THE SCOPE AND EFFECT OF TREASURY REGULATIONS UNDER THE INCOME, ESTATE, AND GIFT TAXES*

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In the recent decision of *Helvering v. R. J. Reynolds Tobacco Co.*¹ the Supreme Court sharply focused attention on an important problem of income tax administration which had been quietly developing in recent years. This decision involved the question of the relationship of Treasury Regulations to the interpretation and application of the revenue acts. While the circumstances of the case suggested the dream-like details of a law school examination problem, the situation presented is nevertheless merely one of many possible intricate patterns. The taxpayer corporation, Reynolds Tobacco Company, had in 1929 sold at a profit some of its own stock which it had previously purchased. The only statutory provision pertinent to the question of whether such profit should be included in taxable income was the broad definition of gross income in Section 22(a) of the Revenue Act of 1928.² Regulations 74, Article 66 under that Act contained the statement that "A corporation realizes no gain or loss from the purchase or sale of its own stock," and this had been the uniform rule of the regulations since 1920. In May, 1934, partly as a result of a circuit court of appeals decision³ indicating that taxable income might arise where a corporation dealt in its own shares as if they were the stock of another corporation, T. D. 4430⁴ was issued by the Treasury Department providing that whether such transactions gave rise to taxable gain depended upon their real nature, and further that if a corporation did so deal in its shares as if they were the shares of another corporation, gain or loss should be computed as though the corporation were actually dealing in such shares. This Treasury Decision retroactively amended Regulations 74, Article 66. The *Reynolds* case was then pending in the Board of Tax Appeals on other issues. Relying upon the Regula-

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Although the writer is employed by the United States Treasury Department, the views set forth herein are entirely his own, and in no way indicate the views of the Treasury Department.

1. 306 U. S. 110 (1939), 39 COL. L. REV. 716. See Note (1939) 52 HARV. L. REV. 1163.

2. 45 STAT. 797 (1928), 26 U. S. C. A. § 22 (1934).

3. *Commissioner v. S. A. Woods Machine Co.*, 57 F. (2d) 635 (C. C. A. 1st, 1932), cert. denied, 287 U. S. 613 (1932). The Court merely mentioned the regulation and then proceeded to discuss the question as if the regulation did not exist.

4. XIII-1 CUM. BULL. 36 (1934).

tions as amended, the Commissioner in an amended answer claimed an additional deficiency for 1929 on account of the profit from the sale of the corporation's stock. Repeated reenactments of Section 22(a) without change had occurred in the various Revenue Acts passed while the original Regulation was in force and in the Revenue Acts of 1934, 1936, and 1938, while the amended Regulation was in effect. The Supreme Court held that Section 22(a) was "so general in its terms as to render an interpretative regulation appropriate";⁵ that the successive Revenue Acts reenacting the definition of gross income without change while the original Regulation was in force evidenced Congressional approval of the administrative construction embodied therein and had thereby given such construction the force of law; and that under these circumstances the amended Regulation could not operate retroactively to upset the rule of law established by the Congressional sanction of the original Regulation. The validity of the prospective operation of the amended Regulation was expressly left undecided. While a wide variety of combinations presented by the interaction of Regulations and Revenue Acts and a host of consequent questions may be immediately conjured up, we may postpone these questions until after a short consideration of their background.

Although the voluminous Regulations⁶ issued by the Treasury Department under a revenue act are popularly thought of as alike in legal force, a proper regard for the scheme of the Revenue Acts compels distinctions. The preponderant majority of the Regulations are what may be termed "interpretative regulations". Such Regulations constitute the Department's interpretations of the Revenue Act and serve to guide the personnel of the Bureau and the taxpaying public in the application of the law. In view of the necessary brevity of the statutory law and the manifold fact situations to which it applies, these guides are of some assistance to taxpayers. But they still remain no more than the Department's construction of the Revenue Act. Apart from their binding effect upon the personnel of the Bureau of Internal Revenue, they do not as Regulations possess any authority. While Section 62 of the Internal Revenue Code,⁷ like its counterpart in prior Revenue Acts, provides that "The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this chapter", this provision does not invest interpretative regulations with the force of law. The standard of "needful . . . for the enforcement" of a revenue act would hardly seem adequate in this

5. *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 114 (1939).

6. U. S. Treas. Reg. 103, Income Tax, under the Internal Revenue Code covers 690 pages plus an appendix.

7. 53 STAT. 32 (1939), 1 U. S. C. (Cur. Serv. 1939) 47. Unless otherwise indicated, the sections cited hereafter are those of the Internal Revenue Code.

regard to support a delegation of legislative power. The issuance of interpretative regulations would be equally valid without such a section and they gain nothing by it. Their effect on the application of a Revenue Act lies rather in the weight accorded to them in the construction of the act under the principles of statutory interpretation.

That the interpretative Regulations issued under Section 62 do not possess the vital current of legislative power is evidenced by the fact that in other selected sections of the various acts the Commissioner is given specific authority to issue rules and regulations to round out the Congressional action. Thus, Section 44 provides for the return of income on the installment basis "under regulations to be prescribed by the Commissioner with the approval of the Secretary"; Sections 170 and 189 allow the net operating loss deduction to estates, trusts, and members of a partnership "under regulations prescribed by the Commissioner with the approval of the Secretary"; Section 113(a) (19) provides that the allocation of the basis of old stock between such stock and dividend stock shall be "made under regulations which shall be prescribed by the Commissioner with the approval of the Secretary". The Regulations thus specifically authorized must obviously be taken to possess different attributes than those issued under Section 62, for otherwise the careful particularization of Congress in these other sections would be without meaning. The Regulations issued under these sections may be termed "legislative regulations" for they are designed to implement the purposely incomplete statutory provisions. While the structure of the Revenue Acts thus would seem to force a differentiation between interpretative and legislative Regulations, the question is pertinent whether such differentiation has been observed in the determination of the effect of Regulations upon the interpretation and application of these Acts.⁸

The interpretative regulations considered in their own right enjoy, as respects taxpayers, no greater authority as to the meaning of the statutory language interpreted than is possessed by the discussions in the tax services or legal periodicals. But the recognized canons of statutory interpretation invest such regulations with considerable importance. The use of contemporaneous administrative construction of a statute as an aid to the ascertainment of its meaning is well established,⁹

8. The third general class of regulations, that of procedural regulations, is not here considered. Such regulations are quite generally regarded as of binding effect. Examples of this class of regulations are found in Sections 22 (b) (4), 51, 54, and 55. In addition, Section 62 may be considered as authorizing administrative or procedural regulations of binding effect. In view of the variety of language in which the Congress has clothed its delegations of power to the Commissioner, it is a difficult matter to ascertain the extent of the authority that has been granted in each situation. See *infra* p. 577.

9. *National Lead Co. v. United States*, 252 U. S. 140 (1920); *Brewster v. Gage*, 280 U. S. 327 (1930); *Fawcus Machine Co. v. United States*, 282 U. S. 375 (1931);

and where the Court has decided in favor of such construction, the administrative construction is a convenient peg upon which to hang the judicial preference. Another familiar canon of statutory interpretation which imparts significance to such Regulations is the principle prescribing the effect of Congressional reenactment of statutory language which has received an administrative construction. This principle, as stated in the recent *Reynolds* decision, is that by virtue of such reenactment, "under the established rule Congress must be taken to have approved the administrative construction and thereby to have given it the force of law."¹⁰ The interpretative Regulation thus serves to announce a rule which, through reenactment of the legislative language which it interprets, may be alchemized into a statutory command. All of the successive acts are affected by this rule, for it has been applied to provide the interpretation of the first act in the series¹¹ as well as the last,¹² and, therefore, will also fix the meaning of the intermediate acts.¹³ The extensive scope of interpretative regulations and the frequency of Revenue Acts thus combine to present a significant source of statutory mandates which warrants further examination.

Like most canons of statutory interpretation or principles of constitutional law, the reenactment rule has qualifications which serve to make its application impossible of prediction. The administrative construction, no matter how numerous may be the reenactments of statutory language, is of no moment where that language prescribes a contrary rule. "Where the law is plain the subsequent reenactment of a statute does not constitute the adoption of its administrative construction."¹⁴ Stated differently, the statutory language must be ambig-

Louisville & Nashville R. R. v. United States, 282 U. S. 740 (1931); United States v. Shreveport Grain & Elevator Co., 287 U. S. 77 (1932).

10. *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 115 (1939). Other cases applying this rule are: *United States v. G. Falk & Brother*, 204 U. S. 143 (1907); *United States v. Cerecedo Hermanos y Compañia*, 209 U. S. 337 (1908); *National Lead Co. v. United States*, 252 U. S. 140 (1920); cases cited in notes 11, 12 and 13 *infra*.

11. *Brewster v. Gage*, 280 U. S. 327 (1930); *Burnet v. Thompson Oil and Gas Co.*, 283 U. S. 301 (1931); *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488 (1931); *Massachusetts Mutual Life Insurance Co. v. United States*, 288 U. S. 269 (1933); *Reinecke v. Smith*, 289 U. S. 172 (1933); *Hartley v. Commissioner*, 295 U. S. 216 (1935); *Hassett v. Welch*, 303 U. S. 303 (1938); *Taft v. Commissioner*, 304 U. S. 351 (1938); *Walker v. United States*, 83 F. (2d) 103 (C. C. A. 8th, 1936).

12. *United States v. Ryan*, 284 U. S. 167 (1931); *United States v. Dakota-Montana Oil Co.*, 288 U. S. 459 (1933); *Helvering v. Winmill*, 305 U. S. 79 (1938); *First Chold Corporation v. Commissioner*, 306 U. S. 117 (1939).

13. *Zellerbach Paper Co. v. Helvering*, 293 U. S. 172 (1934); *Old Mission Portland Cement Co. v. Helvering*, 293 U. S. 289 (1934); *United States v. Safety Car Heating & Lighting Co.*, 297 U. S. 88 (1936); *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110 (1939).

14. *Biddle v. Commissioner*, 302 U. S. 573, 582 (1938); *Houghton v. Payne*, 194 U. S. 88 (1904) (rejecting the administrative construction despite evidence that it had been repeatedly called to the attention of the Congress, which though urged to alter the statute, had refused); *Iselin v. United States*, 270 U. S. 245 (1926); *cf. Rasquin v. Humphreys*, 308 U. S. 54 (1939).

ous,¹⁵ general,¹⁶ silent,¹⁷ doubtful,¹⁸ susceptible of two constructions.¹⁹ With two lines of authority thus conveniently available, the answer is necessarily uncertain until one or the other is chosen by the Court. Thus in *Koshland v. Helvering*,²⁰ the Court thought the words of the statute so clear as to compel rejection of a long standing Regulation unchanged during successive reenactments of the statutory language, despite the fact that two dissenting Justices found statutory warrant for the rule expressed in the Regulation, and the further fact that rejection of such rule would produce untold confusion and manifold inequities. At the other extreme, the Court has indicated a preference for the administrative construction over contrary statements in reports of Congressional committees respecting the statute construed.²¹ In many cases the Court first itself construes the statutory language and then throws in the administrative construction and Congressional reenactments to support the interpretation which it has reached.²² In a recent case the Court, after interpreting the statute, proceeded to examine the administrative construction to see if it compelled a contrary interpretation, but found that it did not.²³ Judge Learned Hand has said:

"The reasoning by which such rulings are deemed to be incorporated into the law upon its reenactment are familiar, and we should have no right to disregard it, whether or not in a given instance it represents a real assent by Congress. But not every ruling is incorporated in the text because it is not repudiated; no one has ever suggested anything of the sort. At most, administrative practice is a weight in the scale, to be considered but not to be inevitably followed. . . . While we are of course bound to

15. *National Lead Co. v. United States*, 252 U. S. 140 (1920); *Brewster v. Gage*, 280 U. S. 327 (1930); *Helvering v. Wilshire Oil Co., Inc.*, 308 U. S. 90 (1939).

16. *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110 (1939); *Morrissey v. Commissioner*, 296 U. S. 344 (1935).

17. *United States v. Dakota-Montana Oil Co.*, 288 U. S. 459 (1933).

18. *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488 (1931); *United States v. Shereveport Grain & Elevator Co.*, 287 U. S. 77 (1932).

19. *R. J. Reynolds Tobacco Co. v. Commissioner*, 97 F. (2d) 302 (C. C. A. 4th, 1938); cf. *Securities Allied Corp. v. Commissioner*, 95 F. (2d) 384 (C. C. A. 2d, 1938), where the administrative construction, if not the most reasonable interpretation, was said to be at least a possible construction.

20. 298 U. S. 441 (1936).

21. *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488 (1931); *United States v. Shereveport Grain & Elevator Co.*, 287 U. S. 77 (1932).

22. *Brewster v. Gage*, 280 U. S. 327 (1930); *Burnet v. Thompson Oil & Gas Co.*, 283 U. S. 301 (1931); *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488 (1931); *United States v. Ryan*, 284 U. S. 167 (1931); *Costanzo v. Tillinghast*, 287 U. S. 341 (1932); *Reinecke v. Smith*, 289 U. S. 172 (1933); *Helvering v. Bliss*, 293 U. S. 144 (1934); *Zellerbach Paper Co. v. Helvering*, 293 U. S. 172 (1934); *Hartley v. Commissioner*, 295 U. S. 216 (1935); *McFeely v. Commissioner*, 296 U. S. 102 (1935); *Taft v. Commissioner*, 304 U. S. 351 (1938).

23. *Estate of Sanford v. Commissioner*, 308 U. S. 39 (1939), with which compare *Rasquin v. Humphreys*, 308 U. S. 54 (1939), in which the administrative construction examined in the *Sanford* case was said to be plainly in conflict with the statute.

weigh seriously such rulings, they are never conclusive; here, it seems to us that they are not enough to turn the scale.”²⁴

Of late, however, some of the lower courts,²⁵ and even the Supreme Court at times, have applied the reenactment rule automatically without bothering to ascertain whether the statutory language was ambiguous or clear.²⁶

Another qualification is that the administrative construction must itself be clear, uniform, consistent—“ambiguous regulations are of little value in resolving statutory ambiguities.”²⁷ A recent decision, *Haggard Co. v. Helvering*,²⁸ implies that the construction must serve a special administrative or governmental convenience or must embody the results of specialized departmental knowledge or experience. While the traditional statement of the rule permitting reliance upon an administrative construction requires the construction to be long continued,²⁹ the reenactment rule apparently does not depend upon the passage of time. Three³⁰ or two³¹ reenactments over a short span of years, or even one reenactment,³² have been regarded as sufficient to

24. *F. W. Woolworth Co. v. United States*, 91 F. (2d) 973, 976 (C. C. A. 2d, 1937), cert. denied, 302 U. S. 768 (1938).

25. *E. R. Squibb & Sons v. Helvering*, 98 F. (2d) 69 (C. C. A. 2d, 1938); *Commissioner v. Haines*, 104 F. (2d) 854 (C. C. A. 3d, 1939); *Helvering v. Cronin*, 106 F. (2d) 907 (C. C. A. 8th, 1939); *Guggenheim v. Rasquin*, 28 F. Supp. 322 (E. D. N. Y. 1939). See Note (1939) 52 HARV. L. REV. 1167.

26. *Old Mission Portland Cement Co. v. Helvering*, 293 U. S. 289 (1934); *Lang v. Commissioner*, 304 U. S. 264 (1938); *Helvering v. Winmill*, 305 U. S. 79 (1938).

27. *Burnet v. Chicago Portrait Co.*, 285 U. S. 1, 16 (1932); *Iselin v. United States*, 270 U. S. 245 (1926); *Estate of Sanford v. Commissioner*, 308 U. S. 39 (1939).

28. 60 Sup. Ct. 337 (1940). The regulations in question interpreted the term “first return”, required under the statutory provisions in force prior to the Revenue Act of 1938 to contain the irrevocable statement of declared value for capital stock tax purposes, to have a literal meaning and hence not to include a second return filed before the date prescribed for filing returns. The Court said that as this regulation was adopted solely in compliance with what was thought to be the command of the statute, it was not persuasive in its interpretation, and held the later return to be included within the term “first return”. Cf. *Estate of Sanford v. Commissioner*, 308 U. S. 39 (1939).

29. *United States v. Cerecedo Hermanos y Compañía*, 209 U. S. 337 (1908); *National Lead Co. v. United States*, 252 U. S. 140 (1920); *Iselin v. United States*, 270 U. S. 245 (1926). A decade is about the minimum time which has been permitted in the tax cases.

30. *Reinecke v. Smith*, 289 U. S. 172 (1933) (provision in 1924 Act, reenacted in 1926, 1928 and 1932 Acts); *Old Mission Portland Cement Co. v. Helvering*, 293 U. S. 289 (1934) (provision in 1921 Act reenacted in 1924, 1926 and 1928 Acts); *Morrissey v. Commissioner*, 296 U. S. 344 (1935) (provision in 1924 Act reenacted in 1926, 1928 and 1932 Acts).

31. *Brewster v. Gage*, 280 U. S. 327 (1930) (provision of 1921 Act reenacted in 1924 and 1926 Acts); *Murphy Oil Co. v. Burnet*, 287 U. S. 299 (1932) (provision in prior Acts reenacted in 1928 and 1932 Acts after change in 1926 in Regulations); *F. H. E. Oil Company v. Helvering*, 308 U. S. 104 (1939) (provision of 1926 Act reenacted in 1928 and 1932 Acts).

32. *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488 (1931) (provision of 1918 Act reenacted in 1921 Act); *Hassett v. Welch*, 303 U. S. 303 (1938) (Joint Resolution of 1931 reenacted in 1932 Act); *Helvering v. Wilshire Oil Co., Inc.*, 308 U. S. 90 (1939) (provision of 1926 Act reenacted in 1928 Act); cf. *Taft v. Commissioner*, 304 U. S. 351, 357 (1938). In these cases the regulations were in effect some time before the reenactment. But cf. *Janney v. Commissioner*, 404 C. C. H. 1940 Fed. Tax Serv. ¶1938 (C. C. A. 3d, 1939).

support the application of the rule. On the qualitative side, while the cases generally involve reenactment in successive statutes of the original language, verbatim or substantially so, some decisions require only that there be succeeding revenue acts, even though these later acts do not repeat the original language and do not even concern themselves with the subject matter to which it relates.³³ Generally, the administrative construction is to be found in the Treasury Regulations prescribed by the Commissioner and approved by the Secretary. Where a decision of the General Counsel for the Bureau (G. C. M.) or a ruling of the Income Tax Unit of the Bureau (I. T.) embodies the construction, the Supreme Court has in some cases relied upon such departmental rulings,³⁴ and in others has said that they are of "little aid".³⁵ Decisions of the Board of Tax Appeals have been considered as evidencing the administrative construction of the statute,³⁶ probably to the chagrin of that body and the surprise of the Bureau, for a more realistic view would consider them as evidence of judicial rather than administrative construction of the law.

With this brief summary as a background we may pause to consider whether these principles jibe with the realities of tax administration and legislation. Reliance upon administrative construction is reasonable enough if one understands that such construction is merely one element in the case and that the citation of the standard cases declaring the pertinent canon of statutory interpretation comes only after the Court has decided in favor of the administrative construction. But should reenactment of the statutory language add anything to the weight to be given to the administrative construction? The Supreme Court states that Congress must be taken to have been familiar with the existing administrative interpretation, so that reenactment of the statutory language indicates approval or ratification of that interpretation.³⁷ Otherwise Congress, knowing the interpretation it had originally intended, would have corrected the administrative ruling if mis-

33. *Commissioner v. Haines*, 104 F. (2d) 854 (C. C. A. 3d, 1939); *Helvering v. Cronin*, 106 F. (2d) 907 (C. C. A. 8th, 1939); *Guggenheim v. Rasquin*, 28 F. Supp. 322 (E. D. N. Y. 1939).

34. *Helvering v. Bliss*, 293 U. S. 144 (1934); *McFeely v. Commissioner*, 296 U. S. 102 (1935); *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110 (1939); *Helvering v. Wilshire Oil Company, Inc.*, 308 U. S. 90 (1939); *cf. Janney v. Commissioner*, 404 C. C. H. 1940 Fed. Tax Serv. ¶ 9138 (C. C. A. 3d, 1939).

35. *Helvering v. N. Y. Trust Co.*, 292 U. S. 455 (1934); *Biddle v. Commissioner*, 302 U. S. 573, 582 (1938); *cf. Estate of Sanford v. Commissioner*, 308 U. S. 39 (1939).

36. *Burnet v. S. & L. Bldg. Corp.*, 288 U. S. 406 (1933); *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110 (1939).

37. *National Lead Co. v. United States*, 252 U. S. 140 (1920); *Massachusetts Mutual Life Ins. Co. v. United States*, 288 U. S. 269 (1933); *Zellerbach Paper Co. v. Helvering*, 293 U. S. 172 (1934); *McFeely v. Commissioner*, 296 U. S. 102 (1935); *United States v. Safety Car Heating & Lighting Co.*, 297 U. S. 88 (1936); *Taft v. Commissioner*, 304 U. S. 351 (1938); *Haggard Co. v. Helvering*, 60 Sup. Ct. 337 (1940) (aware "through its committees"). *But cf. Helvering v. N. Y. Trust Co.*, 292 U. S. 455 (1934).

taken.³⁸ As Congressional failure to alter the language interpreted is said in some cases to indicate satisfaction with the construction even where no reenactment has occurred,³⁹ it is easy to see how the Court would place reliance upon actual reenactment of that language. There can be no quarrel with such reliance if it is shown that the administrative construction was actually called to the attention of Congress and that nevertheless it did not alter its language.⁴⁰ But in the absence of such evidence of actual ratification, is the presumption indulged in by the Court based upon anything more than a polite gesture towards the Congress?

The successive reenactment of the standard income tax sections of the Revenue Acts is due simply to the advisability of having each successive revenue act contain all of the pertinent sections and to the fact that a change in one section of the income tax generally requires tinkering with many other sections, so that the contrary system would produce confusion in view of the many amendments and additions that would result.⁴¹ Such reenactment, therefore, may by no means be regarded as evidencing actual Congressional consideration and approval of each section so reenacted. There is some validity to the presumption if the term "Congress" is expanded to include the group which may be considered as the Congressional tax advisors—the Staff of the Joint Committee, the House Legislative Counsel, the representatives of the Treasury Department, and those tax attorneys who appear to urge particular legislation. But the limits of the knowledge of even this group and the considerable time lag that often exists between awareness of an existing defect and its correction by Congress serve to restrict the support for this presumption. Some Revenue Acts, such as those of 1937 and 1939, because of the need for speedy enactment and the pressure of political considerations, are by Congressional agreement confined to certain subjects, so that there is no disposition to correct defects known to exist in fields not covered by the agreement. Even where a Revenue Act is of wider scope, such as that of 1938, time limitations imposed by drafting difficulties and the claims made by other duties upon the Congressmen concerned require observance of the principle of "first things first", and both the Treasury and taxpayers push the matters which they deem to be most important. Moreover, much worthwhile

38. *Heiner v. Colonial Trust Co.*, 275 U. S. 232 (1927); *Biddle v. Commissioner*, 302 U. S. 573 (1938).

39. *United States v. Shreveport Grain & Elevator Co.*, 287 U. S. 77 (1932); *Costanzo v. Tillinghast*, 287 U. S. 341 (1932); cf. *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488 (1931).

40. But in *Houghton v. Payne*, 194 U. S. 88 (1904), such express refusal was not sufficient to prevent the Court's rejection of the administrative construction. And note the cases in note 20 *supra*.

41. The relatively small number of amendments to the estate and gift taxes makes unnecessary the reenactment of the entire tax in each revenue act.

technical tax legislation must generally yield to the controversial tax measures, such as rates of tax, treatment of capital gains and losses, etc. In other instances, the very difficulty of finding a solution to a recognized problem requires that its consideration be postponed even when it is recognized that the existing situation is undesirable. In addition, where some of the lower courts have taken a view contrary to the administrative construction, is the Congressional silence to be considered as an approval of that construction or merely as a willingness patiently to trust the courts to correct an erroneous interpretation? ⁴² The Supreme Court has recently said that a taxpayer is not entitled to place reliance upon the uniform decisions of four Circuit Courts of Appeals and the Board of Tax Appeals interpreting a provision of the revenue laws where the Commissioner has not acquiesced in such decisions and is still litigating the question.⁴³ Why, therefore, should reenactment by Congress be considered as approval of an administrative construction when the Congress knows that taxpayers think the construction wrong and are contesting it in the courts? ⁴⁴ Judge Learned Hand is more realistic when he states:

"To suppose that Congress must particularly correct each mistaken construction under penalty of incorporating it into the fabric of the statute appears to us unwarranted; our fiscal legislation is detailed and specific enough already." ⁴⁵

All this points to the unreality of the presumption, an unreality which the *Reynolds* case itself highlights, for there the Congress "approved" contradictory interpretations.

42. In the *Reynolds* case situation, the lower courts had indicated that the wording of the earlier regulations was too broad. (1939) 39 Col. L. Rev. 716, 718. Congressional ratification by silence or reenactment extends also to judicial construction as well as administrative interpretation. *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488 (1931); *United States v. Ryan*, 284 U. S. 167 (1931); *Kales v. Commissioner*, 101 F. (2d) 35 (C. C. A. 6th, 1939); *Trumbull Steel Co. v. Routzahn*, 292 Fed. 1009 (N. D. Ohio 1923); *United States v. Security-First National Bank of Los Angeles*, 30 F. Supp. 113 (S. D. Cal. 1939). Where the judicial construction conflicts with the administrative, perhaps both should be disregarded. In *Estate of Sanford v. Commissioner*, 308 U. S. 39 (1939), the Court said that administrative construction may be of persuasive weight in determining the meaning of a statute where the practice is not so inconsistent with applicable decisions of the courts as to produce inconsistency and confusion, but if in conflict with such decisions the administrative construction should be rejected.

43. *Higgins v. Smith*, 8 U. S. L. WEEK 92 (U. S. 1940).

44. In *Haggar Co. v. Helvering*, 60 Sup. Ct. 337 (1940), the Commissioner was contending that in changing certain statutory provisions for the future, Congress must be considered as thereby approving the administrative construction given to the earlier statutes. The Court stated that it must be assumed that Congress was aware of both the administrative construction and the litigation then pending in the instant case and in another in which that construction had been challenged. It then said, "If we are to draw inferences it would seem as probable that Congress was content to leave the problems of the past to be solved by the courts where they were then pending, rather than to preclude their solution there." *Id.* at 342.

45. *F. W. Woolworth Co. v. United States*, 91 F. (2d) 973, 976 (C. C. A. 2d, 1937), *cert. denied*, 302 U. S. 768 (1938). *Janney v. Commissioner*, 404 C. C. H. 1940 Fed. Tax Serv. ¶ 9138 (C. C. A. 3d, 1939), quotes this language with approval.

Despite the lack of factual support for the presumption of Congressional knowledge, we find the courts leaning toward an automatic application of the reenactment rule to give interpretative regulations the force of law. The acceptance of the rule is such, moreover, that the Supreme Court has applied it to legislative regulations without attempting to distinguish its bearing upon regulations of this character as compared to those of an interpretative nature.⁴⁶ While legislative regulations may be tested in the courts,⁴⁷ their validity turns on the sufficiency of the standard accompanying the delegation of power and the compliance of the regulation with such standard and with the criterion of "reasonableness".⁴⁸ Successive reenactments of the statutory language authorizing a legislative regulation are relevant only to the question of the conformity of the regulation with the standard prescribed. The issue is not the meaning of ambiguous statutory language as in the case of an interpretative regulation, but whether the rule prescribed by the administrative branch lies outside of the boundaries marking the limits of the choice permitted by the Congress. To this extent the reenactment rule is applicable to legislative regulations.⁴⁹

The *Reynolds* case drew attention to the problems arising from the impact of the reenactment rule upon a change in the administrative construction. The Court held, as stated above, that as the original Regulation had obtained the force of law by reason of successive reenactments of the pertinent statutory section, the new Regulation could not operate retroactively.⁵⁰ If the premise regarding the metamorphosis of the original Regulation be conceded, no quarrel can be had with the conclusion of the Court. The statement that the original Regulation had been given the force of law can mean only that statutory words ambiguous on their face must be construed as meaning what the original Regulation said they meant. As an interpretative regulation con-

46. *Burnet v. Thompson Oil & Gas Co.*, 283 U. S. 301 (1931); *Burnet v. S. & L. Bldg. Corp.*, 288 U. S. 406 (1933); *United States v. Dakota-Montano Oil Co.*, 288 U. S. 459 (1933); cf. *Fawcus Machine Co. v. United States*, 282 U. S. 375 (1931).

47. Where the Congress requires that the taxpayer must consent to the regulation if he desires to obtain a privilege so conditioned, it may not be possible to test the regulation.

48. E. g., *Manhattan General Equipment Co. v. Commissioner*, 297 U. S. 129 (1936) and *Titsworth v. Commissioner*, 73 F. (2d) 385 (C. C. A. 3d, 1934), rejecting a legislative regulation on the ground of non-conformity with the standard prescribed.

49. Successive reenactments after an administrative construction interpreting the statute to confer the power to make legislative regulations may serve to solidify such interpretation. *Securities Allied Corp. v. Commissioner*, 95 F. (2d) 384 (C. C. A. 2d, 1938).

50. Lower courts had previously taken this position. See *Walker v. United States*, 83 F. (2d) 103 (C. C. A. 8th, 1936) stating that if the courts are bound by the executive construction plus statutory reenactments, the executive department should likewise be bound; *Mayes v. Paul Jones & Co.*, 270 Fed. 121 (C. C. A. 6th, 1921). Accord with the *Reynolds* decision: *Commissioner v. Haines*, 104 F. (2d) 854 (C. C. A. 3d, 1939); *Helvering v. Cronin*, 106 F. (2d) 907 (C. C. A. 8th, 1939); *Guggenheim v. Rasquin*, 28 F. Supp. 322 (E. D. N. Y. 1939); cf. *Lang v. Commissioner*, 304 U. S. 264 (1938).

trary to the statute is of no force, the new regulation thus falls. Hence, if the applicable language in the Revenue Act of 1928 meant that a corporation did not realize income from the sale of its own stock at a profit, a regulation stating that it did would be a nullity, whether that regulation was issued as a current interpretation of the Revenue Act of 1928 or years later as an amendment of an earlier regulation.⁵¹ But if the statutory language were said to reach the profit so realized, so that any contrary regulation would be void, a regulation requiring that the profit be included in gross income is valid, whether that regulation was promulgated currently with the statute construed or some time thereafter.⁵² The choice which Justice Cardozo has said is possessed by a state as respects the effect of a decision of its highest court overruling a prior precedent:

"It (a state) may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. . . . On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning."⁵³

cannot in this regard exist for the Commissioner. He must hold to the ancient dogma.

The crux of the problem is the interpretation to be given to the Revenue Act of 1928 and only on this point can the actual decision be considered vulnerable. It may be true that a court interpreting in 1928 the provisions of that Act would be forced under the applicable principles of statutory construction to reach the conclusion that it did not tax the profit in question. But a court interpreting those provisions in 1939, whether in respect of the Revenue Act of 1928 or of 1938, would not seem so bound, for unlike the former Court, it would have before it conflicting administrative interpretations, each of which had the support of successive Congressional reenactments. There would thus be no consistent administrative construction, for the uniformity of the construction before 1934 was destroyed by the change in that year,

51. *Campbell v. Galeno Chemical Co.*, 281 U. S. 599 (1930); *Miller v. United States*, 294 U. S. 435 (1935); *Rasquin v. Humphreys*, 308 U. S. 54 (1939); cases cited in note 14 *supra*.

52. Thus, in *Estate of Sanford v. Commissioner*, 308 U. S. 39 (1939), the Court said that a change in administrative practice to conform to judicial decision, here a circuit court of appeals decision, and which was consistent with decisions of the Court, would be accepted as controlling in preference to the earlier practice. That the Court was merely rejecting an incorrect interpretation and giving retroactive effect to a later, but correct, interpretation is emphasized by the companion ruling in *Rasquin v. Humphreys*, 308 U. S. 54 (1939), in which the earlier practice was said to be plainly in conflict with the statute.

53. *Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U. S. 358, 364-365 (1932).

just prior to the passage of the Revenue Act of 1934.⁵⁴ A contention that the Congress must be presumed to have approved of the application of the former construction as respects the Revenue Acts up to 1934 and of the later construction as respects the Revenue Acts after that year (leaving to a toss of a coin the status of the Revenue Act of 1934, in view of the short time interval between the change in the regulations and that Act) is as artificial as an assertion that by its later reenactment the Congress must be taken as approving of the retroactive application expressed in the new Regulation. The Court therefore would seem compelled to disregard the administrative construction as an aid in ascertaining the meaning of the Revenue Act of 1928 and, consequently, to interpret those provisions for itself. The difficulty of such a task should not have led to its avoidance through the creation of seemingly automatic rules of statutory construction which themselves may well give rise to even greater difficulties.

The Internal Revenue Code contains a provision, Section 3791(b), taken from the Revenue Acts of 1934 and 1928, which reads as follows:

"The Secretary, or the Commissioner with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect."⁵⁵

While the Commissioner pointed to this Section in the *Reynolds* case as authority for the issuance of retroactive regulations it hardly supports his contention. Although the Section clearly recognizes the existence of retroactive regulations, it does not authorize their issuance.⁵⁶ Rather, it permits the Treasury to limit the retroactivity of a regulation which would perforce have to be applied with unlimited retroactivity in the absence of this Section. So construed, the Section still has a wide scope. If the Commissioner, revising his interpretation of the law, issues an interpretative regulation altering a previous rule, the new regulation being no more than an interpretation of the statute would obviously have to operate retroactively were it not for the permission given to the Commissioner to avoid the hardship to taxpayers that would result from a retroactive application. Or if the Supreme Court interprets the statute contrary to an existing regulation, thus

54. See, for example, *Walker v. United States*, 83 F. (2d) 103 (C. C. A. 8th, 1936), where it was stated that the later regulation is pertinent to the question of whether the earlier regulation is so plainly erroneous as to compel its rejection.

55. For the legislative history of this Section and a discussion of its constitutionality, see PAUL, *SELECTED STUDIES IN FEDERAL TAXATION* (2d Ser. 1938) 72 *et seq.*

56. *Manhattan General Equipment Co. v. Commissioner*, 76 F. (2d) 892 (C. C. A. 2d, 1935) holds to the contrary, stating that regulations must be regarded as tentative, for by reason of this Section, amendments thereto are retroactive unless otherwise stated. See also (1939) 39 COL. L. REV. 716, 719.

compelling the issuance of a new regulation in conformity with the decision, the Commissioner may likewise protect those taxpayers who relied on the former ruling.⁵⁷ The Section thus authorizes the Commissioner as an administrative matter to make his change in interpretation, or one forced upon him, prospective only in much the same fashion as a court may limit the effect of a reversal of a precedent to future situations.⁵⁸ But it can hardly be contended that, under a statute which does not give authority to the Commissioner to make binding interpretative regulations as respects the future, this Section gives him a general power to make such regulations for the past. The Court did state in the *Reynolds* case that this Section authorized the Treasury to correct misinterpretations, inaccuracies, or omissions in the regulations and affect pending cases unless in its judgment there was some good reason to make the change operate only prospectively, but that it did not permit the Treasury to repeal the rule of law for the past achieved by giving the former regulation the force of law.⁵⁹ As indicated above, this interpretation of the Section seems to proceed from a false perspective.

An analogous problem is presented where the original interpretation is by way of a Supreme Court decision. Since the reenactment rule extends to judicial as well as administrative construction, can the Supreme Court reverse itself retroactively if Congressional reenactments have intervened? The *Reynolds* case suggests a negative answer, so that on principle the Court would therefore seem limited to announcing a rule for the future. Whether it can even do that in turn would appear to depend upon whether the Treasury will be permitted to change its regulations prospectively.

Turning therefore from the retroactive effect of a change in a Regulation, we may examine the prospective application of the new Regulation. If the Revenue Act of 1928 had plainly said that the profit on the sale by a corporation of its own stock was not to be taxed, a Regulation no matter when issued attempting to tax such a profit would be invalid. As the Court in the *Reynolds* case construed the statute so to provide, albeit the construction came about through the former Regulation being exalted to the status of a rule of law, the new regulation would seem to be invalid, whether taken as a construction of the Revenue Act of 1928 or of any of the later Revenue Acts. The words of Section 22(a) of the Revenue Act of 1928 were construed to mean

57. See report of Senate Finance Committee, SEN. REP. No. 960, 70th Cong., 1st Sess. (1927) 40. The Commissioner, however, in a situation in which the old but invalid regulation adversely affected the taxpayer, could not say that the new regulation operated only prospectively. See PAUL, *op. cit. supra* note 55, at 95, n. 95.

58. *Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U. S. 358 (1932).

59. *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 116 (1939).

no tax; the same words in the later acts can scarcely be given a different meaning. Yet the Court in the *Reynolds* case specifically reserved judgment on this question, stating that it was not necessary then to determine whether "the alteration of the existing rule, even for the future, requires a legislative declaration or may be shown by reenactment of the statutory provision unaltered after a change in the applicable regulation".⁶⁰ The Court added that "It may be that by the passage of the Revenue Act of 1936 the Treasury was authorized thereafter to apply the Regulation in its amended form."⁶¹ And in the later case of *Rasquin v. Humphreys*,⁶² the Court, with respect to an amendment to the estate tax Regulations, held that whatever validity the amendment may have prospectively, it was so plainly in conflict with the statute as to preclude retroactive application. The lower courts have generally taken the position that once the Regulation is embedded in the statute only an express legislative declaration may dislodge it.⁶³ But in view of the explicit reservation of the point by the Supreme Court in the above two cases, it is necessary to question the analysis first made and to consider whether a different result is obtained where the interpretation previously given to the statutory language was one arrived at through reliance upon administrative construction plus statutory reenactment rather than one clearly expressed in the statutory words themselves.

The discussion on this point has so far concerned an interpretative regulation. Where a legislative regulation is involved, the questions are not so difficult. As the regulation, by virtue of the grant of legislative power, is here part of the legislative scheme, it would seem that the authority of the Treasury to prescribe a retroactive rule is measured by the ability of the Congress itself to make the retroactive command.⁶⁴ If the old regulation is invalid, however, the new regulation should be given full retroactive effect, as otherwise the statute would be incomplete and unworkable.⁶⁵ As to the future, there should be no reason why the delegation of legislative power may not be regarded as a con-

60. *Ibid.*

61. *Id.* at 117.

62. 308 U. S. 54 (1939).

63. *E. R. Squibb & Sons v. Helvering*, 98 F. (2d) 69 (C. C. A. 2d, 1938); *cf.* *Walker v. United States*, 83 F. (2d) 103 (C. C. A. 8th, 1936); *Helvering v. Wilshire Oil Co., Inc.*, 95 F. (2d) 971 (C. C. A. 9th, 1938).

64. The extent of Congressional power with respect to retroactive tax legislation is far from clear. The latest decision bearing on this matter is *Welch v. Henry*, 305 U. S. 134 (1938). A dissent in *Manhattan General Equipment Co. v. Commissioner*, 76 F. (2d) 892, 897 (C. C. A. 2d, 1935), *aff'd*, 297 U. S. 129 (1936), states that legislative regulations should not be applied retroactively.

65. *Manhattan General Equipment Co. v. Commissioner*, 297 U. S. 129 (1936). The Court said that the application thus given to the new regulation was no more retroactive than was that of a judicial decision construing a statute. *Accord:* *Titsworth v. Commissioner*, 73 F. (2d) 385 (C. C. A. 3d, 1934).

tinuing one permitting prospective changes. At the very least, as each reenactment is a new grant of power, the area of possible doubt is narrow. The Court, however, has not approached the question in this manner. In *Murphy Oil Co. v. Burnet*,⁶⁶ a case arising under the Revenue Act of 1918, the Court applied a legislative regulation under that Act, but as amended retroactively in 1926, without any consideration of the retroactive question. The Court pointed out that the revised Regulation had Congressional approval through later reenactment of the statutory language.

The decision rendered in the current term of the Supreme Court in *Helvering v. Wilshire Oil Co., Inc.*,⁶⁷ a case which had been regarded as offering the Court an opportunity to clarify these questions, serves only to increase the confusion. The issue in the case was whether intangible development costs which had been treated by the taxpayer as deductible expense in computing its taxable net income should also be deducted in applying the limitation of Section 114(b)(3) of the Revenue Act of 1928, providing that the allowance for percentage depletion shall not exceed 50 percent of the net income of the taxpayer (computed without allowance for depletion) from the property. That Act in Section 23(1) allowed as a deduction a reasonable allowance for depletion, "such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary". The Regulations under the Revenue Acts of 1921 and 1924, in construing a limitation similar to that contained in Section 114(b)(3) but with respect to a deduction for discovery depletion, had presumably not required the deduction of intangible development costs.⁶⁸ The Revenue Act of 1926 substituted percentage depletion for discovery depletion in the case of oil and gas wells, but no regulations were issued under that Act with respect to the 50 percent limitation as it applied under percentage depletion, although the rule with respect to discovery depletion, retained in the Act for mines, was continued.⁶⁹ But late in 1927 a G. C. M.⁷⁰ stated that such development costs should be deducted in applying the limitation respecting percentage depletion. The Regulations under the Revenue Act of 1928 formally took this view,⁷¹ and like provisions appeared in the Regulations under the Revenue Acts of 1932, 1934, 1936 and 1938. These later acts had reenacted the pertinent statutory provisions without

66. 287 U. S. 299 (1932).

67. 308 U. S. 90 (1939).

68. U. S. Treas. Reg. 62 and 65, Art. 201 (h). The regulations required that "operating expenses" be deducted, and the Treasury practice did not consider development costs as such expenses.

69. U. S. Treas. Reg. 69, Art. 201 (h).

70. G. C. M. 2315, VI-2 CUM. BULL. 21 (1927).

71. U. S. Treas. Reg. 74, Art. 221 (i).

change. The taxpayer contended that the rule of the Regulations under the Revenue Acts of 1921, 1924 and 1926 was embedded in the law and therefore the Regulations under the Revenue Act of 1928 were invalid.

In answer to this contention the Court first stated that the regulation in question, pertaining to Section 114(b)(3), was issued under the "rule-making power" of Section 23(1).⁷² It then said that while it may be assumed that the administrative construction of the earlier acts had received legislative approval by reenactment in 1924, this did not mean that the construction survived the Revenue Acts of 1926 and 1928. There was no comparable regulation under the Revenue Act of 1926, and under that Act the Commissioner had adopted a contrary practice, viz., that stated in the G. C. M. The reenactment in 1928 at a time when the Treasury practice had changed therefore restored the phrase "net income . . . from the property" to its "original ambiguity" and it "became peculiarly susceptible to new administrative interpretation".⁷³ This may be taken as argument one. The Court then stated that in any event the validity of the regulation seems clear. The rule that administrative construction receives legislative approval by reenactment of the statutory provision does not mean that a regulation interpreting one act becomes frozen into another merely by reenactment and cannot be changed prospectively through the exercise of appropriate rule-making powers. The contrary conclusion would drastically curtail the scope and materially impair the flexibility of administrative action; it would deprive the administrative process of its valuable qualities of ease of adjustment to change, flexibility in the light of experience, swiftness in meeting new or emergency situations. This apparently constituted argument two. The Court then stated that the only remaining question is whether the regulation in question was within the power of the Commissioner to promulgate. It pointed out that this regulation operated only prospectively, and not retroactively as did the regulation in the *Reynolds* case. The rule-making power, it said, may here be found in Section 23(1). While the taxpayer contends that the Commissioner should not be considered as having the power to change from time to time, through altered regulations, the measure of "net income . . . from the property", this result of a change in the regulation is immaterial if the power to promulgate the new regulation exists. It then asserted that Section 114(b)(3) was ambiguous so that administrative interpretation of its language was peculiarly appro-

72. *Helvering v. Wilshire Oil Co.*, 308 U. S. 90, 94 (1939). We are not here concerned with the merits of the conclusion on this and other points not pertinent to the discussion in the text.

73. *Id.* at 100.

priate. The complexities of the depletion allowance also warranted such administrative action and likewise an interpretation of Section 23(1) that would strengthen the administrative power to deal with depletion problems. These considerations were said to reaffirm the conclusion that the rule-making power existed and that restrictions on that power should not be lightly imposed where the regulation is only prospective. This may be considered as argument three.

If Section 23(1) did extend to Section 114(b)(3), as the Court apparently decided, so that it had before it a legislative regulation, the decision should have been simple: The regulation was prescribed under an express grant of power and as it was within the standard of a "reasonable allowance", it was valid.⁷⁴ But argument one is almost nonsensical in this light, for it strives hard to create a source of power for the regulation through a restoration of the statutory language to an ambiguous condition, although the Revenue Act of 1928 itself provided the necessary authorization. Argument two has meaning only if it is regarded as a caution not to apply the reenactment rule to legislative regulations. Argument three is either an assertion that a legislative regulation is involved or else an unnecessarily long and complicated statement that the power to make legislative regulations should not be circumscribed. But if Section 23(1) did not extend to Section 114(b)(3)—and the Court seems not too sure of their relationship, for it twice refers to the ambiguity of the statutory language in Section 114(b)(3) as making it peculiarly susceptible to administrative interpretation—so that only an interpretative regulation is involved, much of the decision is difficult to comprehend. Argument one would seem valid only if it were based on the ground that the statutory change in the Revenue Act of 1926 broke the chain, so that the prior administrative construction embedded in the law with respect to discovery depletion was not binding as respects percentage depletion. As the language pertaining to the latter deduction was ambiguous the Court could properly refer to the administrative construction in the regulations under the Revenue Act of 1928 as an aid in the interpretation of the statutory language. But if the argument made by the Court is accepted at its face value, it implies that a change (here made in a G. C. M.) in a regulation, plus one reenactment, likewise breaks the chain, so that identical statutory language may then receive a contrary construction. Presumably, if the new regulation survived another act it would then possess the force of law.⁷⁵ The new Regulation could not apply

74. See the dissent below, 95 F. (2d) 971, 975 (C. C. A. 9th, 1938) supporting the regulation on this ground.

75. *F. H. E. Oil Co. v. Helvering*, 60 Sup. Ct. 26 (1939), involving the same situation as the *Wilshire* case, but with respect to the Revenue Act of 1932, was said

to the current act but would serve as an aid in the construction of the succeeding act. Under this approach, in the *Reynolds* case the new regulation announced in 1934 plus the enactment of the Revenue Act of 1936 (rather than the Act of 1934 in view of the short period of time intervening between that Act and the change) rendered Section 22(a) of that Act ambiguous and susceptible of either construction. The later reenactment in the Revenue Act of 1938 could then be considered under the established rule as ratifying the new Regulation and thus fixing the interpretation of the Revenue Act of 1936 as well as the later acts. It will be remembered that the Court in that case did state that it may be that by the passage of the Revenue Act of 1936 the Treasury was authorized *thereafter* to apply the new Regulation. Argument two may be considered as advancing the practical reasons supporting argument one. Argument three would not seem to be particularly relevant, except as emphasizing the particular character of the ambiguity as supporting the reliance upon administrative construction.

One difficulty with this view is that apparently the Court denied it, for in stating that the reenactment rule could not be construed as forbidding a change in the regulations, it said that the contrary conclusion would mean that before the new Regulation could go into effect a succeeding revenue act would be required, so that the new Regulation would be merely tentative and in effect submitted to the Congress for its approval.

"Outstanding regulations which had survived one Act could be changed only after a preview by the Congress. In preparation for a new revenue Act the Commissioner would have to prepare in advance new regulations covering old provisions. Their effectiveness would have to await congressional approval of the new Act. The effect of such procedure, so far as time is concerned, would be precisely the same as if these new regulations were submitted to the Congress for approval. . . . the result would be to read into the grant of express administrative powers an implied condition that they were not to be exercised unless, in effect, the Congress had consented. We do not believe that such impairment of the administrative process is consistent with the statutory scheme which the Congress has designed." ⁷⁶

The Court may thus be stating that the new Regulation may operate prospectively from the date of its inception and, if a valid construction,

by the Court to be an *a fortiori* case. The lower court in the *Wilshire* case, 95 F. (2d) 971 (C. C. A. 9th, 1938), rejected the argument that reenactment in 1932 ratified the new regulation, on the ground that taxpayers "are not required to have the prescience to discern a difference in Congressional viewpoint two years in the future". *Id.* at 973. But this view completely overlooks the fact that the reenactment rule is founded upon the mystic ability of taxpayers to divine whether a future Congress will or will not reenact the statutory provision interpreted by the administrative construction.

⁷⁶ *Helvering v. Wilshire Oil Co.*, 308 U. S. 90, 101 (1939).

will have legal force from that time on.⁷⁷ But whichever of these two approaches regarding the prospective operation of the new interpretive Regulation is taken, there seems to be no statutory warrant for the result achieved. Certainly it casts doubt upon those cases rejecting a regulation as contrary to the statute despite repeated reenactments,⁷⁸ for by hypothesis the new Regulation given prospective effect under this doctrine is equally contrary to the statute at its inception but becomes possible of acceptance after reenactment by Congress. Yet the rejected Regulations in the above cases had likewise received the tacit approval of Congress. To reply that the distinction lies in the manner in which the earlier statutes received their construction is either to reject the rationale of the canon of statutory interpretation permitting reliance upon administrative construction, or to alter the traditional view of the powers of the Commissioner.

The Court may be stumbling toward an objective which as yet is not clearly disclosed. Perhaps it is motivated by the belief that the taxpayer is entitled to rely on administrative regulations, so that their retroactive alteration is unsound tax administration.⁷⁹ The facts of the *Reynolds* case were compelling in this regard, for the Commissioner changed his regulation while the case was in the Board of Tax Appeals. It has been contended that it is somewhat ironical to hold that, although the Treasury was not compelled to interpret Section 22(a), nevertheless since it chose to do so in one year it thereby restricted its freedom of interpretation in a later year. But this argument disre-

77. The Court referred to the decision in *Morrissey v. Commissioner*, 296 U. S. 344 (1935). In that case a regulation under the Revenue Acts of 1918 and 1921 stated that a Massachusetts trust came within the term "association" if the beneficiaries possessed a certain degree of control, the regulations being based upon the construction of a previous decision of the Court. As a result of a Supreme Court decision in 1924 stating that control was not the only criterion, the regulation was in that year changed accordingly. The instant case concerned the Revenue Acts of 1924 and 1926. The Court said:

"As the statute merely provided that the term 'corporation' should include 'associations', without further definition, the Treasury Department was authorized to supply rules for the enforcement of the Act within the permissible bounds of administrative construction. Nor can this authority be deemed to be so restricted that the regulations once issued, could not later be clarified or enlarged so as to meet administrative exigencies or conform to judicial decision. . . . We find no ground for the contention that by the enactment of the Revenue Act of 1924 the Department was limited to its previous regulations as to associations." *Id.* at 354.

The Court then pointed out that the revised regulation had Congressional approval by reason of later reenactments.

78. E. g., *Iselin v. United States*, 270 U. S. 245 (1926), and cases cited note 14 *supra*.

79. Compare the concurrence of Justices Stone and Cardozo in *Brush v. Commissioner*, 300 U. S. 352, 374 (1937) on the ground that the taxpayer had brought himself within the terms of the exemption in the regulations, and the explanation of that case in *Helvering v. Gerhardt*, 304 U. S. 405 (1938). The Court in adopting an administrative construction has stated that rejection would produce inconvenience and inequity. *Brewster v. Gage*, 280 U. S. 327 (1930); *cf. Estate of Sanford v. Commissioner*, 308 U. S. 39 (1939); *Pictorial Review Co. v. Helvering*, 68 F. (2d) 766 (App. D. C. 1934). The vigorous dissent of Justice Roberts in *Higgins v. Smith*, 8 U. S. L. WEEK 92, 94 (U. S. 1940), is interesting in this connection.

gards the existence of the first construction and the reliance that it may have occasioned. Something is wrong with a system which permits the Commissioner in the courts to controvert the validity of regulations issued by the Treasury.⁸⁰ The Court may be applying a judicial check on retroactivity where it feels that the Commissioner has unjustifiably failed to exercise the power granted him in Section 3791(b) to prescribe an administrative check. But it is evident, as the Court itself seems to realize, that the device utilized in the *Reynolds* case to attain this end, because of its automatic character and the difficulties of securing legislation on a variety of technical points, comes dangerously close to preventing the Commissioner from meeting new problems and conditions. Furthermore, that device has an undesirable restrictive effect upon the Commissioner when he first formulates the regulations under a new statutory provision. If a doubtful point arises, he may by playing safe and saying nothing thereby avoid the dangers lurking in the reenactment rule. The regulations will in this event merely repeat almost verbatim the statutory language, for even a paraphrase may be dangerous. Such regulations are obviously of no aid to the taxpayers or the Bureau personnel. Or the Commissioner may choose the other alternative of always taking the benefit of the doubt so as to protect the revenues. Taxpayers will likewise not welcome the adoption of such a rule of thumb to settle all doubtful issues. The mechanical reliance upon reenactment after the change in regulations may in addition make the interpretation of the revenue acts vary depending upon whether the Congress sticks closely to the system of legislation amendatory of a code or continues because of the dictates of convenience completely to reenact the income tax title.⁸¹ It likewise might restrict the Supreme Court from reversing an erroneous precedent.⁸²

80. E. g., in *Lang v. Commissioner*, 304 U. S. 264 (1938), the Commissioner contended in the Supreme Court that a regulation, later changed, was at variance with the statute, unreasonable, and without effect. In *Farmers Loan & Trust Co. v. Bowers*, 299 U. S. 582 (1938), the Government in successfully resisting a petition for certiorari advanced an argument which it conceded was contrary to the position taken in an existing regulation. In *Helvering v. Hallock*, 8 U. S. L. WEEK 192 (U. S. 1940) and companion cases, the Government likewise asserted a position in conflict with an existing regulation. See *infra* p. 579.

81. In view of the adoption of the Internal Revenue Code, it remains to be seen whether the Congress will retain the prior practice of having each major revenue act contain the entire income tax, or will merely make amendments to the Code. The answer probably depends on the number of amendments and the extent of the mechanical difficulties that would exist under the latter method.

82. If an interpretative regulation is adopted because of a Supreme Court decision construing the statute, how can either the Commissioner or the Supreme Court alter that construction, even for the future, where the decision and regulation have been followed by Congressional reenactments? This is the problem presented in *Helvering v. Hallock*, 8 U. S. L. WEEK 192 (U. S. 1940) and companion cases discussed *infra* p. 579. It may perhaps be contended that in some instances the Congress has because of the subject matter left the meaning of the statutory language to Court decision and is willing to abide by the shifting interpretations of the Court. Thus, in the situation presented in the above cases it would be difficult to write a satisfactory statutory provision

While the reenactment rule may at one time have been regarded by the Court as offering an easy way to avoid admittedly difficult problems of statutory construction, the Court now realizes that its apparent simplicity was deceptive. The Court, and the lower tribunals as well, now find that in almost every case the parties are assiduously combing the regulations and rulings to see what has been the administrative practice and how such practice can be used to advantage. But for the Court to extricate itself from the position in which it has been placed by its own decisions is by no means an easy task.

It is evident that this portion of the tax field is in pressing need of clarification. The scope of the rule-making power now possessed by the Commissioner is becoming increasingly more uncertain. If one were to suggest that the Commissioner be authorized to prescribe rules and regulations interpreting the Revenue Acts which if reasonable shall be binding upon the taxpayer, he would in no time be attacked by angry taxpayers uttering cries of bureaucracy and administrative supremacy. Yet is not that almost the result that obtains under the Court's decisions? There is the declaration in the *Reynolds* case, and in other decisions,⁸³ that where the statute uses ambiguous terms, or is general in its language, an interpretative regulation is appropriate. Certainly, if the statute were unambiguous, any regulation other than one in accord with the statutory language would be unreasonable, so that the suggested rule is not at variance with the Court's position. The statement that ambiguous or general language makes an interpretative regulation peculiarly appropriate has a strange sound to the traditionalist who remembers that the Court has invalidated statutes on the ground of improper delegation of power where it found the standard set forth in the statute to be too indefinite.⁸⁴ The traditionalists may be right,

which could deal equitably with the multitude of fact variations that existed and consequently it may be said that Congress left the interpretation of the general provisions stated in the acts to the Court, with the recognition that judicial shifts in interpretation were bound to occur. Similarly, matters that are dependent upon a construction of the Constitution may be said to have been left subject to the changing temper of the Court. E. g., taxation of the compensation of public officials (prior to the Public Salary Tax Act of 1939, Pub. L. No. 32, 76th Cong., 2d Sess., 1939) and of income linked with the States, a field in which drastic retroactive changes in interpretation have occurred. By a parity of reasoning, regulations in these situations could likewise be changed, at least for the future, for otherwise the Commissioner, unless he chose to argue contrary to existing regulations, would be prevented from urging that the Court should shift its viewpoint.

83. *Morrissey v. Commissioner*, 296 U. S. 344 (1935); *Helvering v. Wilshire Oil Co., Inc.*, 308 U. S. 90 (1939). In *Koshland v. Helvering*, 298 U. S. 441, 446 (1936), the Court said:

"Where the Act uses ambiguous terms, or is of doubtful construction, a clarifying regulation or one indicating the method of its application to specific cases not only is permissible but is to be given great weight by the courts. And the same principle governs where the statute merely expresses a general rule and invests the Secretary of the Treasury with authority to promulgate regulations appropriate to its enforcement."

84. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935).

but they are talking of another world; as respects Federal taxation they have all the law books on their side except the United States Reports. But to push the argument further, can it be contended that, while the power to issue interpretative regulations may be conceded, under the suggested system a taxpayer would be bound by the Regulation if reasonable, whereas today he may attack any interpretative regulation, even one appropriate because of ambiguous language, and assert his construction, thereby forcing the courts to choose between two reasonable but competing interpretations? Yet at the very least, however, the present interpretative regulation, if a reasonable, or even a possible, construction, will be given "great weight" and if it survives one or two statutory reenactments it will obtain the force of law under the *Reynolds* case. As such ratification may require only two, three, or four years under the present pace of revenue acts, it will occur before the taxpayer has had a chance to question the regulation in the courts, for it is not until about five or six years after the enactment of a Revenue Act that controversies arising under it reach the courts. By that time the taxpayer will be attacking a regulation which, if not frozen solidly into the law, will at least not be upset unless "plainly erroneous".⁸⁵ And finally do not the *Reynolds* and *Wilshire* cases indicate that interpretative regulations possess equally with the traditional legislative regulations the vital current of legislative force as respects their prospective operation, in that the Commissioner is deemed authorized to change for the future the existing meaning of a Revenue Act if the new construction be reasonable?⁸⁶ Must we not recognize the futility of resting on traditional concepts of statutory construction and administrative power in the face of the present course of decision of the Court? We may speculate whether that course has been adopted for reasons of administrative policy deemed sound by the Court, or because of a lazy unwillingness on its part to analyze the statutory scheme respecting regulations and its implications, or an understandable desire to avoid almost insoluble problems of statutory construction by following the inviting path of administrative construction. But we cannot wish away the results of the recent decisions.

Nor has the Congress done anything to simplify the problem, but instead has strewn the Revenue Acts with a miscellany of references to administrative action without in any way indicating if the different

85. Compare the statements of the rule regarding the effect of administrative construction collected in *Walker v. United States*, 83 F. (2d) 103 (C. C. A. 8th, 1936).

86. See *Higgins v. Smith*, 8 U. S. L. WEEK 92, 94 (U. S. 1940), in which the following appears: "If the Bureau's stand in the *Jones* case (decided by the Board of Tax Appeals in 1930) represented a change in administrative practice, there can be no doubt that the change operated validly at least from 1930 on", and for which the *Wilshire* case is cited as authority.

modes of expression are intended to imply differences in the degree of power conferred upon the Commissioner. Section 23 (k) (1) allows a reasonable addition to a reserve for bad debts "in the discretion of the Commissioner", and a deduction for partial worthlessness when the Commissioner is "satisfied" that the debt is recoverable only in part. Section 41 requires, in the event no method of accounting is regularly employed, a computation in accordance with such method as "in the opinion of the Commissioner" clearly reflects the income. Section 44 provides for the installment method of reporting income "under regulations prescribed by the Commissioner". In Section 45 the Commissioner "is authorized" to allocate income and deductions among businesses owned by the same interests, if "he determines" that such allocation is necessary. Under Section 46 a change of accounting period requires "the approval of the Commissioner". A foreign corporation is not considered a corporation in certain cases under Section 112 unless it has been established "to the satisfaction of the Commissioner" that an exchange in which it participated was not for the purpose of avoiding tax. Affiliated corporations seeking to file consolidated returns under Section 141, and taxpayers seeking to exclude income derived from the cancellation of indebtedness under Section 22 (b) (9), must "consent" to regulations prescribed by the Commissioner. Under Section 22 (d) (3) the use of the last-in first-out inventory method must be "in accordance with such regulations" as the Commissioner may prescribe. If the Commissioner "finds" that collection of the tax is jeopardized, he shall demand immediate payment under Section 146 (a) (1), and the finding is presumptive evidence of the taxpayer's design, but a similar finding under Section 146 (a) (2) apparently has no such presumption attached to it. Under Section 273 if the Commissioner "believes" that assessment of a deficiency is jeopardized, he shall immediately assess it. This is only a partial list, but it serves to demonstrate the variety of the language used by the Congress.

There is thus a real need for acute analysis and study to be undertaken in an effort to ascertain whether these problems may be solved by statutory action. Through such a study we may find answers to these pertinent questions: Can the various degrees of Congressional authorization of power to the Commissioner be standardized so that the Congress, the Commissioner, the taxpayer, and the courts may readily grasp the statutory scheme? In view of the complexity of the Revenue Acts should the Commissioner be granted specific authority to issue interpretative regulations? If so, what should be their scope and effect? How far should we go in safeguarding the reliance of taxpayers upon the regulations issued by the Commissioner? In what way

shall we meet the necessity of permitting changes in the regulations, occasioned by new conditions, a more experienced judgment, or court decisions? What effect shall we give to "tacit Congressional approval" in its various forms, verbatim reenactment, substantially similar reenactment, or failure to amend, and under varying conditions, such as frequent complete Revenue Acts or legislation merely amendatory of a code? Can the confusion surrounding section 3791(b) be removed, so that the scope of the administrative power under that Section may be clearly determined? Can the scheme of the regulations be so balanced that taxpayers will not fear that the Commissioner can through his regulations stack the cards in his favor, and yet permit the Commissioner to administer an admittedly complex but skeletonized law? No one would for a moment contend that these questions, involving as they do inter-relationships between the Commissioner, the taxpayer, the Congress, and the courts, are susceptible of easy solution. Yet it would seem the part of sound tax policy to attempt to deal with them in a manner which permits of a comprehensive treatment rather than to leave their determination to the slow, incomplete process of judicial decision.

POSTSCRIPT

The recent decision of the Supreme Court in *Helvering v. Hallock*⁸⁷ demonstrates most clearly two things—the mortality of tax articles and the impossibility of placing the Court in a corner. As a consequence of that decision, a Caesarian postscript is perhaps needed to prevent this article from being stillborn.

In 1931 the Supreme Court in *Klein v. United States*,⁸⁸ ruled that an inter vivos transfer by *A* to *B* for life, remainder in *A*, but if *A* dies before *B*, then to *B* in fee, was a transfer intended to take effect in possession or enjoyment at or after death within the meaning of Section 402 (c), later 302 (c), of the estate tax. In 1935 the Court in *Helvering v. St. Louis Trust Co.*⁸⁹ and *Becker v. St. Louis Trust Co.*⁹⁰ held that an inter vivos transfer by *A* to *B* for life, remainder to *B*, but if *A* survives *B*, then remainder to *A*, was not such a transfer as here *A* only possessed a mere "possibility of a reverter".⁹¹ The Regulations under the estate tax were amended in 1937 to accord with the distinction adopted in the latter cases.⁹² The lower courts likewise accepted the distinction as controlling.⁹³ The Revenue Acts of 1936, 1938, and

87. *Helvering v. Hallock*, 8 U. S. L. WEEK 192 (U. S. 1940) (Justices Roberts and McReynolds dissenting). *Id.* at 196.

88. 283 U. S. 231 (1931).

89. 296 U. S. 39 (1935).

90. 296 U. S. 48 (1935).

91. *Helvering v. St. Louis Trust Co.*, 296 U. S. 39, 43 (1935).

92. U. S. Treas. Reg. 80, Art. 17, as amended.

93. Cases cited by Justice Roberts in his dissent in *Helvering v. Hallock*, 8 U. S. L. WEEK 196 (U. S. 1940).

1939 contained amendments to the estate tax, and even to Section 302(d) in the case of the Act of 1936, but Section 302(c) was not repeated in terms in these Acts. Section 302(c) was of course reenacted verbatim in 1939 as part of the Internal Revenue Code.⁹⁴ *Helvering v. Hallock* involved an inter vivos transfer which was thought by the Circuit Court of Appeals⁹⁵ to fall into the *St. Louis Trust* basket rather than the *Klein* basket. In the Supreme Court the Government contended that the *St. Louis Trust* cases were unsound and should be overruled, albeit the regulation based upon those cases was still on the books. The Supreme Court agreed with the contention, stating that "the diversities taken in the *St. Louis Trust* cases" were untenable and should be rejected in favor of a broad application of the *Klein* doctrine.

So far so good. As an original proposition only a crabbed conveyancer would defend the distinction taken in the *St. Louis Trust* cases. But the taxpayer in the *Hallock* case forcefully urged that the Court was faced not with an original proposition but with a rule of law of at least five years standing. What of the doctrine of stare decisis? But as stare decisis is "a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable",⁹⁶ the Court said it did not bar an overruling of the *St. Louis Trust* cases. The taxpayer then asserted that Congress in the intervening years had not repudiated the *St. Louis Trust* cases and must therefore be taken as having approved their doctrine. The Court's answer was phrased by Mr. Justice Frankfurter:

"It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines. To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative

94. I. R. C. § 811 (c).

95. *Helvering v. Hallock*, 102 F. (2d) 1 (C. C. A. 6th, 1939).

96. *Helvering v. Hallock*, 8 U. S. L. WEEK 192, 195 (U. S. 1940). Mr. Justice Frankfurter in his rejection of the contention based upon taxpayer reliance stresses the fact that the transfers in question were all made and the settlors had died prior to the *St. Louis Trust* cases. But this answer can hardly be considered a complete one, for other taxpayers, relying upon the *St. Louis Trust* cases, and dying prior to the instant case, may have determined that it was unnecessary in order to avoid taxation to divest themselves of their interests in the transfers through a modification of their terms.

It is arguable, however, that the Supreme Court should not, or at least only rarely, be moved by the existence of taxpayer reliance upon a prior decision. Congress, recognizing that hardships may be occasioned by a court decision upsetting prior doctrine or practice, has in Section 3791 (b) given ample power to the Treasury Department to mitigate such hardships through a non-retroactive application of the decision. It may therefore be proper for the Court to interpret the law unhampered by a consideration of the hardship that may result, and to leave the problem of dealing with the question of the possible alleviation of such hardship to the Treasury, where Congress has indicated that it properly belongs. But such a course of conduct would require an alert and intelligent use of Section 3791 (b) by the Treasury. Consideration of taxpayer reliance by the Court may be proper, however, where the Treasury by a failure to make an amendment to the regulations non-retroactive has indicated that it will not exercise its power under Section 3791 (b). See *supra* p. 574.

unrealities. Congress may not have had its attention directed to an undesirable decision; and there is no indication that as to the *St. Louis Trust* cases it had, even by any bill that found its way into a committee pigeonhole. Congress may not have had its attention so directed for any number of reasons that may have moved the Treasury to stay its hand. But certainly such inaction by the Treasury can hardly operate as a controlling administrative practice, through acquiescence, tantamount to an estoppel barring reexamination by this Court of distinctions which it had drawn. Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.”⁹⁷

While the taxpayer could now see that the contest was lost, he chose to play the game of statutory construction to the bitter end. He therefore called attention to the intervening Revenue Acts and contended that successive reenactment of a statute without change must be considered as an adoption of the judicial construction given to the statute. Mr. Justice Frankfurter, now relegating the debate to the footnotes, answered in these words:

“Whatever may be the scope of the doctrine that re-enactment of a statute impliedly enacts a settled judicial construction placed upon the re-enacted statute, that doctrine has no relevance to the present problem. Since the decisions in the *St. Louis Trust* cases, Congress has not re-enacted § 302(c). The amendments that Congress made to other provisions of § 302 in connection with other situations than those now before the Court, were made without re-enacting § 302(c). Nor has Congress, under any rational canons of legislative significance, by its compilation of internal revenue laws to form the Internal Revenue Code of 1939, 53 Stat. 1, impliedly enacted into law a particular decision which, in the light of later experience, is seen to create confusion and conflict in the application of a settled principle of internal Revenue legislation.”⁹⁸

There was but one argument remaining—the existence of the Treasury regulation adopting the doctrine of the *St. Louis Trust* cases. This also was answered in a footnote:

“Since the Treasury has amended its regulations in an effort to conform administrative practice to the compulsions of the *St. Louis Trust* cases, it cannot be deemed to have bound itself by this change.”⁹⁹

97. *Ibid.*

98. *Ibid.*

99. *Ibid.*

What becomes of the doctrines of statutory construction which we have been considering? Is there only the sound of quicksand closing over the many cases decided on the ground that Congress must be assumed to have been familiar with an existing administrative interpretation and that consequently its reenactment of statutory language indicates approval or ratification of that interpretation?¹⁰⁰ For clearly the words first quoted above with respect to Congressional silence apply with equal force to an administrative interpretation and give the lie to the whole reenactment doctrine. Our quarrel, as the preceding discussion has made clear,¹⁰¹ is not with the substance of these words but with the unruffled volte-face that is apparent when they are placed against the language controlling in prior decisions. Moreover, taxpayers had been repeatedly told that an administrative interpretation may become embedded in the statute through reenactment of the interpreted language, even though such interpretation when issued was not final in that it could be reviewed by the courts. Were they not to believe that *a fortiori* such reenactment would freeze an interpretation which had been placed upon the statute by the Supreme Court itself and hence was beyond review?

Perhaps the above is too strong in the light of the Court's assertion that here there is no occasion to apply the reenactment doctrine because Section 302(c) was never itself reenacted. In other words, that doctrine may be limited to instances of verbatim, or substantially so, reenactment of the statutory language interpreted by the judiciary or the administrative.¹⁰² If this be true, the canons of statutory construction here turn on the mere mechanics of legislative draftsmanship. The Revenue Acts of 1935 and 1937 are brief and hence convenience does not require repetition of the standard sections. The Revenue Acts of 1936 and 1938 are lengthy and contain numerous amendments, so that it is desirable to make each complete in itself as regards the income tax. The estate tax and the gift tax are less frequently amended, and consequently the taxpayer will not be confused if the Revenue Act of 1938, for example, does not reenact those taxes completely when it amends several of their sections. The Revenue Act of 1939 makes relatively few amendments to the Internal Revenue Code, and hence there is no occasion to depart from the general concept underlying that Code as respects future Acts. Yet later Acts may contain so many income tax amendments that the utility of the Code will be lost unless the income tax chapter is restated in full. These are but questions of legislative technique to be answered on the practical ground of conven-

100. Cases cited in note 47 *supra*.

101. See *supra* p. 563.

102. *But cf.* cases cited in note 33 *supra*.

ience, both in the drafting of statutes and in the use to be made of them by the public. But for the Court they apparently present matters vital to the interpretation of the statutory language.

Nor, apparently, does the reenactment doctrine apply to an administrative regulation which is the result of a change made in order to conform administrative practice to a decision of the Court. Perhaps so, for if the decision is to be swept away, so must its administrative progeny. But where does this rule end? All regulations are written "in an effort to conform administrative practice to the compulsions" of judicial decisions. The connection is more direct in some instances than in others. But is the taxpayer to ascertain at his peril whether the regulation is on the side of the line that qualifies it as an interpretation which may be embedded in the statute through later reenactment rather than on the side which stamps it as one not capable of such adoption?

Perhaps, as respects the reenactment doctrine, we are witnessing the end of another judicial march up the hill and down again. Yet Mr. Justice Roberts, who dissented in the *Hallock* case,¹⁰³ had this to say for a unanimous Court when on the same day he rendered its decision in *Morgan v. Commissioner* ¹⁰⁴ with respect to the meaning of the phrase "general power of appointment" in the estate tax:

"The Treasury regulations have provided that a power is within the purview of the statute, if the donee may appoint to any person.

"With these regulations outstanding Congress has several times reenacted Section 302(f), and has thus adopted the administrative construction." ¹⁰⁵

Is the answer then to be found in these words in the *Hallock* case:

"The Court . . . has from the beginning rejected a doctrine of disability at self-correction." ¹⁰⁶

The Court is free at any time to repent and to clear the past of misdeeds. The Commissioner must live with his sins, or at best can do no more than turn over a new leaf.

103. Justice Roberts based his vigorous dissent upon *stare decisis* and the reenactment doctrine, as applied both to court decisions and administrative regulations. Chief Justice Hughes concurred in the result upon the ground that the case was controlled by the decision in *Klein v. United States*, 283 U. S. 231 (1931).

104. 8 U. S. L. WEEK 205 (U. S. 1940).

105. *Id.* at 206.

106. *Helvering v. Hallock*, 8 U. S. L. WEEK 192, 195 (U. S. 1940).