Regulation of Paid Tax-Return Preparers: A Foregone Conclusion Regardless of the Result in the Loving Case

Katherine M. Hetherington*

I. INTRODUCTION

Many have argued that the tax-return preparation industry is behind the licensing curve. The National Consumer Law Center and National Community Tax Coalition have even noted, “[m]ore regulation is required of hairdressers in many states.” The Internal Revenue Service (IRS) sought to change this by extending its regulatory reach to tax-return preparers. However, the IRS’s right to regulate this industry is currently being litigated. In Loving v. IRS, three paid tax-return preparers, who were not previously subject to IRS regulation, sued the IRS in the United States District Court for the District of Columbia seeking injunctive and declaratory relief. After discussing the district court’s holding in Loving and the parties’ appellate arguments, this Essay analyzes the legal and policy considerations on both sides of the issue. Ultimately, this Essay concludes that the debate surrounding the IRS’s right to regulate paid tax-return preparers will end in regulation. What remains to be seen is whether a regulatory scheme will take effect through judicial blessing or legislative action. Congress has shown an appetite for legislation that would allow the IRS to regulate tax-return preparers. Thus, regardless of Loving’s outcome, tax-return preparers appear destined for regulation, like many other professions.

II. BACKGROUND

A brief history of the regulation of “practice” before the IRS is necessary to frame the debate surrounding the regulation of paid tax-return preparers. The United States Department of the Treasury’s (the Treasury) authority to regulate tax professionals dates back to the Horse Act of 1884. The Horse Act arose

* J.D., LL.M. Assistant Professor of Taxation, Robert Morris University. Moon Township, Pennsylvania.

primarily because of concerns regarding fraudulent claims against the government for the value of dead horses and lost property during the Civil War.\(^4\) The Act predates the modern income tax by twenty-nine years and its provisions are now codified in 31 U.S.C. § 330:

\begin{quote}
(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.\(^5\)
\end{quote}

This legislative grant of regulatory authority spurred the Treasury to publish circulars containing guidance for agents.\(^6\) In 1921, those circulars were combined with other statutes into the precursor of the IRS’s modern day Circular 230, entitled “Regulations Governing Practice Before the Internal Revenue Service.” Since 1921, Circular 230 has listed a wide spectrum of qualifications and entrance requirements for determining who may practice before the IRS. From early on, Circular 230 prohibited anyone other than attorneys and Certified Public Accountants (CPAs) from practicing. Revisions in 1951 removed this restriction allowing anyone who passed an entrance examination prepared by the American Institute of Certified Public Accountants (AICPA) to practice. Then, driven by high demand for practitioners, the rules changed again in 1959 to define practitioners as attorneys, CPAs, and anyone who could pass the Special Enrollment Exam developed by the Treasury. Those who can practice by virtue of having passed the enrollment exam are known as Enrolled Agents (EAs). Generally speaking, Circular 230 has remained static for the past fifty-four years in terms of who can practice.\(^7\)

\[^{[T]}\]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 that they 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.


\(^6\) See Muller, supra note 4, at 292-93.

\(^7\) See Revision of the Provisions Governing Those Individuals Eligible To Practice Before the Internal Revenue Service, 44 Fed. Reg. 4944, 4944 (Jan. 24, 1979) (to be codified at 31 C.F.R. pt. 10) (revision published in Federal Register outlining change to include enrolled actuaries). Enrolled retirement plan agents

\(\text{Id. at 258-59.}\)
Before discussing the recent Circular 230 revision that launched the legal battle in Loving, it is important to define practice before the IRS and explain which practitioners were bound by Circular 230’s standards of conduct prior to the 2011 change. The crux of the issue is that Circular 230 defines practice broadly to include return preparation, but defines practitioner narrowly to exclude return preparers who are not attorneys, CPAs, or EAs. Before the IRS encompasses “all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer’s rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service.” Attorneys, CPAs, and EAs do not make up the entirety of individuals allowed to practice before the IRS. Circular 230 allows for limited practice by unenrolled return preparers. These unenrolled preparers may prepare returns and represent taxpayers during audits of the returns, but may not represent taxpayers during the IRS appeals process. The issue is this: both practitioners and unenrolled preparers can practice by filing tax returns, but only practitioners are subject to Circular 230’s standards and sanctions. To provide an example of the type of preparer omitted from coverage, H&R Block, Jackson Hewitt, and Liberty Tax Service are the three largest employers of (primarily) unenrolled preparers.

The consternation regarding lack of oversight of unenrolled preparers fueled a 2009 IRS study, which described the need for regulation in dramatic fashion. Accordingly, in August 2011, the IRS implemented a program to license and regulate paid tax-return preparers who were not already under the purview of Circular 230. The regulatory scheme creates a category of “Registered tax return preparer” (RTRP) in Circular 230’s definition of practitioner. This change brought RTRPs into the fold of Circular 230’s standards of conduct and sanctions. In addition, it left unenrolled return preparers grappling with new registration requirements, including a one-time competency exam and fifteen hours of annual continuing education.


9. See id. § 10.2(a)(4).

10. See id. § 10.7(c).


13. See 31 C.F.R. § 10.2(a)(5) (defining practitioner to include individuals described under 31 C.F.R. § 10.3(f)); id. § 10.3(f) (listing “Registered tax return preparers”).

14. See 31 C.F.R. § 10.6(c) (2013) (outlining examination requirement); id. § 10.6(e)(3) (outlining
Registration would not change the scope of their ability to practice because RTRPs, like unenrolled preparers before them, may not practice at the IRS appeals level. Under these changes, formerly unregulated preparers now face the double burden of registration requirements and mandatory standards of conduct, including sanctions for improper behavior.

III. LOVING v. IRS

A. The District Court’s Decision

The IRS’s RTRP regulations went into effect on August 2, 2011. The following March, Sabina Loving, Elmer Kilian, and John Gambino (collectively, Loving et al.) filed a lawsuit challenging the legality of the new regulations under the Administrative Procedure Act (APA). The APA requires that courts strike down agency action that exceeds the agency’s statutory authority.\(^{15}\) The Supreme Court, in the seminal case of *Chevron U.S.A., Inc. v. National Resources Defense Council*,\(^ {16}\) interpreted the APA using a two-step inquiry. Step one asks whether “the intent of Congress is clear;” or in other words, whether the statute authorizing agency action is ambiguous.\(^ {17}\) If ambiguity exists, then step two asks whether the agency based its interpretation “on a permissible construction of the statute.”\(^ {18}\) Step two defers to the agency’s interpretation unless it is “arbitrary, capricious, or manifestly contrary to the statute.”\(^ {19}\) The Supreme Court’s language in *Chevron* represents the judiciary’s general policy to avoid substituting a court’s judgment for the reasonable judgment of agencies. Placing *Loving* into the *Chevron* framework, the question under step one is whether the authority granted to Treasury under § 330(a)(1) to “regulate the practice of representatives of persons before the Department of the Treasury” express Congress’s unambiguous intent to give the IRS power to regulate unenrolled preparers. The district court in *Loving* based its decision solely on step one of the *Chevron* two-step inquiry.\(^ {20}\)

\(^{15}\) Administrative Procedure Act § 10(e), 5 U.S.C. § 706 (2012).


\(^{17}\) *Id.* at 842.

\(^{18}\) *Id.* at 843.

\(^{19}\) *Id.* at 844.

\(^{20}\) It would be interesting to reveal only that much of the court’s decision and conduct a poll asking people whether they think the words “representatives of persons before the Department of the Treasury” clearly includes or excludes unenrolled preparers. Perhaps the better question is whether unenrolled preparers can be grouped together with attorneys and CPAs who represent a taxpayer in dealings with the IRS during an audit or appeal. This additional information may slant the answer towards excluding unenrolled preparers from the definition of representatives.
1. The District Court’s Analysis of § 330

The district court concluded that the IRS’s statutory authority to regulate representatives who practice before it unambiguously did not include tax-return preparers. The court began by dividing a taxpayer’s interaction with the IRS into three potential stages: filing a tax return (“assessment and collection”), auditing the return (“examination”), and appealing the outcome of the audit with the IRS (“appeals”). For the second and third stages, the court explained that an attorney or CPA is typically involved to advocate for the taxpayer. All three stages are, of course, prior to a taxpayer having a dispute that would be litigated in federal court. It is obvious from the court’s description of these three stages of interaction with the IRS that it believes the first step is void of any “representative” feature. The court would engage in statutory analysis to support its conclusion.

The district court explained that although the statute does not define practice or representative, it tells us that representatives “advise and assist persons in presenting their cases.”21 The court reasoned that “[f]iling a tax return would never, in normal usage, be described as ‘presenting a case,’” because when a taxpayer files a tax return, there is no dispute or case to present.22 Thus, the court concluded that the statute’s language unambiguously prohibits the IRS from regulating the practice of unenrolled preparers, and therefore step two of the Chevron inquiry was not applicable. Accordingly, the court granted an injunction against the IRS—mandating a halt to the RTRP program—and refused to grant a motion to stay the injunction pending the outcome of the IRS’s appeal.23

The district court’s analysis stemmed from an earlier decision of the D.C. Circuit, which requires that, absent a definition, the “words of the statute should be read in context, the statute’s place in the overall statutory scheme should be considered, and the problem Congress sought to solve should be taken into account” to determine whether Congress has foreclosed the agency’s interpretation.24 Presenting a case may mean different things depending on the context. Presenting a case for promotion means something different than presenting a case for a not-guilty verdict in a murder trial. The former typically does not involve a legal dispute, while the latter does. The district court, however, stood firm that “[a]t 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

22. Id.
stages of the process.”

Yet, the meaning of presenting a case varies with context. Normally, statutory analysis of this kind would examine the legislative history surrounding the adoption of the particular statute. Unfortunately, the Horse Act was adopted twenty-nine years before the codification of the Internal Revenue Code (the Code). In addition, the later substitution of “representatives of persons” for “agents, attorneys, or other persons representing claimants before his department” was part of “An act to revise, codify, and enact without substantive change certain general and permanent laws, related to money and finance, as title 31, United States Code, ‘Money and Finance.’” The revisions were a housekeeping effort rather than a change in the underlying law. So, where do we turn for clues as to the meaning of presenting a case in this context? We know that the Horse Act was designed to curb fraudulent claims against the government for the value of property lost during the Civil War.

2. The District Court’s Broader Statutory Analysis

After concluding that the text of § 330 unambiguously forecloses the IRS’s ability to regulate unenrolled preparers as representatives who practice before the IRS, the district court offered additional statutory support for its holding. Specifically, the court cited the Code’s existing penalty and injunction scheme against unlawful return preparers. The court reasoned that giving the IRS the power to impose monetary penalties on unenrolled preparers and revoke their right to file returns would render the existing Code scheme obsolete. Furthermore, the court contended that it is only the existing scheme that represents Congress’s clear intent to punish unlawful preparers. That is, the specific scheme of the Code trumps the more general authority granted to the IRS under § 330.

The district court admitted the weakness in this line of reasoning. Indeed, the same overlap of Code penalties with Circular 230 penalties already exists for attorneys, CPAs, EAs, and others enrolled to practice before the IRS. One of the court’s main concerns with the RTRP program is that it would allow the

27. See generally Muller, supra note 4.
29. See Loving, 917 F. Supp. 2d at 79 (“Section 7408 thus might seem to undercut the Court’s analysis here . . . . Despite flagging this issue . . . . the Court will pursue it no further. The IRS never relied on (or even cited) § 7408, and the Court declines to generate arguments that the Government has failed to make.”).
IRS to strip unenrolled preparers of their ability to practice without the procedural protections, such as judicial review, provided in the Code.\textsuperscript{30} But these protections have already been eliminated for other practitioners without fanfare. The court rightly concluded that the IRS would almost never pursue injunctive relief under the Code when it could get the same result with far less work under Circular 230. But the court ignored that this overlap already exists, regardless of whether Circular 230 covers unenrolled preparers. Return preparation is an activity constituting “practice before the Internal Revenue Service” under Circular 230.\textsuperscript{31} What probably confused the court is that only practitioners—defined to exclude unenrolled preparers in the pre-2011 version of Circular 230—are subject to penalties and sanctions with respect to unlawful tax returns. In other words, the addition of the RTRP category only extends to unenrolled preparers the overlap of Code penalties and Circular 230 penalties that already exist for credentialed practitioners. In addition, attorneys are subject to regulation in triplicate because they are also governed by the rules of professional conduct. A lawyer who filed an unlawful tax return could be disbarred from practice before the IRS under Circular 230, enjoined from filing tax returns under Code § 7407, and disbarred from practicing law anywhere she has an active license. Unlawful tax-return preparation has always been the target of overlapping penalties, but prior to 2011, only with respect to credentialed preparers.\textsuperscript{32}

\textbf{B. The IRS’s Appeal}

Not surprisingly, given the far-reaching implications of the district court’s decision and the cost the IRS incurred in developing the RTRP program, the IRS appealed the decision to the United States Court of Appeals for the District of Columbia. As previously discussed, the IRS both appealed the decision and filed a motion to defer the injunction pending the outcome on appeal. The court denied the deferral, but clarified that the IRS could proceed with its preparer tax identification number (PTIN) program.\textsuperscript{33} Effective January 1, 2011, all paid tax-return preparers must obtain a PTIN.\textsuperscript{34} A preparer must enter

\begin{itemize}
  \item \textsuperscript{30} See id. at 78 (“Yet if § 330 covers tax-return preparers, the IRS could sidestep every protection § 7407 affords—judicial review, the demanding standards for the extraordinary remedy of an injunction, and the elevated hurdle for enjoining preparation of tax returns (instead of further violation)—while effectively obtaining the same result.”).
  \item \textsuperscript{31} See 31 C.F.R. § 10.2(a)(4) (2013) (defining “Practice before the Internal Revenue Service” to include “preparing documents [and] filing documents”).
  \item \textsuperscript{32} See, e.g., id. § 10.22 (“Diligence as to accuracy.”); id. § 10.33 (“Best practices for tax advisors.”); id. § 10.34 (“Standards with respect to tax returns and documents, affidavits and other papers.”).
  \item \textsuperscript{33} See generally Loving v. IRS, 920 F. Supp. 2d 108 (D.D.C. 2013).
  \item \textsuperscript{34} See 31 C.F.R. § 10.8(a) (“Except as otherwise prescribed in forms, instructions, or other appropriate guidance, an individual must be an attorney, certified public accountant, enrolled agent, or registered tax return preparer to obtain a preparer tax identification number.”); I.R.S. Notice 11-6, 2011-3 I.R.B. 315 (providing “guidance regarding the requirement to obtain a preparer tax identification number (PTIN)” and “interim rules
her PTIN on any tax return or claim for refund she prepares. Obtaining a PTIN is as easy as applying and paying the fee. The IRS issues PTINs regardless of the preparer’s competency or skill level. Preparers must pay an annual fee to renew their PTINs. The IRS may conduct a federal tax compliance check on a preparer who applies for, or renews, a PTIN. The PTIN requirement continues to apply to all preparers, including unenrolled preparers who are not regulated by the IRS in the wake of the Loving decision.

After the district court’s decision, five former Commissioners of the IRS filed an amicus brief with the Court of Appeals for the D.C. Circuit, supporting the IRS’s contention that the statute does not clearly exclude unenrolled preparers from IRS regulation. The essence of their argument is that because of the complexity and importance of our tax system, through which the government administers a wide variety of social welfare programs, unenrolled preparers are not simply calculating an individual’s tax liability, but are also presenting the case for entitlement to government assistance. Specifically, the Commissioners disagree with the district court’s assessment that “[f]iling a tax return would never, in normal usage, be described as ‘presenting a case.’” They argue that:

Given the content and scope of the modern Internal Revenue Code, a tax return preparer is no longer merely poring over a box of receipts in green eyeshades (if such a caricature ever described the full role of the tax return preparer). Instead, the preparer must explore with taxpayer-clients critical issues such as health care, child care, family relationships, education goals, home ownership, charitable giving, saving for retirement, and any number of other public policy goals that Congress has decided to address through the Internal Revenue Code.

The Commissioners’ basis for attaching increased importance to the role of the modern tax-return preparer centers on “refundable credits,” which not only have the potential to wipe out a taxpayer’s tax liability, but also may result in a refund. Their examples of refundable credits include: the earned income applicable . . . during the implementation of new regulations governing tax return preparers”); see also Treas. Reg. § 1.6109-2 (2010) (“Tax return preparers furnishing identifying numbers for returns or claims for refund and related requirements.”).

35. “Amicus curiae” is Latin for “friend of the court.” With the court’s permission, amicus briefs can be filed by parties who have an interest or expertise in the litigation. These briefs neither make the authors a party to the lawsuit nor entitle them to present their arguments in court.


37. Id. at 9.
The child tax credit, the health insurance costs credit, the first-time homebuyer credit, the Making Work Pay credit, and the adoption expenses credit. The American Opportunity Tax credit also belongs on this list of refundable credits. For tax years 2009 to 2017, up to $1000 of this credit for educational expenses is refundable, subject to income-based eligibility constraints. A more detailed explanation of these credits and the difference from a nonrefundable credit will help make the point. The adoption expenses credit was originally enacted in 1996, providing for an initial maximum credit of $5000. The credit was adjusted for inflation over the years and was nonrefundable for years 1997 to 2009. For 2010 and 2011 the credit became refundable, with maximum amounts of $13,170 and $13,360, respectively. The credit has always been subject to elimination (phaseout) for higher-income taxpayers. Imagine a taxpayer with income below the phaseout threshold, who spent $10,000 adopting a child in 2009 and had a tax liability (before applying the credit) of $8000. The credit would eliminate the tax liability. But how much better off would that same taxpayer be if the adoption occurred in 2010? Under the same facts, but with a refundable credit, the taxpayer would receive a $2000 check from the federal government. Under this simplified example, there is a striking difference between a refundable and nonrefundable credit. The Commissioners’ argument is that the government administers social programs through refundable credits, which are offered independent of tax liabilities (at least to the extent of the refundable portion). Accordingly, tax-return preparers are not merely performing a simple calculation of tax liability, but are making the case for entitlement to government assistance in the form of payouts.

Adequate disclosure requirements for certain positions taken on a tax return offer additional support for the argument that the statutory language presenting a case encompasses the filing of a tax return. Indeed, questionable positions on a tax return must be disclosed, explained, and substantiated in order to avoid penalties if the IRS later assesses a tax deficiency. The Code includes penalties

39. See id. § 24(d)(1).
40. See id. § 35.
41. See id. § 36.
42. See I.R.C. § 36A.
43. See id. § 23; see Brief Amici Curiae of Former Commissioners of Internal Revenue in Support of Defendants-Appellants, supra note 36, at 36 (listing credits).
44. See I.R.C. § 25A(d), (i)(5) (2012) (outlining income limitation and refundability of 40% of credit).
47. See I.R.C. § 23(b)(2).
against taxpayers and tax-return preparers for the underpayment of taxes resulting from an improper tax return.\textsuperscript{48} Both parties can avoid penalties by adequately disclosing the questionable position that resulted in reduced tax liability.\textsuperscript{49} The idea is that if a preparer gives the IRS an honest description of the position, there should not be any penalty on top of additional taxes owed. Noncash charitable contributions fall into the category of questionable positions because of valuation challenges. But determining value is a necessary step to claiming the charitable contribution deduction. The IRS provides Form 8283 to assist taxpayers in substantiating the value of a noncash charitable contribution. For example, a taxpayer who donates a painting worth more than $20,000 to the Metropolitan Museum of Art must obtain a qualified appraisal and attach the appraisal to Form 8283. In addition, the Metropolitan Museum of Art and the appraiser must sign Form 8283 indicating receipt of the painting and the veracity of the appraisal, respectively. A taxpayer who follows all of these steps meets the adequate disclosure requirement to avoid any potential penalty stemming from an IRS audit of the charitable contribution.\textsuperscript{50} The above process for claiming a noncash charitable-contribution deduction requires tax knowledge beyond the scope of that possessed by the average individual taxpayer. Its complexity goes beyond checking a box or entering a dollar figure. In that regard, the preparer is acting as an advocate for the taxpayer in presenting a case not only to claim the deduction, but also to avoid any penalties that could arise from an IRS audit of the contribution. The case is the detailed substantiation of the value of the artwork. Without the presentation of this case, the taxpayer gets no deduction. Clearly, this function of a preparer goes well beyond simply transferring wages from the Form W-2 Wage and Tax Statement to the Form 1040 U.S. Individual Income Tax Return.

Loving et al. did not object to IRS regulation of unenrolled preparers representing a taxpayer during audit. Rather, their only objection is to the regulation of unenrolled preparers who do nothing but file returns. The curious result of the district court’s holding is that the IRS lacks authority to regulate the preparation of a return, but would somehow be able to impose competency standards if the preparer decided to represent a taxpayer during an audit of that same return. The mechanics of that would be awkward, at best. Would the unenrolled preparer have to take a competency exam before becoming a practitioner and representing the taxpayer during the audit? Would the Circular 230 standards retroactively apply to the preparation of the return in question? For example, practitioners are bound by Circular 230’s prohibition against

\textsuperscript{48} Id. § 6662 (“Imposition of accuracy-related penalty on underpayments.”); id. § 6694 (“Understatement of taxpayer’s liability by tax return preparer.”).
\textsuperscript{49} See id. §§ 6662(d)(2)(B), 6694(a)(2)(B); see also Treas. Reg. §§ 1.6662-3(c), 1.6694-3(c)(2) (1960).
signing a return containing an unreasonable position. If an unenrolled preparer became subject to IRS regulation during an audit of a return, it would follow that she would be bound by this prohibition. So, we would arrive at the same result of the IRS regulating the act of return filing by unenrolled return preparers.

A three-judge panel for the D.C. Circuit heard oral arguments on September 24, 2013. For the most part, both sides reiterated their arguments from the initial trial. The attorney representing the IRS, Gilbert Rothenberg, argued that § 330 is ambiguous, while the attorney representing Loving et al., Dan Alban, argued that the statute is clear and excludes return preparers. Alban stressed the distinction between tax compliance and tax controversy, arguing return preparers engage only in the former and thus are not being covered by the statutory language about presenting a case. The judges bombarded Rothenberg with questions, leading one commentator to facetiously conclude “Court of Appeals Not Loving IRS Arguments.” Clever, and probably true.

Rothenberg could have done a more effective job of advocating for the IRS. He argued that there is a blurred line between professionals performing a tax compliance function and those performing a tax controversy function. But he should have attacked Alban’s repeated assertion that the tax compliance function is one of “mandatory self-assessment of one’s tax liability.” That could not be further from the truth. At this time, the Code is far too complex for the vast majority of taxpayers to be able to self assess. Indeed, most taxpayers require and seek assistance in complying with their reporting obligations. Even more striking, many taxpayers know so little about tax law that they are at the mercy of the assertions and conclusions the preparer makes on their behalf. For these reasons, return preparers do, in fact, “advise and assist persons in presenting their cases.”

The D.C. Circuit’s panel of presiding judges hammered Rothenberg right out of the gate by asking him why, if the IRS always had the statutory power to

55. Oral Argument at 19:17, supra note 53.
56. See id. at 27:30, 31:00.
58. See supra note 21 and accompanying text.
regulate return preparers, did it wait 130 years to exercise that power?\(^{59}\) Rothenberg responded that the APA allows an agency’s interpretation of its governing legislation to evolve over time.\(^{60}\) Alban agreed.\(^{61}\) In fact, the \textit{Chevron} case expressly provides for the evolution of agency decisions and interpretations: “[An] agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.”\(^{62}\) This flexibility appears to authorize the IRS to change its definition of representative, as the increased complexity of the Code and its administration of various government assistance programs requires a tax professional to present a case on behalf of a taxpayer at a much earlier stage in the process than would have been the case historically. The Commissioners cite refundable credits to support their argument for the role of tax-return preparers as advocates. All of these credits are recent additions to the Code. The earned income credit was enacted in 1975 and is by far the oldest of the refundable credits, apart from the credit for excess wages withheld.\(^{63}\) The child tax credit was enacted in 1997,\(^{64}\) the health insurance cost credit was enacted in 2002,\(^{65}\) and all of the other listed credits were adopted (or made refundable) in 2008 or later.\(^{66}\) The recent advent of most refundable credits lends further support to the argument that the IRS’s definitions of representatives and practice should be able to change as the Code and role of return preparers change. It has been less than six years since the adoption of several refundable credits that changed the landscape of tax-return preparation, increasing the role of preparers in helping taxpayers present their case for entitlement to government assistance.

Along the same lines, Alban argued that return preparers cannot be considered representatives because the IRS does not require them to file a Form 2848 Power of Attorney and Declaration of Representative (POA) to act on behalf of the client.\(^{67}\) A POA is required when a tax professional wishes to

\(^{59}\) See Oral Argument at 5:42, \textit{supra} note 53.

\(^{60}\) See \textit{id.} at 6:11 (citing Air Transp. Ass’n of Am., Inc. v. Nat’l Mediation Bd., 663 F.3d 476, 484 (D.C. Cir. 2011)).

\(^{61}\) See Oral Argument at 32:45, \textit{supra} note 53.


\(^{67}\) See Oral Argument at 32:14, \textit{supra} note 53.
represent a taxpayer during IRS audit or appeal. Alban’s argument is factually accurate, but ignored the IRS’s ability to change its definition of representative with the changing landscape of tax-return preparation. In other words, the fact that the IRS does not currently require a POA for tax-return preparation does not preclude it from later defining representative to include return preparers.

A discussion of legal arguments would not be complete without mentioning step two of the Chevron analysis. Both Loving and the IRS gave short shrift to step two, probably because if the IRS prevails on step one, its victory under step two is almost certain. If the court concludes under step one that the meaning of representatives in § 330 is ambiguous, step two gives deference to the IRS’s interpretation. Deference means that the IRS’s interpretation will prevail unless it is “arbitrary or capricious in substance, or manifestly contrary to the statute.”

“When a challenge to an agency construction of a statutory provision . . . centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left by Congress, the challenge must fail.” Indeed, “[i]n such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.” In other words, a reasonable interpretation by the IRS would be upheld under a step-two analysis, despite any policy arguments made by the plaintiffs. That is because the judicial branch is in the business of interpreting the law, not making policy arguments; the latter is left to Congress. This makes sense because if a court upholds the IRS’s interpretation of representatives and Congress disagrees for policy reasons, Congress can simply legislate a different result.

IV. POLICY CONSIDERATIONS IN SUPPORT OF REGULATION

The district court reiterated the principle that policy considerations cannot override its interpretation of the text and structure of a statute. The court remarked that “[i]n the land of statutory interpretation, statutory text is king.” But these considerations are worth exploring. If the IRS loses this battle in the judiciary, it may turn to Congress, where policy arguments are paramount. Indeed, there have been a number of bills introduced in Congress to give the
IRS express authority to regulate tax-return preparers. The Senate Committee on Finance recently lamented the potential judicial defeat of the RTRP program explaining, “[i]f the IRS does not prevail in its appeal of the Loving case, it will lose an important tool to increase tax compliance and protect taxpayers from unethical tax-return preparers.” There is legislative appetite and enthusiasm for return preparer regulation.

A. Consumer Protection

Consumer protection is the argument most frequently made in support of preparer regulation. Prior to enacting the RTRP regulations, the IRS studied preparer compliance, largely by examining “mystery shopper” tests. As an example, the Treasury Inspector General for Tax Administration (TIGTA) had its auditors pose as taxpayers and “shopped” twenty-eight unenrolled return preparers, twelve of whom worked for commercial tax-return firms and sixteen of whom worked at or owned a small firm. The shopped preparers were asked to prepare a return from one of five scenarios, none of which dealt with complex tax topics. TIGTA summarized the results by breaking out the tax returns into sixteen topics and calculating accuracy on each topic. Accuracy ranged from 0% on business expenses to 100% on wage income, with lots of inaccuracy in between. There was only 60% accuracy on itemized deductions (such as the mortgage-interest deduction), only 50% on education credits, and only 8% on self-employment tax and deduction. The amicus brief filed by the National Consumer Law Center cites even more salacious studies. Results include ignoring dividend income in order to increase the tax refund, fabricating a $2000 church donation for a taxpayer who does not attend church, and overstating the time a child lives with the taxpayer in order to receive a dependency exemption. All such examples could be compiled into a page-turner of a novel. There is little debate about the existence of fraud in the unenrolled preparer community.


77. See id.


79. See id. at 12.
The argument made by opponents of regulation is that the relevant question is not whether there is fraud among unenrolled preparers, but whether there is the same level of fraud among regulated preparers (attorneys, CPAs, and EAs). There is essentially no data in this area, however, because these preparers are already regulated. Yet, in response to the IRS’s strategic plan for fiscal years 2009 to 2013, the TIGTA piloted the Return Preparer Visitation Project in 2010. Preparers included attorneys, CPAs, EAs, and unenrolled persons. Participants were selected based on a risk-assessment targeting the filing of schedules with high error potential. The result was the selection of 10,000 preparers based on error potential, not actual errors. These preparers received a letter from the IRS indicating the reason for their selection, describing the potential penalties for inaccurate tax returns, and explaining that the IRS would visit some of the recipients to check for tax compliance. Of the 10,000 receiving the letter, almost 2,500 received in-person visits. It is unclear from the TIGTA report how many of the visits uncovered inaccuracies in tax returns. But the report concluded that the program should establish a baseline of accuracy among visited preparers and a mechanism for tracking improvement. So, while there may not be any current data on the accuracy of tax returns filed by credentialed preparers, the IRS has coupled its RTRP program with efforts to improve accuracy from all preparers. Furthermore, the absence of data on the accuracy of credentialed preparers is no excuse for not regulating the well-documented problem of inaccuracy from unenrolled preparers. From a consumer-protection standpoint, it does not make sense to regulate attorneys, CPAs, and EAs, but not unenrolled preparers performing exactly the same task. All taxpayers should be protected from fraudulent preparers. That protection starts with regulation.

The frequent use of tax preparation software by individuals and paid return preparers adds a level of complexity to analyzing the accuracy of tax returns. During the 2009 filing season, individuals filed thirty-two million tax returns using software, and preparers filed over sixty-one million returns using software. Currently, the IRS checks software packages to ensure compatibility with its e-filing systems, but there is no evaluation for accuracy.

The regulation of the software industry should be secondary to the regulation of all preparers. Taxpayers and preparers are the ones who can be penalized for an inaccurate return. The onus is on individual taxpayers and preparers to ensure the accuracy of returns filed using software. Blaming the software is not

82. See id. at 10.
an acceptable defense against penalties for inaccuracy. Regulating tax-return preparation software is important from the standpoint that consumers should not be paying for faulty software and vendors should not be falsely advertising a flawed product. But legal responsibility for the accuracy of a return ultimately rests with the taxpayer.

B. Compliance Costs

Loving’s chief complaint about the RTRP program is the cost of compliance. These costs are both monetary, and inclusive of the opportunity cost of lost business while studying for the competency exam or attending continuing education events. A RTRP would be subject to the following expenses: $116 for the one-time competency exam, $34.95 for annual continuing education, and $64.25 to obtain and annually renew a PTIN. Yet, the PTIN requirement is mandatory regardless of the fate of the RTRP program. In terms of quantifiable costs, only a one-time fee of $116 and an annual fee of $34.95 remain.

Loving operates her tax-return business in an economically depressed neighborhood on the South Side of Chicago and is concerned about having to pass the RTRP costs on to her low-income clients. For 2012, she anticipated preparing 100 returns. In her first year of compliance, this would mean increasing the cost for each return by approximately $1.50. In subsequent years, she would only have to charge an additional thirty-five cents on each return compared to pre-RTRP years. This cost analysis does not include the opportunity cost of time spent studying for the exam or attending continuing education classes. But study time should be minimal for experienced tax-return preparers and continuing education can be completed online, eliminating any travel costs.

Annual compliance costs, as low as $34.95 after the first year, appear very reasonable for the added consumer protection provided by the RTRP program. The program looks like even more of a bargain when you compare it to an attorney or CPA’s initial and annual licensing expenses. Consider Illinois, Loving’s state of residence: An attorney in Illinois who prepares tax returns must pay up to $850 to take the bar exam and $64.25 annually for a PTIN. In

87. See Complaint for Declaratory and Injunctive Relief, supra note 83, at 15.
addition, she must earn thirty hours of continuing legal education over two years and pay annual member dues that increase with years of practice. The first year of admission is free, the fifth is $112, the tenth is $223, and so on, up to $320 for the twentieth year and beyond. 89 Of course, none of this includes the cost of three years of law school that enabled her to sit for the bar exam. A licensed CPA in Illinois who prepares tax returns must pay a one-time academic credential evaluation fee of $175 to sit for the CPA exam, a one-time exam application fee of $120, $729.08 to take the exam, 90 and $64.25 annually for a PTIN. In addition, every three years, she must complete 120 hours of continuing education and pay a $120 license renewal fee. 91 Again, this does not include the cost of 150 semester credit hours of college or university study with an accounting concentration or equivalent. By comparison to an attorney or CPA, a RTRP license is a relative bargain.

One final cost-related attack that Loving et al. and their supporters launch against the RTRP program is the lack of a small-business exemption. 92 Their argument is that small businesses are less able to bear the costs of the program than commercial chains, such as H&R Block and Jackson Hewitt. While this may be true, small businesses should not be exempted from quality control measures, such as the RTRP program. Consider how absurd it sounds to propose that an attorney who only practices “a little bit of law” should be exempt from going to law school, passing the bar examination, and complying with the professional code of conduct. Small business exemptions are appropriate for tax relief, as with the exemption in the Marketplace Fairness Act of 2013, which prevents states from requiring a remote business with less than one million dollars in remote sales to collect and remit sales and use tax. 93 But they are not appropriate in the context of quality control measures.

C. Wiping out Competition

Loving et al. argue that large commercial chains, such as H&R Block, as well as interest groups, such as the AICPA, supported the RTRP program with the goal of eliminating competition. 94 While this may be true for H&R Block, the overlap in clientele between unenrolled preparers and CPAs is probably

93. See S. 743, 113th Cong. § 2(c) (2013) (passed by Senate May 6, 2013).
94. See Complaint for Declaratory and Injunctive Relief, supra note 83, at 2.
minimal. As a broad generalization, CPAs are likely serving higher-income taxpayers, who seek expertise on more complex tax issues and are willing to pay higher fees. In addition, CPAs engage in many types of work other than tax-return preparation. The same is true of attorneys. While there may be some truth to the notion that tax-return preparation chains, and even EAs, would support the RTRP program in order to wipe out competition, that goal cannot account for the broad reaching support among CPAs, attorneys, and the general public.95

D. Effectiveness of Licensing

Debating the merits of professional licensing is largely pointless because it is the reality for roughly 29% of the U.S. workforce.96 Nonetheless, one of the primary alleged faults of licensing schemes is not present in the RTRP program—that is, required educational credentials and licensing exams do not accurately measure or predict the quality of a practitioner.97 Painful as this may be to admit, this is undoubtedly true for attorneys, where law school education and the bar examination cover a multitude of areas in which the attorney will never practice and may not cover the area in which she will. Even if the exam covers an attorney’s area of practice, it would only be able to address the narrowest of topics in the allotted time. But this fault does not exist with the RTRP competency exam. The exam tests only knowledge required to complete the Form 1040 U.S. Individual Income Tax Return. Every tax-return preparer should know the answers to the questions in order to accurately perform her job. There is a one-to-one correlation between test questions and knowledge needed to perform the job of tax-return preparer. 

V. CONCLUSION

Though it is difficult to predict the judicial fate of the RTRP program, there are strong legal arguments on both sides. The United States District Court for the District of Columbia concluded that the law favored return preparers. Many commentators believe the Court of Appeals for the D.C. Circuit will reach the same result. But a judicial defeat will not mark the end of preparer regulation. Rather, the battle will then be fought in the legislative arena, where the policy arguments discussed above will carry tremendous weight. With substantial support for regulation from the general public and from Congress

itself, perhaps a judicial defeat is exactly what the legislature is waiting for to give the IRS express statutory authority for its RTRP program. Whether through the judiciary or the legislature, regulation is inevitable.