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ABSTRACT

When it comes to statutory interpretation, the traditional approaches fail to consider how the laws being interpreted by the courts were actually made. Instead, they tend to presume a uniform lawmaking process. In reality, the lawmaking process tends to be highly variable, both among, and even within, different areas of law. Traditional interpretive approaches also fail to consider the actual institutional capabilities of Congress or the courts. Textualist approaches give primacy to the words that Congress chose. By doing so, they implicitly assume that legislators accurately constructed the statutory text but pay no attention to whether the actual lawmaking process was reliable or trustworthy. By contrast, purposivist approaches idealize the role of judges by assuming they have the capacity to uncover the purposes that motivated lawmakers to enact what they did. But whether judges indeed have the capacity to discern Congress's intent might be influenced by whether the interpreters are subject-matter specialists or generalists. In short, the traditional approaches are unsuccessful to the extent they fail to account for the quality of statutory texts or the quality of courts interpreting those texts.

One-size-fits-all approaches might cause judges to fall short in fulfilling their role to accurately interpret statutory text as faithful agents of Congress. The faithful-agent model assumes that the role of courts, as agents of Congress, is to interpret statutory text to reflect congressional intent. This model gives lawmaking deference to Congress consistent with the Constitution's separation of powers. Failing to place

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what Congress said into the context of what it actually did could hinder judges from accurately interpreting laws consistent with Congress's intent. Likewise, ignoring the expertise of courts considering the meaning of statutory texts might result in imprecise or incomplete interpretations.

Although scholars have recognized that ready-made interpretative approaches, like ready-made clothing, might be a poor fit, this Article is the first to apply these insights to tax law by exploring the suitability of a custom-tailored interpretive doctrine specifically for the Internal Revenue Code, arguably the mother of all statutory regimes. In so doing, this Article finds that tax seems to be especially well-suited to a bespoke statutory interpretive approach, with experts involved in conceptualizing and writing tax laws as well as a specialized Tax Court with national jurisdiction interpreting the laws. This Article contends that when courts interpret federal tax laws, they should explicitly and consistently take account of these unique characteristics.

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I. INTRODUCTION

The Supreme Court recently signaled that tools of statutory interpretation should reflect how Congress actually writes laws. The case in question, *King v. Burwell*, involved a challenge to the premium tax credit provision of the Affordable Care Act (ACA).[1] The tax credit helps qualifying taxpayers with the costs of health insurance premiums.[2] The statutory language that explains the amount of the credit refers to enrollment in an insurance plan "through an Exchange *established by the State*."[3] The term "Exchange" refers to the marketplaces where people can purchase health insurance.[4] Generally speaking, states can operate their own marketplaces or they instead can use the marketplace administered by the federal government.[5]

The taxpayers who brought the case were in the unusual posture of arguing *against* their entitlement to tax credits.[6] If they qualified for the tax credit, they would be required to purchase health insurance or become subject to a penalty payable to the Internal Revenue Service.[7] Without the tax credit, they would be exempt from the requirement to purchase health insurance because the cost would be more than 8% of their income.[8] In making their argument, the taxpayers urged the Court to apply the canon against surplusage, which gives effect to all the words of a statutory provision.[9] Otherwise, they argued, the language Congress chose would be meaningless.[10] Their contention was that the phrase "Exchange established by the State" resolved the case in their favor because they lived in states with federal exchanges.[11]

Despite the taxpayers' efforts, which were supported by the seemingly clear language of the statute, the Court found that the tax credit

1. King v. Burwell, 135 S. Ct. 2480 (2015).
2. IRS, AFFORDABLE CARE ACT: WHAT YOU AND YOUR FAMILY NEED TO KNOW 11 (2017), https://www.irs.gov/pub/irs-pdf/p5187.pdf [https://perma.unl.edu/MB2Q-XQN7].
3. *Burwell*, 135 S. Ct. at 2487 (internal quotes omitted) (quoting I.R.C. § 36B(b)(2)(A)).
4. *Id.* at 2483.
5. Louise Norris, *What Type of Health Insurance Exchange Does My State Have?*, HEALTHINSURANCE.ORG (Sept. 28, 2018), https://www.healthinsurance.org/faqs/what-type-of-health-insurance-exchange-does-my-state-have/ [https://perma.unl.edu/446A-JBR9].
6. *Burwell*, 135 S. Ct. at 2487–88. The Treasury Department by regulation took the seemingly perverse position that taxpayers in states with federal exchanges were entitled to the tax credit. *Id.*
7. *Id.* at 2487 (quoting I.R.C. § 5000A) (imposing a monetary penalty for failure to maintain minimum insurance coverage).
8. *Id.*
9. *Id.* at 2492.
10. *Id.*
11. *Id.*

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was not limited to taxpayers in states with state exchanges.[12] The Court expressly refused to apply the canon against surplusage because Congress wrote the ACA "behind closed doors" using unconventional processes that curtailed "care and deliberation."[13] As discussed later in this Article, these processes, while politically expedient, may have discouraged meaningful legislative deliberation and transparency.[14] Congress's lack of care and diligence in drafting the statute caused the Court to question the quality of the legal text and ultimately to ignore the words as written.[15]

Taking account of the process by which laws are actually enacted, as the Court did in *King v. Burwell*, is at odds with the predominant statutory interpretive approaches. Traditionally there were two rival approaches: textualism and purposivism.[16] As these terms suggest, and at the risk of oversimplifying, textualists unravel what the drafters said by giving primacy to the words of the statute. By contrast, purposivists interpret laws to further purposes that reasonably might have motivated the legislation.[17] More recently, textualism and purposivism have blended into a third school of statutory interpretation referred to as "new textualism" or "structural textualism," which is a sort of constrained purposivism.[18]

The traditional interpretive approaches are built on idealized assumptions.[19] Textualist approaches, by emphasizing the words that Congress chose, in general idealize the capacities of legislators in

12. *Id.* at 2495 (noting its departure "from what would otherwise be the most natural reading of the pertinent statutory phrase").
13. *Id.* at 2492. The canon against surplusage assumes that legislators take due care in drafting statutes, and therefore, every word is to be given effect. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012).
14. See *infra* notes 46–53 and accompanying text for a discussion of some of the procedural tactics that Congress employed. Procedural shortcomings were also widely reported in the press. *See, e.g.*, Glenn Kessler, *History Lesson: How the Democrats Pushed Obamacare Through the Senate*, WASH. POST (June 22, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/06/22/history-lesson-how-the-democrats-pushed-obamacare-through-the-senate/?utm_term=.cc33100f259d [https://perma.unl.edu/7UK3-XWSJ]; Norm Ornstein, *The Real Story of Obamacare's Birth*, ATLANTIC (July 5, 2015), https://www.theatlantic.com/politics/archive/2015/07/the-real-story-of-obamacares-birth/397742/ [https://perma.unl.edu/5X9U-M7UE].
15. *See Burwell*, 135 S. Ct. at 2492 ("The Affordable Care Act contains more than a few examples of inartful drafting."); *see also* Robert Pear, *Four Words That Imperil Health Care Law Were All a Mistake, Writers Now Say*, N.Y. TIMES (May 25, 2015), https://www.nytimes.com/2015/05/26/us/politics/contested-words-in-affordable-care-act-may-have-been-left-by-mistake.html (discussing statements from several lawmakers that described the ambiguity as a mistake).
16. *See infra* notes 26–38 and accompanying text.
17. *Id.*
18. *Id.*
19. *Id.*

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crafting the legal text. By contrast, purposivist approaches idealize the capacities of judges by assuming they have the capability to discover the purposes that motivated lawmakers to enact what they did. But the traditional approaches fail to consider the actual institutional capabilities of Congress or the courts. For example, none of the traditional approaches consider the legislator's actual level of drafting expertise or the legislative body's quality of deliberation so long as a law was duly enacted.[20] Thus, unlike regulations from administrative agencies, which may receive judicial deference only if the agency follows the prescribed notice and comment procedures in the Administrative Procedure Act, Congress does not have to justify its statutory lawmaking process.[21] The predominant approaches also tend to presume a uniform lawmaking process. But, in reality, there is great variability in the lawmaking process for which the predominant approaches to statutory interpretation fail to account. For example, much of the development of legislative proposals and the drafting work occurs in subject-specific congressional committees, which subscribe to their own sets of policies and procedures.[22] Yet current interpretive approaches all but ignore this variability.

Scholars have recognized that ready-made interpretative approaches, like ready-made clothing, might be a poor fit.[23] This Article is the first to apply these insights to tax law by exploring the suitability of a custom-tailored interpretive doctrine specifically for the Internal Revenue Code, which is arguably the mother of all statutory regimes.[24] It is the contention of this Article that several unique characteristics of the tax legislative process should explicitly and consistently be taken account of by courts when they interpret federal tax law. A customized approach would account for the actual drafting process and the relative capabilities of Congress and the courts rather than relying on an idealized environment disconnected from reality. To the extent the role of courts when interpreting statutes is to serve as Congress's faithful agent, their approach to statutory interpretation should take into account the process by which the legislation be-

20. *See infra* notes 43–45 and accompanying text.

21. *Id.*

22. There are twenty standing committees in the House, sixteen in the Senate, and six joint committees, including the Joint Committee on Taxation. *Committees of the U.S. Congress*, CONGRESS.GOV, https://www.congress.gov/committees [https://perma.unl.edu/9D2B-3RNK]; *see also* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 920, 1015 (2013) [hereinafter Gluck & Bressman, *Part I*] (finding great variability in the lawmaking process based on surveys and interviews of staff from twenty-six different congressional committees).

23. *See infra* section II.B.

24. *See infra* note 86.

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ing interpreted was enacted.[25] As *King v. Burwell* illustrates, putting what Congress said into context by considering the actual lawmaking process would allow judges to better discern what Congress meant. This in turn would help judges more accurately interpret tax laws consistent with Congress's intent.

Tax seems to be especially well-suited to a bespoke statutory interpretive approach for several reasons. First, courts have at their disposal very mature tax doctrine and specialized interpretive tools, including tax-specific substantive canons and common law anti-abuse doctrines. Second, tax laws are developed using a specialized legislative process that involves non-partisan experts and produces high-quality legislative materials. Finally, the interpretation of the Internal Revenue Code benefits from the institutional capabilities of the Tax Court, a specialized court of national jurisdiction, which hears the vast majority of tax claims and exercises informal influence on hierarchically superior courts.

To develop my argument, Part II discusses the current environment and is presented in two sections. Section II.A sketches the traditional approaches to statutory interpretation, focusing attention on the ways in which they attempt to uncover congressional intent using unrealistic assumptions about the lawmaking process. Section II.B then surveys what various other scholars, writing in non-tax areas of law, have offered on this subject. Applying that literature, Part III makes the case for a bespoke interpretive approach for the Internal Revenue Code. Part IV concludes.

25. Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 LEWIS & CLARK L. REV. 1565, 1568 (2010) (noting that textualism, intentionalism, and purposivism are all informed by the faithful-agent model). The faithful-agent model assumes that the role of courts, as agents of Congress, is to interpret legal text to reflect congressional intent. Anthony J. Bellia Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1502–04 (2006). This model gives lawmaking deference to Congress consistent with the Constitution's separation of powers. Article I of the Constitution vests lawmaking power in Congress by stating that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. CONST. art. I. Section 8 of Article I gives Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution [its] Powers." U.S. CONST. art. I, § 8. Courts are conferred their judicial power pursuant to Article III, which provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

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II. THE CURRENT ENVIRONMENT

A. Traditional Off-the-Rack Interpretive Theories

The purposivist interpretational approach emphasizes an idealized process by which legislation is deemed to be enacted.[26] Purposivism is rooted in Professors Hart and Sacks' legal process model, which optimistically assumes that legislators are "reasonable persons pursuing reasonable purposes reasonably," and that judges are competent to determine what Congress is driving at.[27] The legal process perspective dawned at a time when commentators envisioned a competent legislature that enacted laws pursuant to a "science of legislation" characterized by "long and patient study by experts, careful consideration by conferences or congresses or associations, press discussions in which public opinion is focussed [sic] upon all important details, and hearings before legislative committees."[28] The legal process model was intended to restrain judges from substituting their own justifications by deferring to the lawmakers who were assumed to be "more competent decision-makers."[29] This approach furthers legislative supremacy by instructing courts to interpret laws to further purposes that motivated Congress to legislate. Although the legal process model is one of judicial deference to lawmakers, it optimistically assumed a legislative process in which lawmakers were competent.[30]

Recognition of a reality far different from the idealized process built into the legal process model caused it, along with purposivism, to fall out of favor. Cynicism replaced optimism as legislation began to be seen as products of political deals devoid of public purposes that

26. *See* Nancy Staudt et al., *Judging Statutes: Interpretative Regimes*, 38 LOY. L.A. L. REV. 1909, 1937–38 (2005).

27. HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169, 1378 (1994). It also assumes that legislators "try[ ] responsibly and in good faith to discharge their constitutional powers and duties." *Id.*

28. WILLIAM D. POPKIN, STATUTES IN COURT 119 (1999) (quoting Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908)).

29. *Id.* at 148. The Legal Process materials can be read to support both a restrained version of purposivism that limits judicial discretion as well as a more unbounded version. For example, Hart and Sacks believe the function of the courts is to "decide what meaning ought to be given to the directions of the statute in the respects relevant to the case before it." HART & SACKS, *supra* note 27, at 1374. According to Hart and Sacks, the way to interpret a statute is to "[d]ecide what purpose ought to be attributed to the statute . . . and then . . . [i]nterpret the words of the statute immediately in question, so as to carry out the purpose as best it can." *Id.* These materials perhaps imply broad judicial discretion that may propose to override text. *See* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 148–65 (2011).

30. POPKIN, *supra* note 28, at 148; *see also* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 435 (1989) ("[T]he legal process reference to 'reasonableness' . . . points to the context of the statute's application rather than to its background and development.").

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judges could confidently uncover.[31] Without a clear purpose underlying legislation for courts to interpret, the pendulum swung towards textualism.[32] In the absence of legislative purpose, textualists prefer to stick closely to the text to reduce the chance of judicial misstep or overreach.[33]

If purposivism is likened to a focus on *process*, the textualist interpretational approach emphasizes the *product*—the statutory text that Congress enacted. The goal for textualists is to unravel what the drafters said, not what they meant, by giving primacy to the words of the statute.[34] Textualists "look at texts and not behind or through them."[35] While textualists do not necessarily favor a hyper-literal reading of statutory provisions, considerations of statutory purpose are to be derived "from the text, not from extrinsic sources."[36] Textualists say the use of legislative history to discern lawmakers' subjective intent is risky and unreliable. Instead, textualists believe that judges should interpret the words that Congress enacted because the text itself best captures the lawmakers' objective intent.[37] Textualists shun the use of legislative history to discern purpose because, at best, it reflects the views of congressional committees, a select sub-group of Congress, or congressional staff.[38]

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31. POPKIN, *supra* note 28, at 152.
32. *Id.* at 169.
33. *See* Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 62 (2015).
34. SCALIA & GARNER, *supra* note 13, at 394.
35. George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 354 (1995) (emphasis omitted) (quoting Frederick Schauer, *The Constitution as Text and Rule*, 29 WM. & MARY L. REV. 41, 46 (1987)).
36. SCALIA & GARNER, *supra* note 13, at 39, 56. The Supreme Court, which is commonly characterized as a textualist court, relied on legislative findings enacted by Congress to find a statute providing a tax credit ambiguous in *King v. Burwell*, 135 S. Ct. 2480, 2492–93 (2015). The legislative findings explained Congress's intent in the Affordable Care Act to achieve universal health-care coverage. *Id.* at 2486–87 (discussing 42 U.S.C. § 18091). One pillar of the ACA was affordability of health care through the use of tax credits and a penalty to ensure compliance with the individual mandate. *Id.* These features would help to ensure a broad risk pool of insured individuals. *Id.* The Court found that the taxpayers' interpretation that the tax credit did not apply to states without state insurance exchanges was inconsistent with Congress's intent. *Id.* at 2493–94. That interpretation "could well push a State's individual insurance market into a death spiral" because the absence of premium tax credits would make health insurance less affordable in those states. *Id.*
37. *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992) (assuming that the ordinary meaning of the statutory language "accurately expresses the legislative purpose"); United States v. Turkette, 452 U.S. 576, 593 (1981) ("The language of the statute . . . [is] the most reliable evidence of [Congress's] intent . . . .").
38. Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 73 (2004) (Scalia, J., dissenting) (explaining that attributing the words in a committee report to the en-

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More recently, textualism and purposivism have blended into a third school of statutory interpretation referred to as "new textualism" or "structural textualism," which is a sort of constrained purposivism.[39] This approach places greater emphasis on structural and contextual associations and infers legislative purpose from the statute's text and structure.[40] Further iterations include more fluid theories that envision judges taking a more pragmatic approach or employing a variety of methodologies.[41]

This discussion is not intended to provide a full elaboration of the interpretive theories. Rather, the more modest goal is to sketch the primary approaches and to highlight that the principal disagreement among them relates to how to reliably determine congressional intent or purpose. Traditional textualists eschew discerning congressional intent or purpose, believing it impossible to do so. New textualists, like their more traditional colleagues, avoid legislative history to discern congressional intent or purpose. But unlike traditional textualists, new textualists do consider purpose in a limited manner, confining themselves to stated purposes in the text of the statute, the text itself, and the structure of the statute. By contrast, certain purposivists try to glean the actual or presumed original purpose of a statute by examining the legislative history while other, more liberal purposivists seek to attribute one or more purposes to a statute beyond even the original purpose or presumed intent.[42]

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tire House or Senate is seen as a "kind of ventriloquism"); Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 131–32 (2009).

39. *See* Christopher J. Walker, *What* King v. Burwell *Means for Statutory Interpretation*, 36 YALE J. ON REG: NOTICE & COMMENT (June 25, 2015), http://yalejreg.com/nc/what-king-v-burwell-means-for-administrative-law-by-chris-walker/ [https://perma.unl.edu/PN3Q-PFXX]; *see also* Taylor, *supra* note 35 at 379–81 (citing several examples of cases employing structural textualism); William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. REV. 621, 660–66 (1990).

40. *See* Eskridge, *supra* note 39, at 624 (emphasizing New Textualism's reliance on "the structure of the statute, interpretations given similar statutory provisions, and canons of statutory construction").

41. *See, e.g.*, Phillip G. Cohen, *Statutory Interpretation Lessons Courtesy of Pilgrim's Pride*, 25 U. MIAMI BUS. L. REV. 1 (2017); Mark Seidenfeld, *A Process Failure Theory of Statutory Interpretation*, 56 WM. & MARY L. REV. 467 (2014); Daniel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N.M. L. REV. 325, 340 (2001) (explaining that courts do not use one exclusive method of interpretation); William N. Eskridge Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) (advocating a practical reasoning model of statutory interpretation that "considers a broad range of textual, historical, and evolutive evidence").

42. William B. Barker, *Statutory Interpretation, Comparative Law, and Economic Theory: Discovering the Grund of Income Taxation*, 40 SAN DIEGO L. REV. 821, 848 (2003) (citing GERALD C. MCCALLUM JR., LEGISLATIVE INTENT AND OTHER ESSAYS ON LAW, POLITICS, AND MORALITY 6 (Marcus G. Singer & Rex Martin eds., 1993)) ("[M]odern theorists distinguish between legislative intent as intended

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Notably, none of these approaches considers the actual process by which laws were enacted when interpreting their meaning. Courts evaluating the meaning of statutory texts historically have not taken into account the processes by which they were enacted.[43] Unlike regulations from administrative agencies, which may receive judicial deference only if the agency follows the prescribed notice and comment procedures in the Administrative Procedure Act, Congress does not have to justify its statutory lawmaking process.[44] While the House and Senate do have procedural rules, they "are not legally enforceable."[45] Additionally, these interpretive doctrines are not tailored to particular areas of law.

The traditional interpretive doctrines may have made more sense as applied to the conventional lawmaking process. Customarily, a bill would be introduced and the committee with jurisdiction over the relevant subject matter would debate the bill language and mark it up.[46] "Under the traditional model, the markup ranks highly as an expression of what Congress wanted to do and why because it contains one of the first intensive discussions of the legislation by members."[47] More recently, however, Congress has not followed this conventional route. The Affordable Care Act (ACA) is a good example.[48] Rather than working from the bill language that was referred to the committees,

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meaning, which asks, 'How did [the author] intend these words to be understood?' and legislative intent as purpose, which asks, 'What did [the author] intend the enactment of the statute to achieve?'").

43. *See* King v. Burwell, 135 S. Ct. 2480, 2506 (2015) (Scalia, J., dissenting) ("It is not our place to judge the quality of the care and deliberation that went into this or any other law. A law enacted by voice vote with no deliberation whatever is fully as binding upon us as one enacted after years of study, months of committee hearings, and weeks of debate."); Marshall Field & Co. v. Clark, 143 U.S. 649, 672 (1892) (stating that a duly enrolled bill is presumed to be authentic and cannot be impeached by extrinsic evidence); *see also* Abbe R. Gluck et al, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1857 n.365 (2015) (quoting Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 199 (1976)) (explaining that courts have largely refused "to consider whether Congress engages in 'due process of lawmaking' . . . in evaluating a statute's legitimacy or even its meaning"). One exception is the Supreme Court's enforcement of lawmaking requirements in Article I, § 7 of the U.S. Constitution. *See* Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers*, 57 ALA. L. REV. 689, 717–20 (2006) (discussing cases where the Supreme Court enforces constitutional lawmaking requirements).

44. *See* Linde, *supra* note 43, at 202–03.

45. POPKIN, *supra* note 28, at 193.

46. John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105 L. LIB. J. 131, 132 (2013).

47. *Id.* at 138.

48. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); Healthcare and Education Reconciliation Act of 2010, & Pub. L. No. 111-152, 124 Stat. 1029. A similar story can be told with respect to the Tax Cut and Jobs Act of 2017. *See infra* notes 198–202 and accompanying text.

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Democratic committee members, who constituted the majority of the committee's membership, met behind closed doors to craft their favored bill text and then the committee Chairman proposed this language as a substitute for the introduced language.[49] As the drafters, the majority members were able to advance their interests by framing the issues as they wanted them. Minority members were at a disadvantage by having to amend the existing framework. While this strategy makes it easier for the majority to get what they want in the bill voted out of committee, it effectively forecloses meaningful committee deliberations.[50] Another deviation from traditional legislative process was the absence of a conference committee to achieve agreement between the House and Senate versions.[51] In the case of the ACA, agreement was achieved through closed-door negotiations between "Democratic congressional leaders and White House officials."[52] Deliberations were also stunted by considering the legislation using the budget reconciliation process, which limits the kinds of amendments that may be made, prohibits filibustering in the Senate, limits Senate debate to twenty hours, and permits passage by a simple majority vote.[53]

B. Customized Interpretive Approaches: A Review of the Literature

Scholars have recognized that ready-made interpretative theories, like ready-made clothing, may be a poor fit. Professors Cass Sunstein and Adrian Vermeule, in *Interpretation and Institutions*, recognized that the appropriate interpretive doctrine for specialized judges may be different than that for generalist judges.[54] Instead of a one-size-fits-all approach to statutory interpretation, they argue that interpretational approach should depend on both institutional capabilities and the consequences that an interpretive approach will have on other people and institutions, what the authors term the "dynamic effects" of interpretational approaches.[55]

Professors Abbe Gluck and Lisa Schultz Bressman uncovered significant variability in the legislative drafting process in an empirical

49. *See* Cannan, *supra* note 46, at 139, 141.
50. *Id.* at 138–43 (discussing the lack of deliberations in House committees considering the ACA).
51. *Id.* at 158–59.
52. *Id.* at 159.
53. *Id.* at 160–66.
54. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 888 n.12 (2003); *see also* Ellen P. Aprill, *The Interpretive Voice*, 38 LOY. L.A. L. REV. 2081 (2005) (noting the distinct interpretive voices of courts and administrative agencies and arguing that the focus on interpretive approach should be broadened beyond what to consider the interpreter).
55. Sunstein & Vermeule, *supra* note 54, at 886.

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study of how Congress enacts legislation.[56] Their survey of 137 congressional staffers revealed unevenness in, among other things, who drafts legal texts as well as the processes by which legal texts become law.[57] They found that "different [congressional] committees deploy different drafting practices," and are staffed with varying levels of sophistication and expertise.[58] They also discovered that rather than a standardized, textbook legislative process that the traditional interpretive approaches assume, unorthodox legislative procedures are increasingly being used.[59] They recommend that interpretative principles should evolve to account for the variety of legislative drafting processes.[60] Gluck and Bressman's findings confirm similar findings from an earlier, more limited study conducted by Professors Victoria Nourse and Jane Schacter.[61] Nourse and Schacter interviewed and surveyed the staff of the Senate Judiciary Committee and found significant variability in the drafting process.[62] They also found that "staffers did not view canons as a central factor in drafting legislation."[63]

Professors Shu-Yi Oei and Leigh Osofsky interviewed thirty-one "current and former government counsels who participated in the tax legislation drafting process over the past four decades."[64] They sought to understand how these participants made drafting choices (such as whether to use an existing defined term or create a new one or whether to craft a broad general rule with exceptions or a more narrowly-tailored rule) when formulating tax laws.[65] They found that drafters actually gave little thought to these issues. Instead, drafters writing tax laws sought to maintain existing language and patterns in the Code, with the result that new provisions are layered onto existing language.[66] The tax counsels interviewed generally seemed unconcerned that the development of the tax law in this "layer-cake fashion"

56. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 735–58 (2014).
57. *Id.* at 735–58.
58. *Id.* at 750.
59. *Id*. at 761–62.
60. *Id.* at 797–800.
61. Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002).
62. *Id.* at 583–94; *see also id.* at 617 ("[I]f the wide variability in drafting that we observed is true of other committees—and the general nature of the factors cited by our staffers makes this likely—it suggests caution in building a theory of interpretation upon any simple picture of the legislative process.").
63. *Id.* at 600.
64. Shu-Yi Oei & Leigh Osofsky, *Constituencies and Control in Statutory Drafting: Interviews with Government Tax Counsels* (Aug. 15, 2018) 24–25, 104 IOWA L. REV. (forthcoming 2019).
65. *Id.* at 24–28.
66. *Id.* at 28, 33–34.

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makes for a complex and convoluted Code because ordinary taxpayers are not their intended audience.[67] Instead, they are drafting for tax experts who presumably are less daunted by the Code's seemingly "impenetrable nature."[68] Seen from the perspective of sophisticated tax professionals, maintaining existing language and patterns helps to promote stability in the tax law and protect settled expectations, which might outweigh additional complexity in the law.[69] Also, that the drafters interviewed focused on substantive content rather than wordsmithing to improve clarity or style makes some superficial sense given this intended audience.[70] The underlying assumption is that tax experts have the capacity to cut through clunky, convoluted provisions to meaningfully translate the substantive content for their clients.[71]

Oei and Osofsky's work has several implications for this Article. First, it confirms the disconnect that exists between statutory interpretive theories and the actual drafting process.[72] It also calls into question idealized assumptions underlying certain canons of construction that do not match reality.[73] Finally, the authors aptly note the challenges that generalist courts face when interpreting a Code made increasingly convoluted by the layer-cake approach to revising it.[74]

Jarrod Shobe advances a theory to explain courts' trend towards textualism by drawing on the idea that courts are customizing their interpretive approach in response to what Congress is actually doing.[75] In particular, he claims that increases to the staffs of the Office of Legislative Counsel (OLC) and the Congressional Research Service (CRS) as well as higher pay for committee staff have led to Congress getting better at saying what it means in statutory text, which leaves courts less room for interpretation.[76] In short, his claim is that courts' recent bent toward textualism is attributable to Congress's improved institutional capability. Despite the limited involvement of the CRS in

67. *Id.* at 57.
68. *Id.* at 31, 54–55, 57.
69. *Id.* at 33–34.
70. *Id.* at 50–51.
71. The authors note that "[i]nterviewees seemed to imagine a frictionless transmission of statutory content to tax experts of boundless capacity, who would in turn transmit such content to the law's ultimate subjects." *Id.* at 55.
72. *Id.* at 50–51.
73. *Id.*
74. *Id.* at 54–56.
75. Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807 (2014).
76. *Id.* at 816–17, 834, 853. Professor Thomas Grey also acknowledges that more precise drafting may restrain judges, leaving them little room to elaborate. *See* Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 485 (2003) (noting that the English courts use a strict textualist approach that is "reinforced by the exact and detailed style of legislative drafting characteristic of the British Parliament").

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tax legislation, his work nonetheless illustrates how institutional competence can inform interpretive doctrine.[77]

Professor Michael Livingston, in a 1991 article, recognized that theories of statutory interpretation "should be more sensitive to the differences between . . . the procedures by which [statutes] are enacted."[78] He proposed that courts rely on legislative history to interpret tax statutes, noting the involvement of experts from the Treasury Department and the nonpartisan staff of the Joint Committee on Taxation (JCT).[79] These experts' involvement in a "highly specialized" and "routinized" tax legislative process make courts' reliance on tax legislative history less objectionable than other areas of the law.[80] Professor Livingston distinguished between legislative history that explains the provision at issue and legislative history that provides detailed guidance.[81] While tax experts are involved in writing both types of legislative history, he recommended less deference for the latter, fearing detailed guidance in the form of "pseudo-regulations" is better left to the Internal Revenue Service and the Treasury Department rather than Congress.[82]

Like Professor Livingston, Professor Clinton Wallace recognizes the unique role of the JCT in the tax legislative process.[83] He proposes a new interpretive canon that he terms the "JCT Canon."[84] Courts applying the JCT Canon would interpret ambiguous tax statutes "in

77. Oei & Osofsky, *supra* note 64, at 36 ("The two Legislative Counsel offices hold primary drafting responsibility for the tax law, as they do with other areas of the law."); Clinton G. Wallace, *Congressional Control of Tax Rulemaking*, 71 TAX L. REV. 179, 202 (2017). For a discussion of the role of the OLC in drafting tax legislation, see *infra* note 177.

78. *See* Michael A. Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819, 823 (1991) [hereinafter *Interpretation of Tax Statutes*]. In 1994, Professor Livingston analyzed courts' use of post-enactment tax legislative history. Michael A. Livingston, *What's Blue and White and Not Quite as Good as a Committee Report: General Explanations and the Role of "Subsequent" Tax Legislative History*, 11 AM. J. TAX POL'Y 91 (1994).

79. *Interpretation of Tax Statutes*, *supra* note 78, at 832–39, 842.

80. *Id.* at 826, 837.

81. *Id.* at 819.

82. *Id.* at 874–82; *cf.* Bradford L. Ferguson, Frederic W. Hickman & Donald C. Lubick, *Reexamining the Role of Tax Legislative History in Light of the Changing Realities of the Process*, 67 TAXES 804 (1989). Ferguson et al. assert that "explicit and specific" tax legislative history in the form of committee reports "should be considered as having virtual parity with the statute itself" due to the unique characteristics of the Internal Revenue Code and the tax legislative process. *Id.* at 823.

83. Wallace, *supra* note 77, at 196–203.

84. *Id.* at 225.

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the same manner as the JCT did in producing revenue estimates and other analysis and explanations for the statute."[85]

III. URGING A TAX-SPECIFIC INTERPRETIVE DOCTRINE

This Part explores the suitability of a specific interpretive doctrine for the Internal Revenue Code, arguably the mother of all statutory regimes.[86] Tax seems to be especially well-suited to a bespoke statutory interpretive approach for several reasons. First, courts have at their disposal very mature tax doctrine and specialized interpretive tools, including tax-specific substantive canons and common law anti-abuse doctrines. Second, tax laws are developed using a specialized legislative process, which involves non-partisan experts and produces high-quality legislative materials. Finally, the interpretation of the Internal Revenue Code benefits from the institutional capabilities of the Tax Court and downward deference given to it by hierarchically superior courts. Each of these features is discussed in detail below.

A. Tax Is a Mature Area of Law

While the modern-day federal income tax commonly is traced back to passage of the Constitution's Sixteenth Amendment in 1913, its roots reach back even further.[87] Congress created the position of Commissioner of Internal Revenue in 1862 shortly after the first income tax was enacted in 1861 to help fund the Civil War.[88] The forerunner of the United States Tax Court, the Board of Tax Appeals, was launched in 1924 and is one of the oldest specialized courts established by Congress.[89] The first committee that Congress created was

85. *Id.* 2 U.S.C. § 601(f) assigns to the JCT the job of estimating revenues to aid Congress in tax lawmaking. Abbe Gluck has proposed a CBO Canon pursuant to which "ambiguous statutes should be interpreted in accordance with the reading of the statute adopted by the Congressional Budget Office (CBO) in calculating its budgetary impact." Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177 (2017).

86. In his 2013 article, journalist George Will described the Internal Revenue Code as having four million words and requiring taxpayers to spend 6.1 billion hours annually to comply with it. George F. Will, *Taming the Tax Code Beast*, WASH. POST (Aug. 9, 2013), https://www.washingtonpost.com/opinions/george-will-taming-the-tax-code-beast/2013/08/09/230783ce-011b-11e3-9a3e-916de805f65d_story.html?utm_term=.4f4e4261341e [https://perma.unl.edu/AN7M-MVNS]. In addition to the often-touted complexity of the Code, it has a very long shelf life. *See infra* notes 87–91 and accompanying text.

87. *See* Diane L. Fahey, *The Movement to Destroy the Income Tax and the IRS: Who Is Doing It and How They Are Succeeding*, 15 FLA. TAX REV. 157, 173–82 (2014).

88. *Brief History of the IRS*, IRS.GOV (July 25, 2018), https://www.irs.gov/about-irs/brief-history-of-irs [https://perma.unl.edu/58W9-EE3J].

89. Karla W. Simon, *Constitutional Implications of the Tax Legislative Process*, 10 AM. J. TAX POL'Y 235, 237–38 (1992). Congress initially established the Board of

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the Joint Committee on Taxation, which was created in 1926.[90] This more than 100-year lifespan of the federal income tax has resulted in a rich body of law and several interpretive tools, including tax-specific substantive canons, common law anti-abuse doctrines, the Whole-Code structural canon, and "tax logic."[91]

1. Tax-Specific Substantive Canons

Canons are nothing more than constructs developed by courts to interpret legal text.[92] They are merely guidelines, not rules of law that must be followed in every case.[93] As a result, judges have been accused of relying on interpretive canons after-the-fact "as the proverbial intoxicated man relies on a lamppost upon stumbling out of a pub—for support, not illumination."[94]

Canons may be broadly categorized as either structural or substantive.[95] Structural canons rely on a text's semantics, syntax, and context.[96] Substantive canons, by contrast, are used to interpret legal text in ways that are presumed to advance substantive public values

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Tax Appeals as an independent agency within the executive branch. HAROLD DUBROFF & BRANT J. HELLWIG, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS 117 (2d ed. 2014). In 1969, Congress established it as a legislative court pursuant to Article I of the U.S. Constitution and renamed it the United States Tax Court. *Id.* at 175; I.R.C. § 7441.

90. Simon, *supra* note 89, at 237.

91. Lawrence Zelenak, *Thinking About Nonliteral Interpretations of the Internal Revenue Code*, 64 N.C. L. REV. 623, 651–52 (1986) (discussing "tax logic" of the U.S. Supreme Court's decision in *Commissioner v. Tufts*, which held that the full amount of a non-recourse mortgage should be included in the debtor's amount realized when the property is disposed of even if the debt exceeds the property's fair market value).

92. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 117 (2010). Canons themselves are assumptions that may not represent the actual process by which legislation is enacted. Gluck & Bressman, *Part I*, *supra* note 22, at 949–60.

93. Thomas A. Bishop, *The Death and Reincarnation of Plain Meaning in Connecticut: A Case Study*, 41 CONN. L. REV. 825, 848–49 (2009) (explaining that "[i]n most cases of statutory interpretation, . . . the analytical route taken by the court is at most dicta and not part of its holding," and therefore not subject to stare decisis).

94. *See* Peter A. Lowy & Juan F. Vasquez Jr., *Interpreting Tax Statutes: When Are Statutory Presumptions Justified?*, 4 HOUS. BUS. & TAX L.J. 389, 390 (2004).

95. Commentators may assign different labels for conceptually similar categories. *See*, *e.g.*, Barrett, *supra* note 92, at 117 (using the terms "linguistic" and "substantive"); *see id.* at 117 n.27 for additional examples. Courts more frequently rely on structural canons as they become increasingly textualist because many canons rely on textual semantics and syntax. Gluck, *supra* note 33, at 73 ("Every major recent statutory opinion, from every Justice on the Court, has relied heavily on interpretive canons to decide cases; their rise derives from textualism's impact on the tools—text and presumptions, not legislative history and purpose—that virtually all judges now use to interpret statutes.").

96. These categories are from SCALIA & GARNER, *supra* note 13, at xii–xiii.

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or policies consistent with Congress's intent.[97] Importantly, canons, whether structural or substantive, are judicial constructs that are external to the statute.[98]

The same kinds of statutory interpretative canons used in nontax cases apply to tax cases.[99] Additionally, courts have developed canons that apply specifically to tax statutes. The creation of doctrine-specific canons is not unique to tax. For example, the rule of lenity is a common law doctrine that results in a lenient interpretation of ambiguous criminal statutes.[100] Under the rule of lenity, a criminal defendant should be convicted only if the statute *clearly* bars the defendant's conduct.[101] Thus, conviction is not warranted even if the statute reasonably can be read to include the defendant's conduct.[102] By reading the statute narrowly, judges applying the rule of lenity are exercising restraint in favor of criminal defendants.

A rule of lenity exists in civil immigration law and also in civil bankruptcy law, meaning that ambiguous immigration and bankruptcy statutes are construed in favor of non-citizens and debtors, respectively.[103] Unlike the rule of lenity in criminal law, which is rooted in the Constitution's due process protections and separation of powers, the source of lenity rules that apply in bankruptcy and immigration are likely rooted in presumed congressional intent.[104] For example, construing bankruptcy provisions in favor of a debtor furthers the goal of giving debtors a "fresh start."[105]

Taxpayers would prefer a narrow, restrictive reading of Code provisions that impose tax—a rule of tax lenity of sorts—and a broad, expansive reading of Code provisions that permit deductions, exclusions, or credits. Courts have developed tax-specific canons that work against taxpayers on both counts by interpreting Code provisions that

97. Barrett, *supra* note 92, at 117.

98. *See id.*

99. BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES & GIFTS 4.2.1 (3d ed. 1999) ("In deciding federal tax cases, the courts also employ the same generalized maxims of statutory construction—usually crouched in Latin—that are regularly encountered in other areas of the law . . . .").

100. *See* WILLIAM N. ESKRIDGE JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1207 (2014); Note, *Justifying the Chevron Doctrine: Insights from the Rule of Lenity*, 123 HARV. L. REV. 2043, 2044 (2010).

101. Note, *supra* note 100.

102. *See id.*

103. ESKRIDGE ET AL., *supra* note 100, at 1212, 1214.

104. Note, *supra* note 100, at 2055 (describing justifications for criminal rule of lenity).

105. ESKRIDGE ET AL, *supra* note 100, at 1212.

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impose tax broadly and interpreting provisions authorizing deductions, exclusions, and credits narrowly.[106]

a. Income

In the early years of the income tax, courts recognized a rule of tax lenity pursuant to which ambiguous taxing statutes were "construed most strongly against the government, and in favor of the citizen."[107] The justification for such a presumption may have been based on the notion that a narrow reading of taxing statutes best protected the constitutional power that only Congress has to impose taxes. Read in that manner, the canon constrained courts that might otherwise have sought to tailor tax legislation in ways inconsistent with Congress's will.[108] Judicial expansion of legislation that taxed income was particularly problematic because it increased government power:

> The classic nineteenth century view of taxation was that public taxation law deprived the individual of property due to the subjugation of the individual's will to that of the sovereign. Taxation was a necessary evil; thus, the obligation to pay tax had to be mandated in clear and unequivocal language. . . . The prevailing attitude in the nineteenth century was that the property deprivation imposed by income tax law was analogous to the deprivation of life or liberty imposed by criminal law.[109]

While modern courts occasionally rely on this pro-taxpayer presumption,[110] it has fallen out of favor.[111] The modern interpretation

106. *See infra* notes 134–145 and accompanying text. Of course, not all Code provisions are neatly categorized as income, deduction, exemption, or credit provisions.

107. Gould v. Gould, 245 U.S. 151, 153 (1917). The Court in *Gould v. Gould* held that alimony payments did not constitute income. Congress overruled the Court's decision in 1942 by enacting section 71 of the Code. *See* United States v. Merriam, 263 U.S. 179, 187–88 (1923) ("[I]n statutes levying taxes the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer.").

108. *See* United States v. Wigglesworth, 28 F. Cas. 595, 597 (Cir. Ct. D. Mass. 1842) ("In every case . . . of doubt, [taxing] statutes are construed most strongly against the government, and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import. Revenue statutes are in no just sense either remedial laws or laws founded upon any permanent public policy, and, therefore, are not to be liberally construed."); *see also* NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 66.1 (7th ed. 2017) and cases cited therein ("Courts have suggested that, since there can be no taxation except as provided for by legislative enactment, strict construction is a way to assure that no taxes be exacted except by legislative authority.").

109. Barker, *supra* note 42, at 827. Refer to Barker's article for a nice summary of the Court's evolving jurisprudence regarding the interpretation of the term "income."

110. *See*, *e.g.*, Security Bank Minnesota v. Comm'r, 994 F.2d 432, 441 (8th Cir. 1993). Justice Thomas gave a nod to the canon in 2001 in *United Dominion Industries, Inc. v. United States*, 532 U.S. 822, 839 (2001) (Thomas, J., concurring) ("[I]n

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views the concept of income expansively.[112] This turnabout occurred despite the fact that the statutory text defining income has remained virtually unchanged since 1913. Then and now, Congress has defined the term income broadly to include income from any source.[113]

As Professor Popkin has noted: "[T]he increasing importance of revenue in the modern state undermines the canon that favored a narrow interpretation of statutes imposing taxes."[114] Although Popkin was not referring to any particular event, it seems that several events might have been responsible for the demise of the rule of tax lenity, including the Great Depression and the First and Second World Wars.[115] By the end of World War II, the Supreme Court noted that the term income "is described in sweeping terms and should be

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cases . . . in which the complex statutory and regulatory scheme lends itself to any number of interpretations, we should be inclined to rely on the traditional canon that construes revenue-raising laws against their drafter.").

111. JASPER L. CUMMINGS JR., THE SUPREME COURT'S FEDERAL TAX JURISPRUDENCE: AN ANALYSIS OF FACT FINDING METHODS AND STATUTORY INTERPRETATION FROM THE COURT'S TAX OPINIONS, 1801–PRESENT 188 (2d ed. 2016) (providing that "the rule of strict construction against the government has waned . . . ." and noting a "broader overall regime of mostly anti-taxpayer tilts in the tax law"); *see also id.* at 71 (explaining that federal courts tend to "construe income broadly and deductions narrowly"); SCALIA & GARNER, *supra* note 13, at 299–300 (noting that although "[f]or many years, the Supreme Court of the United States" applied a rule of tax lenity, "it unfortunately can no longer be said to enjoy universal approval"). The Supreme Court has cited to *Gould v. Gould*, the genesis of the rule of tax lenity, only 14 times, the last in 1940. The Tax Court has cited to *Gould* in 23 decisions, the last in 2013. The 2013 case justified applying a rule of lenity because a tax penalty provision was involved. Mohamed v. Comm'r, T.C. Memo. 2013-255 (T.C. 2013) (interpreting I.R.C. § 6651(f)).

112. *See* Comm'r v. Glenshaw Glass Co., 348 U.S. 426 (1955). The Court in *Glenshaw Glass* was interpreting section 22(a) of the Internal Revenue Code of 1939, which defined gross income to include "gains, profits, and income . . . of whatever kind." *Id.* at 429. In holding that lawsuit settlement proceeds were includable in gross income, the Court noted that it "has given a liberal construction to this broad phraseology in recognition of the intention of Congress to tax all gains except those specifically exempted." *Id.* at 430.

113. *Compare* section 22(a) of the Income Tax Act of 1913, Oct. 3, 1913, ch. 16, § II(B), 38 Stat. 114, 167 ("[N]et income . . . shall include . . . income derived from any source whatever . . . .") *with* § 61(a) of Internal Revenue Code of 1986 ("[G]ross income means all income from whatever source derived . . . ."). This broad language mirrors the text of the Sixteenth Amendment, which gives Congress "power to lay and collect taxes on incomes, from whatever source derived." U.S. CONST. amend. XVI. The Court has noted that the language Congress used in the Code to define gross income "indicates the purpose of Congress to use the full measure of its taxing power." Helvering v. Clifford, 309 U.S. 331, 334 (1940).

114. POPKIN, *supra* note 28, at 201.

115. Michael Schuyler, *A Short History of Government Taxing and Spending in the United States*, TAX FOUND. 5–6 (Feb. 2014), https://taxfoundation.org/short-history-government-taxing-and-spending-united-states/ [https://perma.unl.edu/ND5B-GPRP] (noting increases in tax revenues and government expenditures during the Great Depression and major wars, including both World Wars). Schuyler notes that federal spending increased ten-fold during World War I and

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broadly construed in accordance with an obvious purpose to tax income comprehensively."[116] By the mid-1950s, the law had fully evolved.[117]

b. Deductions, Exemptions, and Credits

Courts have consistently interpreted statutes authorizing tax deductions, credits, or exemptions narrowly.[118] The common thread running through all three is that, to the extent applicable, each provides a benefit in one form or another to the taxpayer. Both deductions and exemptions lower a taxpayer's taxable income on which tax liability is computed whereas credits reduce the amount of tax owed.[119]

A narrow interpretation of deduction, exemption, and credit provisions helps Congress exercise its broad taxing power. The Supreme Court in *New Colonial Ice Co. v. Helvering* justified the presumption against deductions because Congress has the power to tax gross in-

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then again in World War II and that revenues and expenditures "have been permanently higher since World War II." *Id.* at 6.

116. Comm'r v. Jacobson, 336 U.S. 28, 49 (1949).

117. Hunley v. Comm'r, T.C. Memo. 1966-66 (T.C. 1966) (recognizing that *Commissioner v. Glenshaw Glass*, 348 U.S. 426 (1955) "represent[s] the final step in the evolution of an all-inclusive concept of the term 'income' by the Supreme Court"). A rule of tax lenity of sorts continues to exist with respect to Code provisions that impose a penalty. *See* United States v. Thompson/Center Arms Co., 504 U.S. 505 (1992) (applying a rule of lenity to interpret a Code provision that imposes a $200 tax on the "maker" of a firearm for each firearm made where failure to comply could result in imprisonment of not less than 10 years); Comm'r v. Acker, 361 U.S. 87, 91 (1959) (holding that tax penalty provisions "are to be strictly construed" such that a taxpayer cannot be "subjected to a penalty unless the words of the statute plainly impose it) (citations omitted); *see also* ESKRIDGE ET AL., *supra* note 100, at 1207 ("Rule of lenity may apply to civil sanction that is punitive or when underlying liability is criminal."). But as Eskridge notes, "The Court applies this canon very unevenly." *Id.* at 1207 n.141.

118. *E.g.*, Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 59–60 (2011) (providing that "exemptions from taxation are to be construed narrowly") (quoting Bingler v. Johnson, 394 U.S. 741, 752 (1969)). Justice Scalia and Bryan Garner call this presumption a "false notion." *See* SCALIA & GARNER, *supra* note 13, at 359–63. They assert that statutes providing tax exemptions are not subject to special treatment. Instead of a narrow reading, they should be given their "fair," or reasonable meaning just like any other statutory provision. *Id.* at 362. "Fair reading" is the normative approach the authors recommend. *Id.* at 33; *see generally* Lowy & Vasquez Jr., *supra* note 94 (finding a presumption that tax statutes permitting deductions are to be interpreted narrowly to be unjustified); Erwin N. Griswold, *An Argument Against the Doctrine that Deductions Should be Narrowly Construed as a Matter of Legislative Grace*, 56 HARV. L. REV. 1142 (1943).

119. *See* BORIS I. BITTKER, MARTIN J. MCMAHON & LAWRENCE A. ZELENAK, FEDERAL INCOME TAXATION OF INDIVIDUALS ¶ 2.01, ¶ 20.01[1] (3d ed. 2002) (describing the calculation of taxable income and describing and distinguishing credits from deductions).

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come—not just gross income net of deductions.[120] Understood in this manner, deductions exist solely by "legislative grace."[121] Thus, "a taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms."[122] Within a short period after deciding *New Colonial Ice*, the Court referred to the presumption as a "now familiar rule"[123] and a "strict rule of construction."[124] More recently, the Court reiterated this broad presumption: "[T]his Court has noted the 'familiar rule' that 'an income tax deduction is a matter of legislative grace and that the burden of clearly showing the right to the claimed deduction is on the taxpayer.'"[125] Justice Blackmun, writing for the Court, justified the presumption by invoking a general interpretive canon that exceptions from a general rule must be narrowly construed.[126] In holding that a target corporation's takeover expenses were not deductible as "ordinary and necessary" trade or business expenses pursuant to section 162(a) but instead must be capitalized pursuant to section 263(a)(1), the Court identified capitalization as the general rule and the provision permitting deductibility to be the exception.[127] The Court's "standard approach" is to "read the exception narrowly in order to preserve the primary operation of the provision."[128]

As a practical matter, a narrow construction of deductions, credits, and exemptions inures to the benefit of the federal fisc because denying deductions or exemptions increases a taxpayer's taxable income on which tax liability is computed, and a denial of credits increases the amount of tax owed.[129] It may be that courts simply intend to reinforce the traditional justification for taxes, which is to raise revenue to fund public goods and services.[130]

120. New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934).
121. *Id.*
122. *Id.*
123. Interstate Transit Lines v. Comm'r, 319 U.S. 590, 593 (1943).
124. Equitable Life Assurance Soc. of U.S. v. Comm'r, 321 U.S. 560, 564 (1944) (citing *New Colonial Ice Co.*, 292 U.S. 435).
125. INDOPCO, Inc. v. Comm'r, 503 U.S. 79, 84 (1992) (quoting *Interstate Transit Lines*, 319 U.S. at 593) (citing Deputy v. Du Pont, 308 U.S. 488 (1940); *New Colonial Ice*, 292 U.S. 435).
126. *INDOPCO*, 503 U.S. at 84.
127. *Id.*
128. Comm'r v. Clark, 489 U.S. 726, 739 (1989).
129. Comm'r v. Jacobson, 336 U.S. 28, 49 (1949) (explaining that tax exemptions "should be construed with restraint" to further the "obvious purpose to tax income comprehensively").
130. *See* Barker, *supra* note 42, at 822 ("Income taxation is the primary way democratic societies allocate the financial burden of government to its people."); James W. Colliton, *Standards, Rules, and the Decline of the Courts in the Law of Taxation*, 99 DICK. L. REV. 265, 324 n.302 (1995) ("[E]ven though our basic and secondary values form much of the tax law, the basic purpose of the tax law remains the collection of revenue."). Relying on revenue raising as the purpose for tax law

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2. Common Law Anti-Abuse Doctrines

In addition to tax-specific substantive canons, courts have developed doctrines to fight abusive tax transactions. Most typically, these anti-abuse doctrines either (1) add non-statutory requirements to a Code provision or (2) recharacterize or disregard the form of a transaction to match its substance. Examples of the first type include the business purpose doctrine and the economic substance doctrine.[131] Examples that fall within the second category include the substance-over-form doctrine and the step-transaction doctrine.[132] This Article need not belabor the subject of common-law anti-abuse doctrines as much has been written elsewhere.[133] What is important to emphasize is their effect, which is to disregard transactions even though they comply with the Code by claiming that what the taxpayer did is not what the statute means irrespective of what the statute seems to

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is over simplified. While Congress historically enacted tax legislation to raise revenue, for example, to fund the war effort or to reduce deficits, it has also been known to use tax reduction to stimulate the economy. ROBERT M. HOWARD, GETTING A POOR RETURN: COURTS, JUSTICE, AND TAXES 9–10 (2009). Additionally, Congress uses the Code to carry out various government programs and to incentivize taxpayer behavior. John M. Samuels, *The Staff of the Joint Committee on Taxation—From the Outside Looking In* 9 (2016), https://uschs.org/wp-content/uploads/2016/02/USCHS-History-Role-Joint-Committee-Taxation-Samuels.pdf [https://perma.unl.edu/5FSM-YC4T] ("For example, today the tax system plays an integral part in the design and delivery of healthcare, welfare and child care benefits to the vast majority of Americans; and in how the Nation's major housing, retirement, savings, educational, environmental, charitable and energy programs are designed, funded and implemented."); *see also* Robert Thornton Smith, *Interpreting the Internal Revenue Code: A Tax Jurisprudence*, 72 TAXES 527, 552 (1994) (explaining that reliance on the purpose of the tax law of raising revenue is an insufficient backstop without consideration of principles such as fairness and equality). According to Smith, "revenue raising provisions nonetheless generally are (should be) designed to do so in ways that are grounded on principled convictions about fairness and appropriateness to the tax system." *Id.* at 555.

131. The economic substance doctrine has since been codified in section 7701(o).

132. Amy Lee Rosen, *Tax Court Ruling Could Widen Divide Over Substance Doctrine*, LAW360 (Mar. 23, 2018), https://www.law360.com/articles/1025541/tax-court-ruling-could-widen-divide-over-substance-doctrine (quoting Stuart Bassin as stating: "The simple version of substance over form is that if it looks like a duck, quacks like a duck and walks like a duck, it's a duck, even if you call it a horse").

133. *See*, *e.g.*, Jonathan D. Grossberg, *Attacking Tax Shelters: Galloping Toward a Better Step Transaction Doctrine*, 78 LA. L. REV. 369 (2018); Joseph Bankman, *The Economic Substance Doctrine*, 74 S. CAL. L. REV. 5 (2000); Noel B. Cunningham & James R. Repetti, *Textualism and Tax Shelters*, 24 VA. TAX REV. 1 (2004); Allen D. Madison, *The Tension Between Textualism and Substance-Over-Form Doctrines in Tax Law*, 43 SANTA CLARA L. REV. 699 (2003); Daniel M. Schneider, *Use of Judicial Doctrines in Federal Tax Cases Decided by Trial Courts, 1993–2006: A Quantitative Assessment*, 57 CLEV. ST. L. REV. 35 (2009); Robert Thornton Smith, *Business Purpose: The Assault Upon the Citadel*, 53 TAX LAW. 1 (1999).

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say.[134] As Professor Jay Soled describes it, these judicially created anti-abuse doctrines "operate as the courts' fingers to plug holes in the fiscal dike left unintentionally open by the legislature or by the literal words of the Code."[135] When courts deploy these interpretive doctrines, they impose a gloss over the words of tax statutes presumably to effectuate Congress's intent.[136]

It may seem peculiar that extra-statutory doctrines exist to interpret the meaning of the Internal Revenue Code, which is "highly reticulated" and uses "lots of language, with nearly mathematical precision."[137] But the Joint Committee on Taxation provides a practical explanation:

> A strictly rule-based tax system cannot efficiently prescribe the appropriate outcome of every conceivable transaction that might be devised and is, as a result, incapable of preventing all unintended consequences. Thus, many courts have long recognized the need to supplement tax rules with anti-tax-avoidance standards . . . in order to assure the Congressional purpose is achieved.[138]

Because the anti-abuse doctrines are crafted specifically for use in tax cases, they could be labeled "tax-specific canons" and discussed along with the other tax-specific canons described earlier in this Article.[139] However, a unique category seems appropriate for the anti-abuse doctrines because, unlike canons, courts deploy them as more

134. Joseph Isenbergh, *Musings on Form and Substance in Taxation*, 49 U. CHI. L. REV. 859, 865 (1982) ("When someone calls a dog a cow and then seeks a subsidy provided by statute for cows, the obvious response is that this is not what the statute means. It may also happen that rich people who would not otherwise have cows buy them to gain cow subsidies. Here, when people say . . . that this is not what the statute means, they are in fact saying something quite different.").

135. Jay A. Soled, *Use of Judicial Doctrines in Resolving Transfer Pricing Controversies*, 42 B.C. L. REV. 587, 590 (2001). Professor Halperin refers to these gaps as "unintentional glitches." Daniel Halperin, *Are Anti-Abuse Rules Appropriate?*, 48 TAX LAW. 807, 807 (1995).

136. *See* Summa Holdings, Inc. v. Comm'r, 848 F.3d 779, 784 (6th Cir. 2017) ("Both sides to this dispute . . . agree that these transactions, as consummated, complied in full with the Internal Revenue Code. If this case dealt with any other title of the United States Code, we would stop there.").

137. *Id.* at 789; *see also* United States v. Brockamp, 519 U.S. 347 (1997) (finding "highly detailed technical manner" of section 6511, which sets forth limitations period for filing refund claims, precludes equitable tolling); Gregory v. Helvering, 27 B.T.A. 223, 225 (1932), *rev'd*, 69 F.2d 809 (2d Cir. 1934) ("A statute so meticulously drafted must be interpreted as a literal expression of the taxing policy, and leaves only the small interstices for judicial consideration.").

138. JOINT COMM. ON TAXATION, GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 111TH CONGRESS 378 (2011) (discussing codification of the economic substance doctrine).

139. *See* Santander Holdings USA, Inc. v. United States, 844 F.3d 15, 21 (3d Cir. 2016) ("[C]ommon law tax doctrines can . . . perhaps best be thought of as a tool of statutory interpretation."). See *supra* subsection III.A.1 for discussion of tax-specific canons.

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than mere tools of statutory interpretation.[140] Consider *Klamath Strategic Investment Fund v. United States*.[141] The specific issue in *Klamath* was whether a loan premium was a liability within the meaning of section 752(b). Section 752(b) provides that "[a]ny . . . decrease in a partner's individual liabilities by reason of the assumption by the partnership of such individual liabilities, shall be considered as a distribution of money to the partner by the partnership."[142] Distributions of money reduce the basis of the partner's partnership interest.[143] Section 752(b) is not a provision that provides a deduction nor does it alone impose a tax. It simply describes how a partnership's assumption of a partner's liabilities effects the partner's tax basis in its partnership interest. Consequently, resort to other tax-specific canons was of no use. So how should the provision be construed? The issue was not answered by reference to the statute, which did not define "liability."

The taxpayer in *Klamath* capitalized a new partnership with cash as well as loan proceeds and assigned the loan obligations to the partnership, but—relying on agency guidance—did not treat the loan premium as a liability.[144] The partnership purchased foreign currencies and then liquidated shortly thereafter.[145] The taxpayer took a basis in the partnership property—namely the foreign currencies—received in the liquidation equal to its basis in its partnership interest.[146] By maintaining that there was no reduction to outside basis for the loan premium, the taxpayer claimed a tax loss upon the sale of the foreign currencies.[147] The taxpayer advocated a narrow reading of an ambiguous statutory provision—one that did not define the term "liability" to include the loan premium. The Fifth Circuit did not decide whether the term "liability" included the loan premium at issue. It avoided the statutory interpretation issue entirely. Instead, it altogether disregarded the loan transaction, finding it lacked economic substance, and thus disallowed the loss that the taxpayer claimed.[148] Used in this

140. *See* Mazzei v. Comm'r, 150 T.C. No. 7, 2018 WL 1168766, at *34 (Mar. 5, 2018) (Holmes, J., dissenting) (accusing the majority of "abandon[ing] general principles of statutory construction in favor of judge-made doctrines that undermine or ignore the text of the Code to recast transactions to avoid 'abuse'").

141. Klamath Strategic Inv. Fund *ex rel.* St. Croix Ventures v. United States, 568 F.3d 537, 542–43 (5th Cir. 2009).

142. I.R.C. § 752(b).

143. I.R.C. § 733(1).

144. *Klamath*, 568 F.3d at 541. The loan premium was essentially an early prepayment penalty because the bank lent the funds at an above-market interest rate. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

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manner, the economic substance doctrine was something wholly different than a tool of statutory interpretation.

Unlike canons of statutory interpretation, which are generally accepted by courts, the judicial anti-abuse doctrines are controversial. One concern is that application of the doctrines is nothing more than results-oriented unprincipled decision making and judicial overreach. As Judge McKee said in his dissent in *ACM Partnership v. Commissioner*:

> I can't help but suspect that the majority's conclusion . . . is, in its essence, something akin to a "smell test." If the scheme in question smells bad, the intent to avoid taxes defines the result as we do not want the taxpayer to "put one over." . . . The fact that ACM may have "put one over" in crafting these transactions ought not to influence our inquiry. Our inquiry is cerebral, not visceral. To the extent that the Commissioner is offended by these transactions he should address Congress and/or the rulemaking process, and not the courts.[149]

In contrast to general interpretive and tax-specific canons, which the U.S. Supreme Court routinely relies on, some speculate that the anti-abuse doctrines are unlikely to survive Supreme Court review due to the textualist approach to interpretation that seems to be in vogue there currently.[150] Given the opportunity, the Court may disregard these doctrines either because (1) the lower courts have spawned them by misconstruing and misapplying Supreme Court precedent or (2) as interpretive tools, they would not be entitled to stare decisis.[151]

The evolution of the business purpose doctrine demonstrates the proliferation of these anti-abuse doctrines in the lower courts. The business purpose doctrine disallows claimed tax benefits from a transaction if the transaction is not motivated by a sufficient business purpose other than tax savings.[152] The United States Supreme Court's *Gregory v. Helvering* decision in 1935 is credited with establishing the business purpose doctrine.[153] Mrs. Gregory was the sole shareholder of United Mortgage Corporation (UMC), which owned appreciated

149. ACM P'ship v. Comm'r, 157 F.3d 231, 265 (3d Cir. 1998) (McKee, J., dissenting).

150. Madison, *supra* note 133, at 739; *see also* Mazzei v. Comm'r, 150 T.C. No. 7, 2018 WL 1168766, at *34 (Mar. 5, 2018) (Holmes, J., dissenting) (ignoring statutory text to prevent consequences the court believes are unintended is "untenable" given the "great textualist counterrevolution of the last few decades.").

151. CUMMINGS, *supra* note 111, at 212–13. The last time the U.S. Supreme Court heard a case involving a tax anti-abuse doctrine was in 1978 in *Frank Lyon Co. v. United States*, 435 U.S. 561 (1978). It may be that the government is strategic about which cases to appeal to avoid a negative ruling from the Supreme Court. N.Y. State Bar Ass'n Tax Sec., *Report on the Proposed Partnership Anti-Abuse Rule*, 64 TAX NOTES 233, 234–35 (1994).

152. Gregory v. Helvering, 293 U.S. 465, 469 (1935) (providing that courts disallow purported tax benefits deriving from a transaction that has "no business or corporate purpose" but instead is "a mere device . . . [used] as a disguise for concealing its real character").

153. *Id.* at 465.

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stock in another corporation, Monitor Securities Corporation (MSC).[154] She wished to sell the MSC stock and obtain the proceeds without receiving a dividend from UMC, which would have been taxed at higher rates.[155] If UMC sold the shares and distributed the proceeds to her, the corporation would incur tax liability and Mrs. Gregory would have had to recognize ordinary income as a result of the distribution. She also would have had ordinary income had UMC distributed the MSC shares to her. To get capital gain treatment, the parties pre-wired a transaction that in form was a tax-free reorganization whereby UMC transferred the MSC shares to a new corporation, Averill Corporation (Averill), for Averill shares that were distributed to Mrs. Gregory.[156] Three days later, Mrs. Gregory exchanged the Averill shares she received in the purported reorganization for the MSC shares by liquidating Averill.[157] She recognized capital gain in the liquidation, but no further gain on the sale of the MSC shares.[158]

The Court disregarded the purported reorganization, finding the transaction was a "conveyance masquerading as a corporate reorganization."[159] The reorganization statute referred to a corporation's transfer of assets to another corporation "in pursuance of a plan of reorganization."[160] Because Averill was formed to temporarily hold the MSC stock, and then was liquidated, the Court found there was "no business or corporate purpose" for the transactions other than to transfer the MSC shares to Mrs. Gregory.[161] Although the Court derived a business purpose requirement from the text of the reorganization statute at issue, lower courts have relied on *Gregory* to impose a business purpose requirement on the Code more generally instead of limiting the Court's holding to similar fact situations.[162]

A similar phenomenon occurred with the Supreme Court's decision in *Ilfeld v. Commissioner*, in which a consolidated group deducted losses incurred on the disposition of subsidiary stock after the losses had already reduced the parent corporation's taxable income.[163] The Court disallowed the second loss deduction "[i]n the absence of a provision . . . that fairly may be read to authorize it."[164] The *Ilfeld* decision

154. *Id.* at 467.
155. Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934).
156. *Gregory*, 293 U.S. at 467.
157. *Id.*
158. *Id.*
159. *Id.* at 470.
160. *Id.* at 469.
161. *Id.*
162. *See* CUMMINGS, *supra* note 111, at 93–94.
163. Charles Ilfeld Co. v. Hernandez, 292 U.S. 62 (1934). This result would no longer be possible because the investment adjustment rules require a decrease to the parent's tax basis in its subsidiary stock for the subsidiary's taxable loss. Treas. Reg. § 1.1502-32(b)(2)(i) (2013).
164. *Ilfeld*, 292 U.S. at 66.

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reasonably can be read to have created a tool to interpret ambiguous tax provisions.[165] But the Tax Court has applied *Ilfeld* more broadly to disallow double deductions regardless of the statutory language at issue.[166] The relevant question is whether *Ilfeld* established a procedural rule, which "merely govern[s] how courts will go about their own business when deciding disputes" or instead created a substantive rule of law.[167]

There is also debate about the origin of the economic substance doctrine. Jack Cummings notes the economic substance doctrine's "questionable pedigree."[168] It is sometimes traced back to the Supreme Court's 1978 decision in *Frank Lyon Co. v. United States*.[169] Despite its shaky lineage, at least one appeals court described the economic substance doctrine as a "gloss" overlaying the Code.[170]

* * *

Tax-specific substantive canons and anti-abuse doctrines usually work to the government's favor.[171] While taxpayers generally are stuck with the form of the transaction they chose, the government may invoke anti-abuse doctrines to stray from the literal language of a

165. *See* W. Wade Sutton Jr., *Duquesne and Ilfeld: A Risen Phoenix or an Entirely Different Animal?*, 41 J. CORP. TAX'N 28, 30 (2014).

166. *See* Duquesne Light Holdings v. Comm'r, 2013-216 T.C.M. (RIA) 1735, 1749 (2013) (stating that the "court will apply . . . *Ilfeld* in any Federal income tax case involving a consolidated return group where the group claims a deduction for a taxable year for an economic loss that duplicates another deduction already taken by the group for the same economic loss"); Thrifty Oil Co. v. Comm'r, 139 T.C. 198, 212 (2012) ("If a taxpayer can point to a specific provision demonstrating congressional intent to allow the double deduction, the second deduction would be authorized. If the taxpayer cannot show congressional intent, then the double deduction would not be allowed.").

167. Sutton, *supra* note 165, at 28. As a procedural rule, *Ilfeld* would apply at the discretion of courts. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1158 (10th Cir. 2008) (Gorsuch, J., concurring) (describing the *Chevron* doctrine as a procedural rule that receives "little precedential consideration").

168. CUMMINGS, *supra* note 111, at 213.

169. Frank Lyon Co. v. United States, 435 U.S. 561 (1978); *cf.* CUMMINGS, *supra* note 111, at 207 (stating that the economic substance doctrine has no proper origin in Supreme Court opinions or in the Code); *id.* at 212 ("The Supreme Court has never used the term prior to a passing reference in 2013, has never stated it as a general 'doctrine.'").

170. *See* United Parcel Serv. of Am., Inc. v. Comm'r, 254 F.3d 1014, 1018 (11th Cir. 2001); *see also* BITTKER & LOKKEN, *supra* note 99, at 4.3.1 (describing the anti-abuse doctrines as "so pervasive that they resemble a preamble to the Code, describing the framework within which all statutory provisions are to function").

171. Zelenak, *supra* note 91, at 667 (noting that nonliteral interpretations tend to favor the government). *But see* Schneider, *supra* note 133, at 66 (challenging the assumption that judicial anti-abuse doctrines are a one-way street in favor of the government).

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statute.[172] These doctrines, when successfully invoked, reduce revenue leakage. It is thus unsurprising that "in tax litigation, the government wins significantly more often than taxpayers."[173]

3. Whole-Code Structural Canon

The Whole-Code canon is a general-purpose structural canon that plays an out-sized role in the interpretation of the Internal Revenue Code.[174] This canon instructs courts to read the words of a statute "in their context and with a view to their place in the overall statutory scheme."[175] The goal is to "interpret the statute as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into an harmonious whole."[176] The Whole-Code canon presumes that the various titles of the United States Code are internally consistent and are drafted in a cohesive and consistent manner.[177] If this is true, then the meaning of a word or phrase in one provision of the Internal Revenue Code should be interpreted in a manner compatible with the same word or phrase used elsewhere in the Code.[178] One empirical study found that when the Supreme Court relies on language canons in its tax decisions, it invokes "the whole act rule or similar presumptions

172. Comm'r v. Danielson, 44 T.C. 549 (1965), *vacated*, 378 F.2d 771 (3d Cir. 1967), *cert. denied*, 398 U.S. 858 (1967), *remanded to*, 50 T.C. 782 (1968) (providing that taxpayers cannot disavow form of transaction absent fraud, mistake, undue influence). Without such a rule, taxpayers in effect could elect their tax consequences after the fact. *See* Maletis v. United States, 200 F.2d 97, 98 (9th Cir. 1952) ("The practical reason for such a rule is that otherwise the taxpayer could commence doing business . . . [using a particular business form] and, if everything goes well, realize the income tax advantages therefrom; but if things do not turn out so well, may turn around and disclaim the business form he created . . . .").

173. Andre L. Smith, *Deferential Review of Tax Court Decisions of Law: Promoting Expertise, Uniformity, and Impartiality*, 58 TAX LAW. 361, 379 (2005).

174. *See supra* note 166 and accompanying text.

175. Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (quoting Davis v. Mich. Dep't. of Treasury, 489 U.S. 803, 809 (1989)).

176. *Id.* (internal citations and quotations omitted); *see also* Comm'r v. Engle, 464 U.S. 206, 223 (1984) ("The true meaning of a single section of a statute in a setting as complex as that of the revenue acts, however precise its language, cannot be ascertained if it be considered apart from related sections, or if the mind be isolated from the history of the income tax legislation of which it is an integral part."). The Supreme Court concluded in *King v. Burwell* that facially unambiguous tax statutes may be found to be ambiguous when considered in the context of the overall structure of the statute. 135 S. Ct. 2480, 2489–92 (2015).

177. James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231, 1299 (2009).

178. SCALIA & GARNER, *supra* note 13, at 168.

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implicating the larger cohesion or structural integrity of the text" more than ninety percent of the time.[179]

4. Tax Logic

Tax scholars have identified certain policies and principles underlying the Code.[180] While not spelled out in the statutes, they are touchstones implicitly woven into the Code that "can be discovered . . . through a thoughtful reading and study of the Code as a whole."[181] These tax policies and principles can be revealed through a process of inductive reasoning whereby Code provisions are examined to identify patterns from which to infer general policies and principles.[182] Examples include the non-deductibility of personal consumption; the matching of income and expenses; the realization requirement; the taxing of an individual's income only once; and the double taxation of corporate income.[183]

One reasonable goal might be for a court to interpret tax statutes in harmony with these permeating policies and principles.[184] The assumption underlying this kind of thinking is that Congress drafts the Code with particular overarching policies and principles in mind. One potential concern is that this approach may assume too much about the cohesiveness of the Code.[185] Even assuming Congress enacts tax statutes in this manner, a second concern is whether all Code provisions can be reduced to a set of underlying policies or principles.

B. Anatomy of Tax Legislative Process

The JCT is a congressional committee composed of ten members, five from each of the two tax standing committees: the Senate Finance Committee and the House Ways and Means Committee.[186] The JCT

179. Brudney & Ditslear, *supra* note 177, at 1298. For insight into how drafters of tax legislation make drafting choices that reinforce the Whole-Code canon, see Orei & Osofosky, *supra* note 64 and accompanying text.

180. Professor Geier refers to this concept as "the theoretical construct that overarches the sum total of the entire Internal Revenue Code and is intended to be captured by it." Deborah A. Geier, *Interpreting Tax Legislation: The Role of Purpose*, 2 FLA. TAX REV. 492, 497 (1995). Professor Weeks McCormack explains that, "[g]eneral principles of tax law refer to overarching theoretical constructs throughout the entire Code that are intended to be captured by its individual provisions." Shannon Weeks McCormack, *Tax Shelters and Statutory Interpretation: A Much Needed Purposive Approach*, 2009 U. ILL. L. REV. 697, 723 (2009).

181. Zelenak, *supra* note 91, at 639.

182. *See* Michael Livingston, *Practical Reason, "Purposivism," and the Interpretation of Tax Statutes*, 51 TAX L. REV. 677, 689 (1996).

183. Geier, *supra* note 180, at 497; Weeks McCormack, *supra* note 180, at 723–24.

184. Livingston, *supra* note 182, at 689.

185. *See supra* notes 134–161 and accompanying text (discussing the Whole-Code canon, a closely-related concept).

186. I.R.C. § 8001 (2012).

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has a professional staff of lawyers, economists, and accountants who are non-partisan, meaning they do not operate as majority or minority staff.[187] Historically, the staff of the JCT has had an influential role in tax legislation. Career civil servants provide valuable institutional knowledge and technical tax expertise.[188] The JCT also provides much-needed consistency to tax law by being involved in all phases of the legislative process, including the drafting of statutory language, committee reports, and post-enactment legislative materials commonly referred to as the "Blue Book."[189]

Scholars have noted that the legislative process has become characterized by unorthodox processes and procedures that have nega-

187. *Overview*, JOINT COMMITTEE ON TAXATION, CONGRESS U.S., https://www.jct.gov/about-us/overview.html [https://perma.unl.edu/QDR8-NB8L] (last visited Dec. 28, 2018).

> It is not at all uncommon for the JCT Staff to be helping members of Congress who are in the majority party in the House or Senate develop and refine tax legislative proposals while it is simultaneously providing technical and policy support to members in the minority party on different and competing tax legislative proposals—proposals that are often in direct conflict with those being advanced by the majority party.

Samuels, *supra* note 130, at 10.

188. Bernard M. "Bob" Shapiro, *The Last 50 Years: The Evolving Role of the Joint Tax Committee*, 151 TAX NOTES 1125, 1130 (2016); Samuels, *supra* note 130, at 5 ("The average tenure of the professionals on the JCT Staff is 12 years."). The staff reports to the Chief of Staff, who is selected by the Chair of the JCT. *Id.* In the JCT's first fifty-five-year history, it had just four Chiefs, who served an average of over thirteen years. *Former Chiefs of Staff*, JOINT COMM. ON TAX'N CONGRESS U.S., https://www.jct.gov/about-us/history/former-chiefs-of-staff.html [https://perma.unl.edu/7KE8-NSQY]. Since then, there have been ten Chiefs who served an average of less than four years. *Id.*

189. Livingston, *supra* note 78, at 834–35, 884; Shapiro, *supra* note 188, at 1130; Wallace, *supra* note 77, at 196–203. In the past, the tax-writing committees met to develop their conceptual proposals and once the concept has been hammered out in sufficient detail, statutory language was drafted to reflect that conceptual understanding. Shapiro, *supra* note 188, at 1128. More recently, the chair of the House Ways and Means Committee provides a "Chairman's Mark," draft legislation for the committee to consider. *Id.* The statutory text may be prepared by the JCT or the Office of Legislative Counsel (OLC). *Joint Committee on Taxation*, JOINT COMMITTEE ON TAX'N, CONGRESS U.S., https://www.jct.gov/about-us/role-of-jct.html [https://perma.unl.edu/F2CG-FY3X]; Shapiro, *supra* note 188, at 1130 (explaining that OLC drafts with technical tax expertise from JCT). The OLC essentially is a ghost writer for the congressional committees. Sandra Strokoff, *How Our Laws Are Made: A Ghost Writer's View*, OFF. LEGIS. COUNS., U.S. HOUSE REPRESENTATIVES, http://legcounsel.house.gov/HOLC/Before_Drafting/Ghost_Writer.html [https://perma.unl.edu/37FZ-N8UG]; *see also Interpretation of Tax Statutes*, *supra* note 78, at 834–35. Use of the OLC is optional. *See* MATTHEW ERIC GLASSMAN, CONG. RESEARCH SERV., RS 20856, OFFICE OF LEGISLATIVE COUNSEL: SENATE (2008) ("Drafting assistance is provided only upon request as there is no requirement in the rules of the Senate that bills, resolutions, or amendments be drafted by the office."); MATTHEW ERIC GLASSMAN, CONG. RESEARCH SERV., RS20735, OFFICE OF LEGISLATIVE COUNSEL: HOUSE 2 (2008) ("Requests for drafting assistance are at Members' initiative.").

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tively impacted legislation.[190] In 2002, Professor Steve Johnson noted that "[f]ederal tax legislation, including the precision of its drafting, has been on a downwards trajectory."[191] Historically, "the tax standing committees (guided by the Joint Committee on Taxation) have drafted on a bipartisan basis in close consultation with the Treasury Department, with the goal of securing unanimity prior to introduction."[192] More recently, however, congressional committees' legislative drafting roles have diminished as more people have become involved in the design of legislation, including the White House, party leadership, and members of Congress who have hired their own tax staffs to develop tax policy and push their own agendas.[193] The bypassing of committees and other subject-matter experts causes the quality of legislation to suffer.[194] Today, the Joint Committee and the Treasury play a lesser role in the development of tax policy.[195] Unorthodox processes curb the deliberation of proposed legislation.[196] Voting is done on a partisan basis, and the use of the fast-track reconciliation process to enact legislation is becoming increasingly popular.[197]

Consider the Tax Cut and Jobs Act of 2017 as an illustration of legislative sausage making.[198] The four-hundred page document passed without any hearings just two weeks after the text was released.[199] The quality of the language likely was impacted by last-

190. BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 4 (5th ed. 2017).

191. Steve R. Johnson, *Should Ambiguous Revenue Laws Be Interpreted in Favor of Taxpayers?*, 10 NEV. LAW. 15, 16 n.14 (2002).

192. James. J. Brudney, *Contextualizing Shadow Conversations*, 166 U. PA. L. REV. ONLINE 37, 42–43 (2017).

193. Oei & Osofsky, *supra* note 64, at 43 (noting a shift to "more amorphous control" over drafting of tax legislation); Shapiro, *supra* note 188, at 1127–29.

194. SINCLAIR, *supra* note 190, at 264–67.

195. Shapiro, *supra* note 188, at 1130.

196. SINCLAIR, *supra* note 190. Sinclair notes that "less deliberation at the prefloor stage of the process . . . would be a serious negative by-product of unorthodox lawmaking, since this is when real deliberation takes place, if it takes place at all." *Id.* at 264.

197. *See* Rebecca M. Kysar, *Reconciling Congress to Tax Reform*, 88 NOTRE DAME L. REV. 2121, 2124 (2013) ("Majority voting, reduced committee power, and a truncated timeline—features of existing fast-track processes—engender fragile and narrow tax legislation rather than complex, long-lasting tax reform."). Unorthodox lawmaking is the "new textbook process." Gluck et al., *supra* note 43, at 1794.

198. Tax Cut and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054; *see also* Oei & Ososfky, *supra* note 64, at 4, 63–64 (summarizing various criticisms of the process used to enact the 2017 Tax Act).

199. Mike Fox, *Winners and Losers: Professors Critique New Tax Law's Impact on Taxpayers, Economy*, U. VA. SCH. L. NEWS & MEDIA (Jan. 29, 2018), http://www.law.virginia.edu/news/201801/winners-and-losers-professors-critique-new-tax-laws-impact-taxpayers-economy [https://perma.unl.edu/TZW2-BUY6].

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minute changes to the text on the floor.[200] Legislators voted in a partisan fashion—in the Senate the vote was in favor fifty-one to forty-nine.[201] Compare that result with the Tax Reform Act of 1986, which involved significant input from tax experts, and in particular the staff of the JCT.[202] The 1986 tax reform involved "more than a dozen hearings in Congress, and the process took more than six months."[203]

While unorthodox processes may help get legislation enacted in the midst of gridlock,[204] those processes are problematic to the extent experts are sidelined from drafting legislation or proposals are insufficiently vetted:

> Nonexperts are less likely to draft with the rest of the landscape of relevant law in mind, creating less consistent and coherent law than courts often presume or desire. Even unorthodox legislation drafted inside Congress may be more textually messy, less thoroughly deliberated, and less likely to have been reviewed and understood by all stakeholders. From the courts' perch, these deficiencies can make a judge's job more difficult.[205]

To the extent the legislative process is degrading, there may be more pressure on judges to deploy more purposivist approaches that exploit the capacities of judges rather than textualist approaches that exploit legislators' capacities.

C. Role and Influence of the Tax Court

Tax Court judges are uniquely positioned to play an influential role in the interpretation of tax statutes. They typically come to the bench with prior tax experience as lawyers in private practice and within the government as policy advisors to the Treasury or the legislative

200. Herb Jackson & Eliza Collins, *Senate Passes Huge Tax Cuts After Last-Minute Changes; Conference with House Next*, USA TODAY (Dec. 2, 2017), https://www.usatoday.com/story/news/politics/2017/12/01/senate-passes-huge-tax-cuts-after-last-minute-changes-conference-house-next/914701001/ [https://perma.unl.edu/RF6L-EWNU].

201. Jasmine C. Lee & Sara Simon, *How Every Senator Voted on the Tax Bill*, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes.com/interactive/2017/12/19/us/politics/tax-bill-senate-live-vote.html.

202. Tax Reform Act of 1896, Pub. L. No. 99-514, 100 Stat. 2085; Sheldon D. Pollack, *Tax Reform: The 1980's in Perspective*, 46 TAX L. REV. 489, 518–25 (1991).

203. John Cassidy, *The Passage of the Senate Republican Tax Bill Was a Travesty*, NEW YORKER (Dec. 2, 2017), https://www.newyorker.com/sections/news/the-passage-of-the-senate-republican-tax-bill-was-a-travesty [https://perma.unl.edu/255M-QTNU].

204. SINCLAIR, *supra* note 190, at 267 ("[P]artisan polarization has made it necessary for the majority-party leaders to employ unorthodox processes and procedures at the prefloor and postpassage stages in order to legislate successfully."). Data that Sinclair analyzed shows that the use of special processes and procedures that characterize "unorthodox lawmaking" help bills get enacted into law. *Id.* at 261.

205. Gluck et al., *supra* note 43, at 1838–39. Gluck, along with O'Connell and Po, have written about the role of courts in interpreting legislation given Congress's unorthodox practices. *Id.* at 1850.

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branch.[206] Their prior work experience likely gives the Tax Court an institutional capacity to engage in a more purposive analysis of the Code.[207] Once on the bench, they hone that experience by handling a tax-exclusive docket.[208] Additionally, the Tax Court is a court with national jurisdiction, meaning appeals of its decisions are heard in all the federal circuit courts.[209] This feature might embolden Tax Court judges to act quite independently because, as discussed below, specialized trial court judges are less likely to defer to hierarchically superior judges that are generalists.[210] Also, pursuant to the *Golsen* rule, the Tax Court does not feel bound to follow appellate court precedent it thinks is wrongly decided.[211] In fact, it may be that hierarchically superior judges downwardly defer to their specialized colleagues.[212]

1. Specialist and Generalist Judges' Differing Approaches to Statutory Interpretation

Claims by the Internal Revenue Service that taxpayers owe additional taxes may be challenged in the federal district courts, the United States Court of Federal Claims, and the United States Tax Court. To invoke the jurisdiction of the federal district courts or the Court of Federal Claims, taxpayers have to first pay what the government claims is owed and then pursue a refund.[213] The Tax Court is the only court with jurisdiction to hear tax disputes without taxpayers having to pay prior to litigating.[214]

Unlike jurists in the Court of Federal Claims, federal district courts, or circuit courts who handle an assortment of cases whose subject matter and applicable law vary widely, Tax Court judges are engrossed solely in the law of tax.[215] It would be reasonable to expect that Tax Court judges, given their specialization, would interpret the meaning of statutory text differently than generalist judges.[216] Pro-

206. *See infra* notes 287–288 and accompanying text; Schneider, *supra* note 41, at 339 and accompanying text.
207. *See infra* notes 248–249 and accompanying text.
208. *See infra* notes 244–245, 287–288 and accompanying text.
209. *See infra* notes 233–235 and accompanying text.
210. *See infra* notes 250–251 and accompanying text.
211. *See infra* notes 236–242 and accompanying text.
212. *See infra* notes 272–286 and accompanying text.
213. 28 U.S.C. § 149 (United States Court of Federal Claims' jurisdiction); 28 U.S.C. § 1346(a)(1) (United States district courts' jurisdiction). See *supra* note 74 and accompanying text for challenges faced by generalist judges interpreting the Code.
214. I.R.C. § 6213(a).
215. *See infra* notes 254–256 and accompanying text for discussion of Tax Court's jurisdiction.
216. Mary L. Heen, *Plain Meaning, the Tax Code, and Doctrinal Incoherence*, 48 HASTINGS L.J. 771, 774–75 (1997) ("[T]he plain meaning approach . . . depends upon a judicial determination that the statutory provision being interpreted is not am-

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fessor Deborah Geier speculated that specialized judges might more closely stick to the text whereas generalist judges may be "more quick to let go of the literal language."[217] It could be that generalist judges gravitate towards spongy legal standards, particularly if they are more steeped in the common law, while specialized judges who are more immersed in statutory law are drawn to precise legal rules.[218] In short, generalist judges might lean towards looser, more inexact interpretations given their familiarity with more malleable common law standards while specialized judges who are more familiar with precise statutory rules would lean towards more exacting interpretations. Generalist judges who "let go of the literal language" may simply be capitalizing on their common-law training and experience.

But an equally likely explanation might be that judges who are uneasy with the law at issue may be *less* likely to depart from the text while those who are comfortable may be more likely to depart from the literal text to try to infer congressional intent.[219] It may be that generalist judges who appreciate the limits of their expertise restrain themselves from blazing new paths into unknown thickets of legal terrain, preferring instead to adhere as closely as possible to the legal text.[220]

Both of these theories seem plausible, and empirical data support both. Professor Daniel Schneider's empirical work seems to support Geier's supposition. Schneider compared a sample of Tax Court decisions from 1979 through 1998 to a sample of federal tax opinions from three federal district courts encompassing Los Angeles, Chicago, and

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biguous. Whether the language of a statute is ambiguous or not may depend upon the background and knowledge of the interpreter as well as the skill of the drafter.").

217. Geier, *supra* note 180, at 512 n.64.

218. David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842, 848 (1999) ("[I]t may be that formalism and expertise go hand-in-hand: that is, that a rule system highly elaborated, and achieving precision by the use of technical terms, is the type of regime with which the common law generalist-judge would be least prepared to deal.").

219. *See* CUMMINGS, *supra* note 111, at 81 (speculating that as the Supreme Court's docket of tax cases has declined over the years, the Court has become "less conversant" in tax law, which may contribute to its textualist trend in tax cases); Brudney & Ditslear, *supra* note 177, at 1297–98 (surmising that the Supreme Court relies on tax-specific canons for "expertise borrowing" in light of the complexity of tax law).

220. Professors James Brudney and Corey Ditslear found that the Supreme Court invoked legislative purpose less in tax cases than in workplace cases (eighty percent of workplace cases versus fifty-two percent of tax cases). Brudney & Ditslear, *supra* note 177, at 1253, tbl.1. They hypothesize that the Court may rely less on legislative purposes in tax cases because the "Justices are not familiar or comfortable enough with the underlying tax policies to impute them to Congress." *Id.* at 1255. This may also explain the Justices' increased reliance on interpretive canons as a way to resolve disputes that require specialized knowledge that the Justices lack. Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 661 (1992).

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New York City to determine the effect of the Tax Court's specialization on statutory interpretation.[221] Schneider concluded that district court judges used non-literal approaches more than the Tax Court:

> Judges in the district court cases relied on practical reasoning even more than judges in the Tax Court cases. Perhaps the greater breadth of the subject matter jurisdiction that district court judges face leads them to justify decisions more pragmatically than judges on the Tax Court, with its narrower jurisdiction.[222]

By contrast, Professor David Shores's empirical study seems to support the opposite premise: specialized judges are more likely than generalists to depart from the literal statutory text.[223] Shores identified all Tax Court decisions that were reversed on appeal between January 1, 2000 and December 31, 2006.[224] He then further limited his sample to cases involving the interpretation of seemingly unambiguous statutory provisions whose plain meanings were inconsistent with their underlying purposes.[225] He found that for every case in the sample, the Tax Court took an intentionalist approach while the appellate courts were more likely to adhere to the plain meaning of the legislation.[226] Shores's work supports the theory that specialized

221. Schneider, *supra* note 41. Schneider's sample population consisted of 482 cases—346 Tax Court decisions and 136 district court decisions. The three federal district courts whose opinions Schneider sampled were: (1) the Central District of California whose jurisdiction includes Los Angeles; (2) the Northern District of Illinois whose jurisdiction includes Chicago; and (3) the Southern District of New York whose jurisdiction includes Manhattan. Schneider coded the courts' rationale, including, among other things, strict construction, reliance on the structure or purpose of the Code, reliance on legislative history, and the use of practical reasoning, which involves an analysis of "statutory text, legislative history, and evolutive considerations—including judicial and administrative precedents and applicable current values—together with the consequences of alternate interpretations and the court's own policy sense." Schneider, *supra* note 41, at 330 (quoting Livingston, *supra* note 182).

222. Schneider, *supra* note 41, at 340.

223. The conflicting outcomes in Shores's work and Schneider's are impossible to reconcile due to, among other things, differences in methodologies used to compile their datasets.

224. David F. Shores, *Textualism and Intentionalism in Tax Litigation*, 61 TAX LAW. 53 (2007).

225. Shores excluded cases that interpreted ambiguous statutory provisions or that applied tax anti-abuse doctrines. The initial step identified 251 Tax Court cases. The second step reduced the sample size to ten, which is so small as to prevent drawing highly confident conclusions. *Id.* at 61–62.

226. *Id.* at 62. Work by Jack Cummings confirms the continuation of this trend. Cummings extended Shores's work by examining Tax Court cases from 2007 to 2015. Jasper L. Cummings Jr., *Trending Literalism in the Tax Court*, 153 TAX NOTES 1461 (2016). He found only three cases that matched Shores's criteria (*i.e.*, cases where the Tax Court favored intentionalism where plain meaning would produce an inappropriate result, but the Tax Court was reversed on appeal by textualist appellate courts). In all three cases, the Tax Court applied intentionalist approaches and the appellate courts applied textualist approaches. *Id.*

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judges favor non-literal approaches to statutory interpretation over generalized judges, particularly in cases where a literal interpretation would lead to a windfall for the taxpayer. Specialized judges with relatively more tax knowledge and expertise understandably may engage more effortlessly with technical tax rules and underlying tax policy than generalized judges.[227] Under this theory, one might expect Tax Court judges to be better equipped to apply a contextual analysis that depends on the overall structure of the Code and its underlying purposes.[228] Such an approach allows specialized judges to distinguish themselves from generalist judges and protect their turf by favoring purposive approaches that reaffirm their tax expertise.[229]

In an earlier work, Shores reached the opposite conclusion, finding that the Tax Court was more likely to take a textualist approach. This article examined four Tax Court cases that made their way to the Supreme Court.[230] In two of the cases, the Tax Court favored a textualist interpretation that respected the form of each of the taxpayer's transactions, but the Supreme Court reversed using an intentionalist approach.[231] The Tax Court adopted a non-literal reading in the other two cases, but according to Shores, the Tax Court felt compelled to disregard the literal text in those cases based on the Supreme Court's intentionalist approach in one of the earlier cases.[232] His earlier article also highlights cases where the Tax Court took an intentionalist approach to fill gaps where the statute was silent.[233] From this analysis, Shores concludes:

> When the Tax Court is [not bound by precedent], it will choose textualism over intentionalism in instances where the statute, literally applied, provides a clear answer to the question at hand. If the answer is not an appropriate one, it is inclined to leave the solution to Congress. The appellate courts, however, are inclined to favor intentionalism over textualism and disregard the plain

227. *See* STEPHEN SCHWARZ & DANIEL J. LATHROPE, FUNDAMENTALS OF CORPORATE TAXATION 612 (8th ed. 2012) (stating that the "Tax Court was somewhat more inclined to apply [tax anti-abuse] doctrines than the generalist judges of the courts of appeals" in tax shelter litigation).

228. *See* Lynda J. Oswald, *Improving Federal Circuit Doctrine Through Increased Cross-Pollination*, 54 AM. BUS. L.J. 247, 252 (2017) (stating that "specialized courts may contribute to greater *accuracy* in legal doctrine," with "accuracy" in this context meaning a legal rule consistent "with the policy underlying the legal regime and the needs and expectations" of frequent actors operating within that regime).

229. *See* Tanina Rostain, *Sheltering Lawyers: The Organized Bar and the Tax Shelter Industry*, 23 YALE J. ON REG. 77 (2006) (describing how tax lawyers gained a competitive advantage over accountants by supporting judicial anti-abuse doctrines, which allowed lawyers to rely on their legal expertise).

230. *See* David F. Shores, *Deferential Review of Tax Court Decisions: Taking Institutional Choice Seriously*, 55 TAX LAW. 667, 672 (2002).

231. *See id.* at 689–91, 703.

232. *Id.* at 703–04.

233. Shores, *supra* note 224, at 60 and accompanying text.

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language of the statute when necessary to achieve what they view as an appropriate result.[234]

The pattern Shores identified in the Tax Court's jurisprudence was a preference for textualism over literalism when the statute literally applied even if the result reached was inappropriate. But where the statutory language was unclear, the Tax Court was more willing to adopt an intentionalist approach. Resolving the apparent discrepancy between Shores's two studies is difficult because they made use of different methodologies. Additionally, the earlier work reached more granular conclusions based on non-empirical analysis. In his more recent work, Shores reconciled the two articles by saying "[b]oth suggest that the Tax Court has moved toward greater emphasis on intentionalism, even as the Supreme Court and the courts of appeal have moved in the opposite direction."[235]

Gitlitz v. Commissioner is consistent with Shores's more recent study.[236] The Supreme Court in *Gitlitz* applied a decidedly textualist interpretation to determine how to treat the discharge of debt of an insolvent S corporation. The S corporation realized cancellation of indebtedness income, but because it was insolvent, it did not recognize any taxable income.[237] Instead, section 108 required the corporation to reduce certain tax attributes, including net operating losses.[238] Although the cancellation of indebtedness (COD) income resulted in no taxable income, the shareholders nonetheless increased their stock basis by their pro rata share of the COD income, which gave them sufficient basis to deduct their suspended losses, leaving no losses subject to section 108 attribute reduction.[239]

In deciding for the government, the Tax Court and the Tenth Circuit recognized the tax windfall that would otherwise result to the taxpayers. Under the taxpayers' interpretation, they would not pay tax on the COD income passed through to them and they were able to

234. Shores, *supra* note 230, at 703–04.

235. Shores, *supra* note 224, at 63; *see also* John F. Manning, *Forward: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 30 (2014) (noting the Supreme "Court's . . . fundamental shift . . . toward textualism in recent years"). In comparing tax decisions in the Burger Court (1969–1986) and the Rehnquist/Roberts Court (2005–2008), Professors Brudney and Ditslear found that the Court relies more on text and language canons than in the past and less on legislative history and purpose, although only the decline in the use of legislative history is statistically significant. These findings are consistent with the Court's trend towards textualism. Brudney & Ditslear, *supra* note 177, at 1255–57.

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

237. *See* I.R.C. §§ 61(a)(12), 108(a).

238. I.R.C. § 108(b)(2).

239. Section 108 treats shareholders' losses from prior years that exceeded the shareholders' stock bases as an S corporation attribute available for reduction. I.R.C. § 108(d)(7)(B).

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deduct their suspended losses.[240] Had the suspended losses been reduced pursuant to section 108 before the positive adjustment to stock basis, there would have been no losses left for the shareholders to deduct.[241] The Supreme Court did not address this "policy concern," concluding instead that a plain reading of the statutes at issue permitted the result that the taxpayers obtained.[242] It relied on the plain reading of section 1366(a)(1), which provided for a basis increase for "items of income (including tax-exempt income)"[243] and section 108(b)(4)(A), which provided that attribute reductions "shall be made after the determination of tax imposed by this chapter for the taxable year of the discharge."[244] Congress overruled *Gitlitz* by prohibiting the pass-through of S corporation COD income that is excluded from income under section 108.[245] This change prevents the double benefit permitted in *Gitlitz*.

2. Tax Court's Independence: Marching to Its Own Beat

The United States Tax Court's status as a national court as well as the judges' tax expertise may result in their weak deference to hierarchically superior courts.

a. Tax Court Is a National Trial Court

The United States Tax Court is a trial court of national jurisdiction that decides cases filed by taxpayers throughout the country.[246] Unlike appeals from any one of the ninety-four federal district courts or the United States Court of Claims that are considered by a single appellate court, Tax Court decisions are appealable to one of the twelve regional U.S. Courts of Appeal, depending on the taxpayer's residence or principal place of business at the time the petition was filed in the Tax Court.[247]

240. *Gitlitz*, 531 U.S. at 208–10.
241. *Id.* at 217.
242. *Id.* at 219–20.
243. I.R.C. § 1366(a)(1).
244. *Gitlitz*, 531 U.S. at 208–09.
245. I.R.C. § 108(d)(7)(A), enacted by Pub. L. 107-147, sec. 402(a) (2002).
246. I.R.C. § 7445.
247. *See* I.R.C § 7482(b)(1) (explaining that cases of individual taxpayers are appealable to the circuit court in the district where the taxpayer resided at the time the petition was filed in the Tax Court, corporate taxpayers appeal their Tax Court cases to the district where their principal place of business or principal office was located, and partnerships appeal to the district where their principal place of business was located). By comparison, federal courts of appeals hear challenges to trial court decisions from district courts located within their circuit. *Court Role and Structure*, U.S. COURTS, http://www.uscourts.gov/about-federal-courts/court-role-and-structure [https://perma.unl.edu/LKE6-HK8E]. Appeals from the U.S. Court of Federal Claims are heard by the Federal Circuit. *Id.*

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The Tax Court, despite being a trial court, may feel less constrained by the courts of appeal as compared to federal district courts and the Court of Federal Claims due to the unique inverted pyramid structure characterizing appeals from the Tax Court to all of the federal circuit courts.[248] Such a structure may embolden the Tax Court to press its own views and create its own precedent.

The Tax Court in *Golsen v. Commissioner* held that it will follow squarely on point judicial precedent from the appeals court to which appeal would lie.[249] This approach fosters judicial efficiency by decreasing the probability of reversal by the appellate court. But the Tax Court only rarely invokes *Golsen*.[250] Rather, the Tax Court reads the rule narrowly to apply only where the "clearly established position of the Court of Appeals" signals "inevitable" reversal upon appeal.[251] The Tax Court more typically refuses to apply *Golsen* by distinguishing the facts or the law. For example, in *Tiger's Eye Trading, LLC v. Commissioner*, the Tax Court did not follow precedent in the D.C. Circuit that held that a partner's basis in her partnership interest cannot be determined in a partnership-level proceeding because it is not a partnership item. The Tax Court declined to follow the hierarchically superior court's precedent because the D.C. Circuit did not consider various Treasury regulations that the Tax Court believed to be relevant.[252] As the Tax Court noted in *Lardas v. Commissioner*:

> It should be emphasized that the logic behind the *Golsen* doctrine is not that we lack the authority to render a decision inconsistent with any Court of Appeals (including the one to which an appeal would lie), but that it would be futile and wasteful to do so where we would surely be reversed.[253]

As a national court, the Tax Court feels obliged to ensure the uniform interpretation of the Internal Revenue Code for similarly situated taxpayers.[254] Thus, despite *Golsen*, the fact that the Tax Court is

248. *See* Shores, *supra* note 230 at 703–04.
249. Golsen v. Comm'r, 54 T.C. 742 (1970).
250. *See* K. Martin Worthy, *The Tax Litigation Structure*, 5 GA. L. REV. 248, 253 (1971) ("[T]he Tax Court has rarely encountered a circuit court decision directly contrary to the position the Tax Court believes correct.").
251. Lardas v. Comm'r, 99 T.C. 490, 495 (1992).
252. Tigers Eye Trading, LLC v. Comm'r, 138 T.C. 67 (2012). The Tax Court's decision to permit the Tax Court to determine the partner's basis in his partnership interest in the partnership-level proceeding was reversed on appeal to the D.C. Circuit due to an intervening decision from the U.S. Supreme Court while the case was pending. United States v. Woods, 571 U.S. 31, 42 (2013) ("To be sure, the District Court could not make a formal adjustment of any partner's outside basis in this partnership-level proceeding.").
253. *Lardas*, 99 T.C. at 495.
254. Lawrence v. Comm'r, 27 T.C. 713, 719 (1957) ("The Tax Court, being a tribunal with national jurisdiction over litigation involving the interpretation of Federal taxing statutes which may come to it from all parts of the country, has a[n] . . . obligation to apply with uniformity its interpretation of those statutes."). Part of the Tax Court's mission is to ensure "the uniform interpretation of the Internal

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a trial court does not seem to hamper its independence to the extent it does not feel bound to follow appellate court precedent it thinks is wrongly decided.[255]

b. Effect of Tax Court's Expertise on Its Independence

The Tax Court is composed of nineteen judges who are appointed by the President and confirmed by the Senate for renewable fifteen-year terms.[256] Deficiency determinations—which permit taxpayers to challenge amounts that the government claims are owed without paying first—comprise a predominant piece of the Tax Court's docket.[257] Other grants of jurisdiction are scattered throughout the Code, including review of collection due process cases under sections 6320 and 6330, innocent spouse claims under section 6015, and determinations regarding whistleblower awards under section 7423.[258] An exhaustive list of the Tax Court's jurisdiction is unnecessary; the point is that, unlike federal district courts and the Court of Federal Claims, the Tax Court's exclusive domain revolves around the Internal Revenue Code. In addition, the Tax Court handles the vast majority of tax cases. The IRS Chief Counsel's Office, which represents the IRS in Tax Court, reported that it closed 29,802 Tax Court cases for fiscal year 2017.[259] By comparison, just 253 refund cases were closed in the other two fora.[260] Because the Tax Court's sole jurisdiction is with respect to taxes, Tax Court judges must stay abreast of tax issues and as a by-product, they certainly develop tax expertise on the bench.[261] In addition to the expertise that results from deciding disputes between taxpayers and the IRS, Tax Court judges typically come to the bench with prior tax experience.[262]

Revenue Code." *About the U.S. Tax Court*, TAXCOURT.GOV, https://www.ustaxcourt.gov/about.htm [https://perma.unl.edu/NY5Y-UXFB].

255. Consider *Metzger Trust v. Commissioner*, 76 T.C. 42 (1981). The Tax Court refused to follow *Rickey v. United States*, 592 F.2d 1251 (5th Cir. 1979), by distinguishing it on its facts. *Id.* at 72–74. The Tax Court also took the opportunity to explain why it disagreed with the appellate court's reasoning: "The Rickey opinion has, in effect, added a new provision to the Internal Revenue Code" by permitting the waiver of attribution rule in section 302(c)(2)(A) to apply to waive beneficiary-to-trust attribution under section 318(a)(3) despite the fact that the waiver rule expressly says it applies to waive family attribution under 318(a)(1). *Id.* at 71.

256. I.R.C. §§ 7443(a), (b), (e).

257. I.R.C. § 6213(a).

258. See I.R.M. 35.1.1.2 (Aug. 11, 2004) for additional grants of jurisdiction.

259. IRS, IRS DATA BOOK 62, tbl.27 (2017), https://www.irs.gov/pub/irs-soi/17databk.pdf [https://perma.cc/K8VR-TJJY].

260. *Id.*

261. According to data on file with the author, the average time on the bench is over twelve years.

262. *See infra* notes 287–288 and accompanying text. "District court judges were more likely to be drawn from private practice, academia, and the judiciary, while more

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Much has been written about the fact that specialized judges, like those on the Tax Court, are less prone to defer to generalist judges, like those on the federal circuit courts that hear appeals from the Tax Court.[263] Whether intentional or the result of unconscious bias, specialists are less responsive to hierarchically superior courts because they see them as less knowledgeable. By contrast, generalist lower court judges are more responsive to hierarchically superior courts who are also generalists.[264]

A recent line of cases involving tax-preferred entities and Roth IRAs provides a good example of this phenomenon.[265] The seminal case, *Summa Holdings, Inc. v. Commissioner*, involved a parent corporation of a group of manufacturing companies.[266] In 2008, the parent corporation, Summa Holdings, Inc. (Summa), made a series of payments to JC Export, Inc. (JC Export), a corporation that elected under Code section 992 to be treated as a domestic international sales corporation (DISC). JC Export, in turn, distributed those payments to its sole shareholder, JC Holding Export Holding, Inc. (JC Holding) who made distributions to its sole shareholders, two Roth IRAs. In form, Summa would receive a deduction for commissions paid to JC Export,

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Tax Court judges had previous experience working for the government." Schneider, *supra* note 41, at 338.

263. *See* Robert M. Howard & Shenita Brazelton, *Specialization in Judicial Decision Making: Comparing Bankruptcy Panels and Federal District Court Judges*, 22 AM. BANKR. INST. L. REV. 407, 416 (2014) (noting that specialized courts are less deferential to "hierarchically superior courts" as compared to generalized courts); HOWARD, *supra* note 130, at 70 (summarizing results of empirical study indicating that "[t]he District Court, but not the Tax Court, is strongly influenced by the appropriate Federal Court of Appeals"); Lawrence Baum, *Probing the Effects of Judicial Specialization*, 58 DUKE L.J. 1667, 1678 (2009) (speculating that specialized judges may "tend to accord less authority to their superiors than do generalists because they see generalist superiors as less knowledgeable than themselves"); Lawrence Baum, *Specialization and Authority Acceptance: The Supreme Court and Lower Federal Courts*, POL. RESEARCH Q., Sept. 1994, at 693 (reporting the results of an empirical study that compared the degree of authority that the Supreme Court had over the Court of Customs and Patent Appeals (CCPA), a specialized court, and the federal circuit courts, whose judges are generalists, by measured Supreme Court citations, and finding that the circuit courts more frequently cited the Supreme Court as compared to the CCPA).

264. HOWARD, *supra* note 130, at 55 ("Songer, Cameron, and Segal (1995) show that federal appellate courts responded to conservative decisions of the U.S. Supreme Court with increased conservative decisions, even controlling for appellate ideology."); Shores, *supra* note 224, at 79 (explaining that federal district courts "are likely to follow the courts of appeal in their approach to statutory construction").

265. The Tax Court has also applied substance-over-form principles to impose liability in an earlier line of cases where taxpayers used non-tax preferred entities such as C corporations and LLCs to transfer value to their Roth IRAs. *See*, *e.g.*, Block Developers, LLC v. Comm'r, T.C.M. 2017-142 (T.C. 2017); Polowniak v. Comm'r, T.C.M. 2016-31 (T.C. 2016); Repetto v. Comm'r, T.C.M. 2012-168 (T.C. 2012).

266. T.C.M. 2015-119 (T.C. 2015).

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thus reducing its taxable income.[267] As a DISC, JC Export would not have paid tax on the commissions it received, but JC Holding would have paid tax on the dividend income received from JC Export.[268] Finally, JC Holdings' distributions to the Roth IRAs would not be subject to the contribution limits imposed on Roth IRAs, and those amounts as well as any accumulation, could be distributed tax-free to the Roth IRA owners.[269] If these transactions were respected, the Roth IRA owners would essentially have funded their IRAs with income from their operating business while avoiding the Roth IRA contribution limits.

The Tax Court granted the government's motion for partial summary judgment, holding that the commission payments made to JC Export and then distributed to JC Holding and the Roth IRAs were actually distributions from Summa to its shareholders followed by contributions to the Roth IRAs. As recharacterized, Summa would be liable for additional tax for the disallowed deduction, Summa shareholders would be taxed on the distributions, and the IRA owners would be liable for excise taxes pursuant to section 4973(a) for making contributions that exceeded the contribution limits. The Tax Court relied on the substance over form doctrine to recharacterize the transactions based on the taxpayers' admission that they had no "nontax business purpose or economic purpose for [entering into] the transactions."[270] The taxpayers "sole reason for entering into the transactions at issue was to transfer money into the . . . Roth IRAs so that income could accumulate on the assets . . . and then be distributed tax free."[271] The Tax Court expressed that "[t]he substance over form doctrine applies when the transaction on its face lies outside the plain intent of the statute and respecting the transaction would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose."[272]

The issue on appeal to the Sixth Circuit was Summa's tax liability. The Sixth Circuit reversed the Tax Court, taking issue with the lower court's broad application of the substance over form doctrine. The Sixth Circuit would apply the substance over form doctrine only to

267. *Id.*

268. I.R.C. § 991 (DISC not subject to income tax); § 301 (dividend income is taxable). The dividends JC Holding received would bear income tax at the corporation's full tax rate because no dividends-received deduction is available for dividends paid by a DISC. I.R.C. § 246(d).

269. *Summa*, T.C.M. 2015-119 ("Dividends paid on stock held by a Roth IRA are considered earnings of the Roth IRA itself, rather than contributions by the owner of the Roth IRA, and do not count towards the contribution limits of section 408A.").

270. *Id.* at 6.

271. *Id.* at 3.

272. *Id.* at 6.

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transactions lacking economic substance.[273] A broader doctrine that would allow the government to ignore a transaction with economic substance that complies with a literal reading of the Code in favor of its substance is, according to the Sixth Circuit, "hard to square with the Supreme Court's textually respectful methods of statutory interpretation."[274] The Sixth Circuit acknowledged that "[s]tatutory purpose no doubt has a role to play," but that purpose must be "grounded in text."[275] The government argued that the Code's overarching purpose was to raise revenue, but the court said the "text-driven function" of the DISC and IRA provisions is to minimize revenue.[276] In short, the purpose of these provisions was to reduce tax and that is what the taxpayers did. That the taxpayers were able to "structure their transactions in unanticipated tax-reducing ways," does not give the Commissioner the power to ignore the text of the Code.[277] In the Sixth Circuit's view, "[t]he best way to effectuate Congress's nuanced policy judgments is to apply each provision as its text requires."[278]

After the Sixth Circuit's decision in *Summa Holdings*, the Tax Court had an opportunity to revisit its analysis in a similar case, *Mazzei v. Commissioner*.[279] The taxpayers in *Mazzei* funded their Roth IRAs with commissions paid by an operating company to a foreign sales corporation (FSC) that were then distributed to the Roth IRAs. After recharacterizing the form of the transactions using the substance over form doctrine (such that the taxpayers were deemed to have received distributions from the operating company that they contributed to their Roth IRAs) the government determined that the taxpayers were liable for excise taxes for excess contributions made to their Roth IRAs. The Tax Court, in a twelve to four decision, disregarded the form of a transaction in favor of its substance:

> We conclude on the basis of the facts in the record that petitioners, and not their Roth IRAs, were the substantive owners of the FSC stock at all relevant times. Consequently, we conclude that in substance the payments from the FSC were income to petitioners rather than to their Roth IRAs and then excess contributions by petitioners to their Roth IRAs.[280]

In disregarding the Roth IRAs' ownership of the FSC stock, the Tax Court applied the assignment of income doctrine, concluding that the Roth IRAs lacked the benefits and burdens of ownership of that stock.

273. Summa Holdings, Inc. v. Comm'r, 848 F.3d 779, 787 (6th Cir. 2017).
274. *Id.* at 787.
275. *Id.* at 789.
276. *Id.*
277. *Id*. at 790 ("[T]he substance-over-form doctrine does not give the Commissioner a warrant to search through the Internal Revenue Code and correct whatever oversights Congress happens to make or redo any policy missteps the legislature happens to take.").
278. *Id.* at 788–89.
279. 150 T.C. No. 7, 2018 WL 1168766 (Mar. 5, 2018).
280. *Id.* at *8.

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The dissenting judges in *Mazzei* disagreed with the majority's approach, which recharacterized transactions that complied with the literal text of the relevant Code provisions, noting that such an approach is "inconsistent with the great textualist counterrevolution of the last few decades."[281] The Supreme Court's trend towards textualism seemingly has had little impact on the Tax Court's interpretive approach. Notably, the tax Court in *Mazzei* applied a more narrowly-tailored substance over form analysis than it did in *Summa Holdings*. Also, the Tax Court in *Mazzei* noted that it was not bound to follow the Sixth Circuit's decision in *Summa Holdings* because an appeal of *Mazzei* would go to the Ninth Circuit.

At the time *Mazzei* was decided, appeals by the Roth IRA owners in the Tax Court's *Summa Holdings* decision were pending. Since then, the First Circuit, in a split two-to-one decision, held in favor of the Roth IRA owners, concluding that the substance over form doctrine could not be used to recharacterize the transactions at issue.[282] According to the First Circuit, the substance over form doctrine applies only when a "transaction upon its face lies outside the plain intent of the statute."[283] According to the court, the taxpayers used a DISC and Roth IRAs consistent with their congressionally-sanctioned tax saving purposes.[284] It will be interesting to see whether the Tax Court continues to maintain its stance given two circuit court reversals.

281. *Id.* at *34. Judge Holmes, who penned the dissent, sees *Mazzei* and *Summa Holdings* as factually similar in that both taxpayers used tax-preferred entities—an FSC in *Mazzei* and a DISC in *Summa Holdings*. Judge Holmes would argue that substance-over-form principles are inapplicable in those cases because Congress created FSCs and DISCs for tax-avoidance purposes. *Cf.* Block Developers, LLC v. Comm'r, T.C.M. 2017-142 (T.C. 2017) (involving the use of an LLC to transfer value to a Roth IRA) In applying substance-over-form principles in ruling in favor of the government, Judge Holmes noted that substance-over-form principles were appropriate "where taxpayers used a corporate form that lacked any substance to facilitate a tax-avoidance scheme." *Id.* at *11 (citing *Summa Holdings*, 848 F.3d at 785–86).

282. Benenson v. Comm'r, 887 F.3d 511, 513 (1st Cir. 2018). The parents' appeal was heard by the Second Circuit on April 10, 2018, but a decision has yet to be issued. Benenson v. Comm'r, 109 T.C.M. (CCH) 1612 (T.C. 2015), *appeal docketed*, No. 16-2953 (2d Cir. Aug. 19, 2016).

283. *Benenson*, 887 F.3d at 517 (quoting Gregory v. Helvering, 293 U.S. 465, 470 (1935)).

284. *Id.* at 521.

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3. Informal Influence and Downward Deference[285]

Appellate courts review Tax Court findings of fact under a clearly erroneous standard.[286] The scope of appellate review with respect to questions of law, at least theoretically, is less clear, however.[287] The Supreme Court in *Dobson v. Commissioner* limited the scope of appellate review of Tax Court decisions to "clear-cut mistake[s] of law."[288] In reaching its decision, the Court relied on the predecessor of section 7482(c), which permitted reversal if the decision of the Tax Court was "not in accordance with law."[289] The Court read this provision to mean that Congress intended to limit appellate courts' review of Tax Court decisions.[290]

In response to *Dobson*, Congress enacted the predecessor of Code section 7482(a), which provides for appellate 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."[291] But Congress left intact section 7482(c). Some commentators maintain that Congress's amendments post-*Dobson* were directed at limiting appellate review of the Tax Court as to questions of fact, but because section 7482(c) remained unaltered, Tax Court decisions relating to questions of law were entitled to deference.[292]

While the enactment of section 7482(a) introduced theoretical uncertainty, in practice appellate courts tend to review Tax Court deci-

285. *See* Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 891 (2014) (using the phrase "downward deference" to refer to the Supreme Court's deference to lower-court precedent).

286. Section 7482(a) provides for appellate 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." *Federal Rule of Civil Procedure* 52(a)(6) provides: "Findings 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." FED. R. CIV. P. 52(a)(6).

287. *See* Vukasovich Inc. v. Comm'r, 790 F.2d 1409, 1411 (9th Cir. 1986) ("[A]mbiguity in this circuit's case law has obscured the scope of review of Tax Court decisions on questions of law.").

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

289. *Id.* at 492.

290. *Id.* at 494.

291. I.R.C. § 7492(a).

292. *See*, *e.g.*, Steve R. Johnson, *The Phoenix and the Perils of the Second Best: Why Heightened Appellate Deference to Tax Court Decisions Is Undesirable*, 77 OR. L. REV. 235, 251 (1998); David F. Shores, *Deferential Review of Tax Court Decisions: Dobson Revisited*, 49 TAX LAW. 629 (1996) (explaining enactment of section 7482 and concluding that 7482(c) permits courts to defer to the Tax Court on issues of law); *see also* Andre L. Smith, *Deferential Review of the United States Tax Court: The Chevron Doctrine*, 37 VA. TAX REV. 75 (2017) (arguing that Tax Court decisions are entitled to *Chevron* deference because the Tax Court is an Article I court within the executive branch).

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sions involving questions of law under a de novo standard.[293] Hierarchically superior courts, however, have been known to defer to the Tax Court due to the Tax Court's subject-matter expertise or to further the uniformity of the tax law.[294] Supreme Court justices have also argued that deference be given to the Tax Court. For example, Justice Jackson, who was a tax lawyer before joining the United States Supreme Court, noted in a dissent that the field of tax law is "beset with invisible boomerangs."[295] He urged the Court to defer to the Tax Court, "a more competent and steady influence toward a systematic body of tax law than our sporadic omnipotence."[296] Justice Stevens, in his dissent in *United Dominion Industries, Inc*., urged the Court to defer to the government in cases interpreting ambiguous tax statutes if the taxpayer's interpretation raises a potential for tax abuse.[297] Justice Stevens was not convinced of his ability to determine whether statutory anti-abuse rules alleviated the government's concerns, noting that when dealing "'with a subject that is highly specialized and so complex as to be the despair of judges,' an ounce of deference is appropriate."[298]

At least one empirical study found that the Tax Court was affirmed more often than the District Courts and Claims Court (about seventy-three percent vs. sixty percent) and the Tax Court was reversed less often (about nineteen percent vs. thirty percent).[299] The fact that the

293. Shores, *supra* note 292, at 667. Of course, "boilerplate language in appellate court opinions as to the standard of review may not describe the true behavior of those courts." Johnson, *supra* note 292, at 252.

294. *See*, *e.g.*, Esgar Corp. v. Comm'r, 744 F.3d 648, 652 (10th Cir. 2014) ("Rulings by the Tax Court on matters of tax law are . . . persuasive authority, especially if consistently followed."); Meruelo v. Comm'r, 691 F.3d 1108, 1114 (9th Cir. 2012) (quoting Merkel v. Comm'r, 192 F.3d 844, 847–48 (9th Cir. 1999) ("Although 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.'")); Boyd Gaming Corp. v. Comm'r, 177 F.3d 1096, 1098 (5th Cir. 1999) (quoting Pahl v. Comm'r, 150 F.3d 1124, 1127 (9th Cir.1998) ("The Tax Court's interpretation of the Internal Revenue Code is 'entitled to respect because of its special expertise in the field.'")); *see also* Shores, *supra* note 292, at 657–60 (discussing appellate cases that give the Tax Court deference in practice while professing a de novo standard of review).

295. Arrowsmith v. Comm'r, 344 U.S. 6, 12 (1952) (Jackson, J., dissenting). See Kirk J. Stark, *The Unfulfilled Tax Legacy of Justice Robert H. Jackson*, 54 TAX L. REV. 171, 173 (2001) for a discussion of Justice Jackson's tax background.

296. *Arrowsmith*, 344 U.S. at 12.

297. United Dominion Ind., Inc. v. United States, 532 U.S. 822, 842 (2001) (Stevens, J., dissenting).

298. *Id.* (quoting Dobson v. Comm'r, 320 U.S. 489 (1943)).

299. Sean Bryant et al., *An Empirical Study of Intercircuit Conflicts on Federal Income Tax Issues*, 9 VA. TAX REV. 125, 140 tbl. 2 (1989) (covering five-year period from 1983 to 1987); *see also* Worthy, *supra* note 250, at 253 (finding that during fiscal years 1967–1970, the Tax Court was fully reversed 13% of the time compared to 23% for federal district court tax cases). These conclusions are consistent

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circuit courts agreed with the Tax Court more often than the generalized trial courts that handle tax cases may indicate a kind of expertise borrowing by the generalized circuit courts.[300] It may also confirm the Tax Court's accuracy in reaching correct outcomes more often.

4. Duty to the Tax System

The overwhelming majority of regular Tax Court judges (eighty-seven percent) currently on the bench have had private practice experience.[301] They also had either prior IRS experience or tax-related government experience exclusive of the IRS, including with the Department of Justice Tax Division, the Joint Committee on Taxation, the Senate Finance or House Ways and Means Committee staff, or as a staff person to a member of Congress.[302] It stands to reason that pre-court experiences of Tax Court judges might influence their judicial philosophy and approach to statutory interpretation in ways that differ from generalist judges deciding tax cases.[303]

In particular, Tax Court judges' prior experience as lawyers, both in private practice and within the government, likely instilled in them a taxpaying ethos, which the federal government began to cultivate

with data on file with the author for fiscal years 2002–2016, which shows the Tax Court is reversed much less frequently than the generalized courts hearing refund claims.

300. Bryant et al., *supra* note 299, at 132 ("Deference and lack of expertise lead the circuits to affirm the Tax Court in a large number of cases.").

301. Data as of June 1, 2018 on file with the author. The Tax Court is authorized to have 19 judges. *See supra* note 243. There were four vacancies as of June 1, 2018. Another vacancy was created when Judge Vasquez retired and assumed senior status on June 24, 2018. *Judges*, U.S. TAX COURT (Oct. 22, 2018), https://www.ustaxcourt.gov/judges.htm [https://perma.unl.edu/A6CW-FQJ7].

302. *See supra* note 301. The percentage of Tax Court judges with prior government experience exclusive of the IRS has been trending up, while the percentage with prior IRS experience has been declining. *Id.* Professor Robert Howard in a study published in 2009 found that just 53% of regular judges had government experience exclusive of the IRS. HOWARD, *supra* note 130, at 58, tbl.4.1. That percentage is now 87%. He also found that 33% of all regular Tax Court judges had prior IRS experience compared to 60% of senior judges, which are retired judges who are recalled by the chief judge to serve. I.R.C. § 7447(c). Now, just 27% of regular judges and 55% of senior judges have prior IRS experience.

303. *See* Schneider, *supra* note 41, at 331 (quoting from James J. Brudney et al., *Judicial Hostility Toward Labor Unions? Applying the Social Science Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675 (1999)) ("[P]re-court life experiences play a prominent role in shaping the personal values and policy preferences of judges, and . . . such biographical factors can be useful in predicting judicial decisions."). Prior employment was also a significant variable in another study. *Id.* at 332 (quoting Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998)).

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during World War II.[304] Today, this taxpaying ethos is reflected in the tax bar's "duty to the tax system," which in broad strokes refers to the tax bar's ethical responsibility to "create, nurture, and promote a fair tax system."[305] When advising clients, the duty to the system obligates tax lawyers to take an "evenhanded approach to interpreting the law."[306] Some would go so far as to say that the duty to the tax system is satisfied only if doubts as to "questionable tax characterizations" are resolved against the client and in favor of the government.[307] There are several justifications for this duty, chief among them the self-assessment nature of our tax system coupled with low levels of government enforcement.[308] Tax advisors have been characterized as gatekeepers, allowing into the tax system "good" transactions that are sustainable under the law while keeping out of the system "bad" transactions.[309] Due to the government's limited resources, the tax

304. Richard Lavoie, *Patriotism and Taxation: The Tax Compliance Implications of the Tea Party Movement*, 45 LOY. L.A. L. REV. 39, 50–51 (2011). Using popular media of the day, including movies, television, and radio, the government

> helped create the perception among the general public that everyone had a part to play in the war effort—a social contract basis for compliance—and the awareness that the tax revenues were providing the men on the front lines with guns, ammunition, planes, and other necessities—a quid pro quo basis for compliance.

Fahey, *supra* note 87, at 182–83.

305. Richard Lavoie, *Am I My Brother's Keeper? A Tax Law Perspective on the Challenge of Balancing Gatekeeping Obligations and Zealous Advocacy in the Legal Profession*, 44 LOY. U. CHI. L.J. 813, 816 (2013). To be clear, as David Moldenhauer observes: "The basis and scope of this duty to the system are not clear; beyond basic principles, the views regarding the fundamental sources of a lawyer's duties to the tax system are all over the map." David T. Moldenhauer, *Circular 230 Opinion Standards, Legal Ethics and First Amendment Limitations on the Regulation of Professional Speech by Lawyers*, 29 SEATTLE U. L. REV. 843, 874 (2006). Commentators have called for these duties to the system, whatever they are, to be made explicit. John S. Dzienkowski & Robert J. Peroni, *The Decline in Tax Adviser Professionalism in American Society*, 84 FORDHAM L. REV. 2721, 2725 (2016) ("This Article advocates for the position that tax professionals owe a duty to the tax system and such a duty must be grounded in concrete guidance."); *see* Michael Hatfield, *Legal Ethics and Federal Taxes, 1945–1965: Patriotism, Duties, and Advice*, 12 FLA. TAX REV. 1, 17 (2012).

306. *See* Lavoie, *supra* note 305, at 816.

307. Anthony C. Infanti, *Deconstructing the Duty to the Tax System: Unfettering Zealous Advocacy on Behalf of Lesbian and Gay Taxpayers*, 61 TAX LAW. 407, 420 (2008).

308. Laing v. United States, 423 U.S. 161, 191 (1976) ("Our income tax system is primarily a self-reporting and self-assessment one.").

309. *See* Infanti, *supra* note 307, at 415 (noting that the tax bar "may often be the ultimate arbiter of what the revenue laws require"). The gatekeeping role of tax professionals may also be justified by the complexity of the tax laws, which apparently is a feature of the Code, not a bug. *See supra* notes 68–71 and accompanying text.

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bar often may be "de facto administrators of the tax system."[310] Tax Court judges who have internalized a duty to the tax system might assume a responsibility for the integrity of the tax system uniquely different than their generalist colleagues.

IV. CONCLUSION

This Article has argued that the predominant statutory interpretive approaches are deficient because they fail to consider the actual processes by which laws were enacted. One way to address these deficiencies is to customize interpretive doctrine to account for the actual lawmaking process. This Article argues for a custom-tailored interpretive doctrine specifically for the Internal Revenue Code. Tax is well-suited to a bespoke statutory interpretive approach given several factors that were explored in this Article. Courts interpreting federal tax laws should explicitly and consistently take account of these unique characteristics.

310. David J. Moraine, *Loyalty Divided: Duties to Clients and Duties to Others—The Civil Liability of Tax Attorneys Made Possible by the Acceptance of a Duty to the System*, 63 TAX LAW. 169, 197 (2009).

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