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Reforming Federal Tax Litigation: An Agenda

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REFORMING FEDERAL TAX LITIGATION: AN AGENDA

Steve R. Johnson

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REFORMING FEDERAL TAX LITIGATION: AN AGENDA

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I. INTRODUCTION

King Vertigorn, it is said, wished to build a castle to defend Britain against invaders. Each day, his mason raised and set the stones. Each night, however, the earth would rumble, bringing the work

* University Professor of Law, Florida State University College of Law. I thank participants in the Symposium—particularly Professor Leandra Lederman, the primary commentator on this Article at the Symposium—for their criticisms, observations, and encouragement. I also thank Mary McCormick of the Florida State University College of Law Research Center for research assistance.

crashing to the ground. Vexed, Vertigorn asked Merlin for an explanation. Merlin's mystical divination revealed that, in a cavern far below the surface, there resided two foes, a red dragon and a white dragon. In their perpetual struggle for dominance, first one dragon then the other would gain temporary ascendancy. Their jostling unsettled the ground, rendering all construction temporary.

In federal tax procedure, the red dragon and the white dragon are facilitation of revenue collection and fairness to taxpayers. Numerous times during the first century of the modern federal income tax, the courts have noted the centrality of the first value: "taxes are the lifeblood of government, and their prompt and certain availability an imperious need."[1] But, were that the only value, we could return to brutal efficiency of the proscription system. We have refrained from doing so because our limited government traditions demand that citizens' claims to due process under the law be taken seriously.

Thus, tax administration in the United States—before, during, and (no doubt) after the income tax's first one hundred years—has involved and will involve the balancing of the revenue facilitation and fairness protection imperatives.[2] Just as the power balance between the red and white dragons fluctuated, so have the relative weights accorded the two tax imperatives. During times of international or domestic crisis, we have looked to Government to save us from threats. This demands opening wider the spigot of fiscal flows, so the first tax value receives greater weight. During more placid times, menace recedes, causing the virtues of the second value to appear more attractive.

In short, the pendulum swings between emphasis on revenue maximization and taxpayer protection. This affects legislative, regulatory, and judicial actions; it implicates not just substantive rules of tax liability and tax rates but also styles of statutory interpretation[3] and the rules and devices of tax procedure.

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1. Bull v. United States, 295 U.S. 247, 259 (1935); *see also* United States v. Dalm, 494 U.S. 596, 604 (1990); United States v. Nat'l Bank of Commerce, 472 U.S. 713, 733 (1985); United States v. Kimbell Foods, Inc., 440 U.S. 715, 734 (1979).

2. The tension between the values has been evident since the founding of the American Republic. Alexander Hamilton, our first Secretary of the Treasury, proposed a general ad valorem duty on all imports. "Immediate opposition in the Congress was rooted in a fear of the alleged centralizing tendencies involved in creating a large force of collectors on the Federal level." INTERNAL REVENUE SERVICE, U.S. TREASURY DEP'T, PUB. NO. 447, THE UNITED STATES TAX SYSTEM: A BRIEF HISTORY 4 (1960). One of the opponents described the proposal as the "horror of all free States," one that was "hostile to the liberties of the people," and which would "convulse the government; let loose a swarm of harpies, who, under the domination of the revenue officers, will range the country prying into every man's house and affairs, and, like the Macedonian phalanx, bear down all before them." *Id.*

3. This is reflected in the assertion, disappearance, and occasional reappearance in federal tax jurisprudence of a canon under which tax statutes were construed strictly against the Government and in favor of taxpayers. *See, e.g.*, Gould v. Gould, 245 U.S. 151,

This Article is about the procedural rules. Specifically, it considers the mechanisms by which disputes as to federal tax liabilities are resolved. The Article identifies an agenda for reforming federal tax litigation.[4] Fully developing the justifications for and the particulars of the proposed changes necessarily is the work of more than one article. Thus, this Article sets the agenda, describing the core elements of the changes (and, in some cases, the reaffirmations) I propose. Subsequent articles will develop specific proposals in greater detail.

Part II of this Article explores the criteria that should guide choices in this area. A fairly uncontroversial list of candidate criteria would include such things as decisional accuracy, efficiency, and actual and perceived equity. However, considerable controversy likely would exist, even among competent commentators, as to the relative weights that should be accorded the criteria, both generally and in application to particular situations.

Hence, in Part II, I will not focus on the weightings that best comport with my personal constellation of values. Instead, Part II sketches key legislative, regulatory, and judicial events that have shaped our current tax procedure rules. By distilling these events, we can get a sense of the values that have actually driven the system.

Parts III, IV, and V apply those values to features of the federal tax litigation system and thereby develop proposals. Specifically, Part III considers reforms as to the judicial fora that should be available for the resolution of federal tax controversies. It offers three principal recommendations: (1) the Tax Court should be given quasi-plenary jurisdiction in civil tax matters (concurrent, not exclusive,

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153 (1917) ("In case of doubt [statutes levying taxes] are construed most strongly against the Government, and in favor of the citizen."). *Gould* cited authorities as far back as Justice Story's opinion in *United States v. Wigglesworth*, 28 F. Cas. 595 (C.C.D. Mass. 1842).

This canon was invoked in hundreds of federal cases in the 1800s and the first two decades of the 1900s, when limited government was the predominant electoral preference. It was largely replaced by pro-IRS canons (such as that I.R.C. § 61 is construed broadly, *see* Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 429 (1955), and that tax deductions and exemptions are construed narrowly, *see* Commissioner v. Schleier, 515 U.S. 323, 328 (1995) (exclusions); INDOPCO, Inc. v. Commissioner, 503 U.S. 79, 84 (1992) (deductions)) during the 1930s through 1970s, when we looked to Washington to save us from the Great Depression, then Fascism, then Communism. Under the sway of the Reagan Revolution, the pro-taxpayer canon returned to the stage briefly in the 1980s and 1990s. *See, e.g.*, United Dominion Inds., Inc. v. United States, 532 U.S. 822, 839 (Thomas, J., concurring); *id.* at 839 n.l (Stevens, J., dissenting). It has faded again since September 11, 2001. *See* Steve R. Johnson, *Should Ambiguous Revenue Laws Be Interpreted in Favor of Taxpayers?*, NEV. LAW., Apr. 2002, at 15-16.

The canon retains greater potency in state and local tax litigation. *See* Steve R. Johnson, *Pro-Taxpayer Interpretation of State-Local Tax Laws*, 51 ST. TAX NOTES 441 (2009).

4. The reforms implicate litigation of all federal taxes, not just the income tax. However, the income tax is the most frequently litigated of the types imposed by the federal government.

jurisdiction); (2) proposals to create a national court of tax appeals should continue to be rejected; and (3) the Court of Federal Claims should be divested of jurisdiction to hear tax cases.

Part IV offers reforms as to the available forms of civil tax actions. It urges two reforms: (1) repeal of the bulk of the TEFRA unified partnership audit and litigation procedures,[5] and (2) reduction in the scope of, but not elimination of, judicial review of Collection Due Process decisions by the IRS Appeals Office.[6]

Finally, Part V addresses prerequisites to suits. It proposes that the *Flora* full payment rule (that taxpayers must pay the full amount of liability determined by the IRS as a prerequisite to bringing a tax refund suit) be abolished.[7]

II. CRITERIA FOR ASSESSING REFORMS

Law reform proposals based on idiosyncratic values preferences are built on a foundation of quicksand. They are unlikely to gain traction initially and to sustain it over time. I hope to erect this reform agenda on a more solid footing. Thus, I will emphasize not my values but the values I perceive as embodied in and reflected by leading facets of the federal tax litigation system as it has developed. Below, I describe the sources that generate relevant criteria, identify key events in the evolution of the current system, and adduce from those developments the values on which the system is based.

A. *Sources of Criteria*

There are four principal sets of actors shaping norms governing the procedural rules of taxation: Congress, the courts, federal tax regulators (Main Treasury,[8] the IRS, and the Department of Justice),[9] and the communities of taxpayers, their representatives, and

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5. *See* I.R.C. §§ 6221-6234. These provisions were enacted in their original form by the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), Pub. L. No. 97-248, 96 Stat. 324 (1982).

6. *See* I.R.C. §§ 6320, 6330.

7. *See* Flora v. United States (*Flora II*), 362 U.S. 145 (1960), *reaff'g* Flora v. United States (*Flora I*), 357 U.S. 63 (1958).

8. The IRS is part of the Treasury Department. Unlike the IRS (which handles day-to-day tax administration and issues lower-level administrative guidance), other parts of Treasury are involved in taxation at a more general level. So called "Main Treasury" finalizes tax regulations, represents the Administration in tax legislation, negotiates tax treaties, and, through its Treasury Inspector General for Tax Administration, monitors performance by the IRS.

9. For discussion of the roles and responsibilities of these actors, see LEANDRA LEDERMAN & STEPHEN W. MAZZA, TAX CONTROVERSIES: PRACTICE AND PROCEDURE 1-29 (3d ed. 2009); DAVID M. RICHARDSON, JEROME BORISON & STEVE JOHNSON, CIVIL TAX PROCEDURE 1-17 (2d ed. 2008).

academic and other commentators. In routine situations,[10] Congress is the dominant actor, both constitutionally[11] and prudentially.[12] But it would be a mistake to see the relationships as strictly hierarchical. Often they are interactive. Courts, through constitutional analysis and statutory interpretation, and government and private professional communities, through advocacy and an "unwritten code" as to how things should be done, also have been highly influential in the development of values shaping the rules of tax procedure.[13]

The legitimate extent of such interaction is unsettled and is the subject of considerable debate in many areas of law. For example, some see statutory interpretation as a collaborative process by which courts and legislatures formulate law interactively.[14] Others have offered similar visions of constitutional law[15] and administrative law.[16]

Tax is about as positivistic as any field of law gets, but courts have made a great deal of the law even in tax.[17] This tradition was estab-

10. A non-routine situation would be, for example, when the courts hold that the Constitution forbids some item of tax legislation. The courts are reluctant to do so. Judicial deference to Congress is considerable in matters of revenue raising. *See, e.g.*, Nordlinger v. Hahn, 505 U.S. 1, 11-12 (1992); Regan v. Taxation with Representation of Wash., 461 U.S. 540, 547 (1983).

11. *See* U.S. CONST. art I, § 8, cl. 1.

12. In dealing with the numerous complex considerations that formulating tax rules entails, Congress has natural advantages over the courts. *See* United States v. Nunnally Inv. Co., 316 U.S. 258, 264 (1942) ("The problem of legal remedies appropriate for fiscal administration rests within easy Congressional control. Congress can deal with the matter comprehensively, unembarrassed by the limitations of a litigation involving only one phase of a complex problem."); *see also* United States v. Kales, 314 U.S. 186, 200 (1941).

Some might argue that an expert agency could make better tax laws than a democratically selected legislature. Whether or not that is true, Congress surely possesses a legitimacy in this area that Treasury lacks. *See generally* Andre L. Smith, *The Nondelegation Doctrine and the Federal Income Tax: May Congress Grant the President the Authority to Set the Income Tax Rates?*, 31 VA. TAX REV. 763 (2012).

13. This fact has been recognized for a long time. Over a half century ago, for example, an Assistant Secretary of the Treasury remarked on "one very important factor": "As our proposed regulations are published, a cumulative effect is being created. The regulations should give you an over-all indication of *attitude* on the part of the Treasury Department." Laurens Williams, *The Preparation and Promulgation of Treasury Department Regulations Under the Internal Revenue Code of 1954*, 8 TAX EXECUTIVE 3, 7-8 (1956) (emphasis in original).

14. *See, e.g.*, William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541 (1988).

15. *See, e.g.*, Blakely v. Washington, 542 U.S. 296, 326 (2004) (Kennedy, J., dissenting) ("Constant, constructive discourse between our courts and our legislatures is an integral and admirable part of the constitutional design."); Mistretta v. United States, 488 U.S. 361, 408 (1989) ("Our principle of separation of powers anticipates that the coordinate Branches will converse with each other on matters of vital common interest.").

16. *See, e.g.*, 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 138 (2d ed. 1978) (stating that administrative procedure is formulated by "[l]egislators and judges who are working [as] partners [to] produce better law than legislators alone could possibly produce").

17. *See, e.g.*, Dobson v. Commissioner, 320 U.S. 489, 499 n.25 (1943) ("Judge-made

lished early, and it has proved enduring.[18] The benefits of judicial participation are doubted by some, however,[19] and the legitimacy of such collaboration was debated in a recent Supreme Court tax case.

In the *Home Concrete* case,[20] the Court invalidated an amended Treasury regulation dealing with the six-year statute of limitations on assessment in cases of substantial omissions of income.[21] In the course of its analysis, a four-justice dissent remarked: "Our legal system presumes there will be continuing dialogue among the three branches of Government on questions of statutory interpretation and application."[22]

Unsurprisingly, Justice Scalia rose to defend his textualist sensibilities. He addressed and rejected the dissenters' "romantic, judge-empowering image" and "mirage" of a legislative-executive-judicial troika.[23] He found the dissenters' vision to be "obliterated" by *Vermont Yankee*, whose teaching Justice Scalia took to be that "Congress prescribes and we [the Court] obey, with no discretion to add to the administrative procedures that Congress has created."[24]

I share Justice Scalia's belief that in tax (and other statutory areas) a clear congressional command controls, unless unconstitutional and until Congress amends its direction. But his argument about constitutional primacy may have missed the point about practical realities. Congress is not hermetically sealed off from other legal actors. The elected Senators and Representatives are influenced by values and norms molded and expressed by judges who decide tax cases, Executive Branch officials who suggest and testify as to tax legislation, Congress's staffs of tax professionals, the tax professionals who lobby Congress on behalf of their clients, and, of course, the

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law is particularly prolific in connection with federal taxation . . . ." (quoting RANDOLPH PAUL, SELECTED STUDIES IN FEDERAL TAXATION 2 n.2 (1938))); Charlotte Crane, Pollock*,* Macomber*, and the Role of the Federal Courts in the Development of the Income Tax in the United States*, 73 LAW & CONTEMP. PROBS. 1, 2 (2010) ("Although the income tax is quintessentially a matter of statute, a significant number of its doctrines are entirely a matter of judicial definition.").

18. Initially, decisions of the Board of Tax Appeals (the predecessor of the Tax Court) were reviewed without any deference. This established a "habit" of free-wheeling review. During those early years, "[p]recedents had accumulated in which courts had laid down many rules of taxation not based on statute but upon their ideas of right accounting or tax practice. It was difficult to shift to a new basis." *Dobson*, 320 U.S. at 497-98.

19. *See, e.g.*, Crane, *supra* note 17; Martin D. Ginsburg, *Making Tax Law Through the Judicial Process*, 70 A.B.A. J. 74 (1984).

20. United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836 (2012).

21. *See* I.R.C. § 6501(e).

22. *Home Concrete*, 132 S. Ct. at 1852 (Kennedy, J., dissenting).

23. *Id.* at 1848 (Scalia, J., concurring).

24. *Id.* (construing Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978)).

clients themselves who are Senators' and Representatives' constituents and contributors.

The values fought for and held by the many actors in the tax community are the womb from which tax laws issue.[25] We turn now to the key developments that have formed such values in the area of tax procedure.

B. Shaping Developments

Ruskin, the British author, critic, and social theorist, asserted that "[g]reat nations write their autobiographies in three manuscripts—the book of their deeds, the book of their words, and the book of their art."[26] For Ruskin's purposes, the book of art was the most trustworthy. For the purposes of this Article, the book of deeds and the book of words—that is, what mechanisms we have created in tax procedure and why we have said they needed to be created—are particularly illuminating. The norms governing the current federal tax procedure system—and the criteria that should govern reform efforts—crystallized as a result of a long skein of legislative, regulatory, and judicial events.

In rough chronological order, the key events—the Defining Dozen—have included the following: (1) adapting the common law in the 1800s to fashion a refund remedy for taxpayers and the progressive expansion of that remedy over more than a century; 2) enactment of the Anti-Injunction Act in 1867[27] and creation of increasing numbers of statutory and judicial exceptions to it; (3) establishment, beginning in the 1920s, of prepayment administrative (and later judicial) remedies for taxpayers as to income and some other taxes;[28] (4) the 1960 decision of the United States Supreme Court in *Flora II*,[29] requiring full payment of liabilities determined by the IRS as prerequisite to a taxpayer's bringing a refund suit; (5) the Supreme Court's 1964 decision in *Powell*,[30] establishing standards to govern judicial challenges to IRS summonses and subsequent statutory elaboration of additional rules;[31] (6) enactment of the Federal Tax Lien Act of

25. *See generally* LOUIS EISENSTEIN, THE IDEOLOGIES OF TAXATION (1961); *see also* William L. Cary, *Pressure Groups and the Revenue Code: A Requiem in Honor of the Departing Uniformity of the Tax Laws*, 68 HARV. L. REV. 745, 746, 773-80 (1955); Stanley S. Surrey, *The Congress and the Tax Lobbyist—How Special Tax Provisions Get Enacted*, 70 HARV. L. REV. 1145, 1146, 1181-82 (1957).

26. JOHN RUSKIN, ST. MARK'S REST: THE HISTORY OF VENICE (New York, John Wiley & Sons 1877) (author's preface).

27. Currently codified at I.R.C. § 7421.

28. HAROLD DUBROFF, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS pt. 1 (1979).

29. *Flora II*, 362 U.S. 145 (1960).

30. United States v. Powell, 379 U.S. 48 (1964).

31. *Id.* at 57-58; *see, e.g.*, I.R.C. § 7609.

1966[32] with subsequent statutory amendments and promulgation of extensive regulations; (7) the Supreme Court's 1976 *Shapiro* and *Laing* decisions,[33] followed by enactment of administrative and judicial mechanisms for prompt review of jeopardy and termination assessments;[34] (8) enactment of the unified partnership audit and litigation procedures in the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA");[35] (9) the Supreme Court's 1997 *Brockamp* decision[36] and its partial reversal by legislation allowing limited equitable tolling of the statute of limitations on filing refund claims;[37] (10) enactment of numerous tax procedure changes in the Internal Revenue Service Restructuring and Reform Act of 1998;[38] (11) the Supreme Court's 2005 *Ballard* decision[39] dealing with Tax Court opinion practice; and (12) the irreversible entry of principles of general administrative law into tax litigation, reflected in part in the Supreme Court's 2011 *Mayo* decision.[40]

Others might constitute the list differently. Clearly, there have been other important developments in federal tax procedure in the past century. I selected the Defining Dozen developments because they deal with rights and obligations as between the IRS and taxpayers. It is from these matters that criteria useful to reforming federal tax litigation are most likely to emerge.

1. *Creation and Expansion of Refund Remedies*

"In present times, federal income taxes are of such a pervasive and significant influence that it is easy to forget their relatively recent origin."[41] For most of this country's history, the federal government assumed limited responsibilities, and so could do with limited revenue, mostly supplied by tariffs, sale of public lands, and various excise taxes.[42]

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32. Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1125 (codified at I.R.C. §§ 6323-6325).

33. Commissioner v. Shapiro, 424 U.S. 614 (1976); Laing v. United States, 423 U.S. 161 (1976).

34. *See* I.R.C. § 7429.

35. Pub. L. No. 97-248, 96 Stat. 324.

36. United States v. Brockamp, 519 U.S. 347 (1997).

37. I.R.C. § 6511(h).

38. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (codified in various sections of the I.R.C.).

39. Ballard v. Commissioner, 544 U.S. 40 (2005).

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

41. DUBROFF, *supra* note 28, at 1 (1979).

42. The idea of an income tax was not unknown, however. As early as 1643, the New Plymouth colony had a rudimentary income tax, and some other colonies and states also imposed income taxes in the seventeenth and eighteenth centuries. *Id.* at 1-2.

Nonetheless, it is surprising, perhaps shocking, to contemporary sensibilities that until 1855 no suit as to tax overpayments was permitted against the federal government.[43] That caused lawyers and judges to do what they usually do when confronted by an inadequate statutory framework—use their creativity to fashion an alternative remedy. The constraint, of course, was the doctrine of sovereign immunity. The answer fashioned by the courts—upheld by the Supreme Court in 1936—was allowing federal tax collectors[44] to be sued personally for taxes allegedly collected illegally.[45] "Such a suit was based on the common-law [action] of assumpsit for money had and received . . . ."[46]

This device was built on a fiction.[47] The real party in interest was the government, not the collector.[48] Much of the law involves fiction, of course, but a regime based on dubious premises often leads to convolution erected on convolution as doctrine is expounded. So it was with this fiction.

There were at least three problems with the solution fashioned by the courts. First, suits against collectors initially depended on diversity jurisdiction.[49] Suit could be barred, therefore, because of acci-

43. If the taxpayer had not yet paid the tax at issue, she might be able to secure judicial review of the merits by posting bond for the tax, then, when the government brought suit on the bond, asserting the absence of substantive liability as a defense. In addition, Congress sometimes determined the merits of tax claims itself via special legislation. *See* William T. Plumb, Jr., *Tax Refund Suits Against Collectors of Internal Revenue*, 60 HARV. L. REV. 685, 687 (1947).

44. For discussion of the role of collectors in federal taxation during the nineteenth century, see Bryan T. Camp, *Theory and Practice in Tax Administration*, 29 VA. TAX REV. 227, 229-43 (2009).

45. Elliott v. Swartwout, 35 U.S. (10 Pet.) 137, 159 (1836). *Elliott* was a customs case. The "sue the collector" remedy was held to apply as well in tax cases. City of Philadelphia v. Collector, 75 U.S. (5 Wall.) 720, 730-33 (1866).

46. *Flora II*, 362 U.S. 145, 153 (1960). This common law action should be distinguished from a taxpayer suit on account stated, which is available when the IRS fails to make a stipulated refund. *See, e.g.*, Bonwit Teller & Co. v. United States, 283 U.S. 258, 259 (1931); MARVIN J. GARBIS, RONALD B. RUBIN & PATRICIA T. MORGAN, TAX PROCEDURE AND TAX FRAUD: CASES AND MATERIALS 420-21 (3d ed. 1992).

47. "A suit against a Collector who has collected a tax in the fulfillment of a ministerial duty is today an anomalous relic of bygone modes of thought. . . . [Although t]here may have been utility in such procedural devices in days when the Government was not suable as freely as now. . . [t]hey have little utility today." George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 382-83 (1933).

48. The office of "Collector" has since been abolished. When the office existed, there was a collector for each district. "When the Commissioner [of Internal Revenue] certifie[d] an assessment to the collector, that official ha[d] a purely ministerial duty to effect its collection." Plumb, *supra* note 43, at 687; *see also* Erskine v. Hohnbach, 81 U.S. (14 Wall.) 613, 616 (1871) (holding that "[t]he collector could not revise nor refuse to enforce the assessment regularly made").

49. Collector v. Hubbard, 79 U.S. (12 Wall.) 1, 8 (1870). Subsequently, Congress established jurisdiction for "all causes arising under any law providing internal revenue." Rev. Stat. § 629(4) (1874) (current version codified at 28 U.S.C. § 1340).

dents of residency. Second, notice of the alleged illegality was held to be an essential element of an action against a collector, requiring that the taxpayer have paid the amount in question under protest.[50] This created a trap for the unwary.[51] The taxpayer who neglected this formality would be nonsuited.[52] Third, underlining the fiction, collectors were initially indemnified by the government for amounts for which they were held personally liable.[53] This led to the practice of collectors withholding amounts from collected taxes to provide cushion against the possibility of being held liable. In turn, this led to theft by collectors[54] and caused Congress in 1839 to prohibit the practice without creating an alternative indemnification mechanism.[55]

This had an unintended consequence. The Supreme Court viewed a reliable indemnification procedure as fundamental to the common law remedy. The Court held that the remedy could not survive the removal of this foundation.[56] Justices Story and McLean filed separate dissents, arguing in part that taxpayers could not constitutionally be deprived of all judicial remedies for recovery of illegal or excessive taxes. There being no other remedy, they maintained, suits against collectors could not be abolished.[57]

Congress reacted quickly. Within a few weeks, it passed a so-styled "explanatory Act" declaring that the 1839 legislation should not be understood as impairing the rights of persons to sue collectors.[58] The Court was satisfied; suits against collectors were rehabilitated as a remedy.[59] But, given the legislation, the Supreme Court "no longer regarded the suit as a common-law action, but rather as a statutory remedy which 'in its nature [was] a remedy against the Government.' "[60]

50. *Elliott*, 35 U.S. (10 Pet.) at 153-54.

51. This ran contrary to "[t]he ideal of the Federal Rules of Civil Procedure and of all modern code pleading . . . that a party who has timely brought a suit in a court having jurisdiction shall not be defeated by mere procedural technicalities." Plumb, *supra* note 43, at 685.

52. The federal government abolished the "paid under protest" requirement in 1924. Revenue Act of 1924, ch. 234, § 1014, 43 Stat. 253, 343.

53. Rev. Stat. § 989 (1875); *see, e.g.*, George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 380-81 (1933).

54. *See* Cary v. Curtis, 44 U.S. (3 How.) 236, 243 (1845) (noting that the practice "led to great abuses, and to much loss to the public").

55. Act of Mar. 3, 1839, ch. 82, § 2, 5 Stat. 339, 348-49 (1839).

56. *Cary*, 44. U.S. (3 How.) at 243-44.

57. *Id.* at 252-56 (Story, J., dissenting), 263-66 (McLean, J., dissenting).

58. Act of Feb. 26, 1845, ch. 22, 5 Stat. 727 (1845).

59. *See, e.g.*, City of Philadelphia v. Collector, 72 U.S. (5 Wall.) 720, 731 (1866).

60. *Flora II*, 362 U.S. 145, 153 (1960) (quoting Curtis's Adm'x v. Fiedler, 67 U.S. (2 Black) 461, 479 (1862)).

Congress created a second refund remedy when it established the Court of Claims in 1855.[61] That body originated as an administrative or advisory body but was elevated to judicial status, with jurisdiction to hear claims against the federal government, including tax claims.[62]

Next, in 1887, Congress created another refund action in the Tucker Act. It conferred on federal district courts jurisdiction to hear claims against the United States not exceeding $1000.[63] Taxpayers with larger refund claims could sue either the United States in the Court of Claims or the collector in district court. The utility of that second alternative was impaired, however, when the Supreme Court held that an action against a collector was personal in character and could not, in the event of the particular collector's death or other vacation of office, be maintained against her successor.[64] Congress responded to that holding by amending the statute to remove the ceiling amount in the event that the collector to whom the tax was paid was not in office when the suit was commenced.[65]

These historical artifacts have now been tidied up. Refund suits against collectors have been abolished.[66] Instead, tax refund claims may be brought against the federal government in either the Court of Federal Claims (the current iteration of the Court of Claims) or federal district court, without any ceiling on the amount sought.[67]

This history was driven by the desire to provide taxpayers effective remedies. Congress' failure to so provide in early years impelled the courts to create a common law remedy, however unwieldy. Limitations on that judicial remedy spurred Congress to improve statutory remedies progressively.

2. *The Anti-Injunction Act and Its Exceptions*

As we have just seen, taxpayers had the ability through refund suits to attempt to secure the return of taxes allegedly improperly collected by the federal government. But were taxpayers remitted to only this "back end" remedy? Lawyers are fond of seeking injunctions. Instead of paying the tax then trying for a refund, could tax-

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61. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612.

62. *See* Williams v. United States, 289 U.S. 553, 562-65 (1933); United States v. Klein, 80 U.S. (13 Wall.) 128, 144-45 (1871).

63. Act of Mar. 3, 1887, ch. 359, § 2, 24 Stat. 505. This was held to include jurisdiction over tax refund claims. United States v. Emery, Bird, Thayer Realty Co., 237 U.S. 28, 32 (1915).

64. Smietanka v. Ind. Steel Co., 257 U.S. 1, 6 (1921).

65. Revenue Act of 1921, ch. 136, § 1310, 42 Stat. 227, 310. The amount-in-controversy ceiling was abolished entirely in 1954. Act of July 30, 1954, ch. 648, § 1, 68 Stat. 589, 589.

66. *See* Act of Nov. 2, 1966, Pub. L. No. 89-713, § 3, 80 Stat. 1107, 1108.

67. 28 U.S.C. § 1346(a)(1) (2006).

payers obtain earlier judicial determination of the merits of a particular case by bringing an injunction action against impending tax assessment or collection?

From an early date—essentially contemporaneous with the abolition of the income tax imposed by the Union during the Civil War[68]—Congress answered that question in the negative. In 1867, it enacted the earliest version of the Anti-Injunction Act ("AIA").[69] The current version of the Act, embodied in I.R.C. § 7421(a),[70] provides, in the main, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."[71]

The AIA was adopted by voice vote as a floor amendment and so was not accompanied by committee reports. Nonetheless, the text of the statute makes the provision's purpose plain enough.[72] "This statute protects the Government's ability to collect a consistent stream of revenue . . . . Because of the [AIA], taxes can ordinarily be challenged only after they are paid, by suing for a refund."[73] This understanding has existed essentially from the original enactment of the statute.[74]

This strong "protect the revenue" measure has been modified by both Congress and the Supreme Court, however. Congress has amended § 7421 from time to time to allow injunction actions when the IRS proceeds with assessment or collection in disregard of statutorily prescribed taxpayer remedies and protections.[75]

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68. For description of the Civil War income tax, see INTERNAL REVENUE SERVICE, *supra* note 2, at 10-15.

69. Act of Mar. 2, 1867, Pub. L. No. 39-169, § 10, 14 Stat. 471, 475.

70. A parallel prohibition exists in I.R.C. § 7421(b) as to suits to restrain assessment or collection of transferee or fiduciary liabilities.

71. I.R.C. § 7421(a). Taxpayers or third parties seeking injunctions sometimes also desire judicial declaration of the illegality of the tax rule or its application in the particular case. Just as the AIA can be a barrier to an injunction, the Declaratory Judgment Act ("DJA") can be a barrier to a declaration. The DJA withdraws authority from federal courts to grant declaratory relief in tax cases. 28 U.S.C. § 2201(a) (2006). The courts typically hold that the AIA and the DJA are coextensive. *See, e.g.*, Sigmon Coal Co. v. Apfel, 226 F.3d 291, 299 (4th Cir. 2000) (citing *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 583 (4th Cir. 1996)).

72. Even textualist judges use statutory purpose, as long as such purpose can be derived from the statute itself and its context, rather than from suspect committee reports. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56-58 (2012).

73. Nat'l Fed. of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2582 (2012).

74. *See* Snyder v. Marks, 109 U.S. 189, 192 (1883); Taylor v. Secor, 92 U.S. 575, 612-15 (1875).

75. Specifically, I.R.C. § 7421(a) allows injunction suits as provided in § 6015(e) (Tax Court review of spousal relief cases), §§ 6212(a), (c), 6213(a) (Tax Court review of deficiency actions), §§ 6225(b), 6246(b) (TEFRA proceedings), § 6330(e)(1) (collection due process cases), § 6331(i) (levies as to divisible taxes), § 6672(c) (trust fund recovery penalty

In addition, the Supreme Court created judicial exceptions to the AIA. Initially, the Court held that an injunction action will lie if all three of these conditions are satisfied: (1) under the most pro-IRS view of the facts and the law, there is no possibility that the IRS could prevail on the merits in the controversy; (2) the taxpayer is threatened with irreparable harm; and (3) no adequate legal remedy is available to the taxpayer.[76]

Later, taking a purposive tack, the Court created a second exception. Under it, the AIA will bar injunction actions "only in situations in which Congress ha[s] provided the aggrieved party with an alternative legal avenue by which to contest the legality of a particular tax."[77]

A recent prominent appearance of the AIA was in *NFIB*, which tested the constitutionality of the individual mandate provision of the Patient Protection and Affordable Care Act. Holding that the shared responsibility payment (which enforces the mandate) constitutes a penalty, not a tax, for statutory purposes, the Court held that the AIA did not prevent on-the-merits review of the constitutional issues.[78]

This chapter in our story reflects a dominant revenue protection purpose, of course. Dominant, but not unmixed. The AIA does not prevent all challenges to tax assessment and collection, just injunctions. The presence of an alternative taxpayer remedy—refund suits—is what makes prohibiting injunctions politically and constitutionally palatable.[79] Moreover, Congress has withdrawn even the prohibition on injunctions when necessary to maintain the integrity of a variety of protections for taxpayers and third parties. The judicial exceptions—although limited[80]—further evince the system's desire to protect the revenue only in cases of genuine necessity.

3. *Creation of Prepayment Remedies*

National crises, especially wars, transform societies. Among other effects, America's participation in World War I caused the federal income and profits taxes to emerge as the federal government's pri-

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bonds), § 6694(c) (preparer penalty), § 7426(a), (b)(1) (wrongful levy and other suits), § 7429(b) (jeopardy and termination assessment review), and § 7436 (employment status determinations).

76. *See* Miller v. Standard Nut Margarine Co., 284 U.S. 498, 510-11 (1932), *overruled by* Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 6 (1962).

77. South Carolina v. Regan, 465 U.S. 367, 373 (1984).

78. *NFIB*, 132 S. Ct. at 2583-84; *id.* at 2656 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting); *see* Steve R. Johnson, *It's Not a Tax (Statutorily), but It Is a Tax (Constitutionally)*, 32 A.B.A. SEC. TAX'N NEWS Q. 13 (2012).

79. *See infra* Part II.B.7.

80. *See, e.g.*, United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1, 14 (2008) (holding that the *Williams Packing* exception applies only when the taxpayer's claim is "so obvious that the Government [would have] no chance of prevailing [on the merits]").

mary means of finance.[81] This emergence created great stress on the then Bureau of Internal Revenue because, first, the taxes were highly conceptually complex and, second, numerous taxpayers were swept into the net when the income tax graduated from a class tax to a mass tax.

Taxpayers who disagreed with the Bureau's determination of their tax liability had the judicial remedies described in Part II.B.1, of course. But the absence of a pre-assessment remedy soon became a sore point. The first such remedy was administrative. In 1918, Congress confirmed and extended 1917 authority by creating an Advisory Tax Board, whose members were appointed by the Commissioner of Internal Revenue with approval of the Secretary of the Treasury.[82] The Commissioner could on his own authority, and was required to on request by the taxpayer, submit to the Board any question as to interpretation or administration of income, war profits, or excess profits tax.[83] In 1921, Congress required the Bureau to give the taxpayer notice of its intention to assess income tax and an opportunity to file an appeal with the Bureau's Committee on Appeals and Review within thirty days of the notice.[84]

Not surprisingly, some believed that taxpayers could not get a "square deal" while the appellate unit remained within the Bureau itself.[85] Accordingly, in 1924 Congress created the Board of Tax Appeals as an independent agency within the Executive Branch to hear appeals from deficiency determinations by the Bureau. Decisions by the Board were appealable to federal district court.[86]

In 1942, Congress renamed the Board the "Tax Court of the United States," although it continued to be an independent agency in the Executive Branch, with its jurisdiction, powers, and duties unaltered.[87] Finally, in 1969, Congress ended the tribunal's status as an agency. It "established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court."[88] As it is currently constituted, "[t]he Tax Court's function

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81. For discussion of this emergence, see DUBROFF, *supra* note 28, at 1-12, and David Laro, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. ILL. L. REV. 17, 19-22.

82. Revenue Act of 1918, ch. 18, § 1301(d)(1), 40 Stat. 1057, 1141.

83. *Id.* § 1301(d)(2), 40 Stat. at 1141; *see* Williamsport Wire Rope Co. v. United States, 277 U.S. 551, 562 n.7 (1928).

84. Revenue Act of 1921, ch. 136, § 250(d), 42 Stat. 227, 255-56.

85. 62 CONG. REC. 8913-14 (1922) (statement of Sen. Pomerene); *see also* DUBROFF, *supra* note 28, at 58 (noting "the widespread belief that the Committee maintained a policy of resolving all doubts against the taxpayer").

86. Revenue Act of 1924, Pub. L. No. 68-176, § 900, 43 Stat. 253, 336-38, *amended by* Revenue Act of 1926, Pub. L. No. 69-20, § 1000-05, 44 Stat. 9, 105-11.

87. Revenue Act of 1942, Pub. L. No. 77-753, § 504, 56 Stat. 798, 957.

88. I.R.C. § 7441.

and role in the federal judicial scheme closely resemble those of the federal district courts . . . ."[89] Its decisions are appealable to the circuit courts "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury."[90]

This chapter in the saga of federal tax procedure is clear. The reasons for the creation of the prepayment remedy initially and for its evolution into greater independence and institutional dignity are evident. Congress was animated by notions of confidence, competence, and consistency. The confidence of the public in the fairness of the process was bolstered by the formalization of the Tax Court as a court, a tribunal separate from the IRS.[91] The competence of the tribunal to decide tax controversies fairly and correctly would be promoted by the tax experience of the members selected for it and their specialized tax dockets.[92] Consistency—nationwide uniformity in interpretation and application of the tax laws—also was hoped to result from the Tax Court's nationwide jurisdiction.[93]

4. Flora *Full Payment Rule*

Part II.B.1 above traced the development of federal refund litigation remedies. An important question remained, however: was full payment of the assessed amount necessary before a refund case could be brought? For instance, assume the IRS has assessed $50,000 of additional income tax liability against Abigail. Can she pay only $20,000 (or even $100) of that amount and sue for refund of it? Or is Abigail precluded from bringing suit until she pays the full $50,000?

The lower courts were divided.[94] The Supreme Court granted certiorari to resolve the conflict. In *Flora I*, with only one justice dissent-

89. Freytag v. Commissioner, 501 U.S. 868, 891 (1991).

90. I.R.C. § 7482(a)(1).

91. John Nance Garner, then ranking Democrat on the House Ways and Means Committee, expressed the common concern that, as long as members of the reviewing body were subject to the Treasury Department, "if they did not decide cases to suit [the Treasury Secretary] he could kick them out and get somebody who would." 65 CONG. REC. 3282 (1924).

92. For a while, Tax Court decisions were given greater influential weight than other decisions of lower courts because of this expertise. *See, e.g.*, Dobson v. Commissioner, 320 U.S. 489, 498-502 (1943) (contrasting the "long legislative or administrative [tax] experience" of Tax Court judges to "the lack of a roundly tax-informed viewpoint of [generalist] judges"), *abrogated in part by* I.R.C. § 7482.

93. For this reason, the Tax Court originally took the position that when its sense of the law differed from that of the circuit court to which the case would be appealable, it would continue to adhere to its view despite the relevant circuit's contrary view. Lawrence v. Commissioner, 27 T.C. 713, 716-20 (1957). The Tax Court later abandoned that position, deferring to the controlling circuit even when that meant that substantively identical cases would be decided inconsistently because they were within different circuits. Golsen v. Commissioner, 54 T.C. 742, 756-58 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).

94. *Compare* Flora v. United States, 246 F.2d 929 (10th Cir. 1957), *aff'g* 142 F. Supp. 602 (D. Wyo. 1956), *and* Suhr v. United States, 18 F.2d 81 (3d Cir. 1927) (holding that full

ing (in a dissent of only one paragraph), the Court held in favor of the full payment view.[95] The majority's opinion turned mainly on statutory interpretation and precedent, not policy. It affirmed what it called "carefully considered dictum" in one of its 1876 decisions.[96]

The majority saw the contrary lower court cases as interlopers. In its view, the full payment "understanding of the statutory scheme appears to have prevailed for the succeeding fifty or sixty years" after 1876.[97] Thus, "there does not appear to be a single case before 1940 in which a taxpayer attempted a suit for refund of income taxes without paying the full amount the Government alleged to be due."[98] This assertion was important because a long settled tradition of consistent interpretation is a powerful consideration of statutory construction.[99]

The Court's historical assertions were inaccurate. As the Government later conceded, there were in fact pre-1940 cases in which taxpayers sued for refunds without having fully paid the assessment and without the Government or the court objecting to this omission.[100] Accordingly, the Court granted rehearing.

Flora II, decided in 1960, was a much more searching exploration. Again the Court held in favor of the full payment approach, but only by five-to-four, with a much longer majority opinion, one long dissent, and one short dissent.[101]

As befits the closeness of the vote, the majority acknowledged the closeness of the merits.[102] As supporting a partial payment approach, the majority noted that suits against collectors[103] could be maintained without full payment and that there was an "absence of any conclusive evidence that Congress ha[d] ever intended to inaugurate a new rule."[104]

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payment is necessary), *with* Bushmiaer v. United States, 230 F.2d 146 (8th Cir. 1956), Sirian Lamp Co. v. Manning, 123 F.2d 776 (3d Cir. 1941), *and* Coates v. United States, 111 F.2d 609 (2d Cir. 1940) (holding that partial payment suffices).

95. *Flora I*, 357 U.S. 63 (1958).

96. *Id.* at 68 (discussing Cheatham v. United States, 92 U.S. 85 (1876)).

97. *Id.*

98. *Id.* at 69.

99. *See, e.g.*, United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 219-20 (2001); *Flora II*, 362 U.S. 145, 177-78 (1960) (Frankfurter, J., dissenting) ("[I]n construing a tax law it has been my rule to follow almost blindly accepted understanding of the meaning of tax legislation, when that is manifested by long-continued, uniform practice, unless a statute leaves no admissible opening for administrative construction.").

100. Although there was some wrangling over precisely how many such cases there were, there were at least two in the Supreme Court and a number in the lower courts. *See Flora II*, 362 U.S. at 181-85 (citing Bowers v. Kerbaugh-Empire Co., 271 U.S. 170 (1926); Cook v. Tait, 265 U.S. 47 (1924), and various lower court decisions).

101. *Flora II*, 362 U.S. 145.

102. *Id.* at 152.

103. *See supra* Part II.B.1.

104. *Flora II*, 362 U.S. at 157.

In favor of the full payment predicate, the majority enlisted its view of the 1876 decision, a 1921 statutory amendment, and—decisively—the "carefully articulated and quite complicated structure of tax laws."[105] The majority perceived "that Congress ha[d] several times acted upon the assumption that [the Code] requires full payment before suit,"[106] these times being the establishment of the Board of Tax Appeals and the enactment of the Declaratory Judgment Act and § 7422(e) of the Code.[107] Although giving primary attention to statutory construction, the majority also invoked several policy arguments, including concerns about claim splitting,[108] allocation of caseloads between the Tax Court and refund fora,[109] and erosion of revenue collection.[110]

In contrast, the dissenters expressed their "deep and abiding conviction that the Court today departs from the plain direction of Congress . . . , defeats its beneficent purpose, and repudiates many soundly reasoned opinions of the federal courts . . . ."[111] The dissenters read the statutes and precedents differently from the majority, and they disagreed at the level of policy as well. Specifically, the dissent maintained that a partial payment rule would not hamper tax collection,[112] but it would avoid "great hardships" by allowing suits by those lacking the resources to pay fully before litigating.[113]

The full payment rule has been settled since *Flora II*, but there are exceptions and ambiguities. For example, the taxpayer's liability may include as many as three components: the deficiency, interest on the deficiency, and one or more penalties. To satisfy *Flora II*, the taxpayer must fully pay the deficiency, of course, but must she also pay all the interest and/or all the penalties? The Supreme Court has not addressed the issue, and lower court decisions have been divided.[114]

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105. *Id.*

106. *Id.* (construing 28 U.S.C. § 1346(a)(1)).

107. *Id.* at 158-67.

108. *Id.* at 165-66.

109. *Id.* at 176.

110. *Id.* at 169 n.36, 176 n.41.

111. *Id.* at 178 (Whittaker, J., dissenting).

112. *Id.* at 194-95.

113. *Id.* at 195, 198.

114. *Compare* Horkey v. United States, 715 F. Supp. 259, 260-61 (D. Minn. 1989) (payment of penalty required), *with* Kell-Strom Tool Co. v. United States, 205 F. Supp. 190, 194 (D. Conn. 1962) (payment of interest and penalties not required). *See also* Martin M. Lore & L. Paige Marvel, *Claims Court Does About Face on* Flora *Full-Payment Rule*, 78 J. TAX'N 81, 81 (1993); Erika L. Robinson, Note, *Refund Suits in Claims Court: Jurisdiction and the* Flora *Full-Payment Rule After* Shore v. United States, 46 TAX LAW. 827, 831-34 (1993) (describing four different views of the issue announced within a two-year period by the Claims Court).

An important exception applies to so-called divisible taxes, that is, taxes based on separate transactions the assessments of which occur separately. Prominent examples include withholding taxes and the related trust fund recovery penalty under § 6672.[115] One facing the penalty can secure judicial review by paying the amount attributable to one employee for each calendar quarter at issue and posting a bond. The government will then counterclaim for the amounts attributable to the remaining employees.[116]

What values does this episode reflect? Since the *Flora* cases are primarily about statutory interpretation and precedent, the values of congressional primacy and stability in taxation are much in evidence. Process efficiency also is implicated. So are revenue protection and provision of effective taxpayer remedies—with no clear winner between the two. Revenue protection was a policy invoked by the majority, but that should not be overemphasized. The justices were closely divided. Moreover, the majority thought that the availability of prepayment Tax Court review ameliorated the concern about erosion of the refund remedy by enshrining a full payment predicate.[117] Thus, the majority did not see a sharp conflict between revenue protection and provision of effective taxpayer remedies.

5. Powell *and IRS Information Gathering*

As Bacon observed, "knowledge itself is power."[118] The IRS cannot test the accuracy of taxpayers' returns without the ability to gather information on taxpayers' transactions. Thus, Congress has granted the IRS authority "[t]o examine any books, papers, records, or other data which may be relevant or material to such inquiry," and to summon taxpayers and third parties to give testimony under oath or produce "such books, papers, records, or other data . . . as may be relevant or material to such inquiry."[119]

But the IRS's need for information must be balanced with taxpayers' interest in avoiding unnecessarily burdensome examinations.[120] Thus, the Code contains a number of provisions to prevent undue in-

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115. *See also* Susan V. Sample & Samira A. Salman, *Tax Shelter Penalties: Are They Divisible? Or Does the Taxpayer Have to Pay the Balance Before Litigating?*, 4 HOUS. BUS. & TAX L.J. 447, 455-58 (2004).

116. I.R.C. § 6672(c).

117. *Flora II*, 362 U.S. at 175.

118. FRANCIS BACON, RELIGIOUS MEDITATIONS (1597), *reprinted in* 7 THE WORKS OF FRANCIS BACON 243, 253 (James Spedding et. al. eds., Garrett Press 1968).

119. I.R.C. § 7602(a)(1)-(2).

120. For an excellent description of the history and premises of IRS information gathering in general, and of the summons power in particular, see Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1 (2004).

trusion. These provisions: (1) require that the times and places of examination be "reasonable under the circumstances;"[121] (2) control audio recording of interviews;[122] (3) require the IRS to explain the audit process and the taxpayer's rights in it;[123] (4) limit IRS summonses when the Department of Justice has entered the case;[124] (5) prohibit the IRS from using especially detailed financial status inquiry programs absent reasonable indication that there is a likelihood the taxpayer has unreported income;[125] (6) impose special restrictions on tax investigations of churches;[126] (7) establish rules as to IRS contacts with third parties;[127] (8) heighten requirements when the IRS seeks sensitive computer information;[128] (9) give taxpayers intervention rights when the IRS summonses information from third parties;[129] and (10) create requirements for the enforcement of "John Doe" summonses.[130] The IRS has established additional protections as a matter of administrative policy.[131]

One of the early protective provisions is § 7605(b), enacted originally in 1921.[132] In current form, the section provides that taxpayers shall not "be subjected to unnecessary examination or investigations" and that taxpayers' "books of account" shall be subject to only one inspection for each tax year unless the IRS "after investigation, notifies the taxpayer in writing that an additional inspection is necessary."[133] The floor manager of the 1921 bill justified the measure thusly:

> Since these income taxes and direct taxes have been in force very general complaint has been made . . . at the repeated visits of tax examiners, who perhaps are overzealous. . . . [F]rom many of the cities of the country very bitter complaints have reached me . . . of unnecessary visits and inquisitions. . . . This section is purely in the interest of quieting all this trouble and in the interest of the peace of mind of the honest taxpayer.[134]

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121. I.R.C. § 7605(a).

122. *Id.* § 7521(a).

123. *Id.* § 7521(b)(1).

124. *Id.* § 7602(d)(1).

125. *Id.* § 7602(e).

126. *Id.* § 7611(b).

127. *Id.* § 7602(c).

128. *Id.* § 7609(a).

129. *Id.* § 7609(b)(1).

130. *Id.* § 7609(f).

131. *See, e.g.*, *IRS Establishes Five-Year Duration on Continuous Audits of Taxpayers*, 25 TAX MGMT. WKLY. REP. 1811, 1811 (2006).

132. Revenue Act of 1921, ch. 136, § 1309, 42 Stat. 227, 310.

133. I.R.C. § 7605(b).

134. 61 CONG. REC. 5855 (1921) (statement of Sen. Penrose).

The interplay of § 7605(b) and the IRS's summons was at the heart of *Powell*,[135] the most important case in our history as to the scope of the IRS's investigatory power. Although the IRS issues summonses during relatively few examinations, the summons power lies behind all IRS information gathering. Taxpayers understand that, if they do not respond to informal IRS requests for information, the IRS has the ability to proceed to a summons.

In *Powell*, the IRS was examining two income tax returns of a company of which Powell was the president. [136] The IRS summoned Powell to give testimony and produce records.[137] Powell declined because the IRS had already examined the returns once before and because the normal statute of limitations on assessing deficiencies as to those returns had already expired (although the limitations period remained open if the returns were fraudulent).[138] Powell maintained that, before he could be forced to respond, it was incumbent on the IRS to state grounds for believing that the returns reflected fraud.[139] The IRS refused to do so.[140] The Government brought an action in district court to enforce the summons,[141] and the district court held for the Government.[142]

The Third Circuit reversed.[143] It reasoned that, because the returns could be adjusted only if fraudulent, § 7605(b)'s prohibition of "unnecessary examination" barred reexamination of the records unless the IRS had information "which might cause a reasonable man to suspect that there has been fraud in the return for the otherwise closed year."[144]

The Supreme Court granted certiorari because of conflict among the circuits as to the standards the IRS must meet in order to obtain judicial enforcement of its summonses.[145] Although it acknowledged that a standard resembling the stringency of the circuit court's test

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135. United States v. Powell, 379 U.S. 48 (1964).

136. *Id.* at 49.

137. *Id.*

138. *Id.*; *see also* I.R.C. § 6501(a) (three-year "general" limitations period), (c)(1) (infinite limitations period in case of fraud).

139. *Powell*, 379 U.S. at 49.

140. *Id.*

141. *Id.* IRS summonses are not self-enforcing. In general, when a taxpayer does not comply with a summons, the Government must seek an order of enforcement. If that order is granted and not complied with, contempt of court sanctions follow. *See, e.g.*, Reisman v. Caplin, 375 U.S. 440, 446 (1964).

142. *Powell*, 379 U.S. at 50.

143. *Id.*

144. United States v. Powell, 325 F.2d. 914, 915-16 (3d Cir. 1963), *rev'd*, 379 U.S. 48 (1964).

145. The conflicting circuit court cases are identified at *Powell*, 379 U.S. at 50, 51 & n.8.

was "possible,"[146] a 6-to-3 majority of the Court held that the IRS "need make no showing of probable cause to suspect fraud unless the taxpayer raises a substantial question that judicial enforcement of the administrative summons would be an abusive use of the court's process."[147]

The majority supported its holding by reference to cases rejecting probable cause requirements as to summonses and subpoenas issued by other federal agencies.[148] Clearly, however, the fulcrum was the majority's fear that a rigorous standard "might seriously hamper the [IRS] in carrying out investigations [it] thinks warranted."[149]

In place of probable cause, the *Powell* Court erected the standard that has controlled summons enforcement cases ever since. It consists of an initial burden on the IRS, satisfaction of which causes the burden going forward to shift to the taxpayer.[150]

The Government's prima facie case consists of its establishing (typically by affidavit of the IRS examining agent) four matters: "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the [IRS's] possession, and that the administrative steps required by the Code have been followed."[151] These elements are minimal, as subsequent cases have underscored.[152]

Even if the IRS establishes these elements, the taxpayer or other summoned party may still " 'challenge the summons on any appropriate ground.' "[153] Illustratively, the Court noted that enforcement would be an abuse of process "if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation."[154]

The dominant impulse behind *Powell* was protection of the revenue, based on the centrality of information to IRS examination and enforcement. However, this impulse is tempered by the second stage

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146. *Id.* at 53.

147. *Id.* at 51.

148. *Id.* at 57 (citing United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950); Okla. Press Pub. Co. v. Walling, 327 U.S. 186, 216 (1946)). For discussion of these and related cases, see Steve R. Johnson, *Reasonable Relation Reassessed: The Examination of Private Documents by Federal Regulatory Agencies*, 56 N.Y.U. L. REV. 742 (1981).

149. *Powell*, 379 U.S. at 54; *see also id.* at 56 ("For us to import a probable cause standard to be enforced by the courts would substantially overshoot the goal which [Congress] sought to attain.").

150. *Id.* at 57-58.

151. *Id.*

152. *See, e.g.*, United States v. Tex. Heart Inst., 755 F.2d 469, 474 (5th Cir. 1985).

153. *Powell*, 379 U.S. at 58 (quoting Reisman v. Caplin, 375 U.S. 440, 449 (1964)).

154. *Id.*

of the *Powell* test, as explained above. Moreover, the context must be considered. Summons enforcement is not a determination of the merits.[155] A pro-IRS doctrine at the investigation stage is tolerable as long as fair procedures are employed in the ensuing determination on the merits. Indeed, *Powell* merely reduces informational asymmetry between the parties, so that administrative and judicial determinations on the merits can be made on something approaching a level playing field.

6. Federal Tax Lien Act

Assessment is a crucial act in federal taxation. Assessment is a mere mechanical act, essentially "a bookkeeping notation" by which the IRS fixes a dollar amount of liability for a particular period of a particular tax for a particular taxpayer.[156] But this mechanical act has great legal significance: the IRS has no legal authority to engage in enforced collection actions until there has been a valid assessment.[157] For the assessment to be valid, all preliminary steps prescribed by the Code must have been accomplished.

Once the assessment has been made, the IRS bills the taxpayer for any amount not yet paid. If the taxpayer does not "voluntarily" pay in response to the bill, the IRS may engage in enforced collection. The IRS's collection powers far exceed those of private creditors.[158] Among the IRS's collection tools are tax liens,[159] filing notices of tax liens,[160] levies on and administrative sale of property,[161] instigation of judicial sale of property,[162] and offsetting tax debts against otherwise due tax refunds.[163]

Pre-assessment issues get much more attention from tax practitioners and scholars than do post-assessment issues. Nonetheless, the latter have great practical significance, not only for the taxpayers

155. *See id.* at 54 (noting the dubious wisdom of "forcing [the IRS] to litigate and prosecute appeals on the very subject which [it] desires to investigate").

156. Laing v. United States, 423 U.S. 161, 170 n.13 (1976); *see* I.R.C. § 6203.

157. *See, e.g.*, I.R.C. §§ 6322, 6331(a).

158. *See, e.g.*, Steve R. Johnson, *The IRS as Super Creditor*, 92 TAX NOTES 655, 655 (2001).

159. The general federal tax lien attaches to "all property and rights to property" of the tax delinquent. I.R.C. § 6321. A variety of special tax liens also exist. *See, e.g.*, *id.* §§ 6324(a) (estate taxes), 6324(b) (gift taxes), 6324A (estate taxes deferred under § 6166), 6324B (additional estate taxes attributable to property qualifying for special valuation under § 2032A).

160. *See id.* § 6323(f). Even before filing, the so-called "secret lien" is effective against the taxpayer. *See, e.g.*, Don King Prods., Inc. v. Thomas, 945 F.2d 529, 533 (2d Cir. 1991).

161. I.R.C. §§ 6331 (levy, also sometimes called seizure or distraint), 6335 (administrative sale of property levied upon).

162. *Id.* § 7403.

163. *See, e.g.*, *id.* § 6402(d).

themselves but also for third parties.[164] Those who owe money to the IRS often owe money to others as well, and tax delinquents often co-own property with persons who do not have tax debts. Accordingly, whether and how the IRS proceeds against the property of taxpayers can have powerful effects on the interests and behavior of third parties as well.

The steady direction of federal tax collection law has been towards greater solicitude for the rights and interests of third parties, even to the point, in some instances, of according third party claims priority over IRS claims. The Federal Tax Lien Act is the most important landmark along this road, although neither the first nor the last.

Early on, the law was highly protective of governmental revenues. Before the modern federal income tax, the Union imposed an income tax during the Civil War. That earlier income tax, too, was enforced in part by a tax lien.[165] That lien was superior to the interests of third parties—even if the tax lien had not been filed and even if the third party was a subsequent bona fide purchaser.[166]

However, in ensuing generations, Congress displayed "an increasing awareness of the public importance of security of titles, and of the need of certain creditors to be able to rely upon the taxpayer's apparent unencumbered ownership of his property."[167] Part of this awareness was enlightened self-interest. Congress realized that protecting the interests of third parties in appropriate circumstances can induce them to engage in economic transactions with the tax delinquent, enhancing the ability of the delinquent to pay the IRS.

Here are some of the steps in the unfolding awareness. In 1913, Congress accorded priority to purchasers, mortgagees, and judgment creditors over the IRS when notice of the federal tax lien was not properly filed in the designated office.[168] In 1939, this was extended to pledgees.[169]

In some instances, third parties should be protected even when the IRS has previously filed notice of its lien, either because searching the records is impracticable under the circumstances or because certain kinds of transactions should be encouraged. Thus, in 1939, Congress created superpriorities for some purchasers and for those

164. For example, federal tax liens attach to the tax debtor's property even if notice of it is not filed. Filing affects priorities between the IRS and other creditors when the taxpayer has insufficient assets to satisfy all claims against him. *See id.* § 6323.

165. Act of July 13, 1866, ch. 184, § 9, 14 Stat. 98, 107; *see also* Act of Mar. 3, 1865, ch. 78, 13 Stat. 469, 470.

166. *See* United States v. Snyder, 149 U.S. 210 (1893).

167. William T. Plumb, Jr., *Federal Liens and Priorities—Agenda for the Next Decade*, 77 YALE L.J. 228, 229 (1967).

168. Act of March 4, 1913, ch. 166, 37 Stat. 1016 (reversing *Snyder*, 149 U.S. 210).

169. Revenue Act of 1939, ch. 247, § 401, 53 Stat. 862, 882-83.

lending on the security of "securities."[170] A superpriority for purchasers of motor vehicles was established in 1964.[171]

The 1966 Federal Tax Lien Act dwarfed in scope previous expansions of collection protections for third parties. Its origins lay in a decade-long study project by the American Bar Association. The 1966 Act contained important provisions related to the validity and priority of tax liens as against purchasers, security interest holders, mechanic's lienors, and judgment creditors; release of tax liens and discharge of property from the reach of the liens; property seizures; release of tax levies and return of property levied upon; and judicial actions by the government, taxpayers, and third parties as to tax collection issues.[172]

A leading figure of the time described the Act thusly:

> Congress granted specific relief in a number of meritorious situations and, on the whole, achieved equity in a field that had been notorious for its absence. . . . Truly it could be said, to borrow a phrase used by Justice Cardozo in another connection, that a "high-minded Government renounced an advantage that was felt to be ignoble, and set up a new standard of equity and conscience."[173]

The 1966 legislation dramatically advanced the cause of fairness and economic rationality in federal tax collection, but it did not resolve all problems.[174] Incremental changes continued, and continue, to be made to the governing Code provisions. A brief survey of the safeguards as they currently stand follows.[175]

Relief from tax liens: Upon request by the taxpayer or another affected person, the IRS may release the tax lien, subordinate it to other interests in or claims upon the property, discharge particular property from the lien, or certify that the lien does not attach to particular property.[176] The IRS also may withdraw a filed notice of tax lien.[177]

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170. *Id.*

171. Revenue Act of 1964, Pub. L. No. 88-272, § 236, 78 Stat. 19, 127.

172. Federal Tax Lien Act of 1966, Pub. L. No. 89-719, §§ 101, 103, 104, 107-202, 80 Stat. 1125, 1125-49, *reprinted at* 1966-2 C.B. 623, 623-43.

173. Plumb, *supra* note 167, at 232-33 (quoting George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933)).

174. *See id.* at 297-98; William T. Plumb, Jr., *Federal Liens and Priorities—Agenda for the Next Decade II*, 77 YALE L.J. 605, 605 (1968); William T. Plumb, Jr., *Federal Liens and Priorities—Agenda for the Next Decade III*, 77 YALE L.J. 1104, 1188-89 (1968); William T. Plumb, Jr., *The Tax Recommendations of the Commission on the Bankruptcy Laws—Tax Procedures*, 88 HARV. L. REV. 1360, 1379-80 (1975).

175. For a more complete description, see RICHARDSON, BORISON & JOHNSON, *supra* note 9, at 364-75.

176. I.R.C. § 6325.

177. *Id.* § 6323(j).

Relief from levies: Under a variety of conditions—some mandatory and some within the discretion of the IRS—the IRS may release a levy and notice of levy and may return property that has been levied on.[178]

Other administrative relief: Taxpayers may secure review of collection controversies by the IRS Appeals Office through the Collection Due Process procedures[179] (with the possibility of subsequent judicial review) and through the Collection Appeals Program[180] (without the possibility of subsequent judicial review). In addition, the Office of the Taxpayer Advocate is empowered to issue Taxpayer Assistance Orders when the IRS fails to follow established collection procedures.[181]

Judicial remedies: Under § 7426, third parties and, in some cases, taxpayers may sue in federal district court for four kinds of relief: (1) determination that a levy is wrongful; (2) return of amounts received from sale of property in excess of tax liability; (3) obtaining funds held as substituted proceeds; and (4) determination of the IRS's interest as to substituted proceeds.[182] Taxpayers and third parties may bring damages actions for improper collection actions by the IRS.[183] In addition, a variety of ancillary judicial remedies are provided under statutes outside the Code.[184]

7. Shapiro*,* Laing*, and Jeopardy Assessment Review*

As seen in Part II.B.3 above, our system is committed to providing a prepayment mechanism for resolving disputes involving liability for income tax and some other kinds of taxes. But there is an obvious peril. In the years that can pass during audit, administrative appeal, and Tax Court litigation, the ability of the IRS to collect on the eventual judgment can be put at hazard. Taxpayers may secret themselves or their assets, may transfer their assets, or may become insolvent. The government's legitimate revenue interests must be protected against such eventualities.

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178. *Id.* § 6343.

179. *Id.* §§ 6320, 6330. These procedures are discussed further in Part IV *infra*.

180. *See* I.R.C. § 7123(a).

181. *Id.* § 7811.

182. *Id.* § 7426(a).

183. *Id.* §§ 7426(h), 7432-7433. For discussion of whether existing damages remedies should be expanded, see Steve Johnson, *A Residual Damages Right Against the IRS: A Cure Worse than the Disease*, 88 TAX NOTES 395 (2000); Leandra Lederman, *Of Taxpayer Rights, Wrongs, and a Proposed Remedy*, 87 TAX NOTES 1133 (2000); Leandra Lederman, *Taxpayer Rights in the Lurch: A Response to Professor Johnson*, 88 TAX NOTES 1041 (2000).

184. *See, e.g.*, 28 U.S.C. § 2410(a) (2006) (authorizing quiet title, foreclosure, partition, condemnation, and interpleader actions).

Thus, the IRS has the power to make jeopardy and termination assessments and levies, shortcutting normal assessment and collection procedures in conditions of peril to the revenue.[185] But the very power of those devices inspires concern about possible abuse. The right to adequate notice and opportunity to be heard as to governmental deprivation of property "is central to the Constitution's command of due process."[186] Normally, this is *prior* notice and opportunity to be heard. "The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property . . . ."[187]

Post-deprivation notice and hearing are permissible only in "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."[188] Due process would be traduced were the government to offer no notice and hearing at all, neither pre- nor post-deprivation.[189]

In the mid-1970s, the Supreme Court decided two cases involving the then extant procedures for challenging IRS jeopardy and termination assessments. In *Laing*[190] and *Shapiro*,[191] the Court expressed reservations about the constitutional adequacy of those procedures. Within a few months, Congress enacted § 7429, providing rapid and reasonably rigorous post-assessment review.[192] The section: (1) requires that the IRS inform the taxpayer within five days of the reasons for the expedited assessment or levy;[193] (2) allows the taxpayer to seek review by the IRS Appeals Office of the expedited action;[194] (3) permits the taxpayer, within ninety days thereafter, to seek district court or Tax Court review;[195] and (4) requires decision by the court within twenty days.[196] This proceeding does not finally resolve the

185. I.R.C. §§ 6851-6852, 6861-6862.

186. United States v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993).

187. Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972).

188. *Id.* at 82 (quoting Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971)).

189. "[I]t is very doubtful that the need to collect the revenues is a sufficient reason to justify seizure causing irreparable injury without a prompt post-seizure inquiry of any kind into the [IRS's] basis for [its] claim." Commissioner v. Shapiro, 424 U.S. 614, 630 n.12 (1976); *see also* Bowles v. Willingham, 321 U.S. 503, 520 (1944).

190. Laing v. United States, 423 U.S. 161 (1976).

191. *Shapiro*, 424 U.S. at 629.

192. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1204(a), 90 Stat. 1520, 1695 (codified at I.R.C. § 7429).

193. I.R.C. § 7429(a)(1)(B).

194. *Id.* § 7429(a)(2)-(3).

195. *Id.* § 7429(b)(1)-(2). Review may be sought in the Tax Court only if the IRS made the jeopardy assessment after a Tax Court deficiency action had already been commenced. *Id.* § 7429(b)(2)(B).

merits.[197] It addresses only whether the making of the expedited assessment and the amount of that assessment were reasonable under the circumstances.[198] Despite occasional murmurs, § 7429 is generally accepted as constitutionally adequate.

This skein of our tax procedure history shows the delicate interplay of the "fair procedures for taxpayers" value and the "protect the revenue" value. The former value called into existence prepayment judicial determinations in the Tax Court as to income taxes and some other taxes. The latter value required modification, through the jeopardy and termination assessment mechanisms, of the prepayment procedures to obviate the possibility of abuse. But the former value again reared its head through § 7429, to modify the modification.

8. *TEFRA Partnership Audit/Litigation Procedures*

Crises often provoke responses that, although dire in their nature and consequences, were necessary at the time or at least seemed so to sober persons lashed by the goad of circumstance.[199] In the 1960s through 1980s, the proliferation of tax shelters provoked a crisis in tax administration in the United States. Numerous legislative, regulatory, and judicial responses—of varying degrees of effectiveness and desirability—were called forth. One of them was the enactment of the so-called unified partnership audit and litigation procedures by the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA").[200]

Tax shelters were designed, in the main, to generate "paper" losses that could offset real income, thus reducing the participants' income subject to tax. Because they are "pass-through" entities, part-

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196. *Id.* § 7429(b)(3).

197. The making of a termination or jeopardy assessment does not obviate the IRS's obligation to issue a notice of deficiency triggering the opportunity for Tax Court review of the merits of the adjustments set out in the notice. In the case of a termination assessment, the notice for the full terminated tax year must be issued within sixty days after the due date of the return for the year or the date on which the return was filed. *Id.* § 6851(b). In the case of a jeopardy assessment, the notice must be issued within sixty days after the making of the assessment. *Id.* § 6861(b).

198. *Id.* § 7429(g). The reasonableness standard "means something more than 'not arbitrary and capricious,' and something less than 'supported by substantial evidence.' " Harvey v. United States, 730 F. Supp. 1097, 1106 (S.D. Fla. 1990) (quoting Loretto v. United States, 440 F. Supp. 1168, 1172 (E.D. Pa. 1977)).

199. One thinks, for example, of Lincoln's suspension of some civil liberties during the Civil War, and of, during World War II, Franklin Roosevelt's internment of Japanese Americans, Churchill's fire-bombing of Dresden, and Truman's use of the atomic bomb on Hiroshima and Nagasaki.

200. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, §§ 401-407, 96 Stat. 324, 648-71 (adding I.R.C. §§ 6221-6232). In ensuing years, some of the original provisions have been modified and complementary sections have been enacted. The most significant revisions came in the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, §§ 1231-1243, 111 Stat. 788, 1020-30. The current TEFRA and related rules are in I.R.C. §§ 6221-6255.

nerships (including, later, limited liability companies taxable as partnerships) and, to a much lesser extent, S corporations were the vehicles through which tax shelters were structured and sold.

Before TEFRA, if the IRS doubted the validity of tax benefits claimed through a partnership, the IRS was compelled to audit the returns of each partner, making common adjustments to each. However, the sheer volume of tax shelters and "investors" in them produced three serious effects. First, the audit resources of the IRS were overwhelmed. Untold tens of thousands of returns containing bogus shelter deductions were allowed to stand because the IRS was unable to audit the returns within the statute of limitations period for assessment of additional liability.[201] Second, the returns the IRS was able to audit led to a volume of notices of deficiency, and petitions contesting those notices, that inundated the Tax Court.[202] Third, the frenzy of activity sometimes led to a breach of horizontal equity. The same substantive items on different returns sometimes were treated differently by the IRS.[203]

A new approach was needed. The IRS wanted to be able to audit at the entity (partnership) level, rather than having to audit all partners' returns.[204] The IRS sought such authority at least as early as 1978.[205] When Congress acted four years later in TEFRA, it did not create a pure entity system. Instead, Congress created a mixed approach. The IRS audits the partnership return at the partnership level; the IRS issues any determination of adjustments to a person designated to represent the partnership; and that person may seek administrative and judicial review of the adjustments on behalf of the partnership. However, at each stage, all the substantial partners have notice and participation rights, preserving the potential for considerable participation by the individual partners in the audit and litigation.[206]

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201. Normally three years from the dates on which the returns were filed. I.R.C. § 6501(a).

202. For example, between fiscal years 1978 and 1986, largely because of tax shelters, the number of petitions pending in the Tax Court rose from 23,140 to 83,686. The total rose each year and often dramatically. The 1979 increase was 16.9%, followed by a 28.9% increase in 1980 and a 31.7% increase in 1981. Harold Dubroff & Charles M. Greene, *Recent Developments in the Business and Procedures of the United States Tax Court*, 52 ALB. L. REV. 33, 35 (1987). Tax shelter petitions were the main drivers of these increases.

203. *See, e.g.*, John B. Palmer III, *TEFRA Treats Partnerships as Separate Entities Under Its New Procedural Rules*, 58 J. TAX'N 34, 34 (1983).

204. *See* Jerome Kurtz, *Auditing Partnerships*, 134 TAX NOTES 977 (2012).

205. *See, e.g.*, *The President's 1978 Tax Reduction and Reform Proposals: Hearing Before the H. Comm. on Ways & Means*, 95th Cong., pt. 1, at 280-90 (1978).

206. *See* I.R.C. §§ 6223-6226. For detailed discussion of the procedures and participation rights, see RICHARDSON, BORISON & JOHNSON, *supra* note 9, at 161-74.

Manifold purposes were at work in the creation of the TEFRA partnership regime. The main inspiration, of course, was protecting the revenue by providing a more workable method for auditing tax shelters.[207] This was reinforced by process values, such as enhancement of accurate and consistent decisionmaking.[208]

But it would be a mistake to limit the angle of vision to these values. Had they been the whole of Congress's contemplation, they could have been achieved—and achieved better—by an unadulterated entity-based approach. Congress chose instead to impose a hybrid system including substantial notice and participation rights for partners as an essential part of the bargain.[209] Thus, even in this context, Congress cared a lot about providing procedural options that were fair to taxpayers and perceived by them to be fair.

9. Brockamp *and Equitable Tolling*

Statutes of limitations serve important functions of promoting finality and minimizing errors caused by stale evidence. But they also can erode fairness. Reflecting this tension, courts have noted that "statutes of limitations have numerous statutory and common law exceptions," and those exceptions can "profoundly impact[] . . . strict and literal application[s] of the statute[s]."[210]

One of these exceptions is equitable tolling, "a judge-made doctrine 'which operates independently of the literal wording of the [statute]' to suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness."[211] At the federal level, it is rebuttably presumed that equitable tolling applies,[212] and nearly all U.S. states recognize the doctrine in one form or another.[213]

Can equitable tolling apply when a taxpayer files a refund claim after the limitations period has passed?[214] Other than the Ninth Cir-

207. *See, e.g.*, STAFF OF JOINT COMM. ON TAX'N, 97TH CONG., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982, at 268 (Comm. Print 1982).

208. *See, e.g.*, A.B.A. Section of Taxation, *Proposal as to Audit of Partnerships*, 32 TAX LAW. 551, 551 (1979).

209. For an argument that partner participation should be increased beyond even the levels provided by TEFRA, see Don R. Spellmann, *Taxation Without Notice: Due Process and Other Notice Shortcomings with the Partnership Audit Rules*, 52 TAX LAW. 133 (1998).

210. Province v. Province, 473 S.E.2d 894, 903 (W. Va. 1996).

211. Lantzy v. Centex Homes, 31 Cal. 4th 363, 370 (Cal. 2003) (quoting Addison v. California, 578 P.2d 941, 943 (1978)).

212. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95-96 (1990).

213. *See* Steve R. Johnson, *Equitable Tolling in State and Local Tax Cases*, 52 ST. TAX NOTES 917, 917 (2009).

214. In general, taxpayers who believe they have overpaid must file refund claims with the IRS "within 3 years from the time the return [for the year] was filed or 2 years from the time the tax was paid, whichever of such periods expires the later." I.R.C. § 6511(a).

cuit, all federal circuit courts that had considered the matter said "no."[215] In *Brockamp*, the Supreme Court granted certiorari to resolve this conflict.

Brockamp involved two Ninth Circuit cases. In both, the taxpayers filed their refund claims well after expiration of the limitations period. In both, the taxpayers explained their failure to file timely as caused by disabilities (senility or alcoholism). In both, the circuit court accepted that the facts sufficed to trigger application of equitable tolling.

The Supreme Court unanimously reversed both cases, holding that equitable tolling is not available as to tax refund claims. As a matter of statutory construction, the Court noted that "[s]ection 6511 sets forth its time limitations in unusually emphatic form . . . in a highly detailed technical manner [and] reiterates its limitations several times in several different ways."[216]

The Court also expressed concern about the impact of equitable tolling on orderly tax administration. Noting that the IRS processes over 200 million returns each year and issues over 90 million refunds, the Court remarked:

> To read an "equitable tolling" exception into § 6511 could create serious administrative problems by forcing the IRS to respond to, and perhaps litigate, large numbers of late claims. . . . The nature and potential magnitude of the administrative problem suggest that Congress decided to pay the price of occasional unfairness in individual cases (penalizing a taxpayer whose claim is unavoidably delayed) in order to maintain a more workable tax enforcement system.[217]

Soon thereafter, Congress displayed a more liberal spirit. It partly overthrew *Brockamp* by enacting a limited tolling provision. The statute currently provides that the running of the normal § 6511 limitations period "shall be suspended during any period of such individual's life that such individual is financially disabled."[218] In general, one is financially disabled if he "is unable to manage his financial affairs by reason of a medically determinable physical or mental impairment . . . which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."[219]

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215. The conflicting cases are cited in *United States v. Brockamp*, 519 U.S. 347, 348-49 (1997).

216. *Id.* at 350-51.

217. *Id.* at 352-53; *see also id.* at 352 ("Tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities.").

218. I.R.C. § 6511(h)(1).

219. *Id.* § 6511(h)(2)(A).

This is a narrow statutory exception and has been read narrowly by the courts.[220] Cases which fall outside the narrow statutory exception are controlled by *Brockamp*'s "no equitable tolling" rule.[221]

10. IRS Restructuring and Reform Act

The Internal Revenue Service Reform and Restructuring Act of 1998 ("RRA")[222] is a particularly unlovely experience in the sausage factory. It is a story about an opportunistic Republican Senator, a spineless Democratic President, and a complicit media. Senator William Roth was in a tough reelection campaign. He decided to use his chairmanship of the Senate Finance Committee to generate favorable publicity and manufacture a campaign issue. The result was multi-day hearings at which disaffected taxpayers, seemingly corroborated by disgruntled IRS employees (testifying, for dramatic effect, from behind screens to shield them from their employer's possible retribution), testified as to IRS behavior appearing to range from callous indifference to jack-booted thuggery. President Clinton, employing his well-honed triangulation strategy, preferred to jump on the anti-IRS bandwagon than to probe the worth of the assertions seriously. The media, staring at ratings gold, covered the circus enthusiastically.[223]

The result was a mood inside the Beltway (and even sometimes in more sober minds outside the Beltway[224]) of "IRS bad; must punish bad IRS." The result was the RRA, omnibus legislation containing numerous measures to rein in (actually or symbolically) IRS abuses.[225] The RRA "introduced seventy-one new taxpayer rights and re-

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220. For a proposal to reform the tolling provisions, see T. Keith Fogg & Rachel E. Zuraw, *Financial Disability for All* (Villanova Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 2013-3009, 2012), *available at* http://ssrn.com/abstract=2182772.

221. *See, e.g.*, Haas v. United States, 107 Fed. Cl. 1, 7-8 (2012).

222. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (codified in various sections of the I.R.C.).

223. The story is told in greater detail in Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules*, 84 IOWA L. REV. 413, 446-57 (1999). *See also* Bryan T. Camp, *Theory and Practice in Tax Administration*, 29 VA. TAX REV. 227, 270 (2009) ("Congress became very concerned—one might say hysterical— . . . [and] worked itself into a lather, and mostly over the wrong problem.").

224. A striking illustration occurred in our criminal tax jurisprudence. I.R.C. § 7212 criminalizes forcible or corrupt interference with tax administration. In a 1998 decision clearly influenced by the Senate Finance Committee hearings, the Sixth Circuit gave § 7212 a cramped reading. United States v. Kassouf, 144 F.3d 952, 958 (6th Cir. 1998) ("In this day, when Congress is attempting to curb the reach of the IRS into the homes of taxpayers, we cannot construe a penal law such as § 7212(a) to permit such an invasion into the activities of lawabiding citizens."). A year later, the Sixth Circuit realized that the outrage of the moment had led it astray, and it limited *Kassouf* to its facts. United States v. Bowman, 173 F.3d 595, 600 (6th Cir. 1999).

225. For a description of the changes wrought by the RRA, see Robert Manning & David F. Windish, *The IRS Restructuring and Reform Act: An Explanation*, 80 TAX NOTES 83 (1998).

quired, [as of 2003], 1,900 implementation actions by the IRS."[226] Some of these measures were in fact constructive.[227] Others were partly good and partly bad.[228] Some were largely meaningless.[229] Some were inimical to effective tax administration.[230]

Subsequent investigations (which received far less publicity than the original allegations) were unable to confirm the veracity of the sensational testimony.[231] But, in politics, perception often matters more than facts. [232] Thus, the point that matters for purposes of this agenda for reform is the value set that the RRA exercise revealed.

Central to the thinking of Congress was "increas[ing] perceptions of procedural fairness by allowing taxpayers additional procedural rights and opportunities to tell their side of the story."[233] This orientation was evident in the hearings described above and was confirmed by the legislative history. The Senate report, explaining reasons for change, was studded with remarks such as the following: "[A] key reason for taxpayer frustration with the IRS is the lack of appropriate attention to taxpayer needs."[234] "The Committee is con-

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226. Nina E. Olson, *Taxpayer Rights, Customer Service, and Compliance: A Three-Legged Stool*, 51 U. KAN. L. REV. 1239, 1243 (2003). For description of the principal changes, see Manning & Windish, *supra* note 225.

227. For example, imposing an initial burden-of-production on the IRS when it asserts penalties, *see* Internal Revenue Service Restructuring and Reform Act of 1998, Pub. Law. No. 105-206, § 3001, 112 Stat. 685, 726 (codified at I.R.C. § 7491(c)), and strengthening the office of the National Taxpayer Advocate, *see* § 1102, 112 Stat. at 697 (codified at I.R.C. § 7803(c)).

228. Such as the Collection Due Process rules discussed *infra* Part IV.B. *See* § 3401, 112 Stat. at 746 (codified at I.R.C. §§ 6320, 6330).

229. Examples are the creation of the IRS Oversight Board, *see* § 1101, 112 Stat. at 691 (codified at I.R.C. § 7802), which has been generally insignificant in operation, and directing the IRS to revise its Mission Statement to put greater emphasis on serving the public and meeting taxpayers' needs, *see* § 1002, 112 Stat. at 690. Priorities in the IRS swing between taxpayer service and enforcement (with the pendulum now more on the enforcement side), without close correlation to the current wording of the Mission Statement.

230. One example is the deceptive burden-of-proof shift provision, *see* § 3001, 112 Stat. at 726 (codified at I.R.C. § 7491(a)). The provision has induced taxpayers to argue the point in numerous cases, expending resources for all parties and the courts, but has almost never made a difference in how cases actually are decided. *See, e.g.*, Johnson, *supra* note 223, at 427-46; *see also* Leandra Lederman, *Does the Burden of Proof Matter?*, 23 A.B.A. SEC. TAX'N NEWS Q. 10 (2004); Leandra Lederman, *Unforeseen Consequences of the Burden of Proof Shift*, 80 TAX NOTES 379 (1998).

Similarly, the mandatory termination provisions, §§ 1201-1205, 112 Stat. at 711-23 (not codified in the Code), had immediate and substantial negative effect on the morale and productivity of IRS employees.

231. *See, e.g.*, Susan Meador Tobias, Letter to the Editor, *IRS Abuse Debate Should Be a Two-Way Street*, 79 TAX NOTES 1071 (1998); Stephen Barr, *Report Labels IRS Testimony "Unfounded,"* WASH. POST, Apr. 26, 1998, at A2.

232. Karma also matters. Despite the publicity generated by his hearings, Senator Roth lost his reelection bid.

233. Leandra Lederman & Stephen W. Mazza, *Addressing Imperfections in the Tax System: Procedural or Substantive Reform?*, 103 MICH. L. REV. 1423, 1441 (2005).

234. S. REP. NO. 105-174, at 8 (2d Sess. 1998).

cerned that individual and small business taxpayers frequently are at a disadvantage when forced to litigate with the [IRS]."[235] Furthermore,

> [T]axpayers are entitled to protections in dealing with the IRS that are similar to those they would have in dealing with any other creditor. Accordingly, the Committee believes that the IRS should afford taxpayers adequate notice of collection activity and a meaningful hearing before the IRS deprives them of their property.[236]

11. Ballard *and Tax Court Process*

Ballard started out as a prosaic case[237] but ended as anything but. The IRS alleged that the taxpayers engaged in a scheme involving kickbacks that they failed to report on their federal income tax returns.[238] The taxpayers filed Tax Court petitions challenging the IRS's determinations. The chief judge of the Tax Court assigned the cases for hearing to a special trial judge.[239] The trial lasted almost five weeks, producing a transcript exceeding 5400 pages and thousands of exhibits with hundreds of thousands of pages. The briefs reached nearly 4700 pages.

The special trial judge eventually submitted a report on the consolidated cases to the chief judge as required by former Tax Court Rule 183(b).[240] The chief judge assigned the cases, under the same rule, to a regular judge, who issued a decision on behalf of the court. The decision stated: "The Court agrees with and adopts the opinion of the Special Trial Judge, which is set forth below."[241] The decision substantially upheld the IRS's determinations.

The taxpayers came to believe that the document entitled the "Opinion of the Special Trial Judge" was not, in fact, that judge's work but that the original special trial judge's report had been substantially modified by the regular judge or by a process of consultation between the special trial judge and the regular judge. The taxpayers filed motions with the Tax Court seeking access to the original

235. *Id.* at 44.

236. *Id.* at 67.

237. If a marathon case involving multiple fairly high-profile taxpayers, large deficiencies, and fraud penalties can so be described. The principal taxpayers were Burton Kanter, a prominent tax attorney, and Claude Ballard and Robert Lisle, both vice presidents of Prudential Life Insurance Company.

238. Ballard v. Commissioner, 321 F.3d 1037, 1038 (11th Cir. 2003).

239. The Tax Court's nineteen regular judges are appointed by the President with the advice and consent of the Senate. I.R.C. § 7443. The chief judge of the Tax Court appoints special trial judges and may designate cases assigned to them. *Id.* § 7443A.

240. *Ballard*, 321 F.3d at 1038.

241. Investment Research Assocs., Ltd. v. Commissioner, 78 T.C.M. (CCH) 951, 963 (1999).

report or, at least, permission to place that report under seal in the record on appeal. The Tax Court denied the motions.

The taxpayers appealed to the circuit courts within whose jurisdictions they resided.[242] All three appellate courts accepted the IRS's argument that the appearance of the special trial judge's signature on the Tax Court's decision meant that the decision was the special trial judge's report, and so rejected the taxpayers' objection to the absence from the record of the original report.[243]

On the merits, the Seventh Circuit (over a dissent) and the Eleventh Circuit largely affirmed. The Fifth Circuit largely upheld the asserted deficiencies but reversed as to the fraud penalty.

The Fifth Circuit taxpayer did not seek Supreme Court review. The Court granted certiorari as to the Seventh and Eleventh Circuit cases. The Court reversed as to the exclusion of the original report from the record.[244] Justice Ginsburg wrote for the majority.[245] Justice Kennedy, joined by Justice Scalia, concurred.[246] Chief Justice Rehnquist, joined by Justice Thomas, dissented.[247]

The majority held that the Tax Court had failed to follow its own rule. That rule, the Court held, contemplated an initial report by the special trial judge, the fact-finding of which the assigned regular judge owed deference.[248] Over time, however, the Tax Court's practice under the rule had morphed into the regular judge treating "the special trial judge's report essentially as an in-house draft to be worked over collaboratively by the regular judge and the special trial judge."[249]

Resolving the case on this ground, the majority found it unnecessary to address the taxpayers' arguments that the Due Process Clause[250] and the applicable appellate review statute[251] compelled inclusion of the original report in the record on appeal. The majority's choice of rationale may have reflected Justice Ginsburg's well-known

242. *See* I.R.C. § 7482(b)(1)(A).

243. Estate of Lisle v. Commissioner, 341 F.3d 364, 384 (5th Cir. 2003); Estate of Kanter v. Commissioner, 337 F.3d 833, 840-41 (7th Cir. 2003); *Ballard*, 321 F.3d at 1042.

244. Ballard v. Commissioner, 544 U.S. 40 (2005).

245. *Id.* at 44.

246. *Id.* at 65.

247. *Id.* at 68.

248. *Id.* at 54.

249. *Id.* at 57.

250. U.S. CONST. amend. V.

251. I.R.C. § 7482(a)(1); *see* Brief of Amica Curiae Professor Leandra Lederman in Support of Petitioners at 2-3, Ballard v. Commissioner, 554 U.S. 40 (2005) (Nos. 03-184 & 03-1034).

preference to resolve cases on the narrowest available ground, or it may have seemed the best way of letting the Tax Court down easily.[252]

Despite the majority's stated rationale, other commentators[253] and I see *Ballard* as driven by the desire to provide fairness in judicial remedies, rather than by a technical construction of the language and history of a rule. Three facts point in this direction. First, it is striking that the Court granted certiorari in this case in the first place. There was no circuit conflict; the Fifth, Seventh, and Eleventh Circuits were in agreement as to the procedural issue. "It is likely that the Supreme Court granted certiorari out of a concern that the lack of transparency denied meaningful appellate review."[254]

Second, the majority picked its rationale in disregard of its accustomed practice. The rule construction argument was not made in the taxpayers' circuit court briefs, in their certiorari petitions, or in their questions presented. The Court typically does not consider such arguments.[255] Something was going on beneath the surface.

Third, although seemingly an exercise in rule construction, the majority opinion is peppered with words and phrases like "transparent,"[256] "undisclosed,"[257] "impedes fully informed appellate review,"[258] and "concealment."[259] Here the subtext is more revealing than the text.

The Court remanded the cases, unfortunately without clear instructions.[260] The course on remand was not smooth. The three in-

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252. Telling a court that it is violating due process is a serious move. On the other hand, it may be an even greater affront to tell a court that it doesn't understand what its own rule says. One of the arguments made by the dissent was that the Tax Court's interpretation of its own rule was due substantial deference by analogy to *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). *See Ballard*, 544 U.S. at 70 (Rehnquist, C.J., dissenting). The majority grudgingly conceded that "the Tax Court is not without leeway in interpreting its own Rules," *id.* at 59, but found deference inappropriate because the Tax Court's construction of the rule at issue was "arbitrary," *id.* at 61. For discussion of this principle, see Steve R. Johnson, Auer/Seminole Rock *Deference in the Tax Court*, 11 PITT. TAX REV. (forthcoming 2013).

253. *See, e.g.*, Katherine Kmiec Turner, *No More Secrets: Under* Ballard v. Commissioner, *Special Trial Judge Reports Must Be Revealed*, 26 J. NAT'L ASS'N ADMIN. L. JUDGES 247, 294 (2006) ("From the public's perspective, *Ballard* ensures less secrecy and a fair trial.").

254. Robin L. Greenhouse & Joshua D. Odintz, *The Status of Tax Court Special Trial Judge Reports After* Ballard*: Where Do We Go From Here?,* 102 J. TAX'N 352, 355 (2005).

255. *See, e.g.*, DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 n.2 (1989). This prompted Chief Justice Rehnquist to remark in his *Ballard* dissent: "Only by failing to abide by our own Rules can the Court hold that the Tax Court failed to follow its Rules." 544 U.S. at 68 n.1 (Rehnquist, C.J., dissenting).

256. *Ballard*, 544 U.S. at 55 (majority opinion).

257. *Id.* at 57.

258. *Id.* at 59-60.

259. *Id.* at 62 n.15.

260. Justice Kennedy's concurrence attempted to make good the deficiency of the majority's opinion. *Id.* at 65-68 (Kennedy, J., concurring).

volved circuit courts remanded the cases to the Tax Court with instructions to review the matter in accordance with the Supreme Court's opinion and to give due regard to the determinations in the special trial judge's original report.[261] The Tax Court rendered a decision which adhered in significant part to its prior view, that is, that the taxpayers were liable for large deficiencies and for fraud penalties.[262]

Again, the taxpayers appealed. The circuit courts were not pleased with the Tax Court's work. Each concluded that the Tax Court again failed to give due deference to the special trial judge's determinations. They again remanded, this time with instructions that the Tax Court adopt as its decision the special trial judge's original decision holding for the taxpayers.[263]

12. Administrative Law in Tax

Authority in tax is a three-legged stool, consisting of statutes, case law, and administrative guidance. The last leg includes Treasury regulations, which have force-of-law status if they reasonably implement the statute,[264] and a variety of lesser guidance documents,[265] which typically are not binding but may have persuasive influence.[266]

Given the importance of administrative guidance, administrative law would seem to be important in tax. It is, but the tax community has recognized this only slowly and grudgingly.[267] For most of our tax history, courts reviewing challenges to tax regulations or practices steered clear of general administrative law, developing instead a tax-specific jurisprudence emphasizing reasonableness in general and a number of hallmarks of reliability in particular.[268]

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261. Estate of Lisle v. Commissioner, 431 F.3d 439 (5th Cir. 2005); Ballard v. Commissioner, 429 F.3d 1026 (11th Cir. 2005); Estate of Kanter v. Commissioner, 406 F.3d 933 (7th Cir. 2005).

262. Estate of Kanter v. Commissioner, 93 T.C.M. (CCH) 721 (2007).

263. Kanter v. Commissioner, 590 F.3d 410, 414 (7th Cir. 2009); Estate of Lisle v. Commissioner, 541 F.3d 595, 597 (5th Cir. 2008); Ballard v. Commissioner, 522 F.3d 1229, 1255 (11th Cir. 2008).

264. *See, e.g.*, Helvering v. R.J. Reynolds Tobacco Co., 306 U.S. 110, 115 (1939); Boulez v. Commissioner, 810 F.2d 209, 212 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 896 (1987).

265. For description of many types of such documents, see RICHARDSON, BORISON & JOHNSON, *supra* note 9, at 17-25.

266. *See, e.g.*, Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239.

267. *See, e.g.*, Leandra Lederman, *"Civil"izing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency*, 30 U.C. DAVIS L. REV. 183, 183 (1996). This phenomenon has been called—and described as—"tax exceptionalism." *See* Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537 (2006).

268. *See, e.g.*, Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979) (identifying six factors); Laurens Williams, *The Preparation and Promulgation of Treasury Department Regulations Under the Internal Revenue Code of 1954*, TAX EXEC., Jan. 1956, at

To regularize administrative practice among the numerous federal agencies, Congress enacted the Administrative Procedure Act ("APA") in 1946. Treasury and the IRS are "agencies" as defined by the APA[269] and so are subject to its requirements. Nonetheless, for decades, both the APA[270] and general principles of administrative law[271] appeared only rarely in tax decisions.

The frequency of appearance of administrative law doctrines in tax has increased markedly in the last fifteen years, in part because of the RRA. Some of the areas at issue involved rights created or expanded by the RRA, such as the CDP rules[272] and spousal relief.[273] The greatest recent prominence of administrative law in tax, however, has been in two areas: the procedural validity of Treasury regulations and deference doctrine. Both are discussed below.

For generations, tax regulations promulgated by the Treasury have been attacked by taxpayers discomfited by them. The standard attacks have been substantive in nature: that the regulation in question was inconsistent with the text, structure, or purpose of the relevant statute or with important extrinsic norms.[274]

In recent years, however, taxpayers have added procedural arrows to their quivers.[275] The use of these weapons is still in relative infancy. Here are examples of that use. First, subject to certain exceptions, the APA prescribes that in order for it to promulgate binding rules, an agency must first publish notice of its proposed rulemaking and give interested persons opportunity to submit comments.[276] Treasury,

3, 9-11 (1956).

269. 5 U.S.C. § 551(1) (2012).

270. *See, e.g.*, Wing v. Commissioner, 81 T.C. 17, 28-29 (1983); Wendland v. Commissioner, 79 T.C. 355 (1982).

271. One area in which the analogy to general administrative law was made involved whether the IRS has a judicially enforceable duty to treat similarly situated taxpayers similarly. *See* Steve R. Johnson, *An IRS Duty of Consistency: The Failure of Common Law Making and a Proposed Legislative Solution*, 77 TENN. L. REV. 563 (2010) (reviewing the cases and commentary); Lawrence Zelenak, *Should Courts Require the Internal Revenue Service to be Consistent?*, 38 TAX L. REV. 411 (1985).

272. *See, e.g.*, Robinette v. Commissioner, 123 T.C. 85 (2004), *rev'd*, 439 F.3d 455 (8th Cir. 2006); Kitchen Cabinets, Inc. v. United States, 87 A.F.T.R.2d (RIA) 1393 (N.D. Tex. 2001); Mesa Oil, Inc. v. United States, 86 A.F.T.R.2d (RIA) 7312 (D. Colo. 2000); *see also* Danshera Cords, *Administrative Law and Judicial Review of Tax Collection Decisions*, 52 ST. LOUIS U. L.J. 429, 440 (2008); Diane L. Fahey, *Is the United States Tax Court Exempt from Administrative Law Jurisprudence when Acting as a Reviewing Court?*, 58 CLEV. ST. L. REV. 603, 609 (2010).

273. *See, e.g.*, Wilson v. Commissioner, 99 T.C.M. (CCH) 1552 (2010), *aff'd*, 705 F.3d 980 (9th Cir. 2013).

274. *See* Steve R. Johnson, *Preserving Fairness in Tax Administration in the* Mayo *Era*, 32 VA. TAX REV. 269 (2012).

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

276. 5 U.S.C. § 553(c), (d) (2012).

however, may not always honor these requirements in promulgating tax regulations.[277] This argument has been presented in a number of recent high-profile tax cases.[278]

Second, under the APA, courts are empowered to strike down agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[279] Under current doctrine, an agency's rule can be arbitrary for a number of reasons, including that the agency relied on factors Congress did not want it to consider, the agency failed to take some important factor into account, or the agency gave an unjustifiable or implausible explanation for its action.[280]

Among these, the "inadequate explanation" strand has received considerable attention recently. Cases[281] and commentary[282] are applying this strand to tax regulations with increasing frequency.

Third, in general, "retroactive [tax] regulations are prohibited, except under limited circumstances."[283] The meaning of retroactivity and the permitted exceptions to the prohibition of it potentially are at issue in a number of tax controversies. Retroactivity questions were raised, but avoided by the Supreme Court, in the recent *Home Concrete* decision.[284] Inevitably, retroactivity issues will have to be squarely addressed in future tax cases.

Deference doctrine entails the extent to which courts, as they interpret statutes, must or should accede to the views of the statutes' meanings espoused by the agencies charged with implementing the statutes. Deference issues go back generations, but their promi-

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277. *See* Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153 (2008); Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727 (2007).

278. *See, e.g.*, Cohen v. United States, 650 F.3d 717, 721 (D.C. Cir. 2011); Intermountain Ins. Serv. of Vail, LLC v. Commissioner, 134 T.C. 211, 220-23 (2010), *rev'd*, 650 F.3d 691 (D.C. Cir. 2011), *vacated*, 132 S. Ct. 2120 (2012).

279. 5 U.S.C. § 706(2)(A) (2012).

280. Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

281. *See, e.g.*, Dominion Resources, Inc. v. United States, 681 F.3d 1313, 1319 (Fed. Cir. 2012); Mannella v. Commissioner, 631 F.3d 115, 127 (3d Cir. 2011) (Ambro, J., dissenting); Fla. Bankers Ass'n v. U.S. Dep't of Treasury, 2014-1 U.S. Tax Cas. (CCH) ¶ 50,133 (D.D.C. 2014); Carpenter Family Invs., LLC v. Commissioner, 136 T.C. 373, 395-96 (2011).

282. *See, e.g.*, Patrick J. Smith, *The APA's Reasoned-Explanation Rule and IRS Deficiency Notices*, 134 TAX NOTES 331 (2012).

283. Marriott Int'l Resorts, L.P. v. United States, 83 Fed. Cl. 291, 303 (2008), *aff'd*, 586 F.3d 962 (Fed. Cir. 2009); *see* I.R.C. § 7805(b), (e).

284. United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836 (2012). *Compare* Brief for the United States at 12, 132 S. Ct. 1836 (2012) (No. 11-139), *with* Brief for Respondents at 45-48, 132 S. Ct. 1836 (2012) (No. 11-139).

nence has grown exponentially since the Supreme Court's 1984 *Chevron* decision.[285]

The extent to which *Chevron* or other doctrines of deference should operate in tax was controversial for decades, but now is moving towards greater clarity. In its 2011 *Mayo* decision, the Supreme Court held that, in general, *Chevron* provides the applicable standard when a tax regulation is challenged on substantive grounds, regardless of whether the regulation was promulgated under the general authority of I.R.C. § 7805(a) or specific authority set out in more particular sections of the Code.[286] Numerous details remain to be filled in as to both regulations and sub-regulation tax guidance documents, but *Mayo* sets the general frame for future discussions.[287]

Thus, the profile of administrative law in tax has been raised dramatically and, I believe, irreversibly. What values does this trend further? The APA was a balance of "green light" and "red light" features. In some respects, the goal was to facilitate agency actions while, in other respects, the idea was to prevent agencies from trampling on citizens' rights.[288]

More specifically, the APA's notice-and-comment rules are designed to improve the accuracy with which regulations implement congressional intent, to minimize unnecessary regulatory burdens, to provide interested parties meaningful participation in the rule-making process, and to raise citizen confidence in government.[289] Deference doctrine is designed to improve accuracy through bringing to bear agency expertise while preserving the role of the courts to keep agencies within their legitimate domains.[290] The increased prominence of administrative law in tax honors these objectives.[291]

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285. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). *Chevron* is the most frequently cited case in American law. *See* STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN & MATTHEW L. SPITZER, ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 289 (5th ed. 2002).

286. Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 714 (2011); *see also* Halbig v. Sebelius, 2014-1 U.S. Tax Cas. (CCH) ¶ 50,138 (D.D.C. 2014).

287. For evaluation of the significance of *Mayo* and appraisal of post-*Mayo* issues, see Johnson, *supra* note 274; Steve R. Johnson, Mayo *and the Future of Tax Regulations*, 130 TAX NOTES 1547 (2011); Leandra Lederman & Stephen W. Mazza, *More* Mayo *Please? Temporary Regulations After* Mayo Foundation v. United States, 31 A.B.A. SEC. TAX'N NEWS Q. 15 (2011); David J. Shakow, *Who's Afraid of the APA?*, 134 TAX NOTES 825 (2012).

288. *See* ALFRED C. AMAN, JR., ADMINISTRATIVE LAW AND PROCESS: CASES AND MATERIALS 19-24 (2d ed. 2006).

289. *See, e.g.*, Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1044 (D.C. Cir. 1987).

290. *See Chevron*, 467 U.S. at 864-65.

291. *See, e.g.*, Leslie Book, *A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation*, 12 FLA. TAX REV. 517 (2012); Rimma Tsvasman, Note, *No More Excuses: A Case for the IRS's Full Compliance with the Administrative Procedure Act*, 76 BROOK. L. REV. 837 (2011).

C. Criteria

What do we learn from the above key events? Important affairs over time rarely reveal the hand of only a single cause or influence. So it is here. Multiple purposes are evident in the legislative, regulatory, and judicial developments shaping tax procedure.

The history shows four sets of values at work: (1) providing remedies for taxpayers and third parties that are both meaningful and perceived to be fair; (2) protecting revenue collection from unreasonable interference; (3) achieving decisional accuracy; and (4) promoting process efficiency, reducing costs and delays.

Professor, later Judge, Sneed developed a number of criteria driving federal income tax policy generally. As is the approach in this Article, Sneed developed his topoi from distillation of our national experience rather than from his own values preferences. In his view, "the legislative, administrative, and judicial history of the federal income tax, as well as the pertinent literature, reveals the existence of seven pervasive purposes which have shaped its rates and structure."[292] Sneed identified these seven purposes thusly:

> (1) to supply *adequate* revenue, (2) to achieve a *practical* and workable income tax system, (3) to impose *equal* taxes upon those who enjoy equal incomes, (4) to assist in achieving economic *stability*, (5) to *reduce economic inequality*, (6) to avoid impairment of the operation of the *market-oriented economy* and (7) to accomplish a high degree of harmony between the income tax and the sought-for *political order*. [293]

Of these, the first, second, and seventh purposes bear with particular force on federal tax procedure.

Taken as a whole, the value most strongly evident in the key events is providing remedies: mechanisms by which taxpayers and affected third parties may challenge IRS liability determinations and collection actions, mechanisms that are both efficacious and perceived to be fair. Henceforth, this Article will sometimes describe this as the Primary Value. The remaining desiderata will sometimes be called Second-Order Values.

The Primary Value, then, will be the first criterion against which to measure the desirability of current features of the federal tax litigation system and of proposed changes to it. But, in practical affairs, single values rarely are absolute. At some point, the accumulation

292. Joseph T. Sneed, *The Criteria of Federal Income Tax Policy*, 17 STAN. L. REV. 567, 568 (1965).

293. *Id.* (emphasis in original).

of powerful contrary consequences can overwhelm even highly cherished values.[294]

Thus, there are two circumstances in which our evaluation of features and proposed changes will turn on Second-Order Values. First, there are some situations in which the Primary Value is not reasonably at stake. Second-Order Values will be decisive when the adequacy of remedies would not be either meaningfully advanced or meaningfully threatened by the current feature or the proposed change. Furthermore, there may be instances in which a trickle of remedies is outweighed by a torrent of revenue protection, decisional accuracy, or efficiency. In cases of stark disproportion, large Second-Order effects should be permitted to defeat small Primary effects.

The following parts of this Article will apply the above criteria in several areas. Left to my own devices, I would weigh the criteria somewhat differently. Specifically, process efficiency shines brighter in my own constellation of values.[295] For example, I am more inclined than Congress has been to say that taxpayers must live with the consequences of their choices, even if the consequences include losing opportunities to litigate.[296]

Efficiency also often has a preferred place for me relative to decisional accuracy. I share Justice Brandeis' conviction that often it is more important that a question of "law be settled than that it be settled right."[297] In addition, Congress has shown the ready ability to reverse tax decisions—both of the Supreme Court[298] and lower

294. For example, the Roman declaration "fiat justicia ruat coelem" (let justice be done even if the sky falls) is stirring but not a practical reality. No matter how much we aspire to do justice, every legal system makes decisions that subordinate the pursuit of justice to other values in some circumstances.

295. For example, I was among the few defenders of the Tax Court's practice that the Supreme Court invalidated in *Ballard v. Commissioner*, 544 U.S. 40 (2005), discussed in Part II.B.11 *supra*. *See* Steve R. Johnson, *Further Thoughts on* Kanter *and* Ballard, 105 TAX NOTES 1235 (2004) (arguing that protection of the Tax Court's decisional process was more important than doubtful gains to fairness or decisional accuracy).

296. For example, as discussed in Part II.B *supra*, in responding to the IRS's plea for procedural help in auditing tax shelter partnerships, Congress in 1982 created entity-level audit *combined with* partner participation. As argued below, this hybridization has been the cause of great complication and confusion. To me, it would have been reasonable to dispense with partner participation, on the ground that the partners' choice to conduct business in entity form should remit them to only entity-level procedures.

297. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Brandeis seemingly was paraphrasing—but with some difference in emphasis—Justice Swayne's observation generations earlier in Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 724 (1865) ("It is almost as important that the law should be settled . . . as that it should be settled correctly."). I am indebted to my colleague Adam Hirsch for bringing *Gilman* to my attention.

298. *See, e.g.*, Gitlitz v. Commissioner, 531 U.S. 206 (2001), *superseded by statute*, I.R.C. § 108(d)(7)(A). This Article has identified several Supreme Court decisions later overturned by Congress. *See* United States v. Brockamp, 519 U.S. 347 (1997) (*see supra* notes 210-17 and accompanying text); Cary v. Curtis, 44 U.S. (3 How.) 236 (1845) (*see su-*

courts[299]—with which it disagrees. Courts should, of course, strive assiduously to reach results that correctly apply the provisions of the Code, but the possibility of legislative correction buffers the consequences in those instances in which such efforts come up short. Thus, my own criteria would accord efficiency concerns higher priority.

I acknowledge the possibility that my personal values preferences may compromise the dispassion I hope to apply in reading the historical record. This is an ever present peril.[300] Some

> scholars suggest that facts about the past are without meaning until they are woven into a story by the historian. Thus, in choosing which facts to emphasize and how to interpret them, the historian will often make choices based upon factors extrinsic to pure research. Although history is continuously refined through testing hypotheses against the facts, the story it tells will be decisively influenced by the "meta-theories," the overarching views of the world, held by the historian.[301]

However, the exercise in this Article is to apply faithfully to procedural choices the values that emerge from the system as it has developed, not the system as I might wish it had developed.[302]

III. REFORMS AS TO AVAILABLE COURTS

Based on the criteria developed in Part II, I advance three suggestions as to the courts that should be available as fora in which to litigate federal tax controversies. First, the Tax Court should be given

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pra notes 49-58 and accompanying text); Elliott v. Swartwout, 35 U.S. (10 Pet.) 137 (1836) (*see supra* notes 43-48 and accompanying text).

299. *See, e.g.*, Commissioner v. Ewing, 439 F.3d 1009 (9th Cir. 2006), *superseded by statute*, I.R.C. § 6015(e)(1)(A); Commissioner v. United States & Int'l Sec. Corp., 130 F.2d 894 (3rd Cir. 1942), *superseded by statute*, Revenue Act of 1942, Pub. L. No. 77-753, § 116, 56 Stat. 798, 812; Cole v. Commissioner, 81 F.2d 485 (9th Cir. 1935), *superseded by statute*, Revenue Act of 1938, Pub. L. No. 75-552, §51(b), 52 Stat. 447, 476; Container Corp. v. Commissioner, 134 T.C. 122 (2010), *aff'd*, 2011 WL 1664358 (5th Cir. May 2, 2011), *superseded by statute*, I.R.C. § 861(a)(9).

300. As it is, for example, when judges apply legislative history. "It sometimes seems that citing legislative history is still, as my late colleague Harold Leventhal once observed, akin to 'looking over a crowd and picking out your friends.' " Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).

301. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1510 (1987) (citing William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1240-45 (1986); G. Edward White, *The Text, Interpretation, and Critical Standards*, 60 TEX. L. REV. 569, 569 (1982)).

302. Fitzerald described Omar Khayyam as "preferring rather to soothe the Soul . . . into Acquiescence with Things as he saw them, than to perplex it with vain disquietude after what they *might* be." OMAR KHAYYÁM, THE RUBÁIYÁT OF OMAR KHAYYÁM 18 (Edward Fitzgerald trans., Three Sirens Press 1st ed. n.d.) (emphasis in original). That was an inaccurate description of the great Tent Maker. It is a fair description of the approach of this Article.

quasi-plenary, but nonexclusive, civil tax jurisdiction. Second, calls to create a national court of tax appeals should continue to be rejected. Third, the Court of Federal Claims should be divested of jurisdiction to hear tax cases. These suggestions are developed below.

A. Tax Court Jurisdiction

The jurisdiction of the ancestors of the Tax Court initially was limited to deficiency actions, but the Tax Court's jurisdiction has expanded—piecemeal, but substantially—in ensuing decades. Nonetheless, holes remain in this patchwork quilt.

Almost all these holes should be filled. I propose that Congress grant the Tax Court nearly plenary jurisdiction over civil tax controversies. Discussed below are: (1) expansions of the Tax Court's jurisdiction beyond deficiency actions; (2) areas that remain outside the Tax Court's jurisdiction; (3) areas to which that jurisdiction should be expanded; and (4) limits on such expansion.

1. Historical Growth of Tax Court Jurisdiction

As discussed in Part II.B.3, what is now the United States Tax Court had its roots as an administrative agency, then morphed into an Article I court. As an Article I court, it is fundamental that "[t]he Tax Court is a court of limited jurisdiction and may exercise its jurisdiction only to the extent authorized by Congress."[303] The Tax Court does not have authority to enlarge upon its statutory grants of jurisdiction.[304]

Starting from its original deficiency jurisdiction, the Tax Court's jurisdiction has grown over the generations. In some instances, the Tax Court's new jurisdiction over particular types of actions is exclusive. In other instances, such jurisdiction is concurrent with that of the district courts or the Court of Federal Claims.

The Tax Court's expanded jurisdiction includes TEFRA actions,[305] Collection Due Process actions,[306] and jeopardy assessment review,[307]

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303. Kasper v. Commissioner, 137 T.C. 37, 40 (2011); *see also* Cohen v. Commissioner, 139 T.C. 299 (2012); Judge v. Commissioner, 88 T.C. 1175, 1180-81 (1987); Naftel v. Commissioner, 85 T.C. 527, 529 (1985).

304. *See, e.g.*, Phillips Petroleum Co. v. Commissioner, 92 T.C. 885, 888 (1989). This principle has had play in many areas, including whether the Tax Court has authority to apply equitable doctrines such as equitable recoupment. *See, e.g.*, Leandra Lederman, *Equity and the Article I Court: Is the Tax Court's Exercise of Equitable Powers Constitutional?*, 5 FLA. TAX REV. 357 (2001). It has since been confirmed that the Tax Court has such authority. I.R.C. § 6214(b).

305. I.R.C. §§ 6225(b), 6226(a), 6228(a)(1), 6234(c), 6246(b), 6247(a), 6252(a).

306. *Id.* § 6330(d); *see, e.g.*, Brian Isaacson & Karen Phu, *Jurisdiction in the Tax Court to Hear Section 6330 Challenges: A Need for Clarification*, PRAC. TAX LAW., Spring 2008, at 27; Carlton M. Smith, *The Tax Court Keeps Growing Its Collection Due Process Powers*, 133 TAX NOTES 859 (2011).

all of which are discussed in greater detail elsewhere in this Article. In addition, Congress has granted the Tax Court authority to issue declaratory judgments in a variety of contexts, including declaratory judgments as to qualification of certain retirement plans,[308] valuation of gifts,[309] tax-exempt status of state and local bonds,[310] eligibility for deferred payment of estate tax,[311] and eligibility of organizations for tax-exempt status.[312]

The Tax Court also has received jurisdiction to review a variety of other actions and determinations by the IRS. These include decisions as to interest abatement,[313] redetermination of interest assessed on deficiencies,[314] restraint of premature assessment or collection,[315] review of proposed sales of seized property,[316] determination of employment status of workers,[317] determinations of awards for tax whistleblowers,[318] review of transferee liability,[319] and IRS decisions not to grant equitable spousal relief.[320]

In general, the pace of expansions of the Tax Court's jurisdiction has accelerated. After slow growth for generations, such expansions have been occurring more often since the 1980s, inspired in part by the Taxpayer Rights movement.[321] The expansions have reflected the desire of Congress to enhance remedies for taxpayers, further judicial economy, and enhance procedural flexibility.[322]

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307. I.R.C. § 7429(b)(2); *see* TAX CT. R. 56.

308. I.R.C. § 7476(a).

309. *Id.* § 7477(a).

310. *Id.* § 7478(a).

311. *Id.* § 7479(a).

312. *Id.* § 7428(a).

313. *Id.* § 6404(h)(1).

314. *Id.* § 7481(c); *see* TAX CT. R. 261.

315. I.R.C. § 6213(a); *see* TAX CT. R. 55.

316. I.R.C. § 6863(b); *see* TAX CT. R. 57.

317. I.R.C. § 7436(a).

318. *Id.* § 7623(b)(4); *see, e.g.*, Cohen v. Commissioner, 139 T.C. 299, 304 (2012); Kasper v. Commissioner, 137 T.C. 37, 41 (2011).

319. I.R.C. § 6901(a).

320. *Id.* § 6015(e)(1)(A).

321. This movement included enactment of several Taxpayer Bills of Rights as well as pro-taxpayer sections in other measures. *See, e.g.*, Omnibus Taxpayer Bill of Rights, *enacted as* Tit. VI, Subtit. J of Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342, 3730; Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 (1996); Taxpayer Bill of Rights 3, *enacted as* Tit. III of Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685, 726.

322. *See, e.g.*, F. Brook Voght, *Amended Tax Court Rules Reflect New Jurisdiction and Goal of Increased Efficiency*, 73 J. TAX'N 404, 404 (1990).

2. Areas Where the Tax Court Lacks Jurisdiction

In the pre-assessment context, perhaps the most significant subject over which the Tax Court lacks jurisdiction is refund suits. When the Tax Court has acquired jurisdiction in a deficiency action, it might conclude that, not only is there no deficiency for the tax year(s) at issue, but also that there had been an overpayment for the year(s). The Tax Court has jurisdiction to determine such overpayment and to command that it be refunded.[323] The Tax Court does not, however, have jurisdiction to hear free-standing refund actions.

In the post-assessment context, the Tax Court's jurisdiction over collection matters is limited. In the main, it can hear some collection matters but only if a Collection Due Process case is properly before it.[324]

In addition, there are several categories of actions that Congress has authorized to be brought in district court but not in Tax Court. These include a wide variety of suits by the government in aid of enforcement,[325] taxpayer suits to contest assessable penalties,[326] suits by taxpayers and others to quash IRS summons or other information gathering,[327] and miscellaneous other taxpayer actions.[328]

3. Where to Expand Tax Court Jurisdiction and Where Not to Expand

The current jurisdiction of the Tax Court resembles a cloak with many holes of varying sizes. As seen above, the pattern is the product of history, not rationality. This hit-and-miss arrangement guarantees the existence of traps for the unwary. Taxpayers regularly discover

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323. I.R.C. §§ 6214(a), 6512(b); *see* TAX CT. R. 260.

324. I.R.C. § 6330.

325. *E.g.*, I.R.C. §§ 7323(a) (action to enforce forfeiture), 7402(a) (miscellaneous actions), 7403(a) (lien enforcement action), 7404 (estate tax enforcement action), 7405(a) (erroneous refund recovery action), 7407(a) (return preparer enforcement action), 7409(a)(1) (action to enjoin political expenditures), 7611(c)(2)(A)(ii) (government action as to church tax investigation).

326. *E.g.*, *id.* §§ 6679(b) (penalty for failure to file foreign returns), 6693(d) (penalty as to retirement accounts), 6694(c)(2) (preparer penalty), 6696(b) (review of penalties under §§ 6694, 6695, 6695A), 6698 (penalty for failure to file partnership return), 6699(d) (penalty for failure to file S corporation return), 6703(b), (c)(2) (penalties under §§ 6700, 6701, 6702), 6706(c) (original-issue-discount information penalty), 6707A(d)(2) (failure to rescind § 6707A penalty), 6713(c) (penalty as to disclosure by return preparer).

327. *E.g.*, *id.* §§ 982(c)(2)(B) (proceeding to quash formal document request), 6038A(e)(4)(C) (proceeding to quash summons as to foreign-owned corporations), 6038C(d)(4) (proceeding to quash summons as to foreign corporation engaged in a U.S. trade on business), 7609(h)(1) (action to quash third-party summons), 7611(c)(2)(A)(i) (taxpayer action as to church tax investigation).

328. *E.g.*, *id.* §§ 6402(g) (review of § 6402 reduction), 7426(a) (taxpayer and third party actions as to collection).

that they have no Tax Court remedy, despite the fact that the cause is a core tax matter and is well within the competence of the court.[329]

The logic behind creation of the Tax Court supports extending the court's jurisdiction. As seen in Part II.B.3 above, the Tax Court was created to bring special expertise to bear and to develop a nationally uniform body of tax law. Tax Court judges—by virtue of their pre-appointment backgrounds and their tax-only dockets—are more technically expert in tax than are the generalist judges of the district courts, the bankruptcy courts, and the partly-tax/partly-nontax Court of Federal Claims.

This expertise differential is not confined to deficiency cases. It extends, in varying degrees, to all tax matters. For example, there is no reason why the Tax Court should not be able to hear refund suits. The same substantive issues arise in both deficiency and refund suits. Some procedural issues are unique to refund cases.[330] However, many Tax Court judges are likely to have handled refund cases before their elevation to the bench, and most district court judges decide tax refund procedural issues quite rarely. The Tax Court already has refund jurisdiction incident to its deficiency jurisdiction.[331] It should have independent refund jurisdiction as well.

In addition, the Tax Court should have widespread jurisdiction as to tax collection controversies. Such controversies often do entail application of state property and other laws, for example, in the determination of the property interests possessed by the tax delinquent[332] and in assessing the validity and priority of competing claims of third parties.[333]

It is sometimes thought that district courts, which deal with state law more regularly, have an advantage over the Tax Court in this regard. However, practicing tax lawyers—which are what most Tax Court judges once were—are often required to work with state property laws.[334] Moreover, Tax Court judges routinely work with state

329. *See, e.g.*, Roberts v. Commissioner, 103 T.C.M. (CCH) 1787 (2012) (holding that the Tax Court lacks jurisdiction to review applications of overpayments made pursuant to § 6402); Adrianne Hodgkins, *Getting a Second Chance: The Need for Tax Court Jurisdiction Over IRS Denials of Relief Under Section 66*, 65 LA. L. REV. 1167, 1167 (2005) ("[I]f the taxpayer filed a separate return while living in a community property state, the Tax Court will not review of denial [sic] [joint-and-several liability] relief under section 66 of the Code because Congress failed to give the Tax Court jurisdiction over such denials.").

330. *See* RICHARDSON, BORISON & JOHNSON, *supra* note 9, ch. 9.

331. I.R.C. § 6214.

332. *See, e.g.*, Steve R. Johnson, *After* Drye*: The Likely Attachment of the Federal Tax Lien to Tenancy-by-the-Entireties Interests*, 75 IND. L.J. 1163, 1174-80 (2000); Steve R. Johnson, *Fog, Fairness, and the Federal Fisc: Tenancy-by-the-Entireties Interests and the Federal Tax Lien*, 60 MO. L. REV. 839, 855-68 (1995).

333. *See supra* Part II.B.6.

334. *See, e.g.*, Erwin N. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153, 1183-84 (1944).

property law in estate and gift tax cases, and often in income tax cases as well. Moreover, as noted in the preceding subpart, the expansion of the Tax Court's jurisdiction over the decades has given it experience with collection issues in many contexts. In particular, the thousands of Collection Due Process cases that the Tax Court has heard in the last fifteen years has exposed the court to numerous collection controversies.

Also, Part V.B below notes the phenomenon of "pure" APA tax suits. The Tax Court's expanded jurisdiction should include them. There would be relatively few such suits, and the Tax Court is being forced to learn and grapple with administrative law principles even in cases already within its jurisdiction.[335]

The expanded Tax Court jurisdiction should be concurrent, not exclusive. Such other courts as Congress has already designated, or may in the future designate, able to hear the various categories of cases should still be able to hear them. This proposal is not a stealth initiative; a stalking horse for eventually exclusive Tax Court jurisdiction.

I propose that the Tax Court have nearly plenary, not plenary, tax jurisdiction. I would reserve three areas. First, criminal tax cases should remain the exclusive province of the district courts, just as all criminal cases are. The Tax Court is and should remain a civil tribunal.

Second, I would keep Tax Court cases as taxpayer, not IRS, initiated events. As seen in Part III.A above, there is concern in some quarters that the Tax Court has a pro-IRS bias. That concern is misplaced, but it does exist. If the IRS were able to go into Tax Court to secure compulsive orders,[336] the concern would rise. The Primary Value of providing taxpayer remedies that are both fair and perceived to be fair could be compromised. To prevent this, the reform would give the Tax Court jurisdiction over taxpayer-initiated actions only.

Third, judicial review of jeopardy and termination assessments under § 7429[337] should continue to take place only in the district courts, not the Tax Court (except to the limited degree currently permitted).[338] A paramount need—a Primary Value need—in such review is expedition.[339] The district courts sit in ninety-five districts with divisions in multiple cities within the districts. The Tax Court sits only in Washington, D.C., except when it periodically sends out

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335. *See supra* Part II.B.12.

336. Such as summons enforcement orders, writs of entry, search warrants, promoter and preparer injunctions, and other types of writs and orders.

337. *See supra* Part II.B.7.

338. *See* I.R.C. § 7429(b)(2)(B).

339. Hence the short time frames for requesting review and for decision by the reviewing court. *See id.* § 7429(a)(1)(B), (b)(3).

judges to "ride circuit." District court can best provide the speedy resolution required by § 7429 at reasonable cost and convenience to taxpayers.

B. National Court of Tax Appeals

Discussion of the jurisdiction of the Tax Court—a tax specialist trial court—invites inquiry as to appellate level tax specialization. This involves a long-playing controversy.

Proposals often have been made to create a national court of tax appeals. Not surprisingly, the details of the proposals vary.[340] At the core, however, the idea is to centralize federal tax appeals—now heard by thirteen circuit courts—in a single, new tax appellate court. The decisions of the new court would be final absent Supreme Court certiorari review, legislative reversal, or regulatory reversal as sanctioned by the *Brand X* decision.[341]

This idea is most frequently associated with Dean Griswold,[342] but many others, including an impressive array of luminaries, have associated themselves with the proposal.[343] The eminence of the proponents, however, did not stifle opposition. The proposal has been decried with at least as much vigor as it has been urged.[344] The debate comes in and goes out like the tide but never is silent for too long.[345]

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340. The details of some of the early proposals, and of alternatives to them, are described by H. Todd Miller, Comment, *A Court of Tax Appeals Revisited*, 85 YALE L.J. 228 (1985). *See also* Gary W. Carter, *The Commissioner's Nonacquiescence: A Case for a National Court of Tax Appeals*, 59 TEMP. L.Q. 879 (1986).

341. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (holding that *Chevron*-entitled regulations can reverse prior contrary decisions of the lower federal courts).

342. Griswold, *supra* note 334.

343. The idea was advanced at least as early as 1925. Oscar E. Bland, *Federal Tax Appeals*, 25 COLUM. L. REV. 1013 (1925). Among other advocates, see Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 644 (1974); Charles L. B. Lowndes, *Taxation and the Supreme Court, 1937 Term: Part II*, 87 U. PA. L. REV. 165, 200 (1938); Stanley S. Surrey, *Some Suggested Topics in the Field of Tax Administration*, 25 WASH. U. L.Q. 399, 414-23 (1940); Roger John Traynor, *Administrative and Judicial Procedure for Federal Income, Estate and Gift Taxes—A Criticism and a Proposal*, 38 COLUM. L. REV. 1393 (1938).

344. *See, e.g.*, Montgomery B. Angell, *Procedural Reform in the Judicial Review of Controversies Under the Internal Revenue Statutes: An Answer to a Proposal*, 34 ILL. L. REV. 151 (1939); E. Barrett Prettyman, *A Comment on the Traynor Plan for Revision of Federal Tax Procedure*, 27 GEO. L.J. 1038, 1048-50 (1939); William A. Sutherland, *New Roads to the Settlement of Tax Controversies: A Critical Comment*, 7 LAW & CONTEMP. PROBS. 359, 360-61 (1940).

345. For a recent call for creation of the court, see Jasper L. Cummings, Jr., *Creation of National Appellate Tax Court Will Improve Tax Law*, *in* TOWARD TAX REFORM: RECOMMENDATIONS FOR PRESIDENT OBAMA'S TASK FORCE 30, 30-32 (Tax Analysts ed., 2009).

It is sometimes hoped that a tax-specialized appellate court would make decisions of higher quality.[346] However, decisional harmony and doctrinal clarity—there would be fewer inconsistent tax precedents—always has been the more heavily emphasized justification.[347]

Opponents of the idea discount the extent to which the tax law will be made more predictable.[348] They also assert that tax specialization would create its own problems, such as that the court would forfeit a valuable perspective by losing contact with the general law and would tilt in favor of the IRS.[349] The last of these objections—pro-IRS orientation—is a species of the well-known administrative law theory of "agency capture," the idea that when an agency (in this case the court) deals repeatedly with a party (usually the regulated industry; here the IRS), it comes to sympathize and identify with that party's needs and concerns.[350] These objections have thus far made the proposal politically nonviable.[351]

If a tax appellate court could be "captured" by the IRS, one would expect that the Tax Court already has been so captured. There is long-running disagreement about whether this has occurred. Some practitioners and commentators believe that the Tax Court favors the IRS,[352] and they point to studies suggesting that the IRS wins more often in Tax Court than in district court.[353]

I am convinced that this view is incorrect. The studies that may seem to hint at bias typically do not adequately control for differences between the types of cases and the types of taxpayers appearing in

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346. It is not obvious that a far higher caliber of decisions would ensue. "Tax law is undeniably complex, but [several justices without much pre-judicial tax experience] have demonstrated that it is not beyond the capacity of generalist judges and Justices to write thoughtful and sophisticated opinions in tax cases." Lawrence Zelenak, *The Court and the Code: A Response to* The Warp and Woof of Statutory Interpretation, 58 DUKE L.J. 1783, 1787 (2009).

347. *See, e.g.*, ROSWELL MAGILL, THE IMPACT OF FEDERAL TAXES 209 (1943).

348. Madaline Kinter Remmlein, *Tax Controversies—Where Goes the Time?*, 13 GEO. WASH. L. REV. 416 (1945).

349. *See* Robert N. Miller, *Can Tax Appeals Be Centralized?*, 23 TAXES 303 (1945).

350. *See generally* MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 87-90, 270 (1955); James M. Landis, S. SUBCOMM. ON ADMIN. PRACTICE & PROCEDURE, 86TH CONG., REP. ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 71 (Comm. Print 1960). *But see* Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 342 (1974) (arguing that "agency capture" lacks theoretical foundation and is unsupported by evidence).

351. *See, e.g.*, Cummings, *supra* note 345.

352. *See* Glenn Kroll, *Are Tax Court Judges Partial to the Government?*, 45 OIL & GAS TAX Q. 135, 136 (1996).

353. *See, e.g.*, Deborah A. Geier, *The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory*, 76 CORNELL L. REV. 985, 998 (1991).

Tax Court versus district court.[354] The better studies refute rather than confirm the Tax Court's alleged pro-IRS bias.[355]

Nonetheless, perceptions sometimes matter as much as (or even more than) reality. "Legislation concerning judicial organization throughout our history has been a very empiric response to very definite needs."[356] Those needs include widespread and stubborn misconceptions as well as accurate perceptions.

By the criteria adduced in this Article, we should continue to reject a national court of tax appeals. Such a court might contribute to efficiency and uniformity, although the extent of such contribution is difficult to estimate. But those are Second-Order Values, which yield to the Primary Value in most cases. The Primary Value includes remedies that are perceived to be fair, not just are in fact fair. Suspicion of the fairness of specialized tax tribunals is too widespread to be ignored. Confidence in the system is too important to risk.[357]

C. Court of Federal Claims Jurisdiction

As maintained above, the civil tax jurisdiction of the Tax Court should be expanded substantially. The tax jurisdiction of the Court of Federal Claims and the Federal Circuit should be abolished, however. Below, I first sketch the relevant history of these courts and then explain why abolition of their tax jurisdiction would promote the values identified in Part II.C above.

1. History

As noted in Part II.B.1, the United States Court of Claims—the original ancestor of the current Court of Federal Claims and the Federal Circuit—was created in 1855. Its jurisdiction was significantly expanded by the Tucker Act in 1887, granting the court nationwide

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354. *See, e.g.*, Robert M. Howard, *Comparing the Decision Making of Specialized Courts and General Courts: An Exploration of Tax Decisions*, 26 JUS. SYS. J. 135, 138 n.1 (2005). For example, there are more *pro se* taxpayers in Tax Court and more wealthy taxpayers in district court.

355. *See, e.g.*, James Edward Maule, *Instant Replay, Weak Teams, and Disputed Calls: An Empirical Study of Alleged Tax Court Judge Bias*, 66 TENN. L. REV. 351, 353 (1999).

356. FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 13 (photo. reprint 1993) (1927).

357. Tax-specialized courts—whether trial or appellate—are parts of a larger topic. There is a substantial and growing literature on specialized courts. *See, e.g.*, Lawrence Baum, *Probing the Effects of Judicial Specialization*, 58 DUKE L.J. 1667 (2009); Steve R. Johnson, *The Phoenix and the Perils of the Second Best: Why Heightened Appellate Deference to Tax Court Decisions Is Undesirable*, 77 OR. L. REV. 235, 235 & n.1, 236 & n.2 (1998) (citing sources). Thorough evaluation of proposals to create a national court of tax appeals should address this literature.

jurisdiction over most suits for monetary claims against the government, including claims for overpaid taxes.[358]

The jurisdiction of the Court of Claims and its successors was further expanded by subsequent enactments, so that the Court of Federal Claims now hears a wide array of matters, including claims for just compensation when the federal government takes private property, military and civilian compensation controversies, contract disputes, claims against the government for patent and copyright infringement, suits by Indian tribes, compensation claims for injuries attributed to specified vaccines, suits by disappointed bidders in federal procurements, and congressional references of legislative proposals for compensation of individual claims.[359]

Beginning in 1925, the Court of Claims' trial jurisdiction was vested in a separate trial function consisting of commissioners, review of which was available from the court's appellate judges (with the later possibility of certiorari review by the Supreme Court). In 1973, the commissioners were renamed the trial judges.[360]

The courts took their modern form in 1982 when the Court of Claims was split. The old court's trial jurisdiction was vested in a new Article I court: the United States Claims Court (later renamed the Court of Federal Claims). The old court's appellate jurisdiction was combined with that of the United States Court of Customs and Patent Appeals to comprise an Article III court: the United States Court of Appeals for the Federal Circuit.[361]

During 2006, the Court of Federal Claims had about 8700 cases on its docket, of which about 3100 involved the court's general jurisdiction and 5600 were vaccine cases.[362] The court had 302 tax cases pending as of October 2010 and 263 as of October 2011.[363] Sixty-one new tax cases were commenced in the court in 2010 and fifty-four in 2011.[364]

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358. 28 U.S.C. §§ 1346(c), 1491(a)(1) (2006).

359. *United States Court of Federal Claims: The People's Court*, U.S. CT. FED. CLAIMS, http://www.uscfc.uscourts.gov/sites/default/files/court_info/Court_History_Brochure.pdf (last visited Feb. 2, 2014). "In recent years, the Court's docket has been increasingly characterized by complex, high-dollar demand, and high profile cases in areas such areas as . . . the savings and loan crisis of the 1980s, the World War II internment of Japanese-Americans, and the federal repository of civilian spent nuclear fuel." *Id.* at 9-10.

360. *Id.* at 8.

361. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

362. *An Overview of the United States Court of Federal Claims*, U.S. CT. FED. CLAIMS, http://www.uscfc.uscourts.gov/sites/default/files/court_info/Court_History_Brochure.pdf (last visited Feb. 2, 2014).

363. STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2011 ANNUAL REPORT OF THE DIRECTOR 291.

364. *See id.* at 35.

In contrast, the number of tax cases commenced in district court in 2011 was 1194, in 711 of which the government was the plaintiff and in 481 of which the government was the defendant.[365] Both the Court of Federal Claims and district court totals are dwarfed by Tax Court cases: 29,720 Tax Court cases were started in 2011.[366]

2. Reasons for Change

The original acquisition of tax jurisdiction by the Court of Claims was a felicitous development. As shown in Parts II.B.1 and II.B.3 above, prepayment remedies did not yet exist and other refund remedies were underdeveloped. The subsequent development of Tax Court and district court channels of redress, however, has rendered superfluous the Court of Federal Claims tax jurisdiction. It should be abolished.

Some taxpayers and their representatives would oppose this reform. First, it is human nature—and especially lawyers' nature—to want as many options as possible. When the Tax Court and the relevant district court have rejected a particular argument, those who wish to press that argument take comfort in having a third available forum.

Second, the Court of Federal Claims possesses, or is believed to possess, certain useful characteristics. It has gained a reputation in some quarters as being a taxpayer-friendly tribunal.[367] Some consider it the forum of choice when the taxpayer has a weak case on the law—one likely to be rejected by the Tax Court.[368] And the court styles itself as the "keeper of the nation's conscience" and "the People's Court,"[369] so taxpayers with good litigating equities may view the court as an attractive forum.[370]

Nonetheless, the Primary Value does not counsel in favor of retaining the tax jurisdiction of the Court of Federal Claims. That value means that taxpayers should have remedies that both are fair and effective and are perceived to be fair and effective. That requirement

365. *Id.* at 127. New district court tax cases were 1522 in 2007, 1451 in 2008, 1306 in 2009, and 1190 in 2010. *Id.* at 130.

366. INTERNAL REVENUE SERVICE, DATA BOOK 61 (2011).

367. *See* Christopher R. Egan, *Checking the Beast: Why the Federal Circuit Court of Appeals is Good for the Federal System of Tax Litigation*, 56 SMU L. REV. 721, 725 (2003).

368. For example, before being reversed, the Court of Federal Claims was the only court to have held that the judicially crafted economic substance doctrine—the IRS's principal weapon against recent tax shelters—is illegitimate as a violation of the separation of powers doctrine. Coltec Indus., Inc. v. United States, 62 Fed. Cl. 716, 755-56 (2004), *vacated & remanded*, 454 F.3d 1340 (Fed. Cir. 2006).

369. *United States Court of Federal Claims: The People's Court*, *supra* note 359, at 1.

370. For instance, the court, on the basis of sparing taxpayers unnecessary expense, created a *de minimis* exception to the capitalization doctrine. Cincinnati, New Orleans & Tex. Pac. Ry. Co. v. United States, 424 F.2d 563 (Ct. Cl. 1970). The Tax Court rejected *Cincinnati Railway*. Alacare Home Health Servs., Inc. v. Commissioner, 81 T.C.M. (CCH) 1794 (2001).

is not synonymous, however, with affording taxpayers redundant options simply to multiply their convenience and advantages.

Under the federal tax litigation structure proposed by this Article, taxpayers would have prepayment opportunities in the Tax Court and, when bankruptcy jurisdiction exists, in the bankruptcy court. Taxpayers would have refund opportunities in the Tax Court, district court, and, when bankruptcy jurisdiction exists, in the bankruptcy court. The Primary Value does not require that taxpayers have yet another refund opportunity, this time in the Court of Federal Claims.

The Primary Value not being engaged, the matter turns on Second-Order Values. Removing one redundant level of refund litigation will decrease the potential for conflict among the courts, reducing forum shopping and increasing predictability and efficiency.

One of the reasons for creation of the Court of Federal Claims was development of a uniform body of law for cases within its jurisdiction.[371] That rationale works well as to the numerous areas, sketched above, in which the court has exclusive jurisdiction. Because of the multiplicity of alternative tax refund fora, however, the uniformity rationale would be better served in the tax area by abolishing the Court of Federal Claims' tax jurisdiction.[372]

If one tax forum is to be removed, which should it be? The Tax Court should be retained because of its expertise and its opportunity for prepayment review. The bankruptcy court should be retained because the tax issues of debtors are best handled as part of the total complexion of the debtor's situation. As between the district court and the Court of Federal Claims, the district court should be retained. Jury trials are possible in district court but not in the Court of Federal Claims.[373]

More importantly, district courts are Article III courts while the Court of Federal Claims is an Article I court. Thus, district court judges have life tenure while Court of Federal Claims judges have renewable fifteen-year terms (like Tax Court judges).[374] Those suspicious that courts may favor the IRS are more likely to see the district court as the more vigilant sentinel.

Accordingly, the Primary Value reinforces the Second-Order Values. We should dispense with the tax jurisdiction of the Court of Fed-

371. *An Overview of the United States Court of Federal Claims*, *supra* note 362.

372. *See, e.g.*, Martin D. Ginsburg, Commentary, *The Federal Courts Study Committee on Claims Court Tax Jurisdiction*, 40 CATH. U. L. REV. 631, 635-36 (1991).

373. Jury trials are not the norm in tax cases. But they are fairly common in cases involving the trust fund recovery penalty under § 6672, and they occasionally are used in refund cases involving other issues, *e.g.*, Scriptomatic, Inc. v. United States, 74-1 U.S. Tax Cas. (CCH) ¶ 9246, 33 A.F.T.R.2d (RIA) 827 (E.D. Pa. 1973), *aff'd*, 555 F.2d 364 (3d Cir. 1977) (§ 385 case).

374. 28 U.S.C. § 172 (2006).

eral Claims. That court would be left with the heavy workload and the important duties entailed with the other types of cases, described above, that comprise its jurisdiction.

IV. REFORMS AS TO AVAILABLE FORMS OF ACTION

The prior Part advanced proposals as to the courts that should be available to hear federal tax disputes. This Part addresses the forms of actions and the kinds of relief that should be available regardless of the court.

I propose two such changes. First, the TEFRA partnership audit and litigation rules enacted in 1982 have proved to be more harmful than beneficial. In the main, they should be repealed. This would return us to partner-level audit and litigation, with some collateral rules to promote efficiency.

Second, among the major products of the IRS Restructuring and Reform Act of 1998 were the Collection Due Process ("CDP") rules. In the main, these rules have entailed great expenditure of effort and resources by taxpayers, the IRS, and the courts without producing commensurate genuine and lasting benefits for taxpayers. Some commentators have urged abolition of the CDP regime. This Article does not go that far. It proposes reducing the scope of, but not eliminating, judicial review of CDP decisions by the IRS Appeals Office.

A. TEFRA Rules

When originally enacted, the rules governing taxation of partnerships and their partners were intended to be, and largely were, simple, in order to facilitate the flexibility partnerships offer for non-tax purposes. These rules are, in the main, embodied in Subchapter K of Chapter 1 of the Code. Over time, Subchapter K has become anything but simple, both because of unresolved tensions in its original design and because—flexibility being the spawning ground of creative tax planning[375]—Congress has superimposed numerous complex étages of anti-abuse on the originally simple edifice.[376] In my view, the game is no longer worth the candle. Some others and I have advocated the

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375. "A partnership is a magic circle. Anything that is dropped into it becomes exempt from taxation. Forever. . . . Adherents to this view of subchapter K understand the word 'flexible' to mean that you can do absolutely anything you want without incurring tax." Lee A. Sheppard, *Partnerships, Consolidated Returns and Cognitive Dissonance*, 63 TAX NOTES 936, 936 (1994).

376. *See, e.g.*, Lawrence Lokken, *Taxation of Private Business Firms: Imagining a Future Without Subchapter K*, 4 FLA. TAX REV. 249, 250 (1999) ("Subchapter K is a mess."); Andrea Monroe, *What's in a Name: Can the Partnership Anti-Abuse Rule Really Stop Partnership Tax Abuse?*, 60 CASE W. RES. L. REV. 401, 402 (2010) ("Partnership taxation is a disaster.").

abolition of Subchapter K, leaving S corporations as the Code's principal "pass-through" form.[377]

This radical suggestion is unlikely to be adopted any time soon, however. Thus, we should direct our attention to a lesser reform: the abolition of the bulk of the TEFRA regime. Others[378] and I[379] have advocated this reform previously, but additional persuasion will be required to forge an effective consensus.

There are two reasons for ending the principal aspects of the TEFRA rules. First, the TEFRA rules are unnecessary. The circumstances causing creation of the regime in 1982 no longer exist. Second, the TEFRA rules have proved to be harmful. From far promoting clarity, consistency, and efficiency in resolving partnership related controversies, the TEFRA rules have undermined these values.

1. Unnecessary

There is some question as to whether the TEFRA rules truly were needed by the time of their enactment in 1982,[380] but let us assume they were. That necessity has evaporated as a result of post-1982 developments.

In 1986, Congress enacted § 469, the passive activity loss rules, and strengthened the § 465 at-risk rules. Section 469 especially struck at the core of tax shelter marketing. It prevented taxpayers from using losses from passive activities (tax shelters) to offset their income from other sources.[381] It was no longer necessary to examine tax shelters individually and to disallow their alleged benefits on technical or substantive grounds.

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377. *See* Steve R. Johnson, *The E.L. Wiegand Lecture: Administrability-Based Tax Simplification*, 4 NEV. L.J. 573, 589-96 (2004); Philip F. Postlewaite, *I Come to Bury Subchapter K, Not to Praise It*, 54 TAX LAW. 451 (2001).

378. *See, e.g.*, Peter A. Prescott, *Jumping the Shark: The Case for Repealing the TEFRA Partnership Audit Rules*, 11 FLA. TAX REV. 503 (2011); Burgess J.W. Raby & William L. Raby, *TEFRA Partnership Rules: The Solution Becomes the Problem*, 88 TAX NOTES 795 (2000); *see also* N. Jerold Cohen & William E. Sheumaker, *When It's Broke, Fix It! It's Time for TEFRA Reform*, 136 TAX NOTES 815 (2012) (expressing concerns about the TEFRA rules but stopping short of urging their repeal).

379. Johnson, *supra* note 377, at 596-602; Steve R. Johnson, Letter to the Editor, *TEFRA: No Fix Possible, Just Get Rid of It!*, 136 TAX NOTES 964 (2012).

380. In the time before Congress acted in 1982, the IRS and the courts developed improved techniques for identifying, processing, and managing tax shelter cases. *See* Johnson, *supra* note 377, at 601. Of course, in the decades since 1982, technological capacities have improved greatly, further undermining the bureaucratic necessity of the TEFRA rules. *See* Prescott, *supra* note 378, at 562-64.

381. *See generally* Boris I. Bittker, Martin J. McMahon, Jr. & Lawrence A. Zelenak, *A Whirlwind Tour of the Internal Revenue Code's At-Risk and Passive Activity Loss Rules*, 36 REAL PROP., PROB. & TR. J. 673 (2002); Robert J. Peroni, *A Policy Critique of the Section 469 Passive Loss Rules*, 62 S. CAL. L. REV. 1 (1988); Lawrence Zelenak, *When Good Preferences Go Bad: A Critical Analysis of the Anti-Tax Shelter Provisions of the Tax Reform Act of 1986*, 67 TEX. L. REV. 499 (1989).

As a result and in short order, the old tax shelter market collapsed. After some years, shelter promoters found new strategies, and new tax shelter vehicles were marketed in the 1990s and early 2000s. Critically, however, that second wave differed fundamentally from the first wave, in ways that makes the TEFRA rules obsolete. Before 1986, shelters were mass marketed to upper middle class as well as rich taxpayers—thousands of shelters, most of which were sold to scores or hundreds of "investors" each. Now, shelters are rifle shots, not shotgun blasts. There are far fewer of them, and typically each shelter partnership or LLC has only a few "investors," mainly large corporations or extremely high-wealth individuals, who are likely to be audited in any event. The audit and litigation challenges posed by current shelters are barely a shadow of challenges posed by pre-1986 shelters.

Moreover, investors in current shelters typically can avoid the TEFRA regime if they wish. In general, the regime does not apply to "any partnership having 10 or fewer partners each of whom is an individual . . . , a C corporation, or an estate of a deceased partner."[382] Since very few current tax shelter partnerships have over 10 investors, the TEFRA regime adds little to the IRS's ability to combat current shelters.

This observation leads to a broader point about the demography of partnerships. At the "small" end of the spectrum, the TEFRA rules have little applicability as a result of the "10 or fewer partners" exception.[383] Depending on the year studied, partnerships have on average only five or six partners,[384] well within the exception. At the "large" end of the spectrum, "electing large partnerships" with 100 or more partners and "publicly traded partnerships" (which may have thousands of partners) also are outside of TEFRA.[385] Thus, TEFRA is potentially meaningful only in the middle of the partnership spectrum, but that middle is not densely populated. Less than ten percent

382. I.R.C. § 6231(a)(1)(B)(i). This exclusion, if applicable, is automatic unless the partnership affirmatively elects into TEFRA treatment. *Id.* § 6231(a)(1)(B)(ii). Many current shelters do elect in. At least sometimes, this decision is motivated by the harms caused by TEFRA described in the following subpart. In a number of important respects, the TEFRA rules are unpredictable in their application, so electing into TEFRA treatment gives the taxpayers additional opportunities to prevail if the IRS "messes up" or guesses incorrectly how the reviewing court eventually will interpret TEFRA's requirements.

383. This exception has been in the TEFRA rules from the start, and Congress has shown little inclination to repeal or modify it. *Id.* § 6231(a)(1)(B).

384. *See* Prescott, *supra* note 378, at 558.

385. Electing large partnerships are outside of TEFRA under I.RC. § 6240(b)(1). With narrow exceptions, publicly traded partnerships are treated as corporations for federal tax purposes and so are outside of TEFRA. *Id.* § 7704.

of partnerships are in this range,[386] and, as noted above, current tax shelter partnerships typically are not there.

In the main, therefore, the TEFRA procedures are dispensable. There are three particular rules that should be retained, though. First, in general, partners are required on their returns to treat items derived from partnerships consistently with the way those items are treated on the partnership's return.[387] Inconsistency allows the IRS to automatically assess any resulting deficiency[388] and may expose the partner to a penalty.[389]

Second, if the IRS settles some or all partnership items with some partners, the other partners are generally entitled to settle their items on similar terms.[390] Both of these consistency rules—the consistent reporting rule and the consistent settlement rule—advance the Second-Order Value of process efficiency and should be retained.

Third, § 6229 sets out limitation periods for IRS assessment of partnership items. There was initial uncertainty as to the relationship between these periods and the general assessment limitation periods prescribed by § 6501. It is now settled that the § 6229 rules may extend the period allowable under § 6501 but may not contract it.[391] This rule too should be retained to protect audits in case of late filed partnership returns.[392]

2. Harmful

The preceding subpart mentioned unresolved tensions in the original design of Subchapter K. A principal tension involves the "entity versus aggregate" question: are partnerships entities separate from their owners or are they mere aggregates of the activities of their owners?[393] Creating unending confusion on specific substantive issues, Subchapter K sometimes applies an entity approach, some-

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386. In 2011, slightly over 3,285,000 partnerships filed returns with the IRS. Slightly over 3,082,000 of them (93.8% of the total) had under ten partners. Rob DeCarlo, Lauren Lee & Nina Shumofsky, Internal Revenue Service, *Partnership Returns, 2011*, STAT. OF INCOME BULL., Fall 2013, at 81, 83 fig. C.

387. I.R.C. § 6222(a). Deviation is permitted, however, when the partner specifically notifies the IRS. *Id.* § 6222(b).

388. *Id.* § 6222(c).

389. *Id.* § 6222(d).

390. *Id.* § 6222(c)(2).

391. *See* Andantech L.L.C. v. Commissioner, 331 F.3d 972 (D.C. Cir. 2003).

392. I have argued that repeal of the main TEFRA rules should not create problems for the IRS auditing partnership items within I.R.C. § 6501's statute of limitations. Nonetheless, should Congress harbor concern on this score, it could amend § 6229 to extend the limitations period. *Cf.* I.R.C. § 6901(c)(1), (2) (extending the limitations period with respect to transferee liability).

393. *See, e.g.*, Bradley T. Borden, *Aggregate-Plus Theory of Partnership Taxation*, 43 GA. L. REV. 717, 719 (2009).

times an aggregate approach, and sometimes a mixed entity-aggregate approach.[394]

TEFRA—a mix of the aggregate and entity approaches—extends that confusion to the procedural realm. This tension is responsible for many ambiguities and inefficiencies in the TEFRA rules. They showed up early in numerous cases, many of which the IRS lost. Undoubtedly, the TEFRA rules sometimes resulted in the government being able to assess and collect amounts it would otherwise have lost. Equally undoubtedly, however, in other cases the IRS lost money because it construed the TEFRA rules in ways the courts later held to be erroneous. Neither side of this revenue ratio ever has been (nor, probably, can it ever be) reliably quantified, so we do not know the extent to which TEFRA succeeded in its fiscal objectives, or even whether it succeeded at all.

Even more troubling than the immense confusion the TEFRA rules spawned early on is the fact that great confusion and dysfunction as to them persist even today. In an *en banc* opinion, the Tax Court noted the "distressingly complex and confusing" nature of TEFRA rules.[395] Similarly, the Treasury has acknowledged that the TEFRA rules sometimes "generate[] complex and burdensome procedural issues that do not contribute to the determination of the [partners'] tax liabilities."[396]

A trifurcation at the core of TEFRA is the source of many of these problems. For TEFRA purposes, one needs to distinguish among partnership items, non-partnership items, and affected items. Partnership items are items "more appropriately determined at the partnership level than at the partner level."[397] Examples include each partner's share of the partnership's income, gain, loss, deductions, credits, non-deductible expenditures, and liabilities.[398] Penalties also are partnership items to the extent that they relate to partnership items.[399] Affected items are not partnership items but are influenced in their availability or extent by partnership items.[400] Examples include items that vary in accordance with the partner's income,

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394. *See* ROBERT J. PERONI, STEVEN A. BANK & GLENN E. COVEN, TAXATION OF BUSINESS ENTERPRISES: CASES AND MATERIALS 1002-04 (3d ed. 2006).

395. Rhone-Poulenc Surfactants & Specialties, L.P. v. Commissioner, 114 T.C. 533, 540 (2000); *see also* Shamik Trivedi & Jeremiah Coder, *TEFRA Raises Complex Jurisdictional Issues, Judge Says*, 135 TAX NOTES 985 (2012) (reporting remarks of Tax Court Judge Mark V. Holmes).

396. Tax Avoidance Transactions, 74 Fed. Reg. 7205, 7206 (proposed Feb. 13, 2009) (to be codified at 26 C.F.R. pt. 301) (proposing new regulations under § 6231).

397. I.R.C. § 6231(a)(3).

398. Treas. Reg. § 301.6231(a)(3)-1(a)(1).

399. I.R.C. § 6221.

400. *Id.* § 6231(a)(5).

a partner's basis in her partnership interest, and a partner's at-risk limitation.[401]

Even when the rules are clear, the potential for inefficiency is considerable. Partnership items are determined in TEFRA proceedings.[402] Nonpartnership items are determined in separate, traditional partner-level deficiency proceedings. Affected items are determined after the partnership adjustments have been resolved, sometimes through automatic computational adjustments and other times through deficiency procedures.[403] Thus, when a partner's individual return for a given year includes both partnership and non-partnership items, multiple separate proceedings can be required before the partner's correct tax liability for the year is established with finality.

Similarly, assume the partnership engages in a transaction that the IRS finds abusive. Assume further that both the partnership and a particular partner obtained legal opinions supporting the transaction's tax legitimacy. When the reasonable reliance defense is raised against the penalties asserted by the IRS,[404] it will have to be litigated in two separate cases. Reasonable reliance based on the opinion obtained by the partnership is a partnership item that must be determined in a TEFRA proceeding. Reasonable reliance based on the opinion obtained by the partner is an affected item that must be determined outside the TEFRA case.[405] Every first-year law student is told that our legal system abhors claim splitting. TEFRA requires it.

All of this inefficiency is compounded by the fact that the demarcations TEFRA requires are often difficult to make. In many situations, there can be reasonable disagreement as to whether an item is a partnership, non-partnership, or affected item. If a party makes the wrong choice and commences a proceeding on the wrong track, the court will lack jurisdiction. Numerous recent cases have tested such TEFRA jurisdictional issues, often with surprising results.[406]

Under the trifurcation central to TEFRA, "[t]he potential for overlapping effects and hidden boomerangs is mind-numbing."[407] And, of

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401. Treas. Reg. § 301.6231(a)(5)-1.

402. I.R.C. § 6221.

403. *See, e.g.*, N.C.F. Energy Partners v. Commissioner, 89 T.C. 741, 744 (1987); Treas. Reg. § 301.6231(a)(6)-1(a)(1).

404. *See* I.R.C. § 6664(c)(1).

405. *See* Treas. Reg. § 301.6221-1(d).

406. *See* Petaluma FX Partners, LLC v. Commissioner, 591 F.3d 649, 650-51, 656 (D.C. Cir. 2010); Tigers Eye Trading, LLC v. Commissioner, 138 T.C. 67 (2012); *see also* Karen C. Burke & Grayson M.P. McCouch, *Reflections on Penalty Jurisdiction in* Tigers Eye, 136 TAX NOTES 1581 (2012).

407. F. Brook Voght, Frederick H. Robinson & Michael E. Baillif, *New Rules for TEFRA Partnerships Provide More Flexibility in Resolving Disputes with the IRS*, 88 J. TAX'N 279, 279-80 (1998).

course, this is not the only source of the uncertainties and inefficiencies TEFRA has engendered.[408]

In short, the harms of the TEFRA partnership audit and litigation rules now exceed the regime's benefits. In 1982, TEFRA-like procedures also were enacted for S corporations.[409] They were repealed in 1996, however.[410] We should learn that lesson in the partnership context as well.

B. Judicial Review of CDP Determinations

The Collection Due Process rules were enacted as part of the RRA blizzard of reforms, discussed in Part II.B.10 above. They were not the most ballyhooed aspect of the RRA at the time, but they have proved to be the most consequential and controversial.[411]

Before enactment of the CDP rules, once tax had been properly assessed and notice and demand for payment had been made, the IRS was permitted to file notice of the tax lien and to levy on the taxpayer's property with minimal statutory hurdles to jump. The CDP rules create speed bumps. Now, within five days after the IRS files notice of the lien[412] or not less than thirty days before levy is effected,[413] the IRS is required to notify the taxpayer of its action or intended action. Among other things, the notice explains the nature of the IRS action and the taxpayer's rights, including the right to administrative hearing. The taxpayer has thirty days from the issuance of the notice to request review by the IRS Appeals Office.[414] The request operates to stay IRS collection action and also to stay the running of the statute of limitations on collection.[415]

Appeals Office CDP hearings are conducted informally.[416] What matters may be considered at the Appeals Office hearing? First, the Appeals Officer is required to verify that the IRS Collection Division has complied with applicable statutory and regulatory provisions.[417]

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408. *See, e.g.*, Raby & Raby, *supra* note 378, at 795 (noting the persistence of TEFRA statute of limitations uncertainties nearly two decades after TEFRA's enactment).

409. Subchapter S Revision Act of 1982, Pub. L. No. 97-354, § 4(a), 96 Stat. 1669, 1691-92 (formerly codified at I.R.C. §§ 6221-6245).

410. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1307(c)(1), 110 Stat. 1755, 1781.

411. Tens of thousands of CDP hearing requests are made each year. Danshera Cords, *Collection Due Process: The Scope and Nature of Judicial Review*, 73 U. CIN. L. REV. 1021, 1022 n.7 (2005).

412. I.R.C. § 6320(a)(2)(C).

413. *Id.* § 6330(a)(2)(C).

414. *Id.* § 6330(a)(3)(B).

415. *Id.* § 6330(e). Normally, IRS efforts to collect unpaid taxes become time-barred ten years after assessment. *Id.* § 6502(a).

416. *See* Treas. Reg. § 601.106(c).

417. I.R.C. § 6330(c)(1).

Second, the taxpayer may raise "any relevant issue relating to the unpaid tax or the proposed levy, including—(i) appropriate spousal defenses; (ii) challenges to the appropriateness of collection actions; and (iii) offers of collection alternatives . . . ."[418] Third, the taxpayer may contest the underlying tax liability if she "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability."[419]

The CDP rules expressly recognize the tension between revenue collection and taxpayer protection. Congress directed Appeals Officers to determine in their resolution of the matter "whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary."[420]

If the taxpayer is dissatisfied with the Appeals Office's determination, she may appeal within thirty days to the Tax Court.[421] The standard of review is *de novo* when the underlying tax liability is properly at issue and abuse of discretion when it is not.[422]

Despite its beguiling name (who could possibly be against due process in collection?), CDP was controversial from the start. A lively debate has gone on for years, with knowledgeable, passionate, and eloquent champions on both sides.[423] Defenders see the judicial review component of CDP as "a step in the progression of the rule of law principles that came to permeate twentieth century legal culture."[424] Detractors find it "an outstanding regulatory failure" that "likely hurts those who most need its promised protection from arbitrary agency action," and argue that CDP demonstrates how "adversarial process, used in the wrong place and the wrong time, becomes a rule of deception rather than a rule of law."[425]

There is little question that CDP has been extremely expensive in terms of the Second-Order Value of efficiency. The many tens of thousands of CDP cases claim substantial resources from the IRS

418. *Id.* § 6330(c)(2)(A).

419. *Id.* § 6330(c)(2)(B).

420. *Id.* § 6330(c)(3)(C).

421. *Id.* § 6330(d)(1).

422. H.R. REP. NO. 105-599, at 266 (1998) (Conf. Rep.).

423. *See, e.g.*, [2004] 1 NAT'L TAXPAYER ADVOCATE ANN. REP. 226-45, 451-70, 498-510 (discussing critiques of CDP and proposals for its reform). The debate between Professor Leslie Book and Bryan Camp identified key issues. Bryan Camp & Leslie Book, *Point & Counterpoint: Should Collection Due Process Be Repealed?*, 24 A.B.A. SEC. TAX'N NEWS Q. 11 (2004).

424. Leslie Book, *The Collection Due Process Rights: A Misstep or a Step in the Right Direction?*, 41 HOUS. L. REV. 1145, 1161 (2004).

425. Bryan T. Camp, *The Failure of Adversarial Process in the Administrative State*, 84 IND. L.J. 57, 57-58 (2009).

and the Tax Court. They also delay collection and, by extending the collection limitations period, postpone the day of repose.[426]

These costs have not been justified by appreciable gains to the Primary Value of taxpayer protection. First, the IRS wins the overwhelming majority of CDP cases.[427] Second, most of the relatively few taxpayer "wins" are victories in name only. They result in recommital of the case to the administrative process, with the taxpayer's ultimate position often benefitted little at the end of the day. Third, the deferential abuse-of-discretion standard of proof may cause losing taxpayers to feel they did not receive a fair day in court.

Another problem is that CDP litigation mixes and confuses the executive and judicial roles. The Executive Branch (in this case, the IRS) applies the law. The courts exist to make sure the IRS follows the law, not to interfere with the IRS's exercise of administrative discretion or second-guess the choices the IRS made among options legally available to it.[428] The notoriously loose standards for judicial review of Appeals Office CDP determinations[429] can tempt the reviewing court to overstep its legitimate role. The Tax Court sometimes displays a regrettable tendency to operate as a self-appointed superintendent of tax administration.[430] That is properly the role of Congress, the Treasury, and the IRS Oversight Board, not of a court of law,[431] except when Congress expressly provides to the contrary.[432]

426. One sorry aspect of this has been the use (or abuse) of CDP by tax defiers (the now in-vogue name for those once called "tax protestors") to delay the system through assertion of worthless arguments. *See* Steve Johnson, *The 1998 Act and the Resources Link Between Tax Compliance and Tax Simplification*, 51 U. KAN. L. REV. 1013, 1061 (2003) (proposing changes to reduce this problem).

427. *See* Camp, *supra* note 425, at 57 (noting, as of 2009, that "[o]f the over sixteen million collection decisions made since 2000, courts have reviewed at most 3,000 and have reversed only sixteen").

428. For an example of a court overstepping its role—and later having to retract its excesses—see Fidelity Equip. Leasing Corp. v. United States, 462 F. Supp. 845 (N.D. Ga. 1978), *vacated in part*, 81-1 U.S. Tax Cas. (CCH) ¶ 9319 (N.D. Ga. 1981) (§ 7429 case).

429. *See, e.g.*, Cords, *supra* note 411, at 1024 (arguing that judicial review of CDP determinations "is an unsettled and problematic area of law because it lacks clear direction from Congress").

430. *See, e.g.*, Rauenhorst v. Commissioner, 119 T.C. 157, 169-73 (2002) (holding the IRS to a position expressed in previous Revenue Rulings despite the fact that Revenue Rulings do not have the force of law); Walker v. Commissioner, 101 T.C. 537, 550-51 (1993) (same).

431. The Tax Court has struggled for generations to be recognized as a court, not an agency. *See, e.g.*, DUBROFF, *supra* note 28, at 165-215.

432. For example, the IRS is authorized to relieve spouses of the normal joint and several liability as to joint income tax returns when "taking into account all the facts and circumstances, it is inequitable to hold the individual liable." I.R.C. § 6015(f)(1). Persons denied such relief by the IRS may bring an action in Tax Court. In such action, the Tax Court may "determine the appropriate relief." *Id.* § 6015(e)(1)(A). Two courts have held that this provision empowers the Tax Court to go outside the administrative record and proceed *de novo* in determining the demands of equity. Wilson v. Commissioner, 705 F.3d 980, 987

Despite these problems, I do not join those who call for complete repeal of the CDP rules. These rules have been salutary in at least one respect. In recent years, "the IRS has implemented procedures and controls significantly improving [its] compliance with legal and internal guidelines" applicable to its seizure of property to satisfy tax debts.[433] This is the wholesome product of spotlights on IRS derelictions cast by Congressional oversight, reports by the National Taxpayer Advocate,[434] investigations by the Treasury Inspector General for Tax Administration,[435] and—yes—by the CDP process. CDP hearings and litigation act as a tripwire alerting the IRS to, and prodding it to correct, its breaches of tax collection rules.

Based on the foregoing, I propose two changes to CDP. First, the current rule—§ 6330(c)(2)(A)(iii)—that authorizes consideration of collection alternatives offered by the taxpayer should be amended. Taxpayers should still be able to present such alternatives to the Appeals Office. However, the Appeals Office's decision with respect to such alternatives should no longer be judiciary reviewable.

Second, the current rules—§ 6330(c)(1) and § 6330(c)(2)(A)(ii)—that require verification of and permit challenges to collection procedures should be amended. Only failures to follow procedures required by a statute or regulation should be judicially reviewable. Failures to follow lesser requirements—such as those set out in the Internal Revenue Manual—should be fodder for administrative review (to serve the tripwire function) but not for judicial review.[436]

V. REFORM AS TO PREREQUISITE TO SUIT

A. Flora *"Full Payment" Rule*

We need not explore whether the majority or the dissenters in *Flora II* had the better of the statutory construction argument. Our inquiry is whether the full payment rule is wise as a matter of policy.

(9th Cir. 2013); Commissioner v. Neal, 557 F.3d 1262, 1263-64 (11th Cir. 2009). The *Neal* court expressly distinguished the language of § 6015(e) from that of § 6330(d)(1). *Neal*, 557 F.3d at 1276. *But see id.* at 1287 (Tjoflat, J., dissenting) ("Today, the court has given the Tax Court the authority to second-guess the Commissioner at its whim . . . .").

433. TREASURY INSPECTOR GEN. FOR TAX ADMIN., FISCAL YEAR 2011 REVIEW OF COMPLIANCE WITH LEGAL GUIDELINES WHEN CONDUCTING SEIZURES OF TAXPAYERS' PROPERTY 3 (2011).

434. *See* I.R.C. § 7803(c)(2)(B).

435. *See id.* § 7803(d)(1)(A), (B).

436. *Cf.* United States v. Caceres, 440 U.S. 741, 756-57 (1979) (holding that the exclusionary rule does not prevent use of evidence obtained in violation of procedures set out in the Internal Revenue Manual); *see also* Sandin v. Conner, 515 U.S. 472, 487 (1995) (holding that an agency regulation—a state prison regulation—did not create a protected liberty interest entitling the affected prisoner to procedural due process protections).

I join those who believe that it is not.[437] I.R.C. § 7422 and 28 U.S.C. § 1346(a) should be amended to permit refund suits to be brought even upon partial payment of the assessed liabilities.

The full payment rule traduces the Primary Value: it blunts the efficacy of taxpayer remedies. A full payment requirement shuts the courthouse door to some taxpayers who have reasonable claims that they overpaid their taxes. The *Flora II* dissenters explained this consequence of a full payment rule:

> Where a taxpayer has paid, upon a normal or a "jeopardy" assessment, either voluntarily or under compulsion of distraint, a part only of an illegal assessment and is unable to pay the balance within the two-year period of limitations, he would be deprived of any means of establishing the invalidity of the assessment and of recovering the amount illegally collected from him, unless it be held . . . that full payment is not a condition upon the jurisdiction of District Courts to entertain suits for refund. Likewise, taxpayers who pay assessments in installments would be without remedy to recover early installments that were wrongfully collected should the period of limitations run before the last installment is paid.[438]

It is impossible to quantify the extent of this problem, but one fact is certain and two facts are probable. It is certain that some taxpayers experience the problem. It is probable that some of those taxpayers experience significant economic distress when the problem hits them. And it is probable that enough taxpayers experience enough hardship that this concern is worth addressing. The four *Flora II* dissenters certainly thought so. They referred to "great hardships," "harsh injustice," and a "grossly unfair and . . . shockingly inequitable result."[439] Commentators have echoed the concern.[440]

The *Flora I* majority conceded that "the requirement of full payment may in some instances work a hardship."[441] The *Flora II* major-

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437. *See, e.g.*, Thomas Vance McMahan, Note, *Income Tax—Federal Tax Court—Election of Remedies—Federal District Court Lacks Jurisdiction of Suit for Refund of Income Tax Payments Which Do Not Discharge Taxpayer's Entire Assessment.* Flora v. United States*, 362 U.S. 145 (1960)*, 39 TEX. L. REV. 353, 355 (1961) ("Viewed from a policy standpoint[,] . . . [the *Flora II* Court] chose the less desirable of the two [options].").

438. *Flora II*, 362 U.S. 145, 195-96 (1960) (Whittaker, J., dissenting) (footnotes omitted). A refund claim must be made within the later of three years after the return was filed or two years after the tax was paid. I.R.C. § 6511(a). If the three-year period applies, the amount that can be refunded is generally limited to the amount paid within three years before the claim is made. *Id.* § 6511(b)(2)(A). If the two-year period applies, the amount that can be refunded is limited to the amount paid within two years before the claim is made. *Id.* § 6511(b)(2)(B); *see also id.* § 6532(a)(1).

439. *Flora II*, 362 U.S. at 195 & n.22, 198 (Whittaker, J., dissenting).

440. *See, e.g.*, McMahan, *supra* note 437, at 355; J.Q. Riordan, *Must You Pay Full Tax Assessment Before Suing in the District Court?*, 8 J. TAX'N 179, 181 (1958); Carlton Smith, *Let the Poor Sue for Refund Without Full Payment* (Benjamin N. Cardozo Sch. of Law, Working Paper No. 256, 2009), *available at* http://ssrn.com/abstract=1354145.

441. *Flora I*, 357 U.S. 63, 75 (1958).

ity sought to alleviate the concern by maintaining that the taxpayer so harmed should have challenged the IRS adjustments before assessment in the Tax Court. "If he permits his time for filing such an appeal [to the Tax Court] to expire, he can hardly complain that he has been unjustly treated, for he is in precisely the same position as any other person who is barred by a statute of limitations."[442]

This is not a full answer to the problem. First, as proposed in Part III.A above, this Article would expand the Tax Court's jurisdiction. Under current law, however, the Tax Court does not have deficiency jurisdiction over all types of federal taxes.[443]

Second, the taxpayer may not have realized until after expiration of the Tax Court petition period[444] that the adjustments proposed by the IRS are legally questionable. For example, the IRS's adjustment may have appeared correct initially but was cast into doubt by a decision handed down after the Tax Court petition period lapsed. Or, the adjustment may have been dubious from the start, but the taxpayer received bad advice from her lawyer or accountant, the error of which was discovered only after the petition period ended.

Third, the taxpayer may have been unaware that a notice of deficiency had been issued, and thus unaware that the clock had started to run on a Tax Court petition. This is especially possible for poor taxpayers—the very ones least likely to be able to satisfy a full payment prerequisite. One highly regarded director of a low-income taxpayer clinic reported:

> In my experience, some common reasons why the poor fail to receive the notice [of deficiency] are: First, the poor tend to move frequently, failing to notify either the IRS or the Post Office of address changes—particularly in cases of eviction. Second, they often live in group housing situations where their names are not on the mailbox, so either the Postal Service employees do not deliver the certified notices or another household member picks up the notice but fails to give it to the taxpayer. Third, their mail is often stolen from mailboxes that have their locks perpetually broken.[445]

In such situations, the *Flora II* majority's "you should have filed a Tax Court petition" rebuke is too harsh.[446]

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442. *Flora II*, 362 U.S. at 175.

443. *See* I.R.C. § 6211(a) (limiting the Tax Court's deficiency jurisdiction to income, estate, and gift taxes).

444. In general, the Tax Court petition must be filed within ninety days after the IRS issues it. *Id.* § 6213(a).

445. Smith, *supra* note 440, at 3 n.7.

446. Congress has already made this value judgment (although only after *Flora II* was decided). *See* I.R.C. § 6330(c)(2)(B) (allowing taxpayers to challenge at a CDP hearing "the existence or amount of the underlying tax liability . . . if [she] did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dis-

Sometimes, taxpayers may have an administrative remedy. For instance, they might be able to challenge the liability via an offer-in-compromise based on doubt as to liability under § 7121 or via a CDP hearing under § 6320 and § 6330. However, such remedies will not always be available, often for reasons similar to the reasons why Tax Court review may be an empty remedy.

Thus, there is a Primary Value objection against the full payment rule. Are there Second-Order Values of sufficient moment to overcome that objection? I think not.

The *Flora II* majority expressed three policy concerns about a partial payment rule: (1) it could encourage claims splitting, with taxpayers paying part of the liability and bringing a refund action but challenging most of the asserted liability in a Tax Court case; (2) it could shift cases away from the Tax Court and into district court; and (3) it could threaten revenue collection.[447] None of these concerns are substantial.

There are psychological and financial barriers to claims splitting. It is nerve-wracking enough for a taxpayer to litigate against the IRS in one case; few would have the appetite to "double their fun." And, of course, two cases are more expensive to prosecute than one. Were claims to be split, the courts have tools by which to protect themselves. For example, one court can stay its case pending resolution in the other court, then apply a doctrine of preclusion or a "show cause order" to expedite resolution of its case. Finally, if I have underestimated the gravity of the concern, Congress could amend the jurisdictional statutes of the Tax Court or the district courts to prohibit them from hearing matters when substantially related matters already are at issue in other courts.

The channeling concern is diminished by this Article. When *Flora II* was decided, and still today, the Tax Court was and is without general refund jurisdiction. Part III.A above proposes giving the Tax Court such jurisdiction. Were both proposals adopted, a taxpayer in a partial payment world could obtain a desired refund remedy without abandoning the Tax Court for district court. There sometimes would be reasons—perhaps desire for a jury or better precedents—for preferring district court over Tax Court, but one may doubt that this would occur with unacceptable frequency.

In any event, *Flora II*'s channeling goal is a bit dated. The Court endorsed the Tax Court as the preferred tax trial tribunal in *Dobson*, and *Dobson* influenced *Flora II*.[448] Congress partially reversed *Dob-*

pute such tax liability.").

447. *Flora II*, 362 U.S. at 165-66, 176.

448. *See* Flora v. United States, 246 F.2d 929, 931 (10th Cir. 1957) (quoting Dobson v. Commissioner, 320 U.S. 489, 501-02 (1943)).

son by directing that appellate courts give district court decisions no less deference than they give Tax Court decisions.[449]

The threat to revenue concern is the weakest of all. A refund suit comes after assessment. Following assessment and notice and demand for payment, the IRS is authorized to employ its full panoply of collection tools, described in Part II.B.6 above. The filing of a refund suit after partial payment would impose no bar to the IRS proceeding with enforced collection of the unpaid portion of the assessment. The IRS might choose to stay such collection in the exercise of its administrative discretion, but one must presume that the IRS would use this discretion in a fashion consistent with its statutory duties.

Thus, any adverse Second-Order Values effects of a partial payment rule would be manageable. They do not outweigh the Primary Value benefits of such a rule. Congress should amend the relevant statutes to overturn *Flora II*.

B. Changes Not Proposed

Among the core problems of litigation generally are its cost and, derivatively, the prospect of unequal access to justice. These problems do exist as to federal tax litigation. I make no proposals along these lines, however, for two reasons. First, these challenges are far from unique to federal tax litigation. They pervade many kinds of litigation in the United States and elsewhere. Second, and more significantly, strides have been made in addressing the problems. The IRS Appeals Office has been effective in resolving tax controversies informally, inexpensively, and without the need for litigation. The Tax Court's small case procedures allow taxpayers, often appearing *pro se*, to resolve cases faster and less expensively.[450] The growth of low-income taxpayer clinics[451] and the existence of the Office of the Taxpayer Advocate[452] have been boons to many.

A recent phenomenon has been the institution of suits against Treasury or the IRS based, not on traditional remedies set out in the Internal Revenue Code or related statutes,[453] but upon the general judicial review provisions of the APA.[454] The applicability of the AIA has been and is being tested in such "pure" APA tax suits.

449. I.R.C. § 7482(a).

450. *See id.* §§ 7436(c), 7463; TAX CT. R. 170-174.

451. Among the useful provisions of the RRA was federal financial support for such clinics. *See* I.R.C. § 7526.

452. *See id.* §§ 7803(c), 7811.

453. Such as the provisions governing deficiency, refund, and CDP actions. *See supra* Parts II.B.1, II.B.3, IV.B.

454. 5 U.S.C. § 706(2) (2012).

In the *Cohen* line of cases,[455] for example, taxpayers used the APA to obtain judicial invalidation of an IRS procedure for returning overpayments of telephone excise taxes. The APA was held not to foreclose such suit.[456] Similarly, in *Oklahoma v. Sebelius*, a case currently pending in district court, Oklahoma is using the APA to challenge regulations under § 36B as to tax credits with respect to medical insurance coverage purchased through federally established exchanges. The government has moved to dismiss, in part on AIA grounds.[457]

Such "pure" APA tax suits raise potentially troubling questions about their effect on orderly tax administration and their consistency with the purposes behind the AIA.[458] Nonetheless, this Article refrains from offering a specific proposal in this context. There need to be more decided cases before the reality and magnitude of the potential problems can be accurately ascertained and the contours of condign correction can be responsibly proposed.

VI. CONCLUSION

Unlike Athena, the current federal tax litigation system did not spring full-blown from the brow of Zeus. As we have seen, it developed piecemeal over nearly two centuries, with the pace of change being greatly accelerated by the enactment of the modern federal income tax.

The federal tax litigation system has been especially shaped by the Defining Dozen events and trends described above. From them, we can infer the values that drive the system. The most powerful of those goals—the Primary Value—is providing remedies for taxpayers and affected third parties that are fair and effective and are perceived to be fair and effective. In situations in which this imperative does not operate or operates only weakly, a variety of Second-Order

455. To date, there are four decisions in this line: *In re* Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig. (*Cohen I*), 539 F. Supp. 2d 281 (D.D.C. 2008), *rev'd in part sub nom.* Cohen v. United States (*Cohen II*), 578 F.3d 1 (D.C. Cir. 2009), *aff'd in part*, Cohen v. United States (*Cohen III*), 650 F.3d 717 (D.C. Cir. 2011) (*en banc*), *on remand In re* Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig. (*Cohen IV*), 853 F. Supp. 2d 138 (D.D.C. 2012) (holding on remand that refund mechanism established by the IRS violated the APA's notice-and-comment procedure requirements).

456. *Cohen II*, 578 F.3d at 7-11, *aff'd in part*, 650 F.3d at 724-27 (D.C. Cir. 2011); *see also* Swisher v. United States, 2009-2 U.S. Tax Cas. (CCH) ¶ 70,293 (M.D. Pa. 2009).

457. Memorandum in Support of Defendants' Motion to Dismiss the Amended Complaint at 16-18, Oklahoma v. Sebelius, No. 6:11-cv-00030-RAW (E.D. Okla. Dec. 3, 2012).

458. Not all pure APA tax suits implicate the AIA, at least as the AIA is currently understood. *See, e.g.*, Loving v. IRS, 917 F. Supp. 2d 67 (D.D.C. 2013) (invalidating Treasury regulations as to tax return preparers); Anonymous v. Commissioner, 134 T.C. 13 (2010) (holding that the APA did not prevent the IRS from disclosing a private letter ruling adverse to the taxpayer).

Values govern. These include protecting the revenue, enhancing decisional accuracy, and promoting process efficiency.

Based on these criteria, major portions of the current system are sound. However, some features should be altered. In some instances, they were unwise from the start, the result of momentary exuberances that ill serve the system over the longer haul. In other instances, the features reasonably balanced the relevant values at the time of their enactment or promulgation, but the constellation of pertinent considerations has subsequently realigned.

Based on the relevant values, this Article has set out an agenda for reform of federal tax litigation. The proposals include expanding the tax jurisdiction of the Tax Court, abolishing the tax jurisdiction of the Court of Federal Claims, continued rejection of a national court of tax appeals, substantially repealing the TEFRA partnership audit and litigation rules, limiting judicial review of CDP determinations, and abolishing the *Flora II* "full payment" prerequisite to refund suits. The agenda having been defined by this Article, it will be the work of future articles to develop these proposals in greater detail.