The Legal Authority of the Treasury Department to Index Capital Gains for Inflation

By
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June 26, 2019

Executive Summary

1. The Supreme Court held in *Verizon v. FCC* that the term cost is inherently ambiguous, contrary to the OLC opinion in 1992, which argued that the term cost had an unambigious, plain, clear meaning of original purchase price. That governing *Verizon* precedent leaves Treasury with the regulatory authority to clear up that ambiguity, and index capital gains for inflation.
2. The tax is imposed on Capital "Gains". Analyzing gains makes more clear that part of the gains being taxed merely reflect general gains in price inflation applying to all goods and services.
3. Explicitly recognizing that makes apparent that taxing such general price inflation makes no economic sense. The gain due to mere inflation applying to all goods and services does not provide any gain at all that can be used to pay for any other goods and services. They have all increased in price by the same inflation, or increase in the general price level. Consequently, unindexed capital gains involve a mere phantom gain due to inflation that should not be taxable as net income under the income tax.
4. Any such unindexed capital gains tax is eating into the value of the original capital, consuming part of it rather than taxing some of the income accruing to it. Over time, any such tax would be consuming the capital that upholds the nation's real production, creating economically downward spiraling decline, with increasing unemployment and decreasing real wages. That makes it a wealth tax instead of an income tax. But the 16^{th} Amendment only authorized an income tax, not a wealth tax.
5. Because any such unindexed tax would be pulling the economy down, and deconstructing it, and would be unconstitutional, that could not have been the intention of Congress. That can be entirely avoided by indexing capital gains for inflation, taking inflation out of the taxable base altogether, and taxing only real gains rather than phantom, nominal gains. Such an indexed tax would be a tax only on real income to capital. That is the intended, and constitutionally authorized, focus of the income tax, which is not a tax on gross (nominal) income, or on wealth. America's income tax is intended to be a tax on real, net income, not a plainly destructive, dysfunctional tax on mere inflation. That is why incomes to labor have already been indexed for inflation, removing mere inflation from the tax. Doing that for labor income and not for capital income is an oversight, because labor income and employment is dependent on capital. That is precisely the kind of oversight that can and should be addressed by regulation.
6. Taxing unindexed inflation under the capital gains tax would have the effect of increasing the holding period or lock in effect of the capital gains tax. That would increase the contractionary,

anti-growth effect of the tax. That anti-growth effect would decrease revenues from the tax, as revenues fall when the economy contracts, just as revenues rise with growth.

7. Treasury as the expert agency regarding taxation would be the precise Executive agency to so define the tax so it can be economically functional, not destructive, in accordance with the elected President's pro-growth economic policies.
8. No one would likely even have standing to challenge a Treasury regulation in court providing for indexation of capital gains for inflation.

Cost Is An Ambiguous Term

The Internal Revenue Service is an agency of the Department of Treasury. That means Treasury has the power to issue the regulations interpreting the U.S. income tax code. Treasury, of course, is an agency of the Executive Branch, which has the power to administer and execute the laws, including the income tax code.

That Executive Branch is all under the power of the President of the United States. So he or she, as the only public official elected by all the people, has the final say over that execution, in accordance with Judicial as well as Presidential oversight. As a practical matter, those regulations can have the effect of cutting or raising income taxes, for particular taxpayers and activities.

Those regulations all must be issued in accordance with applicable law, which includes the Administrative Procedure Act (APA), the U.S. income tax code, and governing judicial precedents. As an agency of the federal government, Treasury has established powers under federal law, as the premier, expert, federal agency administering federal income tax law and policy.

I will address below the specific issue of the indexation of capital gains for inflation. A capital gain is the increase in market value of an item of capital, broadly defined to include almost anything of value. That can include stock in a corporation, or real estate, or precious commodities, such as gold, oil, diamonds, or almost any possession that may be bought and sold, such as a painting, or office furniture, or a computer used for business.

The key question for taxation purposes is how to measure any gain in value. That is typically measured by the market value at the time of acquisition of the capital, or "cost" of the capital, with taxation applying at the time the possession is sold, with the gain measured by market value at that time.

The Office of Legal Counsel at the U.S. Justice Department issued a legal opinion in 1992 saying, "[S]ince the inception of the federal income tax system following ratification of the Sixteenth Amendment in 1913, Treasury has consistently interpreted the statutory term 'cost' to mean price paid." Opinion of the Office of Legal Counsel, U.S. Justice Department, September 1, 1992, (Hereinafter "OLC Op.") at 2. The current Treasury regulation, originally adopted in 1957, states, "The cost [of property] is the amount paid for such property in cash or other property." 26 C.F.R. Section 1.1012-1(a) (1992).

The current debate is whether Treasury has the power to amend this regulation to reinterpret the statutory term "cost" to mean the price paid *as adjusted for inflation*. The governing precedent regarding such power is *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.,* 467 U.S. 837 (1984). Under *Chevron*, Treasury would have that power if the statutory term "cost" could be found to be ambiguous. The OLC Opinion insisted that the term "cost" is unambiguous, meaning the historical price paid for a thing. But the OLC Opinion takes a narrow, crabbed view of ambiguity, saying that "*Chevron* does not furnish blanket authority for the regulatory rewriting of statutes whenever a dictionary gives more than a single definition for a statutory term." OLC Op. at 3. It derides applying economic analysis to the definition of terms, adding "or whenever some arguably relevant discipline assigns a specialized, technical meaning to such a term." Id. It concludes that "the statute itself has a plain meaning which is clear and unambiguous: cost means the 'actual price paid' or 'purchase price,'" and "cost is not ambiguous in the context of determining gain or loss from the disposition of property." OLC Op. at 4.

But the Supreme Court took a more expansive view in *Verizon Communications v. FCC*, 535 U.S. 467, 497 (2002). As Charles Cooper and Vincent Colatriano explain in their most recent analysis in the *Harvard Journal of Law and Public Policy,*[1] the *Verizon* Court ruled "that the meaning of the term 'cost' is not at all plain and unambiguous and therefore can be reasonably interpreted to include costs other than historical cost."[2] The Court in *Verizon* was more broadly informed by economic analysis because it was examining the term "cost" in the context of utility rate regulation, which is exactly what courts need to do when analyzing capital gains.

As Cooper and Colatriano explain in their recent *Harvard Journal* analysis, "The *Verizon* Court flatly and unanimously rejected petitioners' dictionary driven interpretation of cost and deferred to the agency under *Chevron*. Far from plain and unambiguous, the *Verizon* Court held, the term cost is "protean," "a chameleon," and "virtually meaningless."[3] *Id.* at 500-01. Considering the ordinary, plain meaning of the term "cost," the Court in *Verizon* concluded,

> The petitioners have picked an uphill battle. *At the most basic level of common usage, "cost" has no such clear implication.* A merchant who is asked about the "the cost of providing the goods" he sells may reasonably quote their current wholesale market price, not the cost of the particular items he happens to have on his shelves, which may have been bought at a higher or lower price.

Id. (emphasis added).

The *Verizon* Court continued, "When the reference shifts from common speech into the technical realm, the incumbents still have to attack uphill." Cooper and Colatriano add in explanation, "[W]ith regard to the meaning of cost as an economic term of art, the Court rejected the argument that cost must

[1] Charles J. Cooper & Vincent Colatriano, "The Regulatory Authority of the Treasury Department to Index Capital Gains for Inflation: A Sequel," *Harvard Journal of Law and Public Policy*, Vol. 35, No. 2, Spring 2012, at 487 to 524.
[2] Cooper and Colatriano, id at 490.
[3] Cooper and Colatriano, id at 502.

be read 'to mean past incurred cost.'[4] The Court cited several economic definitions of cost, noting that although 'sunk costs' are prior costs, 'practically every other sort of economic 'cost' is forward looking, or can be either historical or forward looking.'"[5]

Cooper and Colatriano continue, "The Court then summarized why the term cost is ambiguous and cannot, in and of itself, be read to refer only to historic cost," quoting from *Verizon*, "The fact is that without any better indicator of meaning than the unadorned term, the word 'cost' in [Section] 252(d)(1), as in accounting generally, is 'a chameleon,' a 'virtually meaningless term.'"[6]

Cooper and Colatriano summarize,

> The Court's decision in *Verizon,* of course, is not directly controlling with respect to the meaning of cost as used in Section 1012 of the Code. Still, the Court unambiguously and forcefully rejected the notion that the term cost, either as a matter of common usage or as an economic term of art, unambiguously means only the historical price actually paid for an asset. The dictionary driven 'plain meaning' argument did not attract a single vote. Thus, the Court's decision wholly eliminates the fundamental premise of the OLC's dictionary driven 'plain meaning' analysis in its 1992 opinion.

Cooper and Colatriano, *supra,* note 1. The authors conclude, "If the issue of Treasury's authority to provide for indexing capital gains for inflation should arise in some future administration, the OLC would therefore be obliged to reconsider the question from scratch." *Id.*

Other cases before *Verizon* interpreted cost more broadly to include inflation. The Eleventh Circuit Court of Appeals in *Mercy Community Hospital v. Heckler*, 781 F.2d 1552 (1986) required the Department of Health and Human Services to account for inflation when reimbursing for "reasonable costs." Likewise, in *Amusement & Music Operators Association v. Copyright Royalty Tribunal*, 676 F.2d 1144 (1982), the Seventh Circuit ruled that the automatic inflation adjustment by the Copyright Royalty Tribunal was supported by the copyright act, even though other parts of the law required adjustments for inflation.

Legislative history of the tax code also does not provide any basis for finding that Treasury is now foreclosed from indexing capital gains for inflation by regulation. Then Rep. Hardy offered an amendment to the Revenue Act of 1918. But neither that Amendment or the ensuing debate indicated any intent of Congress to foreclose indexing capital gains for inflation, and Hardy later withdrew his

[4] 535 U.S. 499, n. 17.
[5] *Id.*
[6] *Id.,* at 500-01.

Amendment to offer an alternative, which the House then rejected. That rejection did not say anything about Congress's intent regarding the indexation of capital gains for inflation.

Taxing the Gain in Capital "Gains"

A more salient and illuminating term than cost may be "gain," since the Code expressly taxes "capital *gains*," which are measured by value at the time of sale. That naturally puts the focus on what is being gained and what is being taxed. In turn, that naturally raises the question, especially if the value is being measured from the time of acquisition, of how much of any nominal gain is simply a matter of inflation since the time of acquisition. That is not a matter only of sophisticated economic analysis, as the Office of Legal Counsel (OLC) suggests.[7] Rather, inflation is a commonly understood, plain concept, often discussed in the general press and media.[8]

This raises the question of what economic sense would it make to tax inflation in the context of any capital "gain". Inflation does not involve any increase in purchasing power. Inflation simply measures an increase in the general price level, which on average affects all prices for all goods and services. So inflation comprising any capital gain would not involve an increase in value that could be used to purchase anything. What is gained from the sale of capital from inflation would be reflected in the price of every other good or service that the taxpayer could choose to buy. If his or hers capital's price has increased by 50% due to general inflation, the price of anything else the taxpayer tries to buy would have increased by 50% as well. So the sale price due to inflation would be eaten up by the increased price of anything else the taxpayer may try to buy with the sale proceeds. Consequently, gain due to inflation does not involve any net income that should be subject to taxation under the income tax code.

Cooper and Colatriano explained the point saying, "A tax imposed on a 'gain' attributable to inflation is a tax on a gain that does not truly increase the taxpayer's purchasing power. By more accurately assessing the actual increase in a person's wealth or purchasing power, capital gains indexation would run truer to the principles underlying federal income taxation."[9]

The U.S. Supreme Court defined income in *Eisner v. Macomber*, 252 U.S. 189 (1919) as "the gain derived from capital, from labor, or from both combined, provided it be understood to include profit

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[7] The OLC Opinion consistently derided using "sophisticated economic analysis" and the "jargon of economists" to interpret the statute, as if the language should be viewed from the perspective of readers that are uneducated, unsophisticated, and ignorant. OLC Op. at 8-9. As we argue below, there are Supreme Court precedents that have interpreted the language precisely using sophisticated economic analysis, and those precedents should be considered governing for purposes of this analysis.
[8] OLC Op. to the contrary at 6-8, 10, 12.
[9] Cooper and Colatriano, *supra,* note 1, at 497.

gained through a sale or conversion of capital assets….”[10] The Court explained a capital gain as “a gain, a profit, something of exchangeable value, proceeding from the property…and…received or drawn by the recipient (the taxpayer) for his separate use, benefit and disposal.”[11]

That language seems to preclude taxation of mere inflation under the capital gains tax, which does not provide anything for separate use, benefit and disposal, because as just described above all other goods and services would bear the same inflationary increase in prices. Indeed, *Eisner v. Macomber* should be cited for the proposition that the sale proceeds from the sale of capital cannot be subject to any tax on the mere inflation component, and consequently as a precedent effectively holding that capital gains must be indexed for inflation.

That proposition in *Eisner v. Macomber* should be considered constitutionally required in fact. The 16th Amendment authorized only an income tax, which, as *Eisner* held, is something involving separate benefit or disposal, as would result from real, or inflation indexed, capital gains. Trying to tax unindexed capital gains would involve a wealth tax. It would involve taxing the corpus of the unindexed capital itself, not taxing real income to the capital.

The income tax raises commonly understood issues that common voters are expected to understand. Those are not specialized matters of sophisticated economic analysis, as OLC’s analysis suggests.[12]

The leading judicial precedent governing Treasury’s regulatory powers is *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). Under the governing *Chevron* doctrine, courts defer to agency discretion and expertise. The agency regulation cannot change statutory language, or adopt an interpretation of that language that is prohibited in the statute. But otherwise, the doctrine of interpretation under *Chevron* involves judicial deference to agency expertise.

The issue under *Chevron* is not whether the court agrees with the interpretation the agency has made. Or if the agency’s interpretation is or is not required under the statute. The issue is whether the agency’s interpretation is *permissible* under the statute.[13] Under *Chevron,* the court must defer to the agency’s interpretation of the statute if that interpretation is “plausible” and “reasonable”, even if the court’s *de novo* interpretation would differ from the agency’s.[14]

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[10] 252 U.S. at 207
[11] Id.
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[13] The Supreme Court said in *Chevron*, “If, however, the statute is silent [as it is concerning indexation of capital gains] or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” 467 U.S. at 843; Charles J. Cooper, Michael A. Carvin, Vincent J. Colatriano, The Legal Authority of the Department of the Treasury to Promulgate A Regulation Providing for Indexation of Capital Gains, Virginia Tax Review, Spring 1993, Vol. 12, No. 3, at 633.
[14] Id.

Even OLC's legal opinion quotes the governing *Chevron* precedent saying,

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

467 U.S. at 865-66.

Because taxing capital owners on the inflation component of capital gains makes no economic sense, and consequently could not have been the considered the intent of Congress, under the governing *Chevron* precedent Treasury has the legal authority to index capital gains for inflation.

The recent Supreme Court decision in *Kisor v. Wilkie,* No. 18-15, 2019 U.S. LEXIS 4397 (June 26, 2019) did not change any of that. That case reexamined, but ended up reaffirming, *Auer v Robbins,* 519 U.S. 452 (1997), which held that courts should defer to an agency's interpretation of its own regulations interpreting its own governing statutes, long known as "*Auer* deference". That "*Auer* deference" should apply, the Court held in *Kisor*, only when the regulation is genuinely ambiguous. In that case, "judges only have to determine whether the agency interpretation is reasonable, not whether it is the best interpretation."[15] When the regulation is not ambiguous, the *Kisor* Court ruled, "the regulation then must mean what it means – and the court must give it effect, as the court would any law."[16]

That only further extended *Chevron's* holding that courts should defer to agency interpretations of their own governing statutes when there is any ambiguity in the meaning of that statute. The upshot for any Treasury regulation indexing capital gains for inflation consequently is that Treasury should try to make the regulation as clear and unambigious as possible. In that case, under *Auer*, as limited in *Kisor*, the Court would uphold it "as the court would any law." But if the Treasury failed in that, and its regulation was deemed ambiguous, then the regulation would only have to be "reasonable," not necessarily the "best interpretation". That indexing regulation would be reasonable for all the reasons discussed above, which is the same standard that would apply to Treasury's authority to issue the regulation under *Chevron* ("plausible" and "reasonable", even if the court's *de novo* interpretation would differ from the agency's, *supra*). That is because *Chevron*, *Auer*, and *Kisor*, all rest "on the idea that

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[15] Amy Howe, *Opinion analysis: Justices leave agency deference doctrine in place – with limits (Updated)*, SCOTUSBLOG (Jun. 26, 2019, 1:20 PM), https://www.scotusblog.com/2019/06/opinion-analysis-justices-leave-agency-deference-doctrine-in-place/

[16] *Id* at 2.

agencies have more expertise in the subject covered by a law than courts do and are therefore better suited to interpret both gaps in a federal law and their own regulations."[17]

Indexing Capital Gains for Inflation

As a matter of economic analysis, any capital gain can be divided into (1) inflation and (2) the real capital gain that is the object of taxation in the first place. What economic sense does it make for the government to impose a tax on inflation when it is really trying to tax real (a term which as a matter of economics means adjusted for inflation) capital gains?

Taxing inflation is not taxing anything that can be recognized as income involving any purchasing power. Inflation is merely an increase in the general price level. It measures the degree to which all goods and services are becoming more expensive. The OLC memorandum does not explain how that general increase in common expenses in the economy can possibly involve a taxable event. It provides exactly zero resources to pay for taxes, or anything else. So how does that represent an increase in resources that can be subject to the income tax?

The economic effect of applying the capital gains tax rate to mere inflation as well as real capital gains is effectively to raise the rate on real capital gains. Because real capital is so much more mobile than labor, the capital gains rate is recognized as having a powerfully contractionary effect on the economy. That is why the capital gains tax rate has always been applied at a preferential, lower rate compared to other forms of income.

And that is why in recent decades, every time the capital gains rate is increased, revenue has declined rather than increased. Taxing the inflation component of capital gains is effectively itself a tax increase on real capital gains, applied haphazardly, inadvertently, and arbitrarily. And that is why it results in a decline in revenue, rather than an increase. Treasury as the expert on tax policy would understand this perverse capital gains history, that when the capital gains rate is raised, revenue declines, and when the rate is cut, revenue increases, more than any other agency.

That recognition would be raised even more so under the current President, who was explicitly elected because of a perceived need to restore economic growth in place of the long-term stagnation under the prior President's economic policies. Courts should recognize the need to follow the new expressed will of the people under this new President, and free the economy to grow maximally, in accordance with that expressed will.

[17] *Id.* at 1.

Put simply, taxing inflation makes no economic sense. Consequently, that could not have been the intent of Congress. As the OLC opinion itself states (OLC Op. at 3), quoting the governing *Chevron* precedent, "If the intent of Congress is clear, that is the end of the matter." 467 U.S. at 842.

Congress has now indexed the taxation of wages for inflation (by indexing the rates that apply to wages). That shows further that Congress understands that taxation of inflation makes no economic sense. In this light, an interpretation of capital "gains" that involves indexation for inflation would surely be a permissible interpretation, and plausible and reasonable. Certainly, extending the same policy of indexing taxation of wages for inflation to the taxation of capital is plausible and reasonable.

Moreover, Treasury is entitled to the same protections of *Chevron* as any other agency. *Mayo Foundation for Med. Educ. & Research v. United States,* 131 S. Ct. 704, 712-714 (2011). Nothing in *Chevron* would suggest any exclusion of Treasury's interpretations of the tax code is warranted. If *Chevron's* same protections for expert agency interpretations, which may include the pro-growth policies of the President elected by the people in the last election, then Treasury has the power to interpret the capital gains provision as only taxing gains indexed for inflation.

This broad application of *Chevron* was further addressed in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). Cooper and Colatriano explained,

> *Brand X* involved a challenge to an FCC Order concluding that cable companies selling broadband internet service do not provide 'telecommunications service' within the meaning of the Communications Act of 1934. One of the principle questions before the Court was whether *Chevron* deference applies to the FCC's interpretation of 47 U.S.C. Section 153(44) notwithstanding the Ninth Circuit's earlier decision interpreting that statutory provision as including cable modem service within the definition of telecommunications services.
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> The Supreme Court held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court's decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion…Because nothing in the Ninth Circuit decision at issue in *Brand X* held that the Communications Act unambiguously required treating cable internet providers as providing telecommunications services, the Court held that the decision did not 'trump' the agency's construction for purposes of the *Chevron* analysis."[18]

[18] Cooper and Colatriano, *supra,* note 1, at 520, discussing *Brand X Internet Services*.

Cooper and Colatriano explain the implications of *Brand X* for the *Chevron* powers of Treasury to interpret the Code as providing for the power to index capital gains for inflation by regulation as follows:

> [T]he [*Brand X*] court made clear that a previous court decision interpreting a statutory provision operates to deprive an agency of discretion to interpret the provision differently only if the judicial decision finds the provision to be unambiguous. Because no previous judicial decisions conclusively hold that the term 'cost' unambiguously precludes indexation, *Brand X* confirms that a Treasury reinterpretation of cost to provide for indexation would be entitled to *Chevron* deference….[19]

Holding Period, Lock In Effects, and Revenues

The capital gains tax is recognized by tax analysts and economists as optional. That is because the tax is only due once the capital is sold. If the taxpayer does not have the funds to pay the tax, it is perfectly permissible for the taxpayer to continue to hold the capital until he can or is willing to pay the tax.

That means the capital gains tax has a powerful lock in effect on capital. Because of the tax, capital often remains locked in where it is already invested. It is not free, as labor is, to be reallocated to its highest possible return, because taxpayers are often not willing or even able to pay the tax.

This is powerfully anti-growth. Growth is maximized only when capital and labor are allocated to their highest and most productive uses. This is why the capital gains tax is recognized as having such a powerfully contractionary effect on the economy.

More capital is estimated to be locked into its current use and investment, at over $2 trillion, than was locked in overseas prior to the 2017 tax reform. That is why that reform sharply reduced the tax rate on repatriated capital in the hope of seeing it reinvested into the United States.

When the capital gains tax is not indexed for inflation, effectively increasing the tax rate on real capital gains, as distinct from inflation, that has the impact of *increasing the lock in effect*, making the anti-growth effect of the capital gains tax even more powerful and harsh. Taxpayers owning stock for decades are even more unwilling to bear the tax for selling their capital. That lower growth in turn decreases the tax revenues from the capital gains tax even more.

This makes indexing the capital gains tax even more powerfully pro-growth. It would free trillions in capital to reallocate to its highest, most productive, best use. That would produce a sharp increase in

[19] Cooper and Colatriano, *supra,* note 1, at 490.

capital gains revenue, as the lock in effect would be immediately and greatly reduced. The resulting general increase in economic growth would further increase tax revenues, as higher economic growth always means higher revenues, because there is more income and value to tax, across all revenue sources: income taxes, sales taxes, property taxes, payroll taxes (more people working and earning higher wages).

This is a strong policy reason why the Treasury and the President may want to index capital gains taxes for inflation.

Treasury, As Well As Other Administrative Agencies, Have the Power to Change Their Interpretations of the Statutes They Administer

Even though indexing capital gains would be a change in long standing Treasury interpretation of the tax code, that change in agency interpretation would still be entitled to deference under *Chevron*. That has already been recognized by the Supreme Court in *Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

In that case, the Department of Health and Human Services issued a new regulation reversing the prior interpretation of federal law. The new regulation limited the use of federal funds for any abortion-related activities. That was challenged by Petitioners who argued "that the [new] regulations are entitled to little or no deference because they 'reverse a longstanding agency policy….' and thus represent a sharp break from the Secretary's prior construction of the statute."[20]

But the Court ruled that the agency's new regulation was entitled to deference under *Chevron* even though the regulation involved a "sharp break" with the prior regulation.

Indeed, *Chevron* itself involved a change in agency interpretation of the statute it was administering. The Supreme Court in *Chevron* recognized a new President had been elected, and was entitled to change Administrative policies, as would be the case in changing income tax code regulations to reflect indexing of capital gains for inflation. The Supreme Court in *Chevron* said,

> The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. *On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.*[21]

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[20] Id. at 1768.
[21] Id. at 863-64 (emphasis added).

Cooper et al., explained, "A central premise of the Court's decision in *Chevron* is that the popularly elected executive…may adopt and implement reasonable policy choices within the discretion the statute entrusts to him, and that changes in such policy choices are the natural and predictable outgrowth of the political process. The judiciary is not to interfere with such legitimate policy choices." Cooper et al. at 643.

No One Would Even Have Standing to Challenge the Indexation of Capital Gains by Regulation

To even challenge a Treasury regulation providing for indexation of capital gains, the Plaintiff would have to satisfy the legal doctrine of "standing". Courts are not open for any party to come in and challenge government tax or budget policy they might disagree with, or think is bad policy. Only parties who have who satisfy the legal doctrine of "standing" can even bring a case in the first place.

To satisfy "standing," the plaintiff must first be able to show that he or she was directly harmed by the policy. Claiming that a tax cut is bad policy, or that it will increase the deficit, does not satisfy "standing" requirements. Courts are not open to hear debates about what policies cause economic growth, or create jobs, or wage increases. When the policy provides a tax cut for someone else, standing is even more remote.

A taxpayer who suffered a tax increase would have standing to sue to challenge whether the tax increase was adopted legally. But the fundamental standing problem caused by indexation of capital gains for inflation is that it involves tax cuts. A plaintiff would not have standing to challenge a tax cut for some third party. So academics, commentators, public policy or tax foundations, even legal foundations would have no standing to sue. If they tried, their case can be dismissed for lack of standing in a preliminary motion. Even a taxpayer does not have standing to sue to object to a tax cut for someone else.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court said the following about whether a party has standing to sue in federal court:

> The plaintiff must have suffered an 'injury in fact,' meaning that the injury
> is of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent. There must be a causal connection between the injury and the conduct brought before the court. It must be likely, rather than speculative, that a favorable decision by the court will redress the injury.

Desperate left-wingers who oppose indexation of capital gains as a "tax cut for the rich," knowing that old ideological saw does not confer standing on them to object, have suggested that charities could object to the tax cut because it makes donations to them by "the rich" less likely. But that argument does not satisfy the requirements of *Lujan* that "There must be a causal connection between the injury and the conduct brought before the court" and "It must be likely, rather than speculative…." That protects judges from having their courtrooms taken over by Marxist debating societies to hear the counter that with the tax cut the rich will more likely use their money to invest to create more jobs and rising wages. That is what working people voted for when they chose Trump over Hillary's continuation of Obama's policies in 2016. They rather than the courts are the ones with the power to decide.

Otherwise, charities might have been able to challenge the more direct Reagan tax cuts of the 1980s, or the Kennedy tax cuts of the 1960s, or the tax cuts spearheaded by Treasury Secretary Andrew Mellon in the 1920s, which created the "Roaring Twenties". Working class voters benefitted enormously from those tax cuts too.

Similarly, states, with their tax codes relying on federal tax code policies, would not have standing to object that their taxes would raise less revenue if federal capital gains were indexed for inflation.[22] Indeed, that argument would quite likely be wrong, as state revenues would more likely rise with higher economic growth, as they have under Trump's tax policies, even with the Trump's restriction on the deduction for state and local taxes. Moreover, states would always have their own sovereign power to adjust their state taxes as they choose.

Nor would members of Congress have standing to sue on the grounds that they would be deprived of their right to vote on the issue. Federal courts have generally held that such disputes between Congress and the Executive Branch are more appropriately left to be resolved as political questions,[23] especially since nothing would bar Congress from using its power to vote to resolve the question in the matter of indexation of capital gains for inflation.

Conclusion

In 2016, the voters, most especially including blue collar working people, chose a new direction for their country. They favored changes to promote booming economic growth, new jobs, and rising wages, and picked a President they thought most likely to deliver those results. Now he has already, in spectacular fashion. Courts should not step in to frustrate those voters and their choice. They should follow established law and precedent, and defer to the pro-growth changes their duly elected President and his executive branch may want to adopt by indexing capital gains for inflation.

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[22] As the Supreme Court did in 1927 in *Florida v Mellon*, 273 U.S. 12 (1927), a time when federal policies turned more favorable to federal taxpayers.

[23] *Raines v. Byrd*, 521 U.S. 811 (1997); *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999).

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