IRS's argument rather than the older one embodied in the Treasury regulations. Likewise, although the Second Circuit claimed that it would not show deference to the Treasury, it still took advantage of the expertise embodied in the regulations to interpret the IRC and ultimately adopted the Treasury Department's understanding. These circuits' methodologies should also be viewed alongside the D.C. Circuit's, which readily showed respect to the Treasury, when predicting how the circuit courts will treat the regulations after *Loper Bright.*

C. *First Impressions from the Tax Court*

At the time of writing this Note, the Tax Court has cited *Loper Bright* in seventeen cases, but the majority of these only mention it in passing.[134] *Bloomberg,* though, does provide some insight.[135] The court recognized that "implementing [the IRC] without some administrative guidance is not a tenable position."[136] While the Tax Court did not give the Treasury regulation the interpretation advocated by the IRS, finding it too restrictive, it did not invalidate it either.[137] In this case at least, the Tax Court made its intent to continue relying on the Treasury regulations clear, though it would still acknowledge the requirements of judicial independence imposed by *Loper Bright.*

Most helpful are two cases which extensively discuss *Loper Bright.* In *Hamel,* the Tax Court focused on Congress's delegation of authority to the Treasury and the respect owed to the Treasury's experience in administering the IRC.[138] The level of respect the court showed was so great that it is difficult to distinguish from deference. Indeed, the court even cited *National Muffler* for the proposition that "courts should

134 *See, e.g.*, JL Mins., LLC v. Comm'r, No. 17076-21, 2024 WL 4442049, at *18 (T.C. Oct. 8, 2024) (noting that the court was not called to determine the consequences of *Loper Bright* in this case); Weston v. Comm'r, Nos. 1289-20, 1290-20, 2025 WL 471395, at *8 n.6 (T.C. Feb. 12, 2025) (relying on stare decisis from cases decided before *Loper Bright* which applied *Chevron* deference); Blum v. Comm'r, No. 5313-16, 2025 WL 521592, at *21 (T.C. Feb. 18, 2025) (noting that the litigants did not cite *Loper Bright* and did not present a serious challenge to the validity of the regulations); Facebook, Inc. v. Comm'r, 164 T.C. 194, 312 (T.C. 2025) (noting, without further discussion, that *Loper Bright* requires courts to exercise independent judgment in determining the limits of statutory authority).

135 *See* Bloomberg L.P. v. Comm'r, Nos. 3755-17, 3756-17, 2024 WL 5075408, at *24 (T.C. Dec. 11, 2024).

136 *Id.*

137 *Id.* The court's view was that the IRS did not give the best interpretation to either the IRC or the Treasury regulation. *See id.* at *24, *38 & n.38.

138 *See* Hamel v. Comm'r, No. 20882-21, 2025 WL 605489, at *3–4 (T.C. Feb. 25, 2025). The court also noted that precedent decided under *Chevron* continues to enjoy stare decisis. *See id.* at *3.

generally *defer* to and uphold Treasury regulations,"[139] not only raising questions of how strong respect can be before it becomes deference but also suggesting that older lines of reasoning that were foreclosed by *Mayo* may be revived. Turning from these interesting questions, which will only be answered with time, the Tax Court clearly stated its view that, in this case at least, the Treasury "is entitled to very great respect"[140] from the courts and authorized to exercise discretion by Congress.[141] It is notable that the court recognized both the § 7805 general grant of rulemaking authority and a specific grant of authority as congressional authorizations for the Treasury to exercise discretion.[142] The Tax Court ultimately identified the best reading of the statute as one that accords respect and recognizes a delegation of authority to the Treasury.

The Tax Court took the opposite position in *Varian*, which was decided in the prior year and the first Tax Court case to cite *Loper Bright*.[143] Although the court noted that respect is due to experienced agencies, it emphasized that even impenetrable statutes have a single best reading and that mere ambiguity does not indicate a delegation of discretionary authority from Congress.[144] It rejected the Treasury's reading of the statute and instead interpreted it according to its plain meaning, invalidating the Treasury regulation.[145] This does not, however, necessarily constitute a complete rejection of any kind of respect to the Treasury. The issue before the court in *Varian* was the effective date of an amended statute.[146] The court found far less room for interpretation in this kind of specification and suggested that the regulation would have been struck down as against the clear intent of Congress even under *Chevron*.[147] Especially in light of its decision a year later in *Hamel*, *Varian* conveys that the Tax Court will not meekly submit to the Treasury, but it would be erroneous to view it as completely rejecting any respect for the Treasury regulations. It is again worth noting that, although the Tax Court rejected the Treasury's interpretation of the IRC provision, as in *Hamel*, it seemed to recognize both the § 7805 grant of general discretion and specific grants of discretion to the Treasury as entitled to respect.[148]

139 *Id.* at *4 (emphasis added).

140 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2257 (2024) (quoting Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827)).

141 *See Hamel*, 2025 WL 605489, at *4.

142 *See id.*

143 *See* Varian Med. Sys., Inc. v. Comm'r, 163 T.C. 76, 107–08 (T.C. Aug. 26, 2024).

144 *See id.* at 106.

145 *See id.* at 107–08.

146 *See id.* at 77.

147 *See id.* at 107.

148 *See id.*

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In summary, there is not yet a definitive stance on how agency actions and the Treasury regulations will be interpreted under *Loper Bright*. Some commentators predict that *Loper Bright* delegation will be *Chevron* deference by another name whereas others argue that agency determinations should bear no greater weight than arguments by any other litigant. The circuit courts also differ in their initial cases. The D.C. Circuit extended respect to the Treasury regulations, though not to the level it would have under *Chevron*, but the Second and Fifth Circuits seemed eager to reclaim their power of interpretation from the Treasury Department. It appears that the Tax Court, however, will continue to extend very great respect to the Treasury Department, even approaching deference. But it is clearly aware of the greater power it has after *Loper Bright* and may exercise it when the circumstances of a case demand.

VI. A NEW ERA OF TAX EXCEPTIONALISM

Chevron is dead, and I come to bury it, not to praise it.[149] For better or worse, the period of courts universally paying high deference to administrative agencies is at a close, and the Supreme Court is unlikely to return to it any time soon. However, *Loper Bright* did not forbid courts from showing respect to administrative agencies or recognizing legitimate congressional delegations of discretionary authority to these agencies where appropriate. It is nowhere more appropriate for courts to show such respect and recognition than to the Treasury regulations. The Treasury Department represents a vast ocean of experience in administering the IRC, an incredibly complex and interconnected legal framework. This experience is the exact type that the Supreme Court explicitly condoned and even seemed to encourage respecting.[150] Additionally, Congress delegated interpretive authority to the Treasury to implement the IRC, both as a blanket grant of general authority[151] and as hundreds of grants of narrower, specific authority.[152] The Court acknowledged in *Loper Bright* that recognizing these types of delegations sometimes constitutes the best reading of a statute.[153] Lastly, showing respect to the Treasury would accord with history, much of which overlaps with the periods identified by the Court in *Loper Bright* as times when the courts enjoyed their proper position as the sole

149 *Cf.* WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 2, l. 71 (K. Deighton ed. 1910).
150 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2257–60, 2262, 2267 (2024).
151 *See* I.R.C. § 7805(a) (2018).
152 Hickman, *supra* note 11, at 1735 & n.37.
153 *See Loper Bright*, 144 S. Ct. at 2263, 2268, 2273.

interpreters of the law.[154] What should follow is a new era of tax exceptionalism, where the Treasury enjoys different treatment in its administration of the IRC than other agencies in general. However, this exceptionalism will not be the result of an explicit recognition of different standards by courts. Rather, it will come about naturally because the factors for according respect identified in *Loper Bright*, which are applied equally to all administrative agencies, have especial relevance to the Treasury and its regulations.

A. *Experience*

The strongest factor that supports the courts showing a high level of respect to the Treasury is its vast experience in interpreting and administering the IRC. The IRC is a labyrinthine set of rules that interconnect in ways that are difficult to understand and even to identify.[155] The difficulty of understanding both the IRC itself and the aftershocks an interpretation of one of its sections will have across many others coupled with the Treasury's particular expertise in doing exactly this make the considerations supporting respect to agency expertise acknowledged in *Loper Bright* apply with increased force and raises practical considerations for why courts should accept help from the Treasury when conducting their independent, albeit aided, review.

1. Theoretical Considerations

The Court in *Loper Bright* did not eschew any place agencies have in interpreting legislation; it merely cut back the broad, universal deference shown under *Chevron*. The Court continued to recognize that agencies have a role in deciphering the statutes they are charged with implementing.[156] This does not require courts to submit to the agency's interpretation, but it does require them to show respect when conducting their own review.[157] Greater respect is warranted in proportion to the greater expertise the agency has in the matter it is administering.[158]

All of these factors apply with full force to the Treasury Department. The Treasury is charged with administering and enforcing the IRC,[159] so its interpretation is inherently relevant to a reviewing court.

154 *See id.* at 2257–60.

155 *See supra* notes 5–8 and accompanying text.

156 *See Loper Bright*, 144 S. Ct. at 2257, 2259–60, 2262.

157 *Id.* at 2258.

158 *See* Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

159 I.R.C. § 7801(a)(1) (2018). There are some sections of the IRC that are under the jurisdiction of other agencies, but the Treasury Department is solely responsible for the vast majority. *See, e.g.*, § 7801(a)(2) (2018).

Furthermore, the Treasury has been entrusted with overseeing the revenue of the United States since 1789,[160] and it finds its roots even before then in the Revolutionary War.[161] The Treasury therefore has two and a half centuries of experience in administering the tax laws of the United States.[162]

The Treasury also has deep insight into the issues that demand consideration in enacting tax legislation and a mastery of the effects of tax policy. It analyzes policy and provides its own proposals to Congress which form the basis of amendments to the IRC.[163] The Treasury thus uniquely understands not only how the IRC is meant to work but also the reasoning behind the policy decisions it embodies. This is the exact situation—expert officers who draft the laws they are charged with implementing—that the Court described as a cause for showing respect to agency interpretations in *Loper Bright*.[164] And the Treasury has even greater expertise than this. It also prepares analyses of the effects of taxing methodologies[165] and compiles dozens of tables of raw data empirically analyzing tax policy.[166] This depth of mastery of the IRC goes beyond anything the Court described in *Loper Bright* and may well go beyond anything it contemplated. What is clear is that this immense amount of expertise is owed great respect.

2. Practical Considerations

In addition to the legal soundness of showing respect to the Treasury, practical considerations also support this approach. Raising revenue is a key function of the government on which all other actions depend. While generally beneficial government activity requires funding, individual taxpayers have selfish incentives to limit the amount they pay personally and will thus search for loopholes that minimize their contribution.[167] This fact makes expert administration of tax laws

160 *See* An Act to Establish the Treasury Department, ch. 12, 1 Stat. 65 (1789).

161 *History of the Treasury*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/about/history/history-overview/history-of-the-treasury [https://perma.cc/66CL-ZMJ3] (last visited Mar. 18, 2025).

162 The first Internal Revenue Code was enacted in 1939. *See* Internal Revenue Code, ch. 2, 53 Stat. 1 (1939). The Treasury Department's duties of administering the United States' tax law predates this enactment. *See* U.S. DEP'T OF THE TREASURY, *supra* note 161.

163 For an example of these proposals, see DEP'T OF THE TREASURY, *supra* note 14.

164 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2258 (2024).

165 *See, e.g.*, JULIE-ANNE CRONIN, U.S. DEP'T OF THE TREASURY, OFF. OF TAX ANALYSIS, TECHNICAL PAPER NO. 8, U.S. TREASURY DISTRIBUTIONAL ANALYSIS METHODOLOGY (2022).

166 *See, e.g.*, *Office of Tax Analysis*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/tax-policy/office-of-tax-analysis [https://perma.cc/JGJ4-7957] (last visited Mar. 28, 2025).

167 *See* N.Y. STATE BAR ASS'N, *supra* note 7, at 11.

that considers the IRC as a whole essential. Otherwise, two problems would arise.

The first problem is the obvious issue of the government not collecting the funds it expects and which it has judged necessary to perform its functions. While each individual considered separately may not cause a fatal problem,[168] a judicial interpretation of the IRC affects all taxpayers. Thus, an error of interpretation could have disastrous effects not realized when considering only the individual.[169] While the same is true for Treasury regulations, it is less likely that the Treasury Department would make such a mistake because of its vast experience and familiarity with the IRC.[170] Additionally, the Treasury can react much quicker to negative consequences of its actions than can courts or Congress. The Treasury is simply better equipped to oversee tax law than the courts,[171] which goes toward explaining why Congress entrusted it to administer and interpret the IRC.[172] Although it is the province of the courts to interpret the law, judges should have the humility to recognize that, while they may have "special competence in resolving statutory ambiguities,"[173] they do not have special competence in designing and administering the IRC or understanding how its sections work together.[174] The Treasury Department does.

The second problem is less immediate but just as serious; it is one of administrability. The IRS already faces difficulty in processing an increasing number of returns with decreasing resources.[175] This means that of over 169 million returns filed during the 2020 season,[176] only a

168 *See id.*

169 The risk of judges creating tax loopholes is a very real one. *See, e.g.*, Gitlitz v. Comm'r, 531 U.S. 206, 221–22 (2001) (Breyer, J., dissenting).

170 *See supra* Section VI.A.1.

171 *See* Weisbach, *supra* note 54, at 4.

172 *See* Bob Jones Univ. v. United States, 461 U.S. 574, 596 (1983); N.Y. STATE BAR ASS'N, *supra* note 7, at 12.

173 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266 (2024).

174 The Tax Court, as a specialty court, does have expertise in tax law, though not necessarily to the level of the Treasury Department. However, it is bound by the precedent of the courts of appeals and Supreme Court, which do not benefit from this expertise. The mere fact that Congress found it appropriate to institute a specialty Tax Court tends to show the importance of expertise in interpreting tax law, and the indication from the Tax Court that it will continue to grant a high level of respect to the Treasury Department even after *Loper Bright* shows that the judges who best understand the IRC and appreciate its complexity also appreciate the value of the Treasury regulations. See *supra* notes 138–42 and accompanying text.

175 *See Compliance Presence*, IRS (May 29, 2025), https://www.irs.gov/statistics/compliance-presence [https://perma.cc/DQ6B-584P].

176 *Filing Season Statistics for Week Ending December 11, 2020*, IRS (May 29, 2025), https://www.irs.gov/newsroom/filing-season-statistics-for-week-ending-december-11-2020 [https://perma.cc/V5LD-7L6Z].

miniscule fraction, as low as 0.1% for some income ranges, were audited.[177] Indeterminacy in interpretations of the IRC will encourage taxpayers to challenge IRS determinations of tax liability and stretch the already-understaffed IRS to its breaking point by forcing it to dedicate resources to litigating these challenges. This would exacerbate the problems of tax avoidance discussed above by emboldening taxpayers to underpay and making their discovery less likely.

This concern is not limited to the Treasury Department. The Tax Court faced an overwhelming workload and backlog of cases before *Loper Bright*.[178] Greater indeterminacy in the IRC and a greater likelihood of prevailing against the Treasury in court means that more taxpayers will challenge IRS determinations of liability, further clogging dockets. It is also unavoidable that courts will need to expend greater time and energy in disposing of each case under *Loper Bright*, as, even according respect to the Treasury, they will need to conduct their own independent review.[179] Some Justices of the Supreme Court have already recognized the destructive impact this influx of litigation could have.[180] In a matter as important as taxation and upon as precarious a perch as our administrative and judicial systems, it is critical that courts continue to show the proper respect to the Treasury.

B. Delegation of Discretionary Authority

Although the Treasury Department's expertise is the strongest factor in support of the courts extending respect to the Treasury regulations, it is not the only one. The Court refused to consider ambiguity in statutes as a tacit delegation of discretionary authority to administrative agencies,[181] but it also recognized that Congress makes genuine delegations of discretionary authority.[182] When Congress does, the role

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177 Aimee Picchi, *Many Taxpayers Fear Getting Audited by the IRS. Here Are the Odds Based on Your Income*, CBS NEWS: MONEYWATCH (Apr. 11, 2024, at 15:15 ET), https://www.cbsnews.com/news/tax-irs-audit-here-are-your-chances-cbs-news-explains/ [https://perma.cc/3U9L-VFGJ]. The highest audit rate was for incomes of $10 million or more, but only 2.4% of these returns were audited. *Id.*

178 *See* Leslie M. Book, Keith Fogg, Nina E. Olson & Jack Townsend, *It Is Time to Take Remedial Steps to Improve the Timeliness of Tax Court Dispositions*, TAX NOTES (Oct. 31, 2022), https://www.taxnotes.com/procedurally-taxing/it-time-take-remedial-steps-improve-timeliness-tax-court-dispositions/2022/10/31/7h5ft [https://perma.cc/Q47A-FULC].

179 *But cf.* Vermeule, *supra* note 94 (rejecting a distinction in practice between *Chevron* and *Loper Bright*).

180 *See* Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2482 (2024) (Jackson, J., dissenting) ("The tsunami of lawsuits against agencies that the Court's holdings in this case and *Loper Bright* have authorized has the potential to devastate the functioning of the Federal Government.").

181 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265, 2272 (2024).

182 *See id.* at 2263, 2268.

of the reviewing court is to ensure that the agency is acting within its delegated authority, and to respect that delegation.[183]

Just as respect for agency expertise applies with special force to the Treasury, so does respect for delegated authority. Congress has a long history of delegating discretionary authority to the Treasury because of its expertise.[184] The Court itself has recognized this delegation as being broad.[185] There is little doubt that specific grants of authority qualify as delegations of authority that must be respected,[186] and even the § 7805 general grant of authority may be due respect under *Loper Bright*.[187] The Court previously rejected the practice of giving different treatment to Treasury regulations issued under its general grant of authority as opposed to a specific grant of authority;[188] however, it is not clear whether this reasoning survived *Loper Bright*.

Early decisions from the Tax Court indicate that it did,[189] but the courts of appeals have not yet weighed in. Even if respect is only shown to specific-authority grants, the Treasury regulations would be given considerable weight overall as many of them would fall within one of the hundreds of such grants. However, the better position is that general-authority grants are also due respect, as the directive that "the Secretary shall prescribe all needful rules and regulations for the enforcement of" the IRC is broad but clear.[190] Reading this general grant of authority as a bona fide delegation of discretionary authority would also accord with practical demands of tax administration and the Court's precedent.[191]

C. Historical Precedent

The last factor which urges the courts to show respect to the Treasury regulations is historical precedent. The Supreme Court emphasized the importance of the historical role of the courts when overruling *Chevron*,[192] so the historical treatment of the Treasury regulations is a relevant factor when courts review them under *Loper Bright*. Historical precedent alone is not enough to overcome the requirements of the APA, but it legitimizes giving different treatment to the Treasury regulations.

183 *Id.* at 2263, 2273.
184 *See* N.Y. STATE BAR ASS'N, *supra* note 7, at 12–13.
185 *See* Bob Jones Univ. v. United States, 461 U.S. 574, 596 (1983).
186 *See* N.Y. STATE BAR ASS'N, *supra* note 7, at 22.
187 *See id.*
188 *See* Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 57 (2011).
189 *See supra* Section V.C.
190 I.R.C. § 7805(a) (2018).
191 *See* Bob Jones Univ. v. United States, 461 U.S. 574, 596 (1983); *Mayo*, 562 U.S. at 57.
192 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2257–60 (2024).

There is no shortage of history supporting special treatment for the Treasury regulations. Tax exceptionalism persisted until *Mayo*, so giving the Treasury Department the same treatment as other agencies is the historical outlier.[193] Tax exceptionalism existed before the APA,[194] continued after the APA was enacted,[195] was given a definitive expression in *National Muffler*,[196] and continued to be upheld years after *Chevron* was decided.[197] In short, tax exceptionalism was pervasive and enduring before *Mayo*. A new era of tax exceptionalism can fairly be characterized as a return to "the traditional . . . judicial function."[198]

D. Legal Concerns of Exceptionalism

I argue for a de facto rather than de jure exceptionalism. The law that applies to the Treasury Department is the same law that applies to every other agency; it is the facts of tax law that make the law apply with special force. Some commentators argue for a legal standard of tax exceptionalism rather than a merely factual one,[199] but this position is difficult to maintain today. Legal exceptionalism for the Treasury Department would conflict with the APA's goals of uniformity.[200] Additionally, legal exceptionalism was already rejected because of uniformity concerns in *Mayo*,[201] which was decided in a period when the Court was much more obsequious to agencies than it is today.

These concerns, however, do not trouble my argument. Courts will consider the Treasury's expertise and congressional delegations of discretional authority to the Treasury as they will for every agency. What distinguishes the Treasury from other agencies is not the standards applied to it but the applicability of the standards. The result of these same legal standards to the exceptional facts of the Treasury is that great respect will be due from courts. Finally, the history of tax exceptionalism should assuage worries about the natural and proper result of the factors identified in *Loper Bright*, a return to tax exceptionalism, by grounding it in historical practice.

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193 *See supra* Section III.B.

194 *See, e.g.*, Helvering v. Winmill, 305 U.S. 79, 83 (1938).

195 *See, e.g.*, United States v. Cartwright, 411 U.S. 546, 550 (1973).

196 *See* Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 476–77 (1979).

197 *See, e.g.*, Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 560–61 (1991).

198 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024).

199 *See* Weisbach, *supra* note 54, at 5.

200 *See* S. REP. NO. 79-752, app. B, at 223–24 (1945); H.R. REP. NO. 79-1980, pt. II, at 249 (1946); *see also* Mellette, *supra* note 45, at 831.

201 *See* Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 55 (2011) ("[W]e are not inclined to carve out an approach to administrative review good for tax law only.").

Conclusion

While the demise of *Chevron* may have dramatic effects on some agencies, it should not have such a dramatic effect on the Treasury regulations. The regulations should continue to enjoy respect from the courts as they did before *Chevron*. While this respect will probably not reach the level of *Chevron* deference, it very well could approach it and may come to resemble traditional standards of deference in tax law. We are about to enter a new era of tax exceptionalism as many other agencies lose their previous power to interpret statutes while the Treasury Department continues to enjoy great respect from the courts.

This era, however, will not be founded on the idea that tax law is special and thus deserves special treatment. The new tax exceptionalism will instead be evidence of the fact that tax law is special rather than a result of it. Any agency that has expertise with the statute it administers is owed respect, and courts must recognize any delegation of discretionary authority Congress makes. What sets the Treasury apart is that it has expertise in administering the IRC to an extreme degree, and Congress has granted it extensive and comprehensive discretionary authority in doing so.

The past exceptionalism is similar to the future exceptionalism, but they are expressed in different ways. Both are reached because the IRC is a tangled labyrinth of interrelated sections, the proper administration of which undergirds the functioning of the entire government. While the old tax exceptionalism was a recognition by the courts that an experienced and skilled agency is needed to ensure it operates properly, the new exceptionalism will speak even louder. It is profound that the same result is the natural conclusion of an objective and universal test fairly applied. There is no better evidence that tax law is indeed special, and it deserves special treatment.