

## Article

# The Death of Tax Court Exceptionalism

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Introduction .....	222
I. The Evolution of the Tax Court .....	229
A. Shifting Constitutional and Administrative Law Status .....	229
B. Expanding Jurisdiction .....	233
1. Tax Deficiency .....	235
2. Innocent Spouse.....	237
3. Collection Due Process .....	240
II. The Legal Case Against Tax Court Exceptionalism.....	242
A. Judicial Review Under the APA.....	243
1. Default Standard of Review .....	245
2. Default Scope of Review .....	247
3. Administrative Common Law Doctrines .....	248
B. The Tax Court, the IRS, and the APA .....	250
1. Tax Deficiency Redeterminations .....	254
2. Review of Innocent Spouse Determinations.....	257
3. Review of Collection Due Process Decisions.....	261

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222	<i>MINNESOTA LAW REVIEW</i>	[99:221
	4. The Tax Court and the Ordinary Remand Rule .....	263
III.	The Policy Case Against Tax Court Exceptionalism .....	268
A.	Rationales for Judicial Deference to Agency Action .....	269
	1. Separation of Powers .....	271
	2. Expertise .....	273
	3. Consistency .....	276
	4. Efficiency .....	282
	5. Equity .....	286
B.	Judicial Toolbox for Enhancing Agency Dialogue ..	289
	Conclusion .....	295

## INTRODUCTION

For decades, tax jurisprudence and scholarship have suffered from what has been labeled “tax exceptionalism”—the perception that tax law is so different from the rest of the regulatory state that general administrative law doctrines and principles do not apply.<sup>1</sup> This “tax myopia” has come under greater scrutiny in recent years.<sup>2</sup>

The death of tax exceptionalism is perhaps best exemplified by the Supreme Court’s 2011 decision in *Mayo Foundation for Medical Education & Research v. United States*.<sup>3</sup> There, the Court refused to apply a less deferential standard of review to the Treasury Department’s interpretation of the tax code.<sup>4</sup> In holding that *Chevron*<sup>5</sup> deference applies with full force to tax

1. See, e.g., Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1541 (2006) (describing the “perception of tax exceptionalism that intrudes upon much contemporary tax scholarship and jurisprudence”); see also Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 515–26 (2011) (documenting IRS-specific precedents that depart unjustifiably from general administrative law doctrines).

2. See Paul L. Caron, *Tax Myopia, or Mamas Don’t Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 518–19 (1994) (arguing that “tax law too often is mistakenly viewed by lawyers, judges, and law professors as a self-contained body of law” and that “this misperception has impaired the development of tax law by shielding it from other areas of law that should inform the tax debate”). Indeed, the *Duke Law Journal* recently dedicated a symposium to the topic—aptly titled *Taking Administrative Law to Tax*. See Amandeep S. Grewal, *Foreword: Taking Administrative Law to Tax*, 63 DUKE L.J. 1625 (2014).

3. 131 S. Ct. 704 (2011).

4. *Id.* at 713–14.

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

regulations, the unanimous *Mayo* Court indicated it was “not inclined to carve out an approach to administrative review good for tax law only,” noting that it has “expressly [r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.”<sup>6</sup> To the contrary, the Court found “no reason why . . . review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as . . . review of other regulations.”<sup>7</sup>

Similarly, the D.C. Circuit recently rejected a tax exceptionalism argument advanced by the Internal Revenue Service (IRS). In *Cohen v. United States*, the D.C. Circuit held en banc that the judicial review provisions of the Administrative Procedure Act (APA) apply with full force to a form of IRS guidance known as a notice.<sup>8</sup> In reaching this conclusion, the court remarked that “[t]he IRS is not special in this regard; no exception exists shielding it—unlike the rest of the Federal Government—from suit under the APA.”<sup>9</sup> To be sure, “[t]here may be good policy reasons to exempt IRS action from judicial review [under the APA]. Revenue protection is one. But Congress has not made that call. And we are in no position to usurp that choice . . . .”<sup>10</sup>

As Kristin Hickman has observed, “[t]aken together, these cases have given tax lawyers a fresh awareness of administrative law doctrine as relevant to their field.”<sup>11</sup> Patrick Smith, for instance, has remarked that “by far the most important aspect of *Mayo*, apart from the holding that *Chevron* applies to tax regulations, was the Supreme Court’s emphasis on the principle that tax law is subject to the same administrative law rules that apply in all other areas of federal law.”<sup>12</sup> And Thomas Greenway has proclaimed that *Mayo* “cured decades of ‘tax my-

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6. *Mayo*, 131 S. Ct. at 713 (quoting *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999)). *Mayo* was an 8–0 decision with Justice Kagan recused. *Id.* at 716.

7. *Id.* at 713.

8. *Cohen v. United States*, 650 F.3d 717, 736 (D.C. Cir. 2011) (en banc).

9. *Id.* at 723.

10. *Id.* at 736 (citations omitted).

11. Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 466 (2013). Professor Hickman’s recent empirical work has given more cause for concern about tax exceptionalism, finding that the Treasury and IRS engage in a substantial amount of nontax regulation. Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717, 1747, 1760–61 (2014).

12. Patrick J. Smith, *Life After Mayo: Silver Linings*, 131 TAX NOTES 1251, 1256 (2011).

opia' that had "afflict[ed] practitioners who cannot see beyond the self-contained world of tax."<sup>13</sup>

This Article turns to another area where tax exceptionalism persists: the status of the United States Tax Court in the modern administrative state.<sup>14</sup> The Tax Court plays an important role in the life of the federal judiciary. It functions as a tax specialist and hears over ninety-five percent of federal tax-related litigation.<sup>15</sup> The overall volume of its work is impressive. As of 1995, for instance, the court had heard approximately 360,000 cases with total tax liabilities reaching about \$34 billion.<sup>16</sup> And the number of cases filed, closed, and still pending has generally risen each year. From 2000 to 2010, the Tax Court closed nearly 260,000 cases while nearly 265,000 cases were filed during the same period.<sup>17</sup> Regardless of this large number of cases, the Tax Court still had over 250,000 cases pending.<sup>18</sup> Of the cases closed, the court released written opinions for over 8,400 of them.<sup>19</sup> The dollar amount is also staggering. In 2006, the Tax Court closed cases with an aggregate tax liability of nearly \$7.4 billion.<sup>20</sup> From fiscal year 2008 to 2012, the Tax Court closed cases with an aggregate amount exceeding \$33 billion.<sup>21</sup>

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13. Thomas Greenaway, *Mayo Foundation Cures Tax Myopia*, KPMG WHAT'S NEWS IN TAX 1 (Jan. 17, 2011), <http://taxprof.typepad.com/files/mayo-kpmg.pdf>. *But see* Lawrence Zelenak, *Maybe Just a Little Bit Special, After All?*, 63 DUKE L.J. 1897 (2014) (providing partial defense of tax exceptionalism).

14. While not addressing the APA question at issue here, Leandra Lederman has made a similar call that the Tax Court be treated more like the rest of the judiciary. *See* Leandra Lederman, *Tax Appeal: A Proposal To Make the United States Tax Court More Judicial*, 85 WASH. U. L. REV. 1195, 1199 (2008) [hereinafter Lederman, *Tax Appeal*] (arguing that "Congress should recognize the entirely judicial nature of the Tax Court by making it subject to the [Administrative Office of U.S. Courts]; the Rules Enabling Act; and, with respect to its rulemaking, the Judicial Conference"); *see also* Leandra Lederman, *(Un)Appealing Deference to the Tax Court*, 63 DUKE L.J. 1835 (2014) [hereinafter Lederman, *(Un)Appealing Deference*] (arguing that federal courts of appeals do not, and should not, give more deference to Tax Court decisions than they do to those of other trial courts).

15. David Laro, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. ILL. L. REV. 17, 18 (1995).

16. *Id.*

17. *See* 2000–2010 U.S. TAX CT. ANN. REP. tbl.4 (on file with author).

18. *See id.*

19. *See id.*

20. 1996–2006 U.S. TAX CT. ANN. REP. tbl.4.

21. INTERNAL REVENUE SERV., DATA BOOK 61 tbl.27 (2012) [hereinafter IRS 2012 DATA BOOK], <http://www.irs.gov/pub/irs-soi/12datbk.pdf>; INTERNAL

The sheer magnitude of the Tax Court's jurisdiction suggests that its internal rules—such as the standard and scope of review of IRS actions—are of national importance. Yet little has been done to conform the Tax Court's standards and procedures to those of its sister courts—the Article III federal district courts and the Article I United States Court of Federal Claims, which similarly adjudicate tax disputes but consider themselves bound by the judicial review provisions of the APA.<sup>22</sup> Rather, the Tax Court has remained insular. It plays by its own rules, and has repeatedly affirmed that “[t]he APA has never governed proceedings in the Court (or in the Board of Tax Appeals).”<sup>23</sup>

Perhaps unsurprisingly, federal courts have reached conflicting conclusions about whether the Tax Court is bound by the APA's default judicial review standards when reviewing IRS actions. The Fifth and D.C. Circuits have disagreed with the Tax Court's current position and held that the Tax Court is bound by the APA's default review standard, which is abuse of discretion.<sup>24</sup> The Eleventh Circuit has also held that the APA's abuse-of-discretion standard of review applies, but in a divided opinion concluded that the scope of review is *de novo* (not limited to the administrative record).<sup>25</sup> By contrast, the First and Eighth Circuits have held that the Tax Court is bound by the APA's default scope of review.<sup>26</sup> And, most recently, the Ninth Circuit in *Wilson v. Commissioner* held that neither the APA's

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REVENUE SERV., DATA BOOK 61 tbl.27 (2011), <http://www.irs.gov/pub/irs-soi/11databk.pdf>; INTERNAL REVENUE SERV., DATA BOOK 61 tbl.27 (2010), <http://www.irs.gov/pub/irs-soi/10databk.pdf>; INTERNAL REVENUE SERV., DATA BOOK 61 tbl.27 (2009), <http://www.irs.gov/pub/irs-soi/09databk.pdf>; INTERNAL REVENUE SERV., DATA BOOK 61 tbl.27 (2008), <http://www.irs.gov/pub/irs-soi/08databkrevised.pdf>. The amount in controversy figure includes penalties but excludes interest owed on past due liabilities.

22. See *infra* Part II.B (discussing approaches in Article III federal courts and Article I United States Court of Federal Claims).

23. *Robinette v. Comm'r*, 123 T.C. 85, 96 (2004), *rev'd* 439 F.3d 455 (8th Cir. 2006); see also, e.g., *O'Dwyer v. Comm'r*, 266 F.2d 575, 580 (4th Cir. 1959) (“The Tax Court, rather than being a ‘reviewing court’, within the meaning of Sec. 10(e) [of the APA] reviewing the ‘record’, is a court in which the facts are triable *de novo*. . . .”), *aff'g* 28 T.C. 698 (1957); *Porter v. Comm'r*, 130 T.C. 115, 117 (2008) (“Since its enactment in 1946 the APA has generally not governed proceedings in this Court (or in its predecessor, the Board of Tax Appeals).”).

24. See *Mitchell v. Comm'r*, 292 F.3d 800, 807 (D.C. Cir. 2002) (innocent spouse claim); *Cheshire v. Comm'r*, 282 F.3d 326, 338 (5th Cir. 2002) (same).

25. *Comm'r v. Neal*, 557 F.3d 1262, 1276–78 (11th Cir. 2009) (innocent spouse claim). *But see id.* at 1281 (Tjoflat, J., dissenting).

26. *Murphy v. Comm'r*, 469 F.3d 27, 31 (1st Cir. 2006) (collection due process claim); *Robinette v. Comm'r*, 439 F.3d 455, 460 (8th Cir. 2006) (same).

default standard of review nor its default scope of review applied; instead, both are de novo.<sup>27</sup> As Judge Bybee (a former administrative law professor) explained in his dissent in *Wilson*, “The question is of more than passing interest. It goes to the heart of the place of the Tax Court in our administrative system. The question has splintered the Tax Court, which has proceeded along three different paths, dragging four circuit courts with them in the process.”<sup>28</sup>

The IRS, despite publicly disagreeing with the majority in *Wilson*, has acquiesced in the court’s holding.<sup>29</sup> In certain cases—equitable innocent spouse cases—it will no longer argue that the Tax Court should review for abuse of discretion or limit its review to evidence in the administrative record.<sup>30</sup> But with the supersized Ninth Circuit joining the Tax Court’s side of the split—with four circuits on the other side and the Eleventh Circuit somewhere in between—it was likely only a matter of time before the Supreme Court intervened to resolve the disagreement among the lower courts and clarify the Tax Court’s proper place in the administrative state.<sup>31</sup>

Following the Supreme Court’s lead in *Mayo* (and the D.C. Circuit’s in *Cohen*), this Article calls for the IRS to resume its fight and for the Tax Court to abandon tax exceptionalism—a misperception that has persisted since (at least) Congress officially transformed the Tax Court from an independent agency into an Article I court in 1969.<sup>32</sup> Instead, the Tax Court should return to first principles of administrative law, including the

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27. *Wilson v. Comm’r*, 705 F.3d 980, 994 (9th Cir. 2013) (innocent spouse relief claim). *But see id.* at 996 (Bybee, J., dissenting).

28. *Id.* at 995.

29. I.R.S. Actions Relating to Court Decisions, 2013–25 I.R.B. (June 17, 2013).

30. See I.R.S. Notice, CC-2013-011 (Jun. 7, 2013).

31. See David C. Frederick, Christopher J. Walker & David M. Burke, *The Insider’s Guide to the Supreme Court of the United States*, in APPELLATE PRACTICE COMPENDIUM 1, 7 (Dana Livingston ed., 2012) (“[T]he critical factor motivating the Court’s exercise of discretion is whether the decision below conflicts with the decision(s) of other federal courts of appeals . . .”).

32. See 26 U.S.C. § 7441 (2012) (“There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court.”); see also Harold Dubroff, *The United States Tax Court: An Historical Analysis—Part IV: The Board Becomes a Court*, 41 ALB. L. REV. 1, 40–51 (1977), reprinted in DUBROFF, *infra* note 41, at 204–15. Professor Fahey has reached a similar conclusion in the context of collection due process. Diane L. Fahey, *Is the United States Tax Court Exempt from Administrative Law Jurisprudence When Acting as a Reviewing Court?*, 58 CLEV. ST. L. REV. 603, 605 (2010).

well-settled rule that, when reviewing federal agency actions, “a reviewing court must apply the APA’s court/agency review standards in the absence of an exception.”<sup>33</sup> By starting with the APA as the default, it becomes clearer which IRS actions are subject to the default APA rules (e.g., innocent spouse and collection due process claims) and which may not be (i.e., tax deficiency redeterminations), based on congressional override in the Internal Revenue Code of the APA default standards.

The Article proceeds as follows. Part I traces the evolution of the Tax Court from an independent executive agency created in 1924 to an Article I court in 1969 and the accompanying expansion of its jurisdiction to adjudicate tax-related disputes. Part I focuses on three types of Tax Court jurisdiction: tax deficiency redeterminations, innocent spouse relief claims, and collection due process claims. Understanding the Tax Court’s history—including that it was converted from an agency to a court (in 1969) after the enactment of the APA (in 1946)—helps explain its misguided reliance on tax exceptionalism and how to reorient the Tax Court on first principles of administrative law.

Part II presents the legal case for why the Tax Court is governed by the APA. The Supreme Court has been clear that the APA applies to any judicial review of federal agency action.<sup>34</sup> The APA establishes the default standards for judicial review of federal agency action.<sup>35</sup> Under the APA, “agency” is defined to include “each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include,” among other entities, Congress and “the courts of the United States.”<sup>36</sup> The APA judicial review standards apply to any “reviewing court” of agency action.<sup>37</sup> The IRS, an executive agency within the Treasury Department, is plainly an “agency” for purposes of the APA. And while the Tax Court used to be an agency before the enactment of the APA, as of 1969 it is an Article I court. For purposes of the APA, it is thus “a court of the United States,”<sup>38</sup> and, for its review of IRS agency actions, a “reviewing court” subject to the

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33. *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999).

34. *Id.* at 154.

35. Administrative Procedure Act, Pub. L. No. 89-554, 80 Stat. 378 (1946) (codified as amended in scattered sections of 5 U.S.C.).

36. 5 U.S.C. § 701(b) (2012).

37. *Id.* § 706.

38. *Id.* § 702; *accord id.* § 701(b).

APA's judicial review provisions.<sup>39</sup> Part II then evaluates the judicial review provisions provided in the Internal Revenue Code with respect to the three claims discussed in Part I to determine which of the Tax Court's proceedings are not subject to the APA's default standards.

Part III details the policy case against Tax Court exceptionalism, including considerations of separation of powers, agency expertise, consistent application of the law, efficient allocation of resources, and horizontal and vertical equity. This Part considers perhaps the most compelling tax policy argument against applying the more agency-deferential APA standards in the Tax Court: concerns for the less sophisticated taxpayer who attempts to navigate the system without representation. At first blush, the Tax Court's current approach of more searching *de novo* review may appear to best protect the unrepresented taxpayer. In contrast, by confining review to abuse of discretion and prohibiting consideration of evidence outside of the administrative record, the APA limits a court's ability to grant relief when it feels such relief may be merited. Moreover, by following traditional administrative law doctrines, the Tax Court may be required to remand cases to the IRS when it finds error instead of just granting the relief outright. The Tax Court may be reluctant to adhere to this ordinary remand rule when it believes the taxpayer is entitled to relief and remand would unduly delay or, worse, preclude relief because the taxpayer would get lost in the process on remand.

Despite the commonsense appeal of more searching review, Part III takes the novel and counterintuitive position that the APA's default regime is actually more effective at addressing these concerns by allowing the Tax Court to have a more systemic effect on IRS decision-making. Federal courts in other agency review contexts have developed a number of tools to help ensure that petitioners do not get lost on remand.<sup>40</sup> By using these tools and developing more of its own, the Tax Court can begin a richer dialogue with the IRS—a dialogue aimed at improving the IRS's procedures and decision-making not only in the case remanded but also in the agency overall. Such dialogue is critical to improving the treatment of less sophisticated

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39. *Id.* § 706.

40. See Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. (forthcoming 2014) [hereinafter Walker, *The Ordinary Remand Rule*], available at <http://ssrn.com/abstract=2242869>.



taxpayers—many of whom, unrepresented, do not even seek judicial review of the IRS's adverse determinations.

The Article concludes by advocating that the the Tax Court abandon tax exceptionalism and return to first principles of administrative law. Not only does the law require the Tax Court to follow the APA when reviewing IRS actions, but administrative law and tax policy considerations support it. Importantly, and somewhat counterintuitively, adhering to the general rules of administrative law—including the ordinary remand rule—could help the Tax Court improve IRS procedures and decision-making by enhancing the court-agency dialogue. In light of the demise of tax exceptionalism in other contexts, the policy considerations that counsel such death here, and the growing conflict among the federal courts of appeals, the Tax Court should reverse course. If the IRS resumed its fight, it would likely be only a matter of time before the Supreme Court (or Congress) intervened and extended the reasoning in *Mayo* to declare the death of tax exceptionalism in yet another area of tax law.

## I. THE EVOLUTION OF THE TAX COURT

The Tax Court's exceptionalist view that it is not subject to the APA is in large part a creature of its unconventional history. This Part explores the Tax Court's shifting status in the administrative state and the expanding nature of the Tax Court's jurisdiction to help explain the widespread confusion among courts about whether (and when) the Tax Court is subject to the APA default judicial review provisions.

### A. SHIFTING CONSTITUTIONAL AND ADMINISTRATIVE LAW STATUS

The Tax Court's constitutional status has shifted greatly over the last century. Over the years numerous scholars have detailed the Tax Court's historical evolution from an independent executive agency to an Article I court.<sup>41</sup> So the full story will not be repeated here. Instead, we focus on the Tax Court's

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41. See, e.g., Fahey, *supra* note 32, at 615–43; Lederman, *Tax Appeal, supra* note 14, at 1200–16. See generally HAROLD DUBROFF, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS 1–215 (1979) (reprinting series of articles first published in the *Albany Law Review*); Bryan T. Camp, *A History of Tax Regulation Prior to the Administrative Procedure Act*, 63 DUKE L.J. 1673, 1684 (2014) (“The world of the APA started in 1947, but the world of U.S. tax administration began in 1789.”).

shifting place in the modern administrative state and how that affects whether the Tax Court is a “court” or an “agency” (or neither, as is the Tax Court’s current position) under the APA.

In 1924, Congress created the Board of Tax Appeals (“Board”).<sup>42</sup> As the name suggests, the Board was not a court, but an independent agency located in the executive branch.<sup>43</sup> The Board functioned as “an impartial tribunal to provide taxpayers with some opportunity to dispute a tax before assessment and collection.”<sup>44</sup> For deficiency proceedings, the scope of review was “a complete hearing de novo according to the rules of evidence applicable in courts of equity of the District of Columbia.”<sup>45</sup> Board decisions were appealable to federal district courts, where “the findings of the Board shall be prima facie evidence of the facts therein stated.”<sup>46</sup> It is beyond dispute that the Board was *not* a court, but an agency that reviewed de novo the determinations of another agency. As the Supreme Court explained, “The Board of Tax Appeals is not a court. It is an executive or administrative board, upon the decision of which the parties are given an opportunity to base a petition for review to the courts after the administrative inquiry of the Board has been had and decided.”<sup>47</sup>

The years following the Board’s establishment saw unsuccessful attempts to transform the body from an agency to a court.<sup>48</sup> In 1942, Congress changed the name of the Board to

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42. Revenue Act of 1924, Pub. L. No. 68-176, § 900, 43 Stat. 253, 336–38.

43. *Id.*; accord *Dobson v. Comm’r*, 320 U.S. 489, 497 (1943); see also Harold Dubroff, *The United States Tax Court: An Historical Analysis—Part II: Creation of the Board of Tax Appeals*, 40 ALB. L. REV. 7, 53–58 (1976), reprinted in DUBROFF, *supra* note 41, at 47–52; Fahey, *supra* note 32, at 617.

44. Fahey, *supra* note 32, at 617.

45. *Phillips v. Comm’r*, 283 U.S. 589, 598 (1931) (citing Revenue Act of 1928, ch. 852, § 601, 45 Stat. 791, 872); accord Dubroff, *supra* note 43, at 96, 101, reprinted in DUBROFF, *supra* note 41, at 90, 95–96 (explaining that the Revenue Act of 1924 allowed the Board to establish its own set of evidentiary rules; however, it decided to use common law rules of evidence).

46. Revenue Act of 1924, Pub. L. No. 68-176, § 900(g), 43 Stat. 253, 337.

47. *Old Colony Trust Co. v. Comm’r*, 279 U.S. 716, 725 (1929).

48. See Harold Dubroff, *The United States Tax Court: An Historical Analysis, Part III: The Revenue Act of 1926—Improving the Board of Tax Appeals*, 40 ALB. L. REV. 253, 257–60 (1976), reprinted in DUBROFF, *supra* note 41, at 113–16. To be sure, Congress tinkered with the Board’s functions. For instance, the Revenue Act of 1926 provided for direct appellate review. Revenue Act of 1926, ch. 27, § 1001, 44 Stat. 9, 109; see also David F. Shores, *Deferential Review of Tax Court Decisions: Dobson Revisited*, 49 TAX LAW. 629, 635 (1996) (discussing the incongruity of having “collateral review of a specialized tribunal’s decisions by a court of general jurisdiction” that could not hand down final decisions). Litigants no longer had to appear in both the Board and

“The Tax Court of the United States.”<sup>49</sup> During the congressional hearings, the Board’s chair, John Murdoch, argued that the Board should be renamed to reduce confusion about its role and highlight the formality of its proceedings.<sup>50</sup> With the passage of the Revenue Act of 1942, the Tax Court assumed its new name, and its members were designated “judges.”<sup>51</sup> Despite these changes, however, the Tax Court remained “an independent agency in the executive branch,” and its “jurisdiction, powers, and duties” were unchanged.<sup>52</sup> And the Supreme Court reaffirmed the Tax Court’s status as a federal agency—indeed, a special agency from which “no administrative decisions are entitled to higher credit in the courts.”<sup>53</sup>

In 1946, four years after the Tax Court’s name change, Congress enacted the APA.<sup>54</sup> As discussed in Part II.A, the APA established the default rules for the modern administrative

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the district court; direct review eliminated the duplication of trials inherent in the 1924 statute. See Deborah A. Geier, *The Emasculated Role of Judicial Precedent in the Tax Court and Internal Revenue Service*, 39 OKLA. L. REV. 427, 431 (1986). The 1926 law also granted finality to Board decisions that were not appealed within six months. See Gary W. Carter, *The Commissioner’s Nonacquiescence: A Case for a National Court of Tax Appeals*, 59 TEMP. L.Q. 879, 882 (1986) (detailing how the window for appeal was eventually shortened to three months in 1932 and currently sits at 90 days today).

49. Revenue Act of 1942, Pub. L. No. 77-753, § 504(a), 56 Stat. 798.

50. Dubroff, *supra* note 32, at 14, reprinted in DUBROFF, *supra* note 41, at 178. Professor Fahey quips that this change allowed the Board to more easily reserve rooms for its hearings, since many courthouses were “reluctant to permit administrative hearings to be carried on in their facilities since such hearings were generally informal ones ‘to which large and undesirable crowds [were] attracted’ and at which ‘smoking’ was permitted.” Fahey, *supra* note 32, at 629 (quoting DUBROFF, *supra* note 41, at 178). The history behind the name change may be far richer than this account. Around this time the government began collecting larger sums of money from affluent people to fund World War II, see JAMES T. SPARROW, *WARFARE STATE: WORLD WAR II AMERICANS AND THE AGE OF BIG GOVERNMENT* 125 (2011), and thus it may have wanted the body reviewing tax determinations to look and act more like an impartial court than another federal agency.

51. Revenue Act of 1942, Pub. L. No. 77-753, § 504(a), 56 Stat. 798, 957; see also Diane L. Fahey, *The Tax Court’s Jurisdiction over Due Process Collection Appeals: Is It Constitutional?*, 55 BAYLOR L. REV. 453, 481–82 (2003).

52. Revenue Act of 1942, Pub. L. No. 77-753, § 504(b), 56 Stat. 798, 957; Fahey, *supra* note 51, at 482.

53. *Dobson v. Comm’r*, 320 U.S. 489, 499 (1943); see also *Wilson v. Comm’r*, 705 F.3d 980, 998 (9th Cir. 2013) (Bybee, J., dissenting) (noting that “the constitutional status of the [1942] Tax Court was not in question” and that the *Dobson* “Court continued to treat the court as an independent executive agency, whose expertise was unquestioned”).

54. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

state, both as to the procedures agencies use in their rulemaking and adjudicative activities and as to the standards courts use when reviewing agency action. But where did the Tax Court fit in this modern administrative state? After all, it was still an administrative agency under the Revenue Act of 1942, yet its name suggested it was a court. So was it subject to either the APA procedures governing agencies or those governing judicial review of agency action (or neither)?

The answer, as of 1946, was not crystal clear. As to the former, an opinion of the Attorney General, which was incorporated into the legislative history of the APA, advised Congress that “‘Courts’ includes The Tax Court, Court of Customs and Patent Appeals, the Court of Claims, and similar courts. This act does not apply to their procedure nor affect the requirement of resort thereto.”<sup>55</sup> As Professor Fahey notes, “Congress was concerned that these judicial entities not be deemed agencies under the sections of the APA specifying agency adjudicatory procedures because these entities already had procedures in place.”<sup>56</sup>

The APA’s legislative history provides further support for the Attorney General’s opinion that the Tax Court is a court (as opposed to an agency) under the APA. Section 706(2) of the APA provides that a court may find an agency action unlawful in a variety of cases, one of which (§ 706(2)(F)) is an action that is “unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.”<sup>57</sup> The House Judiciary Committee Report cites income tax redeterminations as one such instance which “may involve a trial of the facts in The Tax Court or the United States district courts.”<sup>58</sup> In other words, as Professor Fahey concludes, “the Tax Court of the United States [was] not exempt from the APA [judicial review

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55. S. REP. NO. 79-752, at App. B (1945) (Appendix to Att’y Gen. Statement Regarding Revise Comm. Print of Oct. 5 1945), *reprinted in* S. DOC. NO. 79-248, at 224 (1946) (Legislative History of the Administrative Procedure Act).

56. Fahey, *supra* note 32, at 634.

57. 5 U.S.C. § 706(2)(F) (2012).

58. H. REP. NO. 79-1980, pt. 4 § 10(E) (1946) (report of the House Judiciary Committee), *reprinted in* S. DOC. NO. 79-248, at 279 (1946) (Legislative History of the Administrative Procedure Act); *see also* S. REP. NO. 79-752, pt. 4 § 10(e) (1945) (report of the Senate Judiciary Committee), *reprinted in* S. Doc. No. 79-248, at 214 (1946) (Legislative History of the Administrative Procedure Act).

provisions] but, rather, was used as an example of how [§ 706(2)(F)] of the APA was intended to operate.”<sup>59</sup>

Questions regarding the Tax Court’s status as an agency or court should have been put to rest in 1969. Over two decades after the APA’s enactment, Congress “established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court.”<sup>60</sup> As Judge Bybee has noted, “[t]his time, the Tax Court’s constitutional status did change.”<sup>61</sup> In *Freytag v. Commissioner*, for instance, the Supreme Court held that the post-1969 “Tax Court exercises judicial power to the exclusion of any other function. . . . The Tax Court’s function and role in the federal judicial scheme closely resemble those of the federal district courts, which indisputably are ‘Courts of Law.’”<sup>62</sup>

Accordingly, since the Tax Reform Act of 1969, the Tax Court is no longer a federal agency but an Article I court as a matter of constitutional and administrative law.

#### B. EXPANDING JURISDICTION

Whereas the Tax Court’s shifting constitutional and administrative law status has been well chronicled, its expanding jurisdiction has been often overlooked yet sheds important light

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59. Fahey, *supra* note 32, at 636; *see id.* at 634–36 (exploring legislative history in more detail). *But see* O’Dwyer v. Comm’r, 266 F.2d 575, 580 (4th Cir. 1959) (holding that the Tax Court is not subject to the APA, because it was not a “reviewing court” under the APA). In her terrific response to this Article, Leandra Lederman explores in greater detail what Congress meant by “court[s] of the United States” and reviewing “court” under the APA, concluding that the evidence is mixed on the status of the Tax Court at the time the APA was enacted. *See* Leandra Lederman, *Restructuring the U.S. Tax Court: A Reply to Stephanie Hoffer and Christopher Walker’s The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. HEADNOTES 20–24 (2014), <http://www.minnesotalawreview.org/headnotes>.

60. Tax Reform Act of 1969, Pub. L. No. 91-172, sec. 951, § 7441, 83 Stat. 487, 730 (codified at 26 U.S.C. § 7441 (2012)); *see also* Dubroff, *supra* note 32, at 40–51, *reprinted in* DUBROFF, *supra* note 41, at 204–15.

61. *Wilson v. Comm’r*, 705 F.3d 980, 998 (9th Cir. 2013) (Bybee, J., dissenting).

62. *Freytag v. Comm’r*, 501 U.S. 868, 891 (1991); *see id.* (“The courts of appeals, moreover, review those decisions ‘in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury.’ [26 U.S.C.] § 7482(a). This standard of review contrasts with the standard applied to agency rulemaking by the courts of appeals under § 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).”); *see also* Lederman, *(Un)Appealing Deference*, *supra* note 14, at 1874–93 (detailing why as a matter of law and policy the appellate model of judicial review that applies to judicial review of other trial court decisions should apply to Tax Court decisions).

on whether the Tax Court is governed by the APA's judicial review provisions. Despite its transformation, at the passage of both the APA in 1946 and the Tax Reform Act in 1969, the Tax Court's jurisdiction remained limited to redetermination of income tax deficiencies.<sup>63</sup> IRS deficiency determinations have been, and continue to be, subject to de novo scope and standard of review in the Tax Court and other federal courts.<sup>64</sup>

Congress did not expand the Tax Court's reach until the 1970s, after the Tax Court had officially become a court in 1969 and more than three decades after the APA's enactment.<sup>65</sup> The court's broadened reach included both new subject matters and new forms of relief. With the passage of the Employee Retirement Income Security Act of 1974 (ERISA), the Tax Court was given the power to issue declaratory judgments about qualification of retirement plans for preferential federal treatment.<sup>66</sup> The Tax Reform Act of 1976 enabled the court to issue declaratory judgments in taxpayer challenges to refusal of tax-exempt organizational status.<sup>67</sup> It also allowed the court to review IRS refusals to abate interest in tax collection cases.<sup>68</sup> In addition, the court received the power to subpoena, on a taxpayer's behalf, certain evidence in collection cases and to order the Treasury Department to release the identity of persons to whom written rulings pertain.<sup>69</sup> Later legislation expanded the court's jurisdiction to include review of taxpayer challenges to an even wider variety of agency actions, including adjustments to partnership tax returns, collection actions including lien and levy of taxpayer and third-party assets, employment status determinations, and innocent spouse relief determinations.<sup>70</sup> Con-

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63. See Danshera Cords, *Administrative Law and Judicial Review of Tax Collection Decisions*, 52 ST. LOUIS U. L.J. 429, 435–36 (2008).

64. *Id.* at 436, 456–57.

65. See Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (codified as amended in scattered sections of 26 U.S.C.).

66. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, title II, pt. 4, sec. 1041, § 7476, 88 Stat. 829, 949 (codified as amended at 26 U.S.C. § 7476).

67. Tax Reform Act of 1976, Pub. L. No. 94-455, title XIII, sec. 1306, § 7428, 90 Stat. 1520, 1717 (codified as amended at 26 U.S.C. § 7428).

68. Tax Reform Act of 1976, Pub. L. No. 94-455, title XII, sec. 1212, § 6404, 90 Stat. 1520, 1712 (codified at 26 U.S.C. § 6404).

69. Tax Reform Act of 1976, Pub. L. No. 94-455, title XII, sec. 1201, § 6110(d)(3), 90 Stat. 1520, 1661 (codified at 26 U.S.C. § 6902 (subpoena power), § 6110(d)(3)) (order to release identity of taxpayers to whom written rulings are directed).

70. See 26 U.S.C. §§ 6015 (innocent spouse claims), 6226 (partnership pro-

gress's conception of the court's role clearly is not constrained by its prior existence as an agency of limited mission. Rather, the modern court's jurisdiction requires it to decide whether the IRS has permissibly exercised its discretion in a variety of contexts.<sup>71</sup>

Three kinds of cases are useful when comparing the court's legacy agency role to its modern judicial role: redetermination of income tax deficiencies, review of collection due process determinations, and review of innocent spouse relief determinations. The following describes these three in greater detail. We return to these examples in Part II.B to illustrate the appropriate approach for the Tax Court to determine its standard and scope of review under the APA.

### 1. Tax Deficiency

The Tax Court's power to redetermine tax liability pre-dates the APA.<sup>72</sup> Under modern law, § 6213 permits a taxpayer to petition the Tax Court for redetermination of the IRS's deficiency determination.<sup>73</sup> In simple terms, a "deficiency" is the amount by which the taxpayer's legal liability exceeds the amount of liability reported on that taxpayer's return.<sup>74</sup> The IRS may determine a deficiency for only certain kinds of taxes, including income, estate, and gift taxes, and certain excise taxes levied against private foundations.<sup>75</sup> The IRS's deficiency determination generally follows an audit either conducted purely through correspondence, at the local IRS office, or, for more complicated matters, at the location of the taxpayer's records.<sup>76</sup>

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ceedings), 6228(a) (review of disallowed request for adjustment by tax matters partner), 6234 (declaratory judgment regarding treatment on non-partnership items on over-sheltered return), 6246(b) (power to enjoin premature levy), 6247 (review of adjustment to partnership return), 6252 (review of denial of request for administrative adjustment), 6330 (collection due process claims), 7429(b) (review of jeopardy assessment), 7436 (determination of employment status), 7479 (declaratory judgment of eligibility of estate to make installment payments), 7623 (review of award to whistleblower). This list is non-exhaustive.

71. The Tax Court's jurisdiction is not exclusive, and taxpayers have a choice of forum in many cases. *See* Cords, *supra* note 63, at 437.

72. Fahey, *supra* note 32, at 619 (describing the Tax Court's ability to review tax liability from the time it was created in the form of the Board of Tax Appeals in 1924).

73. 26 U.S.C. § 6213(a).

74. *Id.* § 6211(a).

75. *Id.* § 6211(a). Deficiency procedures also apply to penalties calculated as a percentage of those named taxes. *Id.* § 6665(a) (2012).

76. *See* DAVID M. RICHARDSON ET AL., CIVIL TAX PROCEDURE 87–88 (2005)

The audit may take a few hours or several months.<sup>77</sup> During this time, the IRS may request information from the taxpayer informally or via summons, and it may interview knowledgeable third parties.<sup>78</sup>

Following an audit in which the IRS discovers a deficiency, the IRS typically will issue a preliminary report proposing adjustments to the taxpayer's liability.<sup>79</sup> The taxpayer has thirty days following the issuance date to request reconsideration by the IRS Office of Appeals.<sup>80</sup> Appeals conferences are conducted informally, often remotely and occasionally in person.<sup>81</sup> Although the taxpayer may elect to record an appeals conference, testimony is not given under oath, rules of evidence do not apply, and no transcripts are made of the proceedings.<sup>82</sup>

When a case is not resolved on administrative appeal, the IRS will mail a statutorily required notice of deficiency to the taxpayer.<sup>83</sup> The taxpayer then has ninety days to file a petition for redetermination with the Tax Court.<sup>84</sup> In court, the IRS's determination of deficiency is given a "presumption of correctness, and the taxpayer bears the burden of proving that the determination is wrong."<sup>85</sup> The parties are required to stipulate to agreed-upon facts, so admission of evidence is limited to those facts which are in dispute.<sup>86</sup> By statute, if a taxpayer is able to produce "in any court proceeding . . . credible evidence with respect to any factual issue relevant to ascertaining the liability

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(describing audit procedures). The IRS conducts audit proceedings by 26 U.S.C. § 6201(a), which provides for "inquiries, determinations, and assessments of all taxes," and by § 7602(a)(1), which allows the IRS to "examine any books, papers, records, or other data which may be relevant" to a determination of the accuracy of the taxpayer's return.

77. See RICHARDSON, *supra* note 76, at 87–88.

78. See 26 U.S.C. §§ 7602(a) (describing the summons power), 7602(c) (requiring IRS to notify taxpayer that it has contacted third parties).

79. See 26 C.F.R. § 601.105(d)(1) (2013).

80. See LEANDRA LEDERMAN & STEPHEN W. MAZZA, *TAX CONTROVERSIES: PRACTICE AND PROCEDURE* § 5.02[B][2], [C][2] (3d ed. 2009).

81. *Id.* § 5.02[C][5] (explaining that, although appeals conferences were traditionally conducted in person, they may now be done remotely or through correspondence).

82. See RICHARDSON ET AL., *supra* note 76, at 111–12 (describing informality of appeals process).

83. See 26 U.S.C. § 6212(a) (IRS must notify taxpayer of determination and provide contact information for local office of the taxpayer advocate).

84. See *id.* § 6213(a) (taxpayer has 90 days from date of mailing, or 150 days if the taxpayer is outside of the country, to file petition with Tax Court).

85. *Welch v. Helvering*, 290 U.S. 111, 115 (1933).

86. See TAX CT. R. 91 (requirement for stipulation).



of the taxpayer,” the burden of proof for that issue shifts to the IRS.<sup>87</sup> Such burden-shifting only occurs if, among other things, “the taxpayer has maintained all records required under this title and has cooperated with reasonable requests by the Secretary for witnesses, information, documents, meetings, and interviews.”<sup>88</sup>

## 2. Innocent Spouse

Section 6015 of the Internal Revenue Code provides relief from joint and several liability.<sup>89</sup> Typically, married couples who file a joint income tax return are equally liable for the amount of tax owed for the year in which the return is filed.<sup>90</sup> As with any taxpayer, there are two instances in which a couple may owe money to the government after the date of filing. First, a couple may have correctly computed its tax liability but may not have paid the amount owed. This is referred to as an underpayment.<sup>91</sup> Second, a couple may have incorrectly computed its tax, reporting an amount due that is less than its actual liability. This is referred to as an understatement.<sup>92</sup> Because the spouses are jointly and severally liable, the IRS may collect the shortfall from either spouse regardless of who was responsible for the underpayment or understatement.<sup>93</sup>

Section 6015 provides relief to a spouse who was not responsible for the underpayment or understatement in three defined circumstances.<sup>94</sup> First, under § 6015(b), the IRS must find that both objective and subjective criteria have been satisfied.<sup>95</sup> For instance, to receive relief from an understatement, an innocent spouse must show that she had no reason to know of the understatement and that “taking into account all facts and circumstances, it is inequitable to hold [the innocent spouse] liable for the deficiency . . . .”<sup>96</sup> A second form of relief, found in

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87. 26 U.S.C. § 7491(a)(1).

88. *Id.* § 7491(a)(2)(B).

89. *Id.* § 6015.

90. *Id.* § 6013(d)(3).

91. *See id.* § 6601.

92. *See id.* § 6662(d)(2).

93. *Id.* § 6013(d)(3).

94. *Id.* § 6015. The claim may be raised on its own or in conjunction with deficiency or collection due process proceedings.

95. *See id.* § 6015(b).

96. *Id.* § 6015(b)(1). Relief is available if the couple has filed a joint return on which there is an understatement of tax arising from tax items attributable to one spouse; the other did not know or have reason to know of the under-

§ 6015(c), allows an innocent spouse to request allocation of the liability as though the couple had filed separate returns.<sup>97</sup> This form of relief is only available if the couple has separated.<sup>98</sup> Although it must balance equity in the first form of relief, the IRS is granted discretion in neither case. If a taxpayer meets the statutory requirements, the IRS is required to grant relief.<sup>99</sup>

A third form of innocent spouse relief—equitable relief—differs markedly. Under § 6015(f), “the Secretary may relieve” an innocent spouse of joint and several liability if two criteria are met.<sup>100</sup> First, “taking into account all the facts and circumstances, it is inequitable to hold the individual liable.”<sup>101</sup> Second, relief is not available through the other two circumstances.<sup>102</sup> Equitable relief is available in cases of deficiency arising from understatement and also in cases of underpayment.<sup>103</sup>

Although the “facts and circumstances” language of § 6015(f) mirrors that of § 6015(b), there is an important difference. The IRS “may” grant relief in an equitable claim under § 6015(f) but “shall” grant relief under § 6015(b). The difference in language leaves little doubt that Congress intended to grant discretion to the IRS in equitable innocent spouse claims. The textual difference between “shall” and “may” is stark, and the difference in language between the two is even more meaningful because § 6015(b) and § 6015(f) were enacted in a single piece of legislation.<sup>104</sup> Moreover, relief under subsections (b) or (c) is given to any qualifying taxpayer who elects it. Relief under subsection (f) is available only if the IRS accedes to the taxpayer’s request.<sup>105</sup> The statute’s language makes it clear that

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statement; and taking into account facts and circumstances, it is inequitable to hold that spouse liable for the deficiency. *Id.*

97. *Id.* § 6015(c)–(d).

98. *Id.* § 6015(c)(3)(A).

99. *Id.* § 6015(b)(1), (c)(1).

100. *Id.* § 6015(f).

101. *Id.* § 6015(f)(1).

102. *Id.* § 6015(f)(2).

103. *See id.* § 6015(f)(1).

104. *See* Internal Revenue Service Restructuring and Reform Act of 1998 (RRA), Pub. L. No. 105-206, 112 Stat. 685, 734 (codified as amended at 26 U.S.C. § 6015). The discrepancy in the role of the IRS in these claims is made even clearer by the portion of § 6015 that provides that Tax Court review is available to an individual “who elects to have subsection (b) or (c) apply, or in the case of an individual who requests equitable relief under subsection (f).” 26 U.S.C. § 6015(e)(1).

105. 26 U.S.C. § 6015(f). The use of the language is not isolated. It reappears in a provision allowing an innocent spouse to file a Tax Court petition “6 months after the date such election is filed or request is made with the Secre-

the IRS exercises discretion when deciding whether to grant relief under § 6015(f).

Innocent spouse claims may arise in three contexts: deficiency proceedings, collection due process claims, and independent claims referred to as standalone claims.<sup>106</sup> In general, claims raised in any of these three contexts are processed through a central servicing center.<sup>107</sup> Although the IRS may request additional written information from a taxpayer, there typically is no administrative hearing in an innocent spouse case.<sup>108</sup> The IRS is required to give notice of the claim to the non-requesting spouse, and that person may choose to submit information relevant to the case.<sup>109</sup> Upon completion of its review, the IRS sends a letter of determination to the requesting

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tary. . . .” *Id.* § 6015(e)(1)(A)(ii).

106. See *King v. Comm’r.*, 115 T.C. 118, 121–23 (2000) (describing bases for Tax Court jurisdiction over § 6015 claims).

107. In the deficiency context, see I.R.S. Notice CC-2013-011 (June 17, 2013), which states that when a taxpayer raises § 6015 for the first time in a Tax Court petition challenging a determination of deficiency, “[i]f the Service has not made a determination regarding a petitioner’s entitlement to section 6015 relief before the petitioner filed a [Tax Court] petition, the trial attorney must request a determination from the Cincinnati Centralized Innocent Spouse Operations (CCISO) unit.” See also I.R.S. IRM 4.19.13.22 (Jan. 1, 2014) (stating that if a § 6015 claim is raised during a taxpayer examination, the IRS will refer the claim to CCISO); I.R.S. IRM 4.8.9.16.10.6 (June 9, 2013) (clarifying that in deficiency proceedings, if a taxpayer files a Tax Court petition raising § 6015 before the § 6015 claim has been resolved by the agency, counsel may return the issue to either the original examiner or to CCISO for consideration); I.R.S. IRM 25.15.12.25 (May 22, 2012) (stating that if a § 6015 claim is raised for the first time in a Tax Court petition, counsel will refer the case to CCISO for consideration). In the standalone context, see I.R.S. IRM 25.15.1.6.1 (July 30, 2014), which states that stand-alone § 6015 claims must be routed for central processing. In the collection due process context, see I.R.S. IRM 8.22.8.9 (Nov. 8, 2013), which states that a taxpayer who raises a § 6015 claim during CDP proceeding must file Form 8857 to be processed by CCISO.

108. See generally 26 U.S.C. § 6015. A taxpayer may file a claim using Form 8857, and the IRS typically uses Form 12510 to request additional information.

109. Treas. Reg. § 1.6015-6(b) (2002). This information may include the legal status of the marriage, the extent of the innocent spouse’s knowledge of errors on the return or underpayment, the extent of the innocent spouse’s knowledge of family finances, level of education, benefit to the innocent spouse, asset transfers between the spouses, evidence of fraud by either spouse, allocation of tax items between the spouses, whether it would be inequitable to hold the innocent spouse liable, and any other relevant information. *Id.*

spouse, who may appeal the decision within the agency and/or to the Tax Court if he or she has not already done so.<sup>110</sup>

All innocent spouse claims are subject to judicial review under § 6015(e), which grants jurisdiction to the Tax Court “to determine the appropriate relief available to the individual under this section . . . .”<sup>111</sup> The statute permits a non-claimant spouse to join the suit as well.<sup>112</sup> An innocent spouse may petition the Tax Court on the earlier of two dates: either the date on which the IRS mails its final determination of the claim, or six months after the claim is filed with the IRS.<sup>113</sup> In the latter case, the IRS has not yet rendered a decision when the taxpayer’s petition is presented to the court. The IRS’s collection action is suspended by statute until either the taxpayer fails to file a timely petition with the court or “the decision of the Tax Court has become final.”<sup>114</sup> District courts may also review innocent spouse claims on occasion, if the claim is raised in the context of a refund suit.<sup>115</sup>

### 3. Collection Due Process

The review of collection due process complaints is a third important example of Tax Court jurisdiction. Under §§ 6320 and 6330, taxpayers are entitled to administrative review when the IRS gives public notice of lien on taxpayer property or when it notifies a taxpayer of its plan to seize property through levy.<sup>116</sup> Because the two review procedures are similar and may be combined in a single hearing, we focus on administrative review of proposed levies.<sup>117</sup> Upon notification that the IRS has filed a Notice of Federal Tax Lien, or upon notice of the IRS’s intent to levy, a taxpayer may request a hearing with an “im-

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110. See 26 U.S.C. § 6015(e) (establishing the Tax Court’s jurisdiction).

111. *Id.* § 6015(e)(1).

112. *Id.* § 6015(e)(4).

113. *Id.* § 6015(e)(1)(A). Note the formality of the process: the IRS is required by statute to use either certified or registered mail. *Id.* § 6015(e)(1)(A)(i)(I).

114. *Id.* § 6015(e)(1)(B)(i).

115. *Id.* § 6015(e)(3).

116. *Id.* §§ 6320 (taxpayer entitled to notice and opportunity for hearing upon IRS’s filing of notice of lien), 6330 (same for levy). See generally Stephanie Hoffer et al., *To Pay or Delay: The Nominee’s Dilemma Under Collection Due Process*, 82 TUL. L. REV. 781, 787–94 (2008) (examining the collection due process provisions and their history).

117. See 26 U.S.C. § 6320(b)(4) (providing that “[t]o the extent practicable, a hearing under this section shall be held in conjunction with a hearing under section 6330”).

partial officer” from the IRS Office of Appeals.<sup>118</sup> Issues that a taxpayer may raise in the hearing include spousal defenses, challenges to the appropriateness of collection actions, and proposals for alternative methods of collection.<sup>119</sup>

Per IRS regulations, collection due process hearings are not subject to the formal hearing requirements of the APA and may be conducted in person.<sup>120</sup> They need “not be a single event, but may instead be a series of telephonic or written correspondence taking place over time.”<sup>121</sup> The applicable regulations suggest that a face-to-face meeting ordinarily will be offered to requesting taxpayers whose argument is not frivolous.<sup>122</sup> The IRS is not required to create a transcript or recording of the hearing, and the taxpayer has no right to subpoena or examine witnesses.<sup>123</sup> Overall, the proceedings are informal.<sup>124</sup> When the hearing is complete, the IRS sends the taxpayer its determination.<sup>125</sup>

A taxpayer who is unsatisfied with the IRS’s determination may appeal the case to the Tax Court.<sup>126</sup> The IRS Office of Appeals retains jurisdiction over the case and may consider how a change in the taxpayer’s circumstances affects its original determination.<sup>127</sup> Notwithstanding the retention of agency jurisdiction, the statute expressly states that “the Tax Court shall have jurisdiction with respect to such matter.”<sup>128</sup>

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In sum, collection due process claims and innocent spouse claims both are representative of the Tax Court’s expanding jurisdiction. Although the court, like its historical predecessor—

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118. *Id.* § 6320(b)(3).

119. *Id.* § 6330(c)(2)(A). Methods of alternative collection may include posting bond, substituting other assets, or entering into a contractual agreement such as installment agreement or an offer-in-compromise. *Id.* § 6330(c)(2)(A)(iii).

120. Treas. Reg. § 301.6330-1(d), Q&A (6) (as amended in 2006).

121. Bryan T. Camp, *The Failure of Adversarial Process in the Administrative State*, 84 IND. L.J. 57, 83 (2009).

122. Treas. Reg. § 301.6330-1(d), Q&A (7) (as amended in 2006).

123. *Id.* § 301.6330-1(d), Q&A (6).

124. For a thorough treatment of this point, see Camp, *supra* note 121, at 80–88. Professor Camp explains that “hearings can sometimes be so informal that a taxpayer may not understand that one took place until receiving the Notice of Determination.” *Id.* at 84.

125. Treas. Reg. § 301.6330-1(e)(3), Q&A (8)(E) (as amended in 2006).

126. 26 U.S.C. § 6330(d)(1) (2012).

127. *Id.* § 6330(d)(2).

128. *Id.* § 6330(d)(1).

the Board of Tax Appeals—was initially limited to the determination of deficiencies, its role has grown over time to encompass the review of equitable determinations and exercises of agency discretion.<sup>129</sup> This increased jurisdictional breadth provides further support for the conclusion that Congress views the Tax Court as a true court to which it has granted power to review agency determinations. In this sense, it is no different from other federal courts that regularly apply the APA when reviewing the determinations of federal agencies (including the IRS). Part II expands on this point by presenting the legal case against Tax Court exceptionalism.

## II. THE LEGAL CASE AGAINST TAX COURT EXCEPTIONALISM

The Tax Court has declared in unambiguous terms that “[t]he APA has never governed proceedings in the Court (or in the Board of Tax Appeals).”<sup>130</sup> Federal courts of appeals, by contrast, are divided on whether the Tax Court is bound by the APA’s judicial review provisions.<sup>131</sup> And even the Tax Court has reached conflicting conclusions in certain contexts.<sup>132</sup>

To resolve this confusion, we return to principles of administrative law to conclude that the Tax Court, when reviewing federal agency actions, is bound by the APA—just like every other federal court.<sup>133</sup> Part II.A provides the basics of judicial

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129. See *id.* §§ 6015, 6330 (describing the merits of innocent spouse and collection due process claims and granting jurisdiction to the Tax Court to review IRS determinations of these claims).

130. *Robinette v. Comm’r*, 123 T.C. 85, 96 (2004), *rev’d*, 439 F.3d 455 (8th Cir. 2006); see also *Porter v. Comm’r*, 130 T.C. 115, 117 (2008) (“Since its enactment in 1946 the APA has generally not governed proceedings in this Court (or in its predecessor, the Board of Tax Appeals).”).

131. See *Wilson v. Comm’r*, 705 F.3d 980, 994–996 (9th Cir. 2013) (Bybee, J., dissenting) (reviewing different circuit court perspectives on the relationship between the Tax Court and the APA).

132. Indeed, as Professor Cords observes, “despite its statements pertaining to the inapplicability of the APA in cases before it, the Tax Court recognizes the application of the APA in some, but not all, non-collection circumstances.” Cords, *supra* note 63, at 457 & n.187 (citing *Mailman v. Comm’r*, 91 T.C. 1079, 1082–83 (1988); *Estate of Gardner v. Comm’r*, 82 T.C. 989, 994 (1984); *Dittler Bros., Inc. v. Comm’r*, 72 T.C. 896, 909–10 (1979), *aff’d without published opinion*, 642 F.2d 1211 (5th Cir. 1981)).

133. We are by no means the first to suggest that the Tax Court apply the APA judicial review provisions. See *Wilson*, 705 F.3d at 994–1012 (9th Cir. 2013) (Bybee, J., dissenting); *Comm’r v. Neal*, 557 F.3d 1262, 1278–87 (11th Cir. 2009) (Tjoflat, J., dissenting); *Robinette v. Comm’r*, 439 F.3d 455, 458–62 (8th Cir. 2006) (Colloton, J.); *Ewing v. Comm’r*, 122 T.C. 32, 56–71 (2004)

review of agency action under the APA. Part II.B then applies those principles to the Tax Court, focusing on the three types of claims discussed in Part I.B as well as the Tax Court's peculiar conclusion that it has no power to remand most matters to the agency.

#### A. JUDICIAL REVIEW UNDER THE APA

The APA establishes the default standards for judicial review of federal agency rulemaking, adjudication, and other forms of agency action.<sup>134</sup> For the purposes of the APA, "agency" is defined to include "each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include" Congress, certain military authorities, the government of the District of Columbia and other U.S. territories, and, as particularly relevant here, "the courts of the United States."<sup>135</sup> The APA judicial review standards apply to any "reviewing court" of agency action,<sup>136</sup> as opposed, for instance, to an administrative appeals board within an agency.

The APA judicial review standards apply when Congress has made a particular agency action "reviewable by statute" or the action is a "final agency action for which there is no other adequate remedy in a court."<sup>137</sup> As the APA further details, only an individual "aggrieved" by the agency action is entitled to judicial review,<sup>138</sup> and "[t]he form of the proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof . . . , in a court of competent jurisdiction."<sup>139</sup>

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(Halpern & Holmes, JJ., dissenting), *rev'd on jurisdictional grounds*, 439 F.3d 1009 (9th Cir. 2006); *see also* Cords, *supra* note 63, at 448–78; Fahey, *supra* note 32, at 610–48. We draw on these thoughtful positions in particular cases and with respect to specific claims to advance a more comprehensive argument that the APA applies to the Tax Court's review of any IRS action.

134. *See* 5 U.S.C. §§ 701–706 (2012).

135. *Id.* § 701(b)(1).

136. *Id.* § 706.

137. *Id.* § 704. *See generally* Bowen v. Massachusetts, 487 U.S. 879, 901–08 (1988) (providing the history and interpretations of § 704). The APA expressly does not apply when "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

138. 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

139. *Id.* § 703.

The statute that authorizes an agency's action—which is commonly referred to as an agency's organic or governing statute—is thus the primary source of judicial review instructions. As Judge Bybee explains, the agency's organic statute “will frequently identify the reviewing court, confer jurisdiction, provide venue, and waive sovereign immunity; although, any particular organic act may not address each of these elements.”<sup>140</sup> It may also specify the standard and scope of judicial review<sup>141</sup> or prohibit judicial review altogether.<sup>142</sup> Oftentimes, however, the agency's organic statute is silent, ambiguous, or otherwise inadequate in specifying the judicial review provisions. In those situations, the default APA provisions apply.

Indeed, “[r]ecognizing the importance of maintaining a uniform approach to judicial review of administrative action,” the Supreme Court has instructed reviewing courts to “apply the APA's court/agency review standards in the absence of an exception” set forth by Congress.<sup>143</sup> In *Dickinson v. Zurko*, the Court explained that “[t]he APA was meant to bring uniformity to a field full of variation and diversity. It would frustrate that purpose to permit divergence on the basis of a requirement ‘recognized’ only as ambiguous.”<sup>144</sup> Accordingly, to depart from the APA default, the agency's organic statute must suggest “more than a possibility of a [different] standard, and indeed more than even a bare preponderance of evidence”; the exception “must be clear.”<sup>145</sup>

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140. *Wilson v. Comm'r*, 705 F.3d 980, 998 (9th Cir. 2013) (Bybee, J., dissenting).

141. *See id.* (citing 30 U.S.C. § 1276).

142. *See* 5 U.S.C. § 701(a) (providing that the APA “applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review. . .”).

143. *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999).

144. *Id.* at 155. The Court found significant Congress's determination in the APA that “[n]o subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly.” 5 U.S.C. § 559; *see also* *Marcello v. Bonds*, 349 U.S. 302, 310 (1955) (“Exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed in view of the statement in § 12 of the Act that modifications must be express . . .”). The *Dickinson* Court concluded that “[a] statutory intent that legislative departure from the norm must be clear suggests a need for similar clarity in respect to grandfathered common-law variations.” 527 U.S. at 155.

145. *Dickinson*, 527 U.S. at 154–55; *see also* II RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 11.2 at 772 (4th ed. 2002) (explaining that *Dickinson* “seemed to establish a presumption in favor of uniformity in standards for judicial review of agency actions that can be overcome only by



In sum, unless Congress has directed otherwise by statute, the APA's default provisions apply to a court's review of agency action. As discussed below, the APA specifies both the standard and the scope of review, and a variety of administrative common law rules supplement the APA standards and similarly apply as default rules absent an exception.

### 1. Default Standard of Review

Section 706 of the APA sets forth the standard of review by explaining the circumstances under which “[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions.”<sup>146</sup> In particular, the court must set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>147</sup> The APA provides two exceptions to this standard. First, § 706(2)(F) commands that the reviewing court set aside agency action “unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.”<sup>148</sup> Second, with respect to formal rulemaking, formal adjudication, and other action “on the record of an agency hearing provided by statute,” § 706(2)(e) instructs that agency action “unsupported by substantial evidence” must be set aside.<sup>149</sup>

In other words—aside from these two exceptions, both of which are arguably more searching of agency action and apply to limited types of agency action—the default APA standard of

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‘clear’ evidence in support of a departure.”). *But see Marcello*, 349 U.S. at 310 (holding that Congress need not “employ magical passwords in order to effectuate an exemption from the Administrative Procedure Act” but instead the court should look to the legislative history and the organic statute’s text, structure, and design to determine whether Congress intended to depart from the APA default).

146. 5 U.S.C. § 706(2).

147. *Id.* § 706(2)(A). The APA also requires a court to set aside agency action when it is contrary to the Constitution or exceeds the agency’s statutory authority, *id.* § 706(2)(B), (2)(C), and when the agency fails to follow “procedure required by law,” *id.* § 706(2)(D).

148. *Id.* § 706(2)(F).

149. *Id.* § 706(2)(E). As the Court has explained, the substantial evidence standard provides “a considerably more generous judicial review than the ‘arbitrary and capricious’ test.” *Abbott Labs., Inc. v. Gardner*, 387 U.S. 136, 143 (1967); *accord* *Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 412 n.7 (1983) (describing arbitrary-and-capricious review as “more lenient” to the agency than substantial evidence review). *But see* *Small Refiner Lead Phase Down Task Force v. EPA*, 705 F.2d 506, 520 (D.C. Cir. 1983) (explaining that “there may be ‘little practical difference’ between substantial evidence review and arbitrary and capricious review.”).

review is the familiar abuse of discretion standard. This is the same standard used by appellate courts to review a variety of trial court decisions including, for example, evidentiary rulings.<sup>150</sup> As its name suggests, it is more deferential to agency action than de novo review. For instance, the Supreme Court has explained, in the context of reviewing Rule 11 sanctions in civil actions, that “[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.”<sup>151</sup> This deferential standard, the Court noted, “will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court [or, here, the agency]; it will also discourage litigants from pursuing marginal appeals . . . .”<sup>152</sup>

In the APA context, however, this review standard includes what is often called arbitrary and capricious review, which has been interpreted to include a reasoned decision-making requirement. The Supreme Court has crystalized the breadth of arbitrary and capricious review:

[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>153</sup>

The focus is thus on whether the agency considered the factors set forth by Congress in the agency’s organic statute; whether it considered important aspects of the problem it was seeking to address; whether its proposed action is consistent with the evidence; and whether the action otherwise demonstrates reasoned decision-making as evidenced by “the quality and coherence of the agency’s reasoning.”<sup>154</sup> As the *State Farm* Court emphasized APA arbitrary and capricious review is “narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant

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150. See, e.g., *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997).

151. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

152. *Id.* at 404.

153. *Motor Vehicle Mfg. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

154. James D. Cox & Benjamin J.C. Baucom, *The Emperor Has No Clothes: Confronting the D.C. Circuit’s Usurpation of SEC Rulemaking Authority*, 90 TEX. L. REV. 1811, 1825 (2012); see also *Koon v. United States*, 518 U.S. 81, 100 (1996) (“The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.”).

data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”<sup>155</sup>

## 2. Default Scope of Review

Section 706 of the APA also suggests the scope of review, instructing that “the court shall review the whole record or those parts of it cited by a party.”<sup>156</sup> As Professor Koch explains, “[i]t is blackletter law that, except in the rare case, review in federal court must be based on the record before the agency and hence a reviewing court may not go outside the administrative record.”<sup>157</sup> The record review rule applies when judicial review “is performed by a court of original jurisdiction as well as by an appellate tribunal.”<sup>158</sup>

Regardless of whether the agency action is rulemaking, formal adjudication, or some less formal agency action, the agency must submit an administrative record for judicial review.<sup>159</sup> The Supreme Court has held that “a formal hearing before the agency is in no way necessary to the compilation of an agency record,” and that “[t]he APA specifically contemplates judicial review on the basis of the agency record compiled in the course of informal agency action in which a hearing has not occurred.”<sup>160</sup> Such record should consist of “information upon which the agency action was based, including everything that was before the agency pertaining to the merits of its decision.”<sup>161</sup>

Congress can depart from the record review rule in the agency’s organic statute by providing for a trial de novo, which the APA expressly contemplates by specifying a different standard of review (“unwarranted by the facts”) when “the facts are subject to trial de novo by the reviewing court.”<sup>162</sup> Courts in

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155. 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); *accord* *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–14 (2009).

156. 5 U.S.C. § 706(2) (2012).

157. 2 CHARLES H. KOCH, *ADMINISTRATIVE LAW AND PRACTICE* § 8.27[1], at 509 (2d ed. 1997).

158. *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963).

159. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985).

160. *Id.* at 744 (citing 5 U.S.C. §§ 551(13), 704, 706).

161. 2 KOCH, *supra* note 157, § 8.27[3] at 511.

162. 5 U.S.C. § 706(2)(F); *see also Carlo Bianchi*, 373 U.S. at 714–15 (“[I]n cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, this Court has held

rare circumstances also have allowed petitioners to supplement the administrative record when, for instance, “there has been a ‘strong showing of bad faith or improper behavior’ or when the record is so bare that it prevents effective judicial review.”<sup>163</sup> Even when the record requires supplementation, however, the Supreme Court has counseled that the ordinary course is to remand to the agency—not supplement the record on judicial review:

If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.<sup>164</sup>

### 3. Administrative Common Law Doctrines

In addition to the APA’s judicial review provisions, courts have developed administrative common law doctrines that apply generally to judicial review in the modern administrative state.<sup>165</sup> For instance, courts incorporated “hard look” review in response to concerns of agency capture in the 1960s and 1970s,<sup>166</sup> and *Chevron* deference in response to the deregulation

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that consideration is to be confined to the administrative record and that no *de novo* proceeding may be held.”)

163. *Theodore Roosevelt Conservation P’ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010) (quoting *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998)); see also *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (“The court may require the administrative officials who participated in the decision to give testimony explaining their action . . . . And where there are administrative findings that were made at the same time as the decision . . . there must be a strong showing of bad faith or improper behavior before such inquiry may be made.”), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); see also, e.g., *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) (allowing extra-record materials (1) “if necessary to determine whether the agency has considered all relevant factors and has explained its decision,” (2) “when the agency has relied on documents not in the record,” (3) “when supplementing the record is necessary to explain technical terms or complex subject matter,” and (4) “when plaintiffs make a showing of agency bad faith” (internal quotation marks omitted)).

164. *Fla. Power & Light*, 470 U.S. at 744; see *infra* Part II.A.3 (further discussing the ordinary remand rule).

165. See, e.g., Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1295 (2012) (defining and defending “administrative common law” as “administrative law doctrines and requirements that are largely judicially created, as opposed to those specified by Congress, the President, or individual agencies”).

166. See, e.g., Merrick B. Garland, *Deregulation and Judicial Review*, 98

movement in the 1980s.<sup>167</sup> These doctrines are of general application in the administrative state. Relying on its APA-focused decision in *Dickinson*, the *Mayo* Court recently observed, in the context of *Chevron* deference to tax regulations, that there is an “importance of maintaining a uniform approach to judicial review of administrative action,” such that the Supreme Court was “not inclined to carve out an approach to administrative review good for tax law only.”<sup>168</sup>

Of particular importance here, administrative law has evolved to embrace the ordinary remand rule discussed in Part II.A.2: when a court concludes that an agency’s decision is erroneous or otherwise not supported by the record or the agency’s reasoning, the ordinary course is to remand to the agency for additional investigation or explanation (as opposed to the court deciding the issue itself).<sup>169</sup> This ordinary remand rule applies not only to questions of fact but also to mixed questions of law and fact, policy judgments, and even certain questions of law.<sup>170</sup> Indeed, the remand rule applies even if there are alternative grounds on which the agency’s decision could be affirmed (that the agency did not articulate in its ruling)—a departure from “the settled rule” in the civil litigation context

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HARV. L. REV. 505, 525–62 (1985) (detailing the hard look doctrine’s development); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 761 (2008) (“In the 1960s and 1970s, the federal courts of appeals, above all the United States Court of Appeals for the District of Columbia Circuit, developed the ‘hard look doctrine.’”).

167. Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 999 (2011). Professor Merrill argues that the record review rule and the reconceptualization of the record in response to the shift from agency adjudication to rulemaking are other examples of the flexibility of the appellate review model in administrative law. *See id.* at 998. One of the authors has argued elsewhere that many of these administrative common law doctrines emerge in response to the dual separation-of-powers values of Congress (Article I) and the President (Article II) at play in the modern administrative state. *See Walker, The Ordinary Remand Rule, supra* note 40 (manuscript at Part I).

168. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011) (quoting *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999)).

169. *See, e.g., Negusie v. Holder*, 555 U.S. 511, 517 (2009) (“When the BIA has not spoken on ‘a matter that statutes place primarily in agency hands,’ our ordinary rule is to remand to ‘giv[e] the BIA the opportunity to address the matter in the first instance in light of its own expertise.’” (quoting *INS v. Ventura*, 537 U.S. 12, 16–17 (2002) (per curiam))). *See generally* III PIERCE, *supra* note 145, § 18.1.

170. *See Walker, The Ordinary Remand Rule, supra* note 40 (manuscript at Part I); *see also* Christopher J. Walker, *How To Win the Deference Lottery*, 91 TEX. L. REV. SEE ALSO 73, 83–85 (2013).

that a trial court's decision "must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.'"<sup>171</sup> We return to the ordinary remand rule and administrative common law more generally in Parts II.B and III.

#### B. THE TAX COURT, THE IRS, AND THE APA

In light of these first principles of administrative law, the Tax Court's position that it is not governed by the APA is puzzling—and likely a remnant of both the Tax Court's unique history and the accompanying misperception of tax exceptionalism.

After all, the IRS is an executive agency within the Treasury Department. Accordingly, it is an "agency" for purposes of the APA, as it is an "authority of the Government of the United States" that is not otherwise excluded from the APA's definition of agency.<sup>172</sup> Under the APA, an individual "aggrieved" by an IRS action thus "is entitled to judicial review . . . in a court of the United States"<sup>173</sup> so long as the IRS action is "reviewable by statute" or is otherwise a "final agency action for which there is no other adequate remedy in a court."<sup>174</sup> Moreover, the Tax Court is no longer an administrative agency that reviews the actions of another administrative agency. Instead, as discussed in Part I.A, in 1969 Congress transformed the Tax Court into an "[A]rticle I . . . court of record to be known as the United States Tax Court."<sup>175</sup> For purposes of the APA, it is therefore "a court of the United States,"<sup>176</sup> and, for its review of the IRS's actions, a "reviewing court" subject to the APA's judicial review provisions.<sup>177</sup>

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171. SEC v. Chenery Corp., 318 U.S. 80, 88 (1943) (quoting *Helvering v. Gowran*, 302 U.S. 238, 245 (1937)); see Walker, *The Ordinary Remand Rule*, *supra* note 40 (manuscript at Part I.A); see also Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 *FORDHAM L. REV.* 17, 19–26 (2001) (exploring the different role of reasons in judicial review of lower court decisions, administrative actions, and congressional statutes).

172. 5 U.S.C. § 701(b)(1) (2012).

173. *Id.* § 702.

174. *Id.* § 704.

175. Tax Reform Act of 1969, Pub. L. No. 91-172, sec. 951, § 7441, 83 Stat. 487, 730 (1969) (codified as 26 U.S.C. § 7441).

176. 5 U.S.C. § 702.

177. *Id.* § 706.

On at least one occasion, the Tax Court has misinterpreted its unique history to conclude that the APA does not apply because the Tax Court is not an “agency” under the APA.<sup>178</sup> The Eighth Circuit rightly rejected that argument, noting that the Tax Court had “focused erroneously on the status of the reviewing court, rather than on the status of the administrative body rendering the decision under review. The Internal Revenue Service, of course, is an agency of the government, and review of its decisions may be governed by the APA.”<sup>179</sup> Precisely because the Tax Court is no longer an agency but an Article I court of the United States, its review of IRS actions is governed by the APA.

Perhaps a stronger argument that the APA does not govern is that only Article III courts—not Article I courts—can be “reviewing courts” for purposes of the APA. After all, the Constitution vests “judicial power” in life-tenured Article III judges,<sup>180</sup> not term-limited Article I judges. The text of the APA, however, makes no distinction between Article I and Article III courts, and other Article I courts—including the Court of Federal Claims—are governed by the APA when reviewing agency action.<sup>181</sup> Moreover, if the Tax Court were not a “court” under the APA, then, by statutory definition, it would be an “agency”—a position that the Tax Court has correctly rejected.<sup>182</sup>

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178. *Nappi v. Comm’r*, 58 T.C. 282, 284 (1972).

179. *Robinette v. Comm’r*, 439 F.3d 455, 461 (8th Cir. 2006); *accord* *Cords*, *supra* note 63, at 471 (“In determining whether the Tax Court ought to apply the rules of administrative law, a distinction needs to be drawn between applying administrative law to the Tax Court and an application of administrative law by the Tax Court.”).

180. U.S. CONST. art. III, § 1 (“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.”).

181. *See infra* Part II.B (discussing review of IRS actions in the Article I United States Court of Federal Claims).

182. In her response to this Article, Professor Lederman suggests that “there is no simple doctrinal answer to the question of whether the Tax Court is a ‘reviewing court’ or even a ‘court’ for purposes of the APA.” Lederman, *supra* note 59, at 23. It is true, as Professor Lederman thoroughly documents in her response, that the answer is not clear from the legislative history of the APA alone or from the Tax Court’s subsequent treatment of its own status. But as discussed in this Part, it should have become clear as a matter of statutory interpretation in 1969 when Congress transformed the Tax Court from an agency to an Article I court. Under the APA, the Tax Court must be either a court or an agency, and doctrinally no one argues that the post-1969 Tax Court is an agency. So it must be “a court of the United States” for purposes of the APA. Moreover, when the Tax Court reviews an action undertaken by the

In all events, in *Freytag v. Commissioner*, the Supreme Court rejected such an Article I/Article III court distinction.<sup>183</sup> Judges on the Tax Court are appointed for fifteen-year terms by the President, with the advice and consent of the Senate,<sup>184</sup> as required by the Appointments Clause. But Congress has vested the Chief Judge of the Tax Court with power to appoint special trial tax judges.<sup>185</sup> The Constitution allows Congress to vest appointment powers of such inferior officers in one of three entities: “in the President alone, in the Courts of Law, or in the Heads of Departments.”<sup>186</sup> The parties in *Freytag* advanced two competing interpretations: the Government’s position that the Article I Tax Court is an executive department where the Chief Judge as Department Head has power to appoint inferior officers; or, alternatively, the taxpayer’s position that the Tax Court is neither an executive department nor a court and thus constitutionally forbidden from appointing inferior officers.<sup>187</sup>

The *Freytag* Court rejected both positions and instead held that the Tax Court is a “Court[] of Law” under the Appointments Clause.<sup>188</sup> Importantly, the Court noted that “[t]he text of the Clause does not limit the ‘Courts of Law’ to those courts established under Article III of the Constitution” and that “[t]he Tax Court exercises judicial, rather than executive, legislative, or administrative, power.”<sup>189</sup> Whereas the *Freytag* Court was interpreting the meaning of “Courts of Law” under the Constitution and not the meaning of “court of the United States” and “reviewing court” under the APA, the interpretative reasoning counsels the same result. The Tax Court is thus a court of the United States and a reviewing court under the APA.<sup>190</sup>

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IRS, which is indisputably an agency covered by the APA, the Tax Court is an APA “reviewing court” of that agency action.

183. *Freytag v. Comm’r*, 501 U.S. 868, 890–91 (1991).

184. 26 U.S.C. § 7443 (2012).

185. *Id.* § 7443A(a).

186. U.S. CONST. art. II, § 2, cl. 2.

187. *Freytag*, 501 U.S. at 884.

188. *Id.* at 892.

189. *Id.* at 888, 890–91. Any concern that interpreting an Article I Tax Court as a court under the Appointments Clause would violate the constitutional investiture of “judicial power” in an Article III court was dismissed by the *Freytag* Court. *See id.* at 889. The Court has repeatedly upheld the constitutionality of Article I courts for resolution of civil disputes between the government and private citizens, *see* ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 4.4 (6th ed. 2012), and most recently affirmed such a “public rights exception” in *Stern v. Marshall*, 131 S. Ct. 2594, 2611–12 (2011).

190. The D.C. Circuit recently rejected a constitutional challenge to the



That the APA governs the Tax Court's review of IRS actions does not mean the standard of review is always abuse of discretion or the scope of review is always limited to the administrative record. Instead, as discussed above, these are the default review standards, and the inquiry becomes whether Congress by statute has expressly overridden the APA default. To illustrate how the Tax Court should conduct its inquiry into whether the APA default rules apply, we return to the three examples discussed in Part II.B. We then conclude this Part by

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President's removal power of judges on the Tax Court. To reach this conclusion, the court held that the Tax Court is not an Article III (judicial branch) court but a court established under Article I (legislative branch) that actually exercises Article II (executive branch) powers when deciding cases.

We have explained that Tax Court judges do not exercise the "judicial power of the United States" pursuant to Article III. We have also explained that Congress's establishment of the Tax Court as an Article I legislative court did not transfer the Tax Court to the Legislative Branch. It follows that the Tax Court exercises its authority as part of the Executive Branch.

*Kuretski v. Comm'r*, 755 F.3d 929, 943 (D.C. Cir. 2014). At least one commentator has worried that *Kuretski* could open the door for the argument that "APA judicial review provisions simply do not apply in Tax Court proceedings." Patrick J. Smith, *Reflections on Kuretski v. Commissioner*, TAXPROF BLOG (June 22, 2014), [http://taxprof.typepad.com/taxprof\\_blog/2014/06/smith.html](http://taxprof.typepad.com/taxprof_blog/2014/06/smith.html). Although the conclusion in *Kuretski* that the Tax Court "exercises its authority as part of the Executive Branch," 755 F.3d at 943, may be in tension with the *Freytag* majority, it should have no bearing on the APA's definitions of "agency" and "reviewing court." Indeed, the reasoning in *Kuretski* suggests as much: "[W]e conclude that the Tax Court's status as a 'Court of Law'—and its exercise of 'judicial power'—for Appointments Clause purposes under *Freytag* casts no doubt on the constitutionality of the President's authority to remove Tax Court judges." *Id.* at 941–42; accord Kristin Hickman, *Kuretski v. Commissioner: A Fun and Fascinating Bit of Academic Folderol?*, TAXPROF BLOG (June 23, 2014), [http://taxprof.typepad.com/taxprof\\_blog/2014/06/hickman-kuretski-v-commissioner.html](http://taxprof.typepad.com/taxprof_blog/2014/06/hickman-kuretski-v-commissioner.html) ("After all, if the Affordable Care Act penalty can be a tax for constitutional purposes and yet not a tax under § 7421(a) of the Internal Revenue Code (see *NFIB v. Sebelius*), then the Tax Court surely can bear varying labels for different purposes as well."). If there were any lingering doubts about the impact of *Kuretski* on the Tax Court's relationship to the APA, the D.C. Circuit puts them to rest—albeit in dicta—near the end of the opinion:

And while we have no need to reach the issue here, Congress, in establishing those entities [the Tax Court and the Court of Appeals for the Armed Forces] as a 'court' rather than an 'agency,' perhaps also exempted them from statutes that apply solely to executive 'agencies.'" Cf. *Megibow v. Clerk of the U.S. Tax Court*, No. 04–3321, 2004 WL 1961591 at \*4–6, (S.D.N.Y. Aug. 31, 2004) (holding that the Tax Court is a "court of the United States" and not an "agency" under the Administrative Procedure Act, 5 U.S.C. § 551(1)), *aff'd*, 432 F.3d 387 (2d Cir. 2005) (per curiam).

*Kuretski*, 755 F.3d at 944

analyzing the Tax Court's refusal to apply the ordinary remand rule.

### 1. Tax Deficiency Redeterminations

With respect to tax deficiency redeterminations, there appears to be a consensus among courts—including the Tax Court<sup>191</sup>—that the standard and scope of review are both de novo.<sup>192</sup> Judge Bybee explains that the de novo review standard is in place “for largely historical reasons,” suggesting that “[t]he Tax Court’s historical de novo review of tax deficiencies—which dates to the 1920s—may have been grandfathered under the APA.”<sup>193</sup> Indeed, even federal district courts and the (Article I) Court of Federal Claims review analogous cases de novo, as such claims are brought as civil actions for refund after the tax has been paid.<sup>194</sup>

In the Tax Court, by contrast, the deficiency redetermination takes place before the tax has been paid—by filing a petition for redetermination within ninety days of receiving the notice of deficiency from the IRS.<sup>195</sup> It is thus a petition for review of agency action that should be governed by the APA. The historical answer Judge Bybee proffers may well be correct. Because the Tax Court has always conducted de novo review of tax deficiencies and the APA is silent on overriding that history, the de novo standard and scope of review for deficiency re-

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191. See *Ewing v. Comm’r*, 122 T.C. 32, 38 (2004) (“Under section 6213(a) and its predecessors, we (and earlier, the Board of Tax Appeals) have ‘redetermined’ deficiencies de novo, not limited to the Commissioner’s administrative record, for more than 75 years.”), *vacated on other grounds*, 439 F.3d 1009 (9th Cir. 2006).

192. See *Wilson v. Comm’r*, 705 F.3d 980, 1003 n.3 (9th Cir. 2013) (Bybee, J., dissenting) (citing cases for the proposition that “[t]he Tax Court’s review of tax deficiencies has, for largely historical reasons, been held to be de novo.”); see also *Clapp v. Comm’r*, 875 F.2d 1396, 1403 (9th Cir. 1989) (“The Tax Court has as its purpose the redetermination of deficiencies, through a trial on the merits, following a taxpayer petition. It exercises de novo review.”); accord *Raheja v. Comm’r*, 725 F.2d 64, 66 (7th Cir. 1984). See generally *Porter v. Comm’r*, 130 T.C. 115, 119 (2008) (setting forth the Tax Court’s position on the de novo standard and its historical justification for the review standard).

193. *Wilson*, 705 F.3d at 1003 n.3 (Bybee, J., dissenting).

194. See 26 U.S.C. § 7422 (2012); see also *Cords*, *supra* note 63, at 456–57 (explaining that in deficiency redeterminations and refund actions, “[b]oth the Tax Court and the district court conduct de novo review”); Melissa Ellen Segal, *Who Bears the Burden of Proof in Taxpayer Suits Against the IRS?*, 4 PITT. TAX REV. 155 (2007) (discussing burden of proof, introduction of evidence, and other procedural matters in refund action).

195. See 26 U.S.C. § 6213(a) (90 days from date of mailing, or 150 days if the taxpayer is outside of the country).

determinations may well have been grandfathered in under the APA.

Even putting aside the historical argument, however, the IRS's governing statute provides considerable evidence that Congress intended the Tax Court to depart from the APA default standards. First, as others have noted,<sup>196</sup> the Internal Revenue Code instructs the Tax Court to “redetermine the correct amount of the deficiency.”<sup>197</sup> Indeed, the taxpayer is expressly instructed, after receiving a notice of deficiency from the IRS, to “file a petition with the Tax Court for a redetermination of the deficiency.”<sup>198</sup> The use of the term “redetermine” as opposed to “review” or “determine” takes on added significance when, as discussed below, one considers that Congress used “determine” in other parts of the Internal Revenue Code to define the Tax Court's judicial review function. As Judge Bybee notes, “[t]he use of the prefix ‘re-,’ to modify the word ‘determine,’ suggests that something has been, or must be, done again; a definition in closer harmony with a de novo standard.”<sup>199</sup>

To the extent these statutory features do not rise to the level of “clear” evidence of “statutory intent [of] legislative departure from the [APA] norm,”<sup>200</sup> subsequent congressional action should remove any doubt. In 1998, Congress amended the Internal Revenue Code to clarify the burden of proof in tax litigation.<sup>201</sup> In particular, Congress provided that this burden-shifting scheme applies “in any court proceeding” and shifts the burden to the IRS when “a taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer for any tax imposed . . . .”<sup>202</sup> There are certain limitations to this burden-shifting scheme, including a requirement that the taxpayer “has cooperated with reasonable requests by the [IRS] for witnesses, information, docu-

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196. See, e.g., Cords, *supra* note 63, at 473 (“Congress has specifically provided for de novo review of deficiency redeterminations; the Tax Court is directed to ‘redetermine’ deficiencies.”).

197. See 26 U.S.C. § 6214(a). In total, § 6214 uses the term “redetermine” seven times to describe the Tax Court's task with respect to tax deficiencies.

198. See *id.* § 6213(a).

199. *Wilson v. Comm'r*, 705 F.3d 980, 1007 (9th Cir. 2013) (Bybee, J., dissenting).

200. *Dickinson v. Zurko*, 527 U.S. 150, 155 (1999).

201. See generally Segal, *supra* note 194, at 165–66 (discussing 1998 legislation in more detail).

202. 26 U.S.C. § 7491(a)(1).

ments, meetings, and interviews.”<sup>203</sup> In other words, this cooperation requirement is consistent with the policy rationales behind the record review rule discussed in Part III—i.e., to encourage the taxpayer to submit all relevant evidence and make all arguments in the administrative proceeding. Although the taxpayer is not prohibited from introducing new evidence or argument “in any court proceeding” (before the Tax Court in a tax redetermination petition or in the other federal courts in a refund action), Congress still punishes the taxpayer for failure to do so by not shifting the burden to the IRS.<sup>204</sup>

More importantly, that Congress allows a taxpayer to “introduce credible evidence” relevant to the taxpayer’s tax liability “in any court proceeding” is strong evidence that Congress intended—to use the language of the APA—that “the facts [of a tax deficiency] are subject to trial de novo by the reviewing court.”<sup>205</sup> Furthermore, Congress applies this burden-shifting scheme “in any court proceeding” with respect to “credible evidence” relating to a tax deficiency, not just tax redetermination petitions or refund actions. The Tax Court is thus correct that it conducts a trial de novo of an IRS tax deficiency determination in any proceeding in which the IRS’s underlying tax deficiency determination is challenged.

That does not mean, as the Tax Court has asserted, it is “well settled” that “the APA does not apply to deficiency cases in this Court.”<sup>206</sup> The APA still governs, but the alternative § 706(2)(F) judicial review provisions apply: the administrative record does not bind the scope of review (“trial de novo”) and the standard of review is de novo (“unwarranted by the facts”).<sup>207</sup> This reading of the Internal Revenue Code and APA is reinforced by the APA’s legislative history. As discussed in Part I.A, the House Judiciary Committee Report specifically cites income tax redeterminations—describing them as “a trial of the facts in The Tax Court or the United States district courts”—as subject to § 706(2)(F).<sup>208</sup>

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203. *Id.* § 7491(a)(2)(B).

204. *Id.* § 7491(a)(1)–(2) (describing the general rule and limitations on burden shifting for taxpayers who produce credible evidence).

205. 5 U.S.C. § 706(2)(F) (2012) (APA exception to record review rule and abuse of discretion standard).

206. *Ewing v. Comm’r*, 122 T.C. 32, 37 (2004), *rev’d on jurisdictional grounds*, 439 F.3d 1009 (9th Cir. 2006).

207. 5 U.S.C. § 706(2)(F).

208. H. REP. NO. 79-1980, pt. 4 § 10(E) (1946) (report of the House Judiciary Committee), *reprinted in* S. DOC. NO. 79-248, at 279 (1946) (Legislative

## 2. Review of Innocent Spouse Determinations

Unlike in the case of tax deficiency redeterminations, there is no consensus among courts about the proper standard and scope of review for innocent spouse claims. As discussed in Part I.B, there are three ways in which an innocent spouse may qualify for relief from joint and several liability for tax deficiencies. Here, we focus on the third avenue—equitable relief under § 6015(f)—because this is where the judicial disagreement is sharpest.

The Tax Court's position on its own standard and scope of review for innocent spouse claims for equitable relief has shifted over time. First, in 2002, the Tax Court stated that it would review, for abuse of discretion, the IRS's decision not to grant innocent spouse equitable relief.<sup>209</sup> Two years later a divided Tax Court maintained the abuse of discretion standard of review but applied a *de novo* scope of review, concluding—contrary to the IRS's position in the case—that “the APA record rule does not apply to § 6015(f) determinations in this Court.”<sup>210</sup> Then, in 2009, another divided Tax Court concluded that it reviews the IRS's § 6015(f) decision with “a *de novo* standard of review as well as a *de novo* scope of review.”<sup>211</sup>

Perhaps unsurprisingly, the federal courts of appeals have similarly split on which standard applies. In response to the Tax Court's 2002 position, the D.C. and Fifth Circuits agreed that abuse of discretion is the proper standard of review for in-

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History of the Administrative Procedure Act); *see also* S. REP. NO. 79-752, pt. 4 § 10(e) (1945) (report of the Senate Judiciary Committee), *reprinted in* S. DOC. NO. 79-248, at 214 (1946) (Legislative History of the Administrative Procedure Act); Fahey, *supra* note 32, at 634–36 (exploring legislative history in more detail).

209. *Johnson v. Comm'r*, 118 T.C. 106, 125 (2002), *aff'd on other grounds*, 353 F.3d 1181 (10th Cir. 2003).

210. *Ewing*, 122 T.C. at 43–44, *rev'd on jurisdictional grounds*, 439 F.3d 1009 (9th Cir. 2006). Judges Halpern and Holmes dissented from the majority's conclusion that the APA default standard and scope of review and provisions do not apply to the Tax Court's review of IRS actions. *See Ewing*, 122 T.C. at 56–71 (Halpern & Holmes, JJ., dissenting). Their dissent returns to first principles of administrative law similar to the approach set forth in Part II.A, concluding that “[w]e would therefore hold that the APA judicial review provisions apply to section 6015(f) cases as well as deficiency cases.” *Id.* at 61.

211. *Porter v. Comm'r*, 132 T.C. 203, 206–10 (2009). Judge Gustafson, among others, dissented. Judge Gustafson noted that Congress empowered the IRS to have discretion about whether to grant equitable relief, and it would be bizarre to review an agency's exercise of discretion *de novo*. *See id.* at 226–35 (Gustafson, J., dissenting).

nocent spouse claims for equitable relief.<sup>212</sup> Neither the D.C. Circuit nor the Fifth Circuit had occasion to consider the proper scope of review, as the Tax Court had not yet declared that it could conduct a trial de novo.

In response to the Tax Court's 2004 position, a divided Eleventh Circuit upheld the Tax Court's position (and rejected the IRS's contrary position) that the Tax Court is not bound by the APA's record review rule.<sup>213</sup> The court had no reason to opine on the standard of review, as the taxpayer, IRS, and Tax Court all agreed that abuse of discretion was the proper standard.<sup>214</sup> Judge Tjoflat dissented, arguing that "a careful review of applicable law reveals that neither the plain language nor the legislative history nor the historical practices of the Tax Court . . . indicate Congress's intent to supplant the scope and standard of review set forth in the Administrative Procedure Act."<sup>215</sup>

Finally, a divided Ninth Circuit upheld the Tax Court's current position, holding that "the Tax Court properly considered new evidence outside the administrative record" and properly "applied a de novo standard of review."<sup>216</sup> Judge Bybee filed a trenchant dissent, arguing that "[b]ecause the Tax Court is a 'reviewing court' for purposes of the judicial review provisions of the APA, I am persuaded that its scope of review is the administrative record before the IRS, and that the Tax Court can only review the [IRS's] exercise of discretion for an abuse of discretion pursuant to [the APA]."<sup>217</sup>

Accordingly, the supersized Ninth Circuit and Tax Court are on one side of the issue, with the D.C. and Fifth Circuits on the other, and the Eleventh Circuit somewhere in between. Moreover, district courts and the Court of Federal Claims also review innocent spouse claims on occasion in the context of a

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212. *Mitchell v. Comm'r*, 292 F.3d 800, 807 (D.C. Cir. 2002) ("As the decision whether to grant this equitable relief is committed by its terms to the discretion of the Secretary, the Tax Court and this Court review such a decision for abuse of discretion."); *Cheshire v. Comm'r*, 282 F.3d 326, 338 (5th Cir. 2002) (similarly reviewing for abuse of discretion).

213. *Comm'r v. Neal*, 557 F.3d 1262, 1264 (11th Cir. 2009).

214. *Id.* at 1263 ("Both parties agree that the Tax Court appropriately used an abuse of discretion standard of review . . .").

215. *Id.* at 1278 (Tjoflat, J., dissenting). Judge Tjoflat's dissent takes a similar first-principles approach as set forth in Part II.A. *See id.* at 1278–87.

216. *Wilson v. Comm'r*, 705 F.3d 980, 982 (9th Cir. 2013).

217. *Id.* at 996 (Bybee, J., dissenting). Like Judge Tjoflat in *Neal*, Judge Bybee takes a first-principles approach similar to the one presented in Part II.A. *See id.* at 994–1012.

refund suit.<sup>218</sup> To date, they have reviewed such claims for abuse of discretion.<sup>219</sup>

The issue is not confusing if one returns to first principles. As discussed in Part II.A, the Supreme Court has instructed courts to “apply the APA’s court/agency review standards in the absence of an exception” set forth by statute.<sup>220</sup> To depart from the APA default, the Internal Revenue Code must suggest “more than a possibility of a [different] standard, and indeed more than even a bare preponderance of evidence”; the exception “must be clear.”<sup>221</sup> So let’s turn to the relevant text of the Code.

Under § 6015(f), the IRS “may relieve” an innocent spouse of joint and several liability if relief is not available through the other two innocent spouse provisions and “taking into account all the facts and circumstances, it is inequitable to hold the individual liable.”<sup>222</sup> As discussed in Part I.B.2, Congress intended to grant discretion to the IRS in equitable innocent spouse claims. This in and of itself suggests that judicial review of such *discretionary* determinations should be for abuse of *discretion*. All innocent spouse claims are subject to judicial review under § 6015(e), which provides that the taxpayer may file a “[p]etition for review by Tax Court” to “petition the Tax Court (and the Tax Court shall have jurisdiction) to determine the appropriate relief available to the individual under this section.”<sup>223</sup> The Internal Revenue Code is silent on the standard and scope of review. That should be the end of the inquiry.

What clear evidence does the Tax Court have for departing from the default APA standards? As a preliminary matter, the Tax Court has not provided cogent analysis on this point, likely because of its tax exceptionalist view that the APA does not apply at all. But the principal statutory argument it makes for de novo standard and scope of review is that Congress used the term “determine”: “The use of the word ‘determine’ suggests that Congress intended us to use a de novo standard of review as well as scope of review.”<sup>224</sup> As Judge Bybee remarks, “That is

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218. 26 U.S.C. § 6015(e)(3) (2012).

219. See, e.g., *Flores v. United States*, 51 Fed. Cl. 49, 51 n.1 (2001); accord *Mitchell v. Comm’r*, 292 F.3d 800, 807 (D.C. Cir. 2002) (citing *Flores* for applying abuse of discretion in federal court and not just Tax Court).

220. *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999).

221. *Id.* at 154–55.

222. 26 U.S.C. § 6015(f).

223. *Id.* § 6015(e)(1).

224. *Porter v. Comm’r*, 132 T.C. 203, 208 (2009) (en banc).

a lot of weight to put on the word ‘determine,’ and I do not think it can bear it.”<sup>225</sup> This is particularly true in light of the fact there must be “clear” evidence of “statutory intent [for] legislative departure from the [APA] norm,”<sup>226</sup> and “[e]xemptions from the terms of the Administrative Procedure Act are not lightly to be presumed.”<sup>227</sup> Indeed, the APA plainly states that “[n]o subsequent legislation”—such as the innocent spouse section of the Internal Revenue Code—“shall be held to supersede or modify the provisions of [the APA] except to the extent that such legislation shall do so expressly.”<sup>228</sup>

The use of the term “determine” falls far short of this exacting standard. As Judge Bybee has chronicled, Congress knows how to provide for *de novo* scope<sup>229</sup> and standard<sup>230</sup> of review. And when Congress has intended for a *de novo* determination, it has provided for a “*de novo* determination.”<sup>231</sup> Moreover, remember that Congress provided for the Tax Court to “redetermine” tax deficiencies, yet only to “determine” innocent spouse claims.<sup>232</sup> There is a longstanding “presum[ption] that, where words differ as they differ here, Congress acts intentionally and purposely in the disparate inclusion or exclusion.”<sup>233</sup> In

225. *Wilson v. Comm’r*, 705 F.3d 980, 1004 (9th Cir. 2013) (Bybee, J., dissenting).

226. *Dickinson v. Zurko*, 527 U.S. 150, 155 (1999).

227. *Marcello v. Bonds*, 349 U.S. 302, 310 (1955).

228. 5 U.S.C. § 559.

229. *Wilson v. Comm’r*, 705 F.3d 980, 1004 (9th Cir. 2013) (Bybee, J., dissenting) (citing 5 U.S.C. §§ 706(2)(F), 7702(e)(3), 7703(c) (2012); 7 U.S.C. §§ 499g(c), 2023(a)(15) (2012); 28 U.S.C. § 657(a), (c) (2012); 38 U.S.C. § 7261(c) (2012); 42 U.S.C. §§ 300e–9(d)(3), 1995 (2012); 47 U.S.C. § 504(a) (2012)).

230. *Wilson*, 705 F.3d at 1005 (Bybee, J., dissenting) (citing, 6 U.S.C. § 1142(c)(7) (2012); 12 U.S.C. §§ 1828(c)(7)(A), 1849(b)(1), 5567(c)(4)(D)(i) (2012); 15 U.S.C. §§ 2087(b)(4), 3414(b)(6)(F) (2012); 16 U.S.C. § 823b(b), (d)(3)(B) (2012); 18 U.S.C. §§ 1514A(b)(1)(B), 3613A(b)(1), 3742(e) (2012); 19 U.S.C. § 1625(b) (2012); 21 U.S.C. § 399d(b)(4)(A) (2012); 22 U.S.C. § 4140(b)(2) (2012); 28 U.S.C. § 2265(c)(3) (2012); 30 U.S.C. § 1300(j)(4)(ii)(I) (2012); 42 U.S.C. §§ 2282a(c)(3)(B), 5851(b)(4), 6303(d)(3)(B), 8433(d)(3)(B) (2012); 49 U.S.C. §§ 20109(d)(3), 31105(c) (2012)).

231. *See, e.g.*, 18 U.S.C. § 3664(d)(6) (providing for “a *de novo* determination of the issue by the court”); 28 U.S.C. § 636(b)(1) (“A judge of the court shall make a *de novo* determination of those portions of the report . . .”).

232. *Compare* 26 U.S.C. § 6015(e)(1) (2012), *with id.* § 6214(a). *See generally infra* Part II.B.1.

233. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) (internal quotation marks omitted); *accord* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 170 (2012) (“[W]here the document has used one term in one place, and a materially dif-



all events, the use of the term “determine”—without more—is not the type of clear or express command from Congress to depart from the APA default rules.<sup>234</sup>

### 3. Review of Collection Due Process Decisions

Like the innocent spouse statute, the judicial review section of the collection due process statute provides no standard or scope of review. It merely says that the taxpayer “may, within 30 days of a[n IRS] determination under this section, appeal such determination to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).”<sup>235</sup> Accordingly, the APA default provisions should govern the Tax Court’s review of IRS determinations concerning collection due process complaints.

The Tax Court agrees that the standard of review is abuse of discretion (when tax liability is not at issue<sup>236</sup>), but not because it feels bound by the APA. Instead, the Tax Court relies on the legislative history of § 6330.<sup>237</sup> That legislative history—which refers to judicial review in the Tax Court and federal district courts—is unambiguous: “Where the validity of the tax liability is not properly part of the appeal, the taxpayer may challenge the determination of the appeals officer for abuse of discretion.”<sup>238</sup> It is thus no surprise that courts have held that abuse of discretion is also the standard of review of such IRS determinations being reviewed in the federal district courts.<sup>239</sup>

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ferent term in another, the presumption is that the different term denotes a different idea.”).

234. Judge Bybee aptly responds to a number of other arguments that are less persuasive and thus not covered here. *See Wilson*, 705 F.3d at 1004–12 (Bybee, J., dissenting).

235. 26 U.S.C. § 6330(d)(1).

236. As discussed in Part II.B.1, the Tax Court does and should apply a de novo standard of review whenever tax liability or deficiency is challenged in light of the Tax Court’s unique history, the use of the term “redetermine,” and the statutory burden-shifting scheme that suggests de novo standard and scope of review. The legislative history of § 6330 reinforces this position:

Where the validity of the tax liability was properly at issue in the hearing, and where the determination with regard to the tax liability is a part of the appeal, no levy may take place during the pendency of the appeal. The amount of the tax liability will in such cases be reviewed by the appropriate court on a de novo basis.

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

237. *Goza v. Comm’r*, 114 T.C. 176, 179 (2000).

238. H.R. REP. NO. 105-599, at 266. (1998).

239. *See, e.g., Olsen v. United States*, 414 F.3d 144, 150–51 (1st Cir. 2005) (“In a CDP case in which, as here, the amount of the underlying tax liability is

With respect to the scope of review, however, the Tax Court does not follow the APA default. For instance, in *Robinette v. Commissioner*, the Tax Court concluded that “when reviewing for abuse of discretion under § 6330(d), we are not limited by the Administrative Procedure Act (APA) and our review is not limited to the administrative record.”<sup>240</sup> In reaching this conclusion, the Tax Court relied on the historical underpinnings of its tax deficiency jurisdiction to conclude that the APA did not apply at all to its review under § 6330:

Although § 6330 postdates the APA, the APA judicial review provisions are not applicable. The APA does not “limit or repeal additional requirements imposed by statute or otherwise recognized by law.” The Court’s de novo procedures for reviewing IRS functions were well established and “recognized by law” at the time of the APA’s enactment.<sup>241</sup>

The Eighth Circuit, in a unanimous opinion authored by Judge Colloton, reversed, holding that “[n]othing in the text or history of the Restructuring and Reform Act of 1998 clearly indicates an intent by Congress to permit trials de novo in the Tax Court when that court reviews decisions of IRS appeals officers under § 6330. If anything, the available evidence suggests the opposite.”<sup>242</sup> The court found it particularly difficult to square a de novo scope of review—absent some express indication by Congress—with the legislative history that unambiguously directed for an abuse of discretion standard of review.<sup>243</sup> Finally, the court noted:

Every district court to consider an appeal under § 6330 has limited its review to the record created before the agency, and it would be anomalous to conclude that Congress intended in § 6330(d) to create disparate forms of judicial review depending on which court was reviewing the decision of an IRS appeals officer in a collection due process proceeding.<sup>244</sup>

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not at issue, the trial court and the court of appeals review the determination of the IRS appeals officer for abuse of discretion.”); *Living Care Alternatives of Utica, Inc. v. United States*, 411 F.3d 621, 625 (6th Cir. 2005) (applying an abuse of discretion standard); *Jones v. Comm’r*, 338 F.3d 463, 466 (5th Cir. 2003) (applying an abuse of discretion standard for Tax Court and Article III court).

240. *Robinette v. Comm’r*, 123 T.C. 85, 95 (2004), *rev’d*, 439 F.3d 455 (8th Cir. 2006); *see also* Cords, *supra* note 63, at 457 n.185 (gathering published and unpublished Tax Court opinions on point).

241. *Robinette*, 123 T.C. at 97 (quoting 5 U.S.C. § 559 (2000)).

242. *Robinette v. Comm’r*, 439 F.3d 455, 460 (8th Cir. 2006).

243. *Id.* at 460–61.

244. *Id.* at 461 (internal citations omitted).

Moreover, the Tax Court in *Robinette* observed that “[n]othing in the legislative history of §§ 6330 or 6320 indicates . . . that the Court’s review is limited to the administrative record.”<sup>245</sup> The Eighth Circuit did not bother to address this point. It is worth noting, however, that the same legislative history that sets forth the abuse of discretion standard of review states that “[n]o further hearings are provided under this provision as a matter of right. It is the responsibility of the taxpayer to raise all relevant issues at the time of the pre-levy hearing.”<sup>246</sup> Accordingly, not only is there no evidence in the statute that suggests Congress intended to depart from the default APA scope of review, but the legislative history suggests the opposite. And, by not including these instructions in the statute itself but only in the legislative history, one could reasonably conclude the congressional drafters understood that statutory silence resulted in these default APA judicial review standards.

Several months after *Robinette*, the First Circuit joined the Eighth Circuit, holding that “[t]he Tax Court, like the district court, is charged with determining whether the IRS’s rulings during a [collection due process] hearing were within its discretion. Thus, judicial review normally should be limited to the information that was before the IRS when making the challenged rulings.”<sup>247</sup> This issue has received a fair amount of scholarly attention, with commentators agreeing with the First and Eighth Circuit that the APA’s record-review rule applies to the Tax Court’s review of IRS collection due process determinations.<sup>248</sup>

#### 4. The Tax Court and the Ordinary Remand Rule

One final observation is not about a specific type of claim, but about the Tax Court’s position on the ordinary remand rule in its review of IRS actions.

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245. *Robinette*, 123 T.C. at 99.

246. H.R. REP. NO. 105-599, at 266 (1998).

247. *Murphy v. Comm’r*, 469 F.3d 27, 31 (1st Cir. 2006).

248. See Cords, *supra* note 63, at 453–65; Fahey, *supra* note 32, at 609–15; Christine K. Lane, *On-the-Record Review of CDP Determinations: An Examination of Policy Reasons Encouraging Judges to Stick to the Administrative Record*, 6 FLA. ST. U. BUS. L. REV. 149, 156–59 (2007); Nick A. Zotos, *Service Collection Abuse of Discretion: What Is the Appropriate Standard of Review and Scope of the Record in Collection Due Process Appeals?*, 62 TAX LAW. 223, 225–28 (2008).

Consider first the context of collection due process claims. As noted in Part I.B.3, IRS collection due process hearings are not subject to the APA's formal adjudication hearing requirements,<sup>249</sup> and they may "not be a single event, but may instead be a series of telephonic or written correspondence taking place over time."<sup>250</sup> The applicable regulations suggest that a face-to-face meeting ordinarily will be offered to requesting taxpayers whose argument is not frivolous.<sup>251</sup> The IRS is not required to create a transcript or recording of the hearing, and the taxpayer has no right to subpoena or examine witnesses.<sup>252</sup> As Bryan Camp explains, "hearings can sometimes be so informal that a taxpayer may not understand that one took place until receiving the Notice of Determination."<sup>253</sup>

Due to the informal nature of the IRS proceeding, there may be little or no record available for meaningful review. As a matter of policy, therefore, it may be more fair and effective to allow the Tax Court to consider evidence and testimony from both the taxpayer and the IRS. But that policy concern is misplaced and contrary to administrative common law. As the Supreme Court has instructed, "if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."<sup>254</sup> As discussed in Part III, remanding to the IRS to further develop the record—and accompanying such remand with certain dialogue-enhancing tools—is a better policy because it forces the IRS to properly develop a record and reach sound conclusions based on that developed record. And such a remand not only affects that particular case, but should also have system-wide effects on how the IRS handles collection due process complaints.

The Tax Court, however, has disavowed the applicability of administrative law's ordinary remand rule (and the IRS appears to have acquiesced).<sup>255</sup> Instead, the Tax Court believes it-

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249. Treas. Reg. § 301.6330-1(d) Q&A (6)(D) (2013).

250. Camp, *supra* note 121, at 83.

251. Treas. Reg. § 301.6330-1(d) Q&A (7)(D).

252. *Id.*

253. Camp, *supra* note 121, at 84.

254. Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

255. See *Wilson v. Comm'r*, 705 F.3d 980 (9th Cir. 2013) I.R.S. Notice CC-2013-011, at 2 n.1 (June 7, 2013) ("The trial attorney should not move the Tax Court to remand these cases for a determination by the Service regarding section 6015 relief. In *Friday v. Commissioner*, 124 T.C. 220 (2005), the Tax

self unable to remand unless Congress has expressly reserved jurisdiction to the IRS. For instance, in the collection due process context, the Internal Revenue Code provides that the IRS retains jurisdiction over the case during the Tax Court's review and may consider how a change in the taxpayer's circumstances affects its original determination.<sup>256</sup> By contrast, the Code provides no such express retention of jurisdiction with respect to innocent spouse claims (or deficiency redeterminations); accordingly, the Tax Court has held that it lacks the power to remand issues to the IRS in those circumstances.<sup>257</sup> Indeed, the Tax Court relies on this misperception (regarding its remand ability) to justify de novo review of IRS actions, noting that “[a]n abuse of discretion standard of review is also at odds with our decision to decline to remand [innocent spouse] cases for re-consideration.”<sup>258</sup>

The Tax Court's approach here, again, reflects a tax exceptionalist view of administrative law, and a return to first principles leads to a different analysis and conclusion. The Supreme Court in *Dickinson* held that a reviewing court must “apply the APA's court/agency review standards in the absence of an exception” set forth by Congress.<sup>259</sup> More recently, in *Mayo*, the Court relied on *Dickinson* to conclude that this standard applies to departures from administrative common law rules (there, *Chevron* in the tax context) and not just the APA statutory defaults.<sup>260</sup> And the Court has instructed repeat-

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Court held that section 6015 does not provide for remand.”).

256. 26 U.S.C. § 6330(d)(2) (2012).

257. See *Friday v. Comm'r*, 124 T.C. 220, 221–22 (2005) (citing *Parker v. Comm'r*, T.C. Memo. 2004-226, for the proposition that a collection due process “case may be remanded to the [IRS] Appeals Office for further consideration,” but holding that an innocent spouse case may not be remanded due to the lack of a jurisdiction retention provision on the corresponding statutory section); accord *Wilson*, 705 F.3d at 989 (citing *Friday* and discussing the Tax Court's position that it cannot remand innocent spouse cases to the IRS). District courts have similarly remanded collection due process cases to the IRS. See, e.g., *Herycyk v. United States*, No. 4:01-CV-00058, 2001 WL 1836194, at \*4 (N.D. Ohio Dec. 11, 2001). But see *Montijo v. United States*, No. CV-S-01-0423-RLH RJJ, 2002 WL 507573, at \*1–2 (D. Nev. Feb. 22, 2002) (refusing to remand to the IRS because the parties failed to provide any authority to justify such remand).

258. *Porter v. Comm'r*, 132 T.C. 203, 209 (2009); accord *id.* at 220 (Gale, J., concurring); *id.* at 225 (Wells, J., dissenting); see also *Wilson*, 705 F.3d at 1011 (Bybee, J., dissenting) (“The Tax Court has expressed its concern that it cannot remand such cases to the Secretary as justification for its de novo review.”).

259. *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999).

260. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct.

edly that, when an agency has erred or the administrative record is otherwise insufficient to determine whether the agency has erred, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.”<sup>261</sup> In other words, “the guiding principle . . . is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration.”<sup>262</sup> This ordinary remand rule preceded the APA.<sup>263</sup>

Nothing in the Internal Revenue Code suggests a departure from this remand rule when the APA’s default standard and scope of review provisions apply. That the Code retains jurisdiction for the IRS during the pendency of the Tax Court’s review and thereafter in one context (collection due process cases)<sup>264</sup> but not in others (innocent spouse cases, deficiency determinations, etc.) is not the type of clear evidence that Congress intended to depart from the default administrative law doctrines. Nor, as discussed in Part III, are there compelling policy considerations that would suggest such departure when the APA’s default standard and scope of review provisions apply.

This does not mean, however, that the Tax Court must remand every erroneous IRS determination to the IRS for reconsideration. As the ordinary remand rule suggests, it is the “ordinary” rule subject to exceptions for “rare circumstances.”<sup>265</sup> These rare circumstances include when there are minor errors as to subsidiary issues that do not affect the agency’s ultimate decision or when the agency lacks authority to decide the is-

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704, 713 (2011) (refusing “to carve out an approach to administrative review good for tax law only” because of the “importance of maintaining a uniform approach to judicial review of administrative action” (quoting *Dickinson*, 527 U.S. at 154)).

261. *Negusie v. Holder*, 555 U.S. 511, 523 (2009) (quoting *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (per curiam), in turn quoting *INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam), in turn quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

262. *Fed. Power Comm’n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) (reversing the D.C. Circuit’s order for the agency to issue a license the agency had previously denied).

263. See *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943). See generally Walker, *The Ordinary Remand Rule*, *supra* note 40 (manuscript at Part I) (tracing the evolution of the ordinary remand rule from *Chenery* to modern day).

264. 26 U.S.C. § 6330(d)(2) (2012).

265. *Negusie*, 555 U.S. at 523 (internal quotation marks omitted).

sue.<sup>266</sup> And there is another exception of particular relevance here: when APA § 706(2)(F) applies and “the facts are subject to trial de novo by the reviewing court.”<sup>267</sup> In particular, in explicating the ordinary remand rule and how it is “the proper course, except in rare circumstances,” the Supreme Court has noted that “[t]he reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.”<sup>268</sup> Logically, then, if the reviewing court is empowered to conduct a trial de novo, the court is not required to remand (though it retains discretion to do so) because de novo review allows the court to take the unusual step of substituting its judgment for that of the agency.<sup>269</sup>

In light of these principles, it becomes clear that the Tax Court need not remand when it conducts a trial de novo. As explained in Part II.A, the Tax Court conducts a trial de novo of an IRS tax deficiency determination in any proceeding in which the underlying deficiency determination is challenged. (That said, as discussed in Part III, in some circumstances policy considerations may weigh in favor of the Tax Court exercising its discretion to remand even some de novo redeterminations to the IRS.)<sup>270</sup> But when the trial de novo provisions of APA

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266. See Walker, *The Ordinary Remand Rule*, *supra* note 40 (manuscript at end of Part I) (discussing exceptions).

267. 5 U.S.C. § 706(2)(F) (2012).

268. Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

269. Although the logic of this principle seems sound, to date few courts have addressed the issue. See, e.g., *Wilson v. Comm’r*, 705 F.3d 980, 997 (9th Cir. 2013) (Bybee, J., dissenting) (“Except when the reviewing court is authorized to conduct a trial de novo, the court’s review is confined because ‘[t]he court is not empowered to substitute its judgment for that of the agency.’” (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971))); *United States v. UPS Customhouse Brokerage, Inc.*, 686 F. Supp. 2d 1337, 1351 (Ct. Int’l Trade 2010) (“As to remand, the Court is authorized by 28 U.S.C. § 2640(a)(6) to decide the issues in this case at a trial de novo, so remand is not required.”); see also *infra* note 270 (citing cases from ERISA context).

270. In the ERISA context where the remand rule also exists, see *Conkright v. Frommert*, 130 S. Ct. 1640, 1646–47, 1651–52 (2010), courts have recognized this distinction—that a reviewing court only has discretion *not* to remand when the standard of review is de novo. See, e.g., *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1025 n.6 (4th Cir. 1993) (“We do not believe, however, that remand in every case of an inadequate record is consistent with the de novo standard of review or in the interests of judicial economy.”); *Fitts v. Unum Life Ins. Co. of Am.*, No. 98-00617, 2007 WL 1334974, at \*21 (D.D.C. May 7, 2007) (“Remand to a plan administrator is not necessary where the court develops a factual record in making its de novo determination.” (citing

§ 706(2)(F) do not apply, the Tax Court should adhere to the ordinary remand rule. The following Part turns to the policy case for adhering to this rule and the APA default judicial review provisions.

### III. THE POLICY CASE AGAINST TAX COURT EXCEPTIONALISM

The legal case against Tax Court exceptionalism set forth in Part II is compelling and should be sufficient to encourage the Tax Court to reverse course and consider itself bound by the APA's judicial review provisions—just like every other court that reviews federal agency action. The policy case, however, reinforces the legal case and provides additional reasons why the Tax Court should embrace the APA and traditional administrative law principles.

Part III.A reviews the policy considerations in favor of the package of default judicial review standards addressed in this Article; the abuse of discretion standard of review, the record-bound scope of review, and the ordinary remand rule. Part III.A also addresses and dismisses policy counterarguments that tax law and administration should be excepted from these general administrative law principles. A comprehensive normative analysis of this APA default package is surprisingly absent in the literature. And our counterintuitive conclusion that the APA default package may allow a court to have a greater systemic effect on agency decision-making is similarly missing.

Part III.B then presents a number of judicial tools that courts have developed in other administrative law contexts to enrich their dialogue with agencies as well as to help ensure on remand that petitioners do not get lost and that relief is not unduly delayed or denied. These dialogue-enhancing tools help alleviate the policy considerations against deferential review of IRS determinations. In particular, such tools help the reviewing court play a more active role in improving equity, efficiency, and consistency at the IRS generally rather than just in the limited number of cases that make it to the Tax Court. That the vast majority of unrepresented taxpayers never seek judicial review of adverse IRS decisions should encourage the Tax Court to engage in a richer dialogue with the IRS via the ordi-

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Casey v. Uddeholm Corp., 32 F.3d 1094, 1099 n.4 (7th Cir. 1994)); *Dionida v. Reliance Standard Life Ins. Co.*, 50 F. Supp. 2d 934, 942 (N.D. Cal. 1999) (“[R]emand is available even on de novo review.”).



nary remand rule in order to have a more systemic effect on the quality of adjudication that takes place at the IRS.

#### A. RATIONALES FOR JUDICIAL DEFERENCE TO AGENCY ACTION

Before examining policy rationales for the APA's default judicial deference to agency action, it is important to frame this policy discussion against the backdrop of the Tax Court's concerns about deferring to IRS determinations. Consistency and equity are among the most important policy goals in tax administration as well as in the modern administrative state more generally.<sup>271</sup> At first blush, the Tax Court's use of less deferential review standards would seem to advance these goals because more searching judicial review allows the court to correct errors that would otherwise go uncorrected.

Take, for example, the litigation of innocent spouse cases. The IRS's success rate on appeal is perennially low.<sup>272</sup> In 2013, the IRS litigated twenty-one cases on the merits of granting innocent spouse relief, and of these cases, it lost thirty-six percent.<sup>273</sup> The year of 2012 was even worse. The IRS prevailed fully in only twenty-one out of forty such cases, and it received split decisions in eight more.<sup>274</sup> Of these twenty-nine full and partial successes, ten were decided purely on procedural grounds, such as standard of review or whether the claim could be raised as a defense in a collection action or interpleader suit, meaning that the IRS prevailed on the merits in, at most, nineteen out of forty cases.<sup>275</sup> It had similar records in the years

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271. One of the authors explores the importance of consistency in tax administration in a somewhat related context. See Stephanie Hoffer, *Hobgoblin of Little Minds No More: Justice Requires an IRS Duty of Consistency*, 2006 UTAH L. REV. 317, 326–44 (2006) (discussing the IRS's duty of consistency).

272. NAT'L TAXPAYER ADVOCATE, 2012 ANNUAL REPORT TO CONGRESS 654 (2012) [hereinafter NTA 2012 REPORT], <http://www.taxpayeradvocate.irs.gov/userfiles/file/Full-Report/volume-1.pdf> (“[I]n cases decided on the merits [in 2012], the IRS fully prevailed less than half the time.”)

273. NAT'L TAXPAYER ADVOCATE, 2013 ANNUAL REPORT TO CONGRESS 412 (2013) [hereinafter NTA 2013 REPORT], <http://www.taxpayeradvocate.irs.gov/userfiles/file/2013-Annual-Report-to-Congress-Executive-Summary.pdf>. These cases included stand-alone requests for innocent spouse relief, as well as requests brought in conjunction with deficiency determinations or collection due process claims. *Id.*

274. NTA 2012 REPORT, *supra* note 272, at 647. This record led the National Taxpayer Advocate to report to Congress that “[i]n order to avoid imposing unnecessary burden on taxpayers, the IRS must analyze the reasons for this outcome and determine what training would help avert it.” *Id.* at 654.

275. *Id.* at 647. According to the National Taxpayer Advocate, the IRS succeeded on the merits in only 15 of its cases in 2012, for a success rate of 45%.

2009 through 2011.<sup>276</sup> These reversal rates are surprising given the agency's pre-litigation procedure. Before innocent spouse cases reach the Tax Court, claimants engage in alternative dispute resolution in which the IRS considers its risks of litigation while crafting a settlement offer.<sup>277</sup> Because the IRS is a repeat player with institutional knowledge, one would expect it to push for settlement in both losing and uncertain cases.

The Tax Court's consistently high reversal rate suggests either that the court plays an important role in protecting taxpayer rights and policy goals by placing a necessary check on improper agency decision-making, or that the court is improperly overriding procedurally and legally sound agency determinations. On balance, the former may be more likely true, given that appellate courts upheld the Tax Court in all of the appellate decisions reviewed by the National Taxpayer Advocate for its 2012 and 2013 reports to Congress.<sup>278</sup> The 2012 report characterized the IRS's performance in the innocent spouse arena as an "unnecessary burden" to taxpayers, and it called on the IRS to provide additional training to employees to improve agency administration in this context.<sup>279</sup>

Against this backdrop, de novo review by the Tax Court in the absence of remand adds some value to federal tax administration. This does not suggest, however, that tax policy goals are optimized by the court's current stance. In fact, as discussed in Part III.A.5, because lack of remand demands so little

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*Id.* at 648. This figure did not include split decisions. *Id.*

276. Of innocent spouse cases decided on the merits, the IRS prevailed in only 46% in 2011, 62% in 2010, and 52% in 2009. NAT'L TAXPAYER ADVOCATE, 2011 ANNUAL REPORT TO CONGRESS app. 3, tbl. 8 (2011) [hereinafter NTA 2011 REPORT], <http://www.taxpayeradvocate.irs.gov/userfiles/file/IRS%20TAS%20ARC%202011%20VOL%201.pdf>; NAT'L TAXPAYER ADVOCATE, 2010 ANNUAL REPORT TO CONGRESS app.3, tbl.10 (2010) [hereinafter NTA 2010 REPORT], [http://www.taxpayeradvocate.irs.gov/files/ExecSummary\\_2010ARC.pdf](http://www.taxpayeradvocate.irs.gov/files/ExecSummary_2010ARC.pdf); NAT'L TAXPAYER ADVOCATE, 2009 ANNUAL REPORT TO CONGRESS app. 3, tbl. 10 (2009) [hereinafter NTA 2009 REPORT], [http://www.irs.gov/pub/irs-ut/1\\_09\\_tas\\_arc\\_vol\\_1\\_preface\\_toc\\_msp.pdf](http://www.irs.gov/pub/irs-ut/1_09_tas_arc_vol_1_preface_toc_msp.pdf).

277. See Rev. Proc. 2003-19, 2003-5 I.R.B. 371 (Feb. 3, 2003) (setting forth IRS Office of Appeals review process); 26 C.F.R. § 601.106 (2012) (describing IRS appeals function).

278. NTA 2013 REPORT, *supra* note 273, app. 3, tbl.10. The National Taxpayer Advocate reviewed all appellate decisions rendered between June 1, 2012 through May 31, 2013 in which courts rendered an opinion available through commercial legal databases, including opinions appearing in the Federal Appendix. *Id.* at 322; see also NTA 2012 REPORT, *supra* note 272, app. 3, tbl. 9 (listing Tax Court case results from 2012).

279. NTA 2012 REPORT, *supra* note 272, at 654.

of the IRS, the opposite may be true. Moreover, although the Tax Court's current position may improve accuracy in litigated cases, correcting agency errors is not the sole or predominant policy objective in the modern administrative state. If it were, the APA's default judicial review standards would be *de novo*, not abuse of discretion and record-bound review. There are, of course, other policy considerations implicated, including respecting the proper separation of powers, leveraging agency expertise, encouraging consistency, promoting efficiency, and preserving equity. Each will be addressed in turn.

### 1. Separation of Powers

One of the predominant themes in administrative law is proper respect for congressional delegation of policymaking and adjudicative authority to the federal agency tasked with carrying out those objectives. As the Supreme Court has emphasized, where Congress has delegated the authority to an agency, "a judicial judgment cannot be made to do service for an administrative judgment," because "an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."<sup>280</sup> It is thus generally sound policy for courts (including the Tax Court) to respect legislative supremacy<sup>281</sup> and serve as faithful agents to its legislative principal.

This rationale is not just a circular argument that it is good policy to follow the law. In the administrative law context, adhering to congressional commands has a constitutional dimension.<sup>282</sup> As the Supreme Court has remarked, failure to defer properly to the agency "would propel the court into the domain which Congress has set aside exclusively for the administrative agency."<sup>283</sup> Not only does this frustrate the proper separation of powers between Congress and the court (Arti-

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280. SEC v. Chenery Corp., 318 U.S. 80, 88 (1943).

281. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . .").

282. One of the authors explores these separation-of-powers concerns in greater detail elsewhere. See Christopher J. Walker, *Avoiding Normative Canons in the Review of Administrative Interpretations of Law: A Brand X Doctrine of Constitutional Avoidance*, 64 ADMIN. L. REV. 139, 173–182 (2012) [hereinafter Walker, *Brand X Doctrine of Constitutional Avoidance*] (exploring these dual separation-of-powers concerns in the context of *Chevron* deference and modern constitutional avoidance); Walker, *The Ordinary Remand Rule*, *supra* note 40 (manuscript at Part I.A) (discussing the same in the context of the ordinary remand rule).

283. SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

cle I problem) but also between the court and the Executive (Article II problem). After all, the President has the constitutional duty to “take Care that the Laws be faithfully executed.”<sup>284</sup> This duty involves determining the facts relevant for enforcement, applying the law to facts, and making policy judgments about enforcement. Thus, as William Kelley has explained, when a court decides an issue that Congress has placed within the Executive’s responsibility to implement, “the practical effect is for the Court to dictate how the laws shall be executed, or, more precisely, how they shall not be. That arrogation by the Court creates the serious potential for violating Article II by displacing the President as executor of the laws.”<sup>285</sup>

Moreover, the Supreme Court has emphasized that deference to agency actions based on these concerns reinforces core democratic principles of political accountability:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.<sup>286</sup>

The context of the Tax Court’s review of the IRS equitable innocent spouse determinations is illustrative of these delegation and accountability concerns. As set forth in Part II.B.2,

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284. U.S. CONST. art. II, § 3.

285. William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 883 (2001). Some scholars have taken the Article II argument a step further. See Jack Goldsmith & John F. Manning, *The President’s Completion Power*, 115 YALE L.J. 2280, 2282 (2006) (arguing that the President has constitutional authority to fill in the holes of any statutory scheme, subject to congressional override).

286. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984); see also Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2373 (2001) (“As first conceived, the *Chevron* deference rule had its deepest roots in a conception of agencies as instruments of the President, entitled to make policy choices, within the gaps left by Congress, by virtue of his relationship to the public.”); Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 447 (2006) (arguing that “the agency expertise justification plays second fiddle to the primary political accountability rationale in *Chevron*.”).

Congress has provided that the IRS “may relieve” an innocent spouse of joint and several liability if relief is not available through the other two innocent spouse claims and “taking into account all the facts and circumstances, it is inequitable to hold the individual liable.”<sup>287</sup> In other words, as Judge Bybee concluded, Congress has double-delegated the discretion to grant such relief to the IRS: “Congress has both made the grant of innocent spouse relief a matter of equity *and* committed it to the discretion of the Secretary of the Treasury or his delegee [the IRS].”<sup>288</sup> Accordingly, by reviewing such determinations *de novo* (and without a remand) as opposed to on the administrative record for abuse of discretion, the Tax Court has impermissibly substituted its judgment for the discretionary and equitable judgment of the IRS. Indeed, contrary to congressional command, the Tax Court decides the issue anew, based on the evidence submitted to the Tax Court, as if the IRS had not acted at all.<sup>289</sup>

## 2. Expertise

The main rationales for judicial deference to agency action are often grouped into “two faces”—congressional delegation, discussed above, and comparative agency expertise.<sup>290</sup> As Rich-

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287. 26 U.S.C. § 6015(f) (2012).

288. *Wilson v. Comm’r*, 705 F.3d 980, 1001 (9th Cir. 2013) (Bybee, J., dissenting).

289. To be sure, the Tax Court is an Article I court with judges appointed to fifteen-year terms, *see* 26 U.S.C. §§ 7441, 7443, not an Article III court with life-tenured judges, but it is still a court of the United States that “exercises judicial power to the exclusion of any other function.” *Freytag v. Comm’r*, 501 U.S. 868, 891 (1991).

290. Note, *The Two Faces of Chevron*, 120 HARV. L. REV. 1562, 1562–63 (2007); accord Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1764 (2012) (“Judicial deference to administrative agencies is often grounded in presidential control and comparative institutional expertise.” (footnote omitted)); *see also, e.g.*, Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 737 (2002) (arguing that “the expertise rationale provides a stronger justification for giving deference to agency work product than does the implied delegation theory”); Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 441 (2007) (explaining that the “New Deal-era administrative law was not to last long, but it firmly defined the role of expertise in the administrative state and created the model of judicial deference that would be both emulated and reacted against as administrative law developed during the rest of the twentieth century.”); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 200 (2006) (distinguishing

ard Pierce has observed, “[a]n agency with expertise in a particular area of regulation has an enormous advantage over a reviewing court in making this complicated judgment.”<sup>291</sup> The *Mayo* Court, for instance, recognized “agency expertise” as one reason for courts according *Chevron* deference to IRS interpretations of the Internal Revenue Code.<sup>292</sup>

Agency expertise is a strong justification for the general application of all three of the default administrative law standards addressed in this Article. First, limiting judicial review to abuse of discretion—instead of *de novo* review—accords proper deference to the agency’s expertise in the subject matter and in the agency’s procedures. As discussed in Part II.A.1, the Supreme Court has enhanced this abuse of discretion standard to encourage the agency’s exercise of its expertise by imposing a reasoned decision-making requirement: “[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”<sup>293</sup> Similarly, confining judicial review to the administrative record encourages the agency to develop and exercise its expertise by evaluating all relevant evidence in its administrative proceeding and providing a reasoned explanation for its decision.<sup>294</sup> Moreover, remanding er-

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between Justice Scalia’s exclusive focus on congressional delegation and Justice Breyer’s additional focus on agency expertise).

291. I. PIERCE, *supra* note 145, § 6.9, at 377. For more on the comparative expertise policy justification, see STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 480 n.88 (2003); Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733 (2011); Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 246–47 (1987); Walker, *Brand X Doctrine of Constitutional Avoidance*, *supra* note 282, at 159–61.

292. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011) (finding “no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations”).

293. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); *accord FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–14 (2009).

294. See, e.g., William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 140 (2001) (“Administrative record review furthers two key pillars of the administrative state, legislative supremacy and agency expertise. The record requirement ensures that agencies follow the

roneous or incomplete decisions to the agency (instead of the court deciding the issue itself) respects the agency's comparative expertise. As the Supreme Court has explained, by remanding, "[t]he agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides."<sup>295</sup>

The comparative agency expertise justification has less force in the Tax Court context—one area where tax exceptionalism still has some power. Because the Tax Court is a specialized court in tax and hears more tax cases than any other federal court, it has greater comparative expertise in adjudicating tax matters than its sister federal courts that also review IRS actions but are of general jurisdiction.<sup>296</sup> To be sure, as Professor Lederman observes, "the overwhelming majority of Tax Court cases are decided by one judge," and "[t]ax is a broad area, and no judge will have prior experience in every issue."<sup>297</sup> Notwithstanding that observation, it is probably safe to conclude that the expertise gap between the IRS and the Tax Court is smaller than between the IRS and other federal courts—thus tempering the comparative agency expertise justification for agency deference in the Tax Court context.<sup>298</sup>

More importantly, however, Congress arguably has already weighed this difference in expertise when indicating under which circumstances the default administrative law principles do not apply. As set forth in Part II.B, the default principles do not apply when a Tax Court (or any other federal court) reviews an IRS determination of a tax deficiency, but they do apply in

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congressional mandate and base their decisions on a rational application of their expertise to a recognized body of data.").

295. *INS v. Ventura*, 537 U.S. 12, 17 (2002) (per curiam).

296. See Lederman, *(Un)Appealing Deference*, *supra* note 14, at 1880–81.

297. *Id.* at 1880. Professor Lederman also notes the less obvious observation that "specialized judging carries (perhaps underappreciated) risks of what Professor Lawrence Baum terms 'assertiveness, insularity, and stereotyping.'" *Id.* at 1882 (citing Lawrence Baum, *Probing the Effects of Judicial Specialization*, 58 DUKE L.J. 1667, 1677 (2009)).

298. See, e.g., Baum, *supra* note 297, at 1676 ("What commentators generally mean when they talk about expertise seems to be the possibility that expertise will enhance the quality of court decisions: more expert judges, who know more about the field in which they are deciding cases, are more likely to get decisions right."); David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 67 ("It is obvious that concentrated experience in handling a particular category of cases facilitates understanding.").

other contexts such as equitable innocent spouse and collection due process claims. This divergence seems to reflect the underlying differences in comparative expertise: the Tax Court may well be as experienced as the IRS at recalculating taxes owed, but not nearly as experienced in dealing with the mechanics of tax collection in addition to enforcement or perhaps other administrative decisions that implicate the exercise of political judgment.<sup>299</sup> Professor Cords has advanced this policy argument in the collection due process (CDP) context:

Unlike redetermining a deficiency or reconsidering a request for a refund, courts reviewing CDP determinations are generally reviewing matters best left in the discretion of the Service. Congress assigned CDP to the Appeals Office. The Service and the Appeals Office have expertise regarding collection matters. Moreover, assessing collection alternatives, one of the primary reasons for CDP hearings, is uniquely within the expertise of the Service.<sup>300</sup>

In sum, unlike in other regulatory contexts where the comparative expertise rationale may predominate other policy rationales for judicial deference to agency action, this justification carries somewhat less force with respect to the Tax Court's review of IRS decisions. But it still carries some force, especially when Congress has indicated under which circumstances the Tax Court should defer to IRS actions. The following policy rationales reinforce this normative conclusion.

### 3. Consistency

The Supreme Court has justified judicial deference to agency action in part on “the value of uniformity in [an agency's] administrative and judicial understandings of what a national law requires.”<sup>301</sup> Indeed, in applying *Chevron* deference to IRS regulations, the *Mayo* Court “expressly [r]ecogniz[ed] the importance of maintaining a uniform approach to judicial re-

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299. For instance, the IRS's success in collection due process litigation suggests it has developed significant expertise in the area. Of 116 litigated cases reviewed by the National Taxpayer Advocate between June 2011 and May 2012, taxpayers prevailed fully in eight cases and partially in seven more, leaving the IRS with a success rate of 86 percent. NTA 2012 REPORT, *supra* note 272, at 595–96. The IRS prevailed in an even greater percentage of cases in prior years—92 percent in 2011, 89 percent in 2010, 92 percent in 2009, and 90 percent in 2008. *Id.* at 601.

300. Danshera Cords, *Collection Due Process: The Scope and Nature of Judicial Review*, 73 U. CIN. L. REV. 1021, 1034–35 (2005) (footnote omitted); *see id.* at 1041 (“The court should seldom, if ever, substitute its judgment for that of the Service. The Service has vast experience dealing with tax collections.”).

301. *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001).



view of administrative action.”<sup>302</sup> The Tax Court’s refusal to apply the APA to its review of IRS determinations implicates such consistency on two levels: first, it compromises the judiciary’s consistent application of the law as between courts; and, second, it impedes the agency’s consistent application of the law to similarly situated taxpayers. This raises three specific concerns in the context of the Tax Court’s review of IRS actions.

First, by not deferring to the IRS and instead substituting its judgment for that of the agency, the Tax Court inhibits the ability of the executive branch (via the IRS) to establish national policies and practices regarding tax administration. This disruption is exacerbated by the fact that, as discussed in Part II.B, the Tax Court’s sister courts consider themselves bound by the APA’s judicial review standards and thus apply a different standard and/or scope of review in certain contexts.<sup>303</sup> This decentralization has led to forum-shopping opportunities for litigants as well as scholarly calls for tax litigation centralization.<sup>304</sup> Scholars’ proposals range from the creation of an Article III Tax Court,<sup>305</sup> or the consolidation of all tax litigation in the current Article I Tax Court,<sup>306</sup> to the merger of all trial-level tax litigation in the then-Board of Tax Appeals and all appeals to a new appellate tax court.<sup>307</sup> Whereas other reasons for forum shopping between the Tax Court and other federal courts may persist, consistent judicial review standards would eliminate a major reason for such forum shopping.

Yet another problem with lack of uniformity is unrelated to the first but similarly reinforces tax exceptionalism in administrative law. Because the Tax Court believes itself outside the scope of the APA, it has neither contributed to nor drawn from the vast case law and judicial experience with reviewing agency action. As one commentator has observed, “this isolationist attitude has left the area of tax law uninformed by other areas of

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302. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011) (quoting *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999)).

303. See Lederman, *(Un)Appealing Deference*, *supra* note 14, at 1883–85.

304. See *id.* at 1885–91.

305. Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 644 n.38 (1974).

306. Mitchell M. Gans, *Deference and the End of Tax Practice*, 36 REAL PROP. PROB. & TR. J. 731, 789 (2002).

307. Roger J. Traynor, *Administrative and Judicial Procedure for Federal Income, Estate, and Gift Taxes—A Criticism and a Proposal*, 38 COLUM. L. REV. 1393, 1425–29 (1938); accord Stanley S. Surrey, *Some Suggested Topics in the Field of Tax Administration*, 25 WASH. U. L.Q. 399, 417–22 (1940) (supporting Justice Traynor’s argument).

[administrative] law, depriving the field of cross-fertilization with other areas of law.”<sup>308</sup> Returning to first principles of administrative law would not only align all of the federal courts that review IRS actions, but also align tax administrative law with the rest of the modern administrative state. Such death of tax exceptionalism may provide tremendous benefits to the development of tax administrative law and administrative law more generally. Part III.B illustrates some of these benefits by demonstrating how the Tax Court can incorporate certain dialogue-enhancing tools developed in other administrative law contexts when remanding matters to the IRS.

Finally, as Jerry Mashaw has chronicled, normative concerns about consistency in administrative law are not confined to judicial review of agency actions, but extend to the actions of agencies themselves and their “bureaucratic rationality.”<sup>309</sup> If the Tax Court’s refusal to apply the APA to its review of IRS determinations facilitates inconsistency within the IRS, the court’s exceptionalist stance fails as a matter of tax policy. For instance, inconsistent administration of tax law creates a problem not only from the rather obvious normative standpoint of equal enforcement,<sup>310</sup> but also from that of encouraging societal norms of compliance. Compliance norms are important from a federal perspective because income tax is self-reported.<sup>311</sup> Furthermore, compliance norms may be directly affected by public perception of the IRS’s enforcement efforts.<sup>312</sup> If the agency’s ef-

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308. Lane, *supra* note 248, at 166 (citing Leandra Lederman, “Civil”izing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency, 30 U.C. DAVIS L. REV. 183 (1996)); see Lederman, *supra*, at 183 (arguing that “[t]ax law tends to be uninformed by other areas of law” and that such “insularity has the unfortunate consequence of depriving tax and other fields of cross-fertilization”).

309. JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 25–26 (1983); see also Robert A. Kagan, *Inside Administrative Law*, 84 COLUM. L. REV. 816, 820 (1984) (explaining that Professor Mashaw’s concept of “bureaucratic rationality” is a model of administrative adjudication that facilitates “[g]reater control and consistency” by placing the “overriding value” on “accurate, efficient and consistent implementation of centrally-formulated policies”).

310. See generally Hoffer, *supra* note 271, at 318–19 (arguing for “application of a broad duty of consistency to the [IRS] would improve the quality of written advice while furthering fair administration of the revenue laws”).

311. See Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L.J. 1453, 1455–59 (2003) (suggesting that the system of voluntary compliance is supported by the interaction of government enforcement and positive compliance norms).

312. *Id.* at 1488 (reviewing empirical studies of compliance which suggest that effective enforcement efforts may positively affect compliance norms).

forts are perceived as insufficient or inconsistent, voluntary compliance may decrease.<sup>313</sup> From both a normative and a pragmatic perspective, then, consistent administration is of critical importance.

At first blush, an unmet need for consistent application of the law to similarly situated taxpayers seems to support the Tax Court's decision to disregard the APA in favor of de novo scope and standard of review coupled with its general refusal to remand cases. For example, the IRS's litigation record in one problem area—innocent spouse proceedings—is less successful than might be predicted given the presence of a formalized settlement process that requires the agency to consider litigation risk.<sup>314</sup> In fact, to a casual observer, the agency's success rate in innocent spouse cases seems no better than a coin flip.<sup>315</sup> As a result, protection of taxpayer rights may, in some sense, justify the court's exceptionalist stance.

If inconsistent application of the law by the IRS is confined primarily to litigated cases and if the Tax Court itself is consistent in its application of the law, deviation from the APA default standard and scope of review may further the tax policy goal of consistency. Conversely, and more likely, if uneven success in litigation is indicative of a larger intra-agency problem with consistent application of the law (which might arise from sources such as a lack of adequate or clear written procedure in a particular area, high employee turnover, or uneven employee training), the Tax Court's exceptionalist stance is of limited use in the furtherance of consistency. Only a fraction of innocent spouse claimants file appeals with the Tax Court.<sup>316</sup> As a consequence, if a problem within the agency gives rise to disparate treatment of similarly situated taxpayers, it is probable that the court will address only a small fraction of this disparate

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313. *See id.*

314. Although the Priest-Klein model predicts that a success rate of 50 percent would be appropriate in some circumstances, the IRS's status as a repeat player and the presence of a pre-trial dispute resolution process suggest that the IRS is underperforming in these cases. For a description of the model, see George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984).

315. *See supra* notes 272–279 and accompanying text (summarizing statistics).

316. Compare IRS 2012 DATA BOOK, *supra* note 21, at 49 tbl.21 (showing that 2703 innocent spouse claims were brought by taxpayers to the IRS appeals office during the 2012 fiscal year), with NTA 2012 REPORT, *supra* note 272, at 647 (analyzing forty innocent spouse cases that were heard by courts between June 1, 2011 and May 31, 2012).

treatment. The latter assumptions of more systemic inconsistencies at the IRS seem much more likely.

Accordingly, the Tax Court's application of the APA's default standard and scope of review—coupled with the ordinary remand rule—should increase intra-agency consistency in at least three ways. First, as discussed in Part II.A.1, when employing a “hard look” abuse-of-discretion standard, courts focus on the rationality of an agency's decision and the procedure employed to reach it. As a result, the Tax Court's review for abuse of discretion should produce a running commentary on the agency's determinations and provide a basis for improvement within the agency. In contrast, *de novo* review compels the court to reach an independent judgment on the merits, rather than focusing on the agency's reasoning. Over time, abuse of discretion review of the actual IRS decision would likely provide a better basis for intra-agency consistency than a trial *de novo* of the underlying issue (without due consideration of the IRS's determination or decision-making process).<sup>317</sup>

Second, confining review to the agency record likely will force the agency to adopt procedures to work cooperatively with claimants to develop facts in the first instance as well as discourage both the IRS and the taxpayers from raising new arguments and evidence for the first time in the Tax Court.<sup>318</sup> Moreover, allowing the submission of new evidence in court provides an advantage to a subset of taxpayers—those who appeal—while not providing the same advantage to taxpayers who do not appeal. If one assumes all taxpayers have an equal opportunity to appeal, consistency is not implicated by the acceptance of additional evidence. But the more likely reality is that differences in sophistication and access to counsel dictate that the opportunity to appeal is not equally distributed among all taxpayers and that the Tax Court's acceptance of additional

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317. See, e.g., Leslie Book, *The Collection Due Process Rights: A Misstep or a Step in the Right Direction?*, 41 HOUS. L. REV. 1145, 1172 (2004) (“The emphasis on the adequacy of an agency explanation points to the importance of the agency's legal analysis at the time of the administrative determination and prevents the agency from offering post hoc justifications at the time of judicial review.”).

318. Steve Johnson has recently expressed concern about applying hard look review broadly to IRS adjudication—something that the first-principles approach herein advanced would similarly refute as it would only apply when the APA default abuse of discretion standard applies—but Professor Johnson agrees that hard look should at least apply to collection due process determinations. Steve R. Johnson, *Reasoned Explanation and IRS Adjudication*, 63 DUKE L.J. 1771, 1775–77, 1833–34 (2014).

evidence may create inconsistency in the administration of tax law.

Finally, the Tax Court's acceptance of the ordinary remand rule should enhance consistency—particularly when coupled with abuse of discretion review—because it will force the agency to recognize and correct its mistakes. Although remand will increase the IRS's workload in the short term, in a world of limited resources it should create a strong incentive for the agency to internalize the Tax Court's rulings by creating a process that will increase the frequency of correct determinations in the first instance. For example, the IRS may seek to avoid remand via aggressive employee training or creation or clarification of internal written guidance for employee use, among other things. These changes hopefully should lead to improved consistency and quality of determinations not just in cases that eventually reach the Tax Court but, more importantly, in the vast majority of cases that are never appealed.<sup>319</sup>

Anecdotal support for this position may be found in the contrast between collection due process and innocent spouse claims. Unlike innocent spouse claims, collection due process denials are reviewed for abuse of discretion,<sup>320</sup> remanded to the IRS if a taxpayer's circumstances have changed materially,<sup>321</sup> and, in some circuits, reviewed on the record.<sup>322</sup> Although these judicial procedures are not identical to the APA default procedures, they are very similar. As a result, if application of the APA default increases consistency, one would predict better and more formalized IRS procedures relating to collection due process claims and better results in litigation.

Although we only have anecdotal evidence, the IRS procedure is more cohesive and detailed and its litigation record is better for collection due process claims than for innocent spouse claims. For example, the Internal Revenue Manual, which provides guidance to IRS employees, devotes an entire chapter, containing nine sections, to collection due process.<sup>323</sup> In con-

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319. This, of course, assumes that Congress will allocate sufficient resources to the agency. We recognize that this assumption may not be realistic.

320. See *Goza v. Comm'r*, 114 T.C. 176, 182 (2000).

321. See *Churchill v. Comm'r*, T.C. Memo. 2011-182 1, 13 (2011). For more on remand of collection due process cases, see Leslie Book, *A Response to Professor Camp: The Importance of Oversight*, 84 IND. L.J. SUPPLEMENT 63, 73 & n.68 (2009).

322. See *Murphy v. Comm'r*, 469 F.3d 27, 31 (1st Cir. 2006); *Robinette v. Comm'r*, 439 F.3d 455, 460–61 (8th Cir. 2006).

323. See I.R.S. IRM, § 8.22 (2014), <http://www.irs.gov/irm/part8/index>

trast, innocent spouse claims receive more cursory treatment, meriting scattered references throughout the manual and two sections of a single chapter on joint and several liability<sup>324</sup>—though the IRS has provided additional guidance to taxpayers in the innocent spouse area.<sup>325</sup> Similarly, from 2009 to 2013, the IRS had a yearly success rate of between 84 percent and 92 percent in collection due process cases,<sup>326</sup> but only between 53 percent and 65 percent in innocent spouse cases for the same years.<sup>327</sup> One possible explanation for this disparity is that approximation of the APA's default judicial review standards has encouraged the IRS to be more conscientious in its internal procedures in collection due process cases. And one possible result of the IRS's more thorough procedure in collection due process cases may be increased consistency in its administration of those claims.<sup>328</sup>

#### 4. Efficiency

Another main goal of tax policy and administrative law more generally—efficiency—is not well served by the existing interaction between the Tax Court and the IRS. Efficiency may be conceptualized as the dedication of resources to their highest and best use, or the maximization of societal utility.<sup>329</sup> The Tax Court's current approach is less efficient at both the agency ad-

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324. See *id.* §§ 25.15.8, 25.25.14. The latter of these two sections merely provides a coding entry guide for the agency's record-keeping system.

325. See, e.g., Rev. Proc. 2013-34, I.R.B. 2013-43 (Oct. 21, 2013) (providing guidance to taxpayers seeking equitable relief under § 6015(f)); Rev. Rul. 2003-36, 2003-1 C.B. 849 (May 5, 2003) (holding that executor of estate may pursue § 6015 relief on behalf of decedent's estate); Rev. Proc. 2003-19, 2003-5 I.R.B. 371 (Feb. 3, 2003) (providing guidance to taxpayers on administrative appeal rights of a nonrequesting spouse). Although these forms of guidance may be helpful to the IRS, they are not meant for use by taxpayers and do not address internal processes of the IRS.

326. NTA 2013 REPORT, *supra* note 273, at 376.

327. *Id.* at 412; NTA 2012 REPORT, *supra* note 272, at 647; NTA 2011 REPORT, *supra* note 276, at 659; NTA 2010 REPORT, *supra* note 276, at 500; NTA 2009 REPORT, *supra* note 276, at 490.

328. See Leslie M. Book, *CDP and Collections: Perceptions and Misperceptions*, 107 TAX NOTES 487, 491 (2005) (“The Tax Court's casting its lot with the administrative law mainstream would ultimately provide a more systematic basis for taxpayer protection.”).

329. See N. GREGORY MANKIW, *PRINCIPLES OF MICROECONOMICS* 145 (6th ed. 2012) (explaining that an allocation is efficient when it maximizes total market surplus); Daniel Shaviro, *The Rising Tax Electivity of U.S. Corporate Residence*, 64 TAX L. REV. 377, 396–97 (2011) (defining efficiency as “increasing the size of the pie”).

judication stage and the judicial review stage—imposing unnecessary costs on the IRS and the Tax Court as well as, critically, the taxpayers.

One source of inefficiency is the duplication of the agency's work by taxpayers and the Tax Court in litigation. With the use of a *de novo* standard and scope of review, both the taxpayer and the IRS develop a case at the agency level and then again before the court, costing the government and the taxpayer additional time and money. As one commentator has noted, “[n]ot only does admitting new evidence require an enormous amount of time, but it also relegates the IRS essentially to the status of an ordinary litigant”—which could lead both parties to “offer post-hoc justifications for their actions” and thus add further complexity and inefficiency to the judicial review process.<sup>330</sup>

A second potential source of inefficiency is poor decision-making arising from misaligned incentives. If the IRS and the taxpayer knew in advance that judicial review would be limited to the evidence and issues contained in the administrative record (APA record review rule) and the reasoning set forth in the IRS's decision (APA abuse of discretion standard), they would be properly incentivized to fully litigate and present their cases in the administrative proceeding.<sup>331</sup> This is particularly important in the context of collection due process and innocent spouse determinations. As discussed in Part I.B, with respect to both of these claims, the agency's adjudication procedures are relatively informal and the incentives to compile a complete administrative record and provide a reasoned decision may be lacking. Enforcing administrative law's record review rule and the abuse of discretion reasoned decision-making requirement should better calibrate those incentives. Leslie Book has made this observation in the context of collection due process claims:

By limiting courts from considering new evidence or agency arguments on appeal, the on-the-record requirement promotes efficient resolution of disputes. At the same time, by requiring that agency decisions stand or fall based upon previously submitted and considered facts and adequate agency legal analysis and explanation, the on-the-record requirement helps ensure that agency practices when initially

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330. See Lane, *supra* note 248, at 160.

331. See Book, *supra* note 328, at 491 (“[F]ailure to abide by the APA's general approach toward reviewing only material before an agency . . . creates some risk that the IRS will take less care with its procedures at the hearing level.”).

considering a matter are sufficient so that courts can adequately review their determinations.<sup>332</sup>

Another misalignment of incentives may arise from the Tax Court's refusal to remand cases. When the Tax Court corrects IRS mistakes without requiring additional work from the agency, it misses an opportunity to provide the agency with an incentive to make a proper determination in the first instance, and employees within the agency may have less willingness or need to follow the court's past decisions in future cases.<sup>333</sup> As a result, the agency's success rate in litigation may remain low in problem areas such as innocent spouse claims—encouraging taxpayers to appeal at a higher rate in the future and increasing the rate at which the agency's work is duplicated by the court. Otherwise put, current inefficiency in this context may breed greater inefficiency in the future.

It is important to recognize that remand, itself, has costs. It is likely, however, that future efficiency created through the iterative process would outweigh current inefficiency created by the court's request that the IRS issue another determination in keeping with the court's decision. Assume, for instance, that Congress continues to provide the IRS with fewer resources than are needed for optimal function. In such a case, the IRS is likely to allocate resources either to their perceived highest and best use or in response to political pressure. Or, perhaps through inertia, it might maintain a current inefficient allocation of resources. In any of these cases, persistent remand by the Tax Court of cases in problem areas will draw resources away from the IRS's chosen allocation toward the area of persistent remand, focusing the agency's attention on that area. If the agency has a preference for its prior allocation or an aversion to the current inefficiency created by persistent remand, it may react by taking steps to lessen the likelihood of future remand. Future efficiency gains from improved agency function may, in this context, outweigh current efficiency losses created by the remand process.

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332. Book, *supra* note 317, at 1173; see also Leslie Book, *CDP and Collections: Perceptions and Misperceptions*, COMMUNITY. TAX L. REP., Fall/Winter 2004, at 2, 13 ("Often, better agency practice initially, compelled by the searching light of judicial review into what the agency did, provides more meaningful taxpayer protections than the possibility of more searching review.").

333. Lane, *supra* note 248, at 160 (arguing that the Tax Court's failure to limit its review to the administrative record in collection due process cases "may lead more courts to substitute their own judgment for that of the appeals officer, causing disincentives for appeals officers to do their jobs properly").



Finally, a third source of inefficiency may arise from revenue foregone as a result of determinations made in favor of taxpayers who do not actually qualify for such relief, as well as revenue collected from those who are not liable for some or all of the amount under the Internal Revenue Code. Let us assume, for the moment, that most people experience declining marginal utility of the dollar.<sup>334</sup> Next, let us assume (heroically) that the federal income tax rate structure is calibrated to produce an efficient distribution of the cost of government among taxpayers in light of declining marginal utility. For most conceptions of efficiency, this will mean that the government collects more, in dollar terms, from those with higher levels of income than from those with lower levels of income. If these assumptions are true, the IRS's under-collection from some taxpayers and its over-collection from others may distort distribution of the tax burden in a way that is inefficient. For instance, if the IRS is more prone to under-collect from taxpayers at high levels of income, perhaps due to disincentives created by these individuals' access to skilled representation, while it is more prone to over-collect from taxpayers at low levels of income due to lack of such representation, the burden of government is shifted toward those whose marginal utility of a dollar is higher. This would be a clearly inefficient result.<sup>335</sup>

In addition, if the IRS is unjustified in its pursuit of some cases while failing to pursue those in which it has a valid claim, its overall cost of collection is increased, and this is, by definition, also inefficient.<sup>336</sup> If taxpayers perceive that the IRS's actions are frequently unjustified, they may expend more than the usual amount of resources to protect themselves from government action. The inefficiencies arising from repeated incorrect agency determinations would be greatly reduced if the IRS reliably could make proper determinations in the first instance—a situation that will remain unlikely so long as the Tax

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334. This common assumption may not be true in all cases. See Sarah B. Lawsky, *On the Edge: Declining Marginal Utility and Tax Policy*, 95 MINN. L. REV. 904, 907–08 (2011) (empirical evidence suggests some people experience increasing marginal utility).

335. This, of course, assumes that the government is using tax proceeds efficiently and that the difference in actual liability versus collection could not be bridged by culling wasteful spending. We recognize that this is, once again, a rather heroic assumption.

336. See ARTHUR M. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* 96 (Brookings Inst. 1975) (explaining that administrative costs “are deadweight burdens of the system and they absorb resources that could be serving productive ends”).

Court employs de novo review and refuses to adhere to the ordinary remand rule.

### 5. Equity

We now return to equity, the policy objective that may motivate the Tax Court most to review IRS actions de novo.

Poor agency performance directly implicates traditional equity principles in tax policy. Vertical and horizontal equity—the companion ideas that taxpayers should bear the cost of government in proportion to their ability to pay or as an equal sacrifice in light of declining marginal utility of the dollar (vertical), and that similarly situated taxpayers should bear similar shares of that cost (horizontal)—are compromised when the IRS's determinations are incorrect.<sup>337</sup> Inaccurate calculations of taxpayer income and ability to pay draw vertical equity into question. Furthermore, it is not possible for an inaccurate application of the law across taxpayers to distribute the tax burden equally among all similarly situated claimants. Poor agency performance thus also compromises horizontal equity.

Once again, consider innocent spouse claims, and let us assume the IRS's reversal rate in litigation is indicative of a problem with the agency's ability to handle such claims. Now consider that the IRS's inability to produce equitable results in the innocent spouse context is likely exacerbated by the prevalence of pro se claimants. For example, in the period between June 2011 and June 2012, 45 percent of the Tax Court's thirty-two innocent spouse cases were brought by pro se claimants.<sup>338</sup> In the corresponding fiscal year of the IRS, taxpayers brought more than 2703 such claims to the agency's appeals office.<sup>339</sup> Given these statistics, it is likely that the number of pro se claimants appearing before the agency was substantial and that very few of them appealed the agency's determination.<sup>340</sup>

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337. See generally JOEL SLEMROD & JOHN BAKIJA, *TAXING OURSELVES: A CITIZEN'S GUIDE TO THE DEBATE OVER TAXES* 59–60 (4th ed. 2008) (defining vertical and horizontal equity).

338. NTA 2012 REPORT, *supra* note 272, at 647.

339. Compare IRS 2012 DATA BOOK, *supra* note 21, at 49 tbl.21 (2703 innocent spouse claims were brought by taxpayers to the IRS appeals office during the 2012 fiscal year), with NTA 2012 REPORT, *supra* note 272, at 647 (a total of forty innocent spouse cases were heard by courts between June 1, 2011 and May 31, 2012, including four decisions by courts of appeals and three decisions from district courts).

340. IRS 2012 DATA BOOK, *supra* note 21, at 49 tbl.21. Of the 877 cases reviewed for the National Taxpayer Advocate's report on the ten most litigated

This inference is troublesome in light of the agency's track record and the presumption that pro se claimants likely earn lower levels of income than their represented counterparts.<sup>341</sup>

The prevalence of pro se taxpayers in the process may create categorical problems with equity. If one subscribes to the generally accepted notion that pro se claimants fare worse than their represented counterparts in gaining relief, specific deviations from enforcement of an equitable distribution of the tax burden may be concentrated among those pro se claimants.<sup>342</sup> Furthermore, to the extent pro se claimants share particular traits as a category of claimants, these deviations from an equitable distribution may become correlated with possession of those traits. For instance, pro se litigants are less likely to have the expertise and resources needed to challenge the IRS's determination in an adversarial context.<sup>343</sup> Their lack of an attorney restricts access to expertise, repeat player effects, and objective assessment of a claim's merits, among other things.<sup>344</sup> Their chances of success in litigation are thus poorer than their represented peers.<sup>345</sup> For example, a recent study has found

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tax issues of 2013, 63 percent were brought by pro se taxpayers. See NTA 2013 REPORT, *supra* note 273, at 324.

341. See LEGAL SERV. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1, 1–2 (2009), [http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf) (“Studies show that the vast majority of people who appear without representation are unable to afford an attorney . . .”). This study did not look specifically at tax claimants.

342. See Leandra Lederman & Warren B. Hrung, *Do Attorneys Do Their Clients Justice? An Empirical Study of Lawyers' Effects on Tax Court Litigation Outcomes*, 41 WAKE FOREST L. REV. 1235, 1241–52 (2006) (describing reasons why representation may result in more fruitful litigation outcomes).

343. LEGAL SERV. CORP., *supra* note 341, at 24 (“[T]he vast majority of people who appear without representation do so because they are unable to afford an attorney.”). As Professor Book has noted in the collection due process context, “Characteristics of many lower-income taxpayers, including language and literacy barriers, and a lack of ready access to obtain and copy documentation, can contribute to rote rejection.” Book, *supra* note 328, at 488.

344. See Lederman & Hrung, *supra* note 342, at 1241–52.

345. See NTA 2012 REPORT, *supra* note 272, at 563 tbls.3.01 & 3.02 (finding that in most heavily litigated issues of 2012, pro se taxpayers were less likely to prevail in Tax Court); Janene R. Finley & Allan Karnes, *An Empirical Study of the Change in the Burden of Proof in the United States Tax Court*, 6 PITT. TAX REV. 61, 78 (2008) (analyzing Tax Court cases from July 1991 through July 2005 and finding that “taxpayers who were represented by attorneys won significantly more often than those who appeared *pro se*”); Lederman & Hrung, *supra* note 342, at 1259–60 (finding that the government won significantly less assessed tax in litigated cases where taxpayers were represented by counsel than in cases where taxpayers proceeded pro se); Laro,

that female litigants are more likely to succeed when represented than when they appear pro se.<sup>346</sup> And it is likely that the positive influence of counsel, so thoroughly proven in the litigation context, extends to agency proceedings as well.<sup>347</sup> As a result, it is possible that poor decision-making at the agency level creates a disparate effect across both income and gender lines, directly implicating both vertical and horizontal equity.

These equity concerns may well be motivating the Tax Court to conduct more searching review than the APA default standards require. But such an approach is misguided. Because many pro se claimants do not seek further judicial review of the agency's adverse determinations, the Tax Court's adoption of a de novo scope and standard of review and its refusal to remand to the IRS fail as corrective measures in this context. Pro se claimants who do not seek review of an improper IRS determination cannot be protected by the court, unless the court's decisions in litigated cases somehow affect the agency's conduct systematically. Yet, as discussed in Part III.A.3, a system-wide effect on IRS decision-making is unlikely given the court's refusal to remand as well as its refusal to confine its review to the administrative record and the reasoning contained in the IRS's decision.

In other words, the Tax Court's use of a plenary standard and scope of review and its refusal to remand cases to the IRS for redetermination may increase equity relative to a world with no judicial review, but the status quo provides little comfort for the vast majority of claimants who do not appeal the agency's determination and therefore receive no judicial review. The Tax Court has no power to correct mistakes made in these

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*supra* note 15, at 26–27 (“[M]ost pro se taxpayers do not adequately know the Tax Court Rules or the Federal Rules of Evidence and are thus handicapped in the courtroom.”).

346. See Stephanie H. McMahon, *An Empirical Study of Innocent Spouse Relief: Do Courts Implement Congress's Legislative Intent?* 12 FLA. TAX REV. 629, 668–69 (2012).

347. To date, there are no empirical studies on this point. Lederman and Hrung have shown that in settled Tax Court cases, represented and unrepresented taxpayers fared equally well in dollar terms, but their study does not speak to cases in which the taxpayer failed to petition the Tax Court for review. Because these are the majority of innocent spouse cases, it is impossible to generalize the results of their study to review of those claims within the agency. See Lederman & Hrung, *supra* note 342, at 1264 (“The lack of any statistically significant effect of counsel on the IRS's recovery ratio in settled cases contrasts with the results in tried cases, and suggests that counsel do not obtain better settlements than pro se taxpayers do.”).

cases, and if one assumes that the IRS has a similarly high error rate in both reviewed and unreviewed cases, its incorrect assessments of income and ability to pay directly affect the equitable distribution of the cost of federal government. Thus, a judicial approach that does not focus on improvement of the agency's system-wide process and outcomes cannot be equity-maximizing.

#### B. JUDICIAL TOOLBOX FOR ENHANCING AGENCY DIALOGUE

Not only is Tax Court exceptionalism inconsistent with blackletter administrative law and the policy concerns that motivate those legal doctrines, it inhibits the Tax Court from drawing on important judicial experience in other administrative law contexts. This Part provides one concrete example—from the immigration adjudication context—of how the death of tax exceptionalism could assist the Tax Court in having a more profound, system-wide impact on IRS decision-making.

As discussed in Part III.A, a critical reason why the Tax Court prefers *de novo* review of IRS actions may be its concern that taxpayers will not obtain relief from the IRS that the Tax Court believes is due. By limiting review to abuse of discretion and prohibiting the court from considering evidence outside of the administrative record, the APA limits a reviewing court's ability to grant relief when it feels such relief may be merited. Moreover, the Tax Court may prefer to decide an issue itself rather than remand the matter to the IRS in part because it fears a remand to the IRS would unduly delay or, worse, preclude relief as the taxpayer would get lost in the process. The ordinary remand rule, of course, expressly prohibits that.

If the Tax Court did not have such a tax-exceptionalist orientation, however, it would discover that other federal courts (and administrative law scholars and practitioners) for decades have been struggling with and adapting to these APA and administrative common law limitations in a variety of agency contexts. Judicial review of agency immigration adjudications, for instance, is a somewhat analogous context that has produced innovative judicial tools. Federal courts of appeals handle thousands of petitions for review of immigration adjudications each year.<sup>348</sup> The personal stakes for the noncitizens seeking review

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348. Over the last eight years, the federal courts of appeals have issued over 2000 decisions per year in matters appealed from the Board of Immigration Appeals, though the number has decreased each year from 5398 in 2006 to 2408 in 2013. John Guendelsberger, *Circuit Court Decisions for December*

of removal orders are high—the threat of removal from the United States, perhaps to a country where there is a threat of persecution—and the noncitizens are often far from sophisticated litigants, often lacking legal representation and even English language proficiency.<sup>349</sup> Moreover, agency immigration adjudication is plagued with reports of agency incompetence and inconsistency.<sup>350</sup> The most extensive empirical study to date, for example, compares the immigration adjudication process to “refugee roulette.”<sup>351</sup>

In light of the personal stakes, the complexity of immigration law, the lack of sophisticated litigants, and the documented systemic issues in agency immigration adjudication, one arguably could make a much more compelling case for administrative law exceptionalism in immigration than in tax. Yet reviewing courts follow general administrative law principles such as the record review rule and the ordinary remand rule; indeed, judicial review is even more deferential than the APA default because the Immigration and Nationality Act adjusts the standard of review for agency factual determinations<sup>352</sup> and even exempts certain matters from judicial review altogether.<sup>353</sup> Accordingly, the immigration adjudication context provides fertile ground for exploring how courts have attempted to adapt their approach to have a systemic effect on agency decision-making. And scholars have exerted considerable effort in understanding this process. For example, in a recent empirical study of over 400 published court of appeals decisions concerning immigration adjudications and the ordinary remand rule, one of the authors uncovers a number of findings that merit discussion here.<sup>354</sup>

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2013 and Calendar Year 2013 Totals, in IMMIGRATION LAW ADVISOR (Exec. Office for Immigration Review, Jan. 2014) at 5–6.

349. See Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 384 (2007).

350. *Id.*

351. *Id.* at 295–96; see also Christopher J. Walker, *Does the Legal Standard Matter? Empirical Answers to Justice Kennedy's Questions in Nken v. Holder*, 75 OHIO ST. L.J. FURTHERMORE 29, 33–34 (2014), <http://moritzlaw.osu.edu/students/groups/oslj/files/2012/10/Walker-Response-Final.pdf> (reviewing empirical work on systemic issues in immigration adjudication).

352. See 8 U.S.C. § 1252(b)(4)(B) (2012) (“[T]he administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.”).

353. See *id.* § 1252(a)(2) (excluding, inter alia, denials of discretionary relief, orders against criminal aliens, and judicial review of certain legal claims).

354. See Walker, *The Ordinary Remand Rule*, *supra* note 40 (manuscript at

First, the study reveals that most federal courts of appeals, most of the time, follow the ordinary remand rule in the immigration adjudication context. Indeed, while there is much variance among circuits, the overall compliance rate is above 80 percent.<sup>355</sup> When courts refuse to follow the ordinary remand rule, they appear to do so because they are concerned that a remand would allow the agency to continue to delay or deny relief when it should not, and thus result in courts abdicating their duty to say what the law is and to ensure that procedures are fair and rights are protected in the administrative process.<sup>356</sup> It would be no surprise if the Tax Court often shared these concerns about remanding issues to the IRS instead of deciding the issues itself.

Although some courts refuse to remand when they fear undue delay or continued denial of meritorious claims by the agency, other similarly concerned courts have adhered to the remand rule but introduced certain tools aimed at enhancing the courts' dialogue with the agency on remand.<sup>357</sup> These tools are summarized in the following table.<sup>358</sup>

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Part II.A).

355. *See id.* (manuscript at Part II.A & tbl.1).

356. *See id.* (manuscript at Part II.B).

357. These tools are explored at greater length in Parts II.C and III of Walker, *The Ordinary Remand Rule*, *supra* note 40.

358. This table reproduces part of Table 2 from Walker, *The Ordinary Remand Rule*, *supra* note 40. It excludes three tools that were not discovered in the cases reviewed but suggested by the author: (1) preliminary injunctive relief; (2) escalation of issue within the executive branch; and (3) escalation of issue to Congress. *See id.*

### Judicial Toolbox for Agency Dialogue

The Tool	The Effect on Dialogue
1. Notice of Agency Decision on Remand	Signals that court is interested in outcome and continued dialogue
2. Panel Retention of Jurisdiction	Sends message that the panel itself is interested in continuing dialogue in the event the agency denies relief
3. Time Limit on Remand	Communicates strong interest in continuing dialogue by speeding up that conversation
4. Hypothetical Situations	Not only facilitates dialogue on remand, but expressly starts the dialogue before remand
5. Certification of an Issue for Remand	Suggests an agenda for remand, which helps frame dialogue in the event of subsequent judicial review
6. Government Concessions at Oral Argument	Limit issues on remand and focuses court-agency dialogue
7. Suggestions To Transfer to Different Agency Adjudicator	Attempts to change the primary agency speaker in the dialogue

The use and further development of these judicial tools have particular application to the Tax Court and its efforts to have a systemic impact on IRS decision-making.<sup>359</sup> Unlike refusing to remand an issue—and thus substantively deciding the issue for the agency—these tools allow the court to remain part

359. As Emily Hammond has observed, the judicial tools uncovered in this study “extend[] beyond the immediate context . . . to other types of adjudications as well as rulemakings.” Emily Hammond, *Court-Agency Dialogue: Article III’s Dual Nature and the Boundaries of Reviewability*, 82 GEO. WASH. L. REV. ARGUENDO, (forthcoming 2014) (manuscript at Part III) available at <http://ssrn.com/abstract=2504764>; see also Emily H. Hammond, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1739–71 (2011) [hereinafter Hammond, *Deference and Dialogue*] (examining the dialogue on remand in a variety of agency rulemaking contexts).



of the dialogue on remand while respecting congressional delegation and the executive branch's law-execution responsibility. Although a detailed application of these tools to the Tax Court context lies outside the ambitions of this Article, the benefits of these tools for the Tax Court, which are two-fold, merit preliminary exploration here.

First, these tools can assist the Tax Court in addressing its concerns that an unrepresented taxpayer may get lost in the process on remand or that the relief may be unduly delayed or denied. As Professor Hammond has observed, the tools can encourage swifter resolution of cases on remand to the agency—addressing one of the greatest concerns of the ordinary remand rule and agency decision-making more generally.<sup>360</sup> In particular, consider three of the tools uncovered in the cases: (1) requesting notice of the agency decision on remand so as to signal the court's interest in the outcome; (2) retaining jurisdiction over the matter on remand so that the case returns to the same judge(s) who is already familiar with the case; and (3) placing a time limit on remand so as to expedite the process. These all signal to the IRS that the Tax Court is interested in a continued dialogue and a timely (and proper) resolution of the case on remand.

Second, an enriched dialogue in a particular case can have systemic effects on agency decision-making. Consider another set of three tools uncovered in the study: (1) providing hypothetical solutions in the court's decision to remand; (2) certifying an issue or issues for remand; and (3) obtaining government concessions at oral argument (or in the briefing) to limit the open issues on remand. These tools not only help focus the dialogue on remand, but they also communicate to the IRS specific, or even systemic, problems (and accompanying solutions) identified by the Tax Court. And they allow the Tax Court to suggest potential solutions for the IRS to implement beyond the particular case under review. Because these tools consist of words and not commands, they comport with a proper separation of powers and leave discretion for the agency to exercise its expertise to address the issues.<sup>361</sup>

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360. Hammond, *Deference and Dialogue*, *supra* note 359, at 1775.

361. Although outside the scope of this Article, it should be noted that a reviewing court is not only prohibited from deciding substantive issues itself per the ordinary remand rule, but it also cannot order additional agency proceedings on remand that are not required by the APA or the agency's governing statute. *See, e.g.*, *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 524 (1978) ("Agencies are free to grant additional pro-

The Tax Court's issuance of written, public opinions allows this dialogue to extend beyond the IRS administrators dealing with the particular case, including to other similarly situated taxpayers and other IRS administrators handling similar claims.<sup>362</sup> Indeed, such a public dialogue can also reach the agency's principals in Congress and the executive branch.<sup>363</sup> By adhering to the ordinary remand rule (and the APA default judicial review provisions) yet utilizing these dialogue-enhancing tools, courts can contribute to a properly functioning administrative state where all three branches of government interact and influence agency action. As Professor Hammond has remarked, "asking agencies to be equal partners in a dialogue enhances participation, deliberation, and legitimacy because . . . interested parties, Congress, and the courts can more easily understand and respond to their reasoning."<sup>364</sup> Indeed, as the immigration adjudication study explores further, there are a number of ways for the Tax Court to escalate the dialogue within the executive branch or with Congress, including the ordering of supplemental briefing on certain issues and the call to the executive branch and/or Congress for systemic change in its written decisions.<sup>365</sup>

In sum, if as a normative matter the Tax Court is concerned—as it should be—with horizontal and vertical equity and the overall consistency and quality of IRS decision-making, it should abandon tax exceptionalism and embrace the APA judicial review standards, the ordinary remand rule, and the dialogue-enhancing toolbox discussed in this Part to engage in a richer dialogue with the IRS. Indeed, because the Tax Court hears more than 95 percent of all tax litigation<sup>366</sup> the Tax

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cedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them."). These constraints are further addressed in Walker, *The Ordinary Remand Rule*, *supra* note 40, (manuscript at Part III.A).

362. From 2000 to 2010, the court released written opinions for over 8,400 decisions. See 2000-2010 U.S. TAX CT. ANN. REP., *supra* note 17, at tbl.4.

363. See Walker, *The Ordinary Remand Rule*, *supra* note 40 (manuscript at Part III.B.2-3) (providing examples).

364. Hammond, *Deference and Dialogue*, *supra* note 359, at 1780; see also Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 492 (2010) ("[R]equiring that agencies explain and justify their actions also arguably reinforces political controls by helping to ensure that Congress and the President are aware of what agencies are doing.").

365. See Walker, *The Ordinary Remand Rule*, *supra* note 40 (manuscript at Part III.B.2-3) (exploring further these additional dialogue-enhancing tools).

366. Laro, *supra* note 15, at 18.

Court's ability to have a sustained dialogue with the IRS and thus a system-wide effect on the agency may well be much greater than in the agency immigration adjudication context where numerous federal courts of appeals review such agency actions. Moreover, such abandonment of tax exceptionalism produces the positive externality of mainstreaming tax with other areas of administrative law to allow for cross-fertilization. The dialogue-enhancing tools discussed in this Part are just one illustration of best practices developed in other regulatory contexts that the Tax Court could incorporate to improve its review of IRS decision-making. To date, because the Tax Court has considered itself special and separate from general administrative law, it has not even begun that exploration.

### CONCLUSION

In this Article we have argued that, as a matter of law and policy, the Tax Court should return to first principles of administrative law and abandon its misperception of tax exceptionalism. In so doing, the Tax Court should consider itself governed by the APA judicial review provisions and accompanying administrative law doctrines. Adhering to these rules of administrative law—including the ordinary remand rule—would help the Tax Court improve IRS procedures and decision-making in a way that its current *de novo* approach may not, by requiring the IRS to better exercise its expertise and by facilitating a richer, more systemic dialogue between the Tax Court and the IRS. In abandoning tax exceptionalism and embracing administrative law, the Tax Court may also begin to more fully benefit from the abundant case law and judicial experience that federal courts have developed in other administrative law contexts.

In light of the Tax Court's unconventional history and longstanding tax exceptionalist view that it is not subject to the APA and administrative law doctrines, it may be unrealistic to expect the Tax Court to reverse course on its own. The IRS must once again assert the applicability of the APA in tax cases.<sup>367</sup> The deepening circuit split on this question suggests that if the IRS returned to the fight, it would be only a matter of time before the Supreme Court intervened and extended its

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367. After the Ninth Circuit's decision in *Wilson*, the IRS has taken a step back from arguing that the APA default review standards should apply in the Tax Court—at least in the equitable innocent spouse claims context. See I.R.S. Notice CC-2013-011 (June 7, 2013).

reasoning in *Mayo* to reject tax exceptionalism in yet another area of tax law. Such judicial intervention would be even more likely now that the Ninth Circuit—by far the largest circuit in the nation—has joined the Tax Court on the wrong side of the circuit split. In the event that the legal case moves too slowly, congressional intervention may be warranted to correct course and encourage more equitable, efficient, and consistent tax administration.<sup>368</sup>

In all events, it appears that Tax Court exceptionalism is (or at least should be) at death's door.

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368. For example, recent proposals to provide for Tax Court review of IRS determinations of eligibility for § 501(c)(4) social welfare organization status could provide Congress with an opportunity to consider the benefits inherent in applying the APA default standards to Tax Court review of IRS determinations. See NAT'L TAXPAYER ADVOCATE, SPECIAL REPORT TO CONGRESS: POLITICAL ACTIVITY AND THE RIGHTS OF APPLICANTS FOR TAX-EXEMPT STATUS, vii–viii (June 30, 2013), <http://www.taxpayeradvocate.irs.gov/userfiles/file/FullReport/Special-Report.pdf>. *But see* S. 725, 113th Cong. § 14 (2013) (proposing a de novo scope and standard of review in innocent spouse cases that would preserve the problematic status quo).