THE COURT AND THE CODE: A RESPONSE TO *THE WARP AND WOOF OF STATUTORY INTERPRETATION*

LAWRENCE ZELENAK†

Most tax lawyers (myself included) believe there are features of the Internal Revenue Code that distinguish the art of interpreting the code from the interpretation of most other statutes. It is gratifying that the thoughtful and thorough work of Professors James J. Brudney and Corey Ditslear[1] tends to support that belief, both descriptively and normatively. Strictly speaking, Professors Brudney and Ditslear establish only that interpreting the code is a different exercise from interpreting federal workplace statutes, but most tax lawyers would be willing to assume (on perhaps too little evidence) that the interpretation of workplace statutes is in the interpretive mainstream and that code interpretation is the outlier. In this brief Response, I offer a few observations—admittedly, somewhat scattershot—on some of the questions considered by Professors Brudney and Ditslear. My comments focus on the role of tax legislative history in the interpretive process, the usefulness (or lack thereof) of tax-specific canons of statutory interpretation, the ability of Supreme Court Justices without extensive pre-judicial tax backgrounds to write high-quality opinions in tax cases, and the limitations of quantitative analysis of judicial opinions.

I. QUESTIONING THE EXPERTISE-BORROWING EXPLANATION OF THE COURT'S USE OF TAX LEGISLATIVE HISTORY

I agree with Professors Brudney and Ditslear that the quality of the committee reports on federal tax legislation—in terms of both process and product—is extremely high and that Justice Scalia's arguments for disregarding legislative history are, therefore,

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† Pamela B. Gann Professor of Law, Duke University School of Law.

1. James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231 (2009).

particularly weak in the tax context.[2] I am not sure, however, that I fully agree with Professors Brudney and Ditslear's expertise-borrowing description of how the Supreme Court uses the reports of the tax writing committees.[3] My sense is that even the most expert tax lawyers lean very heavily on committee reports in attempting to understand tax legislation, and that they do so not because the tax expertise of the staff of the Joint Committee on Taxation is necessarily greater than their own, but because they know it is standard congressional practice to use the committee reports to resolve statutory ambiguities and to fill in statutory gaps. (The old tax-lawyer joke, that one should consult the statute only if the legislative history is unclear,[4] is not entirely a joke.) Even the most expert of tax lawyers consult tax legislative history to determine legislative intent, and one would expect even the Justices with the greatest tax expertise to do the same for the same reason. Professors Brudney and Ditslear show that Justice Blackmun, with his unique tax background among his contemporaries on the Court, relied on tax legislative history only slightly less than his colleagues.[5] This lends some support to my view; if using legislative history were primarily about expertise borrowing, Justice Blackmun presumably would have leaned much less heavily than the other Justices on tax writing committee reports.

II. TAX-SPECIFIC SUBSTANTIVE CANONS OF STATUTORY INTERPRETATION

Professors Brudney and Ditslear suggest that the Court's use of tax-specific substantive canons of interpretation can be understood as a form of expertise borrowing[6] and that Justice Blackmun's tendency to invoke such canons much less than the other Justices can be explained by his greater tax expertise.[7] That may be right, but I would

2. *See id.* at 1276–95.

3. *See id.* at 1277.

4. RICHARD SCHMALBECK & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION 32 (2d ed. 2007).

5. Brudney & Ditslear, *supra* note 1, at 1275 tbl.9.

6. *Id.* at 1277.

7. *Id.* at 1301. *But see* Indopco, Inc. v. Comm'r, 503 U.S. 79, 84 (1992). In Justice Blackmun's opinion for the Court, a substantive canon plays a crucial role: "In exploring the relationship between deductions and capital expenditures, this Court has noted the 'familiar rule' that 'an income tax deduction is a matter of legislative grace and that the burden of clearly

suggest another possibility—that such canons tend to be worthless or worse, and that Justice Blackmun appreciated that fact more often than the other Justices. The objection to the canons—which will come as no surprise to fans of Karl Llewellyn[8]—is that canons often exist on opposite sides of the same question and that there is no policy justification for either of the competing canons. Compare, for example, the invocation in one Supreme Court tax opinion of "the principle disfavoring implied tax exemptions,"[9] with the Court's claim in another tax opinion that tax statutes "are construed most strongly against the government, and in favor of the taxpayer."[10] Professor Boris Bittker, probably the greatest legal scholar in the history of the federal income tax, had little use for either canon: "[I]t is far from clear why the Code should be construed strictly against *either* the taxpayer *or* the government."[11]

III. WRITING HIGH-QUALITY TAX OPINIONS ON THE SUPREME COURT: PRE-JUDICIAL TAX EXPERTISE PREFERRED, BUT NOT REQUIRED

Professors Brudney and Ditslear show that Justice Blackmun authored considerably more majority opinions in tax cases than any of his colleagues.[12] They also suggest, and I agree, that his tax opinions are generally of high quality.[13] Several of his opinions—

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showing the right to the claimed deduction is on the taxpayer.'" *Id.* (quoting Interstate Transit Lines v. Comm'r, 319 U.S. 590, 593 (1943)).

8. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950).

9. United States v. Wells Fargo Bank, 485 U.S. 351, 356 (1988), *quoted in* Brudney & Ditslear, *supra* note 1, at 1268.

10. Gould v. Gould, 245 U.S. 151, 153 (1917). Admittedly, *Gould v. Gould* is a bit long in the tooth, but it continues to have adherents on the federal courts. *See, e.g.*, Sec. Bank Minn. v. Comm'r, 994 F.2d 432, 441 (8th Cir. 1993), *nonacq.* 1996-1 I.R.B. 6.

11. BORIS I. BITTKER, MARTIN J. MCMAHON, JR. & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION OF INDIVIDUALS ¶ 1.03[1], at 1–25 (3d ed. 2002).

12. Brudney & Ditslear, *supra* note 1, at 1270.

13. *See id.* at 1273. I do have two quibbles, however. First, the fact that Justice Blackmun wrote seventeen dissents in tax cases (compared with thirty-four majority opinions) indicates that his views on tax cases were not overwhelmingly influential with his colleagues. *See* Brudney & Ditslear, *supra* note 1, at 1272 (dissents); *id.* at 1271 tbl.8 (majority opinions). Second, on occasion Justice Blackmun's views in tax cases could be quite idiosyncratic. For example, in his dissent in *Hillsboro National Bank v. Commissioner*, 460 U.S. 370 (1983), Justice Blackmun argued for overturning the decades-old tax benefit rule (under which the occurrence of an event inconsistent with a deduction claimed in an earlier year requires an income inclusion in the year in which the inconsistent event occurs) in favor of a new approach (under which the occurrence of a later inconsistent event would require amending the return for the year in which the

including *Commissioner v. Tufts*,[14] *INDOPCO, Inc. v. Commissioner*,[15] and *Newark Morning Ledger Co. v. United States*[16]—are landmarks in Supreme Court tax jurisprudence. In an insightful qualitative analysis of Justice Blackmun's tax opinions, Professor Robert A. Green commented, "Many of Justice Blackmun's tax opinions are legendary among tax lawyers and academics."[17] Professor Green described Justice Blackmun's multifaceted approach to interpreting the code:

> Justice Blackmun's [tax] opinions . . . exemplif[y] a practical reasoning approach to statutory interpretation. . . . This approach does not rely exclusively on any single touchstone for interpretation. Rather, it relies on multiple arguments that draw on a broad range of evidence and considerations: the statutory text, legislative history, legislative purpose, post-enactment developments (including judicial and administrative precedents), and the practical consequences of alternative interpretations.[18]

Although Justice Blackmun's strong tax background helps explain the quantity and quality of his tax opinions—much as, a generation earlier, Justice Jackson's tax career influenced his Supreme Court tax opinions[19]—it is noteworthy that Justices Marshall and O'Connor, without having extensive tax backgrounds, were able to write tax opinions held in similarly high regard by tax lawyers and academics. Neither wrote nearly as many tax opinions as Justice Blackmun,[20] but my sense is that the average quality of their tax opinions is as high as that of Justice Blackmun's, and there is some anecdotal evidence to suggest that my sense is widely shared. For example, Professor Stephen B. Cohen has opined that "[d]uring his

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deduction was claimed), *id.* at 422 (Blackmun, J., dissenting). As Justice O'Connor noted in her majority opinion, "[N]one of the parties has suggested such a result, no doubt because the rule is so settled." *Id.* at 380 (majority opinion).

14. Comm'r v. Tufts, 461 U.S. 300 (1983).

15. Indopco, Inc. v. Comm'r, 503 U.S. 79 (1992).

16. Newark Morning Ledger Co. v. United States, 507 U.S. 546 (1993).

17. Robert A. Green, *Justice Blackmun's Federal Tax Jurisprudence*, 26 HASTINGS CONST. L.Q. 109, 110 (1998).

18. *Id.* at 130.

19. *See* Kirk J. Stark, *The Unfulfilled Tax Legacy of Justice Robert H. Jackson*, 54 TAX L. REV. 171, 172–73 (2001).

20. *See* Brudney & Ditslear, *supra* note 1, at 1271 tbl.8 (showing that Justice Blackmun authored thirty-four majority opinions in tax cases to Justice Marshall's eighteen, and that Justice O'Connor was not among the four justices writing the highest percentage of majority opinions in tax cases during their tenures on the Court).

twenty-four years on the Supreme Court, Justice Marshall wrote better opinions on federal income taxation than any of his fellow justices."[21] In an article reviewing Justice O'Connor's tax jurisprudence, Professor Myron C. Grauer has identified Justices Marshall, Blackmun, and O'Connor as the three Justices of recent decades who "have become known for authoring opinions in significant tax cases."[22] Professor Grauer described Justice O'Connor as possessing "a sophisticated understanding of the structure of our tax system" and "a faculty for explaining the development of an aspect of tax law in clear, almost hornbook-like prose."[23] Although the tax accomplishments of Justices Marshall and O'Connor take nothing away from Justice Blackmun's accomplishments in the same field, it is interesting and gratifying to note that Justices without extensive pre-judicial tax backgrounds can write tax opinions that are highly regarded by tax experts. Tax law is undeniably complex, but Justices Marshall and O'Connor have demonstrated that it is not beyond the capacity of generalist judges and Justices to write thoughtful and sophisticated opinions in tax cases.

IV. A ROLE FOR QUALITATIVE ANALYSIS

A great virtue of Professors Brudney and Ditslear's primarily quantitative analysis of Supreme Court tax opinions is that it reveals trends and approaches that are easily missed under the tax lawyer's usual qualitative approach to judicial opinions. On the other hand, qualitative approaches are superior to quantitative analysis in some respects (as I am sure Professors Brudney and Ditslear would readily agree). In particular, a quantitative approach may fail to identify a case of special significance, instead treating it as merely one of many data points.

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21. Stephen B. Cohen, *Thurgood Marshall: Tax Lawyer*, 80 GEO. L.J. 2011, 2011 (1992). Highlights of Justice Marshall's tax jurisprudence include *Cottage Savings Ass'n v. Commissioner*, 499 U.S. 554 (1991); *Arkansas Best Corp. v. Commissioner*, 485 U.S. 212 (1988); and *United States v. Davis*, 397 U.S. 301 (1970).

22. Myron C. Grauer, *Justice O'Connor's Approach to Tax Cases: Could She Have Led the Court Toward a More Collaborative Role for the Judiciary in the Development of Tax Law?*, 39 ARIZ. ST. L.J. 69, 70 (2007).

23. *Id.* at 71. Highlights of Justice O'Connor's tax jurisprudence include her majority opinion in *Hillsboro National Bank v. Commissioner*, 460 U.S. 370 (1983); her concurrence in *Commissioner v. Tufts*, 461 U.S. 300, 317 (1983) (O'Connor, J., concurring); and her dissent in *Hernandez v. Commissioner*, 490 U.S. 680, 704 (1989) (O'Connor, J., dissenting).

As an example, Professors Brudney and Ditslear's study does not mention what seems to me the most interesting and important story in Supreme Court tax jurisprudence in the past decade. In the 2001 case of *Gitlitz v. Commissioner*,[24] the Court reached an extremely taxpayer-favorable result in a case involving the interaction between the rules governing cancellations of indebtedness and the rules governing shareholder basis in the stock of S corporations. In an opinion written by Justice Thomas for an eight-member majority, the Court adopted a literal interpretation of the statutory language,[25] producing a structurally absurd tax benefit (the deduction of a tax loss not corresponding to any actual economic loss) clearly not contemplated by Congress. Justice Thomas needed just one sentence to dispose of the argument that Congress did not intend to confer such a benefit: "Because the Code's plain text permits the taxpayers here to receive these benefits, we need not address this policy concern."[26]

Gitlitz was not a tax-shelter case; it was a case in which the taxpayer happened to stumble into an unreasonably favorable result not contemplated by Congress rather than a case in which the taxpayer planned a transaction to exploit a literal reading of the code at odds with legislative intent. Nevertheless, the Court must have been aware that the lower courts were being deluged with tax-shelter cases and that taxpayers would win most or all of those cases under *Gitlitz*'s literal interpretive approach The aggressive marketing of tax shelters combined with *Gitlitz*-style interpretation posed a threat to the fisc of the highest order.[27] Observers concerned about the integrity of the federal tax structure awaited developments with trepidation. Much to their surprise (or at least to my surprise), the *Gitlitz* dog has never barked again in the Supreme Court. The Supreme Court has cited *Gitlitz* in no subsequent opinions, the Court has not granted certiorari in any tax-shelter cases, and in the lower courts the government has won almost all of its tax-shelter cases since

24. Gitlitz v. Comm'r, 531 U.S. 206 (2001).

25. *Id.* at 218.

26. *Id.* at 220.

27. *See, e.g.*, Michael L. Schler, *Ten More Truths About Tax Shelters: The Problem, Possible Solutions, and a Reply to Professor Weisbach*, 55 TAX L. REV. 325, 351 (2002) ("There was no tax shelter [in *Gitlitz*], in that the taxpayer did not look for a gap and then plan to take advantage of it. Nevertheless, this language in *Gitlitz* could indicate a more general view of the Court that taxpayers are free to take advantage of the Code as they find it.").

2005.[28] Perhaps the Court's quiet retreat from the brink should be labeled a nonstory rather than a story, but if so it is by far the most important Supreme Court tax nonstory of this decade. It is not a story, however, that is likely to be uncovered by a quantitative study.

V. WHO THINKS TAX CASES ARE NOT INTERESTING, AND WHY?

Professors Brudney and Ditslear note the widespread view among the Supreme Court Justices that tax cases are boring.[29] Whether or not Supreme Court tax cases are interesting is not a question that Professors Brudney and Ditslear investigate (sensibly enough), but I cannot resist taking this opportunity to comment on the topic. Although the view of tax cases as boring must be nearly universal among people who are not tax specialists, I suspect it is generally assumed that tax specialists have a different view. I hereby reveal a tax lawyers' secret: we also think that most Supreme Court tax cases are boring these days. Unlike many of the workplace statutes, the Court's interpretation of which Professors Brudney and Ditslear also investigate, the Internal Revenue Code is a mature statute (despite Congress's never-ending tinkering). With rare exception, the big interpretive issues were decided decades ago, and what is left for the Court today are just some mundane interstitial questions. Tax lawyers do not think old Supreme Court tax cases are boring, and they do not think legislative and regulatory developments are boring, but they largely agree with the Court that the tax cases it considers today are less than riveting. To say that Supreme Court tax cases are dull is not, however, to say that tax law is dull. To borrow and adapt Norma Desmond's famous remark in *Sunset Boulevard*: tax law is still big; it's the cases that got small.

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28. *See, e.g.*, Kornman & Assocs., Inc. v. United States, 527 F.3d 443, 453 (5th Cir. 2008); Cemco Investors, LLC v. United States, 515 F.3d 749, 753 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 131 (2008); TIFD III-E, Inc. v. United States, 459 F.3d 220, 231 (2d Cir. 2006); Coltec Indus., Inc. v. United States, 454 F.3d 1340, 1347 (Fed. Cir. 2006), *cert. denied*, 127 S. Ct. 1261 (2007); Black & Decker Corp. v. United States, 436 F.3d 431, 443 (4th Cir. 2006); Dow Chem. Co. v. United States, 435 F.3d 594, 605 (6th Cir. 2006), *cert. denied*, 127 S. Ct. 1251 (2007); Long Term Capital Holdings, LP v. United States, 150 F. App'x 40, 44 (2d Cir. 2005). The government has suffered one significant loss in this timeframe, in *Sala v. United States*, 552 F. Supp. 2d 1167, 1167 (D. Colo. 2008), but reversal on appeal seems likely.

29. Brudney & Ditslear, *supra* note 1, at 1272–73 ("Some of the Justices likely deferred to Justice Blackmun simply because they were not interested in tax law—something Blackmun recognized inside the Court as well as in public statements.").