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LOVING AND LEGITIMACY: IRS REGULATION OF TAX RETURN PREPARATION

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I. INTRODUCTION

THE validity of regulations promulgated by the Department of Treasury is a principal battleground in contemporary federal taxation. So far, the clash has had two phases: establishment and implementation. Phase one entailed the destruction of the citadel of tax insularity, the bastion within which tax specialists thought to keep themselves safe from having to learn and apply general administrative law. In cases such as *Swallows Holding Ltd. v. Commissioner*,[1] *Mannella v. Commissioner*,[2] *Lantz v. Commissioner*,[3] *Mayo Foundation for Medical Education & Research v. Commissioner*,[4] and the welter of cases culminating in *United States v. Home Concrete & Supply, LLC*,[5] the old guard was defeated. It is now firmly established that tax, no less than other regulatory areas, is subject to the rules of administrative law.[6] That proposition having been settled, we are now in phase two: implementation, the application of specific administrative law rules in particular tax contexts.

Loving v. IRS[7] is the most recent major phase two case. In *Loving*, the Federal District Court for the District of Columbia—later affirmed by the D.C. Circuit—invalidated a major Department of the Treasury (Treasury) and Internal Revenue Service (IRS) initiative to regulate previously unreg-

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1. 515 F.3d 162 (3d Cir. 2008), *rev'g* 126 T.C. 6 (2006). *See generally* Steve R. Johnson, Swallows *as It Might Have Been: Regulations Revising Case Law*, 112 TAX NOTES 773 (2006); Steve R. Johnson, Swallows Holding *as It Is: The Distortion of National Muffler*, 112 TAX NOTES 351 (2006) [hereinafter Swallows *I*].

2. 631 F.3d 115 (3d Cir. 2011), *rev'g* 132 T.C. 196 (2009).

3. 607 F.3d 479 (7th Cir. 2010), *rev'g* 132 T.C. 131 (2009).

4. 131 S. Ct. 704 (2011); *see also* Steve R. Johnson, Mayo *and the Future of Tax Regulations*, 130 TAX NOTES 1547 (2011) [hereinafter Mayo *and the Future*]; Steve R. Johnson, *Preserving Fairness in Tax Administration in the* Mayo *Era,* 32 VA. TAX REV. 269 (2012) [hereinafter *Preserving Fairness in Tax*].

5. 132 S. Ct. 1836 (2012); *see also* Steve R. Johnson, *Reflections on* Home Concrete, 13 FLA. ST. U. BUS. REV. (forthcoming 2014).

6. *See* Steve R. Johnson, Intermountain *and the Importance of Administrative Law in Tax*, 128 TAX NOTES 837 (2010).

7. 917 F. Supp. 2d 67 (D.D.C. 2013), *aff'd*, 742 F.3d 1013 (D.C. Cir. 2014). For discussion of the circuit court's decision, see Frank G. Colella, Loving *Is Affirmed: IRS Lacked Authority to Regulate Preparers*, 2014 TAX NOTES TODAY 78-5 (2014) (concluding that *Loving* was technically correct but urging legislative reversal); Donald T. Williamson & James S. Gale, Loving *and the End of RTRPs*, 2014 TAX NOTES TODAY 78-4 (2014) (same).

ulated tax return preparers.[8] Alarmed by what it perceived as widespread incompetence and ethical lapses, in 2011, Treasury asserted authority to regulate such preparers without additional legislative support—despite having maintained for generations that it lacked such authority.[9] The district and circuit courts concluded that the Government's prior view—not its current view—of its authority is correct. The courts therefore invalidated the 2011 regulations.

The Government chose not to seek certiorari review of *Loving* by the Supreme Court, but legislation to reverse *Loving* is a possibility.[10] Whichever view ultimately prevails, *Loving* is an important case, both practically and doctrinally. Practically, the regulatory initiative challenged in *Loving* involves hundreds of thousands of return preparers, millions of their customers, and millions or billions in annual revenues for the federal fisc.

Doctrinally, *Loving* bears on an issue of fundamental significance not just as to tax regulations but as to administrative law generally. *Loving* is a *Chevron* case.[11] When *Chevron* applies, it is Step One, not Step Two, that typically poses the greater challenge for the agency.[12] Thus, two matters become crucial: (1) what sources may a court legitimately consult at Step

8. Among other requirements discussed more fully in *infra* notes 15–23, the new regulations required preparers to pass an examination and take a specified amount of continuing professional education. *See* Who May Practice, 31 C.F.R. § 10.3(f) (2013); Regulations Governing Practice Before the Internal Revenue Service, 75 Fed. Reg. 51,713 (proposed Aug. 23, 2010) (proposed regulation); 76 Fed. Reg. 32,286 (June 3, 2011) (final regulation).

9. In contrast, some other federal agencies have long asserted what the Treasury and IRS denied until 2011. For instance, regulations adopted by the Securities and Exchange Commission provided that practicing before the Commission includes: "Providing advice in respect of [securities laws and regulations] regarding any document that the attorney has notice will be filed with or submitted to . . . the Commission, including the provision of such advice in the context of preparing . . . any such document." 17 C.F.R. § 205.2(a)(1)(iii) (2013).

10. As of the time of this writing, the Government appears to have decided not to seek further review of *Loving*. *See* Michael Cohn, *IRS Commissioner Sees Further Appeals on Tax Preparer Lawsuit as Unlikely*, ACCOUNTING TODAY (Feb. 20, 2014), http://www.accountingtoday.com/news/IRS-Commissioner-Sees-Further-Appeals-Tax-Preparer-Lawsuit-Unlikely-69653-1.html. The Administration advocates legislative reversal of *Loving*. *See* U.S. DEP'T OF THE TREASURY, GENERAL EXPLANATION OF THE ADMINISTRATION'S FISCAL YEAR 2015 REVENUE PROPOSALS 244 (2014), *available at* http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2015.pdf. Legislation to that effect has been introduced in the House. *See* H.R. 1570, 113th Cong. (2013). A Senate hearing on *Loving* and return preparer regulation has also taken place. *See Protecting Taxpayers from Incompetent and Unethical Return Preparers: Hearing Before the S. Comm. on Fin.*, 113th Cong. (2014). For a description of the hearings, see William Hoffman, *Koskinen Urges Senate Finance to Reconsider Preparer Regulation*, TAX NOTES (Apr. 14, 2014), at 171.

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

12. Under *Chevron*'s Step One, the court applies the statute if the intent of the statute is unambiguous. *See id.* at 842–43. Step Two is reached if the statute is ambiguous; at Step Two, the agency's interpretation is upheld unless it is unreasonable. *See id.*

One in its attempt to determine whether the statute is unambiguous, and (2) in what spirit—exacting or sympathetic to the agency—are these sources to be evaluated?

Thus far, the courts have hardly spoken with one voice as to these questions. The *Loving* opinions reflect what may be the central tendency of recent decisions: their approach to sources is principally textual, and their spirit is exacting, evincing no thumb on the scale in favor of the agency. Clashes as to these issues will continue for a long time, but the *Loving* opinions surely will have an impact on them.

This article has six principal parts. Part II describes the relevant statutory framework, the practical stakes at issue, and the challenged regulatory initiative.

Part III describes the district court's decision in *Loving*. It notes that the district court viewed *Chevron*'s Step One as controlling and that the court took an exacting textual approach to conducting the Step One inquiry. The court focused on the statutory phrase "regulate the practice of representatives of persons before the [IRS]."[13] Its rejection of the regulations was based on the court's understanding of "practice," reinforced by wider contextual considerations. Part III describes these aspects of the district court's opinion and critiques the proffered wider contextual considerations.

Part IV critiques the "practice" rationale relied upon by the district court. It concludes that this rationale is weak and that the Government has the better position on this issue.

However, Part V maintains that the weakness of the district court's "practice" rationale does not mean it reached the wrong decision. In my view, the district court failed to enlist the key portion of the statute. The superior objection to the regulations is that return preparers are not "representatives." On that basis, I believe that the district court reached the right decision although on the wrong grounds. However, Part V acknowledges that the issue is close and that a court less wedded to a textual approach to *Chevron* Step One could reach the contrary holding.

Part VI takes the Step One statutory interpretation to a deeper level. It contends that *Loving* bears important similarities to *FDA v. Brown & Williamson Tobacco Corp.*,[14] a 2000 decision by the Supreme Court invalidating at *Chevron*'s Step One a major initiative by a different agency. The *Loving* district court cited *Brown & Williamson* in passing, but the case deserves much more attention in this context. *Brown & Williamson* supports the invalidation of the *Loving* regulation in at least two ways not yet substantially explored in the literature on *Loving*: (1) the use of a hyper-contextual lens for analyzing Step One, and (2) the application of a "major question" exception to *Chevron* deference. Part VI develops these perspectives.

13. 31 U.S.C. § 330(a)(1) (2012).
14. 529 U.S. 120 (2000).

Finally, the Epilogue describes the D.C. Circuit's opinion. The circuit court's approach resembles that of the district court in many respects. However, the circuit court made more of the "representatives" and *Brown & Williamson* arguments developed in Parts V and VI of this article.

II. BACKGROUND

A. *Statutory Framework*

The key statute for *Loving* purposes is 31 U.S.C. § 330, which provides, in its current form, as follows:

> (a) Subject to section 500 of title 5, the Secretary of the Treasury may—
> (1) regulate the practice of representatives of persons before the Department of the Treasury; and
> (2) before admitting a representative to practice, require that the representative demonstrate—
> (A) good character;
> (B) good reputation;
> (C) necessary qualifications to enable the representative to provide to persons valuable service; and
> (D) competency to advise and assist persons in presenting their cases.
>
> (b) After notice and opportunity for a proceeding, the Secretary may suspend or disbar from practice before the Department, or censure, a representative who—
> (1) is incompetent;
> (2) is disreputable;
> (3) violates regulations prescribed under this section; or
> (4) with intent to defraud, willfully and knowingly misleads or threatens the person being represented or a prospective person to be represented.
>
> The Secretary may impose a monetary penalty on any representative described in the preceding sentence. If the representative was acting on behalf of an employer or any firm or other entity in connection with the conduct giving rise to such penalty, the Secretary may impose a monetary penalty on such employer, firm, or entity if it knew, or reasonably should have known, of such conduct. Such penalty shall not exceed the gross income derived (or to be derived) from the conduct giving rise to the penalty and may be in addition to, or in lieu of, any suspension, disbarment, or censure of the representative.
>
> (c) After notice and opportunity for a hearing to any appraiser, the Secretary may—
> (1) provide that appraisals by such appraiser shall not have any probative effect in any administrative proceeding

> before the Department of the Treasury or the Internal Revenue Service, and
>
> (2) bar such appraiser from presenting evidence or testimony in any such proceeding.
>
> (d) Nothing in this section or in any other provision of law shall be construed to limit the authority of the Secretary of the Treasury to impose standards applicable to the rendering of written advice with respect to any entity, transaction plan or arrangement, or other plan or arrangement, which is of a type which the Secretary determines as having a potential for tax avoidance or evasion.[15]

Some history is in order. The original version of current section 330 was enacted in 1884, more than a generation before enactment of the modern federal income tax.[16] All quarters appear to agree as to the reason Congress acted in 1884. In the aftermath of the War Between the States,[17] and in the throes of westward expansion, there were "mounting complaints about misconduct by unscrupulous attorneys and claims agents [ ] represent[ing] military pensioners, persons with claims for lost horses, and others with claims for compensation from the federal government . . . ."[18] Attorneys and others competed to solicit claimants. One Congressman described the situation this way:

> While there are some very reputable gentlemen engaged in the business, who charge reasonable fees, there are many who are very disreputable, and who have been guilty of bad practices, and have victimized many a poor soldier who was unable to take care of himself. . . . The object of [the 1884 statute] is to protect soldiers against such practices.[19]

Against this background, Congress enacted the following statute:

> [T]he Secretary of the Treasury may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his Department, and may require of such persons, agents and attorneys, before being recognized as representatives of claimants, that they shall show they

15. 31 U.S.C. § 330 (2012).

16. This fact should have no bearing on the outcome in *Loving*. The federal government was levying non-income taxes—principally excise taxes—in 1884. Section 330 is plastic enough to cover the representatives of claimants of types of claims that arose after its date of enactment.

17. Before I moved to Florida, I would have said the "Civil War."

18. Plaintiffs' Motion for Summary Judgment at 3, Loving v. IRS, 917 F. Supp. 2d 67 (D.D.C. 2013) (No. 12-0385), 2012 WL 8133439. The National Taxpayer Advocate, a staunch supporter of the challenged regulations, accepts the accuracy of this characterization of purpose. *See* Nina E. Olson, *More than a "Mere" Preparer:* Loving *and Return Preparation*, 139 TAX NOTES 767, 767, 775 (2013).

19. 15 CONG. REC. 5219 (1884) (statement of Rep. Richard Townshend).

> are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases. And such Secretary may, after due notice and opportunity for hearing, suspend and disbar from further practice before his Department any such person, agent, or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall with intent to defraud, in any manner willfully and knowingly deceive, mislead, or threaten any claimant or prospective claimant, by word, circular, letter, or by advertisement.[20]

Section 330 substantially took its current form in 1982,[21] when the term "representative of persons" was substituted for "agents, attorneys, or other persons representing claimants." A committee report states that the 1982 revision was stylistic, with no change in substance intended.[22] This characterization appears to be uncontroversial.[23]

B. *Practical Stakes*

As described in greater detail below,[24] some types of tax advisors[25] are already subject to extensive regulation under authority other than the regulation challenged in *Loving*.[26] As the district court acknowledged, *Loving* has no legal effect on such advisors.[27] Instead, *Loving* and the regulations there at issue involve otherwise substantially unregulated tax return preparers.[28]

Such preparers are a major part of the tax reporting and compliance matrix. Of the approximately 150 million individual income tax returns filed annually, nearly 80 million are prepared by return preparers, and over 42 million of those returns were prepared by unregulated

20. Act of July 7, 1884, ch. 334, 23 Stat. 236, 258–59 (1884).

21. Various minor changes have been made since 1982.

22. *See* H.R. Rep. No. 97-651, at 19 (1982); *see also* Poole v. United States, No. 84-0300, 1984 WL 742, at *2 (D.D.C. June 29, 1984).

23. *See* Plaintiffs' Motion for Summary Judgment, *supra* note 18, at 34; Olson, *supra* note 18, at 776.

24. For a further discussion of this topic, see *infra* notes 231–35 and accompanying text.

25. Chief among these types are attorneys, certified public accountants, and enrolled agents. Other types include certified acceptance agents, enrolled actuaries, and enrolled retirement plan agents.

26. *See, e.g.*, 5 U.S.C § 500(b)–(c) (2012) (dealing with practice of lawyers and certified public accountants before IRS); 31 C.F.R. § 10.3 (2009).

27. Loving v. IRS, 920 F. Supp. 2d 108, 109–10 (D.D.C. 2013).

28. Only four states—California, New York, Maryland, and Oregon—regulate tax return preparers. For descriptions of those states' regulatory regimes, see IRS PUBLICATION 4832, RETURN PREPARER REVIEW 18–22 (2009) [hereinafter IRS PUBLICATION 4832], *available at* http://www.irs.gov/pub/irs-pdf/p4832.pdf.

preparers.[29] The IRS puts the number of such preparers at 600,000 to 700,000.[30]

The Government is convinced that a sizeable number of these unregulated preparers are inadequately trained, incompetent, or crooked, hurting both the customers of these preparers and the federal fisc. Accordingly, Treasury promulgated the 2011 regulations in order:

> [T]o improve the service provided by the tax-return-preparation industry, to protect taxpayers who use such services, and to enhance tax administration by reducing the considerable lost tax revenues that are attributable to the significant number of tax-return preparers who are incompetent and/or unscrupulous."[31]

Many persons of great experience, ability, and integrity inside the Government firmly believe in these purposes, and they are not alone. For example:

- In congressional hearings, the American Bar Association, the American Institute of Certified Public Accountants, the National Association of Enrolled Agents, the National Society of Accountants, and the National Association of Tax Professionals all testified in support of regulating return preparers.[32]
- As described in greater detail in subpart II.C below, the IRS submitted heightened return preparer regulation to an extensive comment process. According to the IRS, "commentators overwhelmingly expressed support for efforts to increase the oversight of tax return preparers," including support ranging from 88% to 99% for particular aspects of enhanced regulation.[33]
- Amici briefs were filed in *Loving* in support of the challenged regulation, including briefs by the National Consumer Law

29. *See* Olson, *supra* note 18, at 767, 769 n.14 (citing IRS COMPLIANCE DATA WAREHOUSE, *Individual Returns Transaction File and Return Preparers Database, TY 2011* (2013)).

30. Regulations Governing Practice Before the Internal Revenue Service, 76 Fed. Reg. 32,286, 32,299 (June 3, 2011).

31. Brief for the Appellants at 4, Loving v. IRS, 742 F.3d 1013 (D.C. Cir. 2014) (No. 13-5061), 2013 WL 1282685, at *4.

32. *See* SUBCOMMITTEE ON OVERSIGHT, U.S. H.R., 109TH CONG., FRAUD IN INCOME TAX RETURN PREPARATION (2005).

33. IRS PUBLICATION 4832, *supra* note 28, at 2.

Center and National Community Tax Coalition[34] and by five former Commissioners of Internal Revenue.[35]

- Although the commentary is divided, many commentators support the desirability of increased regulation of return preparers.[36]

One should think twice and be quite sure of the facts before disputing such collective wisdom. Nonetheless, I harbor some doubts. I do not doubt that there are problem areas. When the actions of hundreds of thousands of human beings of any walk of life are scrutinized, both incompetence and chicanery are sure to be found in abundance.[37] Instead, my concerns relate to the efficacy of the cure and the possibility of side effects.

As to efficacy, it would be less than rigorous to simply assume that government regulation will sweep away all or most ills. Beyond count are the government regulatory programs which, though adopted with fanfare and enthusiasm, have failed to achieve their objectives or even have made things worse. The sentiment "there ought to be a law" may have prompted as many feckless or harmful laws as effectual and salutary laws.

Unregulated preparers do make errors, but so do already regulated preparers like enrolled agents, certified public accountants, and lawyers. And so do IRS employees. The error rate of information given to taxpayers by IRS taxpayer service representatives has been a problem for decades.[38] Similarly, unregulated preparers do commit or abet fraud, but so do already regulated advisors. My co-authored text on tax crimes is strewn

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34. Brief for *Amici Curiae* Nat'l Consumer Law Ctr. and Nat'l Cmty. Tax Coal. in Support of Defendants-Appellants and Arguing for Reversal of the District Court, Loving v. IRS., 742 F.3d 1013 (D.C. Cir. 2014) (No. 13-5061), 2013 WL 1386247.

35. Brief *Amici Curiae* of Former Comm'rs of Internal Revenue in Support of Defendants-Appellants, Loving v. IRS., 742 F.3d 1013 (D.C. Cir. 2014) (No. 13-5061), 2013 WL 1386248 [hereinafter Brief of Former Comm'rs].

36. *See, e.g.*, Janet Novack, *Federal Judge Shoots Down IRS Attempt to Regulate All Paid Tax Preparers*, FORBES (Jan. 18, 2013, 11:56 PM), http://www.forbes.com/sites/janetnovack/2013/01/18/federal-judge-shoots-down-irs-attempt-to-regulate-all-paid-tax-preparers/ (quoting Claudia Hill as calling district court's decision "a loss for all taxpayers"); Donald T. Williamson & James S. Gale, *RTRPS and Their "Practice" Before the IRS*, 139 TAX NOTES 179 (2013).

37. The Government justifies the challenged regulations in part through studies showing that unregulated preparers make many mistakes. *See* TREASURY INSPECTOR GEN. FOR TAX ADMIN., REF. NO. 2008-40-171, MOST TAX RETURN PREPARERS BY A LIMITED SAMPLE OF UNENROLLED PREPARERS CONTAINED SIGNIFICANT ERRORS (2008), *available at* http://www.treasury.gov/tigta/auditreports/2008reports/200840171fr.pdf.

38. *See* David Brunori, *Government Power, Cronyism, and the IRS Running Amok*, 134 TAX NOTES 1599 (2012) ("The irony of the IRS wanting to ensure preparer competency is palpable. The Service is notorious for handing out incorrect information to ordinary citizens who call for help.").

with convicted accountants and attorneys,[39] and "[l]awyer disbarment lists are littered with unethical individuals despite *government* regulation of their profession."[40] And IRS employees occasionally engage in criminal acts.[41] In addition, it has been questioned whether the examination the IRS intends to use is sufficiently demanding to assure competence.[42]

As to side effects, some have decried the challenged regulations as another step in the over-regulation of America.[43] Others have noted the lamentable tendency of regulation to create or protect oligopolies by erecting barriers to entry. From this standpoint, support of the regulation by some organizations is seen as motivated less by the public interest and more by anti-competitive behavior.[44]

It is unnecessary to ascribe sinister motives. The pervasiveness of the law of unintended consequences is enough to inspire caution. For instance, some critics fear that the regulations could raise return preparation costs to taxpayers and decrease the supply of preparers.[45]

I take no position as to the competing arguments on the desirability of the challenged regulations. The IRS strongly argued the necessity of the new rule at the district court level. The district court properly ignored

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39. JOHN A. TOWNSEND, LARRY A. CAMPAGNA, STEVE JOHNSON & SCOTT A. SCHUMACHER, TAX CRIMES (2d ed. forthcoming 2014).

40. Brunori, *supra* note 38, at 1599 (emphasis added).

41. *See, e.g.*, Payne v. Comm'r, T.C. Summary Op. 2013–64 (2013) (involving IRS employee who created bogus documents to substantiate fictitious deductions claimed on her return); Complaint, United States v. Oseni, No. 8:13-mj-01016 (D. Md. May 2, 2013) (involving IRS employee accused of altering and falsifying receipts to support personal consumption charged to IRS credit card); Stuart Pfeifer, *IRS Agent Pleads Guilty to Filing False Tax Returns*, L.A. TIMES, (Jan. 5, 2011, 6:12 PM), http://latimesblogs.latimes.com/money_co/2011/01/irs-agent-pleads-guilty-to-filing-false-tax-returns.html (discussing IRS agent who pleaded guilty to filing false tax returns for himself and his relatives, obtaining thousands of dollars in fraudulent refunds); Press Release, U.S. Attorney's Office W.D. Tenn. (Apr. 17, 2013), *available at* http://www.justice.gov/usao/tnw/news/2013/APR171RS.html (announcing twenty-four current and former IRS employees indicted for making false claims for government benefits).

42. *See, e.g.*, Joe Kristan, *Court Throws Out IRS Preparer Regulation Scheme!*, ROTH & CO., P.C. (Jan. 18, 2013), http://rothcpa.com/2013/01/court-throws-out-irs-preparer-regulation-scheme/.

43. *See, e.g.*, Allen Buckley, *Is Treasury's New Reg Scheme for Return Preparers Lawful?*, 137 TAX NOTES 285, 285, 294 (2012) (citing *Over-Regulated America*, ECONOMIST (Feb. 18 2012)).

44. *See, e.g.*, Complaint for Declaratory and Inquisitive Relief at 29, Loving v. IRS, 917 F. Supp. 2d 67 (D.D.C. 2013) (No. 13-5061). The fact that H&R Block, Jackson Hewitt, and other large companies would be exempt from some of the regulations, and that a former H&R Block executive helped write some of the rules, contribute to such concerns. *See* Brunori, *supra* note 38, at 1600; Kristan, *supra* note 42; Opinion, *H&R Blockheads: The IRS Wants to Save You from Your Rogue Tax Accountant*, WALL ST. J. (Jan. 7, 2010, 12:01 AM), http://online.wsj.com/article/SB10001424052748703436504574640572196836150.html.

45. *See* Buckley, *supra* note 43, at 294.

this contention.[46] *Loving* is about the validity of the regulations, not their wisdom.[47] Accordingly, for the remainder of this Article, I assume *arguendo* that the challenged regulations would advance the public good, and I focus solely on their legality.

C. *Promulgation of the Regulations*

It took over a decade of study and advocacy to produce the 2011 regulations. Before she became the National Taxpayer Advocate, Nina Olson identified shoddy return preparation as a problem in congressional testimony in 1997 and 1998.[48] After taking office, her 2002 report to Congress urged adoption of rules requiring registration, testing, and continuing education of unenrolled return preparers.[49]

In 2006 and 2008, auditors from the Government Accountability Office and the office of the Treasury Inspector General for Tax Administration visited small samples of a variety of return preparers. They discovered substantial errors in filed returns and tests on hypothetical fact patterns.[50]

In June 2009, IRS Commissioner Doug Shulman announced a review to focus on the competency and conduct of paid tax return preparers. The review included a series of public hearings in which taxpayers, consumer groups, and preparers participated.[51] The results of the review were announced six months later in a document entitled *Return Preparer Review*.[52] It recommended the following changes:

- Mandatory registration and use of a Preparer Tax Identification Number (PTIN), for all persons paid to prepare, or to help prepare, all or substantially all of a federal tax return;

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46. For a discussion of the current prevailing approach towards application of *Chevron*, see *infra* notes 74–83 and accompanying text.

47. Of course, a judge's perception of where wisdom lays has influenced the outcome of more than one close issue of law.

48. *See, e.g.*, *IRS Restructuring: Hearing on H.R. 2676 Before the S. Comm. on Fin.*, 105th Cong. 337 (1998) (statement of Nina Olson).

49. *See* IRS PUBLICATION 2104, NATIONAL TAXPAYER ADVOCATE: FY 2002 ANNUAL REPORT TO CONGRESS (2002).

50. *See* TREASURY INSPECTOR GEN. FOR TAX ADMIN., NO. 2008-4-171, MOST TAX RETURNS PREPARED BY A LIMITED SAMPLE OF UNENROLLED PREPARERS CONTAINED SIGNIFICANT ERRORS (2008), *available at* https://www.treasury.gov/tigta/auditreports/2008reports/200840171fr.pdf; U.S. GOV'T ACCOUNTABILITY OFFICE, REP. NO. GAO-06-563T, PAID TAX RETURN PREPARERS: IN A LIMITED STUDY, CHAIN PREPARERS MADE SERIOUS ERRORS (2006); Memorandum from Michael E. McKenney, Assistant Inspector Gen. for Audit, for Michael R. Phillips, Deputy Inspector Gen. for Audit, to Comm'r, Small Business/Self-Employed Div.

51. *See* I.R.S. Notice 2009-60, 2009-32 I.R.B. 181, STANDARDS OF CONDUCT FOR THE TAX RETURN PREPARER COMMUNITY AND INCREASED TAXPAYER COMPLIANCE. Several IRS advisory groups also called for enhanced regulation. *See* IRS PUBLICATION 4832, *supra* note 28, at 23–25 (describing work done by Taxpayer Advocacy Panel, IRS Advisory Council, Electronic Tax Administration Advisory Council, and IRS Oversight Board).

52. *See* IRS PUBLICATION 4832, *supra* note 28.

- Mandatory basic competence tests, but with exemptions for attorneys, certified public accountants, and enrolled agents (since they already have testing requirements to earn their credentials), certain non-signing preparers supervised by them, and non-Form 1040 preparers;
- Continuing education obligation of fifteen hours per year, including ten hours in federal tax law, three in tax law changes, and two in ethics;
- Ethics requirements in the form of compliance checks and being subject to the professional responsibility standards in Treasury Circular 230; and
- A publicly searchable database and public education campaign.[53]

The Review concluded that these changes could be effected through regulations and "do[ ] not require additional legislation."[54] The regulations were proposed in 2010 and finalized in 2011.

III. DISTRICT COURT'S DECISION

Operatively, the district court's invalidation of the challenged regulations proceeded through five stages. The court (1) identified *Chevron*'s Step One as controlling, (2) took a searching and textual approach to Step One, (3) found the definition of the statutory term "practice" to be decisive, (4) reinforced its conclusion through a wider contextual analysis, and (5) determined the appropriate remedies.

A. *Step One as Controlling*

The named plaintiffs in *Loving* are Sabina Loving, Elmer Kilian, and John Gambino. They all currently prepare tax returns for compensation without having obtained licenses or certification from the IRS, although they all had obtained or applied for Preparer Tax Identification Numbers. They were joined by the Institute for Justice, a national public interest law firm, which seeks to protect the rights of entrepreneurs.

The plaintiffs sued the IRS under the Administrative Procedure Act (the APA)[55] and the Declaratory Judgment Act,[56] challenging the validity of the 2011 regulations. Both sides moved for summary judgment.[57]

53. I.R.S. News Release IR-2012-59 (June 5 2012), *available at* http://www.irs.gov/uac/Newsroom/IRS-Marks-Third-Anniversary-of-Return-Preparer-Review;-Urges-Required-Preparers-to-Take-Competency-Test-as-Soon-as-Possible.

54. IRS PUBLICATION 4832, *supra* note 28, at 33.

55. 5 U.S.C. §§ 701–706 (2012) (involving judicial review provisions of APA). The APA applies to the Treasury and to the IRS as part of the Treasury. *See id.* § 551(1) (applying APA to Treasury); I.R.C. § 7803(a) (2012) (applying APA to IRS as part of Treasury).

56. 28 U.S.C §§ 2201–2202 (2012).

57. The district court restyled the motions, finding that "the pleadings in this case more accurately seek the Court's review of an administrative decision. [The

The district court identified *Chevron* as the standard controlling the challenge. Subsequent cases[58] established that *Chevron* does not apply to every case in which the agency's action is challenged.[59] The Government argued that the case should be resolved in its favor without resorting to *Chevron*, because every agency, including the Treasury Department and IRS, has inherent authority to regulate persons practicing before it.[60] Commonly, however, statutes prescribe agencies' authority to regulate admission to practice.[61]

Language in some cases might be read to call into question the existence of inherent, non-statutory authority.[62] However, the district court did not go so far. Instead, it rejected the Government's contention because of the "specific controls over general" canon of construction.[63] An agency "cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of [the agency] in a particular area."[64] The district court held that section 330, by specifically defining Treasury's authority to regulate practitioners before it, controls over Treasury's inherent authority.[65]

The issue in *Loving* is the extent of the agency's authority. Questions sometimes have been raised as to whether *Chevron* applies to agencies' determinations of their own jurisdiction, but those questions are no longer troubling. After the district court rendered its decision, the Supreme

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usual summary judgment rules do] not apply because of the limited role of a court in reviewing the administrative record." Loving v. IRS, 917 F. Supp. 2d 67, 72 (D.D.C. 2013) (citations omitted).

58. *See, e.g.,* United States v. Mead Corp., 533 U.S. 218 (2001); *see also* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005); Barnhart v. Walton, 535 U.S. 212 (2002); Christensen v. Harris Cnty., 529 U.S. 576 (2000); United States v. Haggar Apparel Co., 526 U.S. 380 (1999).

59. This creates the Step Zero issue because whether *Chevron* applies at all is logically anterior to application of Steps One and Two. *See generally* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006).

60. *See, e.g.*, Goldsmith v. U.S. Bd. of Tax Appeals, 270 U.S. 117, 122 (1926) (upholding authority of B.T.A. to prescribe rules of practice, including rules as to admission of attorneys to practice before it).

61. This has been so since the founding of the Republic. *See* Act of July 27, 1789, ch. 4, 1 Stat. 28 (granting War Department authority "to prescribe regulations, not inconsistent with the law, for the Government of [the] Department" (quoting Rev. Stat. § 161, 5 U.S.C. § 22 (1952) (recodified at 5 U.S.C. § 301 (2012)))); *see also* Act of July 8, 1870, ch. 230, §§ 17, 19, 16 Stat. 200 ("The Commissioner [of Patents] . . . may from time to time establish rules and regulations, not inconsistent with law, for the conduct of proceedings in the Patent Office" and "[for] gross misconduct . . . may refuse to recognize any person as a patent agent, either generally or in any particular case.").

62. *See, e.g.*, La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").

63. *See generally* Steve R. Johnson, *When General Statutes and Specific Statutes Conflict*, 57 STATE TAX NOTES 113 (2010).

64. Am. Petroleum Inst. v. EPA, 52 F.3d 1113, 1119 (D.C. Cir. 1995).

65. Loving v. IRS, 917 F. Supp. 2d 67, 73 (D.D.C. 2013).

Court decisively held that *Chevron* does indeed apply to issues of jurisdiction.[66]

Having found that *Chevron* controls, the district court identified Step One as determinative because the plaintiffs offered "no independent argument" at Step Two.[67] Strictly speaking, this conclusion does not follow from the premise. A party may present the same arguments at Step One and Step Two.[68] It is theoretically possible that those arguments are insufficient to persuade the court that the statute is clear (Step One) but do suffice to persuade the court that the regulation is unreasonable (Step Two). However, that margin of possibility is small. As a practical matter, even if not necessarily as a theoretical matter, the district court is correct that the plaintiffs win at Step One or they do not win at all.

For completeness, I add that although the *Loving* plaintiffs did not advance independent Step Two arguments, amici supporting the plaintiffs in the circuit court did so. They argued that the regulations fail Step Two—and for the same reasons are arbitrary and capricious[69]—because Treasury failed to adequately explain the choices it made in the regulations and because they reflect a flawed cost-benefit analysis.[70] The amici also argued that the regulations violate the Regulatory Flexibility Act[71] and the APA notice-and-comment rules.[72] Arguments of this ilk are of

66. *See* City of Arlington v. FCC, 133 S. Ct. 1863 (2013).

67. *Loving*, 917 F. Supp. 2d at 73.

68. The plaintiffs made the same arguments at Step Two as at Step One. *See* Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment at 16 n.12, Loving v. IRS, 917 F. Supp. 2d 67 (D.D.C. 2013) (No. 12-0385), 2012 WL 8133439. Thus, they advanced no "independent" argument at Step Two, but they did not concede Step Two.

69. The APA empowers courts to set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2012). Case law and commentary sometimes disagree as to whether *Chevron*'s Step Two and the arbitrary and capricious standard merge or are independent inquiries. The answer to this conundrum is, I think, that arbitrary and capricious has both a procedural dimension and a substantive dimension. The procedural dimension includes such things as the agency's duty to consider all relevant factors and to explain its choices. The substantive dimension is whether the agency's balancing process was rational. *Chevron*'s Step Two subsumes, or is congruent with, the substantive dimension of arbitrary and capricious, but it does not subsume the procedural dimension of arbitrary and capricious. *See* Gen. Instrument Corp. v. FCC, 213 F.3d 724, 732 (D.C. Cir. 2000) (explaining that *Chevron*'s Step Two subsumes substantive dimension of arbitrary and capricious).

70. Brief of Ronda Gordon, Dennis Tafelski, Jason Dinesen, Christine Engel, Russell Fox, Joe Kristan, Richard Schiveley, and the Tax Foundation as Amici Curiae in Support of Plaintiffs-Appellees at 11–13, Loving v. IRS, 742 F.3d 1013 (D.C. Cir. 2014) (No. 13-5061), 2013 WL 2285575 [hereinafter Tax Foundation Brief]. An administrative action is arbitrary and capricious if, *inter alia*, the agency "failed to consider an important aspect of the problem" or failed to "cogently explain why it has exercised its discretion in a given manner." Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 48 (1983).

71. 5 U.S.C. §§ 601–602 (2012).

72. *See id.* § 553; *see also* Tax Foundation Brief, *supra* note 70.

growing importance in tax litigation. I have explored these types of arguments in other articles,[73] so I will not probe these contentions here.

B. *Exacting Textual Approach*

1. *Currently Prevailing Approach*

The spirit in which a court approaches the Step One analysis is important. A court wanting to uphold the agency's decision often will find ambiguity, which will allow it to reach Step Two, where the agency usually (but not invariably) wins.[74] A more rigorous approach to Step One will result in fewer agency wins.

Although examples of both approaches can be found in case law, an exacting Step One analysis is currently the dominant approach. In a recent *Chevron* case, for instance, the Supreme Court endorsed "taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority."[75]

This is consistent with a broad movement in recent years, across a variety of areas of administrative law, "exhibit[ing] a return to congressional primacy both in matters of interpretation and matters of policy . . . ."[76] Three instances of this movement appear below.

First, of particular relevance to *Loving*, "the Court has moved away from deference to agency statutory interpretations toward a more traditional Court-centered approach with the focus on congressional intent."[77] This has resulted in "a significant expansion of the scope of Step One, so that many more interpretive questions are resolved based on clear congressional intent than might have been anticipated."[78]

Second, a similar, less deferential approach is also gaining traction in application of Step Two. Although Step Two is typically agency-friendly, agencies have sometimes lost at Step Two.[79] A more vigorous level of scrutiny has been apparent in a number of recent Step Two cases.[80]

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73. *See, e.g.*, Steve R. Johnson, *Arbitrary and Capricious: Treasury's Duty of Explanation as to Tax Regulations*, 64 DUKE L. J. (forthcoming 2014); Mayo *and the Future*, *supra* note 4, at 1555–56; *Preserving Fairness in Tax*, *supra* note 4, at pt. VI.

74. *See, e.g.*, Robinson v. Comm'r, 119 T.C. 44, 69 (2002) (en banc).

75. City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013).

76. Jack M. Beerman, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727, 729 (2009). Professor Beerman approves of this turn and gives examples of it.

77. *Id.* at 747.

78. *Id.* (adding that "it is now difficult to discern a difference between *Chevron* Step One and traditional, pre-*Chevron*, statutory interpretation"); *see, e.g.*, Am. Petroleum Inst. v. SEC, 953 F. Supp. 2d 5 (D.D.C. 2013).

79. *See, e.g.*, Goldstein v. SEC, 451 F.3d 873 (D.C. Cir. 2006); Northpoint Tech., Ltd. v. FCC, 412 F.3d 145 (D.C. Cir. 2005); Abbott Labs. v. Young, 920 F.2d 984 (D.C. Cir. 1990), *cert. denied*, 502 U.S. 819 (1991).

80. *See, e.g.*, Echostar Satellite L.L.C. v. FCC, 704 F.3d 992 (D.C. Cir. 2013).

Third, agencies traditionally have received a high degree of deference when interpreting their own regulations.[81] However, in recent years, many prominent decisions have invalidated tax[82] and non-tax[83] regulations on the basis of interpretive exercises, concluding that the agency's position was inconsistent with the clear text of the regulation.

Pendulums swing in legal doctrine no less than in hem-lines and 3-D movies. Thus there is no guarantee that exacting application of *Chevron*'s Step One will always be the norm. It is, however, the currently prevailing approach.

2. *District Court's Approach*

The district court in *Loving* proceeded in the currently dominant spirit of exacting analysis. Having identified *Chevron* Step One as the *schwerpunkt*[84] of the case, the district court stated the inquiry as to whether "using the traditional tools of the statutory construction," it could fairly be said that the 1884 statute made clear Congress's intent as to the Treasury's ability to regulate return preparers.[85] The court began "where all such inquiries must begin: with the language of the statute itself."[86]

Desiring to reach Step Two, where it feels itself in a strong position, the Government argued that the statute is ambiguous because it fails to define "representative" and "practice," both of which can have broad meanings. The district court found this approach "simplistic" and rejected it because "[a]mbiguity is a creature not of definitional possibilities but of statutory context."[87] This is an eminently textual approach. Modern textualism takes a broader angle of vision than mere literalistic scru-

81. *See, e.g.*, Auer v. Robbins, 519 U.S. 452, 461 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413–14 (1945). *But see* Steve R. Johnson, Auer/Seminole Rock *Deference in the Tax Court*, 11 PITT. TAX REV. 1 (2013) (describing Tax Court as exception to this tradition of deference).

82. *See, e.g.*, Estate of Petter v. Comm'r, 653 F.3d 1012, 1021–23 (9th Cir. 2011); Estate of Christiansen v. Comm'r, 586 F.3d 1061, 1062 (8th Cir. 2009).

83. *See, e.g.*, Kaiser Found. Hosps. v. Sebelius, 708 F.3d 226 (D.C. Cir. 2013).

84. In German military theory, the *schwerpunkt* is the decisive point, the place where the battle will be won or lost.

85. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984). As the ensuing discussion makes clear, the *Loving* district court made heavy use of canons of statutory interpretation. Canons are among the "traditional tools," and they are properly part of the Step One analysis. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1876 (2013) (Breyer, J., concurring in part and concurring in judgment). *See generally* Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791 (2010).

86. Loving v. IRS, 917 F. Supp. 2d 67, 74 (D.D.C. 2013) (quoting Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S, 132 S. Ct. 1670, 1680 (2012)), *aff'd*, 742 F.3d 1013 (D.C. Cir. 2014).

87. *Id.* at 74 (quoting Brown v. Gardner, 513 U.S. 115, 118 (1994)); *see also* Goldstein v. SEC, 451 F.3d 873, 878 (D.C. Cir. 2006) ("The lack of a statutory definition of a word does not necessarily render the meaning of a word ambiguous . . . .").

tiny of one or a few statutory terms in isolation. As the foremost contemporary exponent of textualism as well as a co-author have observed:

> Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts. . . . Context is a primary determinant of meaning.[88]

3. *Nontextual Arguments*

Loving's textual orientation was confirmed later in the opinion. The district court noted that the Government had offered a number of "nontextual arguments," but the court rejected their relevance, observing that "none of these can overcome the statute's unambiguous text here. In the land of statutory interpretation, statutory text is king."[89]

In fact, both parties offered nontextual arguments, a total of three of them: (1) the importance of the regulations, (2) legislative history, and (3) the inconsistency of the Treasury/IRS. These arguments, and their rejection by the district court, are described below.

a. Importance of the Regulations

Subpart IIB above described the practical stakes implicated by the 2011 regulatory initiative, and subpart IIC above demonstrated the importance that the Government attaches to it. The Government repeatedly impressed this importance upon the district court.

Nonetheless, the district court—properly in my estimation—rejected the pertinence of this consideration to the Step One analysis. The court stated that it did "not gainsay the importance of [the] regulation . . . indeed, it may very well have significant salutary effects . . . . At *Chevron* Step One, however, such policy arguments have no relevance."[90]

The district court's approach is consistent with current doctrine. Policy arguments are admissible at Step Two.[91] At Step One, however, "con-

88. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167 (1st ed. 2012); *see also* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

89. *Loving*, 917 F. Supp. 2d at 79.

90. *Id.*; *see also Chevron*, 467 U.S. at 864 (stating that policy arguments advanced by parties "are more properly addressed to legislators or administrators, not to judges"); SEC v. Johnson, 650 F.3d 710, 715 (D.C. Cir. 2011) ("The Supreme Court has repeatedly made clear [that] [p]olicy considerations cannot overrule our interpretation of the text and structure of the [Act]." (second alternation in original) (internal quotation marks omitted)).

91. *See* Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 715 (2011) (discussing the policy argument of administrability at Step Two).

siderations of policy divorced from the statute's text and purpose could not override its meaning."[92]

b. Legislative History

One might think that—the case having been decided nearly a third of a century ago—the interpretational questions raised by *Chevron* would by now have been resolved. Alas, this is not the case. There are probably more unsettled questions about *Chevron* today than there were immediately after its decision.[93]

An enduring battleground has been whether legislative history is a proper source in the Step One inquiry. Even textualists acknowledge that intent is a relevant aspect of statutory interpretation—but an objectified intent that must be drawn from the enacted statute, not the subjective intent of legislators.[94] They even acknowledge that committee reports may legitimately be consulted for certain narrow purposes[95]—but not for the ascertainment of legislative intent, as purposivists do.

Thus, there is no consistent law on whether legislative history is properly consulted at Step One. The answer given by each case depends upon the accident of which judge pens the opinion.[96] *Chevron* was authored by Justice Stevens, a purposivist, so *Chevron* looked at committee reports at Step One.[97] When textualists write the opinions—as Justice Thomas did

92. United States v. Tohono O'Odham Nation, 131 S. Ct. 1723, 1731 (2011); *see also* Estate of Petter v. Comm'r, 653 F.3d 1012, 1023 (9th Cir. 2011) (noting when text is clear, "public policy cannot save the IRS").

93. This is one reason that I and others have called for *Chevron* to be relegated to the dust bin of failed doctrines. *See, e.g.*, Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 850–51 (2010); Bryan T. Camp, *Interpreting Statutory Silence*, 128 TAX NOTES 501, 507 (2010); *Preserving Fairness in Tax*, *supra* note 4, at 281–84; Patrick J. Smith, Chevron*'s Conflict with the Administrative Procedure Act*, 32 VA. TAX REV. 813 (2013). However, that call is unlikely to be answered by the courts any time soon. In a recent case, a majority of the Justices made clear their desire to protect *Chevron* from interpretations that would lead to its evisceration. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1873 (2013).

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

95. *See* SCALIA & GARNER, *supra* note 88, at 388 (acknowledging utility of committee reports to establish linguistic usage at time statute was enacted and to refute attempted application of absurdity doctrine).

96. *Compare* Regions Hosp. v. Shalala, 522 U.S. 448, 451–64 (1998), *with id.* at 464–69 (Scalia, J., dissenting).

97. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 862–64 (1984). In a later case, Justice Stevens took an intermediate view. Finding that "the plain language of [the] statute appear[ed] to settle the question," Justice Stevens, writing for the Court, looked to legislative history to ascertain "only whether there is clearly expressed legislative intention contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses." INS v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987) (internal quotation marks omitted).

in *Brand X*[98] and Chief Justice Roberts did in *Mayo*[99]—this aspect of *Chevron* is conveniently ignored.

In *Loving*, both parties sought to enlist legislative history. The district court did not categorically rule such history out of Step One. Instead, the court found the history of section 330 to be equivocal, and it observed—consistent with the dominant contemporary view—that it is impermissible to use "ambiguous legislative history to muddy clear statutory language."[100]

The court was more firm, however, with respect to one aspect of legislative history. On many occasions, bills have been introduced in Congress to provide explicit authority to Treasury to regulate return preparers not already covered. All failed.[101] These failures could be spun by proponents of the regulations as evidence of their necessity, or by its opponents as evidence that the 1884 statute does not confer the needed authority. The district court chose to accord the failed proposals no weight, noting that "[f]ailed legislative proposals . . . are a particularly dangerous ground on which to rest an interpretation of a prior statute."[102]

c. Agency Inconsistency

Treasury did not always take the view that the 1884 statute confers upon it the authority to promulgate rules like those contained in the 2011 regulations. Indeed, for many years, it took the contrary view, both publicly[103] and privately.[104] The 1966 version of Treasury regulations stated

98. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 989 (2005).

99. *See* Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 711 (2011).

100. Loving v. IRS, 917 F. Supp. 2d 67, 79 (D.D.C. 2013) (quoting Milner v. Dep't of Navy, 131 S. Ct. 1259, 1266 (2011)) (internal quotation marks omitted).

101. The plaintiffs count nine such attempts between 2005 and 2013. *See* Brief of Plaintiffs-Appellees at 12, Loving v. IRS, 742 F.3d 1013 (D.C. Cir. 2014) (No. 13-5061), 2013 WL 2146603; *see, e.g.*, H.R. 1570, 113th Cong. § 2 (2013); S. 3355, 112th Cong. § 202 (2012); H.R. 6050, 112th Cong. § 202 (2012); S. 3215, 111th Cong. § 202 (2010); H.R. 5047, 111th Cong. § 202 (2010); H.R. 1570, S. 832, 109th Cong. § 4 (2005).

102. *Loving*, 917 F. Supp. 2d at 79 (alteration in original) (quoting Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994)); *see also* Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 170 (2001).

103. *See, e.g.*, *Fraud in Income Tax Return Preparation: Hearing Before Subcomm. on Oversight of the H. Comm. on Ways & Means*, 109th Cong. 24 (2005) (statement of Nancy J. Jardini, Chief, IRS Criminal Investigation Division) ("Tax return preparers are not deemed as individuals who represent individuals before the IRS . . . .").

104. For example, Professor Camp reports the view prevalent in the IRS during his time with the IRS was that "it would literally take an act of Congress to fix the very real problem of unregulated tax return preparers," a view that he shared at the time but no longer does. *See* Bryan T. Camp, *"Loving" Return Preparer Regulation*, 140 TAX NOTES 457, 457 (2013) (noting, also, that "both the applicable regulations and the IRS had, for an equally long time, interpreted [the key language of

expressly: "Neither preparation of a tax return, nor the appearance of an individual as a witness for the taxpayer, nor the furnishing of information at the request of the [IRS] or any of its officers or employees is considered practice before the Service."[105] Should this matter?

The courts have weaved a tangled web as to the significance of agency inconsistency. In a 1939 case involving the validity of income tax regulations, the Supreme Court discounted the significance of Treasury's change of position.[106]

The principal alternative to *Chevron* is *Skidmore v. Swift & Co.*,[107] decided in 1944. That case held that the weight a court should give an agency's interpretation of a statute in a given case depends on a number of non-exclusive factors, including the "consistency [of the agency's current position] with [its] earlier and later pronouncements . . . ."[108]

The notion resurfaced in a 1979 tax case, *National Muffler Dealers Ass'n, Inc. v. United States*.[109] Distilling pre-*Chevron* cases, the Court identified a number of factors bearing on the validity of tax regulations, including "the consistency of the Commissioner's interpretation . . . ."[110] Taxpayers seized on this comment to argue in many later cases that alleged IRS inconsistency was a reason to deny deference. The better understanding of *National Muffler*, however, was that IRS consistency is a reason to accord extra deference, not that its absence is a reason to diminish deference.[111] Indeed, the *National Muffler* Court added: "We would be reluctant to adopt the rigid view that an agency may not alter its interpretation in light of administrative experience."[112]

Motor Vehicle Manufacturers Ass'n of the U.S. v. State Farm Mutual Automobile Insurance Co.[113] is a leading case on when agency action is arbitrary and capricious. The *State Farm* Court stated that agencies "must be given ample latitude to adapt their rules and policies to the demands of changing circumstances."[114]

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section 330] to refer only to persons who helped taxpayers in disputes with the IRS, chiefly attorneys, CPAs, and enrolled agents").

105. 31 Fed. Reg. 10773, 10774 (Aug. 13, 1966).

106. *See* Helvering v. Wilshire Oil Co., 308 U.S. 90, 101 (1939) (predicting negative impact on administrative effectiveness and efficiency if Treasury were unable to take flexible approach to regulatory interpretation).

107. 323 U.S. 134 (1944).

108. *Id.* at 140.

109. 440 U.S. 472 (1979).

110. *Id.* at 477; *see also* Rowan Cos., Inc. v. United States, 452 U.S. 247, 261 n.17 (1981).

111. *See* Swallows *I*, *supra* note 1, at 364–65 (outlining alternative deferential approaches to analyzing regulations and arguing that Supreme Court adopted additive deferential approach in *National Muffler*).

112. *Nat'l Muffler*, 440 U.S. at 485.

113. 463 U.S. 29 (1983).

114. *Id.* at 42 (quoting *In re* Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968)) (internal quotation marks omitted).

Chevron itself involved an agency's change of position, but the agency prevailed nonetheless. The Court remarked, "[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis."[115]

However, three years later, Justice Stevens wrote for the Court in *INS v. Cardoza-Fonseca*.[116] This time, the author of *Chevron* said, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."[117]

In 2005, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*[118] offered a wrinkle. After confirming that agency inconsistency is not germane for *Chevron* purposes, the Court added, "[u]nexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change . . . under the Administrative Procedure Act."[119]

The most thorough exploration of agency inconsistency in the context of the arbitrary and capricious standard came in the Court's 2009 *FCC v. Fox Television Stations, Inc.*[120] decision. The FCC changed its position on indecent broadcasts. The circuit court found the agency's action arbitrary and capricious, in part because the FCC allegedly failed to adequately explain the reasons for the change. A divided Supreme Court reversed the circuit court. Justice Scalia wrote for the Court, although only three other Justices joined his opinion in full. Justice Kennedy provided the fifth vote in his concurrence in part and concurrence in the judgment. Four Justices dissented.[121]

The key paragraph in the Court's opinion laid down four principles:

> [1] [T]he requirement that an agency provide reasoned explanation . . . would ordinarily demand that it display awareness that it *is* changing position. . . . [2] And of course the agency must show that there are good reasons for the new policy. [3] But it need not demonstrate . . . that the reasons for the new policy are *better* than the reasons for the old one . . . . [T]he agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. [4] Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or

115. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 863–64 (1984).

116. 480 U.S. 421 (1987).

117. *Id.* at 446 n.30 (quoting Watt v. Alaska, 451 U.S. 259, 273 (1981)).

118. 545 U.S. 967 (2005).

119. *Id.* at 981.

120. 556 U.S. 502 (2009).

121. *Id.* at 546.

> when its prior policy has engendered serious reliance interests . . . .[122]

Mayo, in 2011, appeared—quite unnecessarily[123]—to abrogate *National Muffler*.[124] *Mayo* also rejected the significance of agency inconsistency for *Chevron* purposes, saying that the Court has "repeatedly held that '[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework.'"[125]

Against this background, how did the *Loving* district court handle Treasury's inconsistency as to the scope of its authority under section 330? The court invoked *Brand X*'s holding that an agency's *volte-face* is irrelevant for *Chevron* purposes, as well as *Brand X*'s dictum that it may be a basis for holding the agency's action to be arbitrary and capricious. The district court avoided that dictum by adding: "While the Court could find no explanation for the IRS's flip-flop in the new Rule, Plaintiffs have not claimed here that the IRS was arbitrary and capricious."[126]

C. *Definition of "Practice"*

Section 330(a)(1) authorized Treasury to "regulate the practice of representatives of persons before the Department . . . ."[127] Central to the district court's holding in *Loving* was its conclusion that the previously unregulated preparers are not engaged in "practice."

The court began by sketching its conception of the process of IRS adjudication. The court saw three phases in the following order: assessment and collection, examination, and appeals.[128] Phase one reflects the putative "self-assessment" nature of our tax system.[129] Taxpayers file their returns; the IRS assesses the liabilities reported on those returns; and the

122. *Id.* at 515 (citing Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996); United States v. Nixon, 418 U.S. 683, 696 (1974)).

123. *See* Mayo *and the Future*, *supra* note 4, at 1553 (arguing that taxpayers in *Mayo* incorrectly applied *National Muffler* considerations and thus misused case).

124. *See* Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 712–14 (2012) (distinguishing between *National Muffler* and *Chevron* analyses of ambiguous statutes and concluding that latter provides appropriate framework for analyzing relevant rule).

125. *Id.* at 712 (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005)) (citing United States v. Eurodif S.A., 129 S. Ct. 878, 887 (2009)).

126. Loving v. IRS, 917 F. Supp. 2d 67, 80 (D.D.C. 2013). As noted above, such a claim has been made in an amici brief to the D.C. Circuit. *See supra* notes 69–70 and accompanying text.

127. 31 U.S.C. § 330(a)(1) (2012).

128. *See Loving*, 917 F. Supp. 2d at 69–70.

129. This characterization is widely used. *See* Brief of Former Comm'rs, *supra* note 35, at 7 (showing five former Commissioners of Internal Revenue use this characterization); Olson, *supra* note 18, at 771 (showing National Taxpayer Advocate characterizes tax system as one of self-assessment). *But see* Camp, *supra* note 104, at 462–66 (maintaining that our system involves self-reporting but not self-assessment). Professor Camp's position is the more precise.

IRS deposits the accompanying payments or attempts to collect in the event of nonpayment.

In phase two, the IRS selects some returns for audit. During the audit, the "taxpayer may be represented . . . by an attorney, certified public accountant, or other representative."[130] The audit may conclude with an IRS "no change" letter, a taxpayer concession of additional liabilities, or disagreement between the taxpayer and the IRS agent.

Phase three resolves any such disagreement. The taxpayers may choose administrative appeal to the IRS Appeals Office, where they may "designate a qualified representative to act for them."[131] Absent agreement, the taxpayer may initiate litigation in the Tax Court, district court, bankruptcy court, or Court of Federal Claims, as appropriate.

The district court acknowledged that section 330(a)(1) does not define "practice of representatives," but it looked to section 330(a)(2)(D) to illuminate the phrase's meaning. That section provides that, before admitting "a representative to practice," Treasury may require the representative to demonstrate "competency to advise and assist persons in presenting their cases."[132] On this basis, the district court concluded that those who merely advise taxpayers as to their returns are not engaged in "practice" within the contemplation of section 330. It said:

> Filing a tax return would never, in normal usage, be described as "presenting a case." At the time of filing, the taxpayer has no dispute with the IRS; there is no "case" to present. This definition makes sense only in connection with those who assist taxpayers in the examination and appeals stages of the process.[133]

The court rejected two responses by the IRS. First, the Government argued: "It is nonsensical that Congress would authorize [Treasury] to ensure the competency of those who present 'cases' but not those who prepare returns, particularly where only a fraction of prepared returns are audited and thereafter become 'cases' upon appeal before the Service."[134] The Government's argument is an attempt to invoke the "absurd results" canon of construction,[135] but it does not meet the high bar required by

130. Treas. Reg. § 601.105(b)(1) (1987); *see also* I.R.C. § 7521(b) (2012) (allowing taxpayer to suspend IRS interview in order to consult with "an attorney, certified public accountant, enrolled agent, enrolled actuary, or any other person permitted to represent the taxpayer before the [IRS] . . . .").

131. Treas. Reg. § 601.106(c) (1987).

132. 31 U.S.C. § 330(a)(2)(D) (2012).

133. *Loving*, 917 F. Supp. 2d at 74.

134. Defendants' Reply Memorandum in Support of Motion for Summary Judgment at 13, Loving v. IRS, 917 F. Supp. 2d 67 (D.D.C. 2013) (No. 12-0385), 2012 WL 8133440.

135. *See generally* Steve R. Johnson, *The "Absurd Results" Doctrine in State and Local Tax Cases*, 54 STATE TAX NOTES 195 (2009).

that canon. It is hardly absurd to think that Congress would want to regulate representatives more heavily than advisors.[136]

Second, the Government contended that section 330(a)(1) is a separate grant of authority from section 330(a)(2)(D), thus the latter does not limit the former. The court rejected this argument on the basis of the "same meaning" canon of construction.[137] The court noted that the sections are proximate and use the same language. "It is a well established rule of statutory construction that a word is presumed to have the same meaning in all subsections of the same statute."[138]

"Well established," yes, but invariable, no. No canon is absolute,[139] and in actual practice, courts flout the same meaning canon about as often as they follow it.[140] But adherence is more frequent when, as here, the provisions were enacted at the same time and were codified in the same place.[141]

D. *Wider Context*

The terms of a statute "cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[142] This is part of the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, [which] necessarily assumes that the implications of a statute may be altered by the implications of a later statute."[143]

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136. *See Loving*, 917 F. Supp. 2d at 75 ("Congress could well desire that those who represent taxpayers in examinations or appeals be more closely regulated than those who merely prepare returns.").

137. *See generally* Steve R. Johnson, *Supertext and Consistent Meaning*, 52 STATE TAX NOTES 675 (2009) (describing same meaning doctrine of construction).

138. *Loving*, 917 F. Supp. 2d at 75 (quoting Allen v. CSX Transp., Inc., 22 F.3d 1180, 1182 (D.C. Cir. 1994)); *see also* Ratzlaf v. United States, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears.").

139. *See, e.g.*, Chickasaw Nation v. United States, 534 U.S. 84, 93 (2001) (rejecting plaintiffs' arguments for application of statutory canons of construction because "canons are not mandatory rules"); *see also* SCALIA & GARNER, *supra* note 88, at 59 (addressing principle of interrelating canons).

140. *See, e.g.*, Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 594–95 (2004) (rejecting argument that multiple uses of same word carried same meaning); United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 212 (2001) (holding that two uses of "wages paid" language had different impacts on benefits eligibility).

141. *See* WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 776–77 (4th ed. 2005) (distinguishing between supertext and internal context approaches to statutory interpretation).

142. Roberts v. Sea-Land Servs., Inc., 132 S. Ct. 1350, 1357 (2012) (quoting Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989)) (internal quotation marks omitted).

143. United States v. Fausto, 484 U.S. 439, 453 (1988).

The *Loving* district court proceeded in this vein in three respects: (1) return preparer-specific penalties that would control over general power to regulate preparers, (2) a disclosure provision that would be expected to reference the regulatory power, and (3) an injunction provision whose safeguards would be set at naught by the claimed regulatory power. In my view, these points have some force but are far from dispositive.

1. *Preparer-Specific Penalties*

The district court noted that "Congress ha[d] already enacted a relatively rigid penalty scheme to punish misdeeds by tax-return preparers," a scheme consisting of at least ten penalties specific to preparers.[144] The court found this significant for three reasons. First, the court feared that "if [section] 330 covers tax-return preparers, the IRS would have the discretion—with few restraints—to impose an array of penalties for this sort of conduct. . . . [This independence] would trample the specific and tightly controlled penalty scheme in [the Code]."[145]

Second and third, the court invoked the canons that specific statutes control over general ones and that highly detailed, comprehensive statutory schemes leave little space for courts to read in additional prescriptions.[146] The court observed, "when statutes intersect, the specific statutes (in Title 26) trump the general ([section] 330). 'That is particularly true where . . . Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.'"[147]

These rationales are not overwhelming. The first rationale—circumvention of procedures set out in the ten penalty sections—is undercut by the second rationale. Since the penalty sections are the more specific sections, the courts could easily hold that the IRS must comply with them, and not the general authority of section 330, when it seeks to discipline or penalize return preparers for conduct potentially covered by both section 330 and one or more of the ten penalty sections.

Moreover, it is doubtful that the ten penalty sections form so comprehensive a regulatory scheme as to squeeze out regulation under section 330. The ten sections are purely "back end" remedies, that is, sanctions after bad conduct has occurred. They do not exclude from practice those who are most likely (because of inadequate training or other incompetence) to commit bad conduct in the future, as the 2011 regulations would. It is entirely possible that Congress could want to address the prob-

144. Loving v. IRS, 917 F. Supp. 2d 67, 76 (D.D.C. 2013) (citing I.R.C. §§ 6694(a)–(b), 6695(a)–(d), (f)–(g), 6713, 7216).

145. *Id.*

146. *See, e.g.*, EC Term of Years Trust v. United States, 550 U.S. 429, 433–34 (2007) (providing example of latter principle in tax area); United States v. Brockamp, 519 U.S. 347, 349 (1997).

147. *Loving*, 917 F. Supp. 2d at 77 (alteration in original) (quoting RedLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065, 2071 (2012)).

lem from both ends, thus that the purely ex post facto penalties do not rise to the level of a comprehensive scheme.

2. *Disclosure Provision*

Section 6103 of the Code establishes a broad principle of confidentiality of tax return information. It also provides many exceptions, situations in which the IRS may disclose some such information. One of the exceptions is in section 6103(k)(5), which permits the IRS to disclose, to state and local agencies that license and regulate tax return preparers, the identities of preparers against whom the sanctions under sections 6694, 6695, or 7216 have been imposed. The district court found it "curious" that penalties under section 330 were omitted from this list if, as claimed by the Government, section 330 already authorizes the IRS to penalize return preparers.[148]

Well, maybe not so curious. First, in fact, omissions often do occur in statutes, which is why how to approach the *casus omissus* has been debated for centuries[149] and why the concept of implied delegation is central to *Chevron*.[150] Second, the oddity is not unique. One of the ten penalties identified by the district court is section 6713, yet that section is also omitted from the section 6103(k)(5) list. Third, the relevant Treasury regulations under section 330 were not promulgated until 2011, and so, of course, no penalties had been imposed. There would be little surprise, therefore, that section 330 would be under the radar when section 6103(k)(5) was drafted.

3. *Injunction Provision*

Under section 7407, upon the occurrence of specified conduct, the Government may bring an action to enjoin a tax return preparer from engaging in the conduct or even from acting as a preparer. The district court stated that, under the Government's construction of section 330, Treasury could, by disbarring the preparer, "sidestep every protection [section] 7407 affords—judicial review, the demanding standards for the extraordinary remedy of an injunction, and the elevated hurdle for enjoining preparation of tax returns . . . ."[151]

148. *See id.*

149. *See, e.g.*, Jones v. Smart, [1785] 1 T.R. 44, 52.

150. *Chevron* held that Congress delegates authority to agencies both by express provisions and by implication from statutory silence. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843–44 (1984). The Court identified several reasons why Congress may have been silent on a particular matter.

> Perhaps that body consciously desired the Administrator to strike the balance . . . perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question . . . . For judicial purposes, it matters not which of these things occurred.

Id. at 865.

151. *Loving*, 917 F. Supp. 2d at 78.

Technically speaking, the Government's interpretation of section 330 would not render section 7407 surplusage[152] because the provisions offer different remedies: IRS disbarment versus judicial injunction. Nonetheless, the court believed that the easier disbarment route would render section 7407 "pointless" as a practical matter.[153]

This type of argument goes only so far. It is quite common for legislatures to enact duplicative measures.[154] This is no less true in tax than in other areas. For instance, Congress has often provided the IRS with overlapping, redundant, but nonetheless independent options for collecting unpaid taxes,[155] and the same conduct frequently could be prosecuted under two or more of the Code's criminal offense sections.[156]

Indeed the district court itself acknowledged that section 7408 "might challenge the Court's doubt that Congress enacts duplicative statutes" because the injunctive remedy provided by section 7408 largely swallows the comparable remedy under section 7407.[157] After "flagging" this point, however, the district court declined to pursue it further because the Government had not relied on, or even cited, section 7408.[158] The Government does argue section 7408 in its circuit court briefs.[159]

The district court declined to decide whether any of its textual points would alone require invalidation of the 2011 regulations. Instead, the court found: "[T]ogether the statutory text and context unambiguously foreclose the IRS's interpretation of [section] 330."[160] Thus, the regulations failed scrutiny at *Chevron*'s Step One.[161]

E. *Remedy*

Having concluded that the 2011 regulations do not pass muster at *Chevron*'s Step One, the district court granted a declaratory judgment that Treasury lacks the statutory authority to promulgate or enforce the new

152. For discussion of the "no surplusage" precept of construction, see Steve R. Johnson, *The 'No Surplusage' Canon in State and Local Tax Cases*, 65 STATE TAX NOTES 793 (2012).

153. *See Loving*, 917. F. Supp. 2d at 78 ("The Court will not lightly assume that Congress enacted such a pointless statute.").

154. *See* LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 104 (2008) (arguing that "the presumptions [underlying the no surplusage canon] simply do not match political reality"). *But see* SCALIA & GARNER, *supra* note 88, at 179 (criticizing Professor Jellum's contention).

155. The general federal tax lien under section 6321, for example, typically "swallows" various special tax liens provided by the Code. *See* DAVID M. RICHARDSON, JEROME BORISON & STEVE JOHNSON, CIVIL TAX PROCEDURE 352–53 (2d ed. 2008) (discussing general tax lien under section 6321 and supplemental special tax liens that vary from normal lien rules).

156. *See* TOWNSEND ET AL., *supra* note 39, chs. 2A–2B.

157. *Loving*, 917 F. Supp. 2d at 78.

158. *See id.* at 79.

159. Brief for the Appellants, *supra* note 31, at 18–19.

160. *Loving*, 917 F. Supp. 2d at 79.

161. *See id.*

regulatory scheme. After reviewing the four established conditions, the court also granted a permanent injunction against Treasury and the IRS enforcing the new scheme.[162] The district court later clarified that the injunction applies to the regulation's requirements that preparers (other than attorneys, certified public accountants, and enrolled agents and actuaries) pay fees unrelated to obtaining PTINs, pass a qualifying examination, and complete annual continuing education. The plaintiffs had not challenged the requirement that preparers obtain PTINs; thus the injunction does not apply to that requirement.[163]

The Government asked the district court to stay the injunction pending appeal. The court evaluated this request under a four-factor test: (1) the likelihood of the Government prevailing on the merits of the appeal, (2) the likelihood that the Government would be irreparably harmed without a stay, (3) the prospect that others would be harmed by a stay, and (4) the public interest.[164]

As to the first factor, the court stated: "Although the Court continues to believe its decision was correct, it is certainly cognizant that the issue is one of first impression and raises serious and difficult legal questions."[165] However, finding that the other three factors do not decisively tilt in the IRS's favor, the court chose not to lift the injunction pending appeal.[166]

IV. THE "PRACTICE" RATIONALE

As seen in subpart IIIC above, a key part of the district court's rationale was that previously unregulated preparers are not engaged in "practice" within the meaning of section 330. That rationale becomes even more important in light of the limitations identified in subpart IID above regarding the court's other rationales.

Below, I develop the court's "practice" rationale. Then, in light of a deeper understanding of what tax returns do, I critique that rationale.

A. *District Court's Conception of "Practice"*

The district court noted that section 330(a)(1) creates no special definition of "practice."[167] In such situations, courts typically "construe a stat-

162. The four factors for a permanent injunction require a plaintiff to show that (1) the plaintiff suffered irreparable injury, (2) the remedies available at law are inadequate, (3) balancing the hardships, an equitable remedy is warranted, and (4) the public interest would not be disserved. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

163. *See Loving*, 920 F. Supp. 2d at 109.

164. *See* Cuomo v. U.S. Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985).

165. *Loving*, 920 F. Supp. 2d at 110.

166. *Id.* at 112.

167. *Id.* at 74.

utory term in accordance with its ordinary or natural meaning."[168] But that does not take us very far in *Loving*. Legal dictionaries define "practice," in the sense most obviously pertinent here, as "engag[ing] in a profession"[169] or "the pursuit of a profession,"[170] which leaves much room for interpretation.

Fortunately, in the view of the district court, Congress provided additional indication of its intended meaning. The court looked to section 330(a)(2)(D) to provide the definition omitted from section 330(a)(1). In the court's estimation, the phrase "advise and assist persons in presenting their cases," in section 330(a)(2)(D), provides the content of "practice" in section 330(a)(1).[171]

What, then, does "case" mean? The district court saw "dispute" as being essential to "case." At the time a return is filed, the court reasoned, there is not yet any dispute in existence between the taxpayer and the IRS as to the taxpayer's liability for the year covered by the return.[172] No dispute, no case, no practice subject to regulation.[173]

The district court's approach could be challenged on any of several grounds: that "practice" is broader than "case," that dispute is not an essential element of "case," or that preparing returns is part of a dispute process. Before evaluating such possible challenges, however, it is important to understand just what tax returns do in our system of taxation.

B. *What Tax Returns Do*

To understand the functions of tax returns, take as the paradigm individual income tax returns, which represent by far the largest category of returns filed with the IRS.[174] All individual income tax returns have at least two elements, and most have a third element as well: (1) always, a number representing the calculation of the taxpayer's tax liability for the year, (2) often, a claim for a refund of the amount by which available refundable credits exceed that calculated tax liability, and (3) always, nu-

168. FDIC v. Meyer, 510 U.S. 471, 476 (1994). This has long been the rule. *See* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 451 (Boston, Hilliard, Gray, & Co. 1833) ("[E]very word . . . is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it.").

169. DANIEL ORAN, ORAN'S DICTIONARY OF THE LAW 373 (3d ed. 2000).

170. JAMES E. CLAPP, RANDOM HOUSE WEBSTER'S DICTIONARY OF THE LAW 335 (2000).

171. *Loving*, 917 F. Supp. 2d at 74.

172. Indeed, there usually is no dispute even later because the IRS accepts without change the great majority of returns as filed.

173. *See Loving*, 917 F. Supp. 2d at 74.

174. In fiscal year 2012, individual income tax returns represented over 60% of all returns filed with the IRS—about 146 million out of the total of about 237 million. The next largest category, employment tax returns, constituted about 13%, about 30 million returns. *See* IRS, INTERNAL REVENUE SERVICE DATA BOOK, 2012 4 (2012) [hereinafter IRS DATA BOOK, 2012].

merous lines and schedules preceding the "bottom line" liability number (and any refund number), which provide the information from which the liability number (and any refund number) was calculated. A document filed with the IRS that lacks sufficient information from which tax liability can be computed does not constitute a valid return.[175]

The second of the above elements—refund claims—deserves amplification. Originally, individual income tax returns were part of a flow of money that had only one direction: from the taxpayer to the government. That changed as a result of three events: (1) the evolution of the income tax from a "class" tax affecting only a small percent of American citizens into a "mass" tax affecting most adult Americans,[176] (2) the enactment of wage withholding, with excess withholding constituting a refundable credit claimed via income tax returns,[177] and (3) the proliferation of other refundable credits.

The stories of the first and second of these events are well known.[178] The third event and its relationship to *Loving* are explored in an article by Nina Olson, National Taxpayer Advocate,[179] and an amici brief by former IRS Commissioners Mortimer Caplin, Sheldon Cohen, Lawrence Gibbs, Fred Goldberg, and Charles Rossotti,[180] from which much of the following discussion is drawn.

In addition to excess withholding, major refundable credits include the earned income credit, child credit, medical insurance cost credit, first-time homebuyer credit, making-work-pay credit, and adoption expense credit.[181] Many of these credits are not intrinsic to the measurement and taxation of income but rather are conceptually non-tax social welfare or incentive measures that Congress has chosen to administer through the income tax apparatus. Return preparers "find themselves on the front line of administering these programs."[182]

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175. *See* Germantown Trust Co. v. Comm'r, 309 U.S. 304, 306–07 (1940).

176. Before the start of World War II, only 3% of Americans paid any federal income tax. That amount rose to 30% by the War's end and continued to climb in succeeding decades. *See* Bruce Bartlett, *The Sacrosanct Mortgage Interest Deduction*, N.Y. TIMES (Aug. 6, 2013, 12:01 AM), http://economix.blogs.nytimes.com/2013/08/061/the-sacrosanct-mortgage-interest-deduction/.

177. *See* I.R.C. § 6401(b)(1) (2012); Treas. Reg. § 301.6402–3(a)(1) (2008).

178. *See* JOSEPH M. DODGE, J. CLIFTON FLEMING, JR. & ROBERT J. PERONI, FEDERAL INCOME TAX: DOCTRINE, STRUCTURE, AND POLICY 9–11 (4th ed. 2012).

179. *See* Olson, *supra* note 18.

180. *See* Brief of Former Comm'rs, *supra* note 35.

181. For a list of these provisions, see I.R.C. §§ 31, 32, 24(d)(1), 35, 36, 36A, and 23, respectively. Refundable credit claims represented over 36% of 2011 refund claims. *See* Olson, *supra* note 18, at 777 (citing IRS data).

182. Brief of Former Comm'rs, *supra* note 35, at 5.

In 2012, over 82% of filed individual income tax returns resulted in payment of a refund.[183] Total refunds paid exceeded $322 billion, an average of nearly $2,700 per return claiming a refund.[184]

Because many of the refundable credits—as well as other features of the Code, including many exclusions, deductions, and nonrefundable credits—are "hideously complex, return preparation is anything but straightforward"[185] and is beyond the abilities of most taxpayers. As a result:

> If you hold yourself out to the public as a tax return preparer, you are not a mere scrivener. You are in the business of advising and assisting your client, the taxpayer, on the treatment of her items of income and expense under the tax code, and on her eligibility for government benefits that are delivered through the tax code. It is *your* judgment and *your* knowledge that enable you to make that entry on the return on behalf of the taxpayer.[186]

Thus, Taxpayer Advocate Olson maintains, "[u]nlike in 1884 . . . or 1982 (when the 1884 statute was 'stylistically' rewritten), return preparers today are the intermediaries between taxpayers and their government for most individual and business taxpayers," and "[t]he definition of representative must keep up with the programs and policies Congress has chosen to administer through today's tax code."[187]

I am somewhat uneasy with the above argument. There is an ongoing debate in statutory interpretation between dynamists who believe that courts should update old statutes in light of changed conditions[188] and textualists who believe that "legal texts must be given the meaning they bore when adopted," and "we do not allow courts to 'update' them."[189]

I am more in sympathy with the latter viewpoint. If the meaning of the statute can expand because Congress laces the Code with non-revenue provisions, it presumably would contract should Congress later move those

183. IRS DATA BOOK, 2012, *supra* note 174, at 6. The number of people receiving tax refunds (about 120 million) is almost double the number receiving payments from the Social Security Administration (about 62 million). SSA, MONTHLY STATISTICAL SNAPSHOT, FEB. 2013 tbl.1 (2013), *available at* http://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/2013-02.html.

184. *See* IRS DATA BOOK, 2012, *supra* note 174, at 19. For a breakdown of the numbers and amounts of refunds claimed for 2011 for six of the largest refundable credits, see Olson, *supra* note 18, at 776 tbl.1 (giving statistics from IRS Compliance Data Warehouse).

185. Olson, *supra* note 18, at 767.

186. *Id.* at 770.

187. *Id.* at 771.

188. *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); LON L. FULLER, THE LAW IN QUEST OF ITSELF 9 (1940) (describing a statute as "not something that is, but something that becomes; it is not a hard chunk of reality, but a fluid process").

189. SCALIA & GARNER, *supra* note 88, at 403–04.

provisions out of the Code, transferring them to other agencies or repealing them entirely. Statutes should be imbued with greater stability.

Despite this uneasiness, there is some pedigree for the evolutionary approach. For instance, the Supreme Court's iconic *Bob Jones University v. United States*[190] decision was based on a static statute which was allowed to "evolve" to reflect changing public policy.[191]

C. *Critique of District Court's Conception*

1. *Is Dispute Necessary?*

As seen in subpart IVA above, the district court defined "practice" in terms of presenting a "case" and saw an extant dispute as essential to the existence of a "case." It is understandable for a federal judge to think so, steeped as such a magistrate is in the "case and controversy" limitation on his or her jurisdiction.[192]

But is dispute an indispensable ingredient of "case"? Dictionaries are not the be-all and end-all for legal definitions—the perils of dictionary shopping are well known[193]—but they are relevant to the exercise.

Legal dictionaries and related works often give dispute or controversy as an attribute of either "case" or its near relatives—often synonyms[194]—"cause," "action," and "suit."[195] But an approximately equal number define these terms without reference to dispute or controversy. The alternative definitions include "grounds,"[196] "right to sue,"[197] "all proceedings with respect to a . . . claim,"[198] and "[t]he legal theory of the party."[199]

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190. 461 U.S. 574 (1983).

191. However, the *Bob Jones* Court cautioned that its approach should be used sparingly. *See id.* at 592.

192. *See* U.S. CONST. art. III, §§ 1–2 (defining power of judiciary). This is the textual basis, for example, of the inability of federal judges to render advisory opinions. *See* Flast v. Cohen, 392 U.S. 83, 96–97 (1968).

193. One dictionary may offer multiple definitions of the key word, many dictionaries have gone through multiple editions, and there are numerous competing dictionaries. All this gives judges wide opportunity to manipulate results. *See generally* SCALIA & GARNER, *supra* note 88, app.; Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275 (1998); Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994).

194. *See* BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 139 (2d ed. 2001) (noting that differentiation between case and cause "if it does exist at all . . . is little heeded"); DAVID MELLINKOFF, MELLINKOFF'S DICTIONARY OF AMERICAN LEGAL USAGE 9 (1992) ("*[A]ction* is interchangeable with *case*, *lawsuit*, and *suit* . . . .").

195. *See* BALLENTINE'S LEGAL DICTIONARY AND THESAURUS 142 (1995); BLACK'S LAW DICTIONARY 243 (9th ed. 2009); GARNER, *supra* note 194, at 142; ORAN, *supra* note 169, at 79.

196. WILLIAM C. BURTON, BURTON'S LEGAL THESAURUS 73 (3d ed. 1998).

197. MELLINKOFF, *supra* note 194, at 9.

198. CLAPP, *supra* note 170, at 71.

199. IRWIN ALTERMAN, PLAIN AND ACCURATE STYLE IN COURT PAPERS 172 (1987). *But see* GARNER, *supra* note 194, at 139 (describing this use as "nonsense").

The reference above to "claim" is significant in light of the genesis of section 330. As shown in subpart IIA above, the provision originated in 1884, and the current (1982) revision was intended to effect only stylistic, not substantive, changes. The 1884 version referred to the representation of "claimants," those who make claims. The dictionaries are virtually unanimous that "claim" means "an assertion that one is entitled to something,"[200] or "[t]he aggregate of operative facts giving rise to a right enforceable by a court."[201] This also was the meaning understood around the time the original version of section 330 was enacted.[202]

As described in subpart IVB above, tax returns assert the taxpayer's calculated liability and, in most cases, their demand for a specified refund for which the taxpayer will be entitled to sue if not paid by the IRS.[203] These sound like claims, rights to sue, and assertions of entitlement as used above. The filing of the returns could be viewed as a proceeding with respect to the claims.[204]

Tax returns also contain numerous lines and schedules providing the information from which the liability and refund amounts were computed. These sound like the taxpayer's grounds, legal theory, or the aggregate of operative facts giving rise to the taxpayer's enforceable right.[205]

2. *Is Dispute Present?*

Another possible avenue of attack would be to accept the district court's premise that dispute is necessary but to maintain that dispute is present as to prepared returns, either potentially or actually. In taking this position, Taxpayer Advocate Olson offers three perspectives. First, "tax return filing has always been a somewhat adversarial act because the taxpayer holds all the information and gets to decide (at her own risk) how much she will tell the tax agency."[206]

Second, the sweep and complexity of the income "tax system almost guarantee that every return has an error in it—some inadvertent, some

200. CLAPP, *supra* note 170, at 84; *see also* BALLENTINE'S LEGAL DICTIONARY AND THESAURUS, *supra* note 195, at 101; GARNER, *supra* note 194, at 159; MELLINKOFF, *supra* note 194, at 81; ORAN, *supra* note 169, at 90.

201. BLACK'S LAW DICTIONARY, *supra* note 195, at 81–82; MELLINKOFF, *supra* note 194, at 81; ORAN, *supra* note 169, at 90.

202. *See* Hobbs v. McLean, 117 U.S. 567, 575 (1886) ("What is a claim against the United States is well understood. It is a right to demand money from the United States."); *see also* Milliken v. Barrow, 65 F. 888 (C.C.E.D. La. 1895), *aff'd*, 74 F. 612 (5th Cir. 1896).

203. *See* BLACK'S LAW DICTIONARY, *supra* note 195, at 281.

204. *See* I.R.C. § 7422(a) (2012) (prohibiting suit for refund unless preceded by claim for refund).

205. It would be no answer to say that not all returns make refund claims. All preparers prepare some refund returns and some non-refund returns. As long as a preparer prepared *some* refund claims, the preparer would be engaged in "practice" under the above line of reasoning.

206. Olson, *supra* note 18, at 771.

intentional."[207] Indeed, the "law has evolved so that competently advising a taxpayer and accurately preparing even the simplest return require an extraordinary exercise of judgment and knowledge by the return preparer."[208]

Third, the position taken on the return "constitutes the opening volley in making [the taxpayer's] case," part of the "annual conversation with the federal government."[209] After the return has been submitted, but before it is accepted into the system, the IRS subjects the return to substantial error review and pre-screening, especially when the return claims a refund. These activities are not counted as audits. When these steps are taken into account, the audit rate rises from the officially announced rate of around 1%[210] to about 7.5%.[211] From this perspective, the bulk of the IRS's compliance checks—arguably controversy "cases"—occur outside traditional examination and collection.[212] Based on modern IRS processing procedures, Professor Camp concludes: "Far from being automatically accepted as filed, all filed returns must make a prima facie case that they are correct. . . . Tax returns do, in a very real sense, present a case before the IRS as to what should be assessed."[213]

The perspectives above represent independent challenges to the district court's "practice" rationale. Dispute might or might not be an essential component of "case" and thus "practice." If it is, dispute might or might not be present in sufficient degree in the return preparation, filing, and processing system. Both of these propositions are debatable.

V. AN ALTERNATIVE RATIONALE—"REPRESENTATIVE"

A. *"Representative"*

The questionable nature of the rationales offered by the district court does not mean that *Loving* was wrongly decided. Appellate courts review the holdings, not the reasoning, of lower courts.[214] Accordingly, it has long been "the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason."[215]

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207. *Id.*

208. *Id.* at 771–72.

209. *Id.* at 772.

210. *See* IRS DATA BOOK, 2012, *supra* note 174, at 22.

211. *See* Olson, *supra* note 18, at 773.

212. *See id.*

213. Camp, *supra* note 104, at 463, 465. Professor Camp's painstaking historical elaboration makes his article, along with Taxpayer Advocate Olson's, must-reads for those interested in *Loving*.

214. *See* Helvering v. Gowran, 302 U.S. 238, 245 (1937).

215. SEC v. Chenery Corp., 318 U.S. 80, 88 (1943) (internal quotation marks omitted). The courts are "reluctant to entertain novel propositions of law with broad implications . . . that were not advanced in earlier stages of the litigation . . . ." Comm'r v. Banks, 543 U.S. 426, 438 (2005). However, the "representa-

I believe there is an alternative rationale that provides a sounder basis for the district court's holding. That rationale trenches on other language in section 330. Section 330(a)(1) authorizes regulation of "the practice of representatives of persons before the Department of the Treasury."[216] Thus, even if there is "practice," it is not subject to regulation unless it is the practice of a "representative." The centrality of "representative" to the statutory scheme is underlined by the fact that the term (or a form of it) appears in four other places in the statute[217] and appeared in the original, 1884 version.[218]

The sources are in virtually universal agreement that, in the sense relevant here, to represent is "to act for another, as an agent or attorney does; to stand in the place of another; to speak for another,"[219] and that a representative is "[o]ne who stands for or acts on behalf of another."[220]

One who prepares the return of another, without more, is not acting, standing, or speaking for the taxpayer. Taxpayer Advocate Olson is surely correct in saying that taxpayers typically do not understand the tax law themselves and so rely on the expertise and advice of their preparers.[221] But that does not alter the fact that the return is the taxpayer's.[222] A form signed by the taxpayer, but not the preparer, is a valid return; a form signed by the preparer, but not the taxpayer, is not a valid return.[223] Thus, the preparer cannot act on behalf of the taxpayer in submitting a return.

The preparer-client situation in *Loving* is distinguishable from the attorney-client relationship in *Commissioner v. Banks*.[224] In *Banks*, the taxpay-

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tive" issue was raised by the plaintiffs from the start. *See* Complaint for Declaratory and Injunctive Relief at ¶¶ 55–58, Loving v. IRS, 917 F. Supp. 2d 67 (D.D.C. 2013) (No. 12-0385), 2012 WL 5356606.

216. 31 U.S.C. § 330(a)(1) (2012).

217. *See id.* § 330(a)(2), (a)(2)(C), (b), (b)(4).

218. *See* Act of July 7, 1884, ch. 334, 28 Stat. 236, 258 ("representing of claimants").

219. BALLENTINE'S LEGAL DICTIONARY AND THESAURUS, *supra* note 195, at 575–76.

220. BLACK'S LAW DICTIONARY, *supra* note 195, at 1416; *see also* CLAPP, *supra* note 170, at 372; MELLINKOFF, *supra* note 194, at 555; ORAN, *supra* note 169, at 418.

221. *See* Olson, *supra* note 18, at 771–72 (observing complex evolution of tax law has resulted in reliance on expertise of tax preparers).

222. *See* Camp, *supra* note 104, at 468 (arguing that return preparers are not agents or representatives of their clients). Professor Camp and I agree that "representative" is the best argument against the 2011 regulations. *See id.* at 462–64 (providing support for assertion that representative is best argument). He, however, believes the argument ultimately fails, while I believe that it succeeds. *See id.* at 466–69 (concluding that representative argument fails). For a discussion of his objections to the argument, see *infra* notes 228–42.

223. *See* I.R.C. §§ 6061, 6064–65 (2012); Treas. Reg. § 1.6012–1(a)(5) (2012).

224. *Compare* Comm'r v. Banks, 543 U.S. 426 (2005) (seeking above-the-line deductions for contingent fees paid to attorneys), *with* Loving v. IRS, 917 F. Supp. 2d 67 (D.D.C. 2013) (explaining that preparer is not authorized to act on behalf of taxpayer-client).

ers, successful plaintiffs in tort actions, sought above-the-line deductions for contingent fees paid to their attorneys.[225] On the basis of the assignment-of-income doctrine, the Supreme Court disagreed, relegating the taxpayers to less desirable below-the-line deductions. In rejecting an alternative argument for the taxpayers, the Court stated:

> We further reject the suggestion to treat the attorney-client relationship as a sort of business partnership or joint venture for tax purposes. The relationship between client and attorney . . . is a quintessential principal-agent relationship. . . . The client may rely on the attorney's expertise and special skills to achieve a result the client could not achieve alone. That, however, is true of most principal-agent relationships, and it does not alter the fact that the client retains ultimate dominion and control over the underlying claim. . . . Even where the attorney exercises independent judgment without supervision by, or consultation with, the client, the attorney, as an agent, is obligated to act solely on behalf of, and for the exclusive benefit of, the client-principal, rather than for the benefit of the attorney or any other party.[226]

In the context discussed by *Banks*, the attorney is authorized to act, and does act, on behalf of the plaintiff-client. In the *Loving* context, however, the preparer is not authorized to act, and does not act, on behalf of the taxpayer-client. The attorney is empowered to start the case and take other significant action via documents signed by him alone. The client makes the decisions, of course, but the lawyer has the power to execute them. In contrast, the preparer *qua* preparer lacks this power. It is the taxpayer's execution, not the preparer's, that makes the filed document legally operative as a tax return.[227]

B. *Counterarguments Considered*

Presumably because it was not the focus of the district court's opinion, the "representative" question received scant attention from the Government on appeal. The totality of the treatment of the question in its initial brief to the D.C. Circuit was the following half sentence in a footnote: "There can be no serious dispute that paid tax-return preparers are 'representatives of persons' . . . ."[228]

Plainly, a more substantial rejoinder is needed. Commentators and officials have offered four: (1) preparers routinely communicate with the IRS after filing; (2) Treasury regulation has progressively and substantially

225. *See Banks*, 543 U.S. at 426 (providing facts).

226. *Id.* at 436.

227. *See* Olpin v. Comm'r, 270 F.3d 1297, 1300–01 (10th Cir. 2001), *aff'g* 78 T.C.M. (CCH) 1254 (1999) (holding that "return" signed by tax preparer but not taxpayers is invalid even if taxpayers intended document to be their return).

228. Brief for the Appellants, *supra* note 31, at 14 n.11.

expanded; (3) preparers have limited appearance rights; and (4) purposively, the current situation is comparable to the situation prompting the 1884 legislation. These arguments are considered below.

1. *Routine Communication*

The National Taxpayer Advocate points out that, after their clients' returns are filed, "preparers call the IRS constantly inquiring about the status of these returns. In short, they have cases before the IRS and they are advocating on behalf of their clients' claims."[229]

But inquiring when the IRS is likely to send out the refund is qualitatively different from urging the merits of the claim. The latter is substantive. The former is ministerial.[230]

2. *History of Expansion*

Professor Camp carefully develops the history of regulation of practitioners under Treasury Circular 230, including modifications between 1884 and 1921, between 1921 and 1966, in 1984, in 1994, in 2004, and in 2007.[231] He concludes: "What Treasury has done over time is expand the term 'practice' beyond simply the representational behavior of 'representatives of persons.' . . . The term 'practice' now includes nonrepresentational behavior—such as preparing returns and rendering written tax advice—as long as that behavior is engaged in by representatives of persons."[232]

As described in subpart IIB above, some of the policy concerns about the regulation are intrusion and regulatory overkill. The dramatic expansion of Treasury's asserted authority under Circular 230—particularly in the last two decades—suggests that there may be substance to these concerns.

Moving beyond policy, there are three reasons why I believe the above history does not legitimize the 2011 regulations. First, usurpation is not its own justification. The fact that an agency expands its self-proclaimed power does not make such arrogations legitimate. This is especially so because the most aggressive assertions under Circular 230 came, not in the first 100 years after the 1884 legislation, but only comparatively recently, within the last twenty years.

Second, although courts sometimes consider post-enactment administrative behavior as one factor bearing on interpreting a statute, Part VI

229. Olson, *supra* note 18, at 775.

230. *Cf.* S. REP. NO. 94-354, at 37 (1975) (discussing when request for status report can constitute an *ex parte* communication prohibited by APA, 5 U.S.C. § 557(d)).

231. *See* Camp, *supra* note 104, at 457–62 ("I do not present the history of Circular 230 as a strictly legal or doctrinal argument favoring regulation . . . . My intention is to simply explain how the decision to regulate return preparers is more consistent than inconsistent with the past.").

232. *Id.* at 462.

puts this and related factors together in the context of a *Brown & Williamson* analysis. As shown in Part VI, the totality of that analysis militates against the validity of the 2011 regulations, or at a minimum offsets the Circular 230 historical analysis.

Third, the most pertinent event in the Circular 230 history is the 1984 episode. In 1984, as part of the government's ongoing war against tax shelters, Treasury amended sections 10.2(a) and 10.33 of Circular 230 to assert—for the first time—authority to control opinion writing by attorneys and certified public accountants.[233]

Professor Camp agrees that under a narrow reading of section 330(a), the 1984 change "was overreaching."[234] However, Congress sanctioned that change. It enacted section 330(d) to provide:

> Nothing in [section 330] or in any other provision of law shall be construed to limit the authority of the [ ] Treasury to impose standards applicable to the rendering of written advice . . . of a type which the [Treasury] determines as having a potential for tax avoidance or evasion.[235]

The 1984 tax shelter opinion change was the only expansion of Circular 230 that Congress specifically ratified. Congress did not see fit to enact comparable provisions blessing other expansions of Circular 230. This episode points to the correct path in *Loving*. If Congress wishes, it can legitimate Treasury's approach by enacting confirming legislation, as Congress did in 1984 regarding section 330(d). Absent such legitimation, the naked assertion of administrative power should not be sustained.

3. *Limited Appearance Rights*

Section 10.7 of Circular 230 created limited practice rights for return preparers. With respect to returns they have prepared, they are allowed to "appear without enrollment as the taxpayer's representative . . . before revenue agents and examining officers" of the IRS Examination Division.[236]

The Government does not emphasize this provision in *Loving*. Properly so. One could understand Treasury, based on section 330, regulating preparers who actually do represent clients during audits under section 10.7. But most return preparers do not exercise this privilege. The section should not be used as a cat's paw to sweep into the regulatory net the numerous return preparers who never act as representatives.

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233. *See* 49 Fed. Reg. 6719 (1984) (codified at 31 C.F.R. pt. 10).

234. Camp, *supra* note 104, at 460.

235. 31 U.S.C. § 330(d) (2012).

236. Camp, *supra* note 104, at 459 (alteration in original) (internal quotation marks omitted).

4. *Comparable Purposes*

As shown in subpart IIA above, Congress enacted the original version of section 330 because of misconduct by unscrupulous attorneys and claims agents.[237] Likening current incompetence and dishonesty to that earlier misconduct, the National Taxpayer Advocate maintains: "Today's tax system, with its industry of preparers, closely resembles the circumstances in 1884 when Congress sought to impose order on the process of filing claims before Treasury."[238]

If the analogy holds, this argument could be persuasive to judges who accept purpose as a legitimate part of the *Chevron* Step One inquiry. I think, though, that the situations are distinguishable in three respects. First, the 1880s claims agents actually appeared before Treasury officials;[239] mere return preparers do not. Second, claimants in the 1880s often conveyed their claims to the representatives;[240] taxpayers do not convey their tax refund claims to their return preparers—indeed they are legally prohibited from doing so by the Anti-Assignment Act.[241] Third, in the 1880s, rival agents and attorneys often made conflicting claims on Treasury;[242] there is no indication that something of the same nature is a problem now. The proffered analogy does not fit with much precision.

VI. *BROWN & WILLIAMSON*

The Supreme Court's 2000 *Brown & Williamson* decision is an important case for *Chevron*, general administrative law, and statutory interpretation.[243] The district court's *Loving* opinion cited *Brown & Williamson* twice.[244] In my view, however, that case should play a larger role in the current controversy.

There are differences between *Brown & Williamson* and *Loving* to be sure, but there are meaningful similarities as well. Below, I describe *Brown & Williamson*, then note its application to *Loving*.

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237. For a further discussion of the reasons Congress enacted the original version of section 330, see *supra* notes 16–23 and accompanying text.

238. Olson, *supra* note 18, at 775.

239. *See* George Maurice Morris, *Growth and Regulation of the Treasury Bar*, 8 A.B.A. J. 742, 742 (1922) (observing that claims agents appeared before Treasury officials).

240. *See id.* ("As the result of the conveyance by claimants of their claims to their representatives questions began to arise between such claimants and their agents . . . .").

241. *See* Anti-Assignment Act, 31 U.S.C. § 3727(b) (2012) (restricting who can receive assignment).

242. See Morris, *supra* note 239, at 742.

243. *See generally* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

244. *See* Loving v. IRS, 917 F. Supp. 2d 67, 75, 77 (D.D.C. 2013) (standing for proposition that ambiguous words can be clarified by context and idea that meaning of one statute may be clarified by other statutes, especially ones subsequently enacted and more specific).

A. *The Case*

The Food, Drug, and Cosmetic Act (the "Act") grants the Food and Drug Administration authority to regulate, *inter alia*, "drugs" and "devices."[245] In 1996, after having long disclaimed having authority to do so, the FDA asserted jurisdiction under the Act to regulate tobacco products, and it promulgated regulations to do so. By a five to four vote, the Supreme Court invalidated the regulations under *Chevron*'s Step One.

The majority stated that, at Step One, "a reviewing court should not confine itself to examining a particular statutory provision in isolation."[246] It should consider, as well, other related statutes, "particularly where Congress has spoken subsequently and more specifically to the topic at hand."[247] In addition, the court "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[248]

The Court reached its Step One conclusion on the basis of several considerations. One was the Act taken as a whole.[249] By itself, however, this likely would have been insufficient, especially because, as noted by the dissent, the statutory language—read literally—seemed to countenance the regulations.[250] Thus, looming large to the outcome were the four reinforcing rationales discussed below: (1) the pattern of subsequent legislation, (2) the FDA's repeated disavowal of the authority it eventually asserted in 1996, (3) Congress's rejection of bills that would have clearly conferred the authority, and (4) the expectation that Congress will make particularly important decisions itself rather than delegate them to an agency.

1. *Pattern of Subsequent Legislation*

The *Brown & Williamson* majority noted that, over a thirty-five year period after passage of the Act, Congress had enacted six separate pieces of legislation addressing tobacco use and human health, the "collective premise" of which was that tobacco products would continue to be sold in

245. *See* 21 U.S.C. §§ 321(g)–(h), 393 (2012).

246. *Brown & Williamson*, 529 U.S. at 132.

247. *Id.* at 133. The Court has not been consistent as to nuance. In contrast to *Brown & Williamson*'s "especially" language, the Court in the same year said that courts should "interpret the text of one statute in the light of text of surrounding statutes, *even* those subsequently enacted." Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 786 n.17 (2000) (emphasis added) (calling this principle "well established"); *see also* United States v. Estate of Romani, 523 U.S. 517, 530–31 (1998) ("[A] specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended.").

248. *Brown & Williamson*, 529 U.S. at 133.

249. *See id.* at 142.

250. *See id.* at 162 (Breyer, J., dissenting).

the United States.[251] Although the text of the Act could, at the time of its enactment, have been plausibly interpreted to allow regulation or even prohibition of tobacco products, the subsequent legislation had narrowed the range of plausibility, excluding that possibility.[252]

I have never been entirely sure why this should be so. As seen earlier, textualists—and the five Justices in the majority in *Brown & Williamson* were usually considered textualists—typically insist that the meaning of language at the time the statute is enacted should control.[253] And the reenactment and inaction canons[254] are usually (and properly) considered weak,[255] in part because the views of subsequent legislatures should not be attributed to the enacting legislature. Also, when a later statute does not purport to amend or abrogate a prior statute, there is a strong presumption against repeal by implication.[256]

Why then should later statutes influence the construction of earlier statutes? One reason seems to be courtesy to a coordinate branch of government. Courts presume that legislatures pass laws "with deliberation, and with full knowledge of existing ones on the same subject . . . ."[257] Of course, "[t]he legislative omniscience assumed by this explanation is fanciful,"[258] but Anglo-American law would be unrecognizable without fictions. It is polite to assume that Congress's actions, even over time, are cohesive.

Additionally, courts believe that it is part of their function to provide stability and assist the governed to understand the commands of the sovereign. Thus:

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251. *See id.* at 139, 143 (majority opinion).

252. *See id.* at 143 ("Over time, however, subsequent acts can shape or focus those meanings.").

253. *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) ("It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law."); Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote."); United States v. Sw. Cable Co., 392 U.S. 157, 170 (1986) (stating that views of subsequent legislators have "very little, if any, significance"); Haynes v. United States, 390 U.S. 85, 87 n.4 (1968) ("The view of a subsequent Congress of course [can] provide no controlling basis from which to infer the purposes of an earlier Congress.").

254. *See generally* Steve R. Johnson, *The Reenactment and Inaction Doctrines in State Tax Litigation*, 50 STATE TAX NOTES 661 (2008) (providing general discussion of reenactment and inaction doctrines).

255. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 600–02 (1983) (stating that these canons are usually disfavored but finding special reasons to apply them in case at hand).

256. *See* J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 141–42 (2001) ("[T]he only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." (quoting Morton v. Mancari, 417 U.S. 535, 550 (1974))).

257. Meade v. Freeman, 462 P.2d 54, 62 (Idaho 1969); *see also* Steve R. Johnson, *The Judicial Instinct to Harmonize Statutes*, 57 STATE TAX NOTES 599 (2010) (discussing judges' inclination to reach results that harmonize statutory meanings).

258. SCALIA & GARNER, *supra* note 88, at 328.

> Where a statutory term . . . is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law. We do so not because that precise accommodative meaning is what the lawmakers must have had in mind (how could an earlier Congress know what a later Congress would enact?), but because it is our role to make sense rather than nonsense out of the *corpus juris*.[259]

2. *Agency's Prior Disavowal of Authority*

In a brief filed in a 1980 case, the FDA stated: "In the 73 years since the enactment of the original [Act] . . . the FDA has repeatedly informed Congress that cigarettes are beyond the scope of the statute . . . ."[260] In light of the importance and visibility of the issue, the Court thought it inconceivable that Congress was unaware of these prior agency statements.[261]

In light of the Court's frequent previous statements discounting the significance of agency inconsistency,[262] the *Brown & Williamson* majority did not say that the FDA's former statements were themselves controlling. Instead, "[t]he consistency of the FDA's prior position is significant . . . for a different reason: It provides important context to Congress's enactment of its tobacco-specific legislation . . . [which] has effectively ratified the FDA's previous position that it lacks the jurisdiction to regulate tobacco."[263]

3. *Rejected Bills*

The *Brown & Williamson* majority noted that Congress had considered and rejected bills that would have granted the FDA the authority it asserted for its invalidated regulations.[264] As the *Loving* district court noted, the Court in other cases has downplayed the significance of such behavior as a guide to statutory interpretation.[265]

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259. W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100–01 (1991) (citation omitted).

260. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 146 (2000) (quoting Brief for Appellee (FDA) at 14–15, Action on Smoking & Health v. Harris, 655 F.2d 236 (D.C. Cir. 1980) (No. 79-1397)).

261. *See id.* at 156 (concluding that in light of circumstances, it was "hardly conceivable that Congress . . . was not abundantly aware of what was going on"). This is similar to what the Court observed about Congress's knowledge of the IRS's position on tax exemption of racially discriminatory schools. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 600–02 (1983).

262. *See supra* notes 103–26.

263. *Brown & Williamson*, 529 U.S. at 156–57.

264. *See id.* at 144 (explaining Congress's considerations).

265. *See supra* notes 99–100 and accompanying text.

What made the *Brown & Williamson* context different? In *United States v. Rodgers*,[266] an important tax collection case, the Court discounted the significance of Congress's failure to enact a bill, concluding that the reason for non-enactment was more likely that Congress viewed the bill as unnecessary (because the IRS already possessed the power in question) than as undesirable (because the IRS should not have that power).[267] That could not have been the reason for the failure of the tobacco regulation bills. With the FDA consistently stating that it lacked the regulatory authority, Congress could not have concluded that the bills were superfluous, making more probable the inference that Congress, in rejecting the bills, wished to keep the authority out of the FDA's hands.

4. *Major Question*

There is a debate about whether there is and should be a "major question" exception to judicial deference to agencies.[268] There is some judicial support for a strong form of the rule: major policy choices should be made by Congress, not by agencies.[269] There is substantial judicial support for a weaker form of the rule: it is presumed that Congress intends to address major questions itself and that only unambiguous statutory language will persuade a court that Congress intended to delegate resolution of such questions to an agency.[270]

Commentators continue to discuss both the scope and the wisdom of "major question" rules.[271] However, many Justices embraced the weak form in a fairly recent tax decision,[272] and the Court adopted an important rationale behind the rules in an even more recent non-tax case.[273]

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266. 461 U.S. 677 (1983).

267. *See id.* at 702 n.31.

268. *See* Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exceptions to* Chevron *Deference as a Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593 (2008).

269. *See* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring) ("It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people. When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress and the President insofar as he exercises his constitutional role in the legislative process.").

270. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 320 n.44 (2001); Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001); MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994); Kent v. Dulles, 357 U.S. 116, 129 (1958).

271. *See, e.g.*, Steve R. Johnson, *Elephants, Mouse Holes, Non-Barking Dogs, and Statutory Interpretation*, 64 STATE TAX NOTES 911 (2012); *Preserving Fairness in Tax*, *supra* note 4, at 304–07; Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19 (2010); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

272. *See* United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1842 (2011); *see also* Johnson, *supra* note 5.

273. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1872 (2013) ("[C]oncerns about agency self-aggrandizement are at their apogee . . . in cases where an

The *Brown & Williamson* majority linked the "major questions" doctrine to *Chevron*'s notion that a statutory gap may be an implicit delegation of authority to the agency. It stated: "In extraordinary cases, [ ] there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[274] And it offered the following—the weak form of the doctrine—apparently as an example: "A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[275] Applying this to tobacco regulation, the Court stated: "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[276]

There is an epilogue. By the time *Brown & Williamson* had worked its way through the courts, "Congress had enacted limited versions of most of FDA's major initiatives" regulating tobacco.[277] Then, in 2009, Congress enacted the Family Smoking Prevention and Control Act, conferring upon the FDA broad authority to regulate tobacco products.[278]

B. *Application to* Loving

As seen in subpart IIIB, the *Loving* district court conducted the Step One inquiry in an exacting fashion, not stopping at the fact that section 330(a)(1) had not defined "practice of representatives."[279] Instead, it enlisted other portions of the statute, as well as other statutes, to reach its conclusion that Congress had unambiguously withheld the authority asserted by Treasury and the IRS.

Brown & Williamson reflects the same kind of approach. The literal language of the statute at issue supported the agency, but the majority did not stop there. The majority found the literal language to be overridden by a combination of contextual clues.

Giving greater attention to *Brown & Williamson* bolsters the *Loving* plaintiffs' cause in four ways: (1) providing a stronger framework for the district court's context and "wider context" points, (2) creating some purchase for potential arguments the district court discounted, (3) laying

agency's expansive construction of the extent of its own power would have wrought a fundamental change in the regulatory scheme.").

274. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

275. *Id.* (quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)).

276. *Id.* at 160 (citing MCI Telecomms. Corp. v. Am. Tele. & Tele. Co., 512 U.S. 218, 231 (1994)).

277. Moncrieff, *supra* note 268, at 627 (identifying different versions).

278. *See* Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended in scattered sections of 21 U.S.C.); *see also* Jeremy R. Singer, Note and Comment, *Taking on Tobacco: The Family Smoking Prevention and Tobacco Control Act*, 34 NOVA L. REV. 539, 539–40 (2010) (providing historical background).

279. *See* Loving v. IRS, 917 F. Supp. 2d 67, 73–75 (D.D.C. 2013) (conducting analysis under *Chevron*'s Step One).

a foundation for a strong-form major-question argument, and (4) suggesting a favorable tie-breaker via a weak-form major-question argument. Below, I discuss the first and second of these possibilities together, then the third and fourth together.

1. *Wider Context and Discounted Arguments*

The *Brown & Williamson* majority did not treat any one indicator as dispositive. Instead, it wove several threads together to form the contextual tapestry it found decisive: the statute as a whole, other statutes enacted subsequent to the statute at issue, the FDA's prior and contrary position—surely known to Congress—that it lacked the authority in question, and Congress's rejection of bills that would have conferred the authority the FDA said it lacked under existing legislation.

Each of these elements arguably exists in *Loving* as well: the statute as a whole (the district court reading section 330(a)(1) in light of section 330(a)(2)(D)),[280] other subsequent statutes (the ten preparer penalties, the disclosure statute, and the injunction statute),[281] the agency's denial of authority (including in testimony given by the IRS to Congress),[282] and Congress's rejection of bills that would have conferred on the Treasury/IRS the authority it originally said it lacked under section 330.[283]

Deploying these arguments in a *Brown & Williamson* analysis would strengthen the arguments—context of the statute and wider context—that the district court did employ. Part III noted that these points have some cut when based solely on various canons of construction but that their cut is limited by certain weaknesses. These points would have greater force when grounded on both traditional canons and *Brown & Williamson*.

In addition, the district court chose not to enlist Treasury/IRS's inconsistency and Congress's rejection of potentially empowering bills. That rejection is understandable based on precedents as to such things taken in isolation. But adopting a *Brown & Williamson* framework could allow these rejected points to be considered as part of a meta-contextual analysis.

I do not maintain that the *Loving* circumstances map with perfect congruence onto the *Brown & Williamson* circumstances. For instance, the six subsequent tobacco-specific statutes strike me as closer in subject matter to the Food and Drug Act than the preparer penalty, disclosure, and injunction sections are to section 330. Further, the FDA's disavowals of jurisdiction were more frequent and visible than the IRS's disavowals of jurisdiction. Thus, the meta-context in *Brown & Williamson* is stronger than the meta-context in *Loving*.[284]

280. *See supra* notes 127–41 and accompanying text.

281. *See supra* notes 142–61 and accompanying text.

282. *See supra* notes 103–26 and accompanying text.

283. *See supra* notes 93–102 and accompanying text.

284. And even the *Brown & Williamson* meta-context persuaded only five of the nine Justices.

But if *Loving* is "*Brown & Williamson* lite," it is more "*Brown & Williamson*" than "lite." That is, although there is some difference in degree or intensity, the similarities between the two cases remain striking. Serious development of *Brown & Williamson* and its comparability to *Loving* would, I believe, bolster the *Loving* result.

2. *"Major Question" Arguments*

The *Loving* district court stated that the importance of the initiative is irrelevant at Step One of *Chevron*.[285] *Brown & Williamson* takes the same tack. The dissent in that case offered that "the statute's basic purpose—the protection of public health—supports the inclusion of cigarettes within its scope."[286] The majority rejoined that, "[i]n our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop."[287]

But this attains yet more strength when put in a *Brown & Williamson* major-question context. By a rhetorical ju-jitsu, the more significant the return preparer regulation project—the more preparers involved, the more clients affected, and the bigger the dollar stakes—the more the plaintiffs can argue, first, that the matter is so significant that Congress, not Treasury, should create the regulatory scheme (strong form) or, second, that the courts should find that Congress delegated that authority to Treasury only upon the clearest textual evidence (weak form).

Of the two, the weak-form version stands the better chance of winning judicial acceptance. One of the problems with the major-question approach is the absence of readily manageable judicial standards: at what point does a question become important enough to trigger the doctrine?[288] That is a bigger concern when applying the strong form. The weak form is a species of the well-known and often invoked "plain statement" principle of statutory interpretation,[289] and line-drawing difficulties

285. *See supra* notes 90–92 and accompanying text.

286. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 162 (2000) (Breyer, J., dissenting) (pointing out FDA's findings that unregulated tobacco use causes over 400,000 deaths annually and that tobacco products kill more people than AIDS, car accidents, alcohol, homicides, illegal drugs, suicides, and fires combined).

287. *Id.* at 161 (majority opinion) (quoting United States v. Article of Drug, Bacto-Unidisk, 394 U.S. 784, 800 (1969)).

288. *Cf.* City of Arlington v. FCC, 133 S. Ct. 1863, 1868–70 (2013) (rejecting distinguishing between "the big, important [interpretations]" and "humdrum, run-of-the-mill stuff" in part because of difficulty of drawing line separating two categories); *see also* Mark Seidenfeld & Jim Rossi, *The False Promise of the "New" Nondelegation Doctrine*, 76 NOTRE DAME L. REV. 1 (2000) (discussing manageable standards in context of nondelegation doctrine).

289. When a particular interpretation of a statute would compromise important substantive principles (here, that the legislature should make the big calls), courts typically accept the interpretation only if the statute contains a plain, unambiguous statement that the legislature intended to do so. *See, e.g.*, Nixon v. Mo.

do not seem to have deterred courts very often from invoking that principle.

The district court properly acknowledged that *Loving* presents "serious and difficult legal questions."[290] A tie-breaking principle such as *Brown & Williamson*'s weak-form, major-question approach might present a tempting way to resolve the case in favor of the plaintiffs.

VII. CONCLUSION

There always are two questions in law: desirability and legitimacy. The desirability question is whether the outcome sought by a party would be a wise result as measured by fairness, efficiency, administrability, or whatever set of criteria the law makes controlling in the situation at hand. But, in our legal system, no agency or tribunal is a knight-errant. None possesses a roving commission to do Good and fight Evil wherever found. The authority of all agencies—including Treasury and the IRS—is limited, and these limits cannot legitimately be exceeded. Thus, the second question in law is always whether the official or body whose intervention the party seeks is duly empowered to decree the desirable outcome.[291]

The second question—legitimacy—is at the core of *Loving*. At the level of desirability, the Government may well be right that increased regulation of tax return preparers would serve the public interest. But that conviction remains idle unless and until Congress cloaks the Treasury with authority to effect such regulation. In my view, although the question is close, section 330 does not confer the requisite authority, and the challenged regulations are illegitimate.

The district and circuit courts' invalidation of the assumedly desirable but illegitimate regulations need not frustrate the Good for long. Congress always has the power to reverse the decision by amending section 330. In our democratic society, Congress is the ultimate arbiter of desirability.

Beyond its practical significance, *Loving* matters in the ongoing doctrinal disputes about Step One of the *Chevron* analysis. The decision of the *Loving* district court takes a textual and exacting approach to Step One. This is consistent with the contemporary, dominant—though certainly not universal—approach. The ultimate outcome in *Loving* will influence future Step One jurisprudence.

It will be interesting as well to see what role *Brown & Williamson* plays in future cases. The invocation of that precedent in more than passing

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Mun. League, 541 U.S. 125 (2004); Gregory v. Ashcroft, 501 U.S. 452, 461 (1991); Hoffman v. Conn. Income Maint. Dep't, 492 U.S. 96, 101 (1989); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985).

290. Loving v. IRS, 920 F. Supp. 2d 108, 110 (D.D.C. 2013).

291. As the Supreme Court recently underscored: "No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority." *City of Arlington*, 133 S. Ct. at 1868.

fashion could help entrench the hyper-textual mode of interpretation and the major question exception to administrative deference.

VIII. EPILOGUE

As this Article was in the editing process, the D.C. Circuit issued its decision in *Loving*. As predicted by this Article, the panel unanimously affirmed the district court's decision.[292] The panel invoked rationales strikingly similar to the arguments advanced in this Article.

The panel held: "Put in *Chevron* parlance, the IRS's interpretation [of section 330] fails at *Chevron* [S]tep 1 because it is foreclosed by the statute. In any event, the IRS's interpretation would also fail at *Chevron* [S]tep 2 because it is unreasonable in light of the statute's text, history, structure, and context."[293]

The panel offered six reasons for its conclusion. First, the panel looked to the statutory term "representatives," which Part V of this Article identified as a rationale superior to that stressed by the district court. The panel acknowledged that a "tax-return preparer certainly *assists* the taxpayer, but the tax-return preparer does not *represent* the taxpayer."[294] A preparer "cannot legally bind the taxpayer by acting on the taxpayer's behalf" and so is not a "representative" within the contemplation of section 330.[295]

The panel's remaining five rationales involved the statutory phrase "practice . . . before the Department of the Treasury," the history of section 330, the broader statutory framework of provisions governing return preparation, the importance of the issue, and the fact that, for generations before promulgation of the 2011 regulations, the IRS had interpreted section 330 as insufficient authority by which to regulate preparers.[296]

Although the circuit court's discussion of these considerations resembled the district court's discussion at many points, the Supreme Court's *Brown & Williamson* decision (discussed in Part VI of this Article) occupied a more prominent place in the former than in the latter. First, although acknowledging that post-enactment history can sometimes be a hazardous guide, the circuit panel saw post-1884 events as forming the sort of pattern that *Brown & Williamson* took as the basis of its statutory construction.[297] Second, the panel invoked *Brown & Williamson*'s "major question" exception to *Chevron* deference, noting that "courts should not lightly presume

292. *See* Loving v. IRS, 742 F.3d 1013 (D.C. Cir. 2014).

293. *Id.* at 1022.

294. *Id.* at 1017.

295. *Id.*

296. *Id.* at 1016–22 (internal quotation marks omitted) (citing 31 U.S.C. § 330(a)(1)).

297. *See id.* at 1020–21; *see also supra* notes 245–78, 280–84 and accompanying text.

congressional intent to implicitly delegate decisions of major economic or political significance to agencies."[298]

Although the Government did not seek Supreme Court review of *Loving*, amending section 330 to reverse the effect of *Loving* remains a possibility. However, Congress has been in near gridlock for several years, and the IRS's credibility with Congress remains damaged as a result of well publicized junket excesses by the IRS and the IRS's questionable handling of applications for tax exemption by conservative political organizations.[299] Thus, timing may not be propitious for such a legislative initiative.

Administrative action in a different form is another possibility. One approach might be voluntary, rather than compulsory. That is, the IRS could create a specially recognized class of preparer/representatives for those who choose to meet criteria like those in the 2011 regulations. Some preparers may find this attractive, whether for perceived competitive benefits in the marketplace or because of privileges or benefits the IRS might confer. To some extent, a carrot might work even if *Loving* prohibits the stick.[300]

Sometimes regulation—like nature—abhors a vacuum. If, for reasons political and doctrinal, efforts prove unavailing to achieve greater federal regulation of tax return preparers, efforts may intensify at the state level. Only a few states currently substantially regulate preparers.[301] It is too early to say with confidence what effect *Loving* will have on this picture.[302]

In short, it appears probable that the 2011 regulations will not provide a firm foundation for stricter federal regulation of tax return preparers. However, it would be unwise to assume that the campaign for tighter regulation—in one form or another—is over.[303]

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298. *Id.* at 1021; *see also supra* notes 285–90 and accompanying text.

299. *See generally* Lily Kahng, *The IRS Tea Party Controversy and Administrative Discretion*, 99 CORNELL L. REV. ONLINE 41 (2013).

300. *See* Vincent R. Barrella & Walter Antognini, Loving*: A Case for Overreaching*, 91 TAXES 33, 44 (2013); Hoffman, *supra* note 10, at 172–73 (both discussing this alternative).

301. *See supra* note 28.

302. *See* Patrick Temple-West, *New York Regulates Tax Preparers as U.S. IRS Effort Drifts*, REUTERS (Dec. 23, 2013, 10:46 PM), http://www.reuters.com/article/2013/12/24/us-usa-tax-preparer-idUSBRE9BM0U920131224.

303. *See* Ariel Alvarez, *The Constitutionality of the Inevitable Regulations of All Tax Return Preparers*, 14 J. ACCOUNTING, ETHICS & PUB. POL'Y 735 (2013); Katherine M. Hetherington, *Regulation of Paid Tax-Return Preparers: A Foregone Conclusion Regardless of the Result in the* Loving *Case*, I SUFFOLK U.L. REV. ONLINE 105 (2013) (maintaining that greater regulation of return preparers is inevitable).