

# (UN)APPEALING DEFERENCE TO THE TAX COURT

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## ABSTRACT

*The U.S. Tax Court (Tax Court), which hears the vast majority of litigated federal tax cases, occupies an unusual place in the federal government. It is a federal court located outside of the judicial branch, but its decisions are appealable to the federal courts of appeals. This odd structure, coupled with the court's history as an independent agency in the executive branch, can give rise to important questions, such as the standard of review that should apply to its decisions. In particular, should the courts of appeals treat Tax Court decisions the same as those of district courts in tax cases, or should they apply a more deferential standard analogous to review of agency decisions, as the U.S. Supreme Court held in 1943 in *Dobson v. Commissioner*?*

*Answering the standard-of-review question implicates issues of both law and policy. Contrary to some scholarship, this Article argues that, as a doctrinal matter, no vestige of the *Dobson* rule remains and that courts of appeals must apply the same standard of judicial review that they apply to district courts in nonjury cases. The Article further argues that appellate review theory supports that result. The *Dobson* rule was a largely instrumental one designed by U.S. Supreme Court Justice Robert Jackson to reduce the volume of tax litigation. Although tax litigation is unusually decentralized and the Tax Court has unique expertise, those differences do not support departing from the policies underlying appellate review. Appellate courts therefore*

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*should not defer to the interpretations of the Tax Court any more than they do to those of the district courts.*

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## INTRODUCTION

The U.S. Tax Court (Tax Court), a specialized federal court, is an extremely important forum for the resolution of federal tax disputes. Although the district courts and the U.S. Court of Federal Claims share concurrent jurisdiction over many of its cases, the Tax Court is the trial court of choice for over 95 percent of litigated federal tax cases.<sup>1</sup> One important reason why is that only in the Tax

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1. See David Laro, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. ILL. L. REV. 17, 18 (“Over ninety-five percent of all tax-related litigation is adjudicated in this court.”). For example, in fiscal year 2012, there were approximately 30,300 cases pending in the Tax Court, 700 in the district courts, and 300 in the Court of Federal Claims, making Tax Court cases approximately 96.8 percent of the total number of federal tax cases docketed in trial courts. OFFICE OF CHIEF COUNSEL, INTERNAL REVENUE SERV., AMERICAN BAR ASSOCIATION TAX SECTION COURT PROCEDURE COMMITTEE, FY 2012, at 3, available at [http://www.americanbar.org/content/dam/aba/events/taxation/taxiq\\_13mid\\_ccp\\_importandev\\_butler\\_slides.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/taxation/taxiq_13mid_ccp_importandev_butler_slides.authcheckdam.pdf). The Tax Court is based in Washington, D.C., but its judges

Court can a taxpayer avoid paying the claimed tax before litigating.<sup>2</sup> However, other factors may influence forum choice as well.<sup>3</sup>

The Tax Court occupies an unusual place in the federal government in that it is a federal court whose decisions are appealable to the federal courts of appeals,<sup>4</sup> yet it is located outside of

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hear cases in cities nationwide. *See* Laro, *supra*, at 23 (“The Tax Court has nationwide jurisdiction over taxpayers regardless of where the individual taxpayer resides or where the corporate taxpayer has its principal office or place of business.”).

2. *See, e.g.*, *Flora v. United States*, 362 U.S. 145, 158 (1960) (“The Board of Tax Appeals was established by Congress in 1924 to permit taxpayers to secure a determination of tax liability before payment of the deficiency.”); *id.* at 193 (“The Government argues, with some force, that our tax legislation as a whole contemplates the Tax Court as the forum for adjudication of deficiencies, and the District Courts and Court of Claims as the forums for adjudication of refund suits. This, in general, is true . . . .”); *Kaffenberger v. United States*, 314 F.3d 944, 958 (8th Cir. 2003) (“Full payment of a tax assessment is a prerequisite to suit in federal district court; taxpayers may bring prepayment suits only in United States Tax Court.”).

A losing taxpayer in Tax Court will owe interest on unpaid amounts due the government. Conversely, if the government loses a tax-refund suit, it will owe interest to the taxpayer on unpaid amounts. WILLIAM H. HOFFMAN, JR. & JAMES E. SMITH, *FEDERAL TAXATION 2012: INDIVIDUAL INCOME TAXES 2–13* (2012). The interest rate is the federal short-term rate plus two or three percentage points. I.R.C. § 6621(a) (2012).

3. *See* Nina J. Crimm, *Tax Controversies: Choice of Forum*, 9 B.U. J. TAX L. 1, 72 (1991) (suggesting that when a forum choice is available in a tax case, factors to consider “include the burden of proof required of the parties, availability of a jury trial, applicable legal precedent, rules relating to procedure and discovery, persons who can represent the taxpayer and the government, expertise of the judges, service-of-process and subpoena powers, and case backlog”).

One factor that is not typically mentioned as a possible reason for the overwhelming selection of the Tax Court is that the notice of deficiency, which is the “ticket to Tax Court” in deficiency cases, is required by law to include the last date to petition the Tax Court but is not required to mention other courts. *See* Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, § 3463(a), 112 Stat. 685, 767. The notice typically does not mention the alternative of paying the tax in full and pursuing the refund path in order to sue in a federal district court or the Court of Federal Claims. *See* LEANDRA LEDERMAN & STEPHEN W. MAZZA, *TAX CONTROVERSIES: PRACTICE AND PROCEDURE* 325–26 (3d ed. 2009) (reproducing a typical notice of deficiency). Over three-quarters of Tax Court petitions are filed pro se. *See* OFFICE OF CHIEF COUNSEL, *supra* note 1, at 13 (reporting that 23,431 of 29,489 cases petitioned in fiscal year 2010 were pro se; in 2011, 23,233 of 29,693 cases were pro se; and in 2012, 24,521 of 31,282 cases were pro se). Although pro se taxpayer litigants disproportionately opt for the informal “small tax case” procedure, taxpayers proceed pro se in approximately two-thirds of regular cases. *See id.* (9,684 of 14,492 regular cases petitioned in fiscal year 2010 were pro se; in 2011, 9,750 of 14,907 regular cases were pro se; and in 2012, 9,798 out of 15,158 regular cases were pro se) (calculations by the author). Many pro se taxpayers may not know about litigation options not communicated to them by the Internal Revenue Service (IRS). And once the taxpayer petitions the Tax Court, the taxpayer cannot change forum. *See* Crimm, *supra*, at 72 (“[I]f the Tax Court is selected and petition is filed, generally no suit for recovery of taxes can be instituted in another court.”).

4. I.R.C. § 7482(a).

the judicial branch.<sup>5</sup> Unlike the Court of Federal Claims, for example, which is also a legislative court, the Tax Court is not treated as part of the judiciary even for administrative purposes.<sup>6</sup> Among other things, that means that the Tax Court is not subject to the Administrative Office of the U.S. Courts, the U.S. Judicial Conference, or the Rules Enabling Act,<sup>7</sup> but rather is left largely to its own devices.<sup>8</sup>

The Tax Court's unique status and history as an independent agency in the executive branch<sup>9</sup> can give rise to important questions, such as the standard of review that should apply to its decisions.<sup>10</sup> In particular, should the courts of appeals treat Tax Court decisions the same as those of district courts in tax cases—reviewing legal questions *de novo* and factual questions under a “clearly erroneous” standard<sup>11</sup>—or should they apply a more deferential standard analogous to review of agency decisions, as was once the case?

The question of whether to afford special deference to the Tax Court, including on issues of law, raises important concerns about the role of appellate review. The standard of review may affect both litigation outcomes<sup>12</sup> and the court taxpayers choose for tax

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5. *See id.* § 7441 (establishing the Tax Court as an Article I court).

6. *See* JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 85 n.17 (1995) (“Although the Court of Federal Claims is lodged within the judicial branch for administrative purposes that arrangement derives largely from the fact that an Article III body, the former United States Court of Claims, previously had exercised much of the present Article I court’s jurisdiction. . . . The other Article I courts—the United States Tax Court, United States Court of Veterans Appeals, and United States Court of Military Appeals—either exist as independent entities or receive administrative support from the executive branch.” (citations omitted)).

7. Rules Enabling Act, 28 U.S.C. § 2072 (2012).

8. *See* Leandra Lederman, *Tax Appeal: A Proposal To Make the United States Tax Court More Judicial*, 85 WASH. U. L. REV. 1195, 1247–48 (2008) (concluding that the Tax Court “seems to have fallen into a gap between the branches of government so that it experiences the disciplining effect of neither the provisions—such as the APA and FOIA—that are applicable to agencies, nor the bodies or provisions—such as the AOUSC, the Judicial Conference, and the Rules Enabling Act—applicable to federal courts”).

9. *See* Harold Dubroff, *The United States Tax Court: An Historical Analysis* (pt. 4), 41 ALB. L. REV. 1, 1, 22–23 (1977) (detailing the evolution of the Tax Court).

10. For a recent example of this issue, see *Petition for a Writ of Certiorari at i*, *Curcio v. Comm’r*, 133 S. Ct. 2826 (2013) (No. 12-1085), 2013 WL 859980 (posing the question presented as “[w]hat is the standard of appellate review for the Tax Court’s determination of a mixed question of law and fact such as whether an expenditure is an ordinary and necessary business expense?”).

11. *See infra* notes 162–63 and accompanying text. The standard of review on mixed questions of law and fact is harder to pin down. *See infra* notes 167–70 and accompanying text.

12. *See* Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 NW. U. L. REV. 1009, 1025 (1996) (“Courts certainly say that standards of

litigation.<sup>13</sup> Moreover, the Tax Court still lacks the oversight that administrative agencies and Article III courts receive, so most of the limited oversight of its actions occurs during the appellate review process.<sup>14</sup>

The standard-of-review question implicates issues of both law and policy. From a policy perspective, answering the question requires weighing a variety of considerations that may cut in different directions, such as the relative roles of specialized expertise and uniformity across courts. As a doctrinal matter, it seems that the answer is that courts of appeals should apply the same standard of review they apply to district court decisions in nonjury cases. However, as discussed below, this rule is not unambiguous, not uncontested, and not always followed.

This Article tackles these doctrinal and policy issues, arguing that both considerations counsel according Tax Court decisions no more deference than district court decisions receive in tax cases decided without a jury. Part I explains why the issue even arises, which is a matter of history. In the 1940s—while the Tax Court was

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review matter, and I think it's fair to assume that standards of review can sometimes, even if not always, make a difference."); *id.* at 1025 n.70 (citing cases and articles stating that the standard of review affects case outcomes).

13. Professor David Shores has pointed to statistics suggesting that the Supreme Court's decision in *Dobson v. Commissioner*, 320 U.S. 489 (1943), calling for deference to Tax Court decisions, did not reduce the volume of Tax Court litigation:

In 1943, when the share of tax cases decided by the Tax Court could not have been affected by *Dobson*, the Tax Court decided 78.2 percent of all tax cases. In 1945, when any impact of *Dobson* on choice of forum would first have had an effect on the share of tax cases decided by the Tax Court, it decided 77.3 percent. In 1948, when presumably all decided tax cases were filed after the *Dobson* decision, it decided 79.3 percent.

David F. Shores, *Rethinking Deferential Review of Tax Court Decisions*, 53 TAX LAW. 35, 49 (1999). Of course, these data do not reflect filings but rather closures of cases, so some pre-*Dobson* filings could be in the later set of closures. It is also possible that *Dobson* effected a shift in the type of cases brought to the district courts toward those in which the taxpayer thought having a second chance to persuade a court was particularly important. See Abraham S. Albrecht & Hyman M. Rubinroit, *Choosing Between the Tax Court and the District Court*, 21 CONN. B.J. 177, 180 (1947) ("If the taxpayer is sure of his case in the Tax Court, that is where he should bring it. However, if he is not sure of his case there, then the District Court is the place to go, so that, if he loses in the District Court, he will at least not be barred from an appeal and may still win."). Of course, the standard of review is only one factor in forum choice, so it might not have a significant effect. See Shores, *supra*, at 50 ("Because other things are never equal, tax lawyers' general preference for full review is an unreliable guide to taxpayers' choice of forum. That preference simply is not sufficiently strong to cause a shift in litigation from the Tax Court to the district courts.").

14. See Lederman, *supra* note 8, at 1215 ("Currently, the Tax Court's principal source of oversight is the appellate review process."); *supra* note 4 and accompanying text.

still an administrative agency—in an effort to reduce tax litigation, Justice Robert Jackson led the Supreme Court in holding in *Dobson v. Commissioner*<sup>15</sup> that appellate courts must be extremely deferential to the Tax Court's decisions.

The *Dobson* rule<sup>16</sup> did not survive unscathed for very long, however. Congress quickly reversed it, at least in part. Part II of this Article considers what current law actually requires of the courts of appeals. This doctrinal question warrants a look at the evolution of the law since the *Dobson* decision, which includes both the *Dobson*-motivated provision requiring appellate courts 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”<sup>17</sup> and the formal change in the status of the Tax Court from an independent agency to an Article I court in 1969.<sup>18</sup>

Part III of this Article addresses the policy question, looking at the role of appellate review generally and then considering possible reasons to except the Tax Court from the type of second look that appellate review normally affords. It considers the reasons Justice Jackson gave in *Dobson*: the Tax Court's expertise; the decentralization of tax litigation, which can result in lengthy percolation of tax issues; and the notion that tax is different from other fields such that finality is more important than accuracy in Tax Court cases. This Part argues that none of these arguments are convincing in light of the institutional role of the Tax Court and the purposes of appellate review. The Article concludes that review of

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15. *Dobson v. Comm'r*, 320 U.S. 489 (1943).

16. See George T. Altman, *The Dobson Rule*, 21 TUL. L. REV. 527, 531 (1947) (“The continuous monotone of *Dobson*, *Dobson*, *Dobson*, *Dobson* eventually took on the crescendo of soldiers' boots approaching in the night. No longer was it just the *Dobson* case; it became known as the *Dobson rule*.”).

17. I.R.C. § 7482(a)(1) (2012).

18. See Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730 (codified at I.R.C. § 7441) (“There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court.”).

The following year, the Tax Court reversed its decision in *Lawrence v. Commissioner*, 27 T.C. 713 (1957), which had been reviewed by the full Tax Court, and ruled that 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.” *Golsen v. Comm'r*, 54 T.C. 742, 757 (1970). It is not clear whether the court's change in status in 1969 contributed to its adoption of the *Golsen* rule. See Deborah Geier, *The Emasculated Role of Judicial Precedent in the Tax Court and Internal Revenue Service*, 39 OKLA. L. REV. 427, 438 (1986) (describing two hypotheses for why the change occurred).

Tax Court decisions should be on par with the review accorded federal district court decisions.

## I. WHERE DID LIMITED APPELLATE REVIEW OF TAX COURT DECISIONS ORIGINATE?

### A. *The Start of Appealable Tax Court Decisions*

The history of judicial review of Tax Court decisions is bound up in the history of the Tax Court's development as an administrative agency with judicial functions. The Tax Court is the successor to the entity known as the Board of Tax Appeals (Board).<sup>19</sup> The Board was created by statute in 1924 as an independent agency in the executive branch<sup>20</sup> and charged with adjudicating disputes over federal income and profits taxes.<sup>21</sup> For the first couple of years of its existence, the Board's decisions were not final and could be collaterally attacked in federal court.<sup>22</sup> In 1926, Congress provided, instead, for review of Board decisions by the courts of appeals,<sup>23</sup> as is true today for Tax Court decisions.<sup>24</sup> At the time, the governing statute gave the courts

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19. Dubroff, *supra* note 9, at 1.

20. *Id.*

21. See Harold Dubroff, *The United States Tax Court: An Historical Analysis* (pt. 1), 40 ALB. L. REV. 7, 7 (1975) (describing the "inadequacy of preexisting institutions" and the need to administer federal income and profits taxes as leading to the creation of the Tax Court).

22. Harold Dubroff, *The United States Tax Court: An Historical Analysis* (pt. 3), 40 ALB. L. REV. 253, 258 (1976); see also *Dobson v. Comm'r*, 320 U.S. 489, 497 (1943) ("Congress dealt cautiously with finality for the Board's conclusions, going only so far as to provide that in later proceedings the findings should be 'prima facie evidence of the facts therein stated.' So the Board's decisions first came before the courts under a statute which left them free to go into both fact and law questions." (footnote omitted) (quoting Revenue Act of 1924 ch. 234, § 900(g), 43 Stat. 253, 337)).

The Board's decisions were not subject to direct appeal to the district courts; rather, they were subject to collateral attack by starting a *de novo* proceeding in district court. See Revenue Act of 1924 § 274(b), 43 Stat. at 297 ("If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector."); *id.* § 900(g), 43 Stat. at 337 ("In any proceeding in court under sections 274, 279, 308, or 312, and in any suit or proceeding by a taxpayer to recover any amounts paid in pursuance of a decision of the Board, the findings of the Board shall be prima facie evidence of the facts therein stated."); *id.* § 1014, 43 Stat. at 343 (providing limitations periods for refund suits); see also Dubroff, *supra*, at 260–61 (explaining the procedure and offering possible explanations for the lack of authorization for a direct appeal). Thus, it is not technically correct that "[a]ppeals from the Board of Tax Appeals were heard by the federal district courts," as stated in Andre L. Smith, *Deferential Review of Tax Court Decisions of Law: Promoting Expertise, Uniformity, and Impartiality*, 58 TAX LAW. 361, 368 (2005).

23. Dubroff, *supra* note 22, at 262.

24. I.R.C. § 7482(a) (2012).

of appeals “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, with or without remanding the case for a rehearing, as justice may require.”<sup>25</sup> The distinct language with respect to modifications and reversals was apparently intentional: “The reports of the Ways and Means and Finance Committees indicated that this language was intended to limit judicial review to questions of law, a limitation comparable to that provided in appeals from determinations of the Federal Trade Commission.”<sup>26</sup> However, these reports also included some evidentiary issues under the “law” umbrella. The House and Senate Reports contained similar language, with the House Report stating:

The court upon review may consider, for example, questions as to the constitutionality of the substantive law applied, the constitutionality of the procedure used, failure to observe the procedure required by law, the proper interpretation and application of the statute or any regulation having the force of law, the existence of at least some evidence to support the findings of fact, and the validity of any ruling upon the admissibility of evidence . . . .<sup>27</sup>

During the floor debate on the appellate review provision, Senator Albert Cummins expressed concern over the constitutionality of allowing an appeal from an administrative agency to a court.<sup>28</sup> The

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25. Revenue Act of 1926, ch. 27, § 1003(b), 44 Stat. 9, 110. The legislative history of the 1926 amendment reveals that the restriction of reversals to questions of law was an intentional policy decision reflecting concern about the existence of authority to review decisions of an administrative agency. See S. REP. NO. 69-52, at 36–37 (1926); H.R. REP. NO. 69-1, at 19–20 (1925).

The statute did not say “that questions of fact and mixed questions of law and fact were final so long as they had any warrant in the record,” as reported by Professor Andre Smith. See Smith, *supra* note 22, at 369 (citing David F. Shores, *Deferential Review of Tax Court Decisions: Dobson Revisited*, 49 TAX LAW. 629, 637 (1996)). The statute was silent regarding questions of fact but explicit regarding questions of law. See Revenue Act of 1926 § 1003, 44 Stat. at 110; see also I.R.C. § 1141 (1946) (explaining that federal appellate courts have 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”). It is the *Dobson* opinion that stated that the Tax Court’s “decision, of course, must have ‘warrant in the record’ and a reasonable basis in the law.” *Dobson*, 320 U.S. at 501.

26. Dubroff, *supra* note 22, at 264 (footnote omitted).

27. H.R. REP. NO. 69-1, at 19–20; see S. REP. NO. 69-52, at 37.

28. See 67 CONG. REC. 3756 (1926) (statement of Sen. Cummins) (“I can not conceive, Mr. President, of a proceeding in an administrative board, even if it is quasi judicial, in which a review is attempted by a judicial tribunal. . . . I have the very gravest doubts about the constitutionality of the entire provision.”).



Senate Report seems to address this concern, arguing that the Board was in essence a court, while nonetheless advocating limited review of its decisions, just as would be the case for an administrative body.

In the view of the committee the decisions of the board are judicial and not legislative or administrative determinations. Review of judicial decisions may be had by direct appeal to the courts . . . . Such review of a judicial as distinguished from a legislative or administrative determination may be had as to either questions of law or fact. The proposed procedure, however, *for reasons of policy and not of law*, limits court review solely to questions of law . . . .<sup>29</sup>

Professor Harold Dubroff has described the committee reports as “read[ing] very much like briefs in favor of sustaining the validity of the statute.”<sup>30</sup> A few years later, in *Old Colony Trust Co. v. Commissioner*,<sup>31</sup> the Supreme Court upheld the constitutionality (under Article III) of appeals from the Board to the courts of appeals.<sup>32</sup>

After the appellate review statute was enacted in 1926, no major dispute about it arose until the Supreme Court’s controversial decision in *Dobson v. Commissioner* in 1943.<sup>33</sup> Before *Dobson*, the Court had established that the Tax Court’s factual findings were not reviewable on appeal, but that questions of law and mixed questions of law and fact were reviewable.<sup>34</sup> *Dobson* therefore marked a turning point in the standard of review.

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29. S. REP. NO. 69-52, at 37 (emphasis added).

30. Dubroff, *supra* note 22, at 267.

31. *Old Colony Trust Co. v. Comm’r*, 279 U.S. 716 (1929).

32. *See id.* at 722 (“It is suggested that the proceedings before the Circuit Courts of Appeals . . . on a petition to review are not and can not be judicial, for they involve ‘no case or controversy,’ and without this a Circuit Court of Appeals, which is a constitutional court is incapable of exercising its judicial function. This view of the nature of the proceedings we can not sustain.” (citation omitted)); *see also* Geier, *supra* note 18, at 431 n.28 (describing these events).

33. *See* Dubroff, *supra* note 22, at 265 (explaining that the standard of review of Tax Court opinions was uncontroversial until *Dobson*).

34. For example, the Court stated in 1935:

The Court of Appeals is without power, on review of proceedings of the Board of Tax Appeals, to make any findings of fact. . . . The function of the court is to decide whether the correct rule of law was applied to the facts found; and whether there was substantial evidence before the Board to support the findings made. Unless the finding of the Board involves a mixed question of law and fact, the court may not properly substitute its own judgment for that of the Board.

*Helvering v. Rankin*, 295 U.S. 123, 131 (1935) (footnote omitted) (citations omitted); *see also* *Bogardus v. Comm’r*, 302 U.S. 34, 38–39 (1937) (finding that whether a payment was

B. *The Rise of Limited Review: Dobson v. Commissioner*

Writing for the Court in *Dobson*, Justice Robert Jackson tried to turn the tide on appellate review doctrine. The *Dobson* opinion states, “[E]ven a casual survey of decisions in tax cases, now over 5,000 in number, will demonstrate that 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>35</sup> That was the lead-in to what many regarded as a dramatic change in the standard of review of Tax Court decisions, as described below.

*Dobson* involved consolidated cases on stipulated facts<sup>36</sup> raising what is known as the “tax benefit rule.” The taxpayer in the lead case, James Collins, had purchased stock in 1929 and sold blocks of it in 1930 and 1931, sustaining deductible losses of approximately \$41,600 and \$28,163.<sup>37</sup> However, the losses did not produce a tax benefit for Mr. Collins because his returns for those years would have reported net losses even without those deductions.<sup>38</sup> In 1936, Collins “learned of facts indicating that he had been induced to purchase [the stock] by fraudulent representations.”<sup>39</sup> He brought a lawsuit that settled in 1939 for approximately \$45,000, a portion of which was allocable to the stock sold in the years in question.<sup>40</sup> He did not report the allocated amounts as income, and appealed to the Board the government’s determination that they constituted gross income, arguing in part that the deductions had produced no tax benefit.<sup>41</sup> The

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compensation or an excludible gift was a legal or mixed question); *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937) (“The ultimate finding [of the Board] is a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from the findings of primary, evidentiary or circumstantial facts. It is subject to judicial review and, on such review, the court may substitute its judgment for that of the board.”).

35. *Dobson v. Comm’r*, 320 U.S. 489, 494 (1943).

36. See *Dobson v. Comm’r*, 46 B.T.A. 770, 770–71 (1942), *rev’d sub nom. Harwick v. Comm’r*, 133 F.2d 732 (8th Cir. 1943), *rev’d sub nom. Dobson*, 320 U.S. 489; *Estate of Collins v. Comm’r*, 46 B.T.A. 765, 765–66 (1942), *rev’d sub nom. Harwick*, 133 F.2d 732, *rev’d sub nom. Dobson*, 320 U.S. 489. One commentator notes, “Since the *Dobson* case involved a stipulation of all the ultimate facts, it must be seriously questioned whether it was at all possible, under the common law and over a century of express statutory law, that there could be presented anything but a clear question of law.” Hugh C. Bickford, *The Trial of the Tax Court*, 23 TAXES 482, 491 (1945).

37. *Dobson*, 320 U.S. at 491.

38. *Id.* at 491–92.

39. *Id.* at 491.

40. *Id.*

41. *Id.* at 491–92.

Board agreed with Collins’s argument,<sup>42</sup> but the Court of Appeals for the Eighth Circuit reversed on the ground that the tax benefit rule was an uncodified equitable doctrine.<sup>43</sup>

On certiorari, the Supreme Court rejected the government’s argument that the taxpayer should recognize gain in the amount of the settlement proceeds because the deduction reduced the taxpayer’s stock basis to zero, reasoning as follows:<sup>44</sup>

[T]he statute contains no such fixed rule as the Government would have us read into it. It does not specify the circumstances or manner in which adjustments of the basis are to be made, but merely provides that “Proper adjustment . . . shall in all cases be made” for the items named if “properly chargeable to capital account.” *What, in the circumstances of this case, was a proper adjustment of the basis was thus purely an accounting problem and therefore a question of fact for the Tax Court to determine.*<sup>45</sup>

Accordingly, the Court held that the amount of any basis adjustment to the taxpayer’s stock was an unreviewable question of fact, rather than a question of law that the court of appeals could examine.<sup>46</sup> It stated that “[w]e are not adopting any rule of tax benefits. . . . The error of the court below consisted of treating as a rule of law what we think is only a question of proper tax accounting.”<sup>47</sup> The Court’s approach was rather odd because, as Professor Myron Grauer has explained, “the *Dobson* Court approved the equitable principle of the exclusionary aspect of the tax benefit rule and the transactional accounting that it entails, but did so in a manner that enabled it to deny that it was engaging in transactional accounting.”<sup>48</sup> He adds:

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42. *Id.* at 492.

43. *Id.*; see *Harwick v. Comm’r*, 133 F.2d 732, 737 (8th Cir. 1943), *rev’d sub nom. Dobson*, 320 U.S. 489 (“We think the allowance of deductions from gross income cannot be made to depend upon general equitable considerations, such as are involved in the tax benefit theory . . .”).

44. *Dobson*, 320 U.S. at 503.

45. *Id.* at 503–04 (emphasis added). Currently, I.R.C. § 1016, on “[a]djustments to basis,” contains the following language: “Proper adjustment in respect of the property shall in all cases be made—(1) for expenditures, receipts, losses, or other items, properly chargeable to capital account.” I.R.C. § 1016(a) (2012). An entirely different provision, I.R.C. § 111, addresses “[r]ecovery of tax benefit items.” *Id.* § 111.

46. *Dobson*, 320 U.S. at 506–07.

47. *Id.*

48. Myron C. Grauer, *The Supreme Court’s Approach to Annual and Transactional Accounting for Income Taxes: A Common Law Malfunction in a Statutory System?*, 21 GA. L. REV. 329, 379 (1986).

Indeed, the intriguing question here is why the Court decided to treat the tax issue as if it were merely a factual question. . . . The Court . . . noted that there were sound policy reasons for paying great deference to the expertise of the Tax Court. The value of paying deference to Tax Court decisions, however, does not explain why the tax issue in *Dobson* was treated as a factual one.<sup>49</sup>

The answer to that question seems to lie more with Justice Jackson than with the facts of *Dobson*.<sup>50</sup> As Professor Kirk Stark has explained, Jackson's early career included serving as Chief Counsel of the Bureau of Internal Revenue (Bureau)<sup>51</sup>—the predecessor of the Internal Revenue Service (IRS)<sup>52</sup>—and as Assistant Attorney General of the Tax Division of the Department of Justice,<sup>53</sup> although Jackson was primarily a litigator and did not consider himself a tax expert.<sup>54</sup> Justice Jackson's experience led him to believe that there was too much tax litigation.<sup>55</sup> Part of the reason, in Justice Jackson's view, was the opportunity that taxpayers had (and still have) to choose among three trial-level fora.<sup>56</sup> In the concluding section of an article published while he was at the Bureau, eight years before the *Dobson* decision, Justice Jackson complained about the abundance of tax litigation and posed several seemingly rhetorical questions that showed the limited role he envisioned for the courts of appeals in tax litigation:

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49. *Id.* at 376.

50. See Kirk J. Stark, *The Unfulfilled Tax Legacy of Justice Robert H. Jackson*, 54 TAX L. REV. 171, 221 (2001) (“If the Tax Court were given the final say on a broader range of disputed tax questions, Jackson believed, much of the complexity arising out of excessive appellate litigation could be curbed. The difficulty lay in locating a case through which this goal could be operationalized.”).

51. *Id.* at 173.

52. INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, IRS HISTORICAL FACT BOOK: A CHRONOLOGY: 1646–1992, at 158 (1993).

53. Stark, *supra* note 50, at 173.

54. See *id.* at 179 (“Robert Jackson neither began nor ended his government service with any special degree of technical tax expertise. . . . In his speeches, writings, and autobiographical notes, Jackson repeatedly disclaimed any specialized knowledge of tax law.”).

55. *Id.* at 180. One contemporary commentator pointed to the expansion of the tax laws as the reason for the increase in litigation. See Bickford, *supra* note 36, at 491 (“In 1913, the Federal Revenue Act covered a few pages. The Internal Revenue Code today contains several thousand sections covering hundreds of pages . . . . Can all of this great body of statutory law possibly be interpreted and enforced without a vast increase in judicial business?”). Bickford argued that “[t]he purpose of the courts is to hear disputes whenever they arise and decide them. To perform this duty they must be as freely open as the doors of the churches.” *Id.*

56. Stark, *supra* note 50, at 186–87.

We are getting too much law, and too many kinds of law, and from too many sources, for tax administration to be simple, or the law clear. Should we reserve to the Supreme Court only constitutional questions in tax matters? Should matters of statutory construction be settled by a tax court, instead of by the twelve Circuit Courts of Appeal, with their frequent conflict of viewpoint? Should questions of fact be finally settled by the finding of the Board of Tax Appeals? Cannot questions of valuation be settled administratively?<sup>57</sup>

Justice Jackson's experiences seem to have led him to value finality—having *some* answer to what the proper tax rule was—over notions of the “correctness” of the answer.<sup>58</sup> In part, that may have been because, to protect the federal fisc, the government took inconsistent positions in different cases, even on major tax issues of the day, such as important timing questions under the income tax and the recently enacted gift tax.<sup>59</sup> Jackson saw no way around this problem, as different taxpayers are not required to maintain consistent positions on an issue.<sup>60</sup>

Justice Jackson's tax litigation experience also led him to respect the Board of Tax Appeals. He appeared only once before the Board,<sup>61</sup> but it was in a high-profile, highly political case involving former Treasury Department (Treasury) Secretary Andrew Mellon,<sup>62</sup> who had helped create the Board just over a decade earlier.<sup>63</sup> The political

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57. Robert H. Jackson, *Equity in the Administration of Federal Taxes*, 13 TAXES 641, 686 (1935).

58. See Stark, *supra* note 50, at 206–07 (“The object of judicial intervention . . . Jackson seemed to conclude, was not so much to ponder the theoretical advantages of one tax theory over another, but rather to facilitate a clean and quick resolution of legal controversies.”).

59. See *id.* at 204–06 (discussing the income-tax question of whether a tenant's improvements to property are gross income when the tenant abandons the property (or only when the property is later sold), as well as the gift-tax question of whether a gift to a trust is complete for gift-tax purposes while the donor retains the power to change the beneficiaries of the trust (or not until that power is relinquished)).

60. See Jackson, *supra* note 57, at 644 (explaining, in the article he wrote while at the Bureau, that otherwise, “[i]f we guess wrong [what the courts will hold], and a lot of cases expire by limitation, our position would be indefensible”). As an example of cases presenting statute-of-limitations issues, Jackson cited a set of cases in which a husband bequeathed money to a trustee, the income from which was to be paid to his widow for life. *Id.* Several courts held that the income stream was not taxable to the widow. *Id.* The IRS then pursued the trustee for tax on that income, but the Supreme Court said that the widow, not the trustee, was the proper taxpayer. *Id.*

61. Stark, *supra* note 50, at 180.

62. *Id.* at 180–81, 189.

63. See *id.* at 189.

nature of the Mellon litigation posed a test for the Board's independence. For two years, Jackson immersed himself in the case.<sup>64</sup>

Ultimately, the Board reached a split decision, allowing some of Mellon's deductions but ruling for the government on points that resulted in a deficiency of approximately \$500,000,<sup>65</sup> a fraction of the approximately \$3 million claimed by the Bureau.<sup>66</sup> Moreover, the Board decided the case in a manner that "successfully converted what began as a hugely controversial political battle into a highly technical analysis of complex tax issues," issuing a "124-page opinion [that] provide[d] excruciating detail on the Mellon transactions and, on the whole, offer[ed] a reasoned, balanced analysis of the issues."<sup>67</sup> As a result, the case established to the public, and probably to Jackson, the Board's technical expertise and its independence from both Mellon and the Bureau.<sup>68</sup>

Justice Jackson was appointed to the Supreme Court in 1941.<sup>69</sup> On the Court, his early work in tax cases reflected his belief in the importance of not disrupting the tax administration process.<sup>70</sup> In addition, he continued to adhere to the view that there was not necessarily a single correct answer in tax cases, and that delay in obtaining a clear rule disrupted tax administration.<sup>71</sup> As Professor Stark has explained,

In *Helvering v. Cement Investors, Inc.*, a corporate tax case decided in his first term on the Court, Jackson prepared an unpublished concurring opinion that foreshadowed his famous *Dobson* opinion. . . . Jackson wrote that tax is not only a complex field of law, but one in which the legal determinations required to be made

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64. *Id.* at 190.

65. *Id.* at 194.

66. *Id.* at 189.

67. *Id.* at 194.

68. *See id.* It would be interesting to know what Justice Jackson would think of the current Tax Court, which, as an Article I court, has at least as much independence as it did in Jackson's era, but less accountability. *See supra* note 8 and accompanying text.

69. *See generally* *Nomination of Robert H. Jackson To Be an Associate Justice of the Supreme Court*, in 4 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1972 (Roy M. Mersky & J. Myron Jacobstein eds., 1975).

70. *See* Stark, *supra* note 50, at 211 ("This early memo reveals Jackson's impatience with having the Court involved in picayune tax cases and suggests, perhaps, a bias in favor of handling such matters administratively.")

71. *See id.* at 221.

are “essentially arbitrary.” “The line between what is taxable and what is not,” Jackson wrote, “is not necessarily drawn by reason. . . . It would not be possible to demonstrate that in abstract rightness or wrongness our opinions are superior to those of the Board of Tax Appeals.”<sup>72</sup>

Justice Jackson gave a copy of that draft concurrence to his first law clerk, John Costelloe, with the assignment to research the scope of appellate review of Board decisions.<sup>73</sup> Costelloe concluded that appellate courts should not defer to the Board’s decisions.<sup>74</sup> Professor Phil Neal, Justice Jackson’s second law clerk, reports, “John told me that after reading the memorandum, Justice Jackson had walked into his office with the memorandum in hand, chuckling, and said: ‘Well, John, that may be the law now but it won’t be for long if I can help it.’”<sup>75</sup>

It appears, then, that Justice Jackson was simply waiting for a vehicle to limit the review of Tax Court decisions, and the one he chose was *Dobson*.<sup>76</sup> In his initial *Dobson* draft, Justice Jackson took the approach that Tax Court matters were essentially unreviewable, leaving the appellate courts with “little more than a proofreading function. Did the Tax Court make a clear-cut mistake in reading the statute? If not, then the decision must be affirmed.”<sup>77</sup>

Justice Jackson sought a unanimous *Dobson* opinion, but he could not have obtained that with his initial draft, which Chief Justice Stone strongly opposed.<sup>78</sup> Moreover, although Justice Frankfurter was

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72. *Id.* at 222 (footnotes omitted) (quoting *Helvering v. Cement Investors, Inc.*, Nos. 644–46, at 2–3 (U.S. 1942) (Jackson, J., unpublished concurring opinion)).

73. John Q. Barrett, *Justice Jackson on “What the Law’s Going To Be”—at Least Until Its “Gelding,”* 6 GREEN BAG 2D 125, 125–26 (2003).

74. *See id.* at 127 (noting Costelloe’s “recommendation that appellate courts, or at least the Supreme Court, should continue not to accord much administrative finality to [Board] decisions”).

75. Phil C. Neal, *Justice Jackson: A Law Clerk’s Recollections*, 68 ALB. L. REV. 549, 553–54 (2005).

76. *See Stark, supra* note 50, at 221 (referring to Jackson’s search for a case to operationalize his goal of increased deference to Tax Court decisions); *cf. Bickford, supra* note 36, at 484 (pointing out that “the Supreme Court violated the very rule which it decided, by thus considering an issue not raised below”).

77. *Stark, supra* note 50, at 227.

78. *See id.* at 225 (“The most vigorous opponent to [Jackson’s] initial draft opinion was Chief Justice Stone. In response to Jackson’s draft, Stone prepared a concurring opinion that essentially restated the Court’s traditional approach to judicial review of Tax Court decisions. . . .”).

generally sympathetic to Jackson's approach, he parted company with Jackson on the treatment of mixed questions of law and fact:

"Merely because questions of law are mixed up with so-called questions of fact," Frankfurter wrote, "does not withdraw their determinations from the courts. It would be too easy otherwise for the Tax Court to mix them up. The remedy is not to leave such admixtures to the Tax Court. The remedy is to insist on proper findings from the Tax Court."<sup>79</sup>

To get Justices Frankfurter and Stone to join the opinion, Justice Jackson drafted compromise language.<sup>80</sup> That resulted in a rather murky decision,<sup>81</sup> as Professor Kirk Stark explains:

The opinion nods toward Stone's view by characterizing as a reviewable "clear-cut question of law" whether "applicable statutes and regulations properly interpreted forbid" the Tax Court's ruling. The insertion of the words "properly interpreted" essentially preserved de novo review for any judge who wanted it. Jackson's side of the argument reemerges later in the opinion, however, when he states that "[w]here no statute or regulation controls, the Tax Court's selection of the course to follow is no more reviewable than any other question of fact." This language suggests that statutory ambiguity, or the absence of a statutory provision, leaves the matter within the Tax Court's province.<sup>82</sup>

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79. *Id.* at 227 (quoting Memorandum from Felix Frankfurter to Robert H. Jackson 3 (Oct. 4, 1943)).

80. The published *Dobson* opinion states, in part:

Whatever latitude exists in resolving questions such as those of proper accounting, treating a series of transactions as one for tax purposes, or treating apparently separate ones as single in their tax consequences, exists in the Tax Court and not in the regular courts; when the 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. In view of the division of functions between the Tax Court and reviewing courts it is of course the duty of the Tax Court to distinguish with clarity between what it finds as fact and what conclusion it reaches on the law. In deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter. The Tax Court is informed by experience and kept current with tax evolution and needs by the volume and variety of its work.

*Dobson v. Comm'r*, 320 U.S. 489, 501–02 (1943).

81. See Stark, *supra* note 50, at 227 ("Jackson reworked the *Dobson* draft in an effort to secure Stone's and Frankfurter's full accord. The final product, not surprisingly, is characterized more by compromise than clarity.").

82. *Id.* at 228 (alterations in original) (emphasis omitted) (footnotes omitted) (quoting *Dobson*, 310 U.S. at 492–93, 502). The Court also held, "The error of the court below consisted of treating as a rule of law what we think is only a question of proper tax accounting." *Dobson*, 320 U.S. at 506–07. However, it did not explain why that meant the question was a factual, not a



### C. Criticism of the Dobson Rule

The *Dobson* decision was quickly criticized, including by leading commentators.<sup>83</sup> Among other things, scholars pointed to the difference between the statute's language of "not in accordance with law" and the *Dobson* rule's "clear-cut mistake of law."<sup>84</sup> The *Dobson* rule also meant that review of Tax Court decisions was more limited than review of district court decisions in tax cases,<sup>85</sup> which seems not to have been the practice until then.<sup>86</sup> For example, one commentator wrote in 1945 that "[i]n all of [the thousands of appeals from the Board], until the *Dobson* decision, the rule stated by the legislature

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legal, one. See Randolph E. Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact*, 57 HARV. L. REV. 753, 767–68 (1944).

83. See, e.g., Erwin N. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153, 1170–73 (1944) (arguing, in part, that "[e]ven if the *Dobson* rule were clear and understandable in its application, and even if decisions of the Tax Court were always decisions of all the court, the *Dobson* rule would not solve the problem with which we are confronted"); Paul, *supra* note 82, at 753–54 ("The [*Dobson*] case started life as a humble, if engaging, income tax dispute and was miraculously transformed by the Supreme Court into an all-embracing essay on the steadily expanding evils of tax litigation and the pressing need for judicial reorientation." (footnote omitted)).

84. Geier, *supra* note 18, at 434. A 2005 article argued that "as a practical matter, in 1926 Congress re-designed the Board of Tax Appeals to stand on almost equal ground with the circuit courts. The circuit courts' remaining function in tax controversies was to ensure that none of the Board's conclusions of law were clear-cut mistakes." Smith, *supra* note 22, at 369. However, as Professor Geier's article notes, it was *Dobson*, not the statute, that used the phrase "clear-cut mistake of law." Geier, *supra* note 18, at 434 (citing *Dobson*, 320 U.S. at 502); cf. Revenue Act of 1926, ch. 27, § 1003(b), 44 Stat. 9, 110 (providing the courts of appeals 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" (emphasis added)). In addition, the Board, as a trial court, was more equal with the district courts than with the courts of appeals. See Bickford, *supra* note 36, at 485–86 ("[T]he Tax Court was . . . created, and Congress has consistently maintained it, as a practical part of the judicial system to sit in the same fashion as, and contemporaneous with, the District Courts." (emphasis omitted)).

85. Dubroff, *supra* note 9, at 26–27.

86. See Note, *Controversy Between the Tax Court and the Courts of Appeals: Is the Tax Court Bound by the Precedent of Its Reviewing Court?*, 7 DUKE L.J. 45, 47 n.10 (1957) ("By the time the Board of Tax Appeals was established, the circuit courts were used to reviewing the tax cases from the district courts in the same manner that they reviewed all other cases, and they continued to exercise this type of review over the Board until *Dobson v. Commissioner*." (citation omitted)). One commentator argued that, before *Dobson*, the courts of appeals actually accorded less respect to the Tax Court's findings than they did to the district courts. See Warren F. Wattles, *Federal Tax Cases upon Appeal: The Rise and Demise of the Dobson Rule*, 1 U. FLA. L. REV. 333, 337 (1948) ("More than once the reviewing [*sic*] court decided a fact question or a mixed question of fact and law, essentially as if the appellate court were the trial court and the Tax Court but a panel of special masters.").

has been adhered to, as expressed in the first decision on the question, namely, that questions of law were fully subject to review.”<sup>87</sup>

Randolph Paul, who was a tax advisor at Treasury,<sup>88</sup> wrote a lengthy article tearing apart the opinion.<sup>89</sup> He challenged *Dobson*’s statement that the Tax Court’s decision must have “a reasonable basis in the law” to be upheld.<sup>90</sup> He argued:

[I]t may mean that a Tax Court decision must be respected on appeal if it is rooted in a reasonable legal interpretation regardless of whether the appellate court would subscribe to that interpretation as an original proposition. . . . Obviously this view is a drastic departure from accepted canons of review in the tax field, for the Tax Court’s control of the law may become practically coterminous with its control of the facts although Congress itself has very definitely intended otherwise.<sup>91</sup>

Another contemporary commentator, Louis Eisenstein, argued in 1945 (while the Tax Court technically was still an administrative agency), that the *Dobson* decision reflected deference to the wrong agency:

One must constantly remember . . . that the *Dobson* decision is a poorly disguised effort to rescue the Supreme Court from the growing demands of tax litigation and, at the same time, augment the scope of administrative finality. In order to accomplish both these purposes, the Supreme Court turned to the Tax Court as the administrative authority on taxation. . . . The *Dobson* decision is essentially a reaction against the failure of administration by the Treasury, which could have narrowed the area of judicial intervention. Nevertheless, the *Dobson* case is not the answer to the Supreme Court’s prayer. . . .

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87. Bickford, *supra* note 36, at 489 (citation omitted) (citing *Avery v. Comm’r*, 22 F.2d 6 (5th Cir. 1927)); see also *id.* at 490 (“[A]ll questions of law are reviewable without limitation or restriction for the simple reason that Congress gave jurisdiction to review all questions of law and said so in the statute and in its reports.”).

88. Stark, *supra* note 50, at 229.

89. See generally Paul, *supra* note 82. He stated, for example, that “[t]he obvious moral of this sad chapter . . . is that judicial haste may very easily make waste. It is hardly the course of wisdom to escape from the frying pan into the fire.” *Id.* at 796.

90. *Id.* at 778–79; see *Dobson v. Comm’r*, 320 U.S. 489, 501 (1943).

91. Paul, *supra* note 82, at 778.

...[A] body which is non-administrative in character cannot perform the administrative functions apparently contemplated by the *Dobson* decision. . . . If the concept of administration includes the authoritative formulation of subsidiary rules by a rule-making agency, the Tax Court is no more administrative in character than a district court.<sup>92</sup>

Eisenstein argued that deference was instead warranted for Treasury regulations, in line with the rest of administrative law.<sup>93</sup> In that regard, Eisenstein seems prescient, given the Supreme Court's 2011 decision in *Mayo Foundation for Medical Education & Research v. United States*,<sup>94</sup> which held that Treasury regulations warrant the same level of deference as those of other agencies.<sup>95</sup>

The *Dobson* rule was a strange one, in part because the Court provided no test for distinguishing issues of fact from issues of law.<sup>96</sup> In his article, Paul particularly criticized the Court's use of the law/fact distinction, stating in part:

The circuit court—and apparently the Tax Court as well as the litigants concerned—had assumed without any qualms that the relevance and application of the tax benefit rule raised a pure question of law. Mr. Justice Jackson, however, with the concurrence

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92. Louis Eisenstein, *Some Iconoclastic Reflections on Tax Administration*, 58 HARV. L. REV. 477, 540–42 (1945) (footnote omitted).

93. *See id.* at 528 (“[T]he central issue is whether an enlightened administrator could finally arrive at the result actually reached, and not whether the issued regulation is the most reasonable which could have been devised to suit the occasion. . . . This view reflects nothing especially novel, except as it extends the teachings of administrative law to the realm of taxation.”).

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

95. *See id.* at 713 (“Aside from our past citation of [tax-specific case] *National Muffler [Dealers Ass'n v. United States]*, 440 U.S. 462 (1979)], *Mayo* has not advanced any justification for applying a less deferential standard of review to Treasury Department regulations than we apply to the rules of any other agency. In the absence of such justification, we are not inclined to carve out an approach to administrative review good for tax law only.”).

The changes that have occurred since Eisenstein wrote only underscore his conclusion that the appropriate locus for deference within tax administration is Treasury, not the Tax Court. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), has become the leading Supreme Court case on deference to agency rulemaking, and the Court applied it in *Mayo* to the Treasury Department. *See Mayo*, 131 S. Ct. at 713. Most importantly, the Tax Court has ceased to be an agency within the executive branch even as a technical matter, having been denominated an Article I (legislative) court in 1969. *See infra* note 151 and accompanying text.

96. *See* 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, 446 n.41 (1951) (“In the entire course of the doctrine's reign, the court never revealed the criteria by which a clear-cut question of law might be distinguished from other questions.”).

of all his brethren, neatly demolishes this assumption by moving the tax benefit rule from the realm of law to the realm of fact. This transmutation of law into fact is really the cornerstone of the decision. But there still remains the stubborn question whether the Supreme Court or the circuit court was correct in the choice of categories.<sup>97</sup>

On the ground, *Dobson* proved challenging to apply.<sup>98</sup> The courts of appeals struggled with the *Dobson* rule,<sup>99</sup> sometimes criticizing it openly.<sup>100</sup> The Supreme Court itself applied the doctrine haphazardly,<sup>101</sup> sometimes applying it to one issue but not others in the same case; sometimes “buttress[ing] its reliance on the *Dobson* rule by an independent judgment as to the merits of the Tax Court decision”; sometimes finding that *Dobson* did not govern its review; and sometimes failing to mention *Dobson* at all.<sup>102</sup> The Justices also sometimes disagreed with each other as to whether *Dobson* deference applied.<sup>103</sup>

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97. Paul, *supra* note 82, at 765.

98. See Geier, *supra* note 18, at 434 (“*Dobson* complicated the review process since a threshold determination was required as to whether the Tax Court question was reviewable.”).

99. See Griswold, *supra* note 83, at 1170 n.51 (“The effect of the *Dobson* case on the circuit courts of appeals to date can only be described as chaos.”); Wattles, *supra* note 86, at 340–41 (“The response of circuit courts of appeals to the *Dobson* rule was varied. . . . Some [courts of appeals] continued to reverse the Tax Court with considerable frequency.”).

100. For example, the Second Circuit wrote in one case, “There remains only the vexed question whether we should yield our own judgment to that of the Tax Court. . . . Concededly, it is impossible to lay down any general principle to distinguish those situations in which a ‘clearcut question of law’ arises . . . .” *Comm’r v. Nat’l Carbide Corp.*, 167 F.2d 304, 307 (2d Cir. 1948) (footnote omitted), *aff’d.*, 336 U.S. 422 (1949); see also Dubroff, *supra* note 9, at 27 (noting that appellate courts criticized *Dobson*); Wattles, *supra* note 86, at 340 (“The Circuit Court of Appeals for the Second Circuit . . . [i]n inimitably ironical language . . . which none who read might miss, . . . paid its respects to the *Dobson* doctrine.” (citing *Am. Coast Line, Inc., v. Comm’r*, 159 F.2d 665, 668–69 (2d Cir. 1947))).

101. Robert C. Brown, *The Nature of the Tax Court of the United States*, 10 U. PITT. L. REV. 298, 307–08 (1949) (“With the Supreme Court first enunciating such an absurd doctrine, and then ignoring it whenever they felt like it—indeed applying it often if not usually only in the most absurd situations—it is small wonder that the courts of appeal could make little of the doctrine.”).

102. See Rice, *supra* note 96, at 446 n.41 (collecting cases).

103. See Paul, *supra* note 82, at 792 (“[S]even Justices [in *Security Flour Mills Co. v. Commissioner*, 321 U.S. 281 (1944),] held the *Dobson* rule of finality inapplicable while the other two, Justices Douglas and Jackson, were equally convinced that the *Dobson* decision governed. Neither group made any attempt to justify its views, although what clearly was fact to one group was obviously law to the other.” (footnote omitted)).

## II. MODERN LAW ON APPELLATE REVIEW OF TAX COURT DECISIONS

### A. *Was the Dobson Rule Legislatively Overturned in 1948?*

Perhaps not surprisingly, given even the Supreme Court's inconsistent adherence to the *Dobson* rule, Congress soon acted on complaints that *Dobson* caused problems for tax litigation. In 1948, Congress amended the Internal Revenue Code (Code), providing for review of 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."<sup>104</sup> This might seem to have put an end to *Dobson* deference. However, Congress left untouched the subsection providing the original standard of review; it still states, "Upon such review, such 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 of the Tax Court, with or without remanding the case for a rehearing, as justice may require."<sup>105</sup> Professor David Shores has raised the question of whether this means that Congress left the *Dobson* rule untouched as to questions of law,<sup>106</sup> as at least one court has suggested.<sup>107</sup> He has argued that this was Congress's intent.<sup>108</sup>

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104. Act of June 25, 1948, ch. 646, § 36, 62 Stat. 869, 991 (codified as amended at I.R.C. § 7482(a)(1) (2012)). Section 7482(a)(1) provides in full:

The United States Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

I.R.C. § 7482(a)(1).

105. I.R.C. § 7482(c)(1).

106. See Shores, *supra* note 25, at 652–53 ("If, as appears to be the case, 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, which intent should control in construing the statute?").

107. See *ABKCO Indus., Inc. v. Comm'r*, 482 F.2d 150, 155 n.3 (3d Cir. 1973) ("Although 26 U.S.C. § 7482(a) had as its express purpose the modification of *Dobson* with respect to review of findings of fact by the Tax Court, the statute does not profess to affect that portion of *Dobson* which discusses appellate review of questions of law.").

108. See Shores, *supra* note 25, at 673 ("That Congress intended to modify rather than overrule *Dobson* when it amended subsection (a) in 1948 is made plain by the retention of subsection (c)."); see also *id.* at 653 ("At a minimum one can say that the language and history of 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')."); cf. Steve R.

However, his description of some of the legislative history is misleading, as detailed below.<sup>109</sup>

The amendment to what was then I.R.C. § 1141 was part of a failed attempt during a recodification of the Judicial Code to move the provisions governing the Tax Court from Title 26 to Title 28 of the U.S. Code.<sup>110</sup> That attempt, which occurred in 1948, was motivated partly by the *Dobson* decision and partly by the enactment of the Administrative Procedure Act<sup>111</sup> in 1946, the application of which to the Tax Court would have required significant changes in Tax Court procedure,<sup>112</sup> most notably en banc review as a matter of right in any case decided by a single judge.<sup>113</sup>

The 1948 bill passed the House of Representatives by a wide margin in spite of the opposition of many members of the House Ways & Means Committee, who did not want to relinquish jurisdiction over the Tax Court, as they would have had to if the Tax Court provisions had been moved to Title 28.<sup>114</sup> The Senate held extensive hearings, and despite the fact that the bill revised and recodified all of Title 28, such that the Tax Court provisions constituted only a small part of the bill, the hearings primarily focused on whether nonattorneys would be allowed to practice before the Tax Court if it were made part of the judiciary.<sup>115</sup>

The provision to make the Tax Court part of the federal judiciary was thus highly controversial in the Senate.<sup>116</sup> It might have impeded passage of the bill and thereby stalled the recodification of Title 28. Representative Edward Devitt, appearing as a witness before the Senate Judiciary Committee, advocated removing from the bill all of

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Johnson, *The Phoenix and the Perils of the Second Best: Why Heightened Appellate Deference to Tax Court Decisions Is Undesirable*, 77 OR. L. REV. 235, 252 (1998) (“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.’” (quoting Shores, *supra* note 25, at 652–53)); Smith, *supra* note 22, at 394 (“Certainly Shores is correct that *Dobson*’s rule relating to deferential review of Tax Court decisions survived the amendment of section 1141.”).

109. See *infra* notes 124–37 and accompanying text.

110. See Dubroff, *supra* note 9, at 22, 35–36; see also Rice, *supra* note 96, at 440 (“The amendment of Section 1141(a) was part of an act primarily designed to effectuate a long overdue revision of the Judicial Code.”).

111. Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2012).

112. Dubroff, *supra* note 9, at 26–27.

113. Shores, *supra* note 25, at 646.

114. Dubroff, *supra* note 9, at 31–32.

115. *Id.* at 35–36.

116. See Shores, *supra* note 25, at 648 (“When the Senate Judiciary Committee took up the House bill, opposition to the Tax Court provisions was intense . . .”).

the language regarding the Tax Court except for the amendment relating to the *Dobson* rule. He argued that *Dobson* restricted the scope of review of Tax Court decisions, confused the law, and deterred tax attorneys from bringing cases to the Tax Court “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 by the Tax Court.”<sup>117</sup>

The chairman of the American Bar Association’s Section of Taxation, William Sutherland, similarly urged that whatever happened to the rest of the provisions regarding the Tax Court, the provision relating to appellate review should remain in the bill.<sup>118</sup> He, too, argued that *Dobson* reflected a departure from the scope of review provided by statute:

The present appellate review provisions in the Internal Revenue Code that govern appeals from the Tax Court were enacted in 1926, and gave the circuit courts of appeals what was assumed during all the period from 1926 to 1943, to be just as complete a power of review as the circuit courts of appeals exercised over cases coming from the district courts of the United States.<sup>119</sup>

Ultimately, to secure passage of the bill, the Judiciary Committee removed all of the provisions regarding the Tax Court from the bill, except for one relating to the *Dobson* rule.<sup>120</sup> However, the Senate bill amended only I.R.C. § 1141(a) (now § 7482(a)). As Professor Shores has pointed out, it left untouched the provision Justice Jackson quoted in *Dobson*, § 1141(c)—unlike the House bill, which would have replaced § 1141(c) with the new provision.<sup>121</sup> The Senate version

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117. *Judicial Code and Judiciary: Hearings on H.R. 3214 Before a Subcomm. of the S. Comm. on the Judiciary*, 80th Cong. 20 (1948) [hereinafter *Judicial Code and Judiciary: Hearings*] (statement of Rep. Devitt).

118. *See id.* at 169–71 (statement of W.A. Sutherland, Chairman, Tax Section, American Bar Association).

119. *Id.* at 167. Sutherland’s view is supported by the pre-*Dobson* Supreme Court case of *Bogardus v. Commissioner*, 302 U.S. 34 (1937), for example, which stated in the context of determining whether a payment was compensation or an excludible gift:

This, as we recently have pointed out, is “a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from findings of primary, evidentiary or circumstantial facts. It is subject to judicial review and, on such review, the court may substitute its judgment for that of the board [of Tax Appeals].”

*Bogardus*, 302 U.S. at 38–39 (quoting *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937)).

120. Dubroff, *supra* note 9, at 36–37.

121. Shores, *supra* note 25, at 650–51.

passed both the House and the Senate,<sup>122</sup> resulting in the situation that exists today, with both sets of language contained in what is now § 7482.<sup>123</sup>

Shores has argued that the reason the Senate bill retained the old language is because the Senate intended to repeal the *Dobson* rule only on questions of fact, whereas the House wanted to overturn *Dobson* on questions of law, as well.<sup>124</sup>

However, the Senate's description of *Dobson* characterizes the *Dobson* decision itself as referring to questions of fact. It wrote:

The effect of [the] language [passed by the House] was to repeal the rule laid down in *Dobson v. Commissioner of Internal Revenue* to the effect that decisions of the Tax Court on *questions of fact*, including *questions of accounting and ultimate conclusions of fact*, are not reviewable if supported by any evidence in the record. The effect of section 1294 was to make decisions of the Tax Court on *questions of fact* reviewable if clearly erroneous, as is now the case with similar decisions of the district courts. In view of the elimination of the Tax Court from the bill and the consequent elimination of section 1294, this amendment to section 1141(a) of the Internal Revenue Code is necessary in order to accomplish the result intended by section 1294.<sup>125</sup>

This description by the Senate of *Dobson* and the House bill suggests that the Senate was trying to repeal *Dobson* where it thought

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122. Dubroff, *supra* note 9, at 37.

123. See I.R.C. § 7482(a) (2012) (“The United States Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have exclusive jurisdiction to review the 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 . . . .”); *id.* § 7482(c)(1) (“Upon such review, such 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 of the Tax Court, with or without remanding the case for a rehearing, as justice may require.”).

I.R.C. § 7482(c)(2), which provides that “[r]ules for review of decisions of the Tax Court shall be those prescribed by the Supreme Court under section 2072 of title 28 of the United States Code,” gives the Supreme Court the power to promulgate rules of practice and procedure for appeals of Tax Court decisions. The Federal Rules of Appellate Procedure address various aspects of filing a notice of appeal in Tax Court cases and other aspects of the record on appeal. See FED. R. APP. P. 13.

124. See Shores, *supra* note 25, at 651 (“The [Senate] Committee’s explanation of its proposed amendment plainly states that it viewed section 1294 of the House bill as intended to repeal *Dobson* as applied to questions of fact. In light of that view, it made sense to retain section 1141(c). That provision, as construed in *Dobson*, would continue to govern review of questions of law, while the new provision of section 1141(a) would govern review of questions of fact.”).

125. S. REP. NO. 80-1559, at 13 (1948) (emphases added) (citation omitted).



*Dobson* applied, not specifically intending to preserve *Dobson*'s existence with respect to questions of law. *Dobson* had, of course, made important statements about the review of legal issues, as well, such as its statement that “[i]n deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter.”<sup>126</sup> But it does not appear that members of the House regarded the Senate version as materially different from the bill the House had passed:

Debate was limited when the bill was returned to the House. Representative Reed of Illinois was then in charge of the bill. He reported that Section 36 of the bill “removed all traces of the *Dobson* decision” in which “the Supreme Court created new rules as to the scope of review as to questions of law and fact” and presented a memorandum which embodied the views of the Judiciary Committee. The memorandum . . . observed that the Senate amendment “restores to the Circuit Courts of Appeals the power to review cases coming from the Tax Court in the same manner and to the same extent as it has power to review other cases—whether tax cases or non-tax cases—coming from a district court in a case tried without a jury. . . .”<sup>127</sup>

Professor Shores rejects as implausible the notion that the Senate perceived *Dobson* as only involving the standard of review on factual issues, stating, “An alternative explanation is that the committee simply overlooked the existence of section 1141(c), or mistakenly assumed that *Dobson* dealt only with questions of fact. However, this explanation seems implausible in light of the extensive Senate hearings on the bill, and particularly in light of Mr. Sutherland’s submission.”<sup>128</sup> Although initially it may seem surprising that the Senate would have less than a perfect understanding of *Dobson*, given the extensive testimony regarding that case, there are a couple of reasons why that is not implausible. First, the *Dobson* opinion was

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126. *Dobson v. Comm’r*, 320 U.S. 489, 502 (1943). The *Dobson* Court also said that the Tax Court’s “decision, of course, must have ‘warrant in the record’ and a reasonable basis in the law. But ‘the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.’” *Id.* at 501 (quoting *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 146 (1939)). Perhaps most famously, the *Dobson* Court stated that “when the 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.” *Id.* at 502.

127. Rice, *supra* note 96, at 442 (footnote omitted) (quoting 94 CONG. REC. 8501 (1948) (statement of Rep. Chauncey Reed)).

128. Shores, *supra* note 25, at 651.

less than completely clear because it reflected a compromise among the views of different Justices.<sup>129</sup> Second, and perhaps more important, the passage in which the Senate describes the House bill, quoted above and which Shores relies on, erroneously describes *Dobson* as limiting review on questions of fact only.<sup>130</sup> While the Senate was aware that *Dobson* had caused problems, its written statements do not reflect awareness that *Dobson* had effected a shift from allowing reversal of a Tax Court decision that was “not in accordance with law” to requiring a “clear-cut mistake of law.”<sup>131</sup>

Additionally, Sutherland’s submission did not say what Professor Shores reports that it said, as a comparison of Shores’s article and Sutherland’s testimony reveals. Shores describes Sutherland’s submission as follows:

In his statement Mr. Sutherland discussed the distinction between questions of law and fact, and noted that under *Dobson* Tax Court decisions were final on all issues other than a “clear-cut question of law.” He did not address the standard of review applicable to clear-cut questions of law. *The main thrust of his criticism was that Dobson adopted an improper standard for distinguishing questions of fact from questions of law and that Tax Court decisions on questions of fact were final.*<sup>132</sup>

However, Sutherland did not focus on the law/fact distinction and did not argue that Tax Court decisions on factual issues were final. Instead, his statements, both oral and written, made two principal arguments: (1) before *Dobson*, review of Tax Court decisions was the same as review of district court decisions, and (2) the Supreme Court usurped legislative power when it decided *Dobson*.<sup>133</sup> In Sutherland’s oral statement, he explained on the first point:

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129. See *supra* notes 80–81 and accompanying text.

130. See *supra* note 125 and accompanying text.

131. For a comparison of these two standards, see *supra* note 84 and accompanying text.

132. Shores, *supra* note 25, at 649–50 (emphasis added) (footnote omitted) (citing *Judicial Code and Judiciary: Hearings*, *supra* note 117, at 171 (statement of W.A. Sutherland, Chairman, Tax Section, American Bar Association)).

133. In his written statement, he says on this point:

In our opinion the *Dobson* decision represents an utterly unwarranted invasion by the United States Supreme Court of the legislative field, and in addition, as legislation it is thoroughly unsound. When Congress acts to restore to taxpayers and to the Government the normal rights of review of Tax Court decisions, which existed prior to the decision of the Supreme Court in the *Dobson* case, it is our hope that the committee will see fit to call attention to the great damage and confusion which

The present appellate review provisions in the Internal Revenue Code that govern appeals from the Tax Court were enacted in 1926, and gave the circuit courts of appeals what was assumed during all the period from 1926 to 1943, to be just as complete a power of review as the circuit courts of appeals exercised over cases coming from the district courts of the United States.

It was not thought, so far as I am aware, by any lawyer that there was any more limited review over those Tax Court cases than over any other cases coming up from district courts, and of course, a great many tax cases come up from district courts.<sup>134</sup>

On the second point, he stated:

Now, Mr. Chairman, this is the chief reason why I was most anxious to have this matter cleared before your committee. It seems to me that the division of powers in this Government between the three branches and the respect for that division by each branch of the Government is essential to the preservation of this country in the way we want it.

....

... [S]ometimes the Supreme Court itself steps beyond the bounds of its authority and usurps the function of the legislature. That is what was done in the *Dobson* decision. There is only one way that I know that the public attention can be called to action of the courts of the United States when they step clearly beyond their bounds and go into the policy matters which are clearly left by the Constitution for decision by Congress.<sup>135</sup>

Sutherland did not mention the law/fact distinction at all in his oral statement.<sup>136</sup> In his written statement, he referred to it in connection with the argument that *Dobson* disturbed the parallelism between appellate review of Tax Court and district court decisions:

[U]ntil the *Dobson* decision in 1943, . . . [i]t was assumed by all the courts, including the Supreme Court, that, on appeal from the Tax Court, questions of law were fully reviewable and questions of fact

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always results from the invasion by the courts of the fields of policy which have been entrusted by the Constitution solely to the legislative branch of government.

*Judicial Code and Judiciary: Hearings, supra* note 117, at 171 (statement of W.A. Sutherland, Chairman, Tax Section, American Bar Association).

134. *Id.* at 167.

135. *Id.* at 169.

136. *See id.* at 167–70.

were subject in general to the same sort of limited review that prevails on appeals from the United States district courts.<sup>137</sup>

Thus, contrary to Shores's argument, Sutherland did not say that Tax Court decisions on factual questions are or should be *final*, but rather that prior to *Dobson* they were understood to receive the "limited review" that findings of fact in district court decisions receive. In Sutherland's written statement, he says, regarding the distinction between fact and law:

We are not unaware of the fact that there is frequently great difficulty in separating questions of law from questions of fact. But that is no excuse for the failure of the court to do so in cases coming from the Tax Court any more than in tax cases, or any other cases, coming from a district court. Nor is it any excuse that the question of law involved may be a question of what sort of accounting practice is acceptable under a given congressional tax statute. It is true that the traditional distinction between law and fact is sometimes illusory and not susceptible of any short and accurate definition, but at least the distinction is well established and is a distinction with which lawyers and judges generally have long been familiar. *Wherever the line is drawn between law and fact there is no good reason why in all fairness both to the Government and private litigants it should be drawn in a different place in cases coming from the Tax Court than in cases coming from the district courts or why some other novel distinction should be set up for the court's guidance.*<sup>138</sup>

Thus, Sutherland's consistent position was that the Tax Court should be treated like the district courts for appellate review purposes, with the accompanying traditional distinction between factual and legal issues.

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137. *Id.* at 171. The larger passage reads:

Section 1141(c) of the Internal Revenue Code indicates that the circuit courts of appeals may reverse decisions of the Tax Court if they are "not in accordance with law." From the time this appellate review was established by the 1926 Revenue Act until the *Dobson* decision in 1943, there was no suggestion that the review of Tax Court decisions was any more limited than the appellate review of the United States district courts. It would be accepted by everyone as clear that by this language Congress intended to provide in tax cases coming from the Tax Court as in those coming from district courts, the traditional review which turns on the well-known distinction between questions of law and questions of fact. It was assumed by all the courts, including the Supreme Court, that, on appeal from the Tax Court, questions of law were fully reviewable and questions of fact were subject in general to the same sort of limited review that prevails on appeals from the United States district courts.

*Id.*

138. *Id.* at 172 (emphasis added).

Accordingly, to the extent that the legislative history sheds light on Congress's actions in 1948, it suggests that the Senate intended to overrule *Dobson* in the sphere in which it understood *Dobson* to apply. The House expressed the view that the Senate amendment, which was enacted, overruled *Dobson*. Therefore, if the question of how to interpret § 1141 (now § 7482) were simply one of congressional intent, there would be a strong argument that Congress overruled *Dobson* in its entirety.

Yet, the fact remains that the bill that Congress passed left subsection (c) untouched, raising the question of how the statutory language should be interpreted with respect to appellate review of issues of law. The failure to remove the old language did not seem to trouble commentators writing shortly after the amendment, who seemed to regard the *Dobson* rule as having been overturned.<sup>139</sup> Three years after the amendment, in 1951, Professor Ralph Rice explicitly raised the issue of what the retention of § 1141(c) meant, but he came out the same way as the other commentators. He first quoted the Judiciary Committee memorandum presented in the House, which stated that the Senate amendment restored parity between review of Tax Court and district court decisions.<sup>140</sup> Rice then stated:

Section 1141(c) of the Code was not amended. It gives appellate courts reviewing Tax Court decisions the power to reverse or modify if the decision below “is not in accordance with law.” Reconciliation

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139. See, e.g., Brown, *supra* note 101, at 306 (“[H]owever unfortunate the method, the purpose of Congress [in amending section 1141(a)] was plain, and presumably accomplished. That purpose was to do away with the doctrine of the famous case of *Dobson v. Commissioner*.”); Robert M. Mangan, *The Judicial Code of 1948*, 37 GEO. L.J. 394, 401–02 (1949) (“It was made amply clear that the purpose of this directive [on review of Tax Court decisions] was to reverse completely the rule of *Dobson v. Commissioner* . . . .”); *Review—Tax Court Decisions*, 24 N.Y.U. L. Q. REV. 609, 609 (1949) (“With the adoption of the recent amendment to Section 1141(a) of the Internal Revenue Code, Congress has freed the appellate courts from the ambiguous delimitation of the scope of review of Tax Court decisions laid down by the Supreme Court in *Dobson v. Commissioner*.” (footnote omitted)); *id.* at 613 (“There can be no question that the amendment has swept away the notion that review of Tax Court decisions must be predicated on finding a clear-cut mistake of law. Congress has made it clear that it desires a full review of the law.”); Alice Helen Sofis, *Legislative Correction of the “Dobson” Rule*, 10 U. PITT. L. REV. 83, 83 (1948) (“The amendment accomplishes the much needed correction of the effect of the rule laid down by the Supreme Court in the *Dobson* case.”); see also Stark, *supra* note 50, at 243–44 (“Although there has been some recent scholarship suggesting that Congress may not have intended to repeal the *Dobson* rule, it seems clear that most lawyers at the time . . . believed that *Dobson* had been put to rest.” (footnote omitted)).

140. Rice, *supra* note 96, at 442.

of this provision with the requirements of § 1141(a) might have been troublesome had not congressional intention with respect to the latter paragraph been made so explicit.<sup>141</sup>

The following year, Justice Jackson lamented the “gelding” of *Dobson* in a dissenting opinion.<sup>142</sup> His original draft of the dissent actually used the term “decapitation” to describe what Congress had done to *Dobson*; he changed it at the request of Justice Frankfurter, who suggested on a draft of the dissent, which he ultimately joined, that Justice Jackson use the term “‘demise,’ adding ‘or something. I don’t think “decapitation” is your pen at its best!’”<sup>143</sup> Thus, even the architect of the *Dobson* opinion apparently believed Congress had felled the *Dobson* rule. And in 1955, Tax Court Judge Bolon Turner explained that the effect of the 1948 amendment was to create complete parity of review between the Tax Court and the district courts:

When the situation . . . created by the Supreme Court’s opinion in the *Dobson* case was brought to the attention of Congress, it took such action as would make clear that no distinction was to be made between the decisions in the Tax Court and in the Federal District Courts, by amending Section [1141(a)] of the Internal Revenue Code of 1939 . . . .<sup>144</sup>

### B. *The Current Status of the Dobson Rule*

Of course, it is possible that these commentators were incorrect in believing that the 1948 amendment overruled *Dobson*. However, if Congress did not entirely overturn *Dobson* in 1948, then it effectively left to the judiciary the issue of what standard of review to apply to

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141. *Id.* at 443 n.19. One appellate court, deciding a case soon after the statutory amendment, stated, “We think it clear, if there is a conflict, which we doubt, that the appellate power must be construed in conformance with the later enacted (a).” *Gillette’s Estate v. Comm’r*, 182 F.2d 1010, 1014 (9th Cir. 1950). This was dictum because, as Shores points out, the opinion finds no conflict between subsections (a) and (c) because it characterized the issue as one of fact. *See Shores, supra* note 25, at 654. However, it reflects another rationale for the notion that the congressional amendment eliminated the *Dobson* rule.

142. *Arrowsmith v. Comm’r*, 344 U.S. 6, 12 (1952) (Jackson, J., dissenting).

143. *Barrett, supra* note 73, at 130 (quoting *Arrowsmith v. Comm’r*, No. 51 (U.S. Nov. 7, 1952) (Jackson, J., unpublished dissenting opinion)).

144. Bolon B. Turner, *The Tax Court of the United States, Its Origin and Functions*, in *THE HISTORY AND PHILOSOPHY OF TAXATION* 31, 45 (1955).

questions of law.<sup>145</sup> That is, it was the Supreme Court that in 1943 interpreted the courts of appeals' right to reverse the Tax Court on questions of law as limited to "clear-cut mistake[s] of law,"<sup>146</sup> and if Congress did not reverse that interpretation in 1948 (as argued above<sup>147</sup>), the Court could.

*Dobson* has since been repudiated, even by the Supreme Court. For example, in 1974, Justice Douglas referred to *Dobson* as "short-lived,"<sup>148</sup> and in the 1991 case of *Freytag v. Commissioner*,<sup>149</sup> the Court stated,

The courts of appeals . . . 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." This standard of review contrasts with the standard applied to agency rulemaking by the courts of appeals under § 10(e) of the Administrative Procedure Act.<sup>150</sup>

Moreover, an important element of the current status of *Dobson* is that the Tax Court is no longer an administrative agency, although it was one both at the time *Dobson* was decided and at the time of the statutory amendment. In 1969, Congress officially made the Tax Court a legislative court, taking it out of the executive branch.<sup>151</sup>

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145. In fact, part of Shores's argument is that "[a]t a minimum . . . the language and history of 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." Shores, *supra* note 25, at 653.

146. *Dobson v. Comm'r*, 320 U.S. 489, 502 (1943).

147. *See supra* Part II.A.

148. *See Comm'r v. Idaho Power Co.*, 418 U.S. 1, 19 (1974) (Douglas, J., dissenting) ("*Dobson* . . . would have left picayune cases such as the present one largely to the Tax Court, whose expertise is well recognized. But *Dobson* was short-lived, as Congress made clear its purpose that we were to continue on our leaden-footed pursuit of law and justice in this field.>").

149. *Freytag v. Comm'r*, 501 U.S. 868 (1991). *Freytag* addressed a challenge under the Appointments Clause of the U.S. Constitution, U.S. CONST. art. II, § 2, cl. 2, to the Tax Court's special trial judges. *Freytag*, 501 U.S. at 872.

150. *Freytag*, 501 U.S. at 891 (citations omitted) (quoting I.R.C. § 7482(a) (1988)) (citing 5 U.S.C. § 706(2)(A)); *see also* Ballard v. Comm'r, 544 U.S. 40, 73 n.9 (2005) (Rehnquist, C.J., dissenting) ("Section 7482, which requires courts of appeals to review 'decisions of the Tax Court' in the same manner as they review similar district court decisions, was passed to eliminate any special deference paid to Tax Court decisions . . ."); *Flora v. United States*, 362 U.S. 145, 177 (1960) (Frankfurter, J., concurring) ("*Dobson v. Commissioner* is no longer law . . .") (citation omitted); *cf.* Potter Stewart, Remarks at the Dedication of the New Courthouse of the United States Tax Court (Nov. 22, 1974), in 28 TAX LAW. 451, 453 (1974) ("Appropriate judicial restraint prevents me from taking this occasion to bemoan the passing of the doctrine of the *Dobson* case.>").

151. Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730 (codified at I.R.C. § 7441 (2012)). The Department of Justice argued in a 2013 brief filed with the D.C. Circuit that the statutory change in § 7441 "does not purport to transfer the Tax Court to another branch of

Additionally, in its 1991 *Freytag* decision, the Supreme Court held that the Tax Court is not a “Department” like Treasury,<sup>152</sup> but rather is a “Court[] of Law” for the purposes of the Appointments Clause.<sup>153</sup> The Court stated, in part, that “[t]he Tax Court exercises judicial, rather than executive, legislative, or administrative, power.”<sup>154</sup> Because *Dobson*’s reasoning relied in part on the fact that the Tax Court was technically an administrative agency, it is not surprising that most courts and commentators believe that nothing of the *Dobson* rule remains.

Accordingly, courts generally ignore § 7482(c)’s statement about decisions not in accordance with the law and focus on § 7482(a)’s admonition to treat Tax Court decisions the same as district court decisions for purposes of appellate review. However, as a matter of statutory interpretation, it is possible to give effect to both subsections by reading § 7482(c) without the *Dobson* gloss. All that § 7482(c) says with respect to court review is that “[u]pon such review, such 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 of the Tax Court, with or without remanding the case for a rehearing, as justice may require.”<sup>155</sup> Thus, it explicitly grants the courts of appeals the power to reverse the Tax Court if its decision “is not in accordance with law,”<sup>156</sup> and that does not seem to have been questioned before *Dobson*.<sup>157</sup>

The implication from the fact that subsection (c) grants appellate courts broad power to affirm the Tax Court’s decisions but reserves reversals for decisions not in accordance with the law is that the courts of appeals originally were not authorized to reverse on

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government.” Brief for the Appellee at 61, *Kuretski v. Comm’r*, No. 13-1090 (D.C. Cir. Sept. 26, 2013), 2013 WL 5400253, at \*61. That may be because Congress made clear its intent in the legislative history, which states in part that the bill “ma[de] the Tax Court an Article I court rather than an executive agency,” S. REP. NO. 91-552, at 303 (1969), “establish[ing] the Tax Court as a court under Article I of the Constitution, dealing with the Legislative Branch.” *Id.* at 304. The Senate explained that the Tax Court’s “constitutional status as an executive agency, no matter how independent, raises questions in the minds of some as to whether it is appropriate for one executive agency to be sitting in judgment on the determinations of another executive agency.” *Id.* at 302. The Supreme Court has since stated that the “Tax Court remains independent of the Executive and Legislative Branches.” *Freytag*, 501 U.S. at 891.

152. *Freytag*, 501 U.S. at 886–88.

153. *Id.* at 892.

154. *Id.* at 890–91.

155. I.R.C. § 7482(c)(1).

156. *Id.*

157. *See supra* notes 33–34 and accompanying text.



questions of fact. The legislative history supports the idea that such power was withheld for “reasons of policy” reflecting the then-Board’s technical nature as an administrative agency.<sup>158</sup> Thus, one might argue that § 7482(c) restricts appellate review of Tax Court decisions on findings of fact. However, Congress explicitly intended to eliminate that restriction when it enacted subsection (a), providing for appellate review on questions of fact concomitant with review of district court decisions, as everyone, including Professor Shores, agrees.<sup>159</sup> Therefore, together the two subsections allow appellate review on questions of both law and fact.

Moreover, § 7482(c) actually is silent on the details of the standard of review, even as to questions of law. In other words, does the appellate court take a *de novo* look to determine whether the decision is “not in accordance with law,” or does it apply some other standard? The legislative history of subsection (c) should not be dispositive because that section was enacted in 1926, well before the Board became a court. Section 7482(a) could be viewed as filling the gap as to the standard of review on the law.<sup>160</sup> In addition, the subsequent legislation making the Tax Court officially a court of record supports that approach.

### C. Dobson’s *Long Shadow*

Thus far, this Article has argued that the limitations on appellate review of Tax Court decisions can be traced to the Tax Court’s history as an administrative agency and that those limitations were later overturned by Congress. Congress likely accomplished parity with review of district court decisions in 1948, but if it did not, it left for judicial determination the standard of review of Tax Court decisions on questions of law. Since then, not only has the Tax Court

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158. See *supra* note 29 and accompanying text.

159. See Shores, *supra* note 25, at 653 (“At a minimum one can say that the language and history of 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’).”).

160. It is odd that subsection (a) is merely labeled “Jurisdiction,” given that subsection (a)(1) refers to the “manner” and “extent” of review, not just the exclusivity of appellate court jurisdiction. It appears to be a carryover from the 1926 statute, which included in the “Jurisdiction” section both the grant of appellate jurisdiction and the power of the appellate courts to affirm or reverse if the Board’s decision was not in accordance with the law. See Revenue Act of 1926, ch. 27, § 1003, 44 Stat. 9, 110. Regardless, a statute’s headers are not law. 1A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 21:4 (7th ed. 2009).

been removed from the executive branch and made an Article I court, but the Supreme Court has generally also treated the *Dobson* rule as a matter of history rather than as a current precedent.<sup>161</sup> Where does that leave review of Tax Court decisions?

Federal Rule of Civil Procedure 52(a)(6) governs the standard of review of findings of fact in district court bench trials; Rule 52(a)(6) states that “[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”<sup>162</sup> The standard of review on legal issues appealed from the district courts is *de novo*.<sup>163</sup> In general, these are the standards courts apply to Tax Court cases, as well.<sup>164</sup> For example, the Court of Appeals for the Second Circuit has noted, “We review the legal rulings of the Tax Court *de novo* and its factual determinations for clear error,”<sup>165</sup> further explaining, “[W]e owe no deference to the Tax Court’s statutory interpretations, its relationship to us being that of a district court to a court of appeals, not that of an administrative agency to a court of appeals.”<sup>166</sup>

However, *Dobson* has cast a long shadow. For example, in 2011, without citing § 7482, a district court cited *Dobson* for the proposition that, “[w]hile decisions by the Tax Court are not binding, ‘uniform

161. *See supra* notes 148–50 and accompanying text.

162. FED. R. CIV. P. 52(a)(6). The Supreme Court has stated:

“[A] finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” . . . If the district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.

*Anderson v. City of Bessemer City*, 470 U.S. 564, 573–74 (1985) (citation omitted) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 394–95 (1948)).

163. *See, e.g.*, *Pierce v. Underwood*, 487 U.S. 552, 558 (1988) (“For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for ‘abuse of discretion’).”).

164. 1 GERALD A. KAFKA & RITA A. CAVANAGH, *LITIGATION OF FEDERAL CIVIL TAX CONTROVERSIES* ¶ 11.13[3] (2d ed. 1997 & Supp. 2013); *see also* *Rose v. Comm’r*, 311 F. App’x 196, 200 n.8 (11th Cir. 2008) (“The Tax Court’s findings of fact are reviewed for clear error, and its resolutions of questions of law . . . are reviewed *de novo*.”).

165. *Schneidman v. Comm’r*, 682 F.3d 189, 193 (2d Cir. 2012). The court quoted for this proposition 26 U.S.C. § 7482(a)(1), which says that “[t]he United States Court of Appeals . . . shall . . . review the 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.”

166. *Id.* (quoting *Madison Recycling Assocs. v. Comm’r*, 295 F.3d 280, 285 (2d Cir. 2002)).

administration would be promoted by conforming to them where possible.”<sup>167</sup> And it took until 2013 for the Second Circuit to hold that § 7482(a) requires it to apply the same standard of review to mixed questions of law and fact decided by the Tax Court as it does to district court decisions.<sup>168</sup>

In the 2013 case of *Diebold Foundation, Inc. v. Commissioner*,<sup>169</sup> the Second Circuit explained that, in a 1991 case, it had adopted the “clear error” standard used by the Seventh Circuit in reviewing mixed questions of law and fact decided by the Tax Court.<sup>170</sup> However, unlike the Seventh Circuit, which applied the same standard to district court decisions, the Second Circuit’s standard of review of district court cases involving mixed questions of law and fact hinged on whether the alleged error dealt with the legal or factual aspect of the mixed question.<sup>171</sup> The Second Circuit had apparently overlooked § 7482 in rendering the 1991 decision.<sup>172</sup>

Other examples may be more subtle. Professor Steve Johnson has observed that “boilerplate language in appellate court opinions as

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167. *Cummings v. United States*, 866 F. Supp. 2d 42, 47 n.11 (D. Mass. 2011) (quoting *Dobson v. Comm’r*, 320 U.S. 489, 502 (1943)). In addition, in 1991, a court of appeals stated, “Because ‘in the circumstances of this case, [the] proper adjustment of the basis was . . . purely an accounting problem and therefore a question of fact for the Tax Court to determine,’ we defer to the tax court.” *Muserlian v. Comm’r*, 932 F.2d 109, 115–16 (2d Cir. 1991) (alterations in original) (quoting *Dobson*, 320 U.S. at 504).

168. *Diebold Found., Inc. v. Comm’r*, 736 F.3d 172, 183 (2d Cir. 2013). Mixed questions of law and fact are “questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard.” *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). The Supreme Court has “held that deferential review of mixed questions of law and fact is warranted when it appears that the district court is ‘better positioned’ than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine.” *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991) (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). More recently, the Court held that “deferential” review applies when “‘the mix weighs heavily on the fact side.’” *Brown v. Plata*, 131 S. Ct. 1910, 1932 (2011) (quoting *Lilly v. Virginia*, 527 U.S. 116, 148 (1999) (Rehnquist, C.J., concurring in the judgment)) (quotation marks omitted).

169. *Diebold Found., Inc. v. Comm’r*, 736 F.3d 172 (2d Cir. 2013).

170. *Id.* (citing *Bausch & Lomb Inc. v. Comm’r*, 933 F.2d 1084, 1088 (2d Cir. 1991)).

171. *See id.* at 182 (“Following a civil bench trial, . . . resolutions of mixed questions of fact and law are reviewed de novo to the extent that the alleged error is based on the misunderstanding of a legal standard, and for clear error to the extent that the alleged error is based on a factual determination.”).

172. *See id.* at 183 (explaining that the Second Circuit had stated, when it adopted the standard, that it was unaware of a decision governing its standard of review of Tax Court decisions and that that was correct, “but the statute which governs our Court’s review of Tax Court decisions set out a mandatory standard, tied to the level of review in appeals on review from a district court”).

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*.’”<sup>173</sup> That may be the case if a court relies on *Dobson*’s reasoning, or cases reflecting that reasoning, without actually citing *Dobson*.

For example, in 2012, the Ninth Circuit recited the de novo review standard for Tax Court conclusions of law, then stated, “[a]lthough we do not give the Tax Court special deference in a de novo review, [b]ecause the Tax Court has special expertise in the field, . . . its opinions bearing on the Internal Revenue Code are entitled to respect.”<sup>174</sup> The opinion quotes a 1999 Ninth Circuit case, the language of which traces back<sup>175</sup> to a 1979 case and a 1980 case.<sup>176</sup> The 1979 case, *Allstate Savings & Loan Ass’n v. Commissioner*,<sup>177</sup>

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173. Johnson, *supra* note 108, at 252.

174. *Meruelo v. Comm’r*, 691 F.3d 1108, 1114 (9th Cir. 2012) (second and third alterations in original) (quoting *Merkel v. Comm’r*, 192 F.3d 844, 847–48 (9th Cir. 1999)).

175. See *Merkel*, 192 F.3d at 847–48 (stating that it reviews the Tax Court’s conclusions of law de novo but that “[b]ecause the Tax Court has special expertise in the field, however, its opinions bearing on the Internal Revenue Code are ‘entitled to respect’” (quoting *Harbor Bancorp & Subsidiaries v. Comm’r*, 115 F.3d 722, 727 (9th Cir. 1997))); *Harbor Bancorp*, 115 F.3d at 727 (stating that it reviews de novo “the legal standards the court applied in reaching its conclusions,” but that “[a]t the same time, ‘the Commissioner has latitude in the interpretation of the Internal Revenue Code . . . and . . . the Tax Court’s opinions bearing on the Internal Revenue Code are entitled to respect because of its special expertise in the field’” (second and third alterations in original) (quoting *Take v. Comm’r*, 804 F.2d 553, 556 (9th Cir. 1986))); *Take*, 804 F.2d at 556 (stating that Tax Court decisions on the “ruling[s] of law” are “subject to de novo review” but that “the Tax Court’s opinions bearing on the Internal Revenue Code are entitled to respect because of its special expertise in the field” (citing *Magneson v. Comm’r*, 753 F.2d 1490, 1493 (9th Cir. 1985))); *Magneson*, 753 F.2d at 1493 (“We review the Tax Court’s conclusions of law de novo, noting however that its opinions are entitled to respect because of its special expertise in the field.” (citing *Cal. Fed. Life Ins. Co. v. Comm’r*, 680 F.2d 85, 87 (9th Cir. 1982))); *Cal. Fed.*, 680 F.2d at 87 (“[T]he interpretation of the Tax Court is entitled to respect because of its special expertise in the field.” (citing *Cruttenden v. Comm’r*, 644 F.2d 1368, 1374 (9th Cir. 1981) and *Allstate Sav. & Loan Ass’n v. Comm’r*, 600 F.2d 760, 762 (9th Cir. 1979))).

176. *Sibla v. Comm’r*, 611 F.2d 1260, 1262 (9th Cir. 1980); *Allstate*, 600 F.2d at 762. In *Cruttenden v. Commissioner*, 644 F.2d 1368 (9th Cir. 1982), the Ninth Circuit stated, “This court has frequently recognized its obligation to accord respect to the views of the Tax Court. ‘Opinions of the Tax Court reflect that degree of special expertise which Congress has intended to provide in that tribunal.’” *Id.* at 1374 (quoting *Max Sobel Wholesale Liquors v. Commissioner*, 630 F.2d 670, 674 (9th Cir. 1980), which itself was quoting *Sibla*, 611 F.2d at 1262). *Cruttenden* further stated, “[W]e ‘should not overrule that body unless some unmistakable question of law mandates such a decision.’” *Id.* (quoting *Max Sobel*, 630 F.2d at 674).

177. *Allstate Sav. & Loan Ass’n v. Comm’r*, 600 F.2d 760 (9th Cir. 1979).

involved the treatment of selling expenses of foreclosed property.<sup>178</sup> In *Allstate*, the Ninth Circuit said,

This case presents precisely the type of issues with respect to which we should accord *substantial deference* to the Tax Court. The resolution of such technical issues affecting a single industry is a task for which the Tax Court is well suited. For this reason alone we would be reluctant to overturn the Tax Court's judgment.<sup>179</sup>

None of the cases in this line cited *Dobson*, but the 1980 case, *Sibla v. Commissioner*,<sup>180</sup> quoted the Supreme Court's 1943 decision in *Commissioner v. Heining*,<sup>181</sup> stating:

[W]e consider that the tax court has exercised that degree of special expertise which Congress has intended to provide in that tribunal, and that this court should not overrule that body, unless some unmistakable question of law mandates such a decision. As the Supreme Court said in *Commissioner v. Heining*:

“Whether an expenditure is directly related to a business and whether it is ordinary and necessary are doubtless pure questions of fact in most instances. Except where a question of law is unmistakably involved a decision of the Board of Tax Appeals on these issues, having taken into account the presumption supporting the Commissioner's ruling . . . , should not be reversed by the federal appellate courts . . . . Careful adherence to this principle will result in a more orderly and uniform system of tax deductions in a field necessarily beset by innumerable complexities.”<sup>182</sup>

*Heining* was decided by the Supreme Court on the same day as *Dobson*.<sup>183</sup> The issue in *Heining* was whether expenditures to defend against a finding by the Postmaster General that the taxpayer's mail-order business was fraudulent were “ordinary and necessary” expenses within the meaning of the statute allowing business deductions.<sup>184</sup> *Heining* concluded with the *Dobson*-esque language quoted just above. The second sentence in the quoted material was

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178. *Id.* at 761–62.

179. *Id.* at 762 (emphasis added).

180. *Sibla v. Comm'r*, 611 F.2d 1260 (9th Cir. 1980).

181. *Comm'r v. Heining*, 320 U.S. 467 (1943).

182. *Sibla*, 611 F.2d at 1262–63 (citation omitted) (quoting *Heining*, 320 U.S. at 475).

183. Both were decided on December 20, 1943. See *Dobson v. Comm'r*, 320 U.S. 489, 489 (1943); *Heining*, 320 U.S. at 467.

184. *Heining*, 320 U.S. at 468–70.

supported with a footnote citing to *Dobson* and an earlier case.<sup>185</sup> *Heininger* therefore not only reflects the *Dobson* concept of limiting appellate review in tax cases to foster uniformity in a complex field, but it also cites *Dobson* as authority on that policy goal.

In addition, *Heininger* is much like *Dobson* in that it characterized a tax issue as purely factual, without providing an explanation for that determination or setting forth a standard for distinguishing factual questions from questions of law and mixed questions. The question of whether an expenditure was an “ordinary and necessary” business expense, much like the tax-benefit-rule issue in *Dobson*, would seem to have substantial legal elements. But the *Dobson* approach of declaring an issue factual in nature was a means to the end of reducing appellate review in an effort to curtail tax litigation.<sup>186</sup>

In some ways, *Heininger* deserves more criticism than *Dobson* because the *Heininger* Court called for the same deferential standard of review yet did not require the Board’s opinion to stand. Instead, the Court found that the Board had denied the taxpayer’s deduction “not by an independent exercise of judgment but upon a mistaken conviction that denial was required as a matter of law.”<sup>187</sup> The Court therefore affirmed the Seventh Circuit’s reversal and remand of the Board’s decision.<sup>188</sup>

If we take the *Heininger* Court at its word that “[e]xcept where a question of law is unmistakably involved a decision of the Board of Tax Appeals on these issues . . . should not be reversed by the federal appellate courts,”<sup>189</sup> then the Court’s finding that the issue in *Heininger* was one of fact constituted dictum.<sup>190</sup> It appears that it was

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185. *Id.* at 475 & n.13 (citing *Dobson*, 320 U.S. at 489; *Helvering v. Lazarus & Co.*, 308 U.S. 252, 255 (1939)).

186. *See supra* Part I.B.

187. *Heininger*, 320 U.S. at 475. The Board had stated, “After careful consideration of this somewhat novel question we have come to the conclusion that the petitioner is not entitled to the deduction claimed. *National Outdoor Advertising Bureau v. Helvering*, in our opinion governs this case.” *Heininger v. Comm’r*, 47 B.T.A. 95, 101 (1942) (citation omitted) (citing *Nat’l Outdoor Adver. Bureau v. Helvering*, 89 F.2d 878 (1937)), *rev’d*, 133 F.2d 567 (7th Cir. 1943), *aff’d*, 320 U.S. 467. That case had reversed the Board, allowing the expenses in a “civil proceeding involving [an] injunction against [a] practice forbidden by law” only to the extent the defense was successful. *Id.* at 102.

188. *Heininger*, 320 U.S. at 475.

189. *Id.*

190. *Cf. Rice*, *supra* note 96, at 446 n.41 (stating that in some cases “the Court declared that the *Dobson* decision was not controlling and passed upon the issues raised on appeal” and citing *Heininger* as one of those cases).

an attempt to square the decision with *Dobson*. As Randolph Paul explained, “Having decided the issue involved, the Court apparently felt that it should say something about the respective functions of the Tax Court and the appellate courts. Perhaps it thought that the *Dobson* opinion might appear at odds with what the Court had just done in the *Heininger* case.”<sup>191</sup>

Given that context, as well as the demise of the *Dobson* approach to tax litigation, *Heininger* provides highly suspect support for the proposition that whether a purported business expense was ordinary and necessary is normally a “pure question[] of fact.”<sup>192</sup> Instead, *Heininger* should be considered as closely linked to *Dobson* and thus a questionable authority to cite on issues of standard of review. Yet, not only was its reasoning perpetuated in the Ninth Circuit cases discussed above, but also, in 2011, the Tax Court cited *Heininger* for the proposition that whether an expenditure constitutes a deductible business expense is a factual question.<sup>193</sup> In 2012, the Second Circuit did the same.<sup>194</sup>

In the Second Circuit case, *Curcio v. Commissioner*,<sup>195</sup> the taxpayers owned small businesses that purchased life insurance plans on their behalf and claimed the costs as deductible business expenses.<sup>196</sup> On appeal, the Second Circuit recited the conventional standard of review, stating that “[w]e review the tax court’s legal conclusions *de novo* and its factual findings for clear error.”<sup>197</sup> However, it then relied heavily on *Heininger* to find that whether a purported business expense is “ordinary and necessary” is a purely factual question requiring deference to the Tax Court.<sup>198</sup>

As the Second Circuit’s experience reveals, retreat from *Dobson*—and its thumb on the scale in favor of finding issues to be questions of fact warranting great deference—can be a long, slow path. The courts of appeals must not merely apply § 7482(a); rather,

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191. Paul, *supra* note 82, at 790.

192. See *id.* (noting that that whether something is a business expense is a “pure question[] of fact . . . [unless] a question of law is unmistakably involved”).

193. See *Weller v. Comm’r*, 102 T.C.M. (CCH) 260, 263 (2011) (citing *Heininger* for the proposition that “[t]he determination of whether an expenditure satisfies the requirements for deductibility under section 162 is a question of fact”).

194. See *Curcio v. Comm’r*, 689 F.3d 217, 225 (2d Cir. 2012).

195. *Curcio v. Comm’r*, 689 F.3d 217 (2d Cir. 2012).

196. *Id.* at 219.

197. *Id.* at 225 (citing *Robinson Knife Mfg. Co. v. Comm’r*, 600 F.3d 121, 124 (2d Cir. 2010)).

198. *Id.* (citing *Comm’r v. Heininger*, 320 U.S. 467, 475 (1943)).

they also need to recognize that *Dobson* is not good law and that cases applying *Dobson*'s sweeping approach to what constitutes a factual question are highly suspect.<sup>199</sup> That is, courts should not apply *Heininger* on the question of whether an issue is one of fact or law without considering *Heininger*'s close ties to the disavowed *Dobson* case.<sup>200</sup>

### III. A POLICY PERSPECTIVE ON APPELLATE REVIEW OF TAX COURT DECISIONS

The history of appellate review of Tax Court decisions suggests that, at least as a doctrinal matter, Tax Court decisions should be treated the way district court decisions in nonjury tax cases are. But policy considerations are of course equally important. This Part therefore addresses the role of appellate review of trial court decisions and whether the traditional approach to that review should be different in the Tax Court context.

#### A. *General Appellate Review Theory*

The very existence of appellate courts suggests that Congress does not view trial courts as necessarily having the last word in the cases before them.<sup>201</sup> And a litigant's right to appellate review is generally considered to be a core component of the litigation

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199. Cf. *Comm'r v. Duberstein*, 363 U.S. 278, 289 n.11 (1960) (stating that *Dobson* is no longer good law on the standard of review, but citing *Heininger* with approval on the question of what constitutes a factual issue). One student note has cited *Duberstein* in a critical manner for the proposition that despite Congress's overruling of *Dobson*, "the Court has since returned to narrow review, at least in the gift area." Note, *Toward New Modes of Tax Decisionmaking—The Debt-Equity Imbroglio and Dislocations in Tax Lawmaking Responsibility*, 83 HARV. L. REV. 1695, 1700 n.36 (1970).

200. Recall that the *Dobson* Court held that "[t]he error of the court below consisted of treating as a rule of law what we think is only a question of proper tax accounting." *Dobson v. Comm'r*, 320 U.S. 489, 506–07 (1943). What is "tax accounting"? A contemporary commentator reported, "The term had its origin and development in commerce schools. Every such school in the country has for years had a course under that precise title. Those courses, however, in every case cover the entire field of income tax law." Altman, *supra* note 16, at 543.

201. See Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 113 (1944) ("[T]he fact that Congress has vested in the trier original jurisdiction to hear a case does not manifest an intention that his determination be final. To the contrary, the creation of appellate courts with full power to review in itself reflects a strong policy that litigants should not be bound by the ruling of the subordinate tribunal.").



process.<sup>202</sup> An important purpose of appellate review is the correction of trial court error.<sup>203</sup> Appellate review also promotes uniformity of decisions and the development of a body of precedent.<sup>204</sup>

Given these goals of appellate review, the allocation of duties between trial and appellate courts reflects what are considered to be their comparative institutional competencies.<sup>205</sup> As the Supreme Court has explained, trials are fast paced, presided over by a single judge, and necessarily focused on gathering the evidence.<sup>206</sup> By contrast, courts of appeals benefit from a factual record settled by the court below and thus have more time to focus on issues of law,<sup>207</sup> as do

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202. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 144 (1994) (referring to appellate courts as the “central component of the adjudicative process”); Dan T. Coenen, *To Defer or Not To Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 MINN. L. REV. 899, 910 (1989) (“It is generally accepted that [t]he right of appeal, while never held to be within the Due Process guaranty of the United States Constitution, is a fundamental element of procedural fairness . . . in this country.”) (alteration in original) (quoting AM. BAR ASS’N COMM’N ON STANDARDS OF JUD. ADMIN., *STANDARDS RELATING TO APPELLATE COURTS* 12 (1977)); Cassandra Burke Robertson, *The Right To Appeal*, 91 N.C. L. REV. 1219, 1224 (2013) (“Appellate remedies play a significant role in the American justice system.”).

The right to appeal may be particularly important in cases in which the government is a party. See Harlon Leigh Dalton, *Taking the Right To Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 103 (1985) (“A sound argument can be made that even in civil cases, litigants who find themselves tilting against the overwhelming might of the state, in a forum set up and operated by the state, should have the right to a sober second look.”).

203. See Coenen, *supra* note 202, at 939 (“It often is said that the purposes of appellate review are to correct errors and to create and clarify a body of law.”); Robertson, *supra* note 202, at 1225 (listing “correcting legal and factual errors” as among the roles of appellate review identified by scholars).

204. See Robertson, *supra* note 202, at 1225.

205. See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Model of Administrative Law*, 111 COLUM. L. REV. 939, 940 (2011) (“The trial court, which hears the witnesses and makes the record, is assumed to have superior competence to resolve questions of fact; the reviewing court is presumed to have superior competence to resolve questions of law.”); see also Christopher J. Walker, *Administrative Common Law Toolbox for Enhancing Court-Agency Dialogue*, 82 GEO. WASH. L. REV. (forthcoming 2014) (manuscript at 2), available at <http://ssrn.com/abstract=2242869> (“Under the appellate model, review is record-bound in that the reviewing court does not take evidence itself, and the standard of review is less or more deferential depending on whether the issue is more legal or factual—reflecting the expertise or competency of the different institutions.”).

206. See *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231–32 (1991) (“District judges preside alone over fast-paced trials: Of necessity they devote much of their energy and resources to hearing witnesses and reviewing evidence.”). Even the litigants are likely less focused on the law at that stage than they would be on appeal. See *id.* (“[T]he logistical burdens of trial advocacy limit the extent to which trial counsel is able to supplement the district judge’s legal research with memoranda and briefs.”).

207. See *id.* at 232 (“With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues.”).

the parties' attorneys.<sup>208</sup> Accordingly, the standard of review of a trial court's decision on legal issues is typically *de novo*,<sup>209</sup> which supports a meaningful appeal right.<sup>210</sup>

Moreover, appellate review helps legitimize the litigation process in the public's eyes.<sup>211</sup> Trials usually are presided over by a single judge,<sup>212</sup> who may bear the brunt of the losing party's dissatisfaction with the outcome of the case.<sup>213</sup> "With or without justification, losing litigants often view [the trial] judge as inept, biased, or corrupt."<sup>214</sup> In effect, the focus of the dispute shifts, after the trial court's decision, from the opposing party to the trial judge.<sup>215</sup> An appeal gives the losing party a chance to vet that judge's determination.<sup>216</sup> This structural setup

serves to defuse antagonism directed at the trial judge by affording a fair hearing, both in fact and in appearance, to litigants who believe that judge has wronged them. By thus legitimizing lower court proceedings, the appellate process fulfills a central aim of the law—to "preserve both the appearance and reality of fairness, *generating the feeling, so important to a popular government, that justice has been done.*"<sup>217</sup>

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208. See *id.* ("As questions of law become the focus of appellate review, it can be expected that the parties' briefs will be refined to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the district judge.").

209. See Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 308 (2009) (relating that law students learn early on that "every time an appellate court reviews a legal determination made by a trial court, it considers the question anew, and accords no deference to the lower court's decision").

210. See Robertson, *supra* note 202, at 1252–54 (discussing civil cases in which the Supreme Court required *de novo*, rather than abuse-of-discretion, review).

211. See *id.* at 1225 (listing among the roles of appellate review "promoting respect for the rule of law").

212. *Salve Regina Coll.*, 499 U.S. at 231.

213. See Coenen, *supra* note 202, at 939 ("Litigants who lose at trial focus their antipathy on the trial judge.").

214. *Id.*

215. See Robertson, *supra* note 202, at 1273 ("[A]t the trial court, the litigant's dispute is with the opposing party, and at the appellate level the litigant's dispute is with the state.").

216. See Coenen, *supra* note 202, at 940; see also Robertson, *supra* note 202, at 1263 ("The existence of appellate review serves as a check on both the perception and the reality of biased or corrupt judging.").

217. Coenen, *supra* note 202, at 939–40 (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980)) (quotation marks omitted).

This “legitimizing function”<sup>218</sup> of appellate review is therefore an important process value.

In addition, appellate courts enjoy the structural advantage of “multijudge panels that permit reflective dialogue and collective judgment.”<sup>219</sup> In part, the use of panels means that each judge on a case benefits from the others’ questions and insights.<sup>220</sup> Multiplying judicial attention to the issues should reduce the likelihood of errors.<sup>221</sup> Moreover, “a central function of multi-judge review is to control judicial subjectivity.”<sup>222</sup> Equally important, the presence of multiple judges helps neutralize a losing litigant’s potential lack of confidence in a single judge.<sup>223</sup> Deference to a trial court’s determination typically undermines the value of a multi-judge panel because it “fosters acceptance of a single judge’s point of view. As a result, the rule clashes with a central message of modern legal scholarship.”<sup>224</sup>

Thus, the appellate model of judicial review reflects both the importance of a second look at the case and the structural differences between a trial court that hears the evidence and an appellate court that reviews the record after trial. The model supports, based on relative institutional competencies, allocation of fact-finding to trial

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218. *Id.* at 939.

219. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 232 (1991) (citation omitted). In addition, “appellate judges have more prestige than trial judges.” Angela P. Harris & Marjorie M. Shultz, “*Another Critique of Pure Reason*”: *Toward Civic Virtue in Legal Education*, 45 STAN. L. REV. 1773, 1777 n.14 (1993). Article III judges are also generally considered to have more prestige than Article I judges, perhaps because only the former have life tenure. *See* Lawrence Baum, *Specializing the Federal Courts: Neutral Reforms or Efforts To Shape Judicial Policy?*, 74 JUDICATURE 217, 219 (1991) (“Another difference, among the courts with permanent judges, is that between Article I ‘legislative’ courts and Article III courts; the latter have greater prestige, and their judges hold lifetime terms.”). This should mean that some of the most highly respected judges populate the courts of appeals.

220. *See* Coenen, *supra* note 202, at 924 (“Assigning several judges to a problem reduces the risk that important lines of analysis will escape attention. Each judge benefits from the others’ insights, including their questions of counsel at oral argument.” (footnote omitted)).

221. *See* Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 83 (1986) (“[G]iven a reasonable understanding of what the job of judging is and under reasonable assumptions about how well individual judges are likely to do it, enlarging the number of judges who sit on a court can be expected to improve the court’s performance.”).

222. Coenen, *supra* note 202, at 945; *see id.* (“A multi-judge appellate process, although subjective, is at least carefully subjective.”).

223. Robertson, *supra* note 202, at 1263.

224. Coenen, *supra* note 202, at 945–46; *see id.* (making that argument in the context of appellate court deference to district courts on questions of state law).

courts and allocation of lawmaking to appellate courts.<sup>225</sup> Deference to a trial court's legal conclusions clashes with all of these reasons for appellate review and might "adversely affect the perceived legitimacy of the judicial system."<sup>226</sup>

*B. Differences in Tax Litigation That May Affect the Analysis*

The appellate review model is well accepted in the case of generalized trial courts such as federal district courts. One of the odd aspects of arguments (such as Professor Shores's) for deference to Tax Court decisions is that they argue primarily for deference on issues of law, not fact. From the perspective of general litigation, that seems almost backward. Appellate courts generally defer to trial courts with respect to the facts, not the law.<sup>227</sup> The idea behind that deference is that the trier of fact is better equipped to find the facts because of its observation of the witnesses and the like.<sup>228</sup>

Is there any reason to give the Tax Court essentially the last word on issues of *law*? Professor Shores has argued that *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>229</sup> supports such deference,<sup>230</sup> although he concedes that "[i]t would be a stretch to claim that review of Tax Court decisions falls within the four corners of *Chevron*. *Chevron* involved a classic administrative agency, the EPA, with rulemaking as well as adjudicative powers."<sup>231</sup> The Tax

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225. See KOMESAR, *supra* note 202, at 124 ("Appellate courts articulate the rules that most people consider judge-made law.").

226. Oldfather, *supra* note 209, at 362; *see id.* at 364 (noting this objection to an argument for a nonabsolute form of deference that "does not preclude a determination that a trial court got the law wrong").

227. Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 438 (2004). The standard of review on facts generally is "clearly erroneous." *See supra* notes 162–63 and accompanying text.

228. Oldfather, *supra* note 227, at 438–39. Even that apparent institutional advantage has been questioned, however. *See id.* at 439 ("There are, it turns out, many respects in which appellate courts enjoy substantial advantages over trial judges and juries when it comes to the evaluation of historical facts.").

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

230. See Shores, *supra* note 25, at 669 ("[T]he question becomes, whereas, under *Chevron* deferential review would apply if the Tax Court had remained within the Service, does it make sense to apply de novo review to Tax Court decisions because the Tax Court operates independently of the Service. With the question put that way, the answer, of course, is obvious.").

231. *Id.*

Court, by contrast, is a court and only has judicial functions.<sup>232</sup> Professor Johnson has pointed out that *Chevron* does not apply to non-agencies, such as the Tax Court.<sup>233</sup> He has further argued that policy considerations do not support extending *Chevron* to the Tax Court.<sup>234</sup> Although scholars have debated the rationales for court deference to agency interpretations,<sup>235</sup> the leading candidates—congressional delegation, separation-of-powers concerns, and the executive branch’s greater accountability—do not support deference to the Tax Court.<sup>236</sup>

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232. See I.R.C. § 7441 (2012) (establishing the Tax Court “under article I of the Constitution of the United States, [as] a court of record”); *Freytag v. Comm’r*, 501 U.S. 868, 891 (1991) (“The Tax Court exercises judicial power to the exclusion of any other function. It is neither advocate nor rulemaker.”).

233. See Johnson, *supra* note 108, at 280 (“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, and I suspect that tribunals applying *Chevron* in the future will take the same approach.” (footnote omitted)); see also Smith, *supra* note 22, at 393 (“While it is tempting to use a *Chevron*-type rationale for deference to the Tax Court—when dealing with an administrative law like tax—it is incompatible with the Tax Court’s Article I position.”). But see Andre L. Smith, *Deferential Review of the United States Tax Court, After Mayo Foundation v. United States* (2011), at 8 (2014) (unpublished manuscript), available at [http://works.bepress.com/andre\\_smith/18](http://works.bepress.com/andre_smith/18) (“Applying *Chevron* to the Tax Court is congruent with its application to other federal administrative contexts—*Chevron* deference applies both to notice and comment rulemakings and to formal adjudications.”).

234. See Johnson, *supra* note 108, at 283–84. Professor Johnson further argues that history and doctrine do not support applying *Chevron* to the Tax Court. *Id.* at 280–82.

235. See, e.g., Evan J. Criddle, *Chevron’s Consensus*, 88 B.U. L. REV. 1271, 1273 (2008) (“Scholars have debated whether *Chevron* deference rests upon a theory of congressional delegation, administrative expertise, agency deliberative rationality, the executive branch’s political responsiveness and accountability, concerns for national regulatory uniformity, or inherent executive power.”); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 836 (2001) (“Three candidates [for *Chevron* deference] have been put forward in the legal literature: (1) the Constitution, in the form of the doctrine of separation of powers; (2) the courts, in the form of a common-law norm of self-governance; and (3) the Congress, in the form of a presumption about congressional intent.”).

236. See Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1538 (2006) (“[*United States v. Mead Corp.*, 533 U.S. 218 (2001).] makes clear that *Chevron* deference is warranted only for agency interpretations promulgated through the exercise of congressionally delegated authority to bind regulated parties with the force of law.”); Mark Seidenfeld, *Chevron’s Foundation*, 86 NOTRE DAME L. REV. 273, 275 (2011) (arguing that “the foundation for the *Chevron* doctrine is anchored in the separation of powers as manifested by the structure of the Constitution and Article III’s assignment of the judicial powers”); Smith, *supra* note 22, at 393 (“Part of the underlying rationale for deferring to agency interpretations under *Chevron* is that the agency is politically accountable to the President who is accountable to the people. The Tax Court . . . is designed to be much less politically accountable since it is situated in the Legislative, not the Executive

The remaining question is therefore whether the appellate review structure that applies to other courts should not apply to the Tax Court because of differences in the Tax Court or in tax litigation more generally. The principal arguments in favor of applying greater deference to Tax Court decisions than to other trial courts' decisions, which have not changed much since the *Dobson* era—Tax Court judges' specialized expertise, the decentralized nature of tax litigation, and the arguably exceptional nature of tax law—are therefore considered below.

1. *The Specialized Expertise of Tax Court Judges.* Perhaps most important to advocates of deference, the Tax Court is specialized—its judges only decide tax cases<sup>237</sup>—and accordingly has greater expertise in tax matters than do other courts.<sup>238</sup> Of course, because the overwhelming majority of Tax Court cases are decided by one judge,<sup>239</sup> the relative expertise of the Tax Court versus a court of appeals in any given case will depend on that judge's practice background and experience at the Tax Court. Tax is a broad area, and no judge will have prior experience in every issue. On average, though, a Tax Court judge has greater tax expertise than a court of

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Branch.” (footnote omitted)); *see also* Johnson, *supra* note 108, at 282 (pointing out that Congress delegated gap-filling authority in the tax arena to Treasury, not the Tax Court); *id.* at 283 (“Treasury and the IRS are designed to be, and are, more politically accountable than is the Tax Court.”). It is also worth noting that Congress chose to move the Tax Court out of the executive branch and into the legislative branch. *See supra* note 18 and accompanying text. Further discussion of this interesting issue (and the potential applicability of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)) is beyond the scope of this Article.

237. Crimm, *supra* note 3, at 74.

238. *See id.* (“[T]he Presidentially appointed judges and the special trial judges [of the Tax Court] have tax expertise acquired both before appointment or assignment to the court and, obviously, during their terms on the court.”); Johnson, *supra* note 108, at 259 (“[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.”).

239. *See* I.R.C. § 7444(c) (2012) (“The chief judge may from time to time divide the Tax Court into divisions of one or more judges . . . .”); Dubroff, *supra* note 9, at 227–29 (describing how the Tax Court came to be divided into divisions that are each comprised of one judge). Typically, the report of a (single-judge) division becomes final. *See* I.R.C. § 7460(b) (“The report of the division shall become the report of the Tax Court within 30 days after such report by the division, unless within such period the chief judge has directed that such report shall be reviewed by the Tax Court.”). Only approximately 1 percent of the Tax Court's opinions are reviewed by the full court and thus issued by more than one judge. For example, statistics obtained from the Tax Court show that in 2010, 7 of its 684 opinions were reviewed by the full court; in 2011, 5 of its 673 opinions were reviewed by the court; and in 2012, 7 of its 663 opinions were so reviewed. TAX COURT STATISTICS, FISCAL YEAR 2012, at 6 tbl.6 (on file with the *Duke Law Journal*).

appeals judge, as the Tax Court hears more tax cases than does any other federal court.<sup>240</sup>

The possible advantages of expertise and specialization for efficient and high-quality decisionmaking may be obvious.<sup>241</sup> However, that does not necessarily mean that appellate courts should defer to a trial court that has that specialized expertise. Even Professor Chad Oldfather, who has argued for a form of deferential review that would allow a court to choose not to apply de novo review in some cases,<sup>242</sup> points out that it would be controversial and “potentially dangerous”<sup>243</sup> to “allow courts to decline to decide questions of law where they perceive themselves to be at a competency disadvantage (e.g., ‘we don’t know much about tax law’).”<sup>244</sup> The risk Oldfather points to is that the appellate courts would stop making law in the unfamiliar field, which would undermine the value of generalist appellate judges.<sup>245</sup>

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240. As indicated above, the Tax Court is the forum of choice for over 95 percent of the tens of thousands of federal tax cases docketed at the trial level. *See supra* note 1 and accompanying text. The courts of appeals hear comparatively few tax cases. *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2012 ANNUAL REPORT OF THE DIRECTOR, tbl.B-1A (2012), available at [http://www.uscourts.gov/uscourts/Statistics/Judicial Business/2012/appendices/B01ASep12.pdf](http://www.uscourts.gov/uscourts/Statistics/Judicial%20Business/2012/appendices/B01ASep12.pdf) (showing 143 tax cases pending as of Oct. 1, 2011, and 120 tax cases pending as of Sept. 30, 2012). Court of appeals judges may nonetheless develop some familiarity with tax law over time, as they serve on panels. *See* Daniel P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: The Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 13 (1975) (“One of thirty district judges in a circuit can expect to hear no more than 3 percent of the total caseload in any field; one of nine appellate judges will hear 33 percent of that caseload.”).

241. *See, e.g.*, Lawrence Baum, *Probing the Effects of Judicial Specialization*, 58 DUKE L.J. 1667, 1676 (2009) (“What commentators generally mean when they talk about expertise seems to be the possibility that expertise will enhance the quality of court decisions: more expert judges, who know more about the field in which they are deciding cases, are more likely to get decisions right.”); Currie & Goodman, *supra* note 240, at 67 (“It is obvious that concentrated experience in handling a particular category of cases facilitates understanding.”).

242. Oldfather, *supra* note 209, at 357. Oldfather cites several situations involving deferential review, including administrative law questions subject to the *Chevron* doctrine. *See id.* Although he points to tax as a subject area in which appellate courts might feel they lack subject-matter expertise, *id.* at 365 n.217, he does not cite or discuss the *Dobson* case. However, Oldfather’s proposal entails a more limited form of deference than the *Dobson* rule did, particularly in that his proposal makes deference discretionary. *See id.* at 360–61 (discussing the benefits of percolation and the risks of discretion in this context).

243. *Id.* at 365 n.217.

244. *Id.* at 365.

245. *Id.* at 365 n.217.

Even in tax cases, there is a strong argument for incorporating the views of generalist judges.<sup>246</sup> In part, that is because specialized judging carries (perhaps underappreciated) risks of what Professor Lawrence Baum terms “assertiveness, insularity, and stereotyping.”<sup>247</sup> Assertiveness in this context means overconfidence that might make specialty-court judges “more willing to overturn administrative decisions . . . [or] make sweeping decisions that change policy substantially.”<sup>248</sup> Generalist judges may be more likely to focus on what Congress intended or to defer to expert agencies.<sup>249</sup>

Insularity entails the risk that specialized judges will, among other things, “accord less authority to their superiors [such as higher-court judges] than do generalists because they see generalist superiors as less knowledgeable than themselves.”<sup>250</sup> This could mean that specialized judges give less weight to appellate precedents than would generalist trial court judges. In addition, it is much more likely for litigants to perceive a single specialty court as biased than for them to blame multiple, geographically dispersed generalist courts.<sup>251</sup> The issue of perceived procedural fairness is an important process value.<sup>252</sup>

Stereotyping in this context means “ascrib[ing] the attributes of past cases to current cases” and thus seeing them less objectively.<sup>253</sup> This could make a seasoned Tax Court judge less objective, for

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246. See Currie & Goodman, *supra* note 240, at 68–70 (identifying several risks associated with specialized courts, including the possibility that they may attract lower-quality judges than do generalist courts).

247. Baum, *supra* note 241, at 1677.

248. *Id.*; see also Currie & Goodman, *supra* note 240, at 71 (“One possibility is that, as [specialized judges] come to know more and more about the subject—or from the outset if chosen because of prior knowledge—the judges may increasingly substitute their judgment for that of the agency in which Congress has vested discretion.”).

249. See Robert N. Miller, *The Courts of Last Resort in Tax Cases: A Specialized Court of Tax Appeals?*, 40 A.B.A. J. 563, 566 (1954) (“[F]inished statutory provisions are found to deviate at various points from the advice of experts, reflecting instead the views of constituents, politicians, and of the public generally. A court, of course, needs to follow the will of Congress—not to bring the statute back to where experts would like to see it.” (footnote omitted)).

250. Baum, *supra* note 241, at 1678.

251. See Currie & Goodman, *supra* note 240, at 72 (noting that it is much easier to blame a single court that “frustrates a popular administrative program” than it is to blame multiple, dispersed circuit courts).

252. See Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens To Assess the Fairness of Legal Procedures*, 22 LAW & SOC’Y REV. 103, 104 (1988) (“It is clear from [previous] research that citizen assessments of the justice of the procedures used by legal authorities to make decisions influence reactions to those decisions.”).

253. Baum, *supra* note 241, at 1678.



example, about whether a particular transaction is abusive or an argument in a particular case is frivolous. By contrast, a generalist judge not only may have “the outsider’s unprejudiced vision,”<sup>254</sup> but also may enjoy a broader perspective and draw on analogies from other areas of law.<sup>255</sup>

Even assuming, however, that none of these risks materializes in Tax Court cases and that Tax Court judges’ tax expertise gives them an advantage over generalist judges in deciding issues of tax law in the first instance, that does not establish whether the courts of appeals should be able to take a meaningful second look at those questions.<sup>256</sup> Professor Richard Fallon has argued that “adequately searching appellate review of the judgments of legislative courts and administrative agencies is both necessary and sufficient to satisfy the requirements of [A]rticle III.”<sup>257</sup> At a minimum, meaningful Article III appellate review of an Article I court’s decisions helps promote the values underlying Article III, such as avoiding politically motivated decisionmaking.<sup>258</sup> An analogous set of specialized Article I courts, the bankruptcy courts, generally have their decisions on legal issues reviewed *de novo*.<sup>259</sup>

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254. See Currie & Goodman, *supra* note 240, at 69 (offering the example that “[a] specialized court made up of experts in the art of marine navigation would surely have been less likely than was the generalist Learned Hand to find the whole industry remiss in failing to adopt the radio”).

255. See *id.* at 68 (“To put blinders on judges and confine them to narrow compartments not only creates the risk of significant disuniformities but also enhances the danger that issues may be resolved on the basis of ignorance as to past experience in related fields.”).

256. If support for tax experts as the decisionmakers is pushed to its limit, it raises the question of how the generalist courts of appeals can ever identify errors that warrant reversal (although they surely can). See *Brooklyn Nat’l Corp. v. Comm’r*, 157 F.2d 450, 452–53 (2d Cir. 1946). On this topic, Judge Learned Hand wrote:

[F]inality [of Tax Court decisions] depends, as we understand, upon the added competency which inevitably follows from concentration in a special field. Why, if that be so, we—or indeed even the Supreme Court itself—should be competent to fix the measure of the Tax Court’s competence, and why we should ever declare that it is wrong, is indeed an interesting inquiry, which happily it is not necessary for us to pursue.

*Id.*

257. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 918 (1988).

258. See *id.* at 947 (“Appellate review can provide an effective check against politically influenced adjudication, arbitrary and self-interested decision-making, and other evils that the separation of powers was designed to prevent.”).

259. See 1 THOMAS J. SALERNO & JORDAN A. KROOP, *BANKRUPTCY LITIGATION AND PRACTICE: A PRACTITIONER’S GUIDE* § 3.18, at 3-73 (4th ed. Supp. 2012) (noting that in bankruptcy cases, “[a]ll conclusions of law (in both core and non-core matters) are reviewed *de novo*”).

In addition, the context in which the courts of appeals conduct their review is very relevant. First, appellate courts can begin their legal inquiry without having to do the legwork of compiling the factual record.<sup>260</sup> Second, they have the benefit of both the Tax Court's legal analysis and the parties' appellate briefs, which distill the issues<sup>261</sup> and point out areas of disagreement with the Tax Court's legal reasoning. That means that the appellate court benefits from a narrow focus on well-analyzed disputed issues. In addition, the appellate court consists not of a single judge but of a three-judge panel in which each judge benefits from the others' perspectives.<sup>262</sup> All of these factors support allowing the courts of appeals to conduct the same level of review of Tax Court decisions as they do of district court decisions.

The larger purposes of appellate review also warrant consideration. Recall that the question is *not* whether the specialized judges at the Tax Court should get to decide questions of law. Rather, the question is whether the courts of appeals should be entitled to conduct a review of the Tax Court's answers to legal questions or instead should be constrained to "rubber-stamp" them in most cases. Given that context, the fact that deference to the trial judge "undermines [the] 'legitimizing' function of appellate review" is a strong argument against such deference.<sup>263</sup> That is, meaningful appellate review supports procedural fairness.<sup>264</sup> And it does so without in any way detracting from the expertise applied by the Tax Court at the trial level.

In fact, as far as perceived fairness is concerned, specialized trial courts benefit even more than generalist courts from appellate review because specialized courts are particularly subject to accusations of bias.<sup>265</sup> A major reason for such perceptions of bias is that, as a

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260. See Coenen, *supra* note 202, at 923 ("The facts of the case, for all practical purposes, are settled on appeal.").

261. *Id.*

262. See *supra* notes 219–22 and accompanying text.

263. Coenen, *supra* note 202, at 940–41.

264. See Tyler, *supra* note 252, at 105 (listing among potential procedural-justice criteria "[c]orrectability," meaning "the existence of opportunities to correct unfair or inaccurate decisions"); *cf. id.* at 125–27 (finding in an empirical, survey-based study in Chicago that "citizens dealing with the courts were more concerned with issues of decision quality, bias, and correctability than were those dealing with the police").

265. The Tax Court is no stranger to bias accusations. Professor James Maule has carefully catalogued the articles accusing the Tax Court of bias in favor of the government and conducted his own empirical study to refute them. See generally James Edward Maule, *Instant Replay*,

structural matter, specialized courts are more easily targeted by interest groups.<sup>266</sup> Meaningful appellate review by nonspecialists mitigates that structural problem. And that is particularly true for the Tax Court, which lacks routine oversight outside of the appellate review process<sup>267</sup> because—unlike the district courts<sup>268</sup> and the Court of Federal Claims<sup>269</sup>—the Tax Court is neither served nor overseen by the Administrative Office of U.S. Courts and the U.S. Judicial Conference.<sup>270</sup>

2. *Decentralization of Tax Litigation.* One of the distinctive features of tax litigation is that multiple trial courts hear federal tax cases, and litigants often may choose among them. Although the Tax Court hears the overwhelming majority of these cases, taxpayers who pay a claimed deficiency in full and meet the other jurisdictional prerequisites can sue in either a federal district court or the Court of Federal Claims.<sup>271</sup> Moreover, whereas an appeal by the same taxpayer in a Tax Court or district court case will generally be brought to the

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*Weak Teams, and Disputed Calls: An Empirical Study of Alleged Tax Court Judge Bias*, 66 TENN. L. REV. 351 (1999).

266. See, e.g., KOMESAR, *supra* note 202, at 145 (“Courts become more attractive targets for special interest groups as their jurisdiction is narrowed.”); Baum, *supra* note 241, at 1679 (“Interest groups gain a better opportunity to influence judges who hear only a narrow set of cases.”).

267. See Lederman, *supra* note 8, at 1215.

268. See *Administrative Office of the United States Courts*, U.S. COURTS, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice.aspx> (last visited Mar. 9, 2014) (“[T]he Administrative Office of the United States Courts (AO) serves the federal Judiciary.”); *Judicial Conference of the United States*, U.S. COURTS, <http://www.uscourts.gov/FederalCourts/JudicialConference.aspx> (last visited Mar. 9, 2014) (“District judges were formally added to the Conference in 1957.”).

269. See *supra* note 6 and accompanying text.

270. See S. REP. NO. 91-552, at 304 n.3 (1969) (“The committee amendments do not place the Tax Court under the supervision of the Judicial Conference or the Director of the Administrative Office of the Article III courts or give them any power or control over the Tax Court.”). The Director of the Administrative Office of U.S. Courts has statutory duties to perform under the supervision of the U.S. Judicial Conference. See 28 U.S.C. § 604(a) (2012) (listing dozens of duties, including to “[p]erform such other duties as may be assigned to him by the Supreme Court or the Judicial Conference of the United States”); see also *id.* § 605 (“The Director, under the supervision of the Judicial Conference of the United States, shall submit to the Office of Management and Budget annual estimates of the expenditures and appropriations necessary for the maintenance and operation of the courts and the Administrative Office and the operation of the judicial survivors annuity fund . . .”).

271. 28 U.S.C. § 1346(a)(1).

same court of appeals,<sup>272</sup> an appeal from the Court of Federal Claims is heard in the Court of Appeals for the Federal Circuit.<sup>273</sup>

Some scholars dislike the forum-shopping opportunities this institutional structure creates and have argued in favor of consolidating trial-level jurisdiction in the Tax Court<sup>274</sup> and/or creating a national Court of Tax Appeals.<sup>275</sup> Each of these options would have costs and benefits.<sup>276</sup> Consolidation of trial-level tax jurisdiction would remove the possibility of forum shopping, but at the expense of eliminating the taxpayer's option to sue in a generalist court.<sup>277</sup> Specialized courts can become somewhat insular, and the Tax

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272. See I.R.C. § 7482(b) (providing a venue for appeals from Tax Court decisions); 28 U.S.C. § 1294 (providing a venue for appeals from district court decisions).

273. 28 U.S.C. § 1295(a)(3).

274. See, e.g., Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 644 n.38 (1974) (supporting the idea of consolidating trial-level tax litigation in an Article III Tax Court); Mitchell M. Gans, *Deference and the End of Tax Practice*, 36 REAL PROP. PROB. & TR. J. 731, 789 (2002) (endorsing the idea of giving the Tax Court exclusive trial-level jurisdiction); Stanley S. Surrey, *Some Suggested Topics in the Field of Tax Administration*, 25 WASH. U. L.Q. 399, 417–22 (1940) (arguing in support of a proposal advanced by then-Professor Roger Traynor); Roger John Traynor, *Administrative and Judicial Procedure for Federal Income, Estate and Gift Taxes—A Criticism and a Proposal*, 38 COLUM. L. REV. 1393, 1425–28 (1938) (proposing consolidation of trial-level tax cases in a reorganized, decentralized Board coupled with a proposal for a Court of Tax Appeals).

275. See, e.g., Friendly, *supra* note 274, at 644 (proposing a Court of Tax Appeals); Gans, *supra* note 274, at 789–90 (mentioning the possible consolidation of appellate tax jurisdiction in a new court); Griswold, *supra* note 83, at 1164–66 (arguing for a Court of Tax Appeals); Surrey, *supra* note 274, at 417–22 (same); Traynor, *supra* note 274, at 1425–28 (same).

276. One of the main arguments advanced in favor of consolidation of tax jurisdiction, particularly at the appellate level, is the increased speed in reaching an answer on what the law is on a particular issue. See Miller, *supra* note 249, at 563. Miller, a former Solicitor of the Revenue for the Bureau of Internal Revenue (equivalent to Chief Counsel of the IRS), argues, however, that a Court of Tax Appeals would not eliminate many of the causes of uncertainty and lengthy litigation. See *id.* at 563–64. Early empirical studies supported that view. See Madaline Kinter Remmlein, *A Time Study of Certain Tax Controversies*, 16 GEO. WASH. L. REV. 238, 250 (1948) (concluding that “[t]he Supreme Court and the circuit court stages consume only a small part of the total time a tax controversy is under consideration”); Madaline Kinter Remmlein, *Tax Controversies—Where Goes the Time?*, 13 GEO. WASH. L. REV. 416, 431–32 (1945) (“Since the Supreme Court takes less than five months on the cases it reviews, and the circuit courts take about nine months, the bulk of the seven or eight years which is apparently required to settle the average tax issue (in cases which get to the Supreme Court) must be consumed below the appellate stage.”).

277. See Melvin A. Coffee, *Tax Court Should Not Be the Sole Forum for Tax Disputes*, 41 TAX NOTES 777, 777 (1988) (“[R]ecent years have seen the appearance of a lessening of even-handed justice in the United States Tax Court and . . . forcing all litigation to that Court would not be wise.”).

Court has at times behaved in ways that depart from judicial norms.<sup>278</sup> Other federal trial courts' tax opinions can provide valuable information about other approaches to the trial of tax cases. In addition, giving taxpayers a choice of fora, including the generalist district courts, can provide the Tax Court with an incentive to keep its behavior in line with that of other courts.<sup>279</sup>

A Court of Tax Appeals would increase the insularity of the tax-litigation process in two ways. First, it would remove the Tax Court's oversight by generalist courts and thus lessen the Tax Court's exposure to those norms. Second, it would itself be a specialized body. That would not only raise all of the concerns about specialty courts discussed above,<sup>280</sup> it would also encourage the development of tax-specific rules<sup>281</sup> and increase the magnitude of the harm from an incorrect decision.<sup>282</sup> Such a powerful specialized court would also be susceptible to interest-group pressures.<sup>283</sup> Even if neither of these things happened, a specialized court would risk accusations of bias that would undermine its perceived fairness.<sup>284</sup>

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278. See Lederman, *supra* note 8, at 1217–32 (describing several incidents evincing a lack of transparency in contexts in which transparency is expected of courts); cf. Currie & Goodman, *supra* note 240, at 70 (“The more important the administrative program, the greater the dangers of giving sole power over it to a single court.”).

279. Cf. 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, 154 (1939) (“At the present time, if a taxpayer has cause for complaint about the Board [of Tax Appeals], he knows that in the next case which he may have he can pay the deficiency and bring suit before his local district judge.”).

280. See *supra* notes 246–55 and accompanying text.

281. See Kalman A. Goldring, *Integration of the Tax Court into the Federal Judicial System*, 25 TAXES 445, 448 (1947) (arguing that a Court of Tax Appeals would “segregate further the tax ‘specialist’ from the general practitioner; and . . . add to the development of peculiar concepts applicable only in taxation and not in the general law of the land”).

282. See Currie & Goodman, *supra* note 240, at 69–70 (“Dispersion of jurisdiction among several courts not only assures that a number of judges may contribute their judgment to the solution of difficult problems; it also vastly reduces the potential of a single wrong decision to harm an administrative program or those subject to it.”).

283. See *supra* note 266 and accompanying text. Interest groups, could, for example, try to influence the nomination of judges by serving on bar committees that recommend or review nominees. Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1148–49 (1990).

284. See Currie & Goodman, *supra* note 240, at 72 (“If a single court frustrates a popular administrative program, it is natural for those disappointed to blame judicial bias; the finger cannot so easily be pointed where responsibility is shared by eleven circuit courts.”); Steve R. Johnson, *Reforming Federal Tax Litigation: An Agenda*, 41 FLA. ST. U. L. REV. 205, 254 (2013) (“Suspicion of the fairness of specialized tax tribunals is too widespread to be ignored. Confidence in the system is too important to risk.”).

A Court of Tax Appeals would also be an exception to the general approach of providing coequal appellate courts that lack “intercircuit stare decisis,”<sup>285</sup> which, as Professor Richard Revesz has observed, serves important purposes, including providing information to the Supreme Court.<sup>286</sup> In addition, if the refund-litigation path continued to exist, a Court of Tax Appeals “would separate the tax judicial system almost completely from the general federal judicial system and give a greater bonus to the possession of sufficient wealth to allow a choice of tribunals.”<sup>287</sup>

Regardless of the costs and benefits of a consolidated tax-litigation process, however, the existing structure is long-standing, and there seems to be no current impetus to change it. So, the question becomes whether the decentralization of tax litigation counsels a deviation from the normal model of appellate review.

Once again, the deviation under consideration is whether the courts of appeals should defer to the Tax Court on issues of law, and perhaps also on mixed questions of fact and law.<sup>288</sup> One commentator,

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285. Revesz, *supra* note 283, at 1156.

286. *See id.* at 1155–59 (explaining the benefits of differing outcomes in the courts of appeals).

287. Goldring, *supra* note 281, at 448.

288. Outside the Tax Court context, the Supreme Court has explained that the standard of review applicable to mixed questions of fact and law depends on the relative competencies of trial courts and the appellate courts:

In deference to the unchallenged superiority of the district court’s factfinding ability, Rule 52(a) commands that a trial court’s findings of fact “shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.” . . . [W]e have held that deferential review of mixed questions of law and fact is warranted when it appears that the district court is “better positioned” than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine.

*Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991) (quoting *FED. R. CIV. P.* 52; *Miller v. Fenton*, 474 U.S. 104, 114 (1985)).

The Court has also stated with respect to a “materiality” issue that “the characterization of a mixed question of law and fact for one purpose does not govern its characterization for all purposes.” *United States v. Gaudin*, 515 U.S. 506, 522 (1995). The Court explained:

It is hard to imagine questions more diverse than, on the one hand, whether an appellate court must remand to a district court for a determination of materiality in a denaturalization proceeding (*Kungys*) and, on the other hand, whether the Constitution requires the finding of the element of materiality in a criminal prosecution to be made by the jury (the present case).

*Id.* (citing *Kungys v. United States*, 485 U.S. 759 (1988)). More recently, the Court stated that “deferential” review applies when “the mix weighs heavily on the ‘fact’ side.” *Brown v. Plata*, 131 S. Ct. 1910, 1932 (2011) (quoting *Lilly v. Virginia*, 527 U.S. 116, 148 (1999) (Rehnquist, C.J., concurring in the judgment)) (quotation marks omitted).

Hugh Bickford, writing in the *Dobson* era, strenuously argued that such deference would undermine Congress's intent in making the Tax Court an additional option for tax litigation, not one that supplanted existing courts:

The primary purpose of the creation of the Board was to remove the adjudication of tax disputes from control of the Treasury Department and to give the taxpayer his "day in court" with full right of appeal to the highest court of the land. This was not a "limitation" or "restriction" upon judicial review; it was a right expressly granted by Congress. It was a broadening of the judicial power. The only limitation intended was upon the executive branch of the Government.<sup>289</sup>

In addition, although it might initially seem that deference would increase uniformity in tax decisions, quite the opposite is true. Deference would foster a certain level of finality of Tax Court decisions, but it would actually decrease uniformity with district court decisions. If a district court case and a Tax Court case on the same issue were decided the same way and both were appealed to the same court of appeals, the court of appeals could reverse the district court if it thought there were a better legal answer, but it could not reverse the Tax Court.

Furthermore, since 1970, the Tax Court has applied the precedent of the court of appeals to which the appeal would lie, assuming that precedent is squarely on point.<sup>290</sup> If deference were added to the mix, it would mean that a court of appeals could effectively have to defer to itself or a sister circuit,<sup>291</sup> essentially ossifying positions that the circuit court might have since rethought. It

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289. Bickford, *supra* note 36, at 486. Bickford supported his argument with a detailed historical analysis. *See id.* at 485–90.

290. *Golsen v. Comm'r*, 54 T.C. 742, 757 (1970), *aff'd on other grounds*, 445 F.2d 985 (10th Cir. 1971).

291. A case decided in the *Dobson* era helps illustrate the problems this could cause even in the absence of *Golsen*. The Court of Appeals there stated:

There remains only the vexed question whether we should yield our own judgment to that of the Tax Court. . . . [T]he Tax Court's decision was altogether based upon an interpretation of the decisions of the Supreme Court, and of the circuit courts of appeal. . . . We cannot believe . . . that even such specialists as the judges of [the Tax Court] are to be deemed in a better position to interpret the meaning of novices than the novices themselves; rather the opposite. Yet, what this appeal in the end comes down to is whether "lay judges"—so to say—shall determine the meaning of other "lay judges" without weighting the scales in favor of an earlier decision of "expert judges."

*Comm'r v. Nat'l Carbide Corp.*, 167 F.2d 304, 307 (2d Cir. 1948) (footnote omitted) (citing *Dobson v. Comm'r*, 320 U.S. 489 (1943)), *aff'd*, 336 U.S. 422 (1949).

is also not clear what a court of appeals would do if the Tax Court invalidated a Treasury regulation that the court of appeals would have upheld under *Chevron*. Would the court defer to Treasury, under *Chevron*, or to the Tax Court?<sup>292</sup>

Moreover, deferring to the Tax Court would mean that the courts of appeals would have one standard of review for Tax Court decisions and another for district court decisions. In fact, the standard of review for Tax Court decisions would likely differ from the standard applied in all refund cases, including those decided by the Court of Federal Claims. Those differences would exist because it is unlikely that the appellate review model would be abandoned for less specialized courts. Even *Dobson*, for example, spoke only of deference to Tax Court decisions.<sup>293</sup>

Such a difference in the treatment of appeals from the Tax Court and the other trial courts would reduce uniformity of case outcomes. In addition, given that taxpayers can choose where to litigate, such distinct treatment might affect where tax cases are docketed. Taxpayers who value meaningful review might increasingly favor the refund fora. Because only taxpayers who can afford to pay the deficiency in advance would have that forum choice, differential treatment of appeals would increase wealth-based disparities.<sup>294</sup>

Thus, decentralization of tax trials undermines, rather than supports, the deference rationale. That might suggest that the answer is to consolidate the existing structure of tax litigation as much as possible. Of course, consolidation would raise the insularity and other concerns mentioned above.<sup>295</sup> And, perversely, deference would be of little use in a consolidated system of tax trials and appeals. Recall that Justice Jackson viewed deference to Tax Court decisions as a second-best approach to his goal of expediting tax-case outcomes.<sup>296</sup> In a system with the Tax Court serving as the only trial-level forum and a

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292. See Johnson, *supra* note 108, at 285 (noting that if the Tax Court invalidated a regulation and the government appealed that decision, “the court of appeals would have to choose which master to serve,” and observing that “[p]redictability and certainty in application of the tax laws would not be furthered by creating such a conflict”).

293. See *Dobson*, 320 U.S. at 501–02.

294. See *Review—Tax Court Decisions*, *supra* note 139, at 611–12 (describing how, under *Dobson*, “[t]he ‘rich man,’ it was said, could, by paying the deficiency, by-pass the Tax Court and limited review, while the ‘poor man,’ seeking to contest a deficiency before payment, could look forward only to limited review”).

295. See *supra* notes 247–55 and accompanying text.

296. See *supra* notes 55–57 and accompanying text.



national Court of Tax Appeals as the sole reviewing body, there would be no circuit splits on tax issues. Moreover, in such a system, the appellate body would have as much expertise as the Tax Court, eliminating one of the principal rationales for deference.

3. “*Tax Is Different.*” Another possible reason for deviating from the appellate review model is the notion that tax cases are different from other cases. The *Dobson* rule was a manifestation of that notion—Justice Jackson thought that finality was more important than accuracy in tax cases.<sup>297</sup> Justice Jackson’s approach has superficial appeal because some issues, such as the timing questions he discussed in print before joining the Court,<sup>298</sup> present a coordination problem, much like the question of which side of the road everyone should drive on. What is most important in those cases is that the law be applied consistently. However, other issues may involve a determination of whether a particular receipt is taxed at all, or whether a particular expense is ever deductible. Particularly when Congress had a particular intent or was trying to promote a specific policy, it is more important to have a thoughtful answer than just some uniform rule.<sup>299</sup>

The general reason underlying tax exceptionalism is the complexity of the tax law, a contention that Part III.B.1 argued was unavailing, given the role of appellate review as a legitimizing second look that builds on and benefits from the Tax Court’s expertise.<sup>300</sup> There are also compelling reasons to avoid distinct treatment of tax cases. Isolating the tax law from other areas of law may stunt the development of the tax law<sup>301</sup> and impede the ability of tax lawyers

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297. See Stark, *supra* note 50, at 207 (arguing that Justice Jackson considered the goal of tax litigation to be “to facilitate a clean and quick resolution of legal controversies”); see also *Dobson*, 320 U.S. at 499 (referring to “[c]onsideration[s] of uniform and expeditious tax administrations” and stating that “diversification of appellate authority inevitably produces conflict of decision”).

298. See *supra* notes 57–59 and accompanying text.

299. See Smith, *supra* note 22, at 377 (“When a tax controversy relates to a tax law which is intended to promote a specific public policy or policies, it is more important that the issue be settled correctly than merely settled.”).

300. See *supra* Part III.B.1.

301. See Paul L. Caron, *Tax Myopia, or Mamas Don’t Let Your Babies Grow Up To Be Tax Lawyers*, 13 VA. TAX REV. 517, 518 (1994) (“[T]ax law too often is mistakenly viewed by lawyers, judges, and law professors as a self-contained body of law. . . . [T]his misperception has impaired the development of tax law by shielding it from other areas of law that should inform the tax debate.”); Hickman, *supra* note 236, at 1541 (“[T]he emphasis of the existing scholarship on the uniqueness of the tax field—and the resulting complexity that this focus has added to

and other lawyers to learn from each other.<sup>302</sup> Currently, tax exceptionalism seems to be on the wane, not the rise.<sup>303</sup> The Supreme Court recently brought tax administration more in line with other areas of administrative law when it held that Treasury regulations are to be accorded *Chevron* deference (not deference under the tax-specific rule of *National Muffler Dealers Ass'n v. United States*<sup>304</sup>), stating, “In the absence of . . . justification, we are not inclined to carve out an approach to administrative review good for tax law only.”<sup>305</sup> Accordingly, a vague notion that tax is different from other areas of the law is not a sufficient reason to depart from general norms of appellate review.<sup>306</sup>

In addition, a *Dobson*-like deference rule would not really provide finality. Not only does *Dobson* have an exception for mistakes of law,<sup>307</sup> but taxpayers would be able to avoid its application by bringing their cases in either of the other two trial fora that hear

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what otherwise should be a fairly simple analysis—are emblematic of a perception of tax exceptionalism that intrudes upon much contemporary tax scholarship and jurisprudence.”).

302. See, e.g., Angell, *supra* note 279, at 155 (“The tax law should be moulded into and made an integral part of our jurisprudence, and not segregated into a separate, water-tight compartment.”); Caron, *supra* note 301, at 518 (“This Article advocates a synergistic relationship between tax and nontax law through which each benefits from the insights of the other.”); Leandra Lederman, “Civil”izing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency, 30 U.C. DAVIS L. REV. 183, 183 (1996) (“Tax law tends to be uninformed by other areas of law. This insularity has the unfortunate consequence of depriving tax and other fields of cross-fertilization.” (footnote omitted)).

303. See Steve R. Johnson, *Preserving Fairness in Tax Administration in the Mayo Era*, 32 VA. TAX REV. 269, 279 (2012) (“[T]he Mayo Court disposed of tax exceptionalism, the notion that tax administration is exempt from the rules governing other areas of regulation.”).

304. *Nat’l Muffler Dealers Ass’n v. United States*, 440 U.S. 472 (1979).

305. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011). The court went on to write, “The principles underlying our decision in *Chevron* apply with full force in the tax context.” *Id.*

306. In addition, some of the ways in which the Tax Court is different—for example, its specialized nature and its Article I status—support meaningful review by the Article III courts of appeals. See *supra* notes 257–59, 265–70 and accompanying text.

307. See *Dobson v. Comm’r*, 320 U.S. 489, 502 (1943) (“[W]hen the 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.”). Johnson explains with respect to Shores’s proposal to resurrect *Dobson*:

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; (2) deference would not be required in certain situations even in cases on appeal from the Tax Court; and (3) despite deference, the court of appeals still could reverse if it found the Tax Court’s view lacking any reasonable basis.

Johnson, *supra* note 108, at 256 (footnotes omitted).

federal tax cases. This might increase litigation in those courts, the decisions of which are not subject to appellate deference.

Moreover, in a sense, Justice Jackson's goal of having the Tax Court have the last word in a large number of tax cases has already come to pass.<sup>308</sup> In 1969, Congress created the small tax case (S case) procedure,<sup>309</sup> an elective procedure allowing for simplified proceedings.<sup>310</sup> Decisions in S cases are not appealable.<sup>311</sup> The jurisdictional limit for S cases has become so high (\$50,000 per tax year in issue<sup>312</sup>) that approximately half of the cases docketed in Tax Court elect S status.<sup>313</sup> The result is finality in a high percentage of decisions. This does not preclude future litigation of the same types of issues—decisions in S cases have no precedential value<sup>314</sup>—but it allows many taxpayers to avoid appellate litigation.<sup>315</sup>

Thus, from a policy perspective, heightened appellate court deference to Tax Court decisions is completely unwarranted. Rather, the goals of appellate review are furthered as much in the tax context as in other contexts by allowing the courts of appeals to review Tax Court decisions on appeal for errors of law and clearly erroneous findings of fact.

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308. The author thanks Keith Fogg for this point.

309. See Tax Reform Act of 1969, Pub. L. No. 91-172, § 957(a), 83 Stat. 487, 733 (adding I.R.C. § 7463).

310. See I.R.C. § 7463(a) (2012) (“[A]t the option of the taxpayer concurred in by the Tax Court or a division thereof before the hearing of the case, proceedings in the case shall be conducted under this section. Notwithstanding the provisions of section 7453, such proceedings shall be conducted in accordance with such rules of evidence, practice, and procedure as the Tax Court may prescribe.”).

311. *Id.* § 7463(b).

312. *Id.* § 7463(a). The previous \$10,000 limit was changed to \$50,000 in 1998. See Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, § 3103(a), 112 Stat. 685, 731.

313. For example, in fiscal year 2010, 14,997 of 29,489 cases docketed in the Tax Court (50.86%) were S cases; in 2011, 14,786 of 29,693 cases docketed (49.80%) were S cases; and in 2012, 16,124 of 31,282 cases (51.54%) were S cases. OFFICE OF CHIEF COUNSEL, *supra* note 1, at 13.

314. I.R.C. § 7463(b).

315. This helps reduce wealth-based barriers to litigation, as does the fact that the simplified S case procedures may be more accessible to pro se taxpayers than more formal procedures are. In S cases, most taxpayers proceed pro se. See OFFICE OF CHIEF COUNSEL, *supra* note 1, at 13 (showing that, in fiscal year 2010, 13,747 of 14,997 S cases involved pro se taxpayers; in 2011, 13,483 of 14,786 did; and in 2012, 14,723 of 16,124 did).

## CONCLUSION

The Supreme Court's *Dobson* opinion brings to mind the words of Judge Friendly, who wrote, regarding a *forum non conveniens* case in which the Supreme Court reversed the court of appeals and called for deference to the district court:

The Supreme Court treated the case as if the court of appeals had been reviewing the action of an administrative agency, where indeed a reviewing court cannot substitute its judgment. But that is because, paying proper heed to the separation of powers, Congress has so directed. In contrast, the district judge and the judges of the court of appeals wear the same robes.<sup>316</sup>

Professor William Eskridge has cautioned against romanticizing institutions.<sup>317</sup> Justice Jackson seemingly did just that in *Dobson*, identifying the Tax Court as *the* administrative body to which courts should defer in tax cases. His reason for doing so was apparently largely instrumental—he wanted to reduce the volume of tax litigation.<sup>318</sup> Although before his appointment to the Supreme Court, Jackson had argued in writing that Congress should address this concern,<sup>319</sup> as a Supreme Court Justice, he apparently considered it within the purview of the judiciary. Randolph Paul, a tax adviser at Treasury, accordingly commented:

There is one striking difference between Mr. Justice Jackson's comments as a writer and his subsequent observations as a judge. The former treat problems of tax administration and adjudication as matters calling for legislative solution; the latter place the same problems, with some limitations, within the province of judicial policy as well.<sup>320</sup>

Put bluntly, the *Dobson* opinion was a disaster. It has been justly criticized as poorly reasoned and misguided. One wonders whether the Court would have explicitly overruled *Dobson* by now had

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316. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 753 (1982); see also *id.* at 749 (“In effect [the Supreme Court] directed the court of appeals to step aside and restore the judgment of the district court.”).

317. See William N. Eskridge Jr., *Expanding Chevron's Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 432 (“One of the most important Komesarian insights is that comparative institutional analysis must avoid the tendency to romanticize institutions.”).

318. See *supra* Part I.B.

319. See *supra* note 57 and accompanying text.

320. Paul, *supra* note 82, at 760 n.30.

Congress not acted long ago. But Congress did act, first in 1948, at least cabining the *Dobson* rule. If Congress's actions were ambiguous, part of the blame may lie with its misunderstanding of the less-than-clear *Dobson* opinion.<sup>321</sup> However, lawyers at the time and Justice Jackson himself seemed to regard Congress's action as overturning *Dobson*.

Regardless, if a vestige of deferential review remained in 1948, it does not and should not remain today. In 1969, Congress officially made the Tax Court a court of law, eliminating its vestigial status as an executive-branch agency. This was an additional action by Congress that undermined the *Dobson* Court's attempt to treat the Tax Court like an administrative agency. And if any of *Dobson*'s statutory interpretation survived both of those changes, the Supreme Court has since put *Dobson* to rest with its post-amendment interpretation of I.R.C. § 7482. In 1991, the Court stated that the standard of review applicable to Tax Court decisions is the same as that applicable to district court decisions, and it contrasted that standard with review of agency rulemaking.<sup>322</sup>

Accordingly, the courts of appeals should disavow *Dobson* and its progeny and instead heed the statutory command to review Tax Court decisions in the same manner and to the same extent as district court decisions in nonjury cases. Such an approach supports the policies behind appellate review, including its legitimizing effect on trial court decisions. This approach also provides consistent standards for appellate review in all tax cases, rather than complicating appellate review by carving out Tax Court appeals for distinct treatment.

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321. See *supra* Parts I.B–C.

322. See *Freytag v. Comm'r*, 501 U.S. 868, 891 (1991).