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Question of Purpose: Early Retirement Payments to Tenured Professors Constitute Wages Subject to FICA Taxation

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A QUESTION OF PURPOSE: EARLY RETIREMENT PAYMENTS
TO TENURED PROFESSORS CONSTITUTE WAGES SUBJECT
TO FICA TAXATION

STEPHEN SCOTT WICK*

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I. OVERVIEW

Currently, there is a circuit split on the issue of whether early retirement payments (ERPs) made to tenured faculty constitute wages subject to Federal Insurance Contribution Act (FICA)¹ taxation. In *North Dakota State University v. United States*, the Eighth Circuit held that ERPs made to tenured faculty do not constitute FICA wages because such payments are made to purchase the constitutionally protected property interest that tenured faculty hold in their tenure rights.² However, the Sixth and Third Circuits, in *Appoloni v. United States*³ and

* With all love and thanks to my wife, Sofia, and my sons, Aidan and Marcos—any success I have had at Cleveland-Marshall is the product of your support and patience. This Note was selected for the 2009-2010 *Cleveland State Law Review* Outstanding Note Award.

¹ I.R.C. §§ 3101-28 (2006).

² *N.D. State Univ. v. United States*, 255 F.3d 599 (8th Cir. 2001).

³ *Appoloni v. United States*, 450 F.3d 185 (6th Cir. 2006).

*University of Pittsburgh v. United States*⁴ respectively, held that such payments do constitute FICA wages because the ERPs were made in consideration of past service within the employment relationship.

This issue of whether ERPs made to tenured faculty constitute wages subject to FICA taxation is a recurring and costly issue that requires resolution. First, a primary concern of the federal tax system is the avoidance of disparate treatment between similarly situated taxpayers.⁵ Second, beyond achieving the ideal of uniform treatment under the federal tax system, taxpayers simply need to know what actions to take—the what, when, why, and how of both tax compliance and tax planning. Furthermore, this is a crucial issue for not only the individual taxpayer, but for the associated institutions as well.⁶

This Note will demonstrate that the Third and Sixth Circuits correctly held that ERPs made to tenured faculty constitute wages subject to taxation under FICA.⁷ Part II will provide the pertinent facts, consider the legal analysis conducted by each court, and argue that there is no material factual distinction among these cases. Part III will present the FICA framework and address the definition of wages in that context. Part IV will examine Revenue Rulings promulgated by the Internal Revenue Service (IRS) and discuss the level of judicial deference that Revenue Rulings merit. Part V will examine the specific Revenue Rulings associated with this issue and the role the rulings played in each court's analysis. Furthermore, it will be demonstrated that the Third Circuit's and Sixth Circuit's analyses, especially related to the Revenue Rulings, correspond most accurately with the purposes of both the concept of tenure and the ERPs in question, which were made to secure early retirement rather than to "buy" property rights.

II. THE THREE CASES

A. Background

In *North Dakota State University v. United States*, the Eighth Circuit unanimously affirmed the district court's finding that ERPs made to tenured faculty do not constitute wages and, therefore, "are not subject to FICA taxation."⁸ This was

⁴ *Univ. of Pittsburgh v. United States*, 507 F.3d 165 (3d Cir. 2007).

⁵ See, e.g., *Nickell v. Comm'r.*, 831 F.2d 1265, 1270 (6th Cir. 1987) ("Uniformity among the circuits is especially important in tax cases to ensure equal and certain administration of the tax system. We would therefore hesitate to reject the view of another circuit.") (quoting *First Charter Fin. Corp. v. United States*, 669 F.2d 1342, 1345 (9th Cir. 1982)); see also *Golsen v. Comm'r.*, 54 T.C. 742, 757 (1970) (noting that "better judicial administration[] requires [the U.S. Tax Court] to follow a Court of Appeals decision which is squarely in point where appeal from [the Tax Court] decision lies to that Court of Appeals," despite the fact that the U.S. Tax Court is a national court with its own precedents (internal footnote omitted)).

⁶ *Univ. of Pittsburgh*, 507 F.3d at 167. For example, the University of Pittsburgh sought refunds for payments made between 1996 and 2001 totaling \$2,196,942, which constituted only the university's liability for the ERP payments. *Id.*

⁷ See I.R.C. §§ 3101, 3111.

⁸ *N.D. State Univ.*, 255 F.3d at 607.

not only “an issue of first impression in the [Eighth Circuit],”⁹ but the court also noted that only one federal district court had addressed the issue prior to this case.¹⁰

The North Dakota State University (NDSU) instituted a voluntary ERP program for eligible¹¹ tenured¹² professors.¹³ If a qualified employee agreed to participate in the early retirement program, the parties negotiated the amount of the ERPs based on multiple factors, such as “past performance, current salary, curriculum needs, and budget restraints.”¹⁴ As one of the conditions of participation in the ERP program, the participating employee agreed to relinquish any tenure¹⁵ or contractual rights.¹⁶

Initially, NDSU paid its share and withheld each employee’s portion of FICA taxes.¹⁷ Some of the participating members questioned this practice, and the university eventually stopped withholding and paying FICA taxes in 1991 based upon information received in a letter issued by the Social Security Administration

⁹ *Id.* at 603. This issue was one of first impression in not only the Eighth Circuit, but also in all of the federal circuits. *Id.*

¹⁰ *Id.* at 603 n.5 (citing *Slotta v. Tex. A. & M. Univ. Sys.*, No. G-93-125, 1994 U.S. Dist. LEXIS 21205, at *6 (S.D. Tex. Aug. 10, 1994) (reasoning that a payment for the relinquishment of tenure pursuant to a settlement agreement would not constitute wages because the professor did not earn tenure; rather, the institution offered tenure as a term of the initial employment, and as such it could not be characterized as payment for past services)).

¹¹ *Id.* at 601. The eligibility requirements varied slightly during the years in question, but generally a faculty member’s “age and years of service [must have] totaled [seventy]” in order to qualify for participation in the ERP program. *Id.*

¹² *Id.* The university maintained “a tenure track of six years, during which time faculty members were evaluated annually.” *Id.* The six-year timeframe could be decreased or eliminated “for faculty having tenure at another university or having a record of outstanding achievement.” *Id.* Once a candidate received tenure, the employment relationship from that point was characterized by a series of one-year contracts, which renewed automatically unless there were sufficient grounds for termination. *Id.* Termination, however, was possible only (1) based on various financial factors or just cause regarding performance, and (2) after appropriate “due process rights and procedures.” *Id.*

¹³ *Id.* The ERP program was also available to certain highly compensated administrative officials. *Id.*

¹⁴ *Id.* This list of factors was not exhaustive, however, and the court noted that several factors could have been considered during the negotiations. *Id.*

¹⁵ *Id.*; see also *Perry v. Sindermann*, 408 U.S. 593 (1972) (holding that tenure is a constitutionally protected property right). Summarizing the right and the relinquishment process, the Eighth Circuit stated that “the faculty who gave up their tenure rights at NDSU in exchange for early retirement gave up the right not only to invoke proper procedure before tenure was lost, but a right not to lose tenure at all without justification.” *N.D. State Univ.*, 255 F.3d at 605.

¹⁶ *N.D. State Univ.*, 255 F.3d. at 601. ERP participants were required to relinquish other rights beyond tenure, such as the right to pursue age-discrimination claims against the university or the right to pursue employment at another North Dakota public academic institution. *Id.*

¹⁷ *Id.* at 602. The university initially understood that the ERP payments would create FICA liability for the institution and the ERP participants. *Id.*

(SSA).¹⁸ The IRS audited NDSU in 1995, and, at that point, the university returned to the practice of paying and withholding FICA.¹⁹

The court began its analysis by noting that the definition of “wages” for purposes of FICA is construed broadly.²⁰ Despite the broad definition of wages, the court focused on the fact that payments for wages “must be remuneration for services provided by the employee.”²¹ From this perspective, the court recognized closely related but distinct tax principles evident in IRS Revenue Rulings that were possibly applicable to the facts at hand.²² Before analyzing each Revenue Ruling, the court first noted that Revenue Rulings merit judicial deference, especially in cases of first impression.²³

The court noted the value inherent in tenure as a property right, even though tenure is not an entity that can be exchanged in the marketplace.²⁴ In addition, the court stated that “tenure is not [an] automatic [right]” that vests simply by the passage of time, and, in fact, the focus of achieving tenure is not on past service at all.²⁵ The court found that two successive relationships exist and reasoned that tenured professors received negotiated ERPs in exchange for the relinquishment of tenure, a property right obtained at the onset of the tenured (second) relationship.²⁶ The ERP recipients did not receive what they should have under their contracts because “they relinquished their tenure rights,”²⁷ and, therefore, the court held that the ERPs did not constitute wages “subject to FICA taxation.”²⁸

¹⁸ *Id.* In a letter to the Social Security Administration (SSA), NDSU referred to the ERP program as a “Tenure Buy-Out Program,” wherein the university would purchase tenure rights from eligible employees. *Id.* The SSA letter in return stated that the payments were akin to payments for the relinquishment of an unexpired employment contract and that such payments were not subject to FICA liability. *Id.* The university did not secure an opinion or ruling from the IRS. *Id.*

¹⁹ *Id.* The university was audited by the IRS, which “assessed deficiencies in FICA taxes for the years 1991 through 1994.” *Id.* NDSU paid the assessed deficiency, resumed the practice of withholding and paying FICA tax for the ERP payments, and eventually “filed for a refund of the FICA taxes for the periods of 1991 through 1997.” *Id.*

²⁰ *Id.* at 603 (citing *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 364-66 (1946)).

²¹ *Id.*

²² *Id.* at 603-05.

²³ *Id.* at 604 n.6 (“Because there is no case law directly on point, we find revenue rulings especially useful in analyzing the issue before us.”).

²⁴ *Id.* at 605.

²⁵ *Id.* (noting that “tenure is much more than a recognition for past services”).

²⁶ *Id.* at 606-07.

²⁷ *Id.* at 607. The court noted that the relinquishment of contractual rights was the distinguishing factor between tenured professors and administrators, whose ERPs were held to constitute wages subject to FICA taxation. *Id.*

²⁸ *Id.*

Five years after *NDSU*, the Sixth Circuit held in *Appoloni v. United States* that ERPs made to tenured faculty do constitute wages subject to FICA taxation.²⁹ Two cases were consolidated on appeal in *Appoloni*, one in which the court found for the plaintiffs³⁰ and one in which the court found for the government.³¹

Rather than a university setting, each of the cases consolidated in *Appoloni* involved tenured public school teachers.³² While there were subtle variations in the program details, both instances involved an ERP program offered to eligible teachers based on age and seniority with the purpose of inducing retirement.³³ As in *NDSU*, program participants were required to waive tenure rights.³⁴ The school districts paid FICA and correctly withheld the participants' shares, but those individuals filed refund claims based upon the outcome in *NDSU*, which the IRS denied.³⁵

Like the Eighth Circuit, the Sixth Circuit also began its analysis with an examination of the definition of "wages."³⁶ While the court stressed the concept of employee service, it emphasized that the broad definition of wages does not include only productive activity.³⁷ The court focused on the program eligibility requirements

²⁹ *Appoloni v. United States*, 450 F.3d 185, 187 (6th Cir. 2006).

³⁰ *Klender v. United States*, 328 F.Supp. 2d 754, 767 (E.D. Mich. 2004) (holding that ERPs to tenured educators do not constitute FICA wages), *rev'd*, *Appoloni v. United States*, 450 F.3d 185 (6th Cir. 2006).

³¹ *Appoloni v. United States*, 333 F. Supp. 2d 624, 631 (W.D. Mich. 2004) (holding that ERPs to tenured educators constitute FICA wages), *aff'd*, 450 F.3d 185 (6th Cir. 2006).

³² *Appoloni*, 450 F.3d at 187. Unlike *NDSU* and *University of Pittsburgh*, *Appoloni* involved tenured public school teachers. The question of whether this fact is of material distinction is addressed *infra* Part II.B. However, there is no dispute that the tenure rights relinquished by educators, whether in public schools or in institutions of higher learning, are materially indistinguishable.

³³ *Appoloni*, 450 F.3d at 187-88. The ERP programs in *Klender* and *Appoloni* varied slightly, but the basic principles were similar, not only to one another, but also to the program design in *NDSU*. The target employees were teachers with high salaries and years of service ranging from ten to twenty years. *Id.* In both instances, the court noted that the stated purpose of each program was to ease financial constraints by inducing retirement of the most senior and highly paid teachers. *Id.*

³⁴ *Id.* at 188. As in *NDSU*, the teachers were required to waive claims to subsequent increases in wages or benefits, and also could not seek reemployment without the school board's consent. *Id.*; *see also* *N.D. State Univ. v. United States*, 255 F.3d 599, 601-02 (8th Cir. 2001).

³⁵ *Appoloni*, 450 F.3d at 188. The school withheld and made the appropriate payments for the FICA liability but immediately filed for refund, which the IRS denied. *Id.*

³⁶ *Id.* at 189-90. Although the Eighth Circuit considered the definition of FICA wages only in very general terms, the Sixth Circuit examined this issue in greater detail. However, both courts agreed that the broad definition of FICA wages was correct. *Id.* at 190 (referring to wages in the FICA context and noting that "[b]oth the Supreme Court and this circuit have emphasized the broad, inclusive nature of this definition"); *N.D. State Univ.*, 255 F.3d at 603 ("[W]ages and employment are read broadly in the FICA context . . .").

³⁷ *Appoloni*, 450 F.3d at 190 ("The [United States Supreme] Court specifically rejected the argument that 'service' as used in the [Social Security] Act should be limited to 'only

and emphasized the fact that the requirements were based on a minimum number of years of service and related factors that arose out of the employment relationship.³⁸ In addition, the court noted that relinquishment of tenure rights does not change the fact that ERPs are wages, because the relevant consideration is not what rights are relinquished but, rather, how those rights are earned.³⁹ Furthermore, the court indicated that the schools did not exchange the payments for tenure rights—the point was to get teachers to retire early in order to save money.⁴⁰ Accordingly, the court concluded that the ERPs were the same as severance packages, which regularly call for employees to relinquish various rights.⁴¹

The court then supported this position in light of the same Revenue Rulings examined in *NDSU*, and it also addressed the issue of the correct level of judicial deference to such rulings.⁴² The court agreed with the Government that the most analogous ruling was that which focused on employee rights acquired through service⁴³ and concluded by noting the difference between its ruling and that of the *NDSU* court.⁴⁴

The *Appoloni* decision was not unanimous, and the dissent disagreed on two main points: a broad definition of FICA wages was incorrect,⁴⁵ and severance payments would not have been paid had the ERP program participants not relinquished their tenure rights.⁴⁶ The dissent concluded that it would follow the Eighth Circuit⁴⁷ and would accord similar deference and interpretation to the Revenue Ruling upon which the *NDSU* court relied.⁴⁸

productive activity’ and emphasized the broad nature of the definition of FICA ‘wages.’” (quoting *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 365-66 (1946)).

³⁸ *Id.* Such factors included years of service, current salary, and the method of calculating the ERP. *Id.*

³⁹ *Id.* at 192-93.

⁴⁰ *Id.* at 193. As such, the ERPs were in essence severance payments, which are subject to FICA taxation. *Id.*

⁴¹ *Id.* (citing *Abrahamsen v. United States*, 228 F.3d 1360, 1364 (Fed. Cir. 2000)); *see also* *Associated Elec. Coop., Inc. v. United States*, 226 F.3d 1322, 1328-29 (Fed. Cir. 2000) (finding that because the employer’s motivations for offering the plan “were not solely to avoid labor unrest,” the payments “fit within the statutory definition of ‘wages’”).

⁴² *Appoloni*, 450 F.3d at 193-94; *see also* discussion *infra* Part IV.B.

⁴³ *Appoloni*, 450 F.3d at 194.

⁴⁴ *Id.* at 195; *see also* discussion *infra* Part II.B.

⁴⁵ *Appoloni*, 450 F.3d at 199-201 (Griffin, J., dissenting); *see also* discussion *infra* Part III.

⁴⁶ *Appoloni*, 450 F.3d at 202-03.

⁴⁷ *Id.* at 203. Contrary to the majority opinion, the dissent also contended that the *Appoloni* facts were materially indistinguishable from the *NDSU* facts. *Id.*; *see also* discussion *infra* Part II.B.

⁴⁸ *Appoloni*, 450 F.3d at 203-04.

One year later, a divided Third Circuit considered the same issue in *University of Pittsburgh v. United States* and sided with the Sixth Circuit.⁴⁹ The facts and program details in *University of Pittsburgh* were very similar to *NDSU*.⁵⁰ The university first paid and withheld the FICA liability; the taxpayers sought a refund, which the IRS denied.⁵¹

Again, the court began by examining the definition of wages and found, just as the previous two courts had, that a broad interpretation of wages is correct.⁵² The court then turned to the Revenue Rulings, dealing first with the level of deference and then providing a description of each ruling.⁵³ From this foundation, the court first noted that the ERP program eligibility requirements were specifically linked to past service.⁵⁴ Second, the ERP program clearly stated that the payments constituted compensation for services.⁵⁵ Third, even if tenure relinquishment was a factor, it was secondary to the goal of inducing retirement, and, therefore, the payments were essentially severance payments.⁵⁶ The court concluded that its view focusing on past service corresponded most directly to the Revenue Ruling relied upon by the Government, and it noted that the Sixth Circuit correctly emphasized the manner in which relinquished rights were earned, rather than just the nature of the rights.⁵⁷

B. The Three Cases Are Materially Indistinguishable on Their Facts

The fact that *NDSU* and *University of Pittsburgh* involved university professors and *Appoloni* involved public school teachers raises the question of whether these cases are materially distinguishable on their facts. Both *Appoloni* and *University of Pittsburgh* addressed this question to varying degrees and arrived at different conclusions. The Third Circuit correctly concluded that there are no materially distinguishing factors between these cases because there is no material difference in (1) the process through which university professors and public school teachers obtain

⁴⁹ *Univ. of Pittsburgh v. United States*, 507 F.3d 165, 166 (3d Cir. 2007). The divided opinion in *University of Pittsburgh* overturned the district court's finding that the ERP payments did not constitute wages. *Id.*

⁵⁰ *Id.* at 166-67. In *University of Pittsburgh*, there were a total of five ERP programs, each of which maintained minimum age and length of service eligibility requirements. All individuals were required to relinquish tenure as a precondition of participation. *Id.*

⁵¹ *Id.* at 167. The university paid in excess of two million dollars between 1996 and 2001, which represented only the university's share of FICA taxes due on the payments. *Id.*

⁵² *Id.* at 167-68; *see also supra* note 36.

⁵³ *Univ. of Pittsburgh*, 507 F.3d at 168-71. Although arriving at the same conclusion that the Revenue Rulings in this case merit some deference, the Third Circuit approached the general question of judicial deference to Revenue Rulings in a different manner than the Eighth and Sixth Circuits. *Id.*

⁵⁴ *Id.* at 171-72. The court emphasized that the factors focused on the service requirement while completely disregarding the relinquishment of tenure and/or contract rights. *Id.*

⁵⁵ *Id.* at 172. The plan clearly noted the financial motivation in compensating highly paid professors for accepting early retirement. *Id.*

⁵⁶ *Id.* at 172-73.

⁵⁷ *Id.* at 174.

tenure, and (2) the property right that university professors and public school teachers relinquish upon entry into an ERP program.⁵⁸

Immediately after the Sixth Circuit stated that the ERPs constituted wages subject to FICA taxation, the court expressly acknowledged that both the ruling and underlying rationale differed from that in *NDSU*.⁵⁹ Although the court suggested that the cases were factually distinguishable, it did so only in a footnote and did not emphasize the factual dissimilarities in the reasoning that led to the disparity between the Sixth and Eighth Circuits.⁶⁰ Instead, the court emphasized the difference in rationale between its holding and that of the Eighth Circuit and expressly stated that the ruling it had reached in *Appoloni* was the correct one.⁶¹

Implicit in this statement is the belief that the Eighth Circuit had arrived at the wrong conclusion in a case that was materially indistinguishable from *Appoloni*. The Sixth Circuit's mention of factual differences was made more as recognition of respectful disagreement with its sister circuit. This is evidenced by the fact that the remainder of the opinion following the footnote in question is devoid of any explanation, or even suggestion, that *Appoloni* and *NDSU* might stand in harmony and that no split between the circuits had formed. Instead, the court summarized its rationale and reiterated the disagreement with the rationale of the Eighth Circuit.⁶² The method of analysis and the language used by the Sixth Circuit in the conclusion indicates a clear recognition of the resulting circuit split on this issue between two materially indistinguishable cases.

Ironically, the Sixth Circuit dissent concluded that the facts in *Appoloni* and *NDSU* were "materially indistinguishable."⁶³ The dissent noted that only subtle differences existed in the method by which the university professors in *NDSU* and the public school teachers in *Appoloni* obtained tenure and concluded that the factual differences were subtle and not determinative of the outcome in either case.⁶⁴ Although the dissent's view on the ultimate substantive outcome is incorrect, that opinion was correct that the minor factual differences by which various individuals obtain tenure do not create factually material distinctions relevant to the consideration of whether ERPs constitute wages subject to FICA.

The Third Circuit majority agreed that no material distinction existed between *Appoloni* and *NDSU*.⁶⁵ Like the Sixth Circuit, the court addressed this issue only briefly in a footnote, demonstrating that subtle differences in various tenure-track processes are irrelevant.⁶⁶ Instead, the court stressed that the general process of how

⁵⁸ *Id.* at 171-74.

⁵⁹ *Appoloni v. United States*, 450 F.3d 185, 195 (6th Cir. 2006).

⁶⁰ *Id.* at 195 n.5.

⁶¹ *Id.* at 194 ("We recognize our holding . . . differs from what the Eighth Circuit held in *North Dakota*; however we believe that we have reached the correct result.").

⁶² *Id.* at 195.

⁶³ *Id.* at 203 (Griffin, J., dissenting).

⁶⁴ *Id.*

⁶⁵ *Univ. of Pittsburgh v. United States*, 507 F.3d 165, 174 (3d Cir. 2007).

⁶⁶ *Id.* at 174 n.13.

one obtains tenure is by “successfully completing a probationary period.”⁶⁷ This demonstrates that, although the precise details may vary, the concept and general process for obtaining tenure based on service remains the same, whether the individual is a university professor or a public school teacher.

Those who might argue that *Appoloni* is distinguishable from *NDSU* and *University of Pittsburgh* will likely support this position by noting that the Sixth Circuit referred to the tenure process for public school teachers as “automatic.”⁶⁸ The Third Circuit majority recognized this in the footnote that addressed the question of factual differences, and the Third Circuit minority quoted the Sixth Circuit and emphasized the concept of automatic tenure in the attempt to distinguish *Appoloni* and *NDSU*.⁶⁹ The Third Circuit incorrectly relied on the term “automatic,” which was simply an inadequate descriptive term used by the Sixth Circuit to explain a subtle difference in the statutorily governed tenure process in place regarding public school teachers.

Although the grant of tenure to public school teachers in Michigan is governed by state statute,⁷⁰ the notion that tenure is obtained automatically is inaccurate. In Michigan, a teacher initially enters a probationary contract period with a public school system.⁷¹ Once the probationary period has expired, a school district may not continue to employ a teacher without a grant of tenure.⁷² Although this statutorily governed process differs from various processes that are in place in institutions of higher learning, the process for public school teachers is not automatic.⁷³ Tenure is still earned by “satisfactory completion” of the probationary period; just as in the university setting, merit is the primary consideration.⁷⁴

Consider the following analogy. To claim that public school teachers gain tenure automatically is similar to the claim that law students in the state of Ohio will automatically take the bar exam because of their acceptances to law school. While this is not a perfect analogy,⁷⁵ it does successfully point out the fact that law students do not automatically receive the right to sit for the bar just because they have been accepted to and entered law school; rather, they must successfully complete law school to do so. Most law students ultimately obtain the right to sit for the bar, but

⁶⁷ *Id.*

⁶⁸ *Appoloni*, 450 F.3d at 194.

⁶⁹ *Univ. of Pittsburgh*, 507 F.3d at 177 (Scirica, J., dissenting).

⁷⁰ See MICH. COMP. LAWS ANN. § 38.71 (West 2009).

⁷¹ *Id.* § 38.82.

⁷² *Id.*

⁷³ *Id.*; see also *id.* § 38.91.

⁷⁴ *Id.* §§ 38.82, 38.91.

⁷⁵ There are two points of distinction. First, not everyone who successfully completes law school will elect to sit for the bar exam. However, this does not change the fact that law school graduates have the right to pursue that option, whereas those who have not completed law school do not. Second, although successful completion of law school is necessary to sit for the bar, it is not sufficient. Ohio law school graduates, for example, must also apply and be accepted to the state bar, based on additional factors such as financial background and character fitness.

some do not. The same is true for Michigan public school teachers, as evidenced by those whose contracts were not renewed because they did not earn tenure during the probationary employment period.

In conclusion, these cases are materially indistinguishable because there are only subtle factual differences in the processes by which the university professors and the public school teachers in question obtained tenure. Although the public school teacher tenure system is governed by statute, it is nonetheless merit-based and not automatic. The focus on these immaterial factual differences reveals an incorrect approach to this whole issue. It is not the specific details of how an educator obtains tenure but, rather, the question of what is tenure and how is it obtained on a conceptual level that is important. These questions lie at the heart of analyses and determinations regarding the Revenue Rulings presented by the parties in these cases. Does the receipt of tenure mark the beginning of a separate relationship without regard to the prior relationship between the individual and the institution, or is the prior employment relationship simply altered by a grant of tenure based upon the past service of an employee to an employer? However, before an examination of the Revenue Rulings relevant to these cases is possible, it is necessary to establish the basic framework of FICA and wages in the FICA context.

III. THE DEFINITION OF WAGES IN THE FICA CONTEXT

A. *The FICA Framework*

The purpose of the Federal Insurance Contribution Act (FICA) is to fund the Social Security and Medicare benefit programs, which include a wide range of services, including insurance programs for the elderly and disabled.⁷⁶ Both employers⁷⁷ and employees are liable for FICA taxes on payments made to the employee as “wages . . . with respect to employment.”⁷⁸

Although wages as commonly understood are the main source of FICA taxation, liability is imposed on a wider range of payments than would fall under such a narrow definition.⁷⁹ The ERPs to tenured educators are just one example of a form of payment that does not neatly fall within the common perception of wages. When considering what should or should not be deemed FICA wages, the manner in which

⁷⁶ See I.R.C. §§ 3101-28 (2006); S. REP. NO. 98-23, at 42 (1983), *reprinted in* 1983 U.S.C.C.A.N. 143, 183.

⁷⁷ See I.R.C. §§ 3102, 3111.

⁷⁸ *Id.* § 3101(a)-(b).

⁷⁹ See, e.g., BORIS I. BITTKER & LAWRENCE LOKKEN, *FED. TAX’N INCOME, EST. & GIFTS*, ¶ 111.5.2, available at 1997 WL 440074 (W.G.&L.) (2009) (noting that “[t]he terms ‘compensation for services’ as used by § 61(a)(1) in defining gross income, ‘wages’ as defined by § 3401(a) for withholding purposes, and ‘wages’ as defined by § 3121(a) for purposes of the FICA . . . overlap in large part and include the overwhelming bulk of wages . . . in the layman’s sense.”). Note, however, that the concept of wages overlaps in the “layman’s sense.” This illustrates that, although a single perception of wages might suffice when providing a basic explanation to an individual for a general level of understanding, there are specific distinctions in the meaning of wages that have real implications for tax planning and compliance, depending on whether one is considering gross income, tax withholding, or FICA.

an employer designates or refers to a payment is irrelevant.⁸⁰ Likewise, neither the medium nor the manner of payment is determinative.⁸¹ Furthermore, it is important to note that the employee bears the burden of demonstrating that a contested payment does not constitute wages. A payment will not be treated as wages if an “employee provides clear, separate, and adequate consideration for the employer’s payment that is not dependent upon the employer-employee relationship and its component terms and conditions.”⁸² This emphasis on proving consideration that is separate from the scope of the employer-employee relationship demonstrates that the key, notwithstanding the factors noted above, is understanding how the terms “wages” and “employment” are defined in the FICA context.

The Internal Revenue Code defines “wages” in the FICA context as “all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash.”⁸³ Although this definition seems quite simple, the possibility for ambiguity emerges with the understanding that not all income an employee receives from an employer constitutes wages.⁸⁴ Wages are comprised of only payments received as “remuneration for employment.”⁸⁵ Therefore, a complete understanding of the definition of “wages” depends on the meaning of “employment.”

The Internal Revenue Code defines “employment” as “any service, of whatever nature, performed . . . by an employee for the person employing him.”⁸⁶ There are two distinct components to this definition: wages are payments made (1) within the scope of the employer-employee relationship (2) for any service. While the former is both peripheral and easily understood in the context of determining whether ERPs to tenured educators constitute wages, the latter is complex and lies at the heart of the inquiry.

First, do ERPs fall within the scope of employment? If not, then such payments cannot be construed as wages, and the inquiry is at an end. One might think that ERPs would not fall under employment because a former employer is making payments to a former employee. However, in terms of defining the scope of employment, the term is broadly construed to encompass the entire employer-employee relationship.⁸⁷ Consequently, a payment that an employer makes to an individual it no longer employs may nonetheless constitute wages because the payment is correctly viewed within the broad employment relationship.⁸⁸ As such,

⁸⁰ 26 C.F.R. § 31.3121(a)-1(c) (2009).

⁸¹ *Id.* § 31.3121(a)-1(d), (e).

⁸² *See* Rev. Rul. 2004-110, 2004-2 C.B. 960.

⁸³ I.R.C. § 3121(a).

⁸⁴ *See* Cent. Ill. Pub. Serv. Co. v. United States, 435 U.S. 21, 25 (1978). For example, meals and lodgings provided to an employee for the convenience of the employer do not constitute FICA wages. *See* I.R.C. § 119; *see also id.* § 3121(a)(19).

⁸⁵ I.R.C. § 3121(a).

⁸⁶ *Id.* § 3121(b).

⁸⁷ *See* Soc. Sec. Bd. v. Nierotko, 327 U.S. 358, 365-66 (1946).

⁸⁸ 26 C.F.R. § 31.3121(a)-1 (2009).

there was rightfully no question in these cases that the ERPs were made “with respect to employment.”⁸⁹

The more difficult task is to determine whether the ERPs were made in exchange for “any service.”⁹⁰ How one defines “service” is crucial because, in essence, it will also determine the definition of “wages.” This is evident in the fact that although the focus of the inquiry is on service, the question is generally framed in the context of wages—are wages in the FICA context to be construed broadly or narrowly?

B. Wages in the FICA Context Are Properly Construed Broadly

The Supreme Court considered the nature of wages for purposes of social security in *Social Security Board v. Nierotko*.⁹¹ In *Nierotko*, the Court held that payments made under the National Labor Relations Act to employees who had been wrongfully discharged constitute wages under the Social Security Act.⁹² The Third, Sixth, and Eighth Circuits all discussed *Nierotko* and FICA wages, and in each instance, the court noted that it is proper to view wages broadly in that context.⁹³ While none of the courts at hand addressed the definition of wages at length, in each instance the court noted that coming to an understanding of the proper definition of FICA wages is the first and crucial step in the determination of the broader issue.⁹⁴

Although this issue was not greatly contested in these cases, this Note addresses the issue of appropriately defining FICA wages for two reasons. First, the Sixth Circuit dissent argued that a broad interpretation of wages is incorrect.⁹⁵ The second point, related to the first but more important, is that the broader issue of ERPs to tenured educators will resurface in another venue (or again in the Eighth Circuit).⁹⁶ Obviously, how any future court construes wages in the FICA context will have a substantial effect on the ultimate outcome of the broader ERP issue.

In *Nierotko*, the National Labor Relations Board found that the respondent had been wrongfully discharged, reinstated him to his position, and awarded him back pay for the period of his discharge.⁹⁷ *Nierotko* sought to have that payment credited

⁸⁹ I.R.C. § 3111(a).

⁹⁰ *Id.* § 3121(b).

⁹¹ *Nierotko*, 327 U.S. at 358-71.

⁹² *Id.* at 364.

⁹³ *Univ. of Pittsburgh v. United States*, 507 F.3d 165, 168 (3d Cir. 2007); *Appoloni v. United States*, 450 F.3d 185, 189-91 (6th Cir. 2006); *N.D. State Univ. v. United States*, 255 F.3d 599, 603 (8th Cir. 2001).

⁹⁴ Although the courts in these cases agreed with one another regarding the broad nature of wages in the FICA context, this is an important issue because there is no certainty that future courts to consider this issue will arrive at the same conclusion. This is evident in the fact that each court identified wages and its proper definition as the foundational basis for determination of the broader issue.

⁹⁵ *Appoloni*, 450 F.3d at 200-01.

⁹⁶ The IRS has proclaimed its non-acquiescence to the Eighth Circuit’s holding in *NDSU*. *N.D. State Univ. v. United States*, 255 F.3d 599 (8th Cir. 2001), *action on dec.*, 162899-04 (Jan. 19, 2007). See also discussion *infra* Part V.A.1.

⁹⁷ *Nierotko*, 327 U.S. at 359-60.

to his Social Security insurance account, but the Social Security board refused on the basis that the payments did not constitute wages.⁹⁸ The Court noted that Nierotko remained an employee during the period of his wrongful discharge, and therefore, the payments were issued from employer to employee.⁹⁹

The key issue in *Nierotko* was whether the payment constituted remuneration for service.¹⁰⁰ The Court disagreed with the Social Security Board's argument that Nierotko did not provide a service because he did not perform work in exchange for the payment.¹⁰¹ Instead, the Court noted that:

The very words "any service . . . performed . . . for his employer," with the purpose of the Social Security Act in mind, import breadth of coverage. They admonish us against holding that "service" can be only productive activity. We think that "service" as used by Congress in this definitive phrase means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer.¹⁰²

Therefore, in *Nierotko*, the Supreme Court declined to construe wages narrowly, and instead, recognized a broad definition of wages that emphasizes service in the context of the entire employment relationship.¹⁰³

In these cases considering the issue of ERPs to tenured educators, even the Eighth Circuit concluded that wages should be construed broadly in the FICA context.¹⁰⁴ While the prevailing view recognizes the broad scope of wages, there are some who reject this interpretation.¹⁰⁵ Notably, the dissent in *Appoloni* relied on

⁹⁸ *Id.* at 360.

⁹⁹ *Id.* at 365.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 365-66 (alterations in original) (citation omitted in original).

¹⁰³ See, e.g., Jeremy L. Hirsh, Note, *The Wages of Not Working: FICA Liability for Severance Payments in Associated Electric Cooperative, Inc. v. United States*, 54 TAX LAW. 811, 817 (2001) ("*Nierotko* teaches that the employment relationship is more than an agreement to exchange a fixed quantity of labor for compensation.>").

¹⁰⁴ See *supra* note 93 and accompanying text.

¹⁰⁵ Compare Hirsh, *supra* note 103 (recognizing the Supreme Court's recognition in *Nierotko* that wages for purposes of section 3121 must be construed broadly to achieve Congress's intent for the social security program), with Mary B. Hevener & Anne G. Batter, *When Are Payments From an Employer to an Employee Not 'Wages' Subject to Employment Taxes?*, 95 J. TAX'N 349, 350-54 (2001) (identifying two camps in this issue, those that accept the broad definition of wages in the FICA context and those that rely on *Central Illinois Public Service Co.* and its progeny); see also *supra* note 84. Hevener and Batter argue that *Central Illinois* is "the primary judicial authority on the definition of wages." Hevener & Batter, *supra*, at 351. The belief that there is only one correct definition of wages is clearly erroneous in light of the 1983 congressional amendments issued in reaction to *Rowan*, which followed *Central Illinois*. In contrast, Hirsh correctly notes that "Congress amended section 3121 in a manner which decoupled the interpretation of FICA wages from the interpretation of wages for income tax purposes . . . and that items of a compensatory nature that are exempt

*Rowan Cos. v. United States*¹⁰⁶ in refuting the broad interpretation.¹⁰⁷ The dissent argued that a broad interpretation of wages had been appropriate previously, but that the Supreme Court had rejected that view in *Rowan*.¹⁰⁸

In *Rowan*, the Supreme Court considered whether the value of meals and lodgings provided to employees for the convenience of the employer constituted wages for purposes of FICA taxation.¹⁰⁹ The IRS relied on various Treasury regulations that indicated that the employee compensation would constitute wages.¹¹⁰ The narrow holding of *Rowan* is that the relied-upon Treasury regulations were invalid because they failed to interpret wages in a consistent and reasonable manner.¹¹¹ More broadly, the Court noted that Congress intended for wages to be interpreted consistently, regardless of the context.¹¹²

So which argument is correct? Perhaps the better question is *when* was which argument correct? The dissent's claim *was* correct, but only for a short time immediately after *Rowan* was handed down. Congress amended the definition of wages in the FICA context in 1983¹¹³ by adding that statutory exclusions from wages in the context of income tax withholding "shall be construed to require a similar exclusion from 'wages' in the regulations prescribed for purposes of this chapter."¹¹⁴ The Congressional response to *Rowan* indicated that wages as defined in the FICA context must be distinguished from the narrower definition of income tax withholding wages in order to achieve the goals of the Social Security program.¹¹⁵

from income tax should not be exempted from FICA" unless expressly excepted in the statute. Hirsh, *supra* note 103, at 812.

¹⁰⁶ *Rowan Cos. v. United States*, 452 U.S. 247 (1981).

¹⁰⁷ *Appoloni v. United States*, 450 F.3d 185, 200-01 (6th Cir. 2006) (Griffin, J., dissenting).

¹⁰⁸ *Id.*

¹⁰⁹ *Rowan*, 452 U.S. at 248.

¹¹⁰ *Id.* at 258-62.

¹¹¹ *Id.* at 263.

¹¹² *Id.*

¹¹³ S. REP. NO. 98-23, at 42 (1983), *reprinted in* 1983 U.S.C.C.A.N. 143, 183. Congress discussed the current law prior to enactment of the amendments, noting that "amounts which constitute wages for income tax withholding purpose (Code sec. 3401) and amounts which constitute wages for social security tax purposes (Code sec. 3121) are separately defined." *Id.* The discussion continued by noting the Court's holding in *Rowan*, which required that the corresponding code regulations must interpret wages identically in each context unless specific statutory provisions indicated otherwise. *Id.*

¹¹⁴ I.R.C. § 3121(a) (2006). With this amended language, Congress statutorily mandated that wages as defined in the FICA context is distinct and broader than the income-tax withholding context. *Id.*

¹¹⁵ *See* S. REP. NO. 98-23, at 42. In amending I.R.C. § 3121, Congress emphasized that: The social security program aims to replace the income of beneficiaries Since the security system has objectives which are significantly different from the objective underlying the income tax withholding rules, the committee believes that amounts exempt from income tax withholding should not be exempt from FICA unless Congress provides an explicit FICA tax exclusion.

In light of the congressional response to *Rowan*, the argument forwarded by the Sixth Circuit dissent is untenable. The dissent recognizes the 1983 amendments only in a single sentence, which continues with the claim that “the ‘broad interpretation’ of the definition of ‘wages’ for FICA purposes has not been restored.”¹¹⁶ Assumedly, this broad definition that *Rowan* and Congress left behind is that proclaimed in *Nierotko*. However, the Supreme Court never cited to *Nierotko* in *Rowan*.¹¹⁷ Furthermore, the Court’s rationale in *Rowan* relied on the assertion that Congress did not intend different definitions of wages that varied depending on the context.¹¹⁸ If *Rowan* might have been construed to refute a broad definition of wages in the FICA context, that view could only have been premised on the notion of a singular concept of wages. But the 1983 amendments mandate that (1) the meaning of wages is not uniform in the FICA and income tax withholding contexts, and that (2) FICA wages are to be construed more broadly than wages related to income tax withholding.¹¹⁹ Therefore, the dissent’s claim that the broad concept of wages has not been restored is without merit. The principles forwarded in *Niertoko* now, just as then, remain undisturbed.

If the issue of whether ERPs made to tenured educators should come before another court, the view of wages in the FICA context must be construed broadly. However, this interpretation serves only as the proper foundation for consideration of the broader issue. Recall that the Eighth Circuit agreed that wages should be construed broadly; nonetheless, that court held that ERPs to tenured educators do not constitute wages for FICA purposes.¹²⁰ But only with a proper understanding of wages under FICA can courts correctly approach the question of whether such payments are made in exchange for service provided in the broad context of the employer-employee relationship¹²¹ or for “clear, separate, and adequate consideration . . . that is not dependent upon the employer-employee relationship and its component terms and conditions.”¹²²

IV. REVENUE RULINGS

IRS Revenue Rulings provide the information necessary to answer the question offered at the conclusion of the previous section. Their significance in the outcome of the cases at hand cannot be understated. In every instance, the parties on either side argued that the ERPs were analogous to the facts presented in different Revenue Rulings. Furthermore, each court relied heavily on the purpose and rationale of the various Revenue Rulings in making its determination.

Id.

¹¹⁶ *Appoloni v. United States*, 450 F.3d 185, 201 (6th Cir. 2006) (Griffin, J., dissenting).

¹¹⁷ *Id.* at 191 n.1 (majority opinion). The Sixth Circuit majority noted this fact in response to the dissent’s view of how to correctly interpret FICA wages. *Id.*

¹¹⁸ *Rowan Cos. v. United States*, 452 U.S. 247, 262-63 (1981).

¹¹⁹ *See supra* notes 113-15 and accompanying text.

¹²⁰ *N.D. State Univ. v. United States*, 255 F.3d 599, 603, 607 (8th Cir. 2001).

¹²¹ *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 365-66 (1946).

¹²² *See Rev. Rul. 2004-110*, 2004-2 C.B. 41.

A. What Are Revenue Rulings?

A Revenue Ruling is defined as “an official interpretation by the [Internal Revenue] Service”¹²³ on issues of “substantive tax law.”¹²⁴ The authority to issue Revenue Rulings is statutorily granted by Congress to the IRS.¹²⁵ While Revenue Rulings do not have the same legal force as Treasury regulations,¹²⁶ Revenue Rulings serve “to provide precedents to be used in the disposition of other cases[] and may be cited and relied upon for that purpose.”¹²⁷ Only the IRS National Office may issue Revenue Rulings.¹²⁸ Revenue Rulings are published in the Internal Revenue Bulletin,¹²⁹ which is published weekly and serves as “the authoritative instrument of the Commissioner of Internal Revenue.”¹³⁰

Revenue Rulings serve to inform and guide both IRS officials and taxpayers.¹³¹ The IRS may not argue a position that is contrary to a current Revenue Ruling.¹³² Revenue Rulings also serve two important functions for taxpayers. First, relevant Revenue Rulings guide taxpayers as an effective tool in tax planning.¹³³ Second,

¹²³ 26 C.F.R. § 601.601(d)(2)(i)(a) (2009).

¹²⁴ *Id.* § 601.601(d)(2)(v)(a).

¹²⁵ *See* I.R.C. § 7805(a) (2006). Authority to promulgate Revenue Rulings is bestowed upon the IRS through the mandate of Congress that:

Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

Id.

¹²⁶ *See, e.g.*, *Atl. Mut. Ins. Co. v. Comm’r.*, 523 U.S. 382 (1998).

¹²⁷ 26 C.F.R. § 601.601(d)(2)(v)(d).

¹²⁸ *Id.* § 601.601(d)(2)(i)(a).

¹²⁹ *Id.*

¹³⁰ *Id.* § 601.601(d)(2)(ii)(a)-(b).

¹³¹ *Id.* § 601.601(d)(2)(i)(a); *see also id.* § 601.601(d)(2)(iii). This portion of the Treasury regulation expands on the purpose of Revenue Rulings, emphasizing that:

The purpose of publishing revenue rulings and revenue procedures in the Internal Revenue Bulletin is to promote correct and uniform application of the tax laws by Internal Revenue Service employees and to assist taxpayers in attaining maximum voluntary compliance by informing Service personnel and the public of National Office interpretations of the internal revenue laws, related statutes, treaties, regulations, and statements of Service procedures affecting the rights and duties of taxpayers.

Id.

¹³² *See, e.g.*, *Estate of McLendon v. Comm’r.*, 135 F.3d 1017 (5th Cir. 1998) (holding that the IRS may not depart from a Revenue Ruling in an individual case where the law is unclear).

¹³³ 26 C.F.R. § 601.601(d)(2)(v)(e).

Revenue Rulings are listed as appropriate authority¹³⁴ for taxpayer-use to avoid understatement penalties.¹³⁵

B. Revenue Rulings Merit Judicial Deference

The Supreme Court has left open the question of what level of judicial deference IRS Revenue Rulings merit.¹³⁶ It is beyond the scope of this Note to offer a definitive answer as to what *specific* level of deference is appropriate.¹³⁷ However, a primary purpose of this Note is to demonstrate that Revenue Rulings merit *at least some* level of judicial deference.¹³⁸ Addressing this broader issue is crucial to the specific issue of ERPs made to tenured educators because Revenue Rulings will undoubtedly play an important role in the ultimate resolution of that issue.

Likewise, it is beyond the scope of this Note to provide a survey of the historical development of judicial deference to administrative rulemaking and interpretations. However, it is impossible to consider this issue without a basic understanding of the principles forwarded by the Supreme Court in two key cases: *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*¹³⁹ and *United States v. Mead Corp.*¹⁴⁰

In *Chevron*, the Supreme Court considered whether the course of action pursued by the Environmental Protection Agency (EPA) in relation to the Clean Air Act Amendments of 1997 was based on a reasonable statutory interpretation.¹⁴¹ The Court upheld the EPA's interpretation,¹⁴² but it more broadly ruled that administrative interpretations merit judicial deference when a statute is either

¹³⁴ *Id.* § 1.6662-4(d)(3)(iii).

¹³⁵ I.R.C. § 6662 (2006); 26 C.F.R. § 1.6662-3(b)(2).

¹³⁶ *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001).

¹³⁷ See, e.g., William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1091-92 (2008) (arguing that Revenue Rulings merit only *Skidmore* deference). Eskridge and Baer suggest that *Skidmore* deference should be the default when any court considers an agency interpretation "when (a) the agency has expertise on issues as to which judges do not; (b) the agency has rendered a reasoned judgment after input from the public; and/or (c) there has been public or private reliance on agency rules or guidances." *Id.* at 1092. While the authors discuss agency inputs generally, Revenue Rulings fall under the *Skidmore* category they identify. Compare *id.*, with Ryan C. Morris, Comment, *Substantially Deferring to Revenue Rulings After Mead*, 2005 BYU L. REV. 999, 1040-46 (arguing that Revenue Rulings merit *Chevron* deference). Morris identifies the authority and procedures for the promulgation of Revenue Rulings, and concludes that "[f]airly formal, fair, and deliberate procedures under a general grant of authority deserve *Chevron's* heightened deference." *Id.* at 1046.

¹³⁸ See *infra* notes 163-64 and accompanying text.

¹³⁹ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

¹⁴⁰ *United States v. Mead Corp.*, 533 U.S. 218 (2001).

¹⁴¹ *Chevron*, 467 U.S. at 839-40.

¹⁴² *Id.* at 866.

ambiguous or Congress intentionally left a gap for the agency to fill, and the agency's interpretation is reasonable.¹⁴³

The Court limited the application of *Chevron* deference in *Mead*.¹⁴⁴ The *Mead* Court addressed whether a United States Customs Service interpretation of the Customs Act merited *Chevron* deference.¹⁴⁵ The Court held that the agency interpretation had no plausible claim to *Chevron* deference because Congress did not "intend[] such a ruling to carry the force of law."¹⁴⁶ The Court noted that the Customs Service did not engage in notice-and-comment procedures¹⁴⁷ when issuing the classifications, which bound only specified parties and could not extend to third parties, and that 46 different offices issued from 10,000 to 15,000 classifications annually.¹⁴⁸

However, the Court emphasized that, despite the fact that the Customs Service interpretation did not merit *Chevron* deference, all administrative interpretations merit some level of judicial deference.¹⁴⁹ The Court cited *Chevron* for the proposition that considerable weight is always due to interpretations by agencies charged with administering the statutes,¹⁵⁰ and the Court referred to the notions of deference articulated in *Skidmore v. Swift & Co.*, which is characterized by considerable deference to well-reasoned, consistent administrative judgment.¹⁵¹

Unlike the Customs Service classifications in *Mead*,¹⁵² Revenue Rulings carry the "force of law."¹⁵³ Although Revenue Rulings, generally, are not issued pursuant to

¹⁴³ *Id.* at 843-44.

¹⁴⁴ *Mead*, 533 U.S. at 218.

¹⁴⁵ *Id.* at 221.

¹⁴⁶ *Id.*

¹⁴⁷ See 5 U.S.C. § 553 (2006). The Administrative Procedure Act requires government agencies to first introduce proposed regulations and solicit comments from the general public before the regulations can be finalized. *Id.*

¹⁴⁸ *Mead*, 533 U.S. at 233.

¹⁴⁹ *Id.* at 227-28; see also *Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002).

¹⁵⁰ *Mead*, 533 U.S. at 227-28 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 831, 844 (1984) ("[A]nd '[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer'" (second alteration in original))).

¹⁵¹ *Id.* at 228 ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944) (footnotes omitted))).

¹⁵² The *Mead* classifications were more like IRS private letter rulings (PLRs), which may be cited as precedent only by the individual taxpayers to whom the letters are issued. 26 C.F.R. § 6110(k)(3) (2009). A series of PLRs is merely a predictor of the position the IRS will take, and in no way constitutes precedent for third parties. *Id.*

¹⁵³ *Mead*, 533 U.S. at 226-27, 230-31.

comment-and-notice procedures,¹⁵⁴ the IRS promulgates Revenue Rulings pursuant to its statutory authority to “prescribe all needful rules and regulations for the enforcement of” the Internal Revenue Code.¹⁵⁵ Revenue Rulings are formal interpretative rulings by the IRS involving “substantive tax law.”¹⁵⁶ The Supreme Court has referred to the IRS as the “primary authority” of the Internal Revenue Code, noting that:

[E]ver since the inception of the tax code, Congress has seen fit to vest in those administering the tax laws very broad authority to interpret those laws. In an area as complex as the tax system, the agency Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems.¹⁵⁷

Additionally, the Supreme Court articulated what it identified as the proper relationship between the agency, the legislature, and the judiciary: the IRS must remain free to interpret the Code, and Congress, which provides the IRS with this authority, may modify what it deems to be improper Revenue Rulings, while courts should serve only to review IRS conduct.¹⁵⁸

Furthermore, only the IRS National Office issues these “official interpretations” that are meant to guide taxpayers and IRS officials alike.¹⁵⁹ Revenue Rulings have legal force and effect, as “precedents to be used in the disposition of other cases” that “may be cited and relied upon for that purpose.”¹⁶⁰ The Commissioner may not argue against a standing Revenue Ruling, and taxpayers who disregard Revenue Rulings can be subjected to penalties.¹⁶¹

It should be evident that the notion that Revenue Rulings merit no judicial deference stands in direct opposition to the Supreme Court’s recognition of deference in *Mead*.¹⁶² Many judicial bodies have recognized this and have noted that Revenue Rulings must merit at least some judicial deference.¹⁶³ However, there are

¹⁵⁴ Revenue Rulings can be issued pursuant to notice-and-comment procedures. See John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the Chevron Era*, 64 GEO. WASH. L. REV. 35, 79 & n.300 (1995) (recognizing that the IRS requested comments on a proposed Revenue Ruling in Announcement 95-25, 1995-14 I.R.B. 11).

¹⁵⁵ I.R.C. § 7805(a) (2006).

¹⁵⁶ 26 C.F.R. § 601.601(d)(2)(v)(a).

¹⁵⁷ *Bob Jones Univ. v. United States*, 461 U.S. 574, 596 (1983); see also *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 219 (2001).

¹⁵⁸ *Bob Jones Univ.*, 461 U.S. at 596-97.

¹⁵⁹ 26 C.F.R. § 601.601(d)(2)(i)(a).

¹⁶⁰ *Id.* § 601.601(d)(2)(v)(d).

¹⁶¹ I.R.C. § 6662 (2006); 26 C.F.R. § 1.6662-3(b)(2).

¹⁶² *Mead*, 533 U.S. at 227-28.

¹⁶³ See, e.g., *id.* at 228 (discussing a spectrum of deference, ranging from great deference to “near indifference at the other.” (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1988)) (representing the “near indifference” referred to in *Mead*, in which an administrative interpretation was proffered for the first time in a litigation brief)). Even under these facts, the Court did not suggest that the administrative interpretation merited no

some, most notably the Tax Court, that disagree.¹⁶⁴ This perception is flawed. Based on their authority and purpose, Revenue Rulings merit at least the substantial deference the Supreme Court recognized in *Mead*.¹⁶⁵

C. Revenue Rulings and Future Implications

The courts in the cases at hand accurately considered the question of judicial deference and correctly decided that Revenue Rulings merit substantial deference.¹⁶⁶ Future courts to consider the issue of ERPs to tenured educators should afford the same deference that the Third, Sixth, and Eighth¹⁶⁷ Circuits have extended to the relevant IRS Revenue Rulings.¹⁶⁸ This is important for two reasons. First, as will be discussed further below, the IRS has modified the Revenue Rulings pertinent to this issue, which will significantly affect any subsequent litigation.¹⁶⁹ Second, the IRS

deference whatsoever. *See also* *Ammex, Inc. v. United States*, 367 F.3d 530, 535 (6th Cir. 2004) (relying expressly on *Mead*, the court recognized that “[w]hether or not *Chevron* deference is appropriately applied here, obviously some level of deference to the agency ruling is due.”); *Omohundro v. United States*, 300 F.3d 1065 (9th Cir. 2002) (applying *Skidmore* deference to uphold a Revenue Ruling that stood in opposition to one of the court’s earlier decisions).

¹⁶⁴ *See* *Estate of McLendon v. Comm’r.*, 72 T.C.M. (CCH) 42 (1996) (holding that “[a]bsent exceptional circumstances, revenue rulings are viewed as ‘merely an opinion of a lawyer in the agency’, they are not considered to have the effect of law, and they are not binding on the Commissioner or the courts.” (citing *Foil v. Comm’r.*, 920 F.2d 1196, 1201 (5th Cir. 1990), *aff’g* 92 T.C. 376 (1989))); *see also* *Appoloni v. United States*, 450 F.3d 185, 203 (6th Cir. 2006) (“[T]he Revenue Rulings at issue . . . are persuasive authority at best.”). The Tax Court’s notion that these official agency interpretations are merely equivalent to an attorney’s argument forwarded during litigation ignores the purpose and authority for Revenue Rulings. *See* discussion *supra* Part IV. Furthermore, this position would seem to contradict the *Golsen* rule, at least when a controversy before the Tax Court could result in appeal to a circuit that has recognized that Revenue Rules merit at least some judicial deference. *See supra* note 5.

¹⁶⁵ *Mead*, 533 U.S. at 227-28.

¹⁶⁶ *Univ. of Pittsburgh v. United States*, 507 F.3d 165, 168-69 (3d Cir. 2007); *Appoloni*, 450 F.3d at 194; *N.D. State Univ. v. United States*, 255 F.3d 599, 603-04, n.6 (8th Cir. 2001).

¹⁶⁷ This proposition is especially interesting in light of the possibility of this issue resurfacing in the Eighth Circuit. The court expressly deferred to the IRS Revenue Rulings, stating that “[b]ecause there is no case law directly on point, we find revenue rulings especially useful in analyzing the issue before us.” *N.D. State Univ.*, 255 F.3d at 604 n.6.

¹⁶⁸ If the Supreme Court were to take up this ERP question, it is unlikely that it would answer the question of the precise level of deference that Revenue Rulings merit. *See* *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 219 (2001). However, the Court would accord some deference under *Mead* and analyze the Revenue Rulings accordingly. However, the Court might provide a definitive answer if a new circuit considered the ERP issue and specifically held that Revenue Rulings merit no judicial deference. When, if ever, the Supreme Court provides a conclusive answer to this question, this author suggests that the Court would likely deny *Chevron* deference to Revenue Rulings but continue to accord them great deference under *Mead*.

¹⁶⁹ *See* Rev. Rul. 2004-110, 2004-2 C.B. 960.

issued a statement of non-acquiescence in the Eighth Circuit's *NDSU* decision.¹⁷⁰ But the IRS later revised this statement and avowed to treat ERPs to tenured educators as wages subject to FICA and to pursue litigation when necessary, even in the Eighth Circuit, as long as those ERPs were issued after January 11, 2005.¹⁷¹ As a result, a circuit split remains that involves a costly and recurring issue of federal taxation. Therefore, there is a very high likelihood that this issue will resurface in the circuit courts.

With the arguments for judicial deference to Revenue Rulings outlined above, what remains is the more substantive analysis of the various rulings relevant to the question of whether ERPs to tenured educators constitute wages. This analysis, however, is possible only after laying the appropriate foundation: the broader analysis of judicial deference and Revenue Rulings correctly leads to the principle that courts should afford great deference to IRS Revenue Rulings. This analysis establishes the appropriate framework for courts to enter the substantive examination of the individual Revenue Rulings.

V. THE REVENUE RULINGS AT HAND IN THE THREE CASES

Even within the appropriate framework of judicial deference to Revenue Rulings, courts arrive at different conclusions as to how various rulings analogize to the underlying facts of the issues before them. This is due, in part, to the fact that Revenue Rulings apply to a limited set of facts rather than to a general issue.¹⁷² This explains how the parties involved in the ERP controversy attempted to analogize at least three different Revenue Rulings to the facts at hand and how three courts came to very different and divided conclusions.

There are three Revenue Rulings with potential application to the issue of ERPs made to tenured educators. Revenue Ruling 75-44 addresses accrued employment rights, indicating that payments to employees in exchange for the waiver of seniority rights under a general, indefinite employment contract do constitute wages subject to FICA.¹⁷³ Revenue Ruling 58-301 indicates that a payment to an employee for the cancellation of an existing employment contract does not constitute wages for FICA purposes.¹⁷⁴ However, the IRS has subsequently issued Revenue Ruling 2004-110, which expressly supersedes Revenue Ruling 58-301 and confirms that the IRS considers as wages any payments made after January 2005 to employees in exchange for the cancellation of an employment contract.¹⁷⁵

¹⁷⁰ See *N.D. State Univ.*, 255 F.3d 599 (2001), *action on dec.*, 2001-08 (Jan. 1, 2002).

¹⁷¹ See *N.D. State Univ.*, 255 F.3d 599 (2001), *revised action on dec.*, 2007-01 (Jan. 18, 2007).

¹⁷² See 26 C.F.R. § 601.601(d)(2)(v)(a) (2009) (“The conclusions expressed in Revenue Rulings will be directly responsive to and limited in scope by the pivotal facts stated in the [R]evenue [R]uling.”).

¹⁷³ See *Rev. Rul. 75-44*, 1975-1 C.B. 15.

¹⁷⁴ See *Rev. Rul. 58-301*, 1958-1 C.B. 23.

¹⁷⁵ *Rev. Rul. 2004-110*, 2004-2 C.B. 960 (“*Rev. Ruls. 55-520 and 58-301 modified and superseded.*”).

A. Which Revenue Ruling is most Analogous?

1. Revenue Rule 2004-110: Stay Tuned

The IRS expressly indicated that Revenue Rule 2004-110 would not be applied retroactively.¹⁷⁶ However, the payments at issue in *Appoloni* and *University of Pittsburgh* were made prior to the IRS's issuance of Rule 2004-110.¹⁷⁷ Accordingly, the ruling had no bearing on the outcome in either case, as each court acknowledged it but correctly declined to consider it in the analysis of the wage issue.¹⁷⁸ That does not mean, however, that Rule 2004-110 is irrelevant to this discussion of the current disagreement among the circuits. On the contrary, Rule 2004-110 provides the definitive answer regarding the status of ERPs made to tenured educators and should be the key to mending the circuit split.¹⁷⁹

The fact that Rule 2004-110 did not apply to the *Appoloni* or *University of Pittsburgh* ERPs is immaterial to the outcome in both the Sixth and Third Circuits, as each would have obviously come to the same conclusion if consideration of that ruling had been appropriate. Instead, the role of Revenue Rule 2004-110 in this issue will be played out in the future. The proper questions are when and how will the issue of ERP payments to tenured educators resurface, and how will the circuit split be resolved? Revenue Rule 2004-110 will provide the answers.

As to when and how the issue will resurface, a plausible reason that the Supreme Court has declined to consider this issue to date is because of the timing of the *Appoloni* and *University of Pittsburgh* payments in relation to Rule 2004-110. It seems likely that the Supreme Court would have addressed this issue if not for the fact that Rule 2004-110 did not apply to the payments at issue in those cases. Instead, the Supreme Court recognized the benefit of waiting until this issue comes before another circuit court or resurfaces in the Eighth Circuit so that the wage status of ERPs can be considered in light of Revenue Rule 2004-110.

When that occurs, the framework detailed in this Note should govern. Any future court to consider the status of ERPs to tenured educators should (1) operate under the broad definition of wages in the FICA context, and (2) afford considerable deference to Revenue Rule 2004-110. This should hold true whether the issue comes as a matter of first impression before a new circuit or resurfaces in the Eighth Circuit. It is telling that even the Sixth Circuit dissent noted that, if applicable, 2004-110 would support the IRS's contention that the ERPs constituted wages.¹⁸⁰

¹⁷⁶ See 26 C.F.R. § 601.601(d)(2)(v)(c) ("Where Revenue Rulings revoke or modify rulings previously published . . . the new rulings will not be applied retroactively to the extent that the new rulings have adverse tax consequences to taxpayers.").

¹⁷⁷ See *Univ. of Pittsburgh v. United States*, 507 F.3d 165, 169-70 (3d Cir. 2007); *Appoloni v. United States*, 450 F.3d 185, 194 n.4 (6th Cir. 2006).

¹⁷⁸ See *Univ. of Pittsburgh*, 507 F.3d at 169-70; *Appoloni*, 450 F.3d at 194 n.4.

¹⁷⁹ See *infra* note 184.

¹⁸⁰ *Appoloni*, 450 F.3d at 204 (Griffin, J., dissenting) (explaining that "Ruling 2004-110 generally supports the government's position"). The dissent also noted the plaintiffs' argument that Rule 2004-110 "was promulgated in anticipation of litigation." *Id.* This notion confuses a basic point about Revenue Rulings, which is that one of their primary purposes is to indicate to taxpayers how the IRS will proceed. This applies, not only to the assessment of

There are two possible scenarios for resolution of this issue and the mending of the circuit split. One possibility is that the issue will very likely come before a different circuit. Regardless of the outcome in that circuit (although a finding of wages appears now to be the only appropriate outcome in light of the promulgation of Rule 2004-110 and the abandonment of Rule 58-301), the Supreme Court would likely accept the issue and resolve the split in favor of the IRS. The second scenario is that the issue will resurface in the Eighth Circuit, which would be the preferred option for two reasons. First, the Eighth Circuit could reverse its decision in *NDSU* without altering its rationale. The court found that the purpose of the payments was to buy back tenure rights from the professors. Although the underlying rationale is erroneous, as will be discussed below, this ruling would remain undisturbed with the application of Rule 2004-110. The court would merely defer, once again, to the valid and applicable Revenue Ruling most analogous to the facts at hand. Second, the likelihood that the Supreme Court will need to address the issue will decrease dramatically. Whereas it is almost certain that the Court would accept the issue should it come before a different circuit, there will be no need if the Eighth reconsiders the issue in light of Rule 2004-110 and mends the split between the circuits on its own.¹⁸¹ And if the Eighth Circuit maintains its present stance, the Supreme Court would simply be in the same position as if the issue had come before another circuit.

2. Revenue Rules 75-44 and 58-301

Despite the changes that have occurred since these cases were decided, the Eighth Circuit nonetheless incorrectly decided that Revenue Rule 58-301 was more analogous to the *NDSU* facts than Rule 75-44.¹⁸² Rule 58-301 on its face was a relevant consideration because it involved relinquishment of contractual rights.¹⁸³ However, instead of finding Rule 75-44 more analogous than Rule 58-301 by focusing on the service aspect inherent in the employer-employee context of the ERPs, the court erred by concluding that the university was buying back the tenure rights relinquished by its employees. This narrow perception is incorrect for two reasons: (1) concern for relinquished contractual rights should focus on how employees obtained the right, rather than what right was relinquished, especially in an instance such as this where (2) relinquishment of the contractual right was merely incidental to the receipt of payment made for a clearly distinct and valid purpose.¹⁸⁴

tax liability but, also, to the resolution of tax controversy through litigation. By their very nature, Revenue Rulings in at least some sense anticipate litigation. It would be another story had the IRS issued Rule 2004-110 during the litigation and argued that the court should defer to the newly fashioned agency interpretation.

¹⁸¹ This outcome would be appropriate and would mirror the correct stance taken by the Ninth Circuit in *Omohundra*. See *supra* note 163.

¹⁸² *N.D. State Univ. v. United States*, 255 F.3d 599, 607 (8th Cir. 2001).

¹⁸³ See Rev. Rul. 58-301, 1958-1 C.B. 23.

¹⁸⁴ There is a subtle distinction between the Eighth Circuit's holding and the position articulated in Rule 2004-110. While the court held that the purpose of the ERP payments was to buy tenure rights, *N.D. State Univ.*, 255 F.3d at 607, Rule 2004-110 indicates that the payments it refers to are made for the purpose of canceling the contract, which incidentally

The Eighth Circuit held that NDSU paid the professors for only the act of relinquishing their tenure rights.¹⁸⁵ According to the court, this is the fact that brought the ERPs squarely under Rule 58-301.¹⁸⁶ The court rejected the applicability of Rule 75-44 based on the notion that two tenured professors experience two relationships with a university, the at-will pre-tenure period and the subsequent period characterized by possession of tenure rights.¹⁸⁷ And although past performance and current salary were considered in the determination of the ERP amounts, the court discounted these factors simply because there had been no express limit imposed as to what factors could be considered.¹⁸⁸ Instead, the court concluded that the fact that professors obtain tenure at the onset of a second relationship invalidated the argument that ERPs, which necessarily included relinquishment of tenure, were based on past service.¹⁸⁹

In contrast, both the Sixth and Third Circuits focused on the ERP program eligibility requirements and the nature of the employment relationship.¹⁹⁰ Both courts noted that the participation in the programs required a minimum number of years of service, and both past service and current salary were key factors in determining the ERP amounts.¹⁹¹ The courts noted that overall longevity was the primary consideration and that the tenured period in isolation was irrelevant.¹⁹² Tenure was merely an eligibility requirement, and relinquishment of tenure rights was simply incidental to participation in the program.¹⁹³ Furthermore, the proper inquiry should focus on how a contractual right is obtained, not on the right itself.¹⁹⁴ Accordingly, both the Sixth and Third Circuits held that tenure rights are clearly obtained exclusively through service to an employer, and as such, Rule 75-44 was most analogous to the ERPs.¹⁹⁵

The Eighth Circuit's ruling in *NDSU* hinges on the declaration that tenured educators and educational institutions maintain two successive relationships.¹⁹⁶ But

involves the relinquishment of certain rights. See Rev. Rul. 2004-110, 2004-2 C.B. 960; see also discussion *infra* Part V.B.

¹⁸⁵ *N.D. State Univ.*, 255 F.3d at 607.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 606.

¹⁸⁸ *Id.* at 606-07. Other factors mentioned included curriculum needs and budget constraints. *Id.* at 601. It is difficult to understand why those factors would make any difference because curriculum needs and budget constraints are clearly concerns of the employer and, therefore, fall directly within context of employer-employee relationship.

¹⁸⁹ *Id.* at 606.

¹⁹⁰ *Univ. of Pittsburgh v. United States*, 507 F.3d 165, 171-74 (3d Cir. 2007); *Appoloni v. United States*, 450 F.3d 185, 195 (6th Cir. 2006).

¹⁹¹ *Univ. of Pittsburgh*, 507 F.3d at 171-74; *Appoloni*, 450 F.3d at 195.

¹⁹² *Univ. of Pittsburgh*, 507 F.3d at 171-74; *Appoloni*, 450 F.3d at 195.

¹⁹³ *Univ. of Pittsburgh*, 507 F.3d at 171; *Appoloni*, 450 F.3d at 192.

¹⁹⁴ *Univ. of Pittsburgh*, 507 F.3d at 174; *Appoloni*, 450 F.3d at 192-93.

¹⁹⁵ *Univ. of Pittsburgh*, 507 F.3d at 173; *Appoloni*, 450 F.3d at 193-94.

¹⁹⁶ *N.D. State Univ. v. United States*, 255 F.3d 599, 606 (8th Cir. 2001).

it is unclear how what appears to be a simple play on words should be interpreted in such a way that the first relationship prior to a grant of tenure falls outside the scope of employment while the second relationship characterized by tenure lies within the employer-employee relationship.¹⁹⁷ Even a finding that the grant of tenure constitutes a new position does not change the fact that both positions fall within the broad employment relationship between the parties.

Consider an employee who works for one employer but, after five years in that job, accepts a new position with the same employer. No one would argue that the employer-employee relationship is somehow divested of those previous five years of service and begins afresh upon entry into the position. When that employee retires, for example after thirty total years of service, neither party would claim that the employee had worked for the employer for only twenty-five years by omitting the first five years served in a different position. Clearly, the employment relationship spanned thirty years.

Likewise, the broad employer-employee relationship at issue spanned the entire length of employment, whether or not it could be construed as distinct periods characterized by pre- or post-grant of tenure. Therefore, the Eighth Circuit incorrectly held that the ERPs were not wages under Rule 58-301 based on this contrived view of tenure and its impact on the employment relationship. As the Sixth Circuit correctly concluded, “just because a teacher relinquishes a right when accepting early retirement does not convert what would be FICA wages into something else.”¹⁹⁸

B. *The Revenue Rulings and the Principle of Purpose*

Why did the Eighth Circuit focus on this concept of two successive relationships? The answer is simple, and it reinforces the argument that courts must give some deference to IRS Revenue Rulings. The Eighth Circuit’s wordplay represents the only means by which the court could formulate a ruling that would fall under Rule 58-301. However, the *NDSU* opinion was incorrectly decided, despite the fact that Rule 2004-110 subsequently superseded Rule 58-301. Although the court acted appropriately by deferring to a valid IRS Revenue Rule, the court was so focused on presenting an argument that supported the outcome mandated in Rule 58-301 that it ignored the underlying principle of purpose. Had the court kept the principle of purpose at the heart of its analysis—both the purpose of tenure itself and the purpose of the ERP program—the Eighth Circuit would have correctly held that Rule 75-44, not 58-301, was more analogous and that the payments constituted wages subject to FICA.

1. The Purpose of Tenure

In order to determine the purpose of tenure, one need only examine the rights an educator receives upon a grant of tenure. Tenure “lays no claim whatever to a guarantee of lifetime employment. Rather, tenure provides only that no person

¹⁹⁷ See, e.g., Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U. L. REV. 67, 74 (2006) (“The awarding of tenure thus *changes* the employment-at-will relationship.” (emphasis added)). Adams correctly notes that a grant of tenure only modifies the existing relationship by adding previously unavailable protections. *Id.*

¹⁹⁸ *Appoloni*, 450 F.3d at 192.

continuously retained as a full-time faculty member beyond a specified lengthy period of probationary service may thereafter be dismissed *without adequate cause*.¹⁹⁹ The American Association of University Professors proclaims that tenure protects two specific rights of educators: academic freedom and the procedural due process rights that afford a sense of job, and, therefore, economic security.²⁰⁰ The Supreme Court has recognized academic freedom as an essential right associated with the First Amendment.²⁰¹ This important right frees educators to inquire, teach, and publish without outside interference, which, in turn, brings to fruition the institution's goal of achieving an environment conducive to liberal education.²⁰² The due process rights associated with tenure means that termination of employment must be preceded by rigorous and extensive procedures not unlike a trial that confirm the existence of just cause.²⁰³

What do these most basic purposes of tenure, the protection of academic freedom, and provision of procedural due process in the face of termination, have in common? These rights hold significance and power only within the scope of the

¹⁹⁹ See William Van Alstyne, *Tenure: A Summary, Explanation, and "Defense"*, 57 AAUP BULL. 328, 328 (1971).

²⁰⁰ See AAUP, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS, *reprinted in* AAUP POLICY DOCUMENTS & REPORTS 3, 3 (10th ed. 2006). The AAUP's 1940 Statement was drafted by faculty and administration representatives from American universities and has been endorsed by the American Association of University Professors, which represents hundreds of institutions of higher learning and professional organizations. Adams, *supra* note 197.

²⁰¹ See, e.g., *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.").

²⁰² See, e.g., Merton C. Bernstein, Essay, *In Praise of Tenure: A Cautionary Essay*, 71 WASH. U. L.Q. 1017, 1019 (1993) (arguing that the existence of academic freedom is dependant on the tenure system); Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 LAW & CONTEMP. PROBS. 325, 355 (1990) ("The economic and social costs of the tenure system are . . . outweighed by the fact that tenure is vital to academic freedom."); Robert B. Conrad & Louis A. Trosch, *Renewable Tenure*, 27 J.L. & EDUC. 551, 553 (1998) ("Academic freedom and academic tenure fit together like a hand and glove. Academic tenure is the glove that protects its hand, freedom of speech and freedom of inquiry within the academic setting.").

²⁰³ See, e.g., Brian G. Brooks, *Adequate Cause for Dismissal: The Missing Element in Academic Freedom*, 22 J.C. & U.L. 331, 340-41(1995) (arguing that procedural due process, namely termination only for good cause, is a necessary component of academic freedom); James J. Fishman, *Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others*, 21 PACE L. REV. 159, 182-83 (2000) (arguing that, without the security of tenure's due process rights, "much experiment, scholarship and intellectual risk would not be undertaken."); Michael J. Phillips, *The Substantive Due Process Rights of College and University Faculty*, 28 AM. BUS. L.J. 567, 597 (1991) (noting that the property interest in tenure enables tenured faculty to "use substantive due process to attack dismissals based on cause or financial exigency.").

employment relationship between an educator and an academic institution. The Eighth Circuit incorrectly concluded that the ERPs were made to buy back tenure rights because the court either ignored or misunderstood that the underlying purpose of tenure is to serve and protect both the employer and employee during the period of service. Quite simply, the tenure rights of individual educators have no use or value to either the employees or the employer outside the employment relationship.

The fact that tenure rights have meaning or value only if considered in relation to service in the employment context stands in stark contrast to the position forwarded by the Eighth Circuit. The court opined that the educators at North Dakota State University “did not receive what they were entitled to under their contracts, which was continued employment absent . . . adequate cause for termination. Rather they gave up those rights.”²⁰⁴ This statement reflects the belief that tenure, by definition, guarantees lifetime employment. This logic is as faulty as the logic noted above, which concluded that tenure is granted automatically. While tenure often results in lifetime employment, it is illogical to suggest that it is a guarantee. One need look no farther than the basic due process rights that tenure affords to understand this. What need would tenured educators have for a right that protects them from termination without the guarantee and protection of certain procedures if termination itself was impossible?

In addition to this misperception concerning tenure, the Eighth Circuit missed another essential point. Even if the employees were truly entitled to “continued employment” as the court suggested, does that not imply that continued employment for only as long as those employees desired? But the educators in these cases chose to retire, which means that they had received continual employment until the point that they chose to forsake that continued employment for retirement. And, as demonstrated above, the rights of tenure have value and meaning only within the scope of service of the employee to the employer. Academic freedom protects tenured educators during employment; what is the value of due process rights related to termination to an individual who has retired? The Eighth Circuit failed to recognize that these educators did receive the full measure of tenure during their employment and that once they voluntarily entered into an early retirement agreement, the meaning and value of tenure was removed.

Clearly these educators would have continued to receive the full measure of their tenure rights had they not retired early. Accordingly, they would have maintained those rights until the time of what could be termed their “normal” time of retirement. The obvious reality that no educator entering a “normal” retirement would be compensated at that point for relinquishing tenure is final proof that the Eighth Circuit misunderstood or ignored the true purpose of tenure. The court emphasized that Revenue Ruling 58-301 was most analogous based on the fact that the educators relinquished tenure, thereby not receiving the full measure of rights associated with tenure.²⁰⁵ The Eighth Circuit’s effort to provide an argument that fit under Rule 58-301 was inadequate and incorrect. The purpose of tenure indicates that the ERPs were necessarily made for services within the employment context. As such, the court should have rejected Rule 58-301 in favor of Rule 75-44 and held that the ERPs constituted wages subject to FICA.

²⁰⁴ N.D. State Univ. v. United States, 255 F.3d 599, 607 (8th Cir. 2001).

²⁰⁵ *Id.*

2. The Purpose of the ERP Program

Directly related to the purpose of tenure is the purpose of the ERP program itself. What would academic institutions receive if the ERPs were made to buy tenure rights? Would they be buying the academic freedom protections or the right to due process procedures that tenured educators enjoy? The same discussion related to the retiring employees applies to the employer, and the obvious answer is that relinquished tenure rights likewise have no value or meaning to academic institutions. Instead, the primary goal of early retirement programs generally is to reduce costs while providing a compensatory benefit to valued employees who have provided years of service and achieved higher scales of pay.²⁰⁶

There is, however, one scenario where the Eighth Circuit's rationale and reliance on Revenue Rule 58-301 would have been appropriate. Consider an instance where an institution compensated educators for relinquishing tenure rights with the stipulation that those individuals would maintain their employment.²⁰⁷ This would truly be a situation where the institution's purpose is to buy tenure rights. However, outside of this narrow set of facts, the Eighth Circuit's holding that the academic institution's purpose was to buy tenure rights is merely an example of form over substance. Announcing in form that the ERPs are made to buy tenure does not trump the substance. The substantive reality is that the academic institutions receive nothing from the rights their employees relinquish, and those employees simply walk away presently from what they would walk away from later; except, they do so presently with added compensation paid in recognition for their valued years of service. Finding that such payments constitute wages correctly recognizes that the transaction results in a win-win for parties connected by the service of one to the other in the employment context.

²⁰⁶ See, e.g., Pamela Perun, *Phased Retirement Programs for the Twenty-First Century Workplace*, 35 J. MARSHALL L. REV. 633, 664 (2002) (noting that academic early retirement programs, which are the only type of early retirement programs that have been expressly authorized by law, strike an effective balance between the needs of both parties in the employment relationship).

²⁰⁷ See, e.g., Sam Dillon, *A School Chief Takes on Tenure, Stirring a Fight*, N.Y. TIMES, Nov. 13, 2008, at A1 (highlighting a proposal wherein secondary school teachers would choose between two compensation plans, one of which would require the relinquishment of tenure); James J. Fishman, *Tenure: Endangered or Evolutionary Species*, 38 AKRON L. REV. 771, 781-82 (2005) (suggesting that the tenure system will survive, but only by adapting socially sensitive procedures, such as extending the probationary period in order to accommodate family planning); Ernest van den Haag, *Academic Freedom and Tenure*, 15 PACE L. REV. 5, 7 (1994) (noting that universities in England have abolished the tenure system); Constance Hawke, *Commentary, Tenure's Tenacity in Higher Education*, 120 ED. LAW REP. 621, 635-36 (1997) (noting a variety of plans wherein professors retain employment, but relinquish tenure in exchange for various incentives); Robert W. McGee & Walter E. Block, *Academic Tenure: An Economic Critique*, 14 HARV. J.L. & PUB. POL'Y 545, 561 (1991) (proposing a market driven approach that would enable universities to retain accreditation while choosing whether they want to operate under the tenure system); Fred L. Morrison, *Tenure Wars: An Account of the Controversy at Minnesota*, 47 J. LEGAL EDUC. 369, 369 (1997) (recounting the struggles of the "Tenure Wars at [the University of] Minnesota" over proposed modifications to the tenure system in place at that institution).

VI. CONCLUSION

The Eighth Circuit incorrectly ruled that ERPs made to tenured educators do not constitute wages subject to FICA taxation.²⁰⁸ The court premised this decision on the flawed rationale that academic institutions provide ERP programs to tenured educators for the purpose of buying back tenure rights.²⁰⁹ Accordingly, the court erroneously held that the facts at hand were most analogous to Revenue Ruling 58-301.²¹⁰

In contrast, the Sixth and Third Circuits correctly held that such payments are FICA wages.²¹¹ These decisions were based on the principle that a tenured relationship is one based on past service of an employee to the employer; accordingly, the courts correctly held that the facts in those cases were most analogous to Revenue Ruling 75-44.²¹²

This circuit split involves a costly and recurring issue of federal taxation that requires resolution. This matter is also complicated by the fact that the IRS has promulgated Revenue Rule 2004-110, which modified and superseded Rule 58-301.²¹³ A Revenue Ruling may not be applied retroactively if it supersedes an existing ruling and application would have a detrimental effect on the taxpayers in controversy.²¹⁴ The complicating factor arises in the fact that Rule 2004-110 was promulgated after the ERPs in *Appoloni* and *University of Pittsburgh* had been made but before those cases were decided.²¹⁵ Therefore, no court has yet considered this issue in light of Rule 2004-110.

This Note identifies a framework by which courts should consider the broad issue of whether ERPs made to tenured educators constitute FICA wages. First, a court should consider the definition of wages in the FICA context and hold that FICA wages must be construed broadly.²¹⁶ Second, any court to address this issue will certainly be presented with arguments concerning the application of Revenue Rulings. Accordingly, courts should find that Revenue Rulings merit at least some judicial deference.²¹⁷ Therefore, any court to examine this issue, even the Eighth Circuit, should the issue come before that court again, should determine that Revenue Ruling 2004-110 directly applies to the issue of ERPs to tenured educators and hold that such payments constitute FICA wages.

²⁰⁸ *N.D. State Univ.*, 255 F.3d at 607.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Univ. of Pittsburgh v. United States*, 507 F.3d 165, 166 (3d Cir. 2007); *Appoloni v. United States*, 450 F.3d 185, 187 (6th Cir. 2006).

²¹² *Univ. of Pittsburgh*, 507 F.3d at 173; *Appoloni*, 450 F.3d at 193-94.

²¹³ Rev. Rul. 2004-110, 2004-2 C.B. 960.

²¹⁴ See 26 C.F.R. § 601.601(d)(2)(v)(c) (2009).

²¹⁵ *Univ. of Pittsburgh*, 507 F.3d at 169-70; *Appoloni*, 450 F.3d at 194 n.4.

²¹⁶ See *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 365-66 (1946).

²¹⁷ *United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001).