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# The Phoenix and the Perils of the Second Best: Why Heightened Appellate Deference to Tax Court Decisions is Undesirable

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STEVE R. JOHNSON\*

## The Phoenix and the Perils of the Second Best: Why Heightened Appellate Deference to Tax Court Decisions Is Undesirable

In our judicial structure, both courts of general jurisdiction and specialized courts are empowered to adjudicate federal income tax controversies. A proper relationship among those courts has proved difficult to forge and maintain. Absent an enduring intellectual and political consensus, institutional arrangements have been subject to recurring question and challenge.

The controversy about the proper role of specialized courts in our tax adjudication system plays an important role in a larger debate. Scholarly interest in specialist versus generalist courts in all areas of the law is of long standing<sup>1</sup> and appears to have inten-

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<sup>1</sup> See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* (2d ed. 1996); David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1 (1975); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989); Henry J. Friendly, *Reactions of a Lawyer-Newly Become Judge*, 71 YALE L.J. 218 (1961); Edwin H. Greenebaum & W. Willard Wirtz, *Separation of Powers: The Phenomenon of Legislative Courts*, 42 IND. L.J. 153 (1967); Patrick E. Higginbotham, *Bureaucracy—The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261 (1980); Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 NW. U. L. REV. 745 (1981); Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603 (1989); Richard A. Posner, *Will The Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 775–89 (1983); Simon Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 A.B.A.J. 425 (1951); Commission on Revision of the Federal Court Appellate System, *Structure & Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 234–236 (1975).

sified in recent years.<sup>2</sup> As a result, a substantial literature now exists. Writers in this area commonly pay considerable attention to tax as a microcosm of the broader issue.

The most fundamental change that has been proposed in the tax adjudication system is exclusive jurisdiction: that is, vesting exclusive trial jurisdiction in the Tax Court or exclusive appellate jurisdiction in a national court of tax appeals. Such a change, it is thought, would promote uniformity, decisional accuracy, and other desiderata. However, such a change seems highly unlikely in the current political climate.<sup>3</sup>

That being the case, those persuaded of the benefits of specialization can be expected to cast about for substitute measures. One plausible alternative would be to retain the present trial and appellate structure but to accord greater authority to decisions of the Tax Court, for example by enjoining greater deference to Tax Court decisions upon the courts of appeal reviewing them. The Supreme Court endorsed this view in the early 1940s in *Dobson v. Commissioner*.<sup>4</sup>

It was widely thought that Congress had legislatively reversed *Dobson* in 1948 when it enacted the predecessor of current I.R.C. section 7482.<sup>5</sup> However, the idea of deference has refused to die. Despite section 7482, federal appellate opinions still sometimes say that more-than-usual deference is due Tax Court decisions. Moreover, words are not the whole story. There is evidence that, whatever standard of review they recite as controlling, circuit courts of appeal may be extending additional deference to Tax Court decisions in practice.<sup>6</sup>

In addition, from time to time, commentators return to the

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<sup>2</sup> See, e.g., Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329 (1991); Rochelle Cooper Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1 (1995); Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 B.Y.U. L. REV. 377; Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 AM. U. L. REV. 581 (1992); S. Jay Plager, *The United States Courts of Appeals, the Federal Circuit, and the Non-Regional Subject Matter Concept: Reflections on the Search for a Model*, 39 AM. U. L. REV. 853 (1990); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111 (1990).

<sup>3</sup> See *infra* text accompanying notes 45 to 56.

<sup>4</sup> 320 U.S. 489 (1943).

<sup>5</sup> I.R.C. § 1141(a) (1939), as amended by ch. 646, § 36, 62 Stat. 869, 991 (1948), reprinted at 1984 U.S.C.C.A.N. A163.

<sup>6</sup> See *infra* text accompanying notes 80 to 84.

idea of deference, urging resurrection of *Dobson* in some form.<sup>7</sup> Most recently, Professor David F. Shores has argued for greater appellate deference to Tax Court decisions, both greater deference than now usually prevails in the review of Tax Court decisions and greater deference than the appellate courts extend to district court decisions.<sup>8</sup> In his view, enhanced deference is legally possible because section 7482 did not, in fact, overrule *Dobson*, and it is prudentially desirable because it “would contribute to clarity, coherence, and uniformity.”<sup>9</sup>

Thus, the notion of heightened appellate deference to Tax Court decisions has a phoenix-like quality, rising anew after its apparent demise. An idea of such resilience must be taken seriously.

Formerly, I shared the view that greater appellate deference to Tax Court decisions would be desirable. Further thought, however, has persuaded me that it would be unwise, less perhaps because of anything intrinsic to it than because of the context within which it would operate.

Whatever can be said in favor of vesting exclusive tax jurisdiction in one court, additional appellate deference to Tax Court decisions would be an inferior surrogate. Settling for the “second best” solution often creates unanticipated problems, producing a worse situation rather than a better one. In my view, that is precisely what would occur. Attempting to engraft additional deference to the Tax Court onto the current fragmented system of federal tax litigation would be unworkable and disadvantageous. Thus, such additional deference would not be an improvement. Instead, its adoption without any structural change in the tax litigation process would make a flawed system even worse.

This Article has four parts. Part I is foundational. It describes the current structure for the litigation of federal tax controversies. Part II discusses the enduring attractiveness to many of enlarging the role of specialist courts in the federal tax adjudication system. It sketches proposals for a national court of tax appeals and proposals for increased deference to the Tax Court. Part II

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<sup>7</sup> E.g., Peter K. Nevitt, *Achieving Uniformity Among the 11 Courts of Last Resort*, 34 TAXES 311 (1956).

<sup>8</sup> David F. Shores, *Deferential Review of Tax Court Decisions: Dobson Revisited*, 49 TAX LAW. 629 (1996).

<sup>9</sup> *Id.* at 673.

concludes that deference proposals are likely to be tenacious and recurring. Part III explains why additional deference to Tax Court decisions is a "second best" approach compared to creation of a national court of tax appeals. It also explores the disadvantages of this "second best" approach. In particular, Part III argues that increased deference, superimposed on the current fragmented tax litigation system, would (1) chill resort to the Tax Court with respect to cases of first impression, thus minimizing the benefits of the Tax Court's expertise in tax matters; (2) increase rewards for forum shopping, allowing taxpayers to "game" the system to the consistent disadvantage of the government; (3) create intracircuit non-uniformity; and (4) exacerbate, not reduce, intercircuit non-uniformity by adding procedural non-uniformity on top of substantive non-uniformity. Part IV considers the effect of the Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>10</sup> on the question of appellate deference to the Tax Court. It concludes that *Chevron* is not likely to be significant in this regard and, in any event, militates against, not for, deference to Tax Court decisions.<sup>11</sup>

## I

### CURRENT FEDERAL TAX LITIGATION STRUCTURE

It has been suggested: "It is difficult to imagine an adjudication system less conducive to uniform decisionmaking" than the current fragmented system of federal tax trials and appeals.<sup>12</sup> I agree.<sup>13</sup> Indeed, as shown below, this description understates the problem.

The traditional description of the federal tax litigation system involves the following three entry portals,<sup>14</sup> with partly overlap-

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<sup>10</sup> 467 U.S. 837 (1984).

<sup>11</sup> The concepts of deference explored in this article—appellate deference to specialized trial courts and, under *Chevron*, judicial deference to administrative agencies—open onto the broader vista of the use of rules of deference in tax law generally. I intend to pursue this broader investigation in future writings. See generally THE USES OF DISCRETION (Keith Hawkins ed., 1992).

<sup>12</sup> Shores, *supra* note 8, at 629.

<sup>13</sup> So have others. E.g., HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 161 (1973); ROSWELL MAGILL, THE IMPACT OF FEDERAL TAXES 209 (1943) ("If we were seeking to secure a state of complete uncertainty in tax jurisprudence, we could hardly do better [than the present system].").

<sup>14</sup> See, e.g., Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 OHIO ST. L.J. 1037, 1039 n.8 (1995); Deborah A. Geier, *The*

ping appellate avenues.<sup>15</sup> Significantly, it is the taxpayer who chooses on which track the case will proceed.

(1) Before paying the amount determined by the IRS to be due, the taxpayer usually may contest the determination in Tax Court.<sup>16</sup> Unless the “small case” procedures have been elected by the taxpayer,<sup>17</sup> the losing party in the Tax Court may appeal to a circuit court of appeals, typically the court of the circuit in which the taxpayer resides.<sup>18</sup>

(2) Alternatively, the taxpayer may decide—for any of a number of strategic reasons<sup>19</sup>—to pay the amount determined by

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*Emasculated Role of Judicial Precedent in the Tax Court and Internal Revenue Service*, 39 OKLA. L. REV. 427, 427 n.5 (1986).

<sup>15</sup> The emphasis here is on civil, not criminal, tax cases. The model described in the text best fits the litigation of cases eligible to be brought as deficiency actions, *i.e.*, cases in which the IRS is prohibited from assessing income, gift, estate, or certain excise taxes (as well as related interest and penalties) until after it issues a notice of deficiency. See I.R.C. §§ 6211-6215 (1994). A comparable multi-portal regime exists for litigating adjustments proposed by the IRS under the unified partnership audit rules. See I.R.C. §§ 6221-6231 (1994).

The above types of cases are the types commonly in mind when one thinks about federal tax litigation. In number and notoriety, they predominate. Although numerous other types of tax litigation exist, taxpayers usually have fewer forum choices in them. Examples include summons enforcement actions, I.R.C. §§ 7604(a) & 7609(h)(1), injunction actions involving promotion of abusive tax shelters or aiding and abetting understatement of tax liability, I.R.C. § 7408(a), and actions to enjoin flagrant political expenditures by § 501(c)(3) organizations, I.R.C. § 7409(a)(1), all of which must be brought in district court. Also, actions challenging post-assessment tax collection activities by the IRS typically must be brought in district court. See, *e.g.*, I.R.C. §§ 7421-7433 (1994).

<sup>16</sup> I.R.C. § 6213(a) (1994). The great majority of civil tax cases are tried in the Tax Court. See, *e.g.*, Theodore Tannenwald, Jr., *The Tax Litigation Process: Where It Is and Where It Is Going*, 44 REC. A.B. CITY OF N.Y. 825, 827 (1989).

<sup>17</sup> I.R.C. § 7463 (1994); Tax Ct. R. 170-179. So-called “S cases” typically are tried by Special Trial Judges of the Tax Court. I.R.C. § 7443A(a)-(c) (1994). The decisions rendered in these cases are not appealable. I.R.C. § 7463(b) (1994).

<sup>18</sup> I.R.C. § 7482(a) & (b) (1994).

<sup>19</sup> Such choice of forum considerations include the courts’ respective evidentiary and discovery rules, their level of legal expertise, their knowledge of local conditions and personalities, the lawyers who will represent the government (see note 31 *infra*), location of trial, congestion of court calendars, jurisdictional limitations or limitations on type of relief available, precedents, ability of the government to raise new issues, and counsel’s own level of experience with and confidence in the courts in question. See generally Nina J. Crimm, *Tax Controversies: Choice of Forum*, 9 B.U.J. TAX LAW 1 (1991).

Such strategic considerations often yield to another factor. The Tax Court is a prepayment forum, *i.e.*, the taxpayer may contest the correctness of the IRS’s determinations before paying the tax at issue. In contrast, to avail themselves of the refund forums, taxpayers typically must pay the full amount of the tax liability asserted by the IRS before filing their refund claims and suits. *E.g.*, *Flora v. United States*, 357 U.S. 63 (1958), *aff’d on rehearing*, 362 U.S. 145 (1960). A taxpayer’s

the IRS, then file a refund claim with the IRS, and ultimately bring a refund action in district court.<sup>20</sup> Of course, any appeal from the district court would be to the regional circuit court of appeals of which the district is a part.

(3) Alternatively, the taxpayer could choose to bring her refund action in the Court of Federal Claims (formerly the Court of Claims or the Claims Court),<sup>21</sup> in which case any appeal would be to the Court of Appeals for the Federal Circuit.

However, this traditional description is underinclusive. One of the most significant developments in federal tax litigation in recent years has been the emergence of the United States Bankruptcy Court as the fourth trial forum for tax issues.

Of course, the Bankruptcy Court has long dealt with a variety of tax issues. However, these were mainly thought of as related to collection, not assessment, of taxes: issues such as lien attachment, priorities, classification of claims, and dischargability. Increasingly, however, important questions of substantive liability for tax are being decided in bankruptcy cases. More and more, substantial taxpayers (such as major corporations undergoing reorganization) are presenting large-dollar tax issues involving complex points of law for decision by the Bankruptcy Court.<sup>22</sup> In addition, individuals and small businesses increasingly are testing

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inability or unwillingness to make such payment often requires choice of a prepayment forum. *See, e.g.*, *United States v. Dalm*, 494 U.S. 596, 615 (1990) (Stevens, J., dissenting).

<sup>20</sup> I.R.C. § 7422(a), (e) (1994); 28 U.S.C. § 1346 (1994).

<sup>21</sup> I.R.C. § 7422(e) (1994).

<sup>22</sup> *E.g.*, *In re Pacific-Atlantic Trading Co.*, 96-1 U.S.T.C. (CCH) ¶ 50,303 (Bankr. N.D. Cal. 1996) (business bad debt deduction disallowed); *In re Hillsborough Holdings Corp.*, 179 B.R. 728 (Bankr. M.D. Fla. 1995) (subsidiary did not qualify as DISC; IRS held to private letter ruling as to capital gains treatment of coal mining royalties because taxpayer's request did not contain material misstatement of fact); *In re Southwestern States Marketing Corp.*, 1994 WL 762192 (Bankr. N.D. Tex.), *aff'd*, 95-1 U.S.T.C. (CCH) ¶ 50,057 (Bankr. N.D. Tex. 1994), *aff'd without opinion sub nom.* *Kellogg v. United States*, 82 F.3d 413 (5th Cir. 1996) (accrual method taxpayer could not deduct liability because no likelihood of repayment existed); *In re West Texas Marketing Corp.*, 155 B.R. 399 (Bankr. N.D. Tex. 1993), *aff'd*, 94-1 U.S.T.C. (CCH) ¶ 50,063 (N.D. Tex. 1993), *aff'd*, 54 F.3d 1194 (5th Cir. 1995), *cert. denied*, *Kellogg v. United States*, 516 U.S. 991 (1995) (accrual method taxpayer could not deduct liability because, although amount was fixed, liability was contingent); *In re Hillsborough Holdings Corp.*, 144 B.R. 920 (Bankr. M.D. Fla. 1992) (taxpayer entitled to use straight-line method or pro rata method of calculating interest income with respect to repossessed properties, rather than economic accrual method); *In re Federated Dept. Stores, Inc.*, 135 B.R. 950 (Bankr. S.D. Ohio 1992), *aff'd*, 94-2 U.S.T.C. (CCH) ¶ 50,430 (S.D. Ohio 1994) (taxpayer could deduct reorganization expenses; capitalization not required under *INDOPCO*).

substantive and procedural tax issues in bankruptcy cases.<sup>23</sup> Because of procedural rules and the court's perceived pro-debtor inclination, for many experienced practitioners the Bankruptcy Court is often the "forum of choice" for litigating federal tax issues.<sup>24</sup>

Although resort to the Bankruptcy Court is not purely elective, there is a significant element of taxpayer choice. The overwhelming majority of bankruptcy filings are voluntary (filed by the debtor) rather than involuntary (filed by the debtor's creditors).<sup>25</sup> Large tax claims—especially ones involving "old" tax years<sup>26</sup> or ones involving substantial penalties—often will be enough, combined with whatever other debts the debtor has accumulated in our credit-intensive economy and liability-intensive legal system, to push taxpayers into insolvency. Also, as evidenced by the dramatic rise in bankruptcy filings in recent years, the stigma once associated with bankruptcy has decreased substantially.<sup>27</sup> Thus, in many cases, there will be no effective bar-

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<sup>23</sup> Examples in recent years include: *In re Michaud*, 199 B.R. 248 (Bankr. D.N.H. 1996) (innocent spouse relief); *In re Dunhill Medical, Inc.*, 96-1 U.S.T.C. (CCH) ¶ 50,276 (Bankr. D.N.J. 1996) (statute of limitations on refunds); *In re Quality Medical Consultants, Inc.*, 192 B.R. 777 (Bankr. M.D. Fla. 1995) (penalties for failure to file information returns); *In re Rutigliano*, 96-1 U.S.T.C. (CCH) ¶ 50,058 (Bankr. E.D. Pa. 1995) (intent to file joint return); *In re Mills*, 189 B.R. 707 (Bankr. W.D. Tenn. 1995) (deductibility of bad debts); *In re Spirco, Inc.*, 95-2 U.S.T.C. (CCH) ¶ 50,330 (Bankr. W.D. Pa. 1995) (availability of net operating loss carryback); *In re Adventure Resorts of America, Inc.*, 183 B.R. 296 (Bankr. M.D. Fla. 1995) (penalties for failure to withhold on interest paid to foreign corporation).

<sup>24</sup> See, e.g., Francis M. Allegra, *Bankruptcy Courts: The Tax Forum for the 90s*, 38 FED. B. NEWS & J. 338 (1991); Grover Hartt III, *Tax Jurisdiction of the Bankruptcy Courts*, 50 N.Y.U. INST. ON FED. TAX'N 35-1 (1992); Robert A. Jacobs, *The Bankruptcy Court's Emergence as Tax Dispute Arbiter of Choice*, 45 TAX LAW. 971 (1992); Lee A. Sheppard, *Rethinking Tax Collection in Bankruptcy*, 75 TAX NOTES 1051 (1997).

<sup>25</sup> See, e.g., ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 374 (1986) (involuntary petitions are "very rare" as to consumer debtors and "relatively rare" as to business debtors).

<sup>26</sup> In general, interest on tax underpayment runs from the date payment was due until the date of payment, I.R.C. § 6001(a) (1994), is based on a market rate of interest, I.R.C. §§ 6621(a), (b) & 1274(d) (1994), and is compounded daily, I.R.C. § 6622(a) (1994). As a result, the interest due may be several times the amount of the asserted deficiency.

<sup>27</sup> In 1996, bankruptcy filings during a year exceeded one million for the first time. *Upward Trend in Bankruptcy Filings Shown in AOUSC Annual Report on Courts*, BNA BANKRUPTCY LAW DAILY, Apr. 1, 1997, at 1 (citing Administrative Office of the U.S. Courts). For 1997, more than 1.3 million consumer bankruptcies were expected to be filed. Hope Viner Samborn, *Uniform Rules for Payback Time*, A.B.A. J., Dec. 1997, at 26. The rising bankruptcy rate prompted a subcommittee chair of the Senate Banking Committee to wonder whether Americans have "no sense of



rier preventing a taxpayer who prefers to litigate her tax issues in Bankruptcy Court from doing so.

Once the jurisdiction of the Bankruptcy Court has been properly invoked, that court has broad jurisdiction to determine the legality or amount of tax liabilities, including related interest and penalties.<sup>28</sup> For this purpose, it is irrelevant whether the tax in question has or has not already been assessed.<sup>29</sup> Appeals of Bankruptcy Court decisions go first to the local federal district court, then to the appropriate circuit court of appeals.<sup>30</sup>

Thus, in many cases, a taxpayer may choose any of *four* trial forums: the prepayment forums of the Tax Court and Bankruptcy Court or the refund forums of the district court and Court of Federal Claims. In short, the federal civil tax litigation system is remarkable for its multiplexity. So Byzantine a "system" could only have come from government.<sup>31</sup>

## II

### PROPOSALS FOR INCREASED ROLE FOR TAX-SPECIALIST COURTS

The idea of elevated status for a specialized tax adjudication

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shame" anymore in declaring bankruptcy. Mary Deibel, *Rising Delinquencies Spur Banks to Tighten Credit Card Policies*, ROCKY MOUNTAIN NEWS, July 25, 1996, at 5B (quoting Sen. Richard Shelby).

<sup>28</sup> The Bankruptcy Court has jurisdiction over all proceedings "arising in or related to" bankruptcy filings, 11 U.S.C. § 1334, which includes tax matters. The courts tend to interpret such jurisdiction "as broadly as possible." *Eubanks v. Esenjay Petroleum Corp.*, 152 B.R. 459, 463-64 (E.D. La. 1993).

<sup>29</sup> See 11 U.S.C. § 505(a)(1) (1994).

<sup>30</sup> Among possible bankruptcy reforms being studied by the Federal Bankruptcy Review Commission is having bankruptcy appeals go directly to the circuit courts. See Hope Viner Samborn, *Going for Broke: Soaring Bankruptcies Prompt Calls for new Repayment Plan*, A.B.A. J., Sept. 1996, at 16.

<sup>31</sup> The government's penchant for complexity is further illustrated by the "system" by which the Commissioner of Internal Revenue is represented in civil tax cases. In the Tax Court, the Commissioner is represented by the IRS Chief Counsel's Office typically through one of its District Counsel Offices; in district court by one of five regional civil trial sections of the Department of Justice Tax Division or by the local United States Attorney's Office; in the Court of Federal Claims by the Court of Federal Claims section of the Tax Division; in Bankruptcy Court by one of the five regional civil trial sections of the Tax Division, the local United States Attorney's Office or local District Counsel acting as Special Assistant United States Attorney; in circuit court by the appellate section of the Tax Division (with initial oversight by the Solicitor General's office); and if certiorari is granted, by the Solicitor General's office of the Department of Justice. The roots of this "system" lie in a Depression-era Executive Order. See 28 C.F.R. § 0.70(a) (1997); Executive Order No. 6166 (June 10, 1933).

tribunal has enduring power. Its principal manifestations have been proposals to create a national court of tax appeals and commands or suggestions that appellate courts accord more-than-usual deference to decisions of the Tax Court. The history of these ideas is explored briefly below.

### A. Proposed National Court of Tax Appeals

The clarion call for creation of a national court of tax appeals has been sounded for over seventy years. In the mid-1920s, Judge Bland suggested that all appeals in federal tax cases be heard by one appellate court.<sup>32</sup> In the 1930s, Justice Traynor,<sup>33</sup> Stanley Surrey,<sup>34</sup> and others<sup>35</sup> recommended the creation of a federal court of tax appeals. Dean Griswold enlisted in the cause in the 1940s.<sup>36</sup>

In the decades since, many commentators have kept the idea of a national court of tax appeals on the agenda of public discourse.<sup>37</sup> In addition, legislative or commission proposals to establish such a court were made in 1969,<sup>38</sup> 1979,<sup>39</sup> and 1990.<sup>40</sup>

The core of the proposals, of course, is that appeals in tax cases

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<sup>32</sup> Oscar E. Bland, *Federal Tax Appeals*, 25 COLUM. L. REV. 1013 (1925).

<sup>33</sup> 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); see also Roger John Traynor and Stanley S. Surrey, *New Roads Towards the Settlement of Federal Income, Estate, and Gift Tax Controversies*, 7 LAW & CONTEMP. PROBS. 336, 349-52 (1940).

<sup>34</sup> Stanley S. Surrey, *The Traynor Plan—What It Is*, 17 TAXES 393 (1939); see also Stanley S. Surrey, *Some Suggested Topics in the Field of Tax Administration*, 25 WASH. U. L.Q. 399 (1940).

<sup>35</sup> E.g., Charles L.B. Lowndes, *Taxation and the Supreme Court, 1937 Term (Part II)*, 87 U. PA. L. REV. 165, 200 (1938). For a discussion of the proposal during that decade, see 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 (1939); E. Barrett Prettyman, *The Traynor Proposals—Some Considerations*, 17 TAXES 397 (1939); G. Aaron Youngquist, *Proposed Radical Changes in the Federal Tax Machinery*, 25 A.B.A. J. 291 (1939).

<sup>36</sup> Erwin N. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944). For responses, see Ralph H. Dwan, *Administrative Review of Judicial Decisions: Treasury Practice*, 46 COLUM. L. REV. 581, 584-85 (1946); Louis Eisenstein, *Some Iconoclastic Reflections on Tax Administration*, 58 HARV. L. REV. 477, 488-90 (1945).

<sup>37</sup> Over 30 articles have discussed the concept since the mid-1940's. See Paul L. Caron, *Tax Myopia, Or Mamas Don't Let Your Babies Grow Up To Be Tax Lawyers*, 13 VA. TAX REV. 517, 582 n.294 (1994); H. Todd Miller, *A Court of Tax Appeals Revisited*, 85 YALE L.J. 228, 231-32 n.14 (1975) (both citing articles).

<sup>38</sup> See, e.g., K. Martin Worthy, *The Tax Litigation Structure*, 5 GA. L. REV. 248,

would be centralized in a new national court of appeals, divesting the current federal appellate courts of their jurisdiction to review tax cases. Beyond that core, structural details are various. For instance, (1) tax trials also could be centralized into a single tribunal or could be left in the present four trial forums; (2) the judges for the new court could be drawn from the ranks of Tax Court judges or separately selected; and (3) the number of judges on the new court, their constitutional status,<sup>41</sup> their practices sitting as panels or *en banc*, and their internal review and coordination procedures could be variously constituted.<sup>42</sup>

Although a number of other advantages have been asserted,<sup>43</sup> the principal justifications offered for creation of a national court of tax appeals are: (1) because of its specialized workload and expertise, the decisions of such a court would be of higher quality than those of generalist appellate courts; (2) because it would be the singular voice of review of tax cases (except for occasional Supreme Court review on certiorari), the new court would promote decisional uniformity and consistency; and (3) again because of singularity, the decisions of the new court would infuse greater certainty and predictability into tax jurisprudence.<sup>44</sup>

On the other side, arguments asserted against a tax appellate

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250-51 (1971); Panel Discussion, *Court Jurisdiction in Civil Tax Litigation: The Tydings Bills and the Rogovin Report*, 22 TAX LAW. 687 (1969).

<sup>39</sup> See, e.g., Gary W. Carter, *The Commissioner's Nonacquiescence: A Case for a National Court of Tax Appeals*, 59 TEMP. L.Q. 879, 910-14 (1986); *Federal Courts Improvement Act of 1979, Hearings before Subcomm. on Improvements in Judicial Machinery, Sen. Comm. on Judiciary*, 96th Cong., 1st Sess. 1 (1979); Panel Discussion, *Proposals for a New National Court of Tax Appeals and the Role in Tax Litigation of the Court of Claims*, 33 TAX LAW. 7 (1979).

<sup>40</sup> See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990). The Committee had floated the idea in preliminary form a year earlier. Federal Courts Study Comm., TENTATIVE RECOMMENDATIONS FOR PUBLIC COMMENT 30 (1989).

<sup>41</sup> Most federal courts derive their constitutional status from Article III. Congress, however, may create additional courts under section 8, clause 9 of Article I. The Tax Court is an Article I court. See *infra* text accompanying notes 60 to 62.

<sup>42</sup> For details of some of the proposals, see Deborah A. Geier, *supra* note 14, at 439-44.

<sup>43</sup> See, e.g., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 70 (1990) (creating a national court of tax appeals, especially if coupled with centralizing most tax trials in the Tax Court, "would rationalize federal tax adjudication, reduce forum-shopping, relieve workload pressures on the existing Article III appellate courts, and reduce the pressure on the Supreme Court to grant certiorari in tax cases to resolve intercourt conflicts").

<sup>44</sup> See also William D. Popkin, *Why a Court of Tax Appeals is So Elusive*, 47 TAX NOTES 1101, 1102-05 (1990) (arguing that a national court of tax appeals would be more inclined to apply general anti-tax avoidance principles).

court focus on the loss of useful perspectives of the generalist appellate courts, the perceived breadth of understanding of generalist judges compared to specialists, and the greater familiarity of generalists with non-tax sources (such as state law and non-tax federal statutes) which may be important to the outcome of particular tax cases.<sup>45</sup> There also is an undertone in much of the opposition: a suspicion that a tax appellate court would be pro-government in outlook and tendency.<sup>46</sup>

These arguments and counter arguments have been well rehearsed. This is not the occasion for a detailed reanalysis of them. For present purposes, it suffices to note two points. First, if a tax appellate court would be desirable, the two key ingredients of its success would be its expertise resulting from specialization and its singularity as the sole appellate tribunal hearing tax cases.

Second, whatever its desirability, it is abundantly plain that, for the foreseeable future, creation of a national court of tax appeals is a political impracticability. The most recent serious proposal, the 1990 proposal, was a non-starter in Congress. The 1990 proposal would have divested the district courts and the Court of Federal Claims of most of their current trial jurisdiction over federal tax cases.<sup>47</sup> The Tax Court would have been reconstituted. A trial division, composed of Article I judges, would have had the Tax Court's current jurisdiction and would have taken over the cases no longer triable in the district courts or the Court of Federal Claims. A new appellate division, staffed by approximately five Article III judges, would have heard appeals from the trial division.<sup>48</sup>

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<sup>45</sup> See, e.g., Mortimer M. Caplin & Stuart L. Brown, *A New United States Court of Tax Appeals*: S.678, 57 TAXES 360, 361 (1979); Sandra Jo Craig, *Federal Income Tax and the Supreme Court: The Case Against a National Court of Tax Appeals*, 1983 UTAH L. REV. 679; Michael Saltzman, *Should There Be a National Court of Tax Appeals?*, 8 A.B.A. SECTION OF TAXATION NEWSLETTER 61 (1989); A.B.A. Section of Taxation, REPORT OF TASK FORCE ON CIVIL TAX LITIGATION PROCESS (1989); 105 A.B.A. REP. 401-04 (1980); 70 A.B.A. REP. 144, 144 (1945); Executive Committee of the New York State Bar Association Tax Section, *Response to Proposals for a National Tax Court of Appeals*, 46 TAX NOTES 819 (1990).

<sup>46</sup> See, e.g., A.B.A. Section of Taxation, REPORT TO HOUSE OF DELEGATES 9 (Feb. 1990).

<sup>47</sup> The district courts would have retained jurisdiction to try criminal tax cases, jeopardy assessment review actions, and tax lien enforcement suits. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 69-72 (1990).

<sup>48</sup> *Id.* at 21, 69-72. Five of the Committee's fifteen members dissented from these recommendations.

The reaction to the 1990 proposal was overwhelmingly negative. The organized bar,<sup>49</sup> the accounting profession,<sup>50</sup> the Tax Court,<sup>51</sup> the Court of Federal Claims,<sup>52</sup> the Justice Department,<sup>53</sup> and the IRS<sup>54</sup> all weighed in against the measure. Congress took no action on it.

Nothing indicates that a political reconstellation favorable to creating a national court of tax appeals has occurred since 1990. In light of the current anti-federal rhetoric in Congress, the general climate is, if anything, even more hostile now to the centralization of power that would be involved in transferring appellate tax jurisdiction from the regional courts of appeal to a new, national court of appeals.

More specifically, as previously noted, one of the obstacles to creation of a national tax appellate court is the suspicion that it would be pro-IRS in outlook.<sup>55</sup> Given that view in some quarters, the political and public relations problems the IRS now is encountering<sup>56</sup> surely move back the day when establishing a

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<sup>49</sup> E.g., Letter from Richard G. Cohen (Association of the Bar of the City of New York) to Joseph F. Weis, Jr. (Federal Courts Study Committee) (Mar. 7, 1990), *reprinted in* 90 TAX NOTES TODAY 63-19 (Mar. 22, 1990); Letter from C. Wells Hall III (National Association of State Bar Tax Sections) to Joseph F. Weis, Jr. (Mar. 16, 1990), *reprinted in* 90 TAX NOTES TODAY 63-18 (Mar. 22, 1990); Executive Committee of the New York State Bar Association Tax Section, *Response to Proposals for a National Tax Court of Appeals*, 46 TAX NOTES 819 (1990); 9 A.B.A. SECTION OF TAXATION NEWSLETTER 46, 53 (1990).

<sup>50</sup> Letter from Arthur S. Hoffman (American Institute of Certified Public Accountants) to Joseph F. Weis, Jr. (Feb. 12, 1990), *reprinted in* 90 TAX NOTES TODAY 46-24 (Feb. 28, 1990).

<sup>51</sup> Chief Judge Arthur L. Nims, III, Statement Before Federal Courts Study Committee (Jan. 31, 1990), *reprinted in* 90 TAX NOTES TODAY 26-18 (Feb. 1, 1990).

<sup>52</sup> Chief Judge Loren A. Smith, Statement Before Federal Courts Study Committee (Jan. 31, 1990), *reprinted in* 90 TAX NOTES TODAY 29-7 (Feb. 5, 1990).

<sup>53</sup> Marianne Evans, *Peterson Explains Justice Department's Focus on Tax Policy Matters*, 90 TAX NOTES TODAY 214-6 (Oct. 19, 1990).

<sup>54</sup> Letter from Sheldon S. Cohen to Joseph F. Weis, Jr., *reprinted in* 90 TAX NOTES TODAY 26-19 (Feb. 1, 1990).

<sup>55</sup> See *supra* text accompanying note 46.

<sup>56</sup> In short order, among other developments, (1) In July 1996, Congress enacted the second in a series of so-called taxpayer bills of rights. Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452. (2) In June 1997, the Kerry-Portman Commission issued its report, proposing substantial revisions of the IRS. REPORT OF NATIONAL COMMISSION ON RESTRUCTURING OF THE INTERNAL REVENUE SERVICE. (3) In August 1997, the Taxpayer Browsing Protection Act of 1997, Pub. L. No. 105-35, 111 Stat. 1104, was enacted to curb IRS abuses of confidential taxpayer information. (4) In September 1997 and May, 1998, the Senate Finance Committee held hearings in which the IRS was denounced by taxpayers, legislators, and current and former IRS employees. (5) On Halloween 1997, House Republican leaders unveiled a new World Wide Web site, to collect taxpayer horror stories, so to provide ammu-

national tax appellate court will again be admissible as a practical subject of public discourse.

### *B. Proposed Heightened Deference to Tax Court*

In light of the current political infeasibility of establishing a national court of tax appeals, proposals for increased appellate deference to Tax Court decisions may be an attempt to salvage something. If the whole loaf is impossible, perhaps half a loaf (promoting specialized expertise via deference, though not achieving jurisdictional centralization) could be managed.<sup>57</sup> The idea has a long history.

When the modern era of federal taxation began, no judicial prepayment tax forum existed. A taxpayer who disagreed with the government's determination of tax liability could pay the asserted liability and then sue for a refund in district court or the Court of Claims. However, that often involved financial hardship for the taxpayer. Accordingly, administrative prepayment review mechanisms were created. These were a Committee on Appeals and Review established within the office of the Commissioner of Internal Revenue and a short-lived Advisory Tax Board appointed by the Commissioner with the approval of the Secretary of the Treasury.<sup>58</sup>

Because these mechanisms were not structurally independent of the Commissioner, concerns arose as to their fairness. Congress responded in 1924 by creating a new and independent administrative tribunal, the Board of Tax Appeals, to provide a prepayment tax-dispute resolution forum.<sup>59</sup> The Board was renamed the Tax Court in 1942, although it remained an adminis-

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tion for future attacks on the IRS. 77 TAX NOTES 667 (1997). (6) In July 1998, Congress overwhelmingly passed the Internal Revenue Service Restructuring and Reform Act, Pub. L. No. 105-206, 112 Stat. 685, to implement some Kerry-Portman proposals and the third taxpayer bill of rights. The House vote was 402 to 8; the Senate vote was 96 to 2.

<sup>57</sup> There is some indication that Professor Shores's support for a rule of deference reflects this "half a loaf" approach. See Shores, *supra* note 8, at 671 ("The main attraction of a court of tax appeals with jurisdiction to hear appeals in tax cases, regardless of where they originate, is that it would contribute to the development of coherent decisional law in the field. Deferential review of Tax Court decisions would not achieve the same level of coherence, but it would move the system a bit closer to that laudable goal.").

<sup>58</sup> Revenue Act of 1919, ch. 18, § 1301(d), 40 Stat. 1057, 1141; see *Williamsport Wire Rope Co. v. United States*, 277 U.S. 551, 562-63 n.7 (1928).

<sup>59</sup> Revenue Act of 1924, ch. 234, § 900, 43 Stat. 253, 336.

trative agency.<sup>60</sup> It was converted into an Article I court in 1969<sup>61</sup> after unsuccessful attempts to give it Article III status.<sup>62</sup>

Appeals from decisions of the Board, and later the Court, were to the appropriate circuit courts of appeals. The courts of appeals had the "power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board."<sup>63</sup> It was the appellate courts' application of that power that led to *Dobson*.

In *Dobson*, the Supreme Court surveyed previous cases and remarked: "courts, including this Court, have not paid the scrupulous deference to the tax laws' admonitions of finality which they have to similar provisions in statutes relating to other tribunals."<sup>64</sup> The Court was determined to change this state of affairs.

The Court's decision was unanimous. Although no model of clarity, it appeared to limit review of Tax Court decisions to questions of law, putting both factual issues and mixed issues of law and fact beyond appellate scrutiny.<sup>65</sup> Moreover, nonreviewable questions of fact were defined broadly, and doubts as to issue classification were resolved against reviewability. "[W]hen the [appellate] court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand."<sup>66</sup>

Such deference was justified through several considerations.<sup>67</sup> Looming especially large was the Court's belief that deference would promote uniformity in application of the Code<sup>68</sup> and

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<sup>60</sup> Revenue Act of 1942, ch. 619, § 504, 56 Stat. 798, 957.

<sup>61</sup> Tax Reform Act of 1969, Pub. L. No. 91-172, §§ 951-962, 83 Stat. 487. See generally HAROLD DUBROFF, *THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS* (1979).

The constitutionality of the Tax Court and its procedures sometimes has been questioned but always has been upheld by the courts. E.g., *Freytag v. Commissioner*, 501 U.S. 868 (1991) (discussed *infra* at text accompanying notes 193 to 196); see 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, 985 n.2 (1991) (citing cases).

<sup>62</sup> See Geier, *supra* note 61, at 991-94.

<sup>63</sup> Revenue Act of 1926, § 1003(b), 44 Stat. 9, 110; see also I.R.C. § 1141(c)(1) (1939).

<sup>64</sup> 320 U.S. at 494.

<sup>65</sup> *Id.* at 506-07.

<sup>66</sup> *Id.* at 502.

<sup>67</sup> *Id.* at 498-502.

<sup>68</sup> *Id.* at 499-500.

would put to better effect the Tax Court's unique expertise:

[The Tax Court] deals with a subject that is highly specialized and so complex as to be the despair of judges. It is relatively better staffed for its task than is the judiciary. Its members not infrequently bring to their task long legislative or administrative experience in their subject. The volume of tax matters flowing through the Tax Court keeps its members abreast of changing statutes, regulations, and Bureau practices, informed as to the background of controversies and aware of the impact of their decisions on both Treasury and taxpayer.<sup>69</sup>

In the following years, the Supreme Court continued to invoke *Dobson* although in ways that eluded ready generalization.<sup>70</sup> This flexibility—or ambiguity—naturally resulted from *Dobson*, which was more guideline than concrete instruction as to when and how to defer.<sup>71</sup>

Because of this indefiniteness, as well as reservations about the very notion of appellate deference to a specialized trial tribunal, *Dobson* quickly proved unpopular. Many circuit court of appeals decisions applied *Dobson*, but unenthusiastically,<sup>72</sup> and leading commentators criticized it.<sup>73</sup>

Efforts to revise *Dobson* legislatively soon were pressed. After lengthy consideration, the House and Senate agreed in 1948 on such legislation, which was signed by the President.<sup>74</sup> The rel-

<sup>69</sup> *Id.* at 498-99.

<sup>70</sup> *See, e.g.*, *Bazley v. Commissioner*, 331 U.S. 737, 742 (1947); *Bingham's Trust v. Commissioner*, 325 U.S. 365, 370-73 (1945); *Commissioner v. Estate of Bedford*, 325 U.S. 283, 290-92 (1945); *Commissioner v. Scottish American Inv. Co.*, 323 U.S. 119, 120-25 (1944).

<sup>71</sup> The *Dobson* court itself acknowledged: "It is difficult to lay down rules as to what should or should not be reviewed in [Tax Court] cases except in terms so general that their effectiveness in a particular case will depend largely upon the attitude with which the case is approached." 320 U.S. at 501.

<sup>72</sup> *See, e.g.*, *Brooklyn Nat'l Corp. v. Commissioner*, 157 F.2d 450, 452-53 (2d Cir. 1946). "Most circuit courts complied with the *Dobson* regime, but their resentment was palpable." Shores, *supra* note 8, at 643.

<sup>73</sup> They included three of the great tax lawyers of their generation: Randolph Paul, Erwin Griswold, and William Sutherland. Mr. Paul called *Dobson* a "strange case." Randolph E. Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact*, 57 HARV. L. REV. 753, 753 (1944). Dean Griswold remarked: "The effect of the *Dobson* case on the circuit courts of appeals to date can only be described as chaos . . . . There is no reason to think that it can ever produce any results more orderly or useful." Griswold, *supra* note 36, at 1170 n.51. Mr. Sutherland, on behalf of the American Bar Association Section of Taxation, urged modification of *Dobson* in testimony before Congress. *Judicial Code and Judiciary: Hearings before Subcomm. of Senate Comm. on Judiciary*, 80th Cong., 2d Sess. 170 (1948).

<sup>74</sup> Act of June 25, 1948, ch. 646, § 36, 62 Stat. 991, 991-92.



evant provisions survive in their essential form today in I.R.C. section 7482. Two portions of section 7482 are of principal importance for us.

First, section 7482(a)(1) states in pertinent part: "The United States Courts of Appeals . . . shall have exclusive jurisdiction to review decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." The well-established standard for review of such decisions is that the district court's findings of fact are accepted unless "clearly erroneous" but that the district court's conclusions of law are considered on a *de novo* basis.<sup>75</sup> By itself, section 7482(a)(1) appears to require application of the same standard when a circuit court reviews a decision of the Tax Court.

Second, section 7482(c)(1) retains the old language in the 1939 Code as to appellate review of decisions of the Board of Tax Appeals (later the Tax Court).<sup>76</sup> That is, section 7482(c)(1) provides that, upon review, the circuit courts of appeals "shall have power to affirm or, if the decision of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court."

After some initial uncertainty,<sup>77</sup> the courts have come to emphasize section 7482(a)(1). That is, the case law typically recites that section 7482 overrules *Dobson* and that circuit courts of appeals should review Tax Court decisions no more deferentially than district court decisions. The Supreme Court has expressed this view<sup>78</sup> and so have the clear preponderance of circuit courts of appeals panels.<sup>79</sup>

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<sup>75</sup> See, e.g., *United States v. General Motors Corp.*, 384 U.S. 127, 141 n.16 (1966).

<sup>76</sup> See *supra* text accompanying note 63.

<sup>77</sup> See Shores, *supra* note 8, at 653-55.

<sup>78</sup> See, e.g., *Commissioner v. Duberstein*, 363 U.S. 278, 289 n.11 (1960). In recent Supreme Court treatment of cases originating in the Tax Court, the Court typically does not discuss *Dobson* and resolves the matter in a fashion not suggesting that greater deference should be accorded Tax Court decisions. E.g., *Commissioner v. Lundy*, 116 S. Ct. 647, 650-57 (1996).

<sup>79</sup> For Shores's survey of cases, see *supra* note 8, at 655-59. Other examples include *Moretti v. Commissioner*, 77 F.3d 637, 642 (2d Cir. 1996); *Bachner v. Commissioner*, 81 F.3d 1274, 1277 (3d Cir. 1996); *Valero Energy Corp. v. Commissioner*, 78 F.3d 909, 912 (5th Cir. 1996); *Mitchell v. Commissioner*, 73 F.3d 628, 631 (6th Cir. 1996); *Resser v. Commissioner*, 74 F.3d 1528, 1535 (7th Cir. 1996); *Brown Group, Inc. v. Commissioner*, 77 F.3d 217, 221 (8th Cir. 1996); *Chakales v. Commissioner*, 79 F.3d 726, 728 (8th Cir. 1996); *Dinsmore v. Commissioner*, 96-1 U.S.T.C. (CCH) ¶ 50,177, at 83,657 (9th Cir. 1996) (per curiam) (designated not for publication); *Cao v. Commissioner*, 96-1 U.S.T.C. (CCH) ¶ 50,167, at 83,627 (9th Cir. 1996) (per curiam) (designated not for publication); *Hawkins v. Commissioner*, 86 F.3d 982, 986 (10th Cir. 1996); *Florida Hospital Trust Fund v. Commissioner*, 71 F.3d 808, 810-11 (11th

But the matter is far from settled. A number of appellate court decisions have stated,<sup>80</sup> and a number of Supreme Court justices have maintained,<sup>81</sup> that additional deference to Tax Court decisions sometimes or always is appropriate, the 1948 legislation notwithstanding.

Moreover, profession is not always congruent with practice. It may well be that some appellate judges do in fact accord greater deference to Tax Court decisions even while rehearsing the incantatory language of a standard of review based on section 7482(a)(1). Commentators have suggested that lack of expertise inclines generalist judges to defer to specialists.<sup>82</sup> Moreover, there is a well-recognized and oft-acknowledged dislike of appellate judges for tax cases,<sup>83</sup> which would make deference to the Tax Court highly tempting. For whatever reason, there is some evidence that appellate courts affirm decisions of the Tax Court more frequently than they do tax decisions of the district courts.<sup>84</sup>

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Cir. 1996); *Friedman v. Commissioner*, 53 F.3d 523, 528 (2d Cir. 1995); *Hudson v. Commissioner*, 96-1 U.S.T.C. (CCH) ¶ 50,001, at 83,006 (5th Cir. 1995) (designated not for publication); *Balken v. Commissioner*, 96-1 U.S.T.C. (CCH) ¶ 50,009, at 83,028 (8th Cir. 1995) (designated not for publication); *Page v. Commissioner*, 58 F.3d 1342, 1347 (8th Cir. 1995); *Praxiteles, Inc. v. Commissioner*, 96-1 U.S.T.C. (CCH) ¶ 50,049 (9th Cir. 1995) (per curiam) (designated not for publication); *Park v. Commissioner*, 25 F.3d 1289, 1291 (5th Cir. 1994), *cert. denied*, 513 U.S. 1061 (1994).

<sup>80</sup> See, e.g., *Inverworld, Ltd. v. Commissioner*, 979 F.2d 868, 875-76 (D.C. Cir. 1992); *Guy F. Atkinson Co. v. Commissioner*, 814 F.2d 1388, 1391 (9th Cir. 1987), *cert. denied*, 485 U.S. 970 (1988); *Take v. Commissioner*, 804 F.2d 553, 556 (9th Cir. 1986); *Magneson v. Commissioner*, 753 F.2d 1490, 1493 (9th Cir. 1985); *ABKCO Indus. v. Commissioner*, 482 F.2d 150, 155 (3d Cir. 1973).

<sup>81</sup> See, e.g., *United States v. Foster Lumber Co.*, 429 U.S. 32, 55 (1976) (Blackmun, J., dissenting, joined by Burger, CJ., & Brennan & Powell, JJ.); *Arrowsmith v. Commissioner*, 344 U.S. 6, 12 (1952) (Jackson, J., dissenting, joined by Frankfurter, J.); *Remarks by the Honorable Potter Stewart, United States Supreme Court, at the Dedication of the New Courthouse of the United States Tax Court*, 28 TAX LAW. 451, 453 (1975).

<sup>82</sup> E.g., Bruff, *supra* note 2, at 337; Dreyfuss, *Specialized Adjudication*, *supra* note 2, at 380; Sean A. Bryan et al., *Special Project: An Empirical Study of the Intercircuit Conflicts on Federal Income Tax Issues*, 9 VA. TAX REV. 125, 132 (1989).

<sup>83</sup> See, e.g., LEARNED HAND, *THE SPIRIT OF LIBERTY* 213 (1952); H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 229-30 (1991); BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 362 (1980); Stephen B. Cohen, *Thurgood Marshall: Tax Lawyer*, 80 GEO. L.J. 2011, 2039-40 (1992); Erwin N. Griswold, *Is the Tax Law Going to Seed?*, 11 AM. J. TAX POL'Y 1, 7 (1994) (noting that "[t]he Supreme Court hates tax cases.").

<sup>84</sup> According to a study of decisions rendered in the years 1983 through 1987, the circuit courts affirmed Tax Court decisions about 73% of the time but district court

Thus, boilerplate language in appellate court opinions as to the standard of review may not describe the true behavior of those courts. Heightened deference to the Tax Court may operate as "*Dobson sub silencio*."

Professor Shores's work may influence the courts' view of the matter in the future. Shores carefully traced the legislative efforts that culminated in the 1948 legislation and concluded that the legislation may not have put *Dobson* to rest after all.

Shores noted the tension between subsections (a) and (c) of section 7482. While subsection (a) seems to repudiate *Dobson*, subsection (c) repeats the law in effect when *Dobson* was decided. If Congress in 1948 reenacted without change the statutory language that *Dobson* appeared to interpret in 1943, was Congress endorsing *Dobson*? Had Congress enacted only section 7482(a) the matter would have been clearer, but it chose to enact section 7482(a) while retaining section 7482(c).<sup>85</sup>

The legislative history does not rescue us from the conundrum. It appears that "the Senate intended to overrule *Dobson* with respect to questions of fact only, while the House intended to overrule *Dobson* with respect to questions of fact as well as law."<sup>86</sup> Whose intent, then, should control? Since the language that eventually became the statute originated in the Senate, Shores maintains that the Senate's intent should predominate.<sup>87</sup> If so, *Dobson* would survive at least to this extent: appellate courts should defer to the Tax Court on issues of law unless the Tax Court's view thereof is plainly unreasonable.

If the statutory pattern sends mixed signals and the legislative history is inconsistent, a conviction that the 1948 legislation completely overruled *Dobson* is on thin ice. Shores does not insist on a radical position that *Dobson* must still be followed in all its particulars.<sup>88</sup> Instead, he argues:

At a minimum one can say that the language and history of

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tax decisions only about 60% of the time. Bryan et al., *supra* note 82, at 146. An earlier study reached largely similar results for the years 1967 through 1970. Worthy, *supra* note 38, at 253.

<sup>85</sup> Shores, *supra* note 8, at 650-51.

<sup>86</sup> *Id.* at 652-53 (discussing the legislative history).

<sup>87</sup> *Id.* at 653.

<sup>88</sup> *Id.* at 631 (noting that "[t]he effect of the 1948 amendment . . . has not been clear with respect to questions of law."). Some other commentators believe the 1948 legislation closed the door on *Dobson* entirely. E.g., Ralph S. Rice, *Law, Fact, and Taxes: Review of Tax Court Decisions Under Section 1141 of the Internal Revenue Code*, 51 COLUM. L. REV. 439, 443 (1951).

the 1948 amendment leave the door open for the courts to construe the amendment as limited to providing a new standard for review of factual issues (“clearly erroneous”) while retaining the *Dobson* standard for legal issues (entitled to “great deference”).<sup>89</sup>

I think Professor Shores is correct. The matter is sufficiently murky that respectable, but inconclusive, arguments can be constructed both for and against the proposition that the law permits appellate deference to Tax Court decisions beyond deference to district court decisions, at least as to issues of law. Thus, “the door [is] open” for greater deference should appellate courts, now or in the future, wish to walk through it.

### *C. Persistence of the Deference Notion*

We have seen proposals for increasing the sway of specialized tax tribunals in several forms: proposals for creating a national court of tax appeals, the *Dobson* version of Tax Court deference, and the post-1948 versions of deference in judicial opinions and Professor Shores’ article. For me, these are not unrelated, and the nature of their relation points to the likelihood that similar ideas will be on the agenda of legal and political discourse for a long time to come.

I earlier used the metaphor of the phoenix. Another is possible as well. The persistence of such proposals is a political/legal counterpart of a physical principle. Boyle’s Law (also known as Mariotte’s Law) states that (at constant temperature) the volume of a gas varies inversely with its pressure. This law explains why, when one squeezes a balloon in one place, it tends to expand in another.

Within our judicial system, concerns related to expertise and uniformity create continuing pressure from some quarters (though not without counterpressures) in favor of expanding the role of specialized tribunals. The complex, arcane nature of the Internal Revenue Code makes that pressure peculiarly powerful.

If the balloon is squeezed at one point as a result of opposition to specialization, the pressure will seek expression at another point. Thus, if a national court of tax appeals is politically infeasible, calls for a substitute (additional deference to the Tax Court) are likely to be heard. If I.R.C. section 7482(a) seems to

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<sup>89</sup> Shores, *supra* note 8, at 653.

sound the death knell for such deference, pressure to revivify it through section 7482(c) is likely to exist.

The various proposals, then, are expressions of a powerful and continuing pressure within the system. Since that pressure is unlikely to disappear, these and similar proposals will remain on the agenda of discourse.

This creates a need to take seriously proposals for enhanced appellate deference to Tax Court decisions and to evaluate their desirability carefully. That is the task of Parts III and IV of this Article, in which I maintain that, while some Tax Court deference arguably still would be legal under section 7482, such deference is a poor idea as a matter of policy.

### III

#### “SECOND BEST” DISADVANTAGES OF INCREASED DEFERENCE

Microeconomics has given us, among other analytical tools, a theorem known as “the general theory of second best.”<sup>90</sup> This theory concerns situations in which a program to accomplish a particular objective entails several necessary parts, or optimal conditions. The theory posits that, if any of the optimal conditions cannot for some reason be achieved or implemented, there is no general reason to believe that the situation will be improved by policies that fulfill a subset of the several optimal conditions.

To take a homely example, assume a person, tired of standing, wishes to build a stool in order to sit. Stools typically have at least three legs, all of which are needed for stability. But our protagonist has only enough wood for two legs, rendering it impossible to fulfill one of the optimal conditions of the stool: a third leg. If, despite that inability, she implements her policy in the feasible but second-best fashion (building a two-legged stool), she likely will topple to the ground when she tries to sit on the stool. While the first-best solution (a three-legged stool) would have been an improvement over the *status quo ante*, the second-best solution (a two-legged stool) created a worse situation (if the pain of hitting the ground is worse than the fatigue of continuing to stand).<sup>91</sup>

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<sup>90</sup> The best known statement of this theorem is in R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUDIES 11 (1956); see also J.E. MEADE, *TRADE AND WELFARE* (1955).

<sup>91</sup> For additional explanation and examples of the theory, see Richard S. Marko-

The theory of the second best has its purest application in cases of allocative efficiency under Pareto optimality.<sup>92</sup> However, the concept also provides a useful perspective from which to understand why the proposal for additional deference to Tax Court decisions, without more radical change in the structure of federal tax litigation, would be unwise.

To the concerns for increased expertise and certainty in resolving tax disputes, a national court of tax appeals arguably is a first-best solution. That solution involves two optimal conditions: (1) specialization and (2) singularity.

Specialization is promoted when the court favored by a proposal hears only one kind of case. Such specialization leads to the subject-matter competence that intensivity breeds. This is compounded when appointments to the court are made from the ranks of those already expert as tax practitioners. Both a national court of tax appeals and deference to the Tax Court would implement the specialization condition since they both seek to exalt the role of a specialist tax court, the former that of a tax appellate court, the latter that of a tax trial court.

The difference between the two proposals relates mainly to the singularity condition. Singularity means that, apart from occasional Supreme Court review,<sup>93</sup> there would be one, final judicial voice directing disposition of tax controversies. A national court of tax appeals would fulfill singularity. Even if multiple trial forums still were permitted, appeals typically would go to the same, singular court of review.<sup>94</sup>

In contrast, a rule of deference to the Tax Court would achieve singularity only if it commanded absolute deference. An absolute rule would operate as to any issue on which the Tax Court had previously expressed its view (whether or not the case at hand had originated in the Tax Court), and it would require, without exception (other than inconsistent Supreme Court reso-

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vits, *A Basic Structure for Microeconomic Policy Analysis in Our Worse-than-Second-Best World: A Proposal and Related Critique of the Chicago Approach to the Study of Law and Economics*, 1975 WIS. L. REV. 950 (1975).

<sup>92</sup> See *id.* at 960-70.

<sup>93</sup> Such review is rare now and might become even more so after creation of a national court of tax appeals. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 70 (Apr. 2, 1990) (creating a national court of tax appeals would "reduce the pressure on the Supreme Court to grant certiorari in tax cases to resolve intercircuit conflicts").

<sup>94</sup> A possible exception would be appeals from tax decisions rendered by the Bankruptcy Court.

lution of the issue), that the court of appeals follow the Tax Court's position. In effect, such a rule would place the courts of appeals in the position of rubber-stamping decisions in cases on appeal from the Tax Court and of applying the Tax Court's view of issues to cases on appeal from other trial courts.

Of course, such an absolute rule of deference cannot be squared with existing law.<sup>95</sup> Recognizing this, Shores' version of deference is not absolute. There are at least three significant qualifications in his proposal: (1) deference to the Tax Court's view would be required only in cases on appeal from the Tax Court, not those on appeal from other trial courts;<sup>96</sup> (2) deference would not be required in certain situations even in cases on appeal from the Tax Court;<sup>97</sup> and (3) despite deference, the court of appeals still could reverse if it found the Tax Court's view lacking any reasonable basis.<sup>98</sup>

The net effect of less-than-absolute deference would be to leave circuit courts with a significant role in developing the tax law, even at variance to positions taken by the Tax Court.<sup>99</sup> Also, the trial forums other than the Tax Court would remain and would not be bound by a single controlling appellate tribunal.

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<sup>95</sup> However one interprets the 1948 legislation in terms of its effect on *Dobson*, such an absolute rule of deference would traduce both of the relevant portions of section 7482. See I.R.C. § 7482(a)(1) (1998) (the circuit courts have jurisdiction to review Tax Court decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury") & (c)(1) (the circuit courts "shall have power to affirm or, if the decision of the Tax Court is not in accordance with law, to modify or to reverse the decision"). As one court admonished:

[T]he Tax Court of the United States is not lawfully privileged to disregard and refuse to follow . . . an opinion of the court of appeals . . . . The desire of the tax court to establish by its decisions a uniform rule does not empower it to disregard the decisions of its several reviewing courts of appeals. It is for the Supreme Court of the United States—and for that tribunal alone—to review and reverse decisions of the courts of appeals . . . . Until the Supreme Court reverses a rule by a court of appeals for its circuit, that rule must be followed by the tax court.

*Stacey Mfg. Co. v. Commissioner*, 237 F.2d 605, 606 (6th Cir. 1956) (per curiam).

<sup>96</sup> Shores, *supra* note 8, at 671-72. This was the rule under *Dobson* too. See 320 U.S. at 502; *Kirschenbaum v. Commissioner*, 155 F.2d 23, 25 (2d Cir. 1946), *cert. denied*, 329 U.S. 726 (1946).

<sup>97</sup> Shores, *supra* note 8, at 672-73. See *infra* text accompanying notes 134 to 143.

<sup>98</sup> Shores, *supra* note 8, at 663. Again, *Dobson* took a largely similar view. 320 U.S. at 502.

<sup>99</sup> Indeed, this is deliberate. Shores wants to preserve the opportunity of the circuit courts of appeals to make their contributions to elaboration of the tax law. Shores, *supra* note 8, at 666.

In short, a national court of tax appeals—by imposing a single review level on all trial forums—would achieve singularity. A non-absolute rule of deference to the Tax Court—which is the only version of deference possible under present section 7482—would not achieve singularity.

Thus, in the language of the theory of second best, the deference proposal would achieve only one of the two optimal conditions. As shown below, the failure of one of the optimal conditions means that fulfilling the other condition will not only be ineffective, it will lead to a worse situation than doing nothing.

Specifically, fulfilling the specialization condition without fulfilling the singularity condition would produce four disadvantages. It would (1) decrease resort to the Tax Court as the trial forum with respect to new issues of law, (2) exacerbate forum shopping by taxpayers, (3) create intracircuit non-uniformity, and (4) increase, not decrease, intercircuit non-uniformity.

#### *A. Decreased Tax Court Litigation of New Issues*

In evaluating the soundness of any proposed reform to a system of litigation, a critical set of questions relates to the behavioral changes that the proposed reform would encourage among lawyers in the system. Thus, we need to ask: how would taxpayers and their counsel react were they to know that, as a result of a rule of deference, the trial court's decision would be very difficult to have reversed if they bring the case in Tax Court but would be easier to have reversed if they bring the case in a different trial forum?

Anyone who has practiced law, or studied it being practiced, is aware of a preference, almost an instinct, ingrained in the bar. Attorneys feel most comfortable when they have several opportunities to secure victory for their clients; lawyers are uncomfortable with having, effectively, only one shot.

Absent a sea change in lawyers' outlooks, this spells trouble under a rule of deference. If the Tax Court's decision would, as a result of deference, be very difficult to reverse on appeal, lawyers bringing their clients' cases in the Tax Court would be putting themselves in the uncomfortable position of having only one shot. If the Tax Court is blind to their logic and deaf to their eloquence, that will, in most instances, be the end of the matter. They will have lost, without the chance to retrieve the situation on appeal.



In contrast, by choosing to bring the case instead in district court, the Court of Federal Claims, or the Bankruptcy Court, taxpayers' counsel would preserve a greater opportunity to undo on appeal an adverse decision by the trial court.

Thus, under a rule of deference, the tendency of counsel would be to think twice before litigating a controversy in the Tax Court. This reticence would be compounded by the lingering suspicion of some that the Tax Court favors the government.<sup>100</sup> This notion is mistaken in my view,<sup>101</sup> but it persists in some quarters. To take a parallel, concern that a specialized tax tribunal would favor the government accounts for at least some of the hostility to a national court of tax appeals.<sup>102</sup> Such suspicion likely would reinforce a tendency on the part of taxpayers and their counsel to shy away from bringing their cases in a Tax Court almost immunized from appellate review.<sup>103</sup>

The concern that appellate deference would lead to fewer cases being taken to the Tax Court has some historical support, from the five-year interim between the *Dobson* decision and Congress' attempt to overrule or modify it. Both houses of Congress held hearings on the 1948 legislation. Testifying before the Senate, Representative Edward J. Devitt described the aftermath of *Dobson's* rule of deference: "[T]ax lawyers have been reticent to bring their cases in the Tax Court now, because when they got up to the higher courts, they could not make a thorough enough examination and review of the decision which had been rendered

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<sup>100</sup> E.g., HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 166 (1973); B. Anthony Billings et al., *Are U.S. Tax Court Decisions Subject to the Bias of the Judge?*, 55 *TAX NOTES* 1259 (1992); Bruff, *supra* note 2, at 336; Geier, *supra* note 61, at 997-99, 1017.

<sup>101</sup> See, e.g., Paul L. Caron, *Tax Myopia Meets Tax Hyperopia: The Unproven Case of Increased Judicial Deference to Revenue Rulings*, 57 *OHIO ST. L.J.* 637, 667-68 (1996); Caron, *supra* note 37, at 577-81; Posner, *Will the Federal Courts of Appeals Survive Until 1984?*, *supra* note 1, at 782.

<sup>102</sup> Objecting to creation of such a court, the American Bar Association Section of Taxation wrote: "One can hardly think of a judicial structure better designed to produce taxpayer distrust and doubts of fairness than one that centers exclusive control over civil tax disputes throughout the nation in a single court of . . . tax specialists before whom the government appears in every case." AMERICAN BAR ASS'N SECTION ON TAXATION, *REPORT TO HOUSE OF DELEGATES* 9 (Feb. 1990); see also Popkin, *supra* note 44, at 1103-04.

<sup>103</sup> An aspect of Shores' version of deference would compound this tendency. He suggests that deference should be especially strong in cases in which the Tax Court held for the IRS. Shores, *supra* note 8, at 664-65. It would be hard to imagine a measure better calculated to render the Tax Court a less attractive forum to taxpayers and their lawyers.

by the Tax Court.”<sup>104</sup>

As we have seen, a principal rationale for deference is the belief that the Tax Court is more qualified to render sound decisions in tax cases than are other courts. It would be ironic if, as a result of a rule of deference, fewer cases were decided by the tribunal with the most expertise. The reluctance to proceed in the Tax Court would be greatest in cases featuring issues that court has not yet addressed, since uncertainty of outcome would be greatest as to such issues. Yet such new issues are among those on which the guidance of specialist Tax Court judges could be of greatest assistance to tax administrators, tax practitioners, and taxpayers.

### B. Exacerbated Forum Shopping

A rule of deference would not introduce forum shopping into tax litigation. That practice already is a way of life in tax controversies—inevitably so when taxpayers can choose among four trial forums.<sup>105</sup> What a rule of deference *would* do, however, would be to increase the predictability of the results taxpayers would get by forum shopping. Such a rule would increase, not the frequency, but the effectiveness of forum shopping. It would allow taxpayers to more effectively “game” the tax litigation system, to the consistent disadvantage of the government.

Consider the incentives under the *status quo*, without a rule of deference. Assume a new issue of law reaches the Tax Court. If the Tax Court decides that issue in favor of the taxpayer, future taxpayers disputing the same issue with the IRS will be inclined to take their cases to the Tax Court also. If, on the other hand, the Tax Court decides that issue for the government, the inclination of future taxpayers with that issue will be to avoid the Tax Court.

However, under the present system, these inclinations are tempered. The Tax Court’s decision (for whichever side) in the first case considering the issue may be reversed on appeal. Moreover, future taxpayers with the same issue but whose cases would be appealable in different circuits could take only partial comfort from the first Tax Court decision, even if affirmed on appeal. Whenever venue for appeal of a future case involving the issue

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<sup>104</sup> *Hearings on H.R. 3214 before Subcomm. of the Comm. on the Judiciary, 80th Cong., 2d Sess. 20 (1948).*

<sup>105</sup> See *supra* text accompanying notes 12 to 31.

lies with a circuit court of appeals that has not yet spoken on the issue, the possibility exists that the party who predictably will win at trial may lose on appeal. Realization of these possibilities necessarily complicates evaluation of forum alternatives, dampening forum shopping by making its advantages less certain and predictable.

In contrast, forum shopping incentives would be reinforced, not tempered, under a rule of deference. Under such a rule, the Tax Court's decision in the initial case presenting the new issue would be largely immune from reversal on appeal. Moreover, the Tax Court's decisions in future cases involving the issue would be similarly secure from reversal—regardless of the circuit or circuits in which they may be appealable.

Thus, under an effective rule of deference, the results of forum selection would be highly predictable.<sup>106</sup> Once the Tax Court has decided an issue for the taxpayer, all future cases presenting that issue will be litigated in that forum,<sup>107</sup> virtually setting in stone the pro-taxpayer rule.

However, once the Tax Court has decided an issue for the government, that issue will appear again in the Tax Court only under remarkable circumstances. Thus, the government's victory in the Tax Court will be at hazard in each succeeding court in which taxpayers seek a more favorable result than was obtained in the Tax Court, *i.e.*, in the Court of Federal Claims, in each district court, in the Bankruptcy Court in each district, and in each appellate court subsequently considering the issue involved.

In short, an effective rule of deference would make the outcomes of forum selection more reliably foreseeable by taxpayers. Forum shopping would become a much more effective enterprise for taxpayers.

This would produce or aggravate three ills:

(1) Effective forum shopping would operate to the consistent disadvantage of the government and, therefore, the national fisc.

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<sup>106</sup> An "effective" rule of deference would be one consistently applied by all circuit courts of appeals. If, as argued by subpart III.D of this Article, no rule of deference is likely to be capable of such uniform application, the ambiguity or unpredictability of application would complicate forum selection. The dilemma, then, is this: an unpredictably applied rule of deference would not improve certainty and uniformity while a predictably applied rule of deference would exacerbate forum shopping.

<sup>107</sup> Indeed, an attorney not choosing the Tax Court under these circumstances would risk unpopularity with her malpractice insurance carrier.

It is entirely appropriate, of course, if the IRS loses a case because it has incorrectly interpreted the Code. It is less acceptable if the revenue is diminished because, in controversial matters, taxpayers are able effectively to manipulate a fragmented litigation structure.<sup>108</sup>

(2) As noted, when the Tax Court holds for the government as to an issue, future cases involving that issue are likely to be diverted to other trial forums. This will compound the effect noted in the prior subpart: reluctance on the part of counsel to bring cases involving new issues in the Tax Court. Thus, in yet a second way, a rule of deference would diminish the number of cases heard by the very forum that has the greatest subject-matter expertise in tax law and the very forum whose influence a rule of deference is designed to enhance.

(3) Rich taxpayers would be advantaged relative to taxpayers of more modest means. Taxpayers of all income classes would, under a rule of deference, understand more clearly the probable effects of selecting different forums. However, taxpayers would not be equally able to seize the new opportunities. Assume two taxpayers dispute the same issue of law with the IRS and that, for whatever reason, these taxpayers cannot or do not wish to file

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<sup>108</sup> The government would, of course, have some options by which to protect itself. For example, Congress could amend the relevant provision of the Code or the Treasury could, in some cases, attempt to tighten an applicable regulation. However, given the press of other business and limitations of time and personnel, such correction cannot be counted upon to be certain, much less swift. From early on, for instance, there was widespread skepticism about *Five Star Mfg. Co. v. Commissioner*, 355 F.2d 724 (5th Cir. 1966) (permitting deduction of amount paid to shareholder to terminate his interest in a company), *rev'g* 40 T.C. 379 (1963). *See, e.g.*, *Jim Walter Corp. v. United States*, 498 F.2d 631, 639 (5th Cir. 1974); *H. & G. Inds. v. Commissioner*, 495 F.2d 653, 656-58 (3d Cir. 1974). Yet it was not until 20 years later that Congress legislatively overruled the *Five Star* decision. *See* I.R.C. § 162(k), enacted by Pub. L. No. 99-514, § 613, 100 Stat. 2251; H. Rep. No. 426, 99th Cong., 1st Sess. 248 (1985). For discussion of the obstacles to legislative correction of judicial decisions generally, see William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331, 353-90 (1991).

Alternatively, the government could seek Supreme Court review to overturn adverse decisions. However, since the Supreme Court takes few tax cases each term, an untoward rule could have long life before the Supreme Court grants review. For instance, despite enormous revenue significance, it was not until 1988 in *Arkansas Best Corp. v. Commissioner*, 485 U.S. 212 (1988), that the Supreme Court corrected the overly broad readings of its 1958 decision *Corn Products Refining Co. v. Commissioner*, 350 U.S. 46 (1955), that had arisen fairly swiftly after *Corn Products* was decided. *See, e.g.*, *Booth Newspapers, Inc. v. United States*, 308 F.2d 916, 920-21 (Ct. Cl. 1962); *Steadman v. Commissioner*, 424 F.2d 1, 5 (6th Cir.), *cert. denied*, 400 U.S. 869 (1970).

bankruptcy petitions. Taxpayer A is flush with cash; taxpayer B is experiencing cash flow difficulties. Further assume that, in a previous case, the Tax Court had decided the same issue in favor of the IRS.

In the above scenario, the logical forum choice, of course, is either district court or the Court of Federal Claims. Both are refund forums, so full payment of the asserted deficiency is pre-requisite to invoking the jurisdiction of these courts.<sup>109</sup>

Taxpayer A will have the wherewithal to make full payment, so will be able to avail herself of the desirable forum. Taxpayer B will lack the necessary resources to fully pay the tax in controversy, so will be forced to litigate in the Tax Court. Thus, A may win at trial, but B almost surely will lose. Because of deference, B will have little chance of improving his lot on appeal.<sup>110</sup>

Of course, even now, financial differences permit some taxpayers to select refund forums while others cannot. However, the difference in opportunities and outcomes between rich and non-rich taxpayers would be greater under a rule of deference. A deference rule tells taxpayers with greater certainty in which court to litigate. Resource differences mean less in an environment in which knowledge limitations render it unclear where resources should be deployed. Under a rule of deference, the rich would know better where they can "buy more justice." This would permit the better mobilization of wealth, increasing the chance that rich taxpayers will have better litigation outcomes than other taxpayers whose cases, on the merits, are identical.<sup>111</sup>

In short, forum shopping is a regrettable feature of the current system of tax litigation. For the reasons described above, a rule of appellate deference to the Tax Court would make the problem worse.

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<sup>109</sup> See, e.g., *Flora v. United States*, 357 U.S. 63, 74 (1958), *aff'd on rehearing*, 362 U.S. 145 (1960).

<sup>110</sup> Of course, even under the present system, there is no guarantee that B would prevail on appeal, regardless of the merits of the case. If B's financial problems are grave enough, he will be unable to pay a lawyer to prosecute an appeal. Still, appeals usually are less expensive than trials, and some means of reducing total litigation costs exist. For example, a pure issue of law often can be presented on a fully stipulated basis, minimizing costs.

<sup>111</sup> The different abilities of taxpayers to manipulate the system is a disadvantage of the complex substantive tax law. E.g., MICHAEL J. GRAETZ & DEBORAH H. SCHENK, *FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES* 32 (3d ed. 1995). A rule of deference would compound this under the procedural tax law.

### C. New Intracircuit Non-Uniformity

Although he concedes that perfect uniformity never can be achieved,<sup>112</sup> a principal attraction of the deference idea for Professor Shores is the expectation that it will increase uniformity in the application of the tax laws.<sup>113</sup> I share the view that such uniformity is an important goal of our tax system.<sup>114</sup> However, in my view, a rule of deference would not appreciably increase tax uniformity or the related virtues of predictability and consistency in taxation. Indeed, it would reduce them.

A national court of tax appeals arguably would enhance decisional uniformity, predictability, and consistency,<sup>115</sup> although even that would not yield perfect results, particularly over time.<sup>116</sup> However, as noted, the second-best alternative, a rule of deference to Tax Court decisions, would fail to fulfill the singularity condition of an optimum solution.

That failure would undercut uniformity, predictability, and consistency. Specifically, a rule of deference would (1) replace *intercircuit* non-uniformity with *intracircuit* non-uniformity and (2) add a new level of procedural non-uniformity to a not-appreciably-diminished level of substantive non-uniformity. The first of these points is developed here; the second is developed below in subpart IIID.

The view of an issue announced by a national court of tax appeals would produce one rule to be followed in each subsequent

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<sup>112</sup> Shores, *supra* note 8, at 629, 671 ("Splits among the circuits would still develop, but they would be less frequent and involve issues of greater difficulty than is presently the case.").

<sup>113</sup> *Id.* at 661, 671.

<sup>114</sup> See, e.g., *United States v. Pelzer*, 312 U.S. 399, 402-03 (1941); *Burnet v. Harmel*, 287 U.S. 103, 110 (1932); *Paul v. Commissioner*, 206 F.2d 763, 765-66 (3d Cir. 1953); *Lawrence v. Commissioner*, 27 T.C. 713, 718-20 (1957) (reviewed by the court).

<sup>115</sup> See, e.g., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 70 (1990); see also *supra* text accompanying note 44. For an argument that a tax appellate court would not increase predictability, see Popkin, *supra* note 44, at 1102.

<sup>116</sup> A court may change its mind over time about the wisdom of its earlier resolution of any given issue. The Tax Court, for example, often has done so. Sometimes this has been as a result of being persuaded by reversals by circuit courts. See *infra* note 152. However, the Tax Court often has reversed its own precedents even without prodding by circuit courts. E.g., *Estate of Levitt v. Commissioner*, 95 T.C. 289, 299-300 (1990); see also Popkin, *supra* note 44, at 1102 & n.10 (citing additional cases); cf. *B.C. Cook & Sons, Inc. v. Commissioner*, 65 T.C. 422 (1975); *B.C. Cook & Sons, Inc. v. Commissioner*, 59 T.C. 516 (1972) (*dictum*) (Tax Court changing its mind as to applicability of the statute of limitations mitigation provisions in same controversy involving same taxpayer).

case, regardless of the trial court in which that case is tried. In contrast, under both *Dobson* and Shores's proposal, a court of appeal would defer to the view of the Tax Court only in cases on appeal from the Tax Court.<sup>117</sup>

Thus, assume the following scenario: a case involving an issue of law is tried in the Tax Court, which decides the issue in favor of the IRS. The taxpayer appeals. The court of appeals hearing the case concludes that the Tax Court is wrong on the issue, but not so wrong that there is no reasonable basis for the Tax Court's view. Under the proposed rule of deference, the court of appeals should affirm the Tax Court's decision for the IRS.<sup>118</sup> Later, however, a case presenting the same issue reaches the same court of appeals from a district court. Now, review of the issue of law is *de novo*, and the appellate court will not have to heed the Tax Court's contrary view. The taxpayer, not the IRS, will prevail in this second case. There will be no consistent view of the issue within that circuit.<sup>119</sup>

In contrast, under the current regime, the two cases would have been decided uniformly. After appeals, the taxpayers would have won both cases. In short, the proposed rule of deference—in its quest to promote intercircuit uniformity—will have destroyed the intracircuit uniformity that now exists.<sup>120</sup>

Professor Shores argues that the beneficial effect of a deference rule on intercircuit uniformity should trump its deleterious effect on intracircuit uniformity.<sup>121</sup> I argue in subpart IIID that a deference rule actually will decrease, not increase, uniformity on a nationwide basis.

However, for present purposes, assume that national uniform-

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<sup>117</sup> See *supra* text accompanying note 96.

<sup>118</sup> I say "should" rather than "would" because it is far from sure that the circuit courts always would implement a rule of deference as intended by its proponents. See *infra* subpart IIID.

<sup>119</sup> Maintaining decisional consistency within the circuit is an important concern for appellate judges. Still, this institutional drive is no sure safeguard here. Inconsistency in tax cases would not be the fault of these judges, but would be the consequence of disparate standards of review foisted upon them.

<sup>120</sup> Shores is aware of this problem. He acknowledges it but concludes that it is inevitable because of the fragmented tax trial structure. Shores, *supra* note 8, at 672 ("A degree of incoherence is built into the tax litigation system that Congress has adopted. While this incoherence violates the uniformity principle, absent legislation it is simply unavoidable."). This highlights the central flaw of the deference proposal. By fulfilling one but not both of the optimal conditions of reform, the second-best approach of deference fails to solve the problem it is intended to cure.

<sup>121</sup> *Id.*

ity would be furthered by a rule of deference. On that premise, it still is less than clear that an increased level of intercircuit uniformity should be valued more highly than the acknowledged decrease of intracircuit uniformity. In making the comparative assessment, attention should be paid to the debate that culminated in the Tax Court's adoption of the *Golsen* rule.<sup>122</sup> The Tax Court (in the form of its ancestor, the Board of Tax Appeals) was created as a nation-wide tribunal. Congress contemplated that the decisions of that court would maximize uniform application of the tax laws throughout the country.<sup>123</sup>

For that reason, the Tax Court originally took the position that, while such decisions would be given careful consideration for their persuasive content, the Tax Court was not bound by contrary decisions of the courts of appeals, even those to whom their decisions were appealable.<sup>124</sup> For example, assume a case tried in the Tax Court involved an issue of law and that the Tax Court thought the issue should be resolved for the taxpayer, but the court of appeals to which appeal would lie had made it clear that it thought the issue should be resolved for the IRS. Under the Tax Court's original position, the Tax Court would decide the case for the taxpayer, despite the appellate court's contrary view (thus increasing the probability of reversal on appeal).<sup>125</sup> The Tax Court based that position on its view of itself as a national court designed to promote uniformity in application of the tax laws.<sup>126</sup> However, this original position was widely criticized. Commentators roundly denounced it.<sup>127</sup> As might be expected,

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<sup>122</sup> *Golsen v. Commissioner*, 54 T.C. 742, 756-58 (1970) (reviewed by the court), *aff'd*, 445 F.2d 985 (10th Cir.), *cert. denied*, 404 U.S. 940 (1971).

<sup>123</sup> *See, e.g.*, H. R. REP. NO. 69-1, at 17-19 (1925); 67 CONG. REC. 1136-37, 3749 (1925) (statements of Rep. McLaughlin); *Revenue Act of 1926: Hearings Before the House Ways & Means Comm.*, 69th Cong. 869, 878, 911, 926, 932 (1926) (statements of Sen. King).

<sup>124</sup> *E.g.*, *Joan Carol Corp. v. Commissioner*, 13 T.C. 83, 85 (1949), *rev'd per curiam*, 180 F.2d 751 (2d Cir. 1950); *Brooklyn Nat'l Corp. v. Commissioner*, 5 T.C. 892, 895 (1945), *aff'd*, 157 F.2d 450 (2d Cir.), *cert. denied*, 329 U.S. 733 (1946).

<sup>125</sup> The key case expressing this view was *Lawrence v. Commissioner*, 27 T.C. 713, 716-20 (1957) (reviewed by the court), *rev'd*, 258 F.2d 562 (9th Cir. 1958).

<sup>126</sup> The Commissioner of Internal Revenue, who has the duty of administering the taxing statutes of the United States throughout the Nation, is required to apply these statutes uniformly, as he construes them. The Tax Court, being a tribunal with national jurisdiction over litigation involving the interpretation of Federal taxing statutes which may come to it from all parts of the country, has a similar obligation to apply with uniformity its interpretation of those statutes.

*Id.* at 719.

<sup>127</sup> *E.g.*, Louis A. Del Cotto, *The Need for a Court of Tax Appeals: An Argument*



the appellate courts were less than enamored of the idea.<sup>128</sup> Even individual Tax Court judges expressed their reservations.<sup>129</sup>

These waves of disapprobation crested in *Golsen*. In a decision reviewed by the full court, and with only one judge in dissent, the Tax Court abandoned its "oft-criticized"<sup>130</sup> former view. It held that, henceforth, it would "follow a Court of Appeals decision which is squarely in point where appeal from our decision lies to that Court of Appeals and to that court alone."<sup>131</sup>

What of the concern for national uniformity on which the Tax Court's prior position had been based? Although the court suggested that that purpose still could be served in some measure,<sup>132</sup> the inference drawn from *Golsen* is that promoting intracircuit consistency outweighs dilution of intercircuit consistency.<sup>133</sup>

That lesson applies to the deference proposal as well. A long debate preceded *Golsen*. *Golsen* concluded that debate by deciding that the Tax Court should yield to the reviewing appellate

*and a Study*, 12 BUFF. L. REV. 5, 8-10 (1962); M. Carr Ferguson, *Jurisdictional Problems in Federal Tax Controversies*, 48 IOWA L. REV. 312, 368-70 (1963); Jack Lee Orkin, *The Finality of the Court of Appeals Decisions in the Tax Court: A Dichotomy of Opinion*, 43 A.B.A.J. 945 (1957); F. Trowbridge Vom Baur & George M. Coburn, *Tax Court Wrong in Denying Taxpayer the Rule Laid Down in His Circuit*, 8 J. TAX. 228 (1958); Note, *Controversy Between the Tax Court and Courts of Appeals: Is the Tax Court Bound by the Precedent of its Reviewing Court?*, 7 DUKE L.J. 45 (1957); Comment, *Heresy in the Hierarchy: Tax Court Rejection of Court of Appeals Precedents*, 57 COLUM. L. REV. 717 (1957); Comment, *The Tax Court, the Courts of Appeals and Pyramiding Judicial Review*, 9 STAN. L. REV. 827 (1957); Recent Case, 70 HARV. L. REV. 1313 (1957).

<sup>128</sup> E.g., *Stern v. Commissioner*, 242 F.2d 322, 324 (6th Cir. 1957), *aff'd*, 357 U.S. 39 (1958); *Sullivan v. Commissioner*, 241 F.2d 46, 47 (7th Cir. 1957), *aff'd*, 356 U.S. 27 (1958); *Stacey Mfg. Co. v. Commissioner*, 237 F.2d 605, 606 (6th Cir. 1956) (per curiam); *Holt v. Commissioner*, 226 F.2d 757, 758 (2d. Cir. 1955).

<sup>129</sup> *McLellan v. Commissioner*, 51 T.C. 462, 465-67 (1968) (Simpson, J., concurring); *Automobile Club of New York, Inc. v. Commissioner*, 32 T.C. 906, 925-26 (1959) (Pierce, J., dissenting); *Dann v. Commissioner*, 30 T.C. 499, 510 (1958) (Opper, J., dissenting).

<sup>130</sup> *Golsen v. Commissioner*, 54 T.C. 742, 756-57 (1970) (reviewed by the court), *aff'd*, 445 F.2d 985 (10th Cir.), *cert. denied*, 404 U.S. 940 (1971).

<sup>131</sup> *Id.* at 757. For limits to the *Golsen* rule, see Geier, *supra* note 14, at 438 n.81.

<sup>132</sup> *Golsen*, 54 T.C. at 757 ("We shall remain able to foster uniformity by giving effect to our own views in cases appealable to courts whose views have not yet been expressed, and, even where the relevant Court of Appeals has already made its views known, by explaining why we agree or disagree with the precedent that we feel constrained to follow.")

<sup>133</sup> The Tax Court stated: "Notwithstanding a number of the considerations which originally led us to that decision, it is our best judgment that better judicial administration . . . , efficient and harmonious judicial administration calls for us to follow the decision of [the reviewing appellate] court." *Id.*

court. In the quarter of a century since, *Golsen* has been followed hundreds of times, and it is a settled rule.

The deference proposal, by having the reviewing circuit court yield to the Tax Court, would turn the clock back and reverse the judgment of history. In attempting to promote intercircuit consistency, we should be slow to create intracircuit inconsistency.

#### *D. Increased Intercircuit Non-Uniformity*

My argument here is that, because of the inherent complexity and ambiguity of a deference rule and because many circuit judges will be reluctant to defer, some judges would operate deferentially with respect to Tax Court decisions but many others would not. Two implications as to certainty, predictability, and uniformity of the tax law flow from this. First, because deference would be only partial, the increased uniformity of the substantive tax law resulting from a rule of deference would be limited.

Second, a whole new layer of uncertainty and lack of uniformity would be created. Since deference would be appropriate in some cases but not others and since deference, even when appropriate, would be accorded by some judges but not others, taxpayers and their counsel always would be unsure whether, when the case is appealed and the court of appeals panel is constituted, deference would be accorded to the Tax Court's decision in their case.<sup>134</sup> This can be called "procedural uncertainty," since rules of deference are procedural in character.

When limited reduction of substantive uncertainty is combined with creating a whole new layer of procedural uncertainty, the likely effect of a rule of deference would be less certainty, predictability, and uniformity in federal taxation, not more.

When the doctrinal shoe cramps the judicial foot, judges often find ways to avoid the discomfort by avoiding the rule. Instances can be found in the application of many rules.<sup>135</sup> A rule of

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<sup>134</sup> The larger the circuit in terms of the number of its appellate judges, the greater the uncertainty in this regard. Some circuits already may be too large to maintain reasonable cohesion. See, e.g., Posner, *supra* note 1, at 762. But see Arthur D. Hellman, *Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come*, 57 MONT. L. REV. 261, 262 (1996) ("empirical studies do not support assertions that the Ninth Circuit Court of Appeals has been unable to maintain consistency in its decisions").

<sup>135</sup> Two examples follow. First, a trial court's findings of fact traditionally have been harder to challenge on appeal than its conclusions of law. See *supra* text accompanying note 75. Thus, appellate courts wishing to expand their room for review often have creatively redefined factual findings as legal conclusions. See, e.g., Bing-

heightened deference to the Tax Court is likely to suffer the same fate. This is because (1) a judge who wants to avoid heightened deference typically will be able to do so and (2) judges in many cases will want to avoid heightened deference.

### 1. Opportunity

No one—neither the *Dobson* court, subsequent courts, nor commentators—argues for a rule of absolute deference. Institutionally and politically, it is hard to imagine any arrangement that leaves Tax Court decisions largely unreviewable.

However, if circuit courts of appeals will continue to have a role in the process, it will be hard to police the limits. For instance, Professor Shores still would allow reviewing courts to reverse the Tax Court on issues of law when they find clear error.<sup>136</sup> The line between clear error and mere error is wavy at best. Thus, Shores acknowledges: “Deferential review is by no means a mechanical standard, and at times courts of appeals would undoubtedly disagree on whether the Tax Court’s view on a given issue represents clear error. It would not end conflict among the circuits; nor should it.”<sup>137</sup>

That is not all. In our legal system, rare is the rule without exceptions. Judicial imagination likely would discover situations in which deference, even if normally extended, would be deemed inappropriate. Many exceptions already have been suggested or are easy to anticipate:

(1) One Ninth Circuit decision suggested that Tax Court decisions authored by a single judge should receive less deference than decisions reviewed by the full Tax Court.<sup>138</sup> This exception by itself would largely eviscerate a rule of deference since the

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ham’s Trust v. Commissioner, 325 U.S. 365, 382 (1945) (Frankfurter, J., concurring); Emanuel L. Gordon, *Reviewability of Tax Court Decisions*, 2 TAX L. REV. 171, 171-81 (1947); Rice, *supra* note 88, at 447-53.

Second, the *Chevron* rule applies to administrative law generally. See *infra* Part IV. There is substantial evidence that the courts have manipulated *Chevron* (or ignored it) to advance their ideological preferences. See Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051 (1995).

<sup>136</sup> Shores, *supra* note 8, at 663.

<sup>137</sup> *Id.* at 666; see also *id.* at 672 (noting that “[d]eferential review is a flexible concept, and not all Tax Court decisions should be treated equally.”).

<sup>138</sup> Ann Jackson Family Found. v. Commissioner, 15 F.3d 917, 920 n.9 (9th Cir. 1994) (dictum). Shores agrees. Shores, *supra* note 8, at 672.

great majority of Tax Court decisions are authored by only one judge.<sup>139</sup>

(2) Even as to reviewed opinions, the same Ninth Circuit decision implied that non-unanimous Tax Court decisions could receive less deference.<sup>140</sup> Again, this would be a significant exception. In many important reviewed cases, the Tax Court has been seriously split.<sup>141</sup>

(3) It also has been suggested that deference is less important when another circuit court already has spoken to the issue or when the issue of law is not particularly complex or technical.<sup>142</sup>

(4) Other possible exceptions can be imagined. For instance, the case for deference seems weaker in (a) areas over which the Tax Court has only recently acquired jurisdiction and thus has not had time to acquire great expertise,<sup>143</sup> (b) situations in which the Tax Court has long had jurisdiction but has had few cases, again preventing formation of a critical mass of expertise,<sup>144</sup> and

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<sup>139</sup> For example, in 1996, the Tax Court released 564 memorandum opinions and 46 regular opinions. No memorandum opinions are reviewed by the full court, and only four of the regular opinions in 1996 were court-reviewed. Thus, 606 of the 610 appealable Tax Court decisions in that year would have fallen within this exception.

<sup>140</sup> 15 F.3d at 920 n.9. Again, Shores agrees, at least as to cases in which the vote in the Tax Court is close. Shores, *supra* note 8, at 672.

<sup>141</sup> *E.g.*, North West Life Assurance Co. of Canada v. Commissioner, 107 T.C. 363 (1996); Estate of Mueller v. Commissioner, 107 T.C. 189 (1996); Estate of Clack v. Commissioner, 106 T.C. 131 (1996); Redlark v. Commissioner, 106 T.C. 31 (1996); A.E. Staley Mfg. Co. v. Commissioner, 105 T.C. 166 (1995); Brown Group, Inc. v. Commissioner, 104 T.C. 105 (1995), *rev'd*, 77 F.3d 217 (8th Cir. 1996); Tate & Lyle, Inc. v. Commissioner, 103 T.C. 656 (1994), *rev'd*, 87 F.3d 99 (3d Cir. 1996); Simon v. Commissioner, 103 T.C. 247 (1994); Clougherty Packing Co. v. Commissioner, 84 T.C. 948 (1985); Miller v. Commissioner, 84 T.C. 827 (1985).

<sup>142</sup> *Ann Jackson Family Found.*, 15 F.3d at 920 n.9. Again, Shores agrees. Shores, *supra* note 8, at 673.

<sup>143</sup> For example, the Technical and Miscellaneous Revenue Act of 1988 ("TAMRA"), Pub. L. No. 100-647, 102 Stat. 3342, (1988) (codified in scattered sections of 26 U.S.C.) expanded the jurisdiction of the Tax Court. TAMRA gave the Tax Court concurrent jurisdiction over a variety of types of tax litigation that formerly had been confined to district court, including review of jeopardy and termination assessments, restraint of premature assessments and collection activities, enforcing determinations of overpayments, review of IRS decisions to sell seized property, determination of liability for interest, and ordering refunds incident to deficiency proceedings. See H.R. CONF. REP. NO. 100-1104, 223, 230-34 (1988), reprinted in 1988 U.S.C.C.A.N. 5283, 5290-94 (Conf. Comm. 1988).

As an additional example, see Taxpayer Relief Act of 1997, Pub. L. No. 105-34, §§ 505 & 1454, 111 Stat. 854, 1055 (1997) (enacting new I.R.C. § 7479 providing for declaratory judgments with respect to estates' eligibility for installment payments under I.R.C. § 6166 and new I.R.C. § 7436 providing for proceedings for determination of worker status for employment tax purposes).

<sup>144</sup> For example, the Tax Court has for generations had jurisdiction to decide cases

(c) cases which the Tax Court resolves on a ground that was not argued or briefed by either party before it.

The cumulative effect of exceptions like the above—to say nothing of others that might be developed by the courts over time—would provide ample opportunity for appellate judges who wished to avoid heightened deference to Tax Court decisions.<sup>145</sup>

## 2. *Motivation*

In light of these opportunities for avoidance, the key question becomes: what would federal appellate judges want to do? For three reasons, many judges would want to eschew additional deference to the Tax Court.

*Reason 1:* Many judges are protective of the jurisdiction of their courts. This is particularly so when a threat to that jurisdiction is premised on an assertion that these judges are less capable of deciding issues properly than other judges would be. It is not too much to suspect that, as a matter of institutional and personal pride, many appellate judges believe themselves at least as capable as Tax Court judges of correctly deciding issues of law.

Two parallels support this. First, when a bankruptcy case involves a tax issue, parties—typically the government—sometimes move to lift the automatic bankruptcy stay to permit adjudication in the Tax Court of tax deficiencies asserted by the IRS against the debtor/taxpayer.<sup>146</sup> Such motions usually are denied by the Bankruptcy Court. Undoubtedly, one of the concerns of bankruptcy judges is that Tax Court litigation proceeds more slowly than bankruptcy litigation, such that granting the motion would delay ultimate disposition of the bankruptcy case. However, another factor also is at work. Although bankruptcy judges some-

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in which the IRS denies that certain state-local bonds qualify for tax-exemption of interest under I.R.C. § 103, but it has decided only a handful of cases in the area.

<sup>145</sup> A famous work described the federal estate tax as a “voluntary tax,” in which sufficient avoidance mechanisms exist that a motivated and well advised taxpayer can always avoid the tax. GEORGE COOPER, *A VOLUNTARY TAX? NEW PERSPECTIVES ON SOPHISTICATED ESTATE TAX AVOIDANCE* (1979). In like measure, a rule of heightened deference to the Tax Court would be a largely voluntary rule.

<sup>146</sup> When a bankruptcy petition is filed, all actual or potential litigation in other courts involving the debtor’s liabilities is automatically stayed. 11 U.S.C. § 362(a) (1994). This includes Tax Court actions. *E.g.*, *Schlosser v. Commissioner*, 94 T.C. 816, 821 (1990). A party may file a motion with the Bankruptcy Court to lift the automatic stay to permit litigation in another court (such as the Tax Court) to go forward despite the pendency of the bankruptcy case. 11 U.S.C. § 362(d) (1994).

times are considered specialists,<sup>147</sup> they actually are generalists accustomed to applying the full panoply of civil laws, both federal and state. As a result, many bankruptcy judges feel themselves no less capable of applying the Internal Revenue Code than they are of applying any other body of law. They do not fear comparison with Tax Court judges in ability to properly decide tax cases, despite the specialized tax expertise of Tax Court judges.<sup>148</sup> Appellate judges likely would be as protective of their jurisdiction as are bankruptcy judges.

Second, those arguing against creation of a national court of tax appeals often have advanced two related arguments in contending that generalist judges may actually be better in deciding tax cases than specialist tax judges. These arguments are: (1) generalist judges are better able to develop broad legal principles than specialized judges, who are prone to tunnel vision, and (2) generalist judges are more capable than specialized judges in handling the points of intersection that frequently arise in tax cases between tax law and other areas of law (such as corporate, contract, agency, trust, or criminal law).<sup>149</sup> Some appellate judges likely believe these arguments relative to the Tax Court now, or would come to believe them if a rule of deference threatened to immunize Tax Court decisions against their review in most cases.<sup>150</sup>

A related point comes into play. The foregoing does not reflect mere egotism or empire-building (or preserving) tendencies. The fact is that—whether because of generalist advantage, force of intellect, or simply the benefit of a fresh look at a thorny mat-

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<sup>147</sup> *E.g.*, Jordan, *supra* note 1, at 772-78.

<sup>148</sup> For a flavor of the wide diversity of substantive and procedural tax issues that have been decided in Bankruptcy Court, see *supra* text accompanying notes 22 & 23.

<sup>149</sup> *See, e.g.*, Angell, *supra* note 35, at 155; Hearings before Subcomm. on Improvements in Judicial Machinery, Sen. Comm. on Judiciary, 96th Cong., 1st Sess. 62 (1979) (testimony of M. Carr Ferguson); A.B.A. Section of Taxation, REPORT OF TASK FORCE ON CIVIL TAX LITIGATION PROCESS 13-18 (1989). *But see* Popkin, *supra* note 44, at 1103.

<sup>150</sup> *E.g.*, *NCAA v. Commissioner*, 914 F.2d 1417, 1420 (10th Cir. 1990) (“[w]e are equally as able as the tax court to draw conclusions from the undisputed facts presented”) (quoting *Pollei v. Commissioner*, 877 F.2d 838, 839 (10th Cir. 1989)); *Metzger Trust v. Commissioner*, 693 F.2d 459, 472 (5th Cir. 1982) (“The courts of appeals have been given the authority to review Tax Court decisions at least in part because it was thought that a generalist’s perspective would be helpful; that we are less likely to succumb to the arcane.”).

ter—the decisions of circuit courts have in many instances contributed positively to the development of the tax law.

Every tax scholar and practitioner can think of cases in which, she or he feels, an appellate court's view of a case was more sensible or more faithful to the statute than was the Tax Court's decision below. As less subjective measures, it is noteworthy that (1) in many cases in which the circuit court had reversed the Tax Court, the Supreme Court agreed with the court of appeals,<sup>151</sup> and (2) in many other cases, adverse decisions by appellate courts have persuaded the Tax Court to recant its view on particular issues.<sup>152</sup>

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<sup>151</sup> Of course, this is an indirect and imprecise measure of decisional accuracy. *Cf.* *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

Nonetheless Professor Shores argues that Supreme Court action is one relevant measure. He reviewed cases over a 20-year period in which Tax Court decisions reversed by a circuit court received Supreme Court consideration. He found that 57% of the time the Supreme Court agreed with the Tax Court and 43% of the time agreed with the circuit court. Shores, *supra* note 8, at 662-63. Even if that proportion were to hold over a longer span of time, it would not argue persuasively for a rule of deference. On Shores's own numbers, the circuit court reversing the Tax Court is right a sizeable minority of times. The times it is wrong can be retrieved since the issue is likely to be appealed to other circuits too through other cases. Having before them the contrasting views of the Tax Court and one circuit court, those later circuit courts will be more likely to reach the correct result. *See, e.g., Revesz, supra* note 2, at 1155-59; *Current and Quotable: Court of Tax Appeals: Pro and Con*, 10 TAX NOTES 731, 732 (1980) (quoting Randolph W. Thrower); *Administration Likes Court of Tax Appeals Concept, But Asks Changes in Bill*, 9 TAX NOTES 679, 679 (1979) (quoting Charles M. Walker). On a system-wide basis, therefore, a correct reversal of the Tax Court is likely to become general, but an incorrect reversal is not.

Moreover, it would be wrong to infer that, because the circuit courts of appeals were wrong 57% of the time they disagreed with the Tax Court *in cases the Supreme Court later reviewed*, the courts of appeals are wrong 57% of the time they reverse the Tax Court. The losing party is more likely to seek review, and the Supreme Court is more likely to grant it, in cases which the court of appeals got wrong. Therefore, incorrect circuit reversals of the Tax Court are more likely to reach the Supreme Court, and thus more likely to be included in Shores's population sample, than are correct circuit reversals.

<sup>152</sup> *E.g., Estate of Clack v. Commissioner*, 106 T.C. 131 (1996); *Central Pa. Sav. Ass'n v. Commissioner*, 104 T.C. 384, 396-97 (1995); *Lenz v. Commissioner*, 101 T.C. 260, 270 (1993); *Hardy v. Commissioner*, 93 T.C. 684, 689-93 (1989); *Latham Park Manor, Inc. v. Commissioner*, 69 T.C. 199, 215-16 (1977), *aff'd without pub. op.*, 618 F.2d 100 (4th Cir. 1980); *Bankers Union Life Ins. Co. v. Commissioner*, 62 T.C. 661 (1974); *Bradford v. Commissioner*, 60 T.C. 253 (1973); *Mills, Inc. v. Commissioner*, 27 T.C. 635, 637-38 (1957); *McDonald v. Commissioner*, 23 T.C. 1091, 1098-99 (1955); *Rowan v. Commissioner*, 22 T.C. 865, 873-74 (1954); *Burrus Mills, Inc. v. Commissioner*, 22 T.C. 881, 885 (1954); *see Popkin, supra* note 44, at 1102 n.10 (citing additional cases).

This is not to suggest that all appellate court tax decisions have been beneficial. There probably have been as many appellate reversals of the Tax Court that have done violence to the coherence of the Code or to sound statutory elaboration as there have been appellate reversals that have moved the tax law in a positive direction.<sup>153</sup> Still, it would be hard to deny that in individual cases—over time, in many individual cases—appellate tax decisions have made useful contributions.<sup>154</sup> That being the case, it is readily understandable why at least some appellate judges would be hostile to a rule of deference to the Tax Court and would seek to apply such a rule so as to retain the largest possible scope of appellate review.

*Reason 2:* One cannot fail to be struck, and be at least a bit troubled, by an anomaly that a rule of deference would create. As previously discussed, under both *Dobson* and Shores's proposal, that rule would require deference to the Tax Court's view of an issue only in cases reaching the court of appeals on appeal from the Tax Court. In other words, there would be situations in which the court of appeals would affirm in cases originating in the Tax Court but would reverse in otherwise identical cases originating in the district court.

For example, in interpreting *Dobson* prior to the 1948 legislation, the Second Circuit Court of Appeals affirmed the Tax Court

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Also, adverse appellate opinions sometimes cause the government to reconsider the wisdom of its audit and litigation position, even when the position had been sustained by the Tax Court. For example, in light of an adverse appellate decision, *Campbell v. Commissioner*, 943 F.2d 815 (8th Cir. 1991), *rev'g* T.C. Memo. 1990-162, 59 T.C.M. (CCH) 236, the IRS largely conceded its position that a partnership profits interest received for services rendered to the partnership is includable in income, despite the Tax Court's acceptance of that position. *See Diamond v. Commissioner*, 56 T.C. 530 (1971), *aff'd*, 492 F.2d 286 (7th Cir. 1974); Rev. Proc. 93-27, 1993-2 C.B. 343.

<sup>153</sup> Nor is this likely to change for the better in the foreseeable future. The workloads of the federal appellate courts have escalated greatly in recent years, in part because of the rapid rate of enactment of new federal statutes and burgeoning constitutional and statutory litigation arising from the "war on crime." *See, e.g.,* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 4-10 (1990) (describing "the impending crisis of the federal courts"). Such pressures provide little opportunity for the kind of careful and thoughtful deliberation by which the appellate courts can contribute to positive development of the tax law. *See also* Terry Carter, *A Conservative Juggernaut*, A.B.A. J., June 1997, at 32 (describing political pressures on federal courts, including efforts to reduce the number of federal judges).

<sup>154</sup> Indeed, Shores does not deny it. He argues that a rule of deference would not preclude the circuit courts from making such contributions in the future. Shores, *supra* note 8, at 666.



but signaled that it would have reversed had the case reached it from the district court.<sup>155</sup> The court noted that this approach created an inconsistency.<sup>156</sup>

Is it reasonable to expect that appellate judges would be untroubled by this inconsistency? Federal district court and appellate court judges are fellow Articles III judges. They frequently collaborate in deciding cases (when district court judges sit by designation on court of appeals panels), attend judicial or other conferences together, have offices in the same courthouse, and socialize together. A given appellate judge will review more decisions by a district judge than decisions by a Tax Court judge. Certainly, appellate judges have more points of contact with, more opportunities to develop friendship with and respect for, district court judges than Tax Court judges.

This being the case, at least some appellate judges are likely to feel uncomfortable according more deference to Tax Court decisions than to district court decisions. Human beings tend to shape their behavior to reduce their discomfort. Again, therefore, there will be an incentive to construe and apply the rule adversely to deference.

*Reason 3:* Perhaps most significantly, appellate judges—like all judges—want to do justice as they see it, and the temptation is to interpret rules to permit such justice to be done.<sup>157</sup>

A special aspect of this tendency is the extent to which fairness or perceived equity is allowed to operate dispositively. Many recent court of appeals reversals of Tax Court decisions, particularly reversals of IRS victories in the Tax Court, are best understood as reflecting different views of this matter.<sup>158</sup> Many appellate judges likely would view unfavorably a rule of defer-

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<sup>155</sup> *Kirschenbaum v. Commissioner*, 155 F.2d 23, 25 (2d Cir. 1946) (Learned Hand, J.).

<sup>156</sup> *Id.* (“That there should be one answer when the taxpayer pays his assessment and sues to recover it, and another when he resists collection, may appear inconsistent; but, if consistency is eventually to prevail, it has not done so yet.”).

<sup>157</sup> “[H]ard cases make bad law.” *Northern Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

<sup>158</sup> As examples, two areas in which Tax Court decisions for the IRS recently have been reversed with greater frequency, apparently for reasons of perceived fairness, are tax penalties and the availability of “innocent spouse” relief under I.R.C. § 6013(e).

As to penalties, *see, e.g.*, *Chamberlain v. Commissioner*, 66 F.3d 729 (5th Cir. 1995), *rev’g as to this issue* T.C. Memo. 1994-228, 67 T.C.M. (CCH) 2992 (1994); *Mauerman v. Commissioner*, 22 F.3d 1001 (10th Cir. 1994), *rev’g* T.C. Memo. 1993-23, 65 T.C.M. (CCH) 1772 (1993); *Asphalt Prods. Co. v. Commissioner*, 796 F.2d 843

ence that prevents them from doing justice in cases in which they perceive the Tax Court failed in that duty.

Thus, there are reasons why, in theory, at least some appellate judges might be inclined to interpret uncharitably a rule of deference. However, I do not maintain that all appellate judges would seek to evade a rule of deference. First, I am not so cynical as to dismiss judicial integrity. If deference were the law, many judges would seek to do their duty conscientiously. Second, tax is not the most popular topic for many judges.<sup>159</sup> Honoring a rule of deference might be anodyne for the pain of having to review tax decisions at all. Third, for busy judges struggling with burgeoning caseloads, deference would be a way to save time.<sup>160</sup>

On balance, the fair statement is that there likely would be conflicting pressures leading to varying responses. A rule of deference would be followed in some cases but avoided in others. Indeed, one suspects that not only courts and panels but also individual judges might behave inconsistently from case to case.

This prospect is hardly reassuring. As courts continue to disagree, substantive unpredictability and nonuniformity would remain high. Adding to it would be greatly increased procedural uncertainty, since parties and their counsel would be unsure whether the ostensibly prevailing deference rule would or would not actually be applied in their given cases. On net, an inconsistently applied deference rule likely would make the tax universe even less predictable, uniform, and certain than it is now.

### E. Summary

As shown, a rule of deference would chill litigation of new issues in the very forum whose influence the rule seeks to expand; it would exacerbate forum shopping in tax litigation; it would subvert the intracircuit uniformity that is a feature of the present

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(6th Cir. 1986) (*rev'g Akers v. Commissioner*, T.C. Memo. 1984-208, 47 T.C.M. (CCH) 1621 (1984)), *rev'd*, 482 U.S. 117 (1987).

As to "innocent spouse" relief, *see, e.g.*, *Silverman v. Commissioner*, 116 F.3d 172 (6th Cir. 1997); *Estate of Simpson v. Commissioner*, 95-1 U.S. Tax Cas. (CCH) ¶ 50,276 (10th Cir. 1995) (citation disfavored per designation by the court), *rev'g & remanding as to this issue* T.C. Memo. 1994-2, 67 T.C.M. (CCH) 1914 (1994); *Erdahl v. Commissioner*, 930 F.2d 585 (8th Cir. 1991), *rev'g* T.C. Memo. 1990-101, 58 T.C.M. (CCH) 1532 (1990); *Price v. Commissioner*, 887 F.2d 959 (9th Cir. 1989), *rev'g* unreported Tax Court decision.

<sup>159</sup> *See supra* note 83 and accompanying text.

<sup>160</sup> *See, e.g.*, RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 148-49 (1985); Galler, *supra* note 14, at 1079.

system; and it would increase, not decrease, intercircuit non-uniformity.

The common root of these disadvantages is that deference would fulfill only one of the two optimal conditions of an effective solution. It would exalt specialization while ignoring singularity. As predicted by the theory of second best, such a piecemeal approach would fail to solve the problems in the current system. Indeed, the second-best approach of a rule of deference would create an even worse situation.

#### IV

#### CHEVRON AND DEFERENCE

When a court is reviewing administrative agency action, what standard of review should it use? The pendulum has swung between rules of substantial deference to the agency's position and rules of little or no deference.<sup>161</sup>

In 1984, the Supreme Court in *Chevron, USA, Inc. v. Natural Resources Defense Council*<sup>162</sup> announced another formulation of the standard of review:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>163</sup>

*Chevron* has spawned an immense and still growing literature.<sup>164</sup> This literature includes discussions of how *Chevron* af-

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<sup>161</sup> See, e.g., Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2072-75 (1990).

<sup>162</sup> 467 U.S. 837 (1984).

<sup>163</sup> *Id.* at 842-43 (footnotes omitted).

<sup>164</sup> See, e.g., Alfred C. Aman, Jr. & William T. Mayton, ADMINISTRATIVE LAW § 13.7.2 (1993); 1 Kenneth C. Davis & Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE 109-31 (3d ed. 1994); Richard J. Pierce et al., ADMINISTRATIVE LAW AND PROCESS § 7.4 (2d ed. 1992). Many articles are cited in John F. Coverdale, *Court*

fects the tax area.<sup>165</sup>

Although *Chevron* is about judicial deference to administrative agency actions, it has been brought into the discussion about appellate deference to the Tax Court. The roots of the Tax Court go back to the Board of Tax Appeals, which was an administrative board and, before that, to units associated with the Commissioner's office itself.<sup>166</sup> Because of this and because of the Tax Court's independence and specialized expertise, Professor Shores argues that the teaching of *Chevron* supports additional deference to the Tax Court.<sup>167</sup>

I will address this contention only briefly since it seems to me that it is not fated to play a prominent role in future discourse. Below, I discuss *Chevron* generally, then examine its application to appellate deference to Tax Court decisions.

### A. *Chevron* Generally

Initially, *Chevron* was viewed as an extremely significant case. Judges<sup>168</sup> and commentators<sup>169</sup> described it as a "landmark"<sup>170</sup> decision which "ushered in a new era of judicial review of agency lawmaking"<sup>171</sup> and effected "a huge transfer of power from Congress to the Executive Branch."<sup>172</sup>

At first, there seemed to be some empirical support for such characterizations. A study of lower federal court decisions conducted by Professors Peter H. Schuck and E. Donald Elliott con-

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*Review of Tax Regulations and Revenue Rulings in the Chevron Era*, 64 GEO. WASH. L. REV. 35, 36 n.3 (1995).

<sup>165</sup> See, e.g., Coverdale, *supra* note 164, at 36 n.3 & articles cited therein.

<sup>166</sup> See *supra* text accompanying notes 58 to 62.

<sup>167</sup> Shores, *supra* note 8, at 667-71.

<sup>168</sup> E.g., Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512; Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 307 (1986).

<sup>169</sup> E.g., 1 Kenneth C. Davis & Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE, § 3.2, at 110 (3d ed. 1994); Ronald M. Levin, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 356 (1987); Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 302-03, 307-08 (1988); Sunstein, *supra* note 161, at 2075.

<sup>170</sup> Russell L. Weaver, *Some Realism About Chevron*, 58 MO. L. REV. 129, 129 (1993) (describing other's views).

<sup>171</sup> Rebecca Hanner White, *The Stare Decisis "Exception" to the Chevron Deference Rule*, 44 FLA. L. REV. 723, 723 (1992).

<sup>172</sup> James L. Oakes, "Plain Meaning," "Original Intent," "Administrative Deference": *Judicial Abdication or Judicial Activism?*, 47 REC. A.B. CITY OF N.Y. 772, 794 (1992).

cluded that deference to agency interpretations did increase appreciably after *Chevron*.<sup>173</sup> However, the authors cautioned that the “*Chevron* effect” in the lower federal courts may have been only temporary.<sup>174</sup>

That caution was appropriate. In recent years, the Supreme Court often has ignored *Chevron* altogether in administrative cases or has applied it so as to produce little genuine deference. A study by Professor Thomas W. Merrill found that the rate at which the Court upheld the agencies’ positions actually decreased in the 1984-1991 post-*Chevron* period compared to the 1980-1984 pre-*Chevron* period.<sup>175</sup> If the Court persists on this course, “lower courts will have no choice but to [follow suit].”<sup>176</sup> Accordingly, Merrill concludes that *Chevron* did not entail a “major transfer of interpretative power from courts to agencies.”<sup>177</sup>

Based on the foregoing, it has been argued—persuasively, in my view—that *Chevron* may have more rhetorical than doctrinal significance. Professor Paul Caron, for instance, distinguishes between the decision-making and decision-justifying functions. He views *Chevron* as principally related to the second function, *i.e.*, a tool for explaining or rationalizing results reached on other grounds.<sup>178</sup>

This may be particularly likely when *Chevron* is applied to federal taxation.<sup>179</sup> Administrative interpretations of the Internal

<sup>173</sup> Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1061.

<sup>174</sup> *Id.*

<sup>175</sup> Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 981-82 (1992). The Fifth Circuit, noting Merrill’s results, examined decisions from the Supreme Court’s 1993-1994 term. It concluded that the pattern described by Merrill “still holds.” *Mississippi Poultry Ass’n v. Madigan*, 31 F.3d 293, 299 n.34 (5th Cir. 1994).

<sup>176</sup> Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752 (1995).

<sup>177</sup> Merrill, *supra* note 175, at 977; *see also* *Ohio State Univ. v. Secretary*, 996 F.2d 122, 123-24 n.1 (6th Cir. 1993) (through *Chevron*, we have “travel[led] far without going anywhere”); Weaver, *supra* note 170, at 131. *But see* Ernest Gellhorn, *Justice Breyer on Statutory Review and Interpretation*, 8 ADMIN. L.J. AM. U. 755, 764 (1995); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decision-making in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 84 n.5 (1994).

<sup>178</sup> Caron, *supra* note 37, at 654-60; *see also* Merrill, *supra* note 175, at 975-80.

<sup>179</sup> “*Chevron* has had a checkered career in the tax arena. . . . [T]he Supreme Court, as well as other courts, has been inconsistent in applying *Chevron* and [the

Revenue Code—including legislative and interpretive regulations promulgated by the Treasury and various types of rulings and notices issued by the IRS<sup>180</sup>—have long been crucial to the system. Accordingly, a voluminous body of law existed before *Chevron* as to the weight of such interpretations and the level of deference they deserve from the courts.<sup>181</sup> While the matter is far from settled, *Chevron* seems more to confirm the standards developed by such law than to radically revise them.<sup>182</sup>

If the foregoing is correct—if *Chevron* has lost doctrinal momentum (both generally and in the tax area) and has become a tool of opinion-writing rather than decision-making—*Chevron* will be hard to enlist as a force of persuasion for any cause, including heightened appellate deference to Tax Court decisions. However, as shown by the next subpart, *Chevron* should not buttress the case for deference even if, contrary to the revisionist view described above, *Chevron* really is doctrinally dynamic.

### B. *Chevron* and Deference to Tax Court Decisions

Assume that *Chevron* does retain decisional generative capacity. The matter would then stand no better for supporters of ap-

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pre-*Chevron* case] National Muffler, often ignoring one case and relying on the other." Central Pa. Savings Ass'n v. Commissioner, 104 T.C. 384, 391-92 (1995); see, e.g., Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, 72 B.U. L. REV. 841, 844 n.16, 870-76 (1992); cf. Coverdale, *supra* note 164, at 38 (arguing that *Chevron* should not be applied to tax at all, but that traditional, pre-*Chevron* standards should continue to be used).

<sup>180</sup> For descriptions of such administrative authorities, see GAIL LEVIN RICHMOND, *FEDERAL TAX RESEARCH: GUIDE TO MATERIALS AND TECHNIQUES* 76-119 (1997); Galler, *supra* note 14, at 1042-58; Mitchell Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity: A View from Within*, 43 TAXES 756 (1965).

<sup>181</sup> See, e.g., United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982); National Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979); United States v. Correll, 389 U.S. 299, 307 (1967).

<sup>182</sup> See, e.g., Armstrong World Inds., Inc. v. Commissioner, 974 F.2d 422, 430 (3d Cir. 1992); Central Pa. Savings Ass'n v. Commissioner, 104 T.C. 384, 391 (1995); Georgia Fed. Bank v. Commissioner, 98 T.C. 105, 108-09 (1992); Merrill, *supra* note 175, at 983 n.56.

Arguably, this is less true with respect to administrative interpretations below the level of regulations, particularly legislative regulations. This is so because, in theory at least, the pre-*Chevron* standards directed lesser deference to such lower level interpretations. See Galler, *supra* note 179, at 849-57. However, theory and practice may well have diverged. It is an open question how much pre-*Chevron* courts really distinguished among different types of administrative interpretations, meting out calibrated amounts of deference to the various types of interpretations. See, e.g., 1 Boris I. Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates and Gifts* 110-62 (2d ed. 1989).

pellate deference to the Tax Court. Indeed, it seems to me, it would stand worse. I say this for two reasons: (1) *Chevron* commands deference to administrative agencies rather than courts, such as the Tax Court and (2) *Chevron* deference to Tax Court decisions would exacerbate the second-best problems described *supra* in Part III.

### 1. *Administrative Versus Judicial Deference*

Taken literally, *Chevron* talks about courts deferring to administrative agencies, not courts deferring to other courts. Whatever its origins, the Tax Court is now, and for almost 30 years has been, a court. The Administrative Procedure Act distinguishes between courts on the one hand and agencies on the other,<sup>183</sup> and I suspect that tribunals applying *Chevron* in the future will take the same approach.

Reasonably, in light of the foregoing, Shores concedes that “[i]t would be a stretch to claim that review of Tax Court decisions falls within the four corners of *Chevron*.”<sup>184</sup> Instead, his argument involves the underlying reasoning and principles of *Chevron*. However, the contention is not satisfying even at that level. History, doctrine, and policy do not support *Chevron* deference to Tax Court decisions.

#### a. *History*

It is formalistic to say that, before 1969, the Tax Court was an administrative agency. Throughout its history, the Tax Court (and predecessor Board of Tax Appeals) has been understood, by virtue of its structure and operations, to be principally judicial, not administrative, in substance. For example:

(1) The Board of Tax Appeals was created in 1924.<sup>185</sup> In signing the enabling legislation into law, then President Coolidge remarked: “The provisions of the bill . . . with reference to the Board, make it in its essentials practically a court of record.”<sup>186</sup>

(2) Various changes were made to the Board in 1926.<sup>187</sup> The legislative reports on the changes repeatedly described the Board

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<sup>183</sup> 5 U.S.C. § 551(l)(B) (1997) (the term “agency” “does not include the courts of the United States”).

<sup>184</sup> Shores, *supra* note 8, at 669.

<sup>185</sup> Revenue Act of 1924, ch. 234, § 900(k), 43 Stat. 338.

<sup>186</sup> *Reprinted in* DUBROFF, *supra* note 61, at 66.

<sup>187</sup> Revenue Act of 1926, ch. 27, 44 Stat. 9.

as essentially judicial, not administrative.<sup>188</sup>

(3) The name of the Board was changed to the Tax Court in 1942.<sup>189</sup> In explaining the change, Chairman (later Judge) Murdock stated that it “validate[d] the generally recognized view that the Board was a court in everything but name.”<sup>190</sup>

(4) The Tax Court became an Article I court in 1969.<sup>191</sup> The change was explained by the legislative history thusly: “Since the Tax Court has only judicial duties, the committee believes it is anomalous to continue to classify it with quasi-judicial executive agencies that have rulemaking and investigatory functions.”<sup>192</sup>

To complete the story, after the 1969 change, the Supreme Court, in *Freytag v. Commissioner*,<sup>193</sup> was called upon to decide whether the use of a Special Trial Judge of the Tax Court in disposing of substantial tax shelter litigation violated the applicable statute<sup>194</sup> or the Appointments Clause of the Constitution.<sup>195</sup> In upholding the challenged practice, the Court had occasion to consider the nature of the Tax Court. The majority held:

The Tax Court exercises judicial, rather than executive, legislative, or administrative power. . . .

The Tax Court exercises judicial power to the exclusion of any other function. It is neither advocate nor rulemaker. As an adjudicative body, it construes statutes passed by Congress and regulations promulgated by the Internal Revenue Service. It does not make political decisions. The Tax Court’s function and role in the federal judicial scheme closely resemble those of the federal district courts, which indisputably are “Courts of Law.” Furthermore, the Tax Court exercises its judicial power in much the same way as the federal district courts exercise theirs. . . . All these powers are quintessentially judicial in nature.

The Tax Court remains independent of the Executive and Legislative Branches.<sup>196</sup>

<sup>188</sup> See DUBROFF, *supra* note 61, at 111-16, 167.

<sup>189</sup> Revenue Act of 1942, ch. 619, § 504, 56 Stat. 957.

<sup>190</sup> Reprinted in DUBROFF, *supra* note 61, at 178. Commentators typically held the same view. *E.g.*, Daniel L. Ginsburg, *Is the Tax Court Constitutional?*, 35 *MISS. L.J.* 382 (1964); Daniel M. Gribbon, *Should the Judicial Character of the Tax Court Be Recognized?*, 24 *GEO. WASH. L. REV.* 619 (1956). *But see* DUBROFF, *supra* note 61, at 180 (contrary view of Attorney General Biddle).

<sup>191</sup> Tax Reform Act of 1969, Pub. L. No. 91-172, §§ 951-962, 83 Stat. 487, 730-36.

<sup>192</sup> S. REP. NO. 91-552 (1969), reprinted in 1969 U.S.C.C.A.N. 2027, 2341.

<sup>193</sup> 501 U.S. 868 (1991).

<sup>194</sup> I.R.C. § 7443A(b)(4) (1992).

<sup>195</sup> U.S. CONST., art. II, § 2, cl. 2.

<sup>196</sup> 501 U.S. at 890-91.



In short, the Tax Court is now and from its inception has been more a court than an administrative agency. History therefore undercuts an argument for *Chevron* deference to the Tax Court.

*b. Doctrine*

*Chevron* is about interstitial rulemaking: how and by whom the gap is to be filled "if the statute is silent or ambiguous with respect to the specific issue."<sup>197</sup> Doctrinally, the reason to prefer an agency's permissible interpretation as to this gap involves the concept of delegation. By leaving the gap, the *Chevron* Court reasoned, Congress expressly or impliedly delegated to the relevant agency the authority to promulgate the rule as to the issue.<sup>198</sup>

Thus, a "precondition to deference under *Chevron* is a congressional delegation of administrative authority."<sup>199</sup> Congress delegated to the Treasury and the IRS the authority to administer the tax laws,<sup>200</sup> including the authority to promulgate "all needful rules and regulations for [their] enforcement."<sup>201</sup>

In contrast, the principal mission of the Tax Court is to determine the correct amount of tax liability in cases brought to it.<sup>202</sup> This is interpretive, not administrative, authority. "If agencies are simply interpreting a statute, but have not been granted the power to 'administer' it, the principle of [*Chevron*] deference should not apply"<sup>203</sup> since no congressional delegation of rulemaking authority is then involved. Thus, the doctrinal precondition to *Chevron* deference does not apply to Tax Court decisions.<sup>204</sup>

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<sup>197</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

<sup>198</sup> *Id.* at 843-44.

<sup>199</sup> *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990).

<sup>200</sup> I.R.C. §§ 7801 & 7802 (1997).

<sup>201</sup> I.R.C. § 7805(a) (1998).

<sup>202</sup> I.R.C. §§ 6214(a) & 6512(b) (1998); see Meade Whitaker, *Some Thoughts on Current Tax Practice*, 7 VA. TAX REV. 421, 437-38 (1988).

<sup>203</sup> Sunstein, *supra* note 161, at 2094; see also Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 232-33 (1992).

<sup>204</sup> *Chevron* deference can apply to agency adjudications as well as to agency promulgation of regulations. However, that says little about Tax Court adjudications. For many administrative agencies, adjudications are a means by which they exercise their congressionally conferred authority to administer the relevant statute, to make ultimately policy and political judgments. See, e.g., RONALD A. CASS ET AL., *ADMINISTRATIVE LAW: CASES AND MATERIALS* 400-07 (2d ed. 1994). Unlike the Tax

### c. Policy

The case for *Chevron* deference to Tax Court decisions is weak at the level of policy as well. *Chevron* partly shifted the theoretical basis for agency deference. Traditional justifications for deference have included such things as agency expertise and the technical complexity of the subject matter. While not ignoring such justifications, *Chevron* put emphasis on democratic theory and political accountability:<sup>205</sup>

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the government to make such policy choices — resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities. . . . [F]ederal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: “Our constitution vests such responsibilities in the political branches.”<sup>206</sup>

Treasury and the IRS are designed to be, and are, more politically accountable than is the Tax Court. The Secretary of the Treasury, the Assistant Secretary for Tax Policy, the IRS Commissioner, and the IRS Chief Counsel all are political appointees, who regularly come and go as Administrations change. In contrast, departures from the Tax Court do not particularly correlate with changes in the occupancy of the White House. Tax Court judges have fifteen-year terms,<sup>207</sup> they are removable only for specified cause after public hearing,<sup>208</sup> and their retirement crite-

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Court’s merely interpretive adjudications, such agency adjudications should qualify for *Chevron* deference as being within the congressional delegation of authority.

<sup>205</sup> See *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991); Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1228 (1988); Galler, *supra* note 14, at 1051; Lawrence H. Silberman, *Chevron-The Intersection of Law and Policy*, 58 GEO. WASH. L. REV. 821, 822-24 (1990).

<sup>206</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984) (quoting *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978)); see Coverdale, *supra* note 164, at 42-44 (and authorities cited in n.50 thereof); Seidenfeld, *supra* note 177, at 94-101.

<sup>207</sup> I.R.C. § 7443(e) (1998).

<sup>208</sup> I.R.C. § 7443(f) (1998) (“[J]udges of the Tax Court may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause.”).

ria are set out by statute.<sup>209</sup>

Of course, precisely how politically accountable we want the IRS to be is a delicate matter,<sup>210</sup> particularly in view of the importance of public confidence in the IRS's integrity to the successful functioning of our tax system.<sup>211</sup> There is, nonetheless, some proper role for ideological preferences in tax administration. For instance, in my view, an Administration committed to reducing compliance burdens on business or to enhancing international competitiveness could legitimately reflect these preferences in developing tax regulations or revenue rulings.

In contrast, most of us would be more uncomfortable with political or ideological decisionmaking by the Tax Court.<sup>212</sup> Thus, *Chevron's* emphasis on democratic theory and political accountability fits better with deference to the Treasury and the IRS than with deference to the Tax Court.

## 2. *Additional Second-Best Problems*

*Chevron* reminds us that the tax system contains more than the four trial courts and the appellate courts. It also contains, as

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The removal power is not exercised as to Tax Court judges. Cf. Jonathan L. Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence*, 75 KY. L.J. 699, 778 (1987); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 955 (1980) (removal-for-cause power typically not used as to executive agencies).

<sup>209</sup> I.R.C. § 7447 (1998).

<sup>210</sup> Sensitivity to politicization of the IRS has been high at least since the Nixon Administration's attempt in the early 1970's to use the IRS against persons and entities on the Administration's "enemies list."

The Kerry-Portman Commission recently proposed, among other structural overhauls of the federal tax administrative system, that the IRS be taken out of the Treasury Department. The question of the political responsiveness of the IRS is basic to such suggestions. See, e.g., REPORT OF NAT'L COMM. ON RESTRUCTURING THE INTERNAL REVENUE SERVICE 63 (1997) (statement of Comm'r Ernest J. Dronenburg, Jr.) ("to successfully reform itself, the IRS must have the ability to work within the government unfettered by the political trade-offs and necessary distractions inherent to the duties of any successful Secretary of the Treasury"). I.R.C. § 7217, enacted in 1998, contains limits on Executive Branch influence over audits and other IRS investigations.

<sup>211</sup> The IRS acknowledges that maintaining "the highest degree of public confidence in [the] integrity, efficiency and fairness" of tax administration is a key part of its mission. I.R.M. P-1-1 (May 14, 1990).

<sup>212</sup> See, e.g., *Freytag v. Commissioner*, 501 U.S. 868, 891 (1991) (the Tax Court "does not make political decisions"); *United States v. Sotelo*, 436 U.S. 268, 279 (1978) ("judges cannot override the specific policy judgments made by Congress"); *Atlantic Mut. Ins. Co. v. Commissioner*, 111 F.3d 1056, 1065 (3d. Cir. 1997), *aff'd*, 118 S. Ct. 1413 (1998).

a key element, administrative guidance, precedents, and authority. If *Chevron* has significance for the tax world, it means that at least Treasury regulations and IRS revenue rulings should receive greater deference from the courts.

Can *Chevron* then mean greater deference to both Treasury/IRS and the Tax Court? If so, what are appellate courts to do when the views of those bodies conflict? For instance, assume a case in which the IRS has disallowed a claimed deduction based on a solidly on-point revenue ruling but the Tax Court nonetheless permits the deduction, ignoring or disagreeing with the revenue ruling. If the government appeals, the reviewing court would be in an uncomfortable position. How could it simultaneously defer to incompatible positions?<sup>213</sup>

This is not just a theoretical possibility. Several times in recent years, the Tax Court invalidated a Treasury regulation but was reversed by the court of appeals.<sup>214</sup> Such a situation easily could recur.<sup>215</sup>

*Chevron* deference surely is owed to legislative tax regulations and almost surely is owed to interpretive tax regulations as well.<sup>216</sup> If Professor Shores is right, *Chevron* deference also would be owed to a Tax Court decision invalidating a regulation. If the government were to appeal such a decision, the court of appeals would have to choose which master to serve. Predictability and certainty in application of the tax laws would not be furthered by creating such a conflict.

Shores's view of *Chevron* would necessarily entail such conflicts. If *Chevron* truly is significant with respect to the Tax

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<sup>213</sup> "No one can serve two masters." BIBLE, *Matthew* 6:24.

<sup>214</sup> See, e.g., *Atlantic Mut. Ins. Co.*, 111 F.3d at 1056, *rev'g* T.C. Memo. 1996-75, 71 T.C.M. (CCH) 2154 (interpretive regulation; reversal based on *Chevron*), *aff'd*, 118 S. Ct. 1413 (1998); *Tate & Lyle, Inc. v. Commissioner*, 87 F.3d 99 (3d Cir. 1996), *rev'g*, 103 T.C. 656 (1994) (legislative regulation; reversal based on *Chevron*).

<sup>215</sup> For instance, in *Redlark v. Commissioner*, 106 T.C. 31 (1996), a seriously divided Tax Court invalidated an interpretive regulation under I.R.C. § 163. Recently, *Redlark* was reversed on appeal. *Redlark v. Commissioner*, 141 F.3d 936 (9th Cir. 1998). See generally William D. Popkin, *The Taxpayer's Third Personality: Comments on Redlark v. Commissioner*, 72 IND. L.J. 41 (1996); Melinda L. Reynolds, Note, *Redlark v. Commissioner: "A Bird in the Hand" for Noncorporate Taxpayers?*, 47 CASE W. RES. L. REV. 751 (1997).

<sup>216</sup> See, e.g., *Hefti v. Commissioner*, 983 F.2d 868, 871 (8th Cir.), *cert. denied*, 508 U.S. 913 (1993); *Lima Surgical Assocs., Inc. v. United States*, 944 F.2d 885, 888 (Fed. Cir. 1991); *Dresser Inds., Inc. v. Commissioner*, 911 F.2d 1128, 1137 (5th Cir. 1990). But see *E.I. du Pont de Nemours & Co. v. Commissioner*, 41 F.3d 130, 135-36 n.23 (3d Cir. 1994) (questioning whether *Chevron* applies to interpretive regulations).

Court, its call for deference to the relevant agencies should not be compromised by an inconsistent call for deference to a trial court.

#### CONCLUSION

Because of the allure of specialized tribunals in so intricate an area as tax, calls for increasing the role of specialized tax courts—whether a new appellate tax court or the existing trial Tax Court—will long be with us. There are two essential conditions if such an effort is to improve the system: expertise and exclusivity.

*Both* of these conditions must be achieved. Frustration over the infeasibility of a solution achieving both conditions should not lead us to hastily adopt a “solution” achieving only one, for such a step may well make matters worse, not better. In particular, a rule requiring greater deference to Tax Court decisions—if superimposed upon the present highly fragmented and taxpayer-driven trial and appellate structure — would leave us worse off than no “reform” at all.