

The Un-Precedented Tax Court

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I. INTRODUCTION

Around the turn of this century, a “highly-charged” debate erupted over unpublished federal appellate court opinions.¹ Some, including most notably Judge Alex Kozinski of the Ninth Circuit, strongly argued that the common prohibition against citation to those opinions posed no constitutional problems, and that the prohibition allowed appellate judges to efficiently discharge their duties.² Yet others, including Judge Richard Arnold of the

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1. Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. REV. 705, 706 (2006).

2. *Hart v. Massanari*, 266 F.3d 1155, 1180 (9th Cir. 2001). For a survey of various courts’ citation rules regarding unpublished opinions, see Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251,

Eighth Circuit, passionately disagreed, arguing that the no-citation rule eliminated a significant check on the judicial power and consequently violated the Constitution.³

In 2006, the Judicial Conference of the United States addressed one aspect of this controversy. Under new Federal Rule of Appellate Procedure 32.1, any party may cite unpublished opinions.⁴ However, the new rule does not address other fundamental questions related to unpublished opinions, including their appropriate precedential status and their constitutionality.⁵ Consequently, an active scholarly debate over these issues continues.⁶

This debate might have been expected to reach, but has not yet touched upon, issues related to the purportedly nonprecedential nature of most Tax Court opinions. Although the Tax Court sometimes issues precedential “Division” opinions,⁷ most of its opinions come in one nonprecedential form or another.⁸ Under court practices, the Chief Judge classifies some opinions as Memorandum or “Memo” opinions, and these opinions, in theory, involve only heavily factual determinations or applications of settled law.⁹ Although

253–85 tbl. 1 (2001).

3. *Anastasoff v. United States*, 223 F.3d 898, 904 (8th Cir. 2000).

4. *See* FED. R. APP. P. 32.1 (“A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been . . . designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedential,’ . . . and . . . issued on or after January 1, 2007.”). For a discussion of how the rule changes for unpublished appellate opinions affects Tax Court practice, see Peter A. Lowy et al., *Citing Unpublished Opinions in Tax Court Proceedings*, 114 TAX NOTES 171 (2007).

5. *See* FED. R. APP. P. 32.1 committee’s note (“Rule 32.1 is extremely limited. It does not require any court to issue an unpublished opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as ‘unpublished’ or specify the procedure that a court must follow in making that determination. It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court. Rule 32.1 addresses only the *citation* of federal judicial dispositions that have been *designated* as ‘unpublished’ or ‘non-precedential’—whether or not those dispositions have been published in some way or are precedential in some sense.”).

6. *See* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3978.10 (4th ed. 1998) (discussing controversy and collecting citations to scholarly works).

7. On occasion, after reviewing a draft opinion, the Chief Judge will call for full-court review. *See* I.R.C. § 7460(b) (2012). The opinions ultimately issued via this procedure are usually referred to as reviewed opinions.

8. According to a search of its website, the Tax Court issued over 500 total opinions in 2014, only 45 of which received the T.C. designation. The remainder were Memorandum or Summary opinions. *See Opinions Search*, U.S. TAX COURT, <http://www.ustaxcourt.gov/USTCInOP/OpinionSearch.aspx> (last visited May 18, 2016) (providing an opinion search field).

9. As described by former Tax Court Chief Judge Mary Ann Cohen, Memo opinions are issued in “cases involving application of familiar legal principles to routine factual situations, nonrecurring or enormously complicated factual situations, obsolete statutes or regulations, straightforward factual determinations, or arguments patently lacking in merit.” Mary Ann Cohen, *How to Read Tax Court Opinions*, 1 HOUS. BUS. & TAX L.J. 1, 7 (2001).

parties may cite them,¹⁰ Memo opinions purportedly lack precedential value.¹¹

Congress has also denied precedential status to some Tax Court opinions. Under Section 7463(b),¹² so-called Summary or “S” opinions can neither be appealed nor cited as precedent. These opinions relate to cases decided under an essentially elective, streamlined set of procedures and involve relatively small amounts of tax liabilities.¹³

The justifications for Memo and S opinions seem straightforward. Like other federal courts, the Tax Court faces a heavy workload, and Memo opinions might allow Tax Court judges to decide clear-cut cases without worrying about the dangers of establishing precedent. S opinions also go hand-in-hand with streamlined case procedures, without which taxpayers could judicially contest their tax liabilities only by following generally cumbersome procedural rules.¹⁴

The nonprecedential status of these Tax Court opinions gives rise to practical problems, however.¹⁵ A judicial exposition of a case is difficult to ignore, and taxpayers frequently invoke Memo or S opinions as authority in connection with their tax disputes, whether in front of the IRS, the Tax Court, or other federal courts.¹⁶ And the Tax Court seemingly cannot ignore its own opinions.¹⁷ Although plenty of cases dismiss Memo opinions as

10. See Press Release, U.S. Tax Court (June 26, 2012), <https://www.ustaxcourt.gov/press/062612.pdf> (providing citation forms for Memo opinions and noting that such opinions “generally address cases which do not involve novel legal issues and in which the law is settled or the result is factually driven”).

11. See, e.g., *Dunaway v. Comm’r*, 124 T.C. 80, 87 (2005) (dismissing IRS’s reliance on several Memo opinions, given their limited analysis and because “memorandum opinions of this Court are not regarded as binding precedent”) (citing *Nico v. Comm’r*, 67 T.C. 647, 654 (1977)), *rev’d in part on other grounds*, 565 F.2d 1234 (2d Cir. 1977).

12. Unless noted otherwise, Section references are to the Internal Revenue Code of 1986 (I.R.C.), codified at 26 U.S.C.

13. See I.R.C. § 7463(a) (2012) (prescribing dollar limits for cases eligible for Section 7463 procedures).

14. See S. REP. NO. 91-552 (1969), *reprinted in* 1969-3 C.B. 423, 614 (explaining how *stare decisis* and judicial review procedures mandate a degree of formality in Tax Court proceedings, and these procedures may be burdensome to taxpayers litigating relatively small amounts).

15. See Erik M. Jensen, *American Indian Law Meets the Internal Revenue Code: Warbus v. Commissioner*, 74 N.D. L. REV. 691, 692 n.9 (1998) (“There is a neverending dispute within the Tax Court about the precedential effect of the court’s not-officially-published ‘memorandum opinions’”).

16. See *infra* Part II. Generally speaking, the value of a judicial precedent falls along a spectrum, with some authorities being accorded only persuasive value and others being viewed as binding, unless a justification for abandoning the principles of *stare decisis* applies. Practices regarding Memo opinions cover the spectrum.

17. Andrew R. Roberson & Randolph K. Herndon, Jr., *The Precedential and Persuasive Value of Unpublished Dispositions*, 66 TAX EXEC. 83, 87 (2014) (“[I]t is rare to find a non-T.C. opinion that has rejected the reasoning of a prior memorandum opinion.”). Memo opinions also routinely cite prior Memo opinions for their precedential value. See, e.g., *Tilden v. Comm’r*, 110 T.C.M. (CCH) 314, 316–17 (2015) (relying on *Boultee v. Comm’r*, 101 T.C.M. (CCH) 1031 (2011), which

nonprecedential, other cases treat them like persuasive or binding authorities.¹⁸ More troubling still, Memo opinions sometimes address controversial issues of tax law, and not only heavily factual or clear-cut legal issues.¹⁹ The ambiguous weight of Memo opinions thus sows confusion in the tax law.²⁰

S opinions also raise problems. Section 7463(b) denies the precedential effect of S opinions, and uncertainty lingers over whether this statute displaces issue preclusion doctrines.²¹ Also, a case that seems suitable for streamlined procedures sometimes turns out not to be, and the Tax Court may address important issues through a nonprecedential, nonreviewable opinion.²²

Issues relating to the scope of the judicial power further complicate matters. If Judge Arnold's view holds, federal courts, including the Tax Court, do not enjoy the constitutional authority to deprive their opinions of precedential value. Under this view, the categorical denial of precedential status to Memo opinions reflects an unconstitutional practice.

The statutory prohibition against citation to S opinions adds a further wrinkle to this analysis. Some who defend the use of nonprecedential opinions argue that classifying an opinion one way or another reflects a decision historically committed to judicial discretion.²³ If that is correct, then Section 7463(b) may reflect an improper legislative encroachment on the judicial power. That is, if judges, and only judges, may decide the precedential weight of their opinions, then Congress has no business setting the precedential status of S opinions.²⁴

"expressly decided" an issue related to the application of the Section 7502 mailbox rule).

18. See *infra* Part II. See also, e.g., *Bedrosian v. Comm'r*, 143 T.C. 83 (2014) (relying on various Memo opinions which previously held that pass-thru partners under Section 6231(a)(9) include disregarded entities, consistent with the IRS's conclusion in Rev. Rul. 2004-88, 2004-2 C.B. 165). That conclusion is highly questionable. See Alice G. Abreu, *Paradise Kept: A Rule-Based Approach to the Analysis of Transactions Involving Disregarded Entities*, 59 SMU L. REV. 491, 546 (2006) (stating that Rev. Rul. 2004-88 reaches a result "patently inconsistent" with the entity classification regulations and "calls into question the manner in which the Service will apply those regulations").

19. See *infra* Part II.

20. See generally Alvin D. Lurie, *More Than His Share: Reflections on Ashare*, 7 J. OF TAX'N OF EMPL. BENEFITS 187, 187-88 (2000) ("[T]here is increasing confusion among practitioners as to the proper distinction between regular and memo decisions of the Tax Court."); Mark F. Sommer & Anne D. Waters, *Tax Court Memorandum Decisions—What Are They Worth?*, 80 TAX NOTES 384 (1998) (discussing ambiguity over status of Memo opinions).

21. See *infra* Part III.

22. See *infra* Part III.

23. See, e.g., R. Ben Brown, *Judging in the Days of the Early Republic: A Critique of Judge Richard Arnold's Use of History in Anastasoff v. United States*, 3 J. APP. PRAC. & PROCESS 355, 356-59 (2001); see also *id.* at 359 (concluding that "judges often did pick and choose which English statutes and common law precedents were binding within their states" and that "even those judges who looked to the common law as the source of American law felt that the judicial power included the right to decide whether an American statute complied with the common law").

24. See generally Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-*

The continuing controversy over the Tax Court's constitutional status complicates matters even further. Originally, Congress established the Board of Tax Appeals as "an independent agency in the executive branch,"²⁵ suggesting that the court exercises the executive power. Later, Congress renamed the Board, and in 1969 established the United States Tax Court as a "court of record" under Article I of the Constitution,²⁶ suggesting that it exercises the judicial power. But the case law remains unclear on whether the Tax Court exercises the executive power or the judicial power, and that determination may affect whether *stare decisis* applies to Tax Court opinions.

This Essay tries to bring some sense to the morass of practical and constitutional issues related to Memo and S opinions. Part II explains the ongoing controversy over the constitutionality of nonprecedential federal court opinions. It also illustrates the significant confusion that Memo opinions have caused and briefly touches on potential problems related to bench opinions.

Part III explains the constitutional and practical issues raised by the statutory denial of precedential status to S opinions. This discussion assumes that the Tax Court exercises the judicial power, but Part IV examines recent developments that might cast doubt on that view. Part V argues that the Tax Court should abandon its nonprecedential designation of Memo opinions, and that Congress should repeal Section 7463(b)'s limitation regarding the precedential value of S opinions.

II. THE NATURE OF THE NONPRECEDENTIAL PROBLEM

A. THE THEORETICAL DEBATE

Faye Anastasoff thought she had just beat the deadline when she mailed her 1992 refund claim to the IRS on April 13, 1996. Although the IRS would not actually receive her claim until April 16, 1996 (one day after the April 15, 1996 deadline set by Section 6511(a)), Section 7502 provides a special

Making, 18 CONST. COMMENT. 191, 194 (2001) ("Congress may not by statute tell the federal courts whether or in what way to use precedent.").

25. Pub. L. No. 68-176, § 900(k), 43 Stat. 253, 338 (1924).

26. See Pub. L. No. 91-172, § 951, 83 Stat. 730 (codified as I.R.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."). The reference to an Article I court is somewhat misleading because Congress enjoys no judicial power. See *Gordon v. United States*, 117 U.S. (1 Wall.) 697, 705 (1864) ("The Constitution of the United States delegates no judicial power to Congress. Its powers are confined to legislative duties, and restricted within certain prescribed limits."). The phrase instead refers to courts created via the powers conferred under Article I, but whose judges do not receive the salary and tenure protections of Article III. The constitutional status of Article I courts remains controversial. For a somewhat dated but still useful analysis, see Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197 (1983); see also James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004).

mailbox rule for various tax filings.²⁷ Under that rule, a filing will be treated as timely filed if a taxpayer mails it by the due date, even if the IRS receives it after that date.

Section 7502 in fact established the timeliness of Anastasoff's refund claim under Section 6511(a), but she ran into another problem. A different statute, Section 6511(b), generally limits a taxpayer's refund to the amounts she paid in the three years prior to the filing of a refund claim.²⁸ Anastasoff had paid the taxes at issue on April 15, 1993,²⁹ but the IRS received the claim three years and one day later, on April 16, 1996. The IRS consequently denied her refund claim, concluding that although Section 7502's mailbox rule made her claim timely under Section 6511(a), that rule did nothing to alter Section 6511(b)'s separate three-year limitation.

Anastasoff challenged this harsh result in court. After losing in the district court, she appealed to the Eighth Circuit.³⁰ Although the Eighth Circuit had previously decided the exact same issue, and in a way adverse to Anastasoff, that ruling came in an unpublished opinion.³¹ And, under an Eighth Circuit rule, those opinions lacked precedential value and parties generally could not cite them.³² Consequently, Anastasoff argued that the prior, indistinguishable case did not bind the court, and it could decide the Section 6511(b) issue in her favor.

But the Eighth Circuit declared its own rule unconstitutional. Judge Arnold, writing on behalf of a unanimous panel, concluded that the "judicial power" under Article III did not grant courts the "power . . . to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not."³³ In fact, the obligation to follow

27. See I.R.C. § 7502 (2012).

28. See I.R.C. § 6511(b)(2)(A) (2012) ("If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return.").

29. Under Section 6513, taxes paid prior to the due date for filing a return are generally treated as paid on the due date.

30. Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), *vacated on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000).

31. See *Christie v. United States*, No. 91-2375MN, 1992 U.S. App. LEXIS 38446 (8th Cir. Mar. 20, 1992) (per curiam) (unpublished).

32. See *Anastasoff*, 223 F.3d at 899 (quoting 8th Cir. R. 28A(i) (2006), *abrogated by* FED. R. APP. P. 32.1 (2007)) ("Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of *res judicata*, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well . . .").

33. *Id.* at 904. Although Judge Arnold wrote on behalf of the panel, he had previously expressed his individual concerns about nonprecedential opinions. See generally Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219 (1999).

precedent reflected “the historic method of judicial decision-making,”³⁴ and this obligation separated the judicial power from a “dangerous union with the legislative power.”³⁵

Judge Arnold did not, however, suggest that precedents could not be overruled, nor did he conclude that every opinion requires publication. Rather, precedent could be overcome “by some ‘special justification,’”³⁶ and courts could choose which opinions appear in official reporters. But the fact of publication could not control the authoritative value of an opinion. Although treating every opinion as precedent would burden already-overworked courts, the remedy for scarce resources was “not to create an underground body of law for one place and time only.”³⁷ The court consequently held against *Anastasoff*, believing itself bound by its prior decision.³⁸

Predictably, *Anastasoff* generated a firestorm of commentary.³⁹ Academics debated the accuracy of Judge Arnold’s historical analysis and the alleged dangers of nonprecedential opinions.⁴⁰ Judge Arnold’s analysis also drew attention from other judges, given his express criticism of them.⁴¹ In Judge Arnold’s view, the federal circuit courts were improperly telling the bar, “We may have decided this question the opposite way yesterday, but this does not bind us today, and, what is more, you cannot even tell us what we did yesterday.”⁴²

In *Hart v. Massanari*, a lawyer in a social security case dared to tell the Ninth Circuit what it did yesterday.⁴³ That court’s rules provided a flat ban against citing unpublished opinions, but the attorney found an earlier case

34. *Anastasoff*, 223 F.3d at 901.

35. *Id.* at 903.

36. *Id.* at 905 (citing *United States v. Int’l Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996)).

37. *Id.* at 904.

38. *Id.* at 905.

39. See, e.g., Tony Mauro, *Judge Ignites Storm over Unpublished Opinions*, FULTON COUNTY DAILY REP., Sept. 5, 2000; Evan P. Schultz, *Gone Hunting: Judge Richard Arnold of the 8th Circuit Has Taken Aim at Unpublished Opinions, But Missed His Mark*, LEGAL TIMES, Sept. 11, 2000, at 78.

40. See generally, e.g., Stephen R. Barnett, *From Anastasoff to Hart to West’s Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1 (2002); Thomas R. Lee & Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power to “Unpublish” Opinions*, 77 NOTRE DAME L. REV. 135 (2001); Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235 (2004); Amy E. Sloan, *If You Can’t Beat ‘Em, Join ‘Em: A Pragmatic Approach to Nonprecedential Opinions in the Federal Appellate Courts*, 86 NEB. L. REV. 895, 922–27 (2008); Dean A. Morande, Comment, *Publication Plans in the United States Courts of Appeals: The Unattainable Paradigm*, 31 FLA. ST. U. L. REV. 751 (2004).

41. See *Symbol Techs., Inc. v. Lemelson Med.*, 277 F.3d 1361, 1366–68 (Fed. Cir. 2002) (rejecting Arnold’s view and “declin[ing] to consider the nonprecedential cases cited by [the appellee]”); *Alshrafi v. Am. Airlines, Inc.*, 321 F. Supp. 2d 150, 159–60 n.9 (D. Mass. 2004) (“[T]his Court considers the reasoning of *Anastasoff* especially compelling . . .”).

42. *Anastasoff v. United States*, 223 F.3d 898, 904 (8th Cir. 2000).

43. *Hart v. Massanari*, 266 F.3d 1155, 1159 (9th Cir. 2001) (noting the appellants’ citation of a prior unpublished opinion).

that supported his client.⁴⁴ He thus cited that unpublished case, *Rice v. Chater*, in a footnote in his opening brief.⁴⁵ The court then moved to sanction the attorney, and it ordered him to show cause to escape discipline. The attorney defended himself by citing *Anastasoff*, which implied that the Ninth Circuit's own no-citation rule may be unconstitutional.

Judge Kozinski, writing for a unanimous panel, flatly rejected that argument. Although the Eighth Circuit had withdrawn its opinion in *Anastasoff*—the IRS eventually paid the taxpayer her refund and the case became moot—that opinion retained “persuasive force.”⁴⁶ Consequently, the Ninth Circuit would address the speculations about the constitutionality of no-citation rules and “lay [them] to rest.”⁴⁷

The court acknowledged the long history of *stare decisis* and the Framers' familiarity with the concept.⁴⁸ However, modern understandings differed from the Framers'.⁴⁹ Under current practices, opinions of appellate courts, with limited exceptions, rigidly bind successor courts and lower courts, whereas precedents at common law were much more malleable.⁵⁰ The adoption of no-citation rules thus reflected a natural accommodation of the new and growing role *stare decisis* played in federal courts. By prohibiting citations to unpublished opinions, appellate courts could properly choose to handcuff future courts only when circumstances so warranted.⁵¹

Judge Kozinski also doubted whether the phrase “judicial power” actually imposed any “limitation on how courts conduct their business.”⁵² Rather, constitutional limitations on courts came from other sources, like the “Cases” or “Controversies” requirements. The granting of the Article III judicial power was “more likely descriptive than prescriptive.”⁵³ The Ninth Circuit thus rejected the lawyer's reliance on *Anastasoff* but decided not to sanction him, concluding that his misconduct was not willful.

44. *Id.*; see also 9th Cir. R. 36-3 (“Unpublished dispositions and orders of this Court are not binding precedent . . . [and generally] may not be cited to or by the courts of this circuit.”).

45. Appellant's Opening Brief at 13 n.6, *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (No. 99-56472) (citing *Rice v. Chater*, 98 F.3d 1346 (9th Cir. 1996) (unpublished)).

46. *Hart*, 266 F.3d at 1159.

47. *Id.*

48. *Id.* at 1161–66 (discussing the differences between the founders' conception of precedent and our current view of the practice).

49. *Id.* at 1163 (“[O]ur concept of precedent today is far stricter than that which prevailed at the time of the Framing.”).

50. *Id.* at 1174 (“While we agree with *Anastasoff* that the principle of precedent was well established in the common law courts by the time Article III of the Constitution was written, we do not agree that it was known and applied in the strict sense in which we apply binding authority today.”).

51. See *id.* at 1172 (“Designating an opinion as binding circuit authority is a weighty decision that cannot be taken lightly, because its effects are not easily reversed.”).

52. *Id.* at 1160.

53. *Id.* at 1161.

In 2006, the Judicial Conference of the United States amended the Federal Rules of Appellate Procedure and abolished all no-citation rules.⁵⁴ But new Rule 32.1 does not actually address any of the contentious issues underlying unpublished status, such as their appropriate precedential status or the constitutional issues related to any denial of their precedential status.⁵⁵ The new rule instead simply allows parties to cite unpublished opinions, and the theoretical debate regarding the relationship between the judicial power and *stare decisis* continues.

B. THE PROBLEM IN PRACTICE: MEMO OPINIONS

The theoretical debate over the scope of the judicial power, although undoubtedly important, should not obscure the practical problems created by nonprecedential opinions. Whatever one thinks about their constitutionality (this writer sides with Arnold), nonprecedential opinions, although designed to limit confusion, can actually have the opposite effect. A tension almost automatically arises when a court issues an opinion but then instructs future litigants to ignore it. Both taxpayers and the government pay attention to judicial expositions on questions of law, and a warning to avoid those expositions frequently does not work. The Tax Court's attempts to deny precedential status to its Memo opinions demonstrates this.

Congress formally authorized the issuance of Memo opinions in 1928 and the Tax Court,⁵⁶ then known as the Board of Tax Appeals, "soon adopted the policy of not citing prior memorandum opinions in its decisions."⁵⁷ However, this no-citation policy did not last long.⁵⁸ In 1945, the court's

54. Technically speaking, the Judicial Conference does not independently amend the Federal Rules of Appellate Procedure. A proposed rule must be presented to the Supreme Court for approval, and if approved, the effective date is delayed for seven months to allow Congress an opportunity to reject, modify, or defer the rule. See 28 U.S.C. §§ 2071–2077 (2012). For an insider's look at Rule 32.1, see generally Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429 (2005) (discussing rule's evolution from perspective as Reporter to the Advisory Committee on the Federal Rules of Appellate Procedure); see also *Overview for the Bench, Bar, and Public*, U.S. COURTS, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public> (last visited May 18, 2016).

55. See FED. R. APP. P. 32.1 advisory committee's notes to 2006 adoption (noting that Rule 32.1 only addresses citation and does not prescribe the effect that a court must give to an unpublished opinion).

56. See Revenue Act of 1928, ch. 852, § 601, 45 Stat. 872 (codified at I.R.C. § 1219(b) (1925 & Supp. II 1929)) ("It shall be the duty of the Board and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Board shall report in writing all its findings of fact, opinions and memorandum opinions."); see also I.R.C. § 7459(b) (2012) for the modern version of the statute.

57. HAROLD DUBROFF & BRANT J. HELLWIG, 2 THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS 750 (2014).

58. See Sommer & Waters, *supra* note 20, at 384 ("From a review of the decisions of the BTA and the Tax Court during the period 1929 to 1944, it appears that this policy was followed for the next 17 years or so.").

presiding judge wrote that, although a Memo opinion was “supposed to be limited to . . . having no value as a precedent,”⁵⁹ a lawyer could cite it if he found “some precedent of value . . . even though the opinion does not appear in the bound volumes of the reports of the court.”⁶⁰

In response, practitioners urged the Tax Court to officially publish Memo opinions in its printed volumes.⁶¹ Outside companies already published Memo opinions, and practitioners came to rely on them.⁶² However, the Tax Court declined this request, concluding that it should instead take greater care to ensure that Memo opinions addressed only issues of limited prospective importance.⁶³

Unfortunately, Memo opinions continue to address significant issues. In *Helmer v. Commissioner*, for example, the Tax Court laid the foundation for the most recent wave of criminal tax shelters.⁶⁴ In that case, decided via a Memo opinion in 1975, the court held that a small, informal partnership’s granting of an option did not create a liability for purposes of determining the partners’ bases in their partnership interests.⁶⁵ Consequently, the partners could not increase their bases upon the granting of the option, and they recognized gain when cash distributions were later made to them.⁶⁶

Helmer dealt with a sleepy set of facts, but its holding would have explosive consequences a couple of decades later. Practitioners eventually recognized that the Tax Court’s rule could be manipulated to dodge billions in taxes.⁶⁷ Failing to treat an option as a liability may have had adverse tax consequences for the *Helmer* taxpayers, but that holding, when applied to a partnership’s assumption of a partner’s liability, meant that taxpayers could grossly inflate their outside bases and generate huge tax losses.⁶⁸ The so-called Son-of-BOSS tax shelter was born.⁶⁹

59. J. Edgar Murdock, *What Has the Tax Court of the United States Been Doing?*, 31 A.B.A. J. 279, 299 (1945).

60. *Id.*

61. DUBROFF & HELLWIG, *supra* note 57, at 751.

62. *See id.*

63. *See id.* at 751–52.

64. *See generally* *Helmer v. Comm’r*, 34 T.C.M. (CCH) 727 (1975).

65. Under the tax code, basis is used to measure gain or loss on a sale or other disposition of property. *See* I.R.C. § 1001(a) (2012). A higher basis leads to smaller tax gains or larger losses, so all else being equal, taxpayers generally prefer as high a basis as possible.

66. *See* I.R.C. § 731(a)(1) (2012) (requiring recognition of gain when distribution to a partner exceeds outside basis).

67. *See* Richard M. Lipton, *Tax Shelters and the Decline of the Rule of Law*, 120 J. TAX’N 82, 84 (2014) (“The origin of the Son-of-BOSS transactions is clear—the Service’s position in *Helmer*, which was sustained by the Tax Court.” (citation omitted)).

68. *See* Richard M. Lipton, *Second Circuit Sinks Castle Harbour (Again)—Did it Sink the FISC, Too?*, 116 J. TAX’N 206, 210 (2012) (“[T]ax practitioners who structured Son-of-BOSS transactions used the decision in *Helmer* to justify their conclusion that a taxpayer received a basis increase when long and short positions were transferred to a partnership.”).

69. The so-called Son-of-BOSS transaction and its variants, which were based on *Helmer*, have

Although the government, relying on judicial doctrines, successfully challenged many Son-of-BOSS transactions on their merits,⁷⁰ *Helmer* nonetheless damaged the tax system. Some taxpayers escaped liability entirely because the statute of limitations on assessment had run.⁷¹ Courts protected other taxpayers from penalties, concluding that they could “justifiably rely on *Helmer* and its progeny.”⁷²

If Memo opinions really lacked precedential value, *Helmer* should have been ignored. But the Tax Court treats Memo opinions inconsistently, sometimes dismissing them because of their status and sometimes giving them weight.⁷³ This inconsistent approach presents a whipsaw opportunity—

given rise to numerous civil and criminal controversies. For a basic description of basis inflation transactions like Son-of-BOSS, see IRS Notice 2000-44, 2000-2 C.B. 255 (discussing the use of artificially high basis to further tax avoidance). See generally TANINA ROSTAIN & MILTON C. REGAN, JR., CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER INDUSTRY (2014).

70. See generally Justice Department Highlights Tax Division’s Enforcement Results, DOJ 13-399 (D.O.J.), 2013 WL 1410349 (Apr. 9, 2013) (describing various judicial victories).

71. See *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1845 (2012) (finding the government’s attempt to challenge taxpayer’s shelter transaction precluded by statute of limitations).

72. *Klamath Strategic Inv. Fund, L.L.C. ex rel St. Croix Ventures, L.L.C. v. United States*, 440 F. Supp. 2d 608, 626 (E.D. Tex. 2006) (concluding that taxpayer could rely on *Helmer* in interpreting I.R.C. § 752, notwithstanding contrary retroactive regulation); see also *Klamath Strategic Inv. Fund, L.L.C. v. United States*, 472 F. Supp. 2d 885, 901 (E.D. Tex. 2007) (holding that a taxpayer’s transaction lacked economic substance but applying no negligence penalty, finding substantial authority for the taxpayer’s interpretation of I.R.C. § 752), *aff’d sub nom.*; *Klamath Strategic Inv. Fund, L.L.C. ex rel St. Croix Ventures v. United States*, 568 F.3d 537 (5th Cir. 2009). Consistent with the confused status of Memo opinions, courts disagree on the appropriate weight of *Helmer*. See *Markell Co. v. Comm’r*, 107 T.C.M. (CCH) 1447, 1457 (2014) (describing different courts’ approaches to *Helmer*); see also, e.g., *Cemco Investors, L.L.C. v. United States*, 515 F.3d 749, 751 (7th Cir. 2008) (dismissing *Helmer* as “not controlling in this court—or anywhere else,” but concluding that the full implications of *Helmer* need not be addressed in light of other reasons to support the IRS’s position).

73. *Compare Shirley v. Comm’r*, 88 T.C.M. (CCH) 140, 141 (2004) (describing *Van Susteren v. Comm’r*, 37 T.C.M. (CCH) 1302 (1978) as “usable precedent” in connection with predominant-use analysis under I.R.C. § 50(b)(2) (2012)), and *Racine v. Comm’r*, 92 T.C.M. (CCH) 100, 103 n.9 (2006) (prior Memo opinion dealing with tax consequences associated with exercise of non-statutory options provided “clear precedent to be followed”), *aff’d*, 493 F.3d 777 (7th Cir. 2007), with *Dunaway v. Comm’r*, 124 T.C. 80, 87 (2005) (dismissing the IRS’s reliance on several Memo opinions, given their limited analysis and because “memorandum opinions of this Court are not regarded as binding precedent”) (citing *Nico v. Comm’r*, 67 T.C. 647, 654 (1977)), *rev’d in part on other grounds*, 565 F.2d 1234 (2d Cir. 1977)). For different views expressed by Tax Court judges over Memo opinions in a single case, see, e.g., *UAL Corp. v. Commissioner*, 117 T.C. 7, 30 (2001), in which the majority fails to cite a relevant case—*Murphy v. Commissioner*, 66 T.C.M. (CCH) 32 (1992)—the concurring opinion relied on it, and the dissenting opinion objected to its use because it “does not constitute binding precedent and should not be followed”; *Comparini v. Comm’r*, 143 T.C. 274, 287 (2014) (Halpern & Lauber, J.J., concurring), expressing concerns about the majority’s analysis and how it treats “our precedents” in two cases decided via Memo opinion; *Kenseth v. Comm’r*, 114 T.C. 399, 428 (2000), *aff’d*, 259 F.3d 881 (7th Cir. 2001), in which the majority opinion relies on Memo opinions but the concurring opinion dismisses them as “not properly regarded as binding precedent.” Cf. *RACMP Enters., Inc. v. Comm’r*, 114 T.C. 211, 256 (2000) (Halpern, J., dissenting) (“*Shasta Indus., Inc. v. Comm’r*, [52 T.C.M. (CCH)

taxpayers or the IRS might follow Memo opinions when they are helpful, but ignore them when they are not.

Like everyone else, circuit courts sometimes give Memo opinions weight, and at other times ignore them.⁷⁴ In *Kornman v. United States*, for example, the Fifth Circuit acknowledged that “[a]lthough tax court memorandum opinions have no precedential value in tax court, we have previously relied upon them.”⁷⁵ Yet in *InverWorld v. Commissioner*, the D.C. Circuit dismissed an on-point Tax Court decision because it was “a memorandum opinion . . . which has no precedential effect.”⁷⁶

The significant issues addressed in Memo opinions compounds the problems associated with this inconsistency. In theory, Memo opinions are issued only regarding clear-cut cases, where settled law directs the inevitable result.⁷⁷ But in practice, Memo opinions often address contentious or novel issues.⁷⁸ In *Helmer*, for example, the Tax Court acknowledged that it confronted a “unique situation.”⁷⁹ And in *Campbell v. Commissioner*, the Court addressed a question that has filled endless law review pages: whether a partner’s receipt of a profits interest in a partnership reflects a recognition event.⁸⁰

190 (1986)] . . . is a Memorandum Opinion. Therefore, we applied settled law to the facts before us. Those facts and the facts before us today are quite similar, yet, today, we reach a different result. I assume, therefore, that settled law has changed.”)

74. *E.g.*, *Kornman & Assocs. v. United States*, 527 F.3d 443, 460 n.16 (5th Cir. 2008).

75. *Id.*

76. *InverWorld, Ltd. v. Comm’r*, 979 F.2d 868, 878 n.9 (D.C. Cir. 1992).

77. *See Putoma Corp. v. Comm’r*, 66 T.C. 652, 668 n. 22 (1976) (“[T]he . . . issue was considered sufficiently settled to issue this Court’s opinion in *Fender Sales* as a Memorandum Opinion.”); *Foster v. Comm’r, B.T.A.M. (P-H)* P 35,333 (1935) (“There are no novel questions of law, and hence a memorandum opinion would suffice.”).

78. *See, e.g.*, *Armstrong v. Comm’r*, 139 T.C. 468, 482 (2012) (Holmes, J., dissenting) (noting that technical interpretive issue regarding Section 152 had not been officially addressed by the Tax Court or circuit courts, but “[i]t is one that a number of our memorandum opinions have touched on”).

79. *Helmer v. Comm’r*, 34 T.C.M. (CCH) 727, 731 (1975).

80. *Campbell v. Comm’r*, 59 T.C.M. (CCH) 236, 237 (1990), *aff’d in part and rev’d in part*, 943 F.2d 815 (8th Cir. 1991). *Campbell* purported to merely follow a prior Division opinion, *Diamond v. Commissioner*, 56 T.C. 530 (1971), but *Diamond* itself was highly controversial. The issues in *Campbell* were thus far from well-settled, which helps explain the case’s partial reversal. The IRS eventually issued guidance to address the confusion sown by *Diamond* and *Campbell*. *See Rev. Proc. 93-27*, 1993-2 C.B. 343. For another notable Memo opinion, *see, e.g.*, *Bardahl Manufacturing Corp. v. Commissioner*, 24 T.C.M. (CCH) 1030 (1965), an oft-cited case regarding working capital computations and accumulated earnings tax. *See, e.g.*, *Malone & Hyde, Inc. v. Comm’r*, 58 T.C.M. (CCH) 631 (1989) (addressing complex reinsurance arrangement and denying taxpayer some deductions), *suppl’d by* 66 T.C.M. (CCH) 1551 (1993) (revisiting issues in light of new authority on brother-sister corporate arrangements and finding for taxpayer), *rev’d by* 62 F.3d 835 (6th Cir. 1995) (ordering re-entry of the original judgment in the first Memo opinion); *see also* *CNT Inv’rs, L.L.C. v. Comm’r*, 144 T.C. 161, 196 n.36 (2015) (citing various Memo opinions to establish that court has linked the sham transaction doctrine to the substance over form doctrine).

Addressing novel questions through Memo opinions might be less concerning if they were always answered correctly. But the Tax Court itself has acknowledged errors in its previous Memo opinions.⁸¹ Commentators have also criticized the holdings of various Memo opinions.⁸²

Of course, the possibility of appellate review may sort out any problems with a hastily written Memo opinion. Appellate courts have in fact reversed numerous Memo opinions, on both legal and factual grounds.⁸³ However, the appellate courts maintain a somewhat strange relationship with the Tax Court. Section 7482 suggests that appellate courts ought to apply de novo review to the Tax Court's interpretations of the tax code.⁸⁴ However, the appellate courts occasionally offer some deference to the Tax Court's legal interpretations.⁸⁵ Consequently, a faulty Memo opinion may enjoy a better chance of surviving on appeal than a federal district court opinion. Given the Tax Court's large share of federal tax cases, a poorly reasoned Memo opinion poses a greater threat than a poorly reasoned federal district court opinion.

81. See, e.g., *Newman v. Comm'r*, 68 T.C. 494, 502 n.4 (1977) (rejecting taxpayer's reliance on *Fuller v. Comm'r*, 8 T.C.M. (CCH) 889 (1949), noting that "it is a Memorandum Opinion of this Court that is not controlling precedent . . . and conflicts with our published opinion in *Johnson v. Commissioner*, 45 T.C. 530 (1966)").

82. See, e.g., Tye J. Klooster & Stephanie Loomis-Price, *The Dance Continues—Post-Death Use of Entity Assets to Pay Estate Obligations*, 25 PROB. & PROP. 50, 52 (2011) (noting that the holding in *Estate of Rector v. Comm'r*, 94 T.C.M. 567 (2007), was "troubling"); Richard M. Lipton, *Tax Court Upsets New Corporate Tax Shelter—Lessons from the Colgate Case*, 86 J. TAX'N 331, 331 (1997) (criticizing Tax Court Memorandum decision ACM Partnership as "problematic" in addressing corporate tax shelter); Janet Novack, "Taxpayers Rely on IRS Guidance at Their Peril," *Tax Judge Rules*, FORBES (Apr. 18, 2014, 5:53 PM), <http://www.forbes.com/sites/janetnovack/2014/04/18/taxpayers-rely-on-irs-guidance-at-their-own-peril-tax-judge-rules/#3aa57a869b3a> (noting that the Tax Court's decision in *Bobrow v. Comm'r*, 107 T.C.M. (CCH) 1110 (2014) was questioned by some of the nation's most prominent tax professionals as "unfair"); Carlton M. Smith, *Friedland: Did the Tax Court Blow Its Whistleblower Jurisdiction?*, 131 TAX NOTES 843 (2011) (criticizing *Friedland v. Comm'r*, 102 T.C.M. (CCH) 247 (2011), which addressed a novel issue related to a tax whistleblower statute); Arnold W. Martens, Note, *The Mark IV Pictures Decision Offers No Guidance for the Tax Advisor, Only More Confusion*, 38 S.D. L. REV. 641, 641–42 (1993) (criticizing the Tax Court memorandum decision in *Mark IV Pictures, Inc. v. Comm'r*, 969 F.2d 669 (8th Cir. 1992), as leaving tax planners confused of the rules governing the taxability of a profits interest exchanged for a partner's services).

83. See *Peracchi v. Comm'r*, 71 T.C.M. (CCH) 2830, 2834 (1996) (concluding that taxpayer's own note did not reflect genuine indebtedness), *rev'd*, 143 F.3d 487, 488 (9th Cir. 1998) (reversing that factual finding and going on to "unscramble a Rubik's Cube of corporate tax law" to determine the related tax consequences); see also *Manchester Grp. v. Comm'r*, 68 T.C.M. (CCH) 1383 (1994), *rev'd*, 113 F.3d 1087 (9th Cir. 1997).

84. Section 7482 provides that the circuit courts "shall have exclusive jurisdiction to review the decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions." I.R.C. § 7482(a)(1) (2012). This language suggests that circuit courts should apply de novo review to the Tax Court's interpretations of the I.R.C.

85. See generally Leandra Lederman, *(Un)Appealing Deference to the Tax Court*, 63 DUKE L.J. 1835 (2014) (explaining how some courts provide deference to the Tax Court's legal analysis, even though that approach runs counter to Section 7482 and to the majority view).

Any possible retrenchment of the *Golsen* rule, under which the Tax Court defers to appellate courts, would compound these problems further.⁸⁶ That is, the Tax Court believes, rightly or wrongly, that its national jurisdiction makes it directly answerable only to the Supreme Court and to the Congress.⁸⁷ But under the *Golsen* rule, the Tax Court supports judicial economy and voluntarily follows the law of the circuit in which a taxpayer's appeal would lie.⁸⁸ If the Tax Court returns to its pre-*Golsen* practice, the prospect of an appellate reversal would not necessarily influence Memo opinions.

Of course, even if *Golsen* were abandoned, an appellate court's reasoning might persuade the Tax Court to change its position. And even if the Tax Court stubbornly adheres to a position contrary to the relevant circuit court's, a litigant could usually appeal and secure a reversal. But none of these possibilities detracts from the general point that poorly reasoned Memo opinions pose dangers greater than those associated with ordinary federal district court opinions, published or unpublished. One can always return to *Helmer* if she believes otherwise.

Ultimately, the uncertain precedential status of Memo opinions hurts the tax system. Memo opinions are nonprecedential, except when they are not.⁸⁹

86. See *Golsen v. Comm'r*, 54 T.C. 742 (1970), *aff'd on other grounds*, 445 F.2d 985 (10th Cir. 1971). In the short run, it seems unlikely that the Tax Court will overturn *Golsen*. However, Tax Court deference to appellate courts has “sometimes backfire[d],” and the Supreme Court has adopted Tax Court holdings that the appellate courts have rejected. *Lawrence v. Comm'r*, 27 T.C. 713, 717–18 (1957). It's conceivable that the Tax Court may abandon *Golsen* regarding an unusually contentious issue, even if an across-the-board abandonment does not appeal to the current judges. See *Tigers Eye Trading, LLC v. Comm'r*, 138 T.C. 67, 191–92 (2012) (Holmes, J., dissenting) (arguing that majority opinion departed from the *Golsen* rule and performed a “reverse benchslap” on the D.C. Circuit); Jeremiah Coder, *Tax Court Thumbs Its Nose at D.C. Circuit's Ruling on TEFRA Jurisdiction*, 2012 TNT 31-2 (2012); cf. Sheldon I. Banoff & Richard M. Lipton, *Tax Court Abandons Redlark After Five Appellate Losses*, 97 J. TAX'N 317 (2002) (“How many appellate court cases does it take for the Tax Court to reverse its position—even though many of the Tax Court judges still think they're right? The answer appears to be ‘between three and five.’”) (discussing *Redlark v. Comm'r*, 106 T.C. 31 (1996), *rev'd*, 141 F.3d 936 (9th Cir. 1998)).

87. See *Lawrence*, 27 T.C. at 719–20 (“The Tax Court, being a tribunal with national jurisdiction over litigation involving the interpretation of Federal taxing statutes which may come to it from all parts of the country . . . [must] apply with uniformity its interpretation of those statutes. . . . [W]ith all due respect to the Courts of Appeals, it cannot conscientiously change unless Congress or the Supreme Court so directs.”), *rev'd on other grounds*, 258 F.2d 562 (9th Cir. 1958); see also *Lardas v. Comm'r*, 99 T.C. 490, 495 (1992) (“[T]he logic behind the *Golsen* doctrine is not that we lack the authority to render a decision inconsistent with any Court of Appeals (including the one to which an appeal would lie), but that it would be futile and wasteful to do so where we would surely be reversed.”); Cohen, *supra* note 9 at 6 (“If the Fifth Circuit reverses us on a legal issue and the issue comes up again, we are not bound to follow the law of the Fifth Circuit.”).

88. *Golsen v. Comm'r*, 54 T.C. 742 (1970), *aff'd on other grounds*, 445 F.2d 985 (10th Cir. 1971). Whether the Tax Court *must* follow circuit precedent remains an open question. In a case that arose prior to the Tax Court's designation as an Article I court, the Sixth Circuit held that circuit precedents bound the Tax Court. See *Stacey Mfg. Co. v. Comm'r*, 237 F.2d 605, 606 (6th Cir. 1956). The Tax Court has explicitly rejected *Stacey Mfg.* and maintains that it is not so bound. See *supra* note 86 and accompanying text.

89. Without a trace of irony, one Memo opinion counsels that “[j]udicial opinions are the

It is impossible to quantify the effects of the problem, but it surely is time to consider the adoption of a consistent approach.

C. A POTENTIAL PROBLEM: BENCH OPINIONS

Division and Memo opinions each follow the procedures described in Sections 7459 and 7460.⁹⁰ Those provisions generally require that, for each Tax Court proceeding, a judge issue a report (i.e., a draft opinion) and provide that report to the Chief Judge.⁹¹ Unless the Chief Judge determines that the entire court should review it,⁹² the draft opinion leads to a “decision of the Tax Court.”⁹³ Consequently, each opinion type (Division or Memo) goes through a statutorily mandated review process and each carries the weight of the Tax Court’s decisional authority, not merely that of a single judge.

The final sentence of Section 7459(b), added in 1982, provides an exception from these general procedural requirements.⁹⁴ Under the provision, statutory requirements will be “met if findings of fact or opinion are stated orally and recorded in the transcript of the proceedings,” subject to any limitations the Tax Court prescribes.⁹⁵ Under Tax Court Rule 152(a), a judge may, “in the exercise of discretion,” issue a so-called oral or Bench opinion if she is “satisfied as to the factual conclusions to be reached in the case and that the law to be applied thereto is clear.”⁹⁶ Although they may be appealed, Bench opinions, unlike Division or Memo opinions, do not receive pre-issuance review from the Chief Judge. Instead, the authoring judge will read the opinion into the record prior to the close of the relevant trial session and promptly send transcripts to the parties.⁹⁷

Bench opinions apparently have not given rise to the same level of controversy as Memo opinions. The case law reflects some occasions where a judge may have incorrectly decided a case via the streamlined Bench opinion

heart of the common law system and serve as a critical component of what we understand to be the law,” and that the opinion is intended to “guide future litigants.” *Waltner v. Comm’r*, 107 T.C.M. (CCH) 1189, 1194 (2014).

90. I.R.C. §§ 7459–7460 (2012).

91. *See id.*

92. *Id.* § 7460(b) (“The report of the division shall become the report of the Tax Court within 30 days after such report by the division, unless within such period the chief judge has directed that such report shall be reviewed by the Tax Court.”).

93. *Id.* § 7459(a); *see also* Allen D. Madison, *Revisiting Access to the Tax Court’s Deliberative Process*, 103 TAX NOTES 749, 751 (2004) (“[T]he Tax Court speaks with a single voice. That single voice remains important to maintain uniformity in the interpretation and administration of the tax laws.”).

94. *See* Act of Oct. 25, 1982, Pub. L. No. 97-362, § 106(b), 96 Stat. 1726 (codified as amended at I.R.C. § 7459 (2012)).

95. I.R.C. § 7459(b) (2012).

96. TAX CT. R. 152(a).

97. TAX CT. R. 152(a)–(b).

process, but these circumstances seem rare.⁹⁸ Also, Tax Court Rule 152(c) flatly denies precedential status to Bench opinions, and this substantially limits taxpayer confusion as compared to Memo opinions, regarding which taxpayers must grapple with various conflicting statements.⁹⁹ Perhaps most importantly, Bench opinions historically have not been published or posted online. Opinions cannot cause a lot of confusion if no one can find them.

Expanded search capabilities for Tax Court opinions could change this. The court's website now allows users to search recent Bench opinions.¹⁰⁰ It is possible that a litigant will find a favorable opinion and rely on it, notwithstanding the prohibitions contained in the Tax Court rules.¹⁰¹

Any taxpayer reliance on Bench opinions would seemingly implicate the same constitutional issues related to Memo opinions. Just as some litigants challenged the appellate rules denying precedential status to unpublished appellate opinions, some litigants might challenge the Tax Court rules denying effect to Bench opinions.

Bench opinions, however, seem qualitatively different from Division or Memo opinions. The latter opinions follow a statutory review process and eventually lead to a decision of the Tax Court. Bench opinions do not actually follow any pre-issuance review process and, though they reflect a decision of the Tax Court, they are only deemed to satisfy the procedural requirements of sections 7459 and 7460. They thus seem roughly analogous to opinions issued by federal district judges, which do *not* establish any "law of the district."¹⁰² Consequently, even if the Constitution mandates the precedential

98. See, e.g., *Estate of Hudgins v. Comm'r*, 57 F.3d 1393, 1405 (5th Cir. 1995) (reversing Tax Court on a special use valuation issue decided via a "speaking opinion" from the bench"); *Price v. Comm'r*, 887 F.2d 959, 966 (9th Cir. 1989) (reversing Tax Court on an innocent spouse issue decided via a Bench opinion); IRS Market Segment Specialization Program Guideline, *The Laundromat Indus.*, 2000 WL 1006018, at *1 (IRS June 2000) (discussing "significant victory" earned in case involving novel method of proof, decided via a Bench opinion).

99. See TAX CT. R. 150(c).

100. See generally Keith Fogg, *Tax Court Decisions "Shall Be Made as Quickly as Practicable"—A Discussion of Bench Opinions*, 17 J. TAX PRAC. & PROC. (2015).

101. See TAX CT. R. 50(f) (denying precedential status of orders); TAX CT. R. 152(c) (denying precedential status of Bench opinions).

102. *Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991). See generally Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 803 (2012) ("[T]he current district courts have adopted none of the other features that define circuit court stare decisis practices. . . . [They] do not care whether the decision under consideration was from another judge of the same district, the same circuit, or somewhere else entirely." (footnote omitted)). Professor Mead argues that the district courts have the authority, although not the obligation, to establish *stare decisis* within a district. See *id.* at 805–09. Unlike district courts, which look to circuit courts to establish the law of the region, the Tax Court enjoys national jurisdiction and its obligation to follow *stare decisis* likely stems in part from the geographical breadth of its powers, although courts generally do not identify the source of the Tax Court's obligations. See *Estate of Maxwell v. Comm'r*, 3 F.3d 591, 599–600 (2d Cir. 1993) ("It is well established that the Tax Court is governed by the doctrine of *stare decisis*. . . . Indeed, the doctrine applies with special force in the tax context, given the important reliance interests

effect of Division or Memo opinions, it seems unlikely that that mandate would apply to Bench opinions.

Putting constitutional issues aside, functional concerns militate against the precedential status of Bench opinions. Sections 7459 and 7460 establish procedures under which the Tax Court will “decide all cases uniformly, regardless of where, in its nationwide jurisdiction, they may arise.”¹⁰³ The statutory review provisions, which might independently establish a *stare decisis* requirement,¹⁰⁴ do not apply to Bench opinions, which were authorized only recently. If those opinions nonetheless bound the entire court, it is hard to see how uniformity could be achieved.

That is not to say that Bench opinions raise no concerns. In a recent article, Professor Keith Fogg surveyed more than 200 such opinions and found that their use varied widely among Tax Court judges.¹⁰⁵ One judge disposed of 60 cases via Bench opinion, employing them more than twice as frequently as any other judge. However, several judges rarely issued them.

Given the breadth of Rule 152, under which a judge can issue a review-free Bench opinion in almost any case, some further guidance on Bench opinions would be helpful.¹⁰⁶ As it stands now, the Rule leaves the decision to issue an opinion solely within the discretion of the authoring judge. Given their newfound accessibility, the significance of Bench opinions will likely rise, especially if practitioners uncover decisions addressing key issues. However, these concerns remain speculative, and the remainder of this Essay will focus on the more concrete issues raised by Memo and S opinions.

involved.” (citations omitted)); *Smith v. Comm’r*, 926 F.2d 1470, 1479 (6th Cir. 1991) (generally discussing “the heavy burden placed upon the tax court by doctrine of *stare decisis*” but concluding that the Tax Court properly departed from precedent in the controversy at issue).

103. *Lawrence v. Comm’r*, 27 T.C. 713, 718 (1957).

104. Because Section 7441(b) refers to the Tax Court as a “court of record,” it might independently establish a *stare decisis* requirement. That is, Section 7441(b) arguably commands the Tax Court to follow traditional judicial methods of interpretation (including following precedents), rather than follow the looser methods adopted by agencies. Also, Section 7463(b)’s denial of precedential status to S opinions provides a negative inference that Congress wanted the Tax Court to respect *stare decisis* principles for the other types of opinions. See I.R.C. §§ 7441, 7463(b) (2012).

105. See Fogg, *supra* note 100.

106. Dispositive summary judgment orders raise issues similar to those discussed regarding Bench opinions. That is, such orders may deal with substantive issues and cannot be cited as precedent, but their use may give rise to institutional concerns. TAX CT. R. 50(f); see Carl Smith, *Unpublished CDP Orders Dwarf Post-Trial Bench Opinions in Uncounted Tax Court Rulings*, PROCEDURALLY TAXING (Jan. 29, 2015), <http://procedurallytaxing.com/unpublished-cdp-orders-dwarf-post-trial-bench-opinions-in-uncounted-tax-court-rulings> (focusing on CDP-related summary judgment orders and concluding that “[t]hese orders are for all intents and purposes like published opinions and could easily have been issued as T.C. Memo. or T.C. Summary Opinions, unless the judges are deliberately evading the Chief Judge’s review function for opinions found at section 7460(b)”).

III. THE PROBLEM COMPOUNDED

A. THE SEPARATION OF POWERS ISSUE

The Tax Court's inconsistent treatment of Memo opinions stems from its own practices. Consequently, in assessing whether purportedly nonprecedential opinions comply with the Constitution, we can focus solely on the Tax Court. Summary or "S" opinions, by contrast, present inter-branch concerns.

S opinions relate to "small cases"¹⁰⁷ conducted under Section 7463.¹⁰⁸ Under that statute, a taxpayer can elect out of the normal procedural rules that apply to Tax Court litigation. To make this election, the taxpayer's dispute generally cannot involve more than \$50,000.¹⁰⁹ The Tax Court must concur with the taxpayer's election and if it does so, the "case[] will be conducted as informally as possible consistent with orderly procedure."¹¹⁰

When it decides a case, the Tax Court usually must "report in writing all its findings of fact, opinions, and memorandum opinions."¹¹¹ However, Section 7463(a) lifts that requirement for small cases. Although S opinions must be submitted to the Chief Judge for review, they may contain only the final decision, "with a brief summary of the reasons therefor."¹¹² Neither party can appeal the Tax Court's decision in small cases. Also, Section 7463(b) denies the prospective effect of S opinions, saying that they "shall not be treated as a precedent for any other case."

Section 7463(b) adds a wrinkle to the controversy over nonprecedential opinions. The Arnold-Kozinski debate involved a *court's* power to deny precedential status to its own decisions, not a legislature's intrusion into this arguably purely judicial function. The statute thus raises separation of powers issues not implicated in the earlier debate.

Issues related to Congress and *stare decisis* have only recently drawn attention from commentators.¹¹³ Gary Lawson forcefully argues that "Congress may not by statute tell the federal courts whether or in what way to use precedent."¹¹⁴ Under his view, "the judicial power of course includes the

107. Section 7463 does not refer to "small cases," but practitioners and the Tax Court refer to cases conducted under the statute as such. *See* TAX CT. R. 170-174; *see also* I.R.C. § 7436(c) (2012) (establishing small case procedures for some employee determination disputes).

108. *See generally* Christopher J. Badum, *The Small Tax Case Procedure: How it Works—Does it Work?*, 4 *FORDHAM URB. L.J.* 385 (1976).

109. *See* I.R.C. § 7463(a) (2012).

110. TAX CT. R. 174(b); *see also* I.R.C. § 7463(a) (2012) (granting the Tax Court the authority to establish special procedures for small cases).

111. I.R.C. § 7459(b) (2012).

112. *Id.* § 7463(a).

113. *See* Lawson, *supra* note 24, at 191 (noting that scholars have largely neglected issues related to legislative attempts to control judicial decision making).

114. *Id.* at 194.

power to reason to the outcome of a case.”¹¹⁵ Thomas Healy argues that statutes which limit a *court’s* ability to follow precedent strip away at the legitimacy of judicial opinions.¹¹⁶ And if Congress handcuffs a court and prevents it from justifying its decisions on its preferred grounds (such as its respect for *stare decisis*), Congress has interfered with the judicial power.¹¹⁷

Some commentators take a different view. Michael Stokes Paulsen focuses on constitutional cases and contemplates that respect for *stare decisis* stems from the exercise of judicial discretion.¹¹⁸ Whether to follow prior cases, such as those involving abortion rights, and what weight to give them, involves “[m]ere nonconstitutional policy considerations.”¹¹⁹ Congress can thus displace the judiciary’s weighing of those considerations and deny prospective precedential effect to prior opinions, at least in constitutional cases. John Harrison also believes that Congress can play a role in setting the rules of precedent, arguing that the Necessary and Proper Clause allows the legislature to prescribe any precedent-related rule that a court could itself establish.¹²⁰

The case law on congressional control of *stare decisis* remains unsettled, probably because statutes like Section 7463(b) are so rare. *United States v. Klein*, a Civil War-era case, provides the leading authority in the area.¹²¹ *Klein* addressed the Abandoned and Captured Property Act, which granted the sale proceeds of property seized in insurrectionary states to the original owners, if those owners had not “given any aid or comfort to the . . . rebellion.”¹²² Although many original owners provided such aid or comfort, President Lincoln offered a pardon to anyone who executed an oath of allegiance to the United States. The Supreme Court subsequently ruled that persons so pardoned were cleansed of their prior involvement in the rebellion, such that they were entitled to the sale proceeds of their seized property.¹²³

Congress was displeased with that decision and could have flatly repealed the Abandoned and Captured Property Act. Instead, Congress passed a statute

115. *Id.* at 210.

116. Thomas Healy, *Stare Decisis and the Constitution: Four Questions and Answers*, 83 NOTRE DAME L. REV. 1173, 1201–02 (2008).

117. *Id.*

118. Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1540 (2000). Paulsen warns that he has sometimes taken a more jaundiced view of precedent, but for purposes of his article, he assumes that it reflects a legitimate principle and not “a disingenuous ‘cover’ for a decision made on other grounds.” *Id.* at 1538.

119. *Id.* at 1540.

120. John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 504 (2000).

121. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

122. *Id.* at 131. For a detailed discussion of *Klein*, see Lawrence G. Sager, *Klein’s First Principle: A Proposed Solution*, 86 GEO. L.J. 2525 (1998).

123. See generally *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870) (construing the Captured and Abandoned Property Act of 1863, ch. 119, 12 Stat. 820).

changing how a pardon would bear on an owner's entitlement to sale proceeds. Under the new statute, the acceptance of a pardon, without denial of involvement in the rebellion, conclusively proved that the owner aided the rebellion, and courts could not use the pardon to establish otherwise. Additionally, courts would immediately lose jurisdiction whenever an original owner accepted the pardon.

In *Klein*, the Supreme Court struck down the new statute, concluding that it "passed the limit which separates the legislative from the judicial power."¹²⁴ Although Congress could define the Court's appellate jurisdiction, the new statute was "founded solely on the application of a rule of decision."¹²⁵ And Congress lacked the power to "prescribe a rule for the decision of a cause in a particular way."¹²⁶ The Court distinguished its prior decision in *Pennsylvania v. Wheeling Bridge*,¹²⁷ saying that "[n]o arbitrary rule of decision was prescribed in that case" and that the Court was simply "left to apply its ordinary rules to the new circumstances" created by congressional amendments.¹²⁸

The precise scope of *Klein* remains "deeply puzzling."¹²⁹ On the one hand, all agree that Congress cannot simply tell a court how to decide a case. On the other hand, congressional amendments can change the outcomes of pending cases. These two principles should provide, at a minimum, a clear framework for testing the constitutionality of Section 7463(b). But application of the principles may present difficulties.

124. *Klein*, 80 U.S. (13 Wall.) at 147.

125. *Id.* at 146.

126. *Id.*

127. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855). In *Wheeling Bridge*, the Supreme Court revisited an earlier holding that a low-built bridge over the Ohio River obstructed navigation in violation of federal law. In the earlier case, the Court had issued an injunction requiring the elevation or abatement of the bridge. *Id.* at 421; *see also* *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851). Congress later passed a statute providing that the bridge was a lawful structure, and its owner filed a suit seeking a removal of the injunction. Although Congress had seemingly altered the Court's prior decision, a divided Court upheld the constitutionality of the new statute. *Wheeling Bridge*, 59 U.S. (18 How.) at 433. The original case did not involve a final judgment granting monetary relief, in which case Congress could not disturb the Court's ruling. *Id.* at 431. Instead, the Court's prior order was a continuing decree. That is, whether the bridge continued to interfere with the right of navigation depended on the state of the law at the relevant time. And because that "right ha[d] been modified by the competent authority, so that the bridge [was] no longer an unlawful obstruction," the injunction would be lifted. *Id.* at 432.

128. *Klein*, 80 U.S. (13 Wall.) at 146-47; *see also* *Miller v. French*, 530 U.S. 327, 347 (2000) ("[W]hen Congress changes the law underlying a judgment awarding prospective relief, that relief is no longer enforceable to the extent it is inconsistent with the new law.").

129. *Bank Markazi v. Peterson*, No. 14-770 (U.S. 2016) (slip Op at 13) (quoting Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 Geo. L.J. 2537, 2538 (1998)). *Bank Markazi* provided the Court an opportunity to clarify *Klein*, but that decision, reached over a strenuous dissent, will probably only deepen the confusion.

Robertson v. Seattle Audubon Society nicely illustrates this.¹³⁰ That case involved section 318 of the so-called Northwest Timber Compromise, through which Congress addressed agency guidelines for timber harvesting in 13 national forests that contained northern spotted owls.¹³¹ Environmental groups and industry groups had each challenged the guidelines under numerous statutes, arguing that the guidelines did not go far enough to protect the environment, or that they went too far and threatened the local economies.¹³²

Congress, in response, passed section 318 and gave something to both groups. Under subsections (a)(1) and (2) of the statute, Congress ordered the government to sell specific quantities of timber before the end of the 1990 fiscal year.¹³³ However, under subsections (b)(3) and (5), Congress prohibited timber harvesting altogether in some designated areas for the remainder of that fiscal year.¹³⁴

To resolve the pending cases, subsection (b)(6) announced a special rule:

[T]he Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests. . . known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned *Seattle Audubon Society et al., v. F. Dale Robertson*, Civil No. 89-160 and *Washington Contract Loggers Assoc. et al., v. F. Dale Robertson*, Civil No. 89-99 (order granting preliminary injunction) and the case *Portland Audubon Society et al., v. Manuel Lujan, Jr.*, Civil No. 87-1160-FR.¹³⁵

This statute apparently directed the judiciary to hold for the government in specific cases, even identifying the cases by name and docket numbers. The government consequently invoked the statute and sought dismissal of the relevant suits.

But the environmental groups resisted and argued that subsection (b)(6) violated the separation of powers. The Ninth Circuit, relying on *Klein*, agreed.¹³⁶ Congress did not use section 318 to “repeal or amend the

130. *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429 (1992).

131. *Id.* at 433; *see also* Act of Oct. 23, 1989, Pub. L. No. 101-121, 103 Stat. 701, 745 (1989) (making appropriations for the Department of the Interior and related agencies).

132. *Robertson*, 503 U.S. at 432-33.

133. Act of Oct. 23, 1989, Pub. L. No. 101-121, § 318(a)(1)-(2), 103 Stat. 701, 745 (1989).

134. *Id.* § 318(b)(1), (5), 103 Stat. at 746-47.

135. *Id.* § 318(b)(6)(A), 103 Stat. at 747.

136. *Seattle Audubon Soc. v. Robertson*, 914 F.2d 1311, 1314 (9th Cir. 1990), *rev'd*, 503 U.S. 429 (1992).

environmental laws,” but instead sought to “perform functions reserved to the courts by Article III of the Constitution.”¹³⁷

A unanimous Supreme Court reversed.¹³⁸ In the Court’s view, section 318 in fact amended existing law.¹³⁹ Prior to the enactment of the statute, the government, to defend against the groups’ lawsuits, would need to establish its compliance with numerous environmental statutes.¹⁴⁰ But section 318 changed that. Under subsection (b)(6)(A), the government would only need to show that it had complied with the restrictions contained in subsections (b)(3) and (b)(5).¹⁴¹ In this way, section 318 created new law and did not compel the judiciary to reach a particular result under old law. Although (b)(6) made references to specific pending cases, those references were really just an easy way to identify and amend the various environmental statutes at issue.¹⁴²

Robertson seems to reaffirm the two basic principles previously alluded to. That is, if Congress directs the result of a particular case through a change in the underlying law, no constitutional violation occurs. But if Congress leaves that law alone and tells the judiciary how to decide a case, it violates the separation of powers.

Unfortunately, there is a blurry line between a statute that directs a result and one that amends underlying law. With only a slight difference in statutory wording, the statute in *Robertson* would have been struck down.¹⁴³ The case law on congressional control over *stare decisis* thus remains at best unsettled and at worst hopelessly confused.¹⁴⁴

So what does this all mean for Section 7463(b)? It is difficult to say. On the one hand, Section 7463(b) does not map neatly onto the statute declared

137. *Id.* at 1316.

138. *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 437 (1992).

139. *Id.* at 438.

140. *Id.*

141. *Id.*

142. *Id.* at 440.

143. Consider a simplified example and assume that a federal agency must satisfy six different statutes to establish its compliance with environmental laws, but the agency complies only with two. If Congress simply says that courts must find that the agency’s existing practices comply with all laws, the statute would run afoul of *Klein*. However, if Congress directs that satisfaction of the two criteria will establish compliance, the statute would be constitutional under *Robertson* because Congress apparently amended the law to reduce the number of requirements. For more on *Roberston*, see Amy D. Ronner, *Judicial Self-Demise: The Test of When Congress Impermissibly Intrudes on Judicial Power After Robertson v. Seattle Audubon Society and the Federal Appellate Courts’ Rejection of the Separation of Powers Challenges to The New Section of the Securities Exchange Act of 1934*, 35 ARIZ. L. REV. 1037, 1070 (1993) (concluding that *Robertson* implicitly overruled *Klein*).

144. See William D. Araiza, *The Trouble with Robertson: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055, 1137 (1999) (“[T]he Court’s refusal to face such broad and difficult questions may be the real trouble with *Robertson*.”).

unconstitutional in *Klein*. That statute commanded courts to decide a particular type of case in a particular way, but Section 7463(b) does not go that far. In fact, Section 7463(b) says nothing about any particular case. Congress has instead mandated that the judiciary ignore a particular source of authority (S opinions), without saying anything about how any given case should turn out.

On the other hand, Section 7463(b) does not resemble the statute upheld in *Robertson*. Unlike that statute, Section 7463(b) does not amend any substantive law. Instead, it relates to the decisional independence of the courts.¹⁴⁵ The statute forbids the Tax Court from creating authority when deciding a class of cases and forbids all courts from giving precedential weight to those cases. No Supreme Court opinion expressly protects anything like Section 7463(b).

Regarding the scholarly literature, I side with the Lawson approach, under which Congress cannot tell courts which authorities to consider and cannot deny precedential effect to judicial decisions. Even if one accepts Paulsen's controversial view¹⁴⁶—that Congress can establish rules of precedent for constitutional cases—it would have a limited role for the Tax Court, whose cases overwhelmingly involve interpretations of the Internal Revenue Code. Harrison's view—that Congress can establish any rule of precedent that a court could itself establish—would simply bring us back to square one: does the judicial power include the authority to deny precedential effect to an entire class of decisions?

At some point, courts may sort out the constitutionality of Section 7463(b). The IRS has rejected the holdings of some S opinions that reach taxpayer-favorable results, and a future taxpayer may argue that the Tax Court should follow those (non?) precedents. Another *Anastasoff*-type case could thus easily emerge.¹⁴⁷

B. THE PROBLEM IN PRACTICE: S OPINIONS

Putting constitutional issues aside, Section 7463(b) raises practical problems. Simply saying that a decision lacks precedential value does not

145. See Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 707 (1995) (“Examination of both established constitutional principles and fundamental precepts of American political theory demonstrates that decisional independence is the *sine qua non* of the federal judiciary's operation.”).

146. See Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 574 (2001) (“Professor Paulsen's second premise (that *stare decisis* lacks constitutional stature) is mistaken and that the first (involving constitutional methodology), although not flatly wrong, is likely to prove misleading.”); Healy, *supra* note 116, at 1206 (stating that Paulsen's approach “sounds radical because it is radical”).

147. See, e.g., IRS INFO. LETTER NO. INFO 2002-0002 5 (Sept. 14, 2001), <https://www.irs.gov/pub/irs-wd/02-0002.pdf> (discussing a letter from an IRS official expressing view that S opinions related to reimbursed employee business expenses of school bus drivers do not “properly apply the law” and “are not precedent for any other case”).

erase it entirely, and uncertainty lingers over the prospective effect of S opinions.¹⁴⁸

In *Mitchell v. Commissioner*, for example, the Tax Court danced around whether collateral estoppel (issue preclusion) applies to matters decided in S cases.¹⁴⁹ In *Mitchell*, the taxpayer argued that a pension payment received in her 2001 tax year did not constitute gross income. She had litigated the same issue for her 2000 tax year, and the Tax Court had ruled against her in an S opinion.¹⁵⁰ The IRS consequently argued that she could not raise the argument, relying on the doctrine of collateral estoppel.¹⁵¹

The Tax Court declined to address that argument, but Judge Holmes wrote a lengthy concurrence explaining that collateral estoppel should apply to issues decided in S cases.¹⁵² Although the absence of appellate review usually forecloses the application of collateral estoppel, taxpayers choose S case procedures voluntarily. Nothing in Section 7463 prevents a taxpayer from litigating her dispute under the court's regular, more formal procedures, under which she can appeal any adverse decision to a circuit court. Also, although Section 7463(b)'s plain terms denies precedential value to S opinions, that simply means that courts cannot cite those opinions for their statements on a point of law.¹⁵³ Section 7463(b) does not wipe out all effects related to S opinions.

To illustrate the problems caused by Section 7463(b)'s potential elimination of collateral estoppel, Judge Holmes described a particularly wasteful series of cases.¹⁵⁴ In the first case, the taxpayer lost on an issue decided through an S opinion.¹⁵⁵ The taxpayer argued the same issue in a later case for different tax years and also presented a second issue, losing both issues in a Memo opinion.¹⁵⁶ In a third case, the taxpayer argued the second

148. In *Reifler v. Commissioner*, 106 T.C.M. (CCH) 554, 558 n.8 (2013) the Tax Court emphasized the nonprecedential nature of S opinions but concluded that "we may give consideration to our reasoning and conclusions in such opinions to the extent that they are persuasive." See also *Reifler v. Comm'r*, 110 T.C.M. (CCH) 360, 364 n.10 (2015) (making similar statement).

149. *Mitchell v. Comm'r*, 131 T.C. 215, 217 n.2 (2008) (declining to address IRS's collateral estoppel argument). The Tax Court acknowledged the issue more than 30 years ago, in *Sherwood v. Commissioner*, 38 T.C.M. (CCH) 660, 662 n.3 (1979) (suggesting that issues decided in one S case are collaterally estopped in later S cases, but "we need not decide presently whether decisions under section 7463 may also act as collateral estoppel in later cases in which this Court's full jurisdiction is invoked").

150. *Mitchell v. Comm'r*, T.C. Summ. Op. 2004-160 (2004).

151. "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

152. *Mitchell*, 131 T.C. at 221-39 (Holmes, J., concurring).

153. *Id.* at 228.

154. *Id.* at 238-39.

155. *Jacobs v. Comm'r*, T.C. Summ. Op. 1971-22 (1971) (resolving issue for 1966, 1967, and 1968 tax years).

156. *Jacobs v. Comm'r*, 36 T.C.M. (CCH) 1, 6 (1977) (resolving issue for 1972 and 1973 tax

issue once again, losing in another Memo opinion.¹⁵⁷ The taxpayer still had not given up and presented the second issue for more tax years, at which point the Tax Court penalized her and employed collateral estoppel to reject consideration of the repetitive arguments.¹⁵⁸ But that apparently was not enough, because the taxpayer again argued the second issue, with (predictably) the same lack of success.¹⁵⁹

Of course, this series of cases involved an unusually nettlesome taxpayer. Yet it illustrates how repetitious arguments can consume judicial resources.¹⁶⁰ Such arguments present an especially serious concern in the tax law, where the combination of the annual accounting rule and recurring items of income or deduction set the stage for repeat battles between a taxpayer and the IRS.¹⁶¹

Unfortunately, Judge Holmes' concurrence did not lead the Tax Court to subsequently address the relationship between Section 7463(b) and collateral estoppel. A later Division opinion simply acknowledges that the issue remains "controversial."¹⁶² Consequently, confusion lingers over the prospective effect of S opinions.

Reasonable minds can differ over whether collateral estoppel should apply to S cases. However, that matter should be settled by the Tax Court, not Congress.¹⁶³ To the extent that Section 7463(b) displaces the Tax Court's authority to determine that issue, the statute reflects poor policy. The Tax Court deals with many vexatious litigants, and absent a special justification, it should independently determine the preclusive effects of its judgments.¹⁶⁴

years).

157. *Jacobs v. Comm'r*, 40 T.C.M. (CCH) 949, 952 (1980) (resolving issue for 1974, 1975, and 1976 tax years).

158. *Jacobs v. Comm'r*, 43 T.C.M. (CCH) 1071, 1074 (1982) (resolving issue for 1977, 1978, and 1979 tax years).

159. *Jacobs v. Comm'r*, 46 T.C.M. (CCH) 1119, 1120 (1983) (resolving issue for 1980 tax year).

160. *See Wnuck v. Comm'r*, 136 T.C. 498, 510–11 (2011) (explaining burdens that frivolous arguments place on Tax Court).

161. *Mitchell v. Comm'r*, 131 T.C. 215, 238–39 (2008) (Holmes, J., concurring).

162. *Koprowski v. Comm'r*, 138 T.C. 54, 62 (2012).

163. Generally, "[t]he preclusive effect of a federal-court judgment is determined by federal common law." *Taylor v. Sturgell*, 553 U.S. 880, 893 (2008).

164. To challenge their income tax liabilities in the Court of Federal Claims or in federal district courts, taxpayers must pre-pay the amounts owed. *See Flora v. United States*, 362 U.S. 145, 150 (1960) (jurisdictional grant under 28 U.S.C. § 1346(a)(1) "require[s] payment of the full tax before suit"). However, the Tax Court enjoys jurisdiction to hear prepayment challenges to deficiencies asserted by the IRS. *See I.R.C.* § 6213(a) (2012). Consequently, the Tax Court remains the forum of choice for many taxpayers, including those who believe they do not have to pay a penny of taxes. *See David Laro, The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. ILL. L. REV. 17, 26 (describing how the Tax Court, as "the most convenient forum" for resolving tax disputes, attracts persons who "seem to have an agenda quite aside from the narrow issue of correctly determining their tax liability"). For an illustrative case, see generally *Waltner v. Commissioner*, 107 T.C.M. (CCH) 1189 (2014) (sanctioning tax protestor and providing refutation of various anti-tax arguments).

Section 7463(b) can also lead to problems when the Tax Court decides a difficult issue through S procedures. In *Cutts v. Commissioner*, for example, the Tax Court addressed a complex issue of first impression under Section 7872, which re-characterizes interest paid on some below-market loans.¹⁶⁵ The court candidly acknowledged that it “dropped the ball” when it allowed the case to proceed under S procedures.¹⁶⁶ To remedy this problem, the court offered a “thorough analysis”¹⁶⁷ of the issues, noting that collateral estoppel could affect the taxpayer’s other tax years.¹⁶⁸

Cutts nicely illustrates how Section 7463(b) fosters uncertainty. As with every S opinion, *Cutts* prominently announces that it “MAY NOT BE TREATED AS PRECEDENT FOR ANY OTHER CASE.”¹⁶⁹ But it then offers an extended analysis of a recurring tax issue.¹⁷⁰ And it then notes that its reasoning may have preclusive effect in future litigation.¹⁷¹

Taxpayers may be understandably confused by this. Can they really ignore the court’s “thorough analysis” of Section 7872?¹⁷² And what weight does the court’s statement about collateral estoppel receive? The opinion announces that it cannot be cited as precedent but then says that it may close off arguments for different tax years.¹⁷³ If the Tax Court eventually addresses whether collateral estoppel applies to S cases, can a party cite *Cutts*, as precedent, to reveal the court’s prior statements on the subject? Or does the prohibition against citation to S cases also apply when addressing the effect of S cases?

Luckily, *Cutts* reflects a fairly unusual case, and the vast majority of S cases do not present such riddles.¹⁷⁴ But *Cutts* is not alone in addressing a significant

165. *Cutts v. Comm’r*, T.C. Summ. Op. 2004-8, 2004 WL 171335, at *9 (T.C. Jan. 29, 2004).

166. *Id.*

167. *Id.*

168. *Id.* (“By virtue of the principle of *Commissioner v. Sunnen*, our decision may affect other tax years of petitioners.” (citation omitted)).

169. *Id.* at cover page.

170. *Id.* at *4–9.

171. *Id.* at *9.

172. Although Section 7463(b) denies precedential effect to S opinions, such opinions must nonetheless be submitted to the Chief Judge for review and possible circulation to the entire court. See Tax Ct. R. 182(a). Consequently, an S opinion may reflect the views of several Tax Court judges. See *Mitchell v. Comm’r*, 131 T.C. 215, 235–36 (2008) (Holmes, J., concurring) (describing thorough procedures for promulgation of S opinions).

173. *Cutts*, T.C. Summ. Op. 2004-8, 2004 WL 171335, at cover page, *9.

174. This statement requires some speculation because the small case procedures became effective in 1971, but the Tax Court did not start releasing its S opinions until 2001. Two practitioners obtained permission to review paper copies of the 12,000–13,000 summary opinions issued between 1971 and 2000, but they were able to make it only through a small fraction. See Saul Mezei & Joseph Judkins, *A Square Peg in a Round Hole: The Golsen Rule in S Cases*, 134 TAX NOTES 347, 350 n.34 (2012) (describing their examination of S opinions for *Golsen*-related issues only for opinions issued through 1973).

tax issue,¹⁷⁵ and more cases will inevitably emerge, even if the small case procedure apparently works “pretty well.”¹⁷⁶ We can thus fairly call into question the wisdom of a statute, like Section 7463(b), that asks us to pretend like the judicial bell has not rung.

IV. THE PROBLEM FURTHER COMPOUNDED: THE TAX COURT’S JUDICIAL(?) POWER

The cases on unpublished opinions and congressional control over *stare decisis* involved Article III courts. The extension of those authorities to the Tax Court seems safe in light of *Freytag v. Commissioner*, which plainly indicates that Article I tribunals, like the Tax Court, “exercise the judicial power of the United States.”¹⁷⁷ However, recent developments create uncertainty over the characterization of the Tax Court’s power under the Constitution. To appreciate the controversy, one must first understand *Freytag*.

In *Freytag*, the Court addressed whether the appointment of the Tax Court’s special trial judges comported with the Constitution.¹⁷⁸ Section 7443A(a) gives the Chief Judge of the Tax Court the power to appoint those judges, who enjoy explicit statutory authorization to hear specific types of cases.¹⁷⁹ Special Trial Judges may also conduct “any other proceeding which the chief judge may designate.”¹⁸⁰

The taxpayers in *Freytag* argued that this regime violated the Appointments Clause. Under that clause, the power to appoint an inferior officer, like a special trial judge, could vest only “in the President alone, in the Courts of Law, or in the Heads of Departments.”¹⁸¹ The taxpayers argued that the Chief Judge fell into none of these three categories, thereby tainting the special trial judge who conducted their trial.¹⁸²

The Court ultimately rejected the taxpayers’ arguments. It first agreed that the Chief Judge was not the Head of a Department—that term referred only to executive divisions, and not literally to every head of every government subdivision.¹⁸³ The Court further rejected the Tax Court’s alleged placement

175. See Roberson & Herndon, *supra* note 17, at 89 (“[S]ome summary opinions provide ‘insightful and illuminating discussions of the law or applications of facts to law’ that practitioners may desire to cite in appropriate cases.” (quoting Lowy et al., *supra* note 4, at 177)); see also *Bot v. Comm’r*, 118 T.C. 138, 151 (2002), *aff’d*, 353 F.3d 595 (8th Cir. 2003) (acknowledging taxpayer’s reliance on an S opinion but not discussing it, saying only that it “has no precedential value”).

176. *Mitchell*, 131 T.C. at 236 n.19.

177. *Freytag v. Comm’r*, 501 U.S. 868, 889 (1991).

178. *Id.* at 870.

179. *Id.* at 870–71.

180. *Id.* at 871 (citing I.R.C. § 7443A(a), later codified at I.R.C. § 7443A(b)(7) (2012)).

181. U.S. CONST. art. II, § 2, cl. 2.

182. *Freytag*, 501 U.S. at 880.

183. *Id.* at 886 (“This Court for more than a century has held that the term ‘Departmen[t]’ refers only to ‘a part or division of the executive government, as the Department of State, or of the Treasury,’ expressly ‘creat[ed]’ and ‘giv[en] . . . the name of a department’ by Congress.”

within the Executive Branch, noting that Congress enacted Section 7441 to make “the Tax Court an Article I court rather than an executive agency,” and any other classification would be “anomalous.”¹⁸⁴

The Court then examined whether the Tax Court qualified as a Court of Law under the Appointments clause. To perform that analysis, the Court focused heavily on the nature of the power exercised by the Tax Court, concluding that it exercised “the judicial power of the United States.”¹⁸⁵ The Court rejected the “literalistic” argument that the Constitution limited the grant of judicial power to that conferred in Article III.¹⁸⁶ Because “[t]he Tax Court exercises judicial power to the exclusion of any other function,” it qualified as a Court of Law, and the Chief Judge’s appointment of special trial judges satisfied constitutional requirements.¹⁸⁷

It would be impossible to untangle every implication of the Court’s holding here. For now, the key question relates to whether principles of *stare decisis* extend to the Tax Court in the same way that they extend to Article III courts. *Freytag* certainly seems to suggest as much. The Court, rightly or wrongly, concluded that the judicial power of the United States extends beyond Article III.¹⁸⁸ Nothing in the opinion suggests that the judicial power operates differently when exercised by Article I courts. Consequently, if one accepts, as this author does, that principles of *stare decisis* restrict the exercise of the Article III judicial power, and that the fashioning of those rules remains the exclusive province of the courts, then the case law on noncitation rules and congressional control over rules of precedent applies with full force to the Tax Court.

However, a recent D.C. Circuit case complicates this analysis. In *Kuretski v. Commissioner*, the taxpayers argued that Section 7443(f), which allows the

(quoting *United States v. Germaine*, 99 U.S. 508, 510–11 (1879)).

184. *Id.* at 887 (quoting legislative history materials); *see also* I.R.C. § 7441 (2012).

185. *Freytag*, 501 U.S. at 891.

186. *Id.* at 889 (“[T]he legislative courts possess and exercise judicial power . . . although not conferred in virtue of the third article of the Constitution.” (quoting *Williams v. United States*, 289 U.S. 553, 566 (1933))).

187. *Id.* at 891.

188. *Id.* at 889. In *Freytag*, Justice Scalia wrote a persuasive concurring opinion concluding that the Tax Court exercised the executive power, not the judicial power. *Id.* at 903 (Scalia, J., concurring). Under Scalia’s view, Section 7443A consequently complied with the Appointments Clause because the Tax Court was a department under the Constitution, and the removal power over Special Trial Judges was vested in the department’s head (the Chief Judge). *Id.* At 901–22. Although Scalia’s approach seems more faithful to the Constitution and to the prior Tax Court cases on the subject, the majority opinion of course controls. *See Burns, Stix Friedman & Co. v. Comm’r*, 57 T.C. 392, 395 (1971) (noting that Tax Court “remained an independent agency in the Executive Branch of the Government” after 1942 statutory amendments and that the 1969 amendments did not “change the status and function of the Tax Court”). For a criticism of the majority’s approach, *see Tuan Samahon, Blackmun (and Scalia) at the Bat: The Court’s Separation-of-Powers Strike Out in Freytag*, 12 NEV. L.J. 691, 695–701 (2012).

President to remove Tax Court judges on limited grounds,¹⁸⁹ violates the separation of powers.¹⁹⁰ The taxpayers pointed to *Freytag* and argued that the statute established an impermissible inter-branch removal regime.¹⁹¹ The President, as the holder of executive power, could not constitutionally remove Tax Court judges, who exercise judicial power. The taxpayers consequently wanted the court to declare Section 7443(f) unconstitutional, such that their case should be remanded and heard by a Tax Court judge operating without the threat of Presidential removal.

The D.C. Circuit rejected that request, fundamentally disagreeing with the taxpayers' characterization of *Freytag*.¹⁹² According to the D.C. Circuit, the Tax Court "exercises Executive authority as part of the Executive Branch."¹⁹³ Consequently, Section 7443(f) presented no inter-branch removal concerns. The statute merely allowed the President to remove one of his subordinates.

To reconcile its holding with *Freytag*'s, the D.C. Circuit emphasized that the Tax Court, as an Article I court, could not exercise the judicial power conferred by Article III. *Freytag* merely referred to the Tax Court's judicial power in "an enlarged sense,"¹⁹⁴ describing its role in resolving administrative disputes between taxpayers and the IRS. This made it similar to agencies like the Federal Trade Commission, who performed quasi-judicial functions but nonetheless fell under the Article II umbrella. *Freytag*'s statement that the Tax Court "remains independent of the Executive . . . Branch" reflected a generic functionalist description, not a formal statement about the court's constitutional status.¹⁹⁵

Read broadly, *Kuretski* could free the Tax Court from constitutional restrictions related to the exercise of the judicial power. If the Tax Court really were just another agency, then the constitutionality of its nonprecedential opinions would not be examined through the judicial lens. Judges, as the last word on the meaning of the law, follow precedent to encourage certainty and to self-check the exercise of their power.¹⁹⁶ Agencies enjoy much more

189. See I.R.C. § 7443(f) (2012) ("Judges of the Tax Court may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause.").

190. *Kuretski v. Comm'r*, 755 F.3d 929, 932 (D.C. Cir. 2014).

191. *Id.* at 939-40.

192. *Id.* at 940-41.

193. *Id.* at 932.

194. *Freytag v. Comm'r*, 501 U.S. 868, 909 (1991) (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 280 (1856)).

195. *Kuretski*, 755 F.3d at 891 (quoting *Freytag*, 501 U.S. at 891).

196. See, e.g., *Hohn v. United States*, 524 U.S. 236, 251 (1998) ("*Stare decisis* is 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991))); *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) ("[S]tare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations."); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE

latitude in departing from prior practices, and judicial review can help mitigate some of the negative consequences associated with a whimsical executive.¹⁹⁷

However, the D.C. Circuit did not squarely address the precise consequences of its holding. It suggested that Section 7441 exempts the Tax Court from statutes that apply solely to executive agencies, given the statute's reference to a "court of record."¹⁹⁸ But *Kuretski's* implications for the Tax Court remain uncertain,¹⁹⁹ even after an alleged statutory "clarification."²⁰⁰

The confusion over the Tax Court's status ultimately stems from different approaches to separation of powers analysis. Under a formal approach, the Constitution establishes three distinct branches of government, each of which is exclusively assigned the executive, legislative, or judicial power. Under a functionalist approach, however, some blending of powers may be permissible. Additionally, an entity that exercises a blend of powers, or which does not fit neatly into any particular Article, may have "no constitutional home"²⁰¹ and may belong to a so-called fourth branch of government.²⁰²

UNITED STATES §§ 377–378 (1833) (“[D]eparture from [precedents] would have been justly deemed an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority.”); THE FEDERALIST NO. 78 (Alexander Hamilton) (“To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents . . .”).

197. The Due Process Clause and the Administrative Procedure Act impose some general limits on executive action, but they do not force agencies to apply principles of *stare decisis*. See, e.g., *UAW v. NLRB*, 802 F.2d 969, 974 (7th Cir. 1986) (“[W]hile not bound by *stare decisis*, the Board can jettison its precedents only if it has ‘adequately explicated the basis of its [new] interpretation.’” (quoting *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975))); *R-C Motor Lines, Inc. v. United States*, 350 F. Supp. 1169, 1172 (M.D. Fla. 1972) (“[T]he doctrine of *stare decisis* does not apply to decisions of administrative bodies . . .”), *aff’d*, 411 U.S. 941 (1973).

198. *Kuretski*, 755 F.3d at 944 (“Tax Court is a ‘court of the United States’ and not an ‘agency’ under the Administrative Procedure Act, 5 U.S.C. § 551(1).” (quoting *Megibow v. Clerk of the U.S. Tax Court*, 2004 WL 1961591, at *4 (S.D.N.Y. Aug. 31, 2004), *aff’d*, 432 F.3d 387 (2d Cir. 2005) (per curiam))).

199. See Leandra Lederman, *When the Bough Breaks: The U.S. Tax Court’s Branch Difficulties*, 34 NEWSQUARTERLY 10, 10 (2015) (“Was the D.C. Circuit correct? The law in this area is so uncertain that, barring Supreme Court review, it is hard to know.”).

200. Recently, Congress passed the Improve Access and Administration of the United States Tax Court Act, which contained a provision titled “Clarification Relating to United States Tax Court.” S. 903, 114th Cong. §301 (2015). That provision adds a sentence to the code, stating that “[t]he Tax Court is not an agency of, and shall be independent of, the executive branch of the Government.” S. REP. NO. 114-14, at 10 (2015); see also I.R.C. § 7441 (2012). Although this language may clear some questions regarding the classification of the Tax Court for purposes of federal statutes (such as the Freedom of Information Act), it does nothing to address the constitutional status of the court. Congress cannot, through mere labels, establish the constitutional classification of an entity that exercises governmental power.

201. CHARLES H. KOCH, ADMINISTRATIVE LAW & PRACTICE § 7:11 (3d ed. 2010).

202. See, e.g., Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 510 (1985) (“*Humphrey’s Executor* simultaneously spawned the concept of an ‘independent agency,’ which Congress values so highly, and the concept of a headless fourth branch of government, which jurists and scholars frequently decry.”)

Freytag adopted a functional approach, rejecting the “literalistic” argument that the judicial power conferred under the Constitution belongs only to Article III entities.²⁰³ The *Kuretski* taxpayers, however, used *Freytag* to support a formal argument.²⁰⁴ They argued that Article II cabins the President’s removal power to persons exercising executive power.²⁰⁵

This conflation of approaches—using a functionalist case to make a formalist argument—explains the confusion over the Tax Court’s constitutional status. It is conceptually difficult to: (1) conclude, as *Freytag* did, that the judicial power extends beyond Article III to the Tax Court; and (2) assign the Tax Court to a single branch of government, as the D.C. Circuit was asked to do.

The contradictory approaches in the case law makes it uncertain whether, as a doctrinal matter, the Tax Court faces the same constitutional restrictions regarding *stare decisis* as do Article III courts.²⁰⁶ The contradictory case law also makes it difficult to determine whether Section 7463(b) poses the same concerns posed by statutes that would control the rules of precedent for Article III courts. For purposes of this article, it suffices to say that if the Tax Court exercises judicial power under the Constitution, as will be assumed here, we can make the equations with Article III courts. If the Tax Court exercises a different power—the executive power or perhaps a “fourth” power—the issues become exquisitely uncertain and will be left for another day.²⁰⁷

V. A PROPOSED SOLUTION

Memo and S opinions present both theoretical issues and practical problems. They generate thorny questions related to the scope of the judicial power and to the separation of powers. The opinions also raise practical problems for the taxpayers who are confused by their purportedly non-precedential status.

This Part argues that the Tax Court should abandon its purportedly non-precedential treatment of Memo opinions and that Congress should repeal Section 7463(b). Constitutional concerns alone should warrant these actions, although the relevant case law remains undeveloped and could change. The

(footnote omitted).

203. *Freytag v. Comm’r*, 501 U.S. 868, 889–90 (1991).

204. *Kuretski v. Comm’r*, 755 F.3d 929, 940–41 (D.C. Cir. 2014).

205. *Id.* at 932, 940–41.

206. For an extended discussion of the confusion related to the constitutional status of the Tax Court, see generally Brant J. Hellwig, *The Constitutional Nature of the United States Tax Court*, VA. TAX REV. (forthcoming).

207. See generally Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 575 (1984) (examining the “difficulty in understanding the relationships between the agencies that actually do the work of law-administration, whose existence is barely hinted at in the Constitution, and the three constitutionally named repositories of all governmental power—Congress, President, and Supreme Court”).

practical problems related to nonprecedential Tax Court opinions provide a more robust opportunity for discussion, and they will be the principal focus here.

A. MEMO OPINIONS

The Tax Court should no longer call its Memo opinions nonprecedential. The Tax Court, taxpayers, the IRS, and Article III courts routinely cite Memo opinions as persuasive or binding authority. To simultaneously maintain, as the Tax Court does, that Memo opinions lack precedential value sows confusion in the law.

A change in the status of Memo opinions would finally update the Tax Court's practices in light of its relocation in the structure of government. The Tax Court first adopted Memo opinions as the Board of Tax Appeals, an independent agency in the Executive branch whose decisions would be reviewed through that lens.²⁰⁸ Given this initial structure, nonprecedential Memo opinions made perfect sense. *Stare decisis* does not apply to agencies, and judicial review would provide an appropriate check on any arbitrary Board interpretations.²⁰⁹

But the Tax Court plays a weightier role now. It hears the vast majority of federal tax cases and apparently exercises the judicial power.²¹⁰ It even sometimes receives special deference from the appellate courts.²¹¹ This increases the need for predictability and reliability in its own decision making.

Also, some of the original justifications for Memo opinions no longer seem relevant. Like unpublished appellate opinions, Memo opinions may

208. See *Old Colony Tr. Co. v. Comm'r*, 279 U.S. 716, 725 (1929) (“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.”).

209. A reversal of *Freytag* would not necessarily revert the Tax Court to its 1920s status, under which it was not bound to follow precedent in the same way as courts. Section 7441's later enactment and its reference to a “court of record” might imply a congressional command to follow principles of *stare decisis*, as would, by negative implication, Section 7463(b)'s denial of precedential status to Summary Opinions. See I.R.C. §§ 7441, 7463(b) (2012).

210. See Lederman, *supra* note 85, at 1836 (“Although the district courts and the U.S. Court of Federal Claims share concurrent jurisdiction over many of its cases, the Tax Court is the trial court of choice for over 95 percent of litigated federal tax cases.”); see also INTERNAL REVENUE SERV., PUB. NO. 55B, INTERNAL REVENUE SERVICE DATA BOOK 2015, at 63 tbl.27 (2015), <https://www.irs.gov/pub/irs-soi/15databk.pdf> (showing 18,365 pending cases in Tax Court and 845 pending cases in other lower federal courts).

211. See *Merkel v. Comm'r*, 192 F.3d 844, 847–48 (9th Cir. 1999) (“Because the Tax Court has special expertise in the field, . . . its opinions bearing on the Internal Revenue Code are ‘entitled to respect.’” (quoting *Harbor Bancorp & Subsidiaries v. Comm'r*, 115 F.3d 722, 727 (1997))); *Bhada v. Comm'r*, 892 F.2d 39, 43 (6th Cir. 1989) (“The issues in this case are close and the interplay of the various sections of the Internal Revenue Code are both complex and confusing. We give some deference to the conclusions of the Tax Court”); *Vukasovich, Inc. v. Comm'r*, 790 F.2d 1409, 1411–12 (9th Cir. 1986) (identifying circuit cases that give deference to Tax Court and others that take a different view).

have been initially adopted for purposes of convenience. The Judicial Conference expressed concerns that publication of every opinion obscured the most significant ones, and circuit courts subsequently began issuing unpublished opinions.²¹² Similar concerns apparently motivated the adoption of Memo opinions, along with concerns over excessive printing costs.²¹³ But today, electronic databases go a long way towards helping taxpayers separate the wheat from the chaff. And even if the Tax Court wishes to save on printing costs, online publication reflects a relatively inexpensive means to share decisions.

In *Hart v. Massanari*, Judge Kozinski identified another possible justification for nonprecedential opinions.²¹⁴ He cautioned that if every appellate opinion earned precedential status, this would “lead to confusion and unnecessary conflict.”²¹⁵ Different judges “may use slightly different language to express the same idea,”²¹⁶ but lawyers would seize on the differences to manufacture conflicts. This would compromise one of a court’s core functions: to ensure “a coherent, consistent and intelligible body of caselaw.”²¹⁷

Admittedly, the problem identified by Judge Kozinski appears frequently in the tax context. Taxpayers, the IRS, and even courts often give talismanic weight to isolated phrases in judicial opinions. This disturbing practice warrants some further attention because it contradicts the Supreme Court’s approach, as illustrated in *Commissioner v. Bollinger*.²¹⁸

In *Bollinger*, the Court addressed whether a corporation acted as a mere agent for its shareholders regarding the record ownership of various properties.²¹⁹ If the corporation were a mere agent, as the shareholders argued, income and losses from the properties would belong to them. However, if no principal–agent relationship existed, tax consequences related to the properties would attach to the corporation.

The parties in *Bollinger* heavily debated a prior Court case, *National Carbide v. Commissioner*, which discussed various factors relevant to

212. See Schiltz, *supra* note 54, at 1434 (“The Judicial Conference was motivated by concern over ‘the rapidly growing number of published opinions . . . and the ever increasing practical difficulty and economic cost of establishing and maintaining accessible private and public law library facilities.’” (quoting JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: MARCH 16–17, 1964, at 11 (1964))).

213. See DUBROFF & HELLWIG, *supra* note 57, at 750–51 (explaining concerns that many Tax Court decisions “were of little value as authority” and should be provided in Memo form to the parties, rather than published, and the Tax Court used Memo opinions “to save printing costs”).

214. *Hart v. Massanari*, 266 F.3d 1155, 1179 (9th Cir. 2001).

215. *Id.*

216. *Id.*

217. *Id.*

218. See generally *Comm’r v. Bollinger*, 485 U.S. 340 (1988).

219. *Id.* at 341. The actual facts in *Bollinger* were somewhat more complicated, in ways not relevant to the discussion here.

principal-agent questions in the corporate context.²²⁰ These factors “bec[a]me known in the lore of federal income tax law as the ‘six *National Carbide* factors.’”²²¹ The tax community essentially treated the statements in *National Carbide* as binding law.

But in *Bollinger*, the Court “decline[d] to parse the text of *National Carbide* as though that were itself the governing statute.”²²² Under general legal principles, the taxpayers had shown that they had established a principal-agent relationship with their corporation, whether or not every *National Carbide* factor had been met. Consequently, the Court entered judgment in their favor.²²³

Bollinger should make taxpayers, the IRS, and lower courts think twice before seizing on errant statements in judicial opinions, whether published or unpublished. Occasionally, in a tax case, a court will warn that “it is a blunder to treat a phrase in an opinion as if it were statutory language.”²²⁴ However, the tax law continues to suffer from numerous purportedly common law doctrines, and the lower courts will routinely use snippets from judicial opinions to override statutory language.²²⁵

Memo opinions might limit this problem by shrinking the universe of cases from which statements may be applied out of context. However, two wrongs do not make a right. The Tax Court should not use nonprecedential opinions to mitigate improper emphasis on judicial expositions. Instead, the Tax Court should adopt the Supreme Court’s approach, under which “general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used,”²²⁶ and are not treated as statements of positive law.

220. *Nat’l Carbide Corp. v. Comm’r*, 336 U.S. 422, 437 (1949).

221. *Bollinger*, 485 U.S. at 346.

222. *Id.* at 349.

223. *Id.* at 350.

224. *Sears, Roebuck & Co. v. Comm’r*, 972 F.2d 858 (7th Cir. 1992).

225. This practice is adopted heavily in the context of tax-conscious or tax-motivated transactions. Under the economic substance doctrine, for example, lower courts will refuse to examine statutory law and instead seize on phrases from various court cases to deny a taxpayer’s claimed benefits. *See, e.g., In re CM Holdings, Inc.*, 301 F.3d 96, 102 (3d Cir. 2002) (“We can forgo examining the intersection of these statutory details, for pursuant to *Gregory v. Helvering* and *Knetsch v. United States*, courts have looked beyond taxpayers’ formal compliance with the Code and analyzed the fundamental substance of transactions.” (citations omitted)); *Crispin v. Comm’r*, 103 T.C.M. (CCH) 1349, 1353 n.12 (2012) (declining to consider statutory arguments because case was decided under the economic substance doctrine), *aff’d*, 708 F.3d 507, 514 n.15 (3d Cir. 2013) (making similar statement). *See generally* Amandeep S. Grewal, *Economic Substance and the Supreme Court*, 116 TAX NOTES 969 (2007) (arguing that lower courts’ approach reflects misunderstanding of Supreme Court’s statute-based approach to tax cases); Joseph Isenbergh, *Musings on Form and Substance in Taxation*, 49 U. CHI. L. REV. 859 (1982).

226. *Cohens v. Virginia*, 19 U.S. 264, 399 (1821); *see also* *Arkansas Game & Fish Comm’n v. United States*, 133 S. Ct. 511, 520 (2012).

It is also doubtful that the Tax Court can firmly predict which opinions should form the authoritative body of tax case law. The Tax Court reaches its decisions in the context of a single dispute between a particular taxpayer and the IRS for a prior taxable year. It does not, understandably, have the foresight necessary to determine the issues whose importance will bloom in later years.

The allegedly straightforward nature of some disputes also does not justify Memo opinions. As Judge Boggs of the Sixth Circuit writes, the notion of “‘easy cases’ that are clearly dictated by existing precedent . . . is self-evidently wrong for both empirical and theoretical reasons.”²²⁷ Like numerous unpublished appellate opinions, numerous Memo opinions have faced sharp reversals.²²⁸

As a practical matter, Memo opinions already enjoy *ersatz* precedential status, given the frequent reliance on them. The Tax Court, in a half-hearted way, even acknowledges the precedential effect of Memo opinions by allowing parties to cite them (just not for their precedential value). But as Judge Kozinski explained, if parties can cite a form of authority, that form of authority will inevitably influence decision making and creep into the *corpus juris*.²²⁹ If the Tax Court really wants to deny precedential status to Memo opinions, it should stop citing them entirely and severely sanction practitioners who do. That approach, although seriously misguided, at least has the virtue of consistency.

The approach suggested here could have one major downside. If every opinion becomes precedential, the Tax Court, an already busy tribunal, might have to work even harder to ensure the accuracy and consistency of its opinions. Alternatively, the argument might go, judges will work an equal number of hours but on a larger number of precedential opinions, leading to a decline in their quality.

Commentators expressed similar doomsday scenarios during debates over unpublished appellate court opinions.²³⁰ But the adoption of Rule 32.1 did not wreak havoc on the appellate courts. Formally establishing the precedential status of Memo opinions, which courts, taxpayers, and the IRS already pay attention to, will not cause the sky to fall.

227. Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2D 17, 20 (2000).

228. See *id.* (noting unpublished appellate opinions that were reversed by the Supreme Court); see also *supra* note 83 and accompanying text.

229. *Hart v. Massanari*, 266 F.3d 1155, 1178 (9th Cir. 2001) (“Faced with the prospect of parties citing these [unpublished] dispositions as precedent, conscientious judges would have to pay much closer attention to the way they word their unpublished rulings. . . . [J]udges would have to start treating unpublished dispositions—those they write, those written by other judges on their panels, and those written by judges on other panels—as mini-opinions.”).

230. See Schiltz, *supra* note 54, at 1452 (noting that opponents of Rule 32.1 recited a “parade of horrors,” including “predictions that it would substantially slow disposition times and cause courts to issue many more one-line orders disposing of appeals”).

General limitations on *stare decisis* can also help mitigate some of the dangers associated with inadequately reasoned cases.²³¹ If any Tax Court opinion passes on an issue only indirectly or maintains reservations about the rule applied, taxpayers rely on the opinion at their peril. *Stare decisis* does not provide an “inexorable command,”²³² and courts may depart from their precedents in appropriate circumstances. But treating Memo opinions as precedential would, at the very least, require that the Tax Court justify its dismissals of them.²³³ This would be far preferable to the current system, where the Tax Court sometimes dismisses Memo opinions with little more than casual hand-waving.²³⁴

The extensive review process for Memo opinions also cuts against any argument that they provide effective shortcuts for fulfilling judicial responsibilities. The authoring Tax Court judge submits a draft of any opinion to the Chief Judge, who determines the Division or Memo designation.²³⁵ This procedure encourages careful attention to all written opinions—the authoring judge does not know in advance which drafts will enjoy mere Memo status. Also, the Chief Judge distributes draft Memo opinions to all Tax Court judges for comment, which again suggests that the court already takes Memo opinions seriously.

Any extra work required for Memo opinions could also save energy down the line. That is, *stare decisis* promotes judicial economy because “no judicial system could do society’s work if it eyed each issue afresh in every case that raised it.”²³⁶ This principle surely extends to tax cases, where many litigants present similar issues related to their tax obligations.

In formally changing its approach to Memo opinions, the Tax Court could also easily avoid metaphysical questions related to the nature of precedent. That is, *stare decisis* comes in many forms, and the precise weight given to a prior authority sometimes varies with the jurist. But a shift in practices will not require a perfectly precise delineation of the exact weight

231. See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (“[W]hen governing decisions are unworkable or are badly reasoned, ‘this Court has never felt constrained to follow precedent.’” (citing *Smith v. Allwright*, 321 U.S. 649, 665 (1944))).

232. *Id.* at 828 (citing *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

233. See *Cheshire v. Comm’r*, 115 T.C. 183, 209 (2000) (“Under the doctrine of *stare decisis* we generally follow the holding of a previously decided published opinion of the Tax Court or explain why we are not doing so.”), *aff’d*, 282 F.3d 326 (5th Cir. 2002).

234. See Kermit Roosevelt III, *Polyphonic Stare Decisis: Listening to Non-Article III Actors*, 83 NOTRE DAME L. REV. 1303, 1305 (2008) (“If a Court abandons precedent too readily and without adequate explanation, observers may conclude that its decisions are driven by preference rather than principle.”).

235. If the Chief Judge classifies an opinion as a Memo opinion, he or she will circulate it to all of the Tax Court’s judges prior to its issuance. If two judges express reservations about the opinion, the Chief Judge will delay its release. See Roberson & Herndon, *supra* note 17, at 87, 89 (discussing Tax Court procedures).

236. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (citing BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921)).

accorded to Memo opinions, nor will it require a code-like guide to circumstances where Memo opinions may be trumped. All the Tax Court needs to do, whether by Rule (preferably) or via a reviewed opinion, is announce that Memo opinions enjoy the same precedential weight as Division opinions. Judicial development regarding the contours of *stare decisis* can then proceed undisturbed.

It is time for the Tax Court to abandon its 1920s approach to Memo opinions. The Tax Court honors its archaic nonprecedential rule in its breach, and whatever its precise constitutional status, the court operates much more like an entity that exercises the judicial power than one that serves purely bureaucratic ends. Taxpayers would benefit from clarification and consistency in the Tax Court's opinion practices.²³⁷

B. S OPINIONS

Section 7463(b), when placed alongside other statutes related to the structure and operation of the Tax Court, reveals congressional equivocation over the status of that entity. Some statutes, like Section 7482, reflect congressional intent to put the Tax Court on the same plane as Article III courts. But the small case provisions, including Section 7463(b), contemplate an entity that operates more like a federal agency than a court.

There is nothing inherently wrong with a voluntary process under which disputes are involved informally, with no opportunity for judicial appeal, and with no establishment of precedent. After all, taxpayers and IRS definitely resolve many disputes without going to court.²³⁸ A streamlined set of procedures for taxpayers to contest their tax deficiencies seems like a wise idea.

But problems emerge when an entity that exercises the judicial power must administer a bureaucratic enterprise. Section 7463(b) and related provisions essentially contemplate that the Tax Court will decide S cases under looser standards than those applied in other cases. In explaining Section 7463(b), for example, the Senate Finance Committee expressed concerns that the Tax Court generally needed to consider “the precedent that it might provide for future cases”²³⁹ whenever it issued an opinion, and this posed difficulties for taxpayers with small disputes.²⁴⁰

237. Cf. William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949) (“[T]here will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon.”).

238. See I.R.C. § 7121 (2012) (allowing the IRS to enter into a final and conclusive closing agreement with a taxpayer); see also I.R.C. § 7123(b)(2) (2012) (IRS must establish options for binding arbitration of disputes that have not been settled at the appeals level); Rev. Proc. 2006-44, 2006-2 CB 800 (establishing binding arbitration procedures); cf. I.R.C. § 6110(k)(3) (2012) (stating that IRS written determinations generally lack precedential status).

239. S. REP. NO. 91-552 (1969), as reprinted in 1969-3 C.B. 423, 614.

240. See also I.R.C. § 7453 (2012) (mandating that the Tax Court follow “rules of practice and procedure . . . as the Tax Court may prescribe and in accordance with the Federal Rules of Evidence” but excepting S cases from this requirement).

It is hard to fault procedures that make the tax system simpler for ordinary taxpayers, but the Tax Court's dual capacities lead to odd and arguably unseemly results. Given that Section 7463(b) removes the check of appellate review and the constraints of *stare decisis*, the Tax Court may decide an issue one way in an S case but in another way in a regular case. The Tax Court's complete adherence to the *Golsen* rule provides a partial safeguard against this tendency,²⁴¹ but one gets the unshakeable feeling that the law operates differently in S cases.²⁴²

Again, there is nothing wrong with using the executive power to show leniency to a particular class of persons who lack resources. But the Tax Court exercises the judicial power, under which statutory interpretation must be performed without bias in favor of a particular litigant.²⁴³ One might respond that the Tax Court exercises judicial power only in regular cases and exercises the executive power in S cases, but this chameleon theory would reflect a rather novel take on constitutional law.²⁴⁴

All that being said, it is difficult to make too strong a policy objection to Section 7463. From the standpoint of a constitutional formalist, Congress would establish the Tax Court as an Article III court, repeal the small case procedures entirely, and establish a quasi-judicial, small case forum within the IRS, with greater resources and taxpayer protections than that associated with the current Appeals office.²⁴⁵ But as a functional matter, the Tax Court separates its small cases from its regular cases and, to some extent, roughly replicates the proposed regime.²⁴⁶

241. See Mezei & Judkins, *supra* note 174, at 351 (noting that the Tax Court applies and follows circuit law even for nonappealable S cases and that without "the *Golsen* rule, Tax Court judges are arguably given broader discretion to mete out justice at whim").

242. See, e.g., Christopher J. Badum, *The Small Tax Case Procedure: How It Works—Does It Work?*, 4 *FORDHAM URB. L.J.* 385, 395 (1976) (stating that Section 7463 "can work in the taxpayer's favor," because the judge "is more likely to decide a close case in favor of the taxpayer since there is no danger that his ruling will open the floodgates as precedent to similar cases which might deprive the IRS of millions of dollars annually").

243. See *Vukasovich, Inc. v. Comm'r*, 790 F.2d 1409, 1412 (9th Cir. 1986) ("[C]ongressional intent in conferring more independence on the Tax Court seems to have been directed at making it function as a court, deciding cases based on judicial reasoning rather than administrative discretion.").

244. Cf. *Freytag v. Comm'r*, 501 U.S. 868, 882 (1991) ("The fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution. If a special trial judge is an inferior officer for purposes of subsections (b)(1), (2), and (3), he is an inferior officer within the meaning of the Appointments Clause and he must be properly appointed.").

245. Generally, "executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution." *Morrison v. Olson*, 487 U.S. 654, 677 (1988) (quoting *Buckley v. Valeo*, 424 U.S. 1, 123 (1976)).

246. Under Tax Court practices, small cases "are not tried by the Tax Court's Judges but, instead, are assigned to Special Trial Judges." 14 *MERTENS LAW OF FEDERAL INCOME TAXATION* § 50:139 (Callaghan 2016). In other respects, small cases follow procedures similar to regular case procedures. See *Mitchell v. Comm'r*, 131 T.C. 215, 235–36 (2008) (Holmes, J., concurring)

Rather than entirely scrap the S case procedures, Congress should amend Section 7463(b) and eliminate its restrictions regarding the precedential value of S opinions. This would give the Tax Court greater rein to determine the prospective effect of S opinions, without creating additional dangers. To the extent that small cases involve simple statutes and simple facts, S opinions will contain only bare legal analysis and short factual recitations. To the extent that small cases implicate complex statutes or complex facts, then it is that much more important that *stare decisis* apply. The absence of appellate review under Section 7463(b) removes a significant check on the judicial power, making the constraining principles of *stare decisis* that much more important.

If Congress eliminates the nonprecedential rule in Section 7463(b), the Tax Court should treat S opinions as precedential for the same reasons discussed regarding Memo opinions. This may raise some concerns, given that S cases themselves are not appealable, and the court might hesitate to apply a new rule without allowing the taxpayer the benefit of further review. However, if an S case really treads new ground, the Tax Court can deny the small case election and decide the case under regular procedures.²⁴⁷ Also, any precedential rule contained in an S opinion would face appellate review when the Tax Court later applied that rule in a regular case. Consequently, the elimination of Section 7463(b)'s nonprecedential rule should not overly disrupt the administration of small cases.²⁴⁸

VI. CONCLUSION

The Tax Court's uncertain constitutional status raises many different theoretical and practical issues.²⁴⁹ This Essay has focused on matters related to *stare decisis*, but the scholarly literature and pending cases present other constitutional issues, including matters related to the Tax Court's exercise of equitable powers and the President's removal power over judges.²⁵⁰

(discussing how draft S opinions are submitted to Chief Judge for review).

247. Section 7463 allows a taxpayer to elect small case status only with the Tax Court's concurrence. Also, the IRS can request that a case be heard under regular procedures. *See* Kallich v. Comm'r, 89 T.C. 676, 681 (1987) (noting that a taxpayer's "option to elect the small tax case procedure is not unlimited, even when the jurisdictional maximum for a small tax case has not been exceeded, as the election must be concurred in by the Court," and that the Commissioner can challenge the S case election on various grounds).

248. Regular Tax Court judges might scoff at allowing Special Trial Judges to establish binding precedential rules. However, that is merely a concern of internal politics and can be addressed in various ways, including by expanding internal review of S opinions prior to their issuance.

249. *See generally* Deborah A. Geier, *The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory*, 76 CORNELL L. REV. 985 (1991); Hellwig, *supra* note 206.

250. *See* Meadows v. Comm'r, 405 F.3d 949, 953 (11th Cir. 2005) ("[T]he requested relief that Meadows seeks . . . arguably would require the Tax Court to exercise equitable power to expand its statutorily prescribed jurisdiction. . . . This raises a constitutional question: if a party's position urges the Tax Court to award relief that would exceed its statutorily prescribed

To address these issues, Congress should consider statutory amendments that would make the Tax Court fit more neatly into the constitutional framework. Establishing the Tax Court as a full-fledged Article III tribunal seems like the obvious solution,²⁵¹ but the legislative appetite for that approach seems small. Senator Hatch introduced a provision (later enacted) to affirm the Tax Court's independence from the IRS,²⁵² but Congress left alone the constitutional questions addressed in *Kuretski*.²⁵³

Until Congress takes meaningful action or the Court revisits *Freitag*, tensions will persist regarding the exercise of the judicial power by a body that still retains some practices associated with its prior life as a federal agency. While waiting for a solution, the Tax Court should independently update its treatment of Memo opinions to account for its apparent change in constitutional status. Congress should also take a small interim step and eliminate the Section 7463(b) restrictions on the precedential status of S opinions.

jurisdiction, would that run afoul of Article III?" (citing Diane L. Fahey, *The Tax Court's Jurisdiction over Due Process Collection Appeals: Is It Constitutional?*, 55 BAYLOR L. REV. 453, 454 (2003)); Leandra Lederman, *Equity and the Article I Court: Is the Tax Court's Exercise of Equitable Powers Constitutional?*, 5 FLA. TAX REV. 357, 362 (2001) ("[T]he Tax Court's tendency to apply equitable doctrines when necessary to avoid harsh outcomes dictated by statute lacks constitutional authority.").

251. See Leandra Lederman, *Tax Appeal: A Proposal to Make the United States Tax Court More Judicial*, 85 WASH. U. L. REV. 1195, 1248 (2008) ("Because the Tax Court truly is a court, with solely judicial functions, it is most appropriate to treat it as one.").

252. See S. REP. NO. 114-14, at 10 (2015) ("The Committee is concerned that statements in *Kuretski v. Commissioner* may lead the public to question the independence of the Tax Court, especially in relation to the Department of Treasury or the Internal Revenue Service. The Committee wishes to remove any uncertainty caused by *Kuretski v. Commissioner*, and to ensure that there is no appearance of institutional bias."). For a discussion of the constitutional issues left open by the amendment to Section 7441, see Daniel Hemel, *Tinkering with the Tax Court*, U. CHI. L. SCH. FAC. BLOG (Dec. 18, 2015), <http://uchicagolaw.typepad.com/faculty/2015/12/tinkering-with-the-tax-court.html>.

253. See JOINT COMM. ON TAXATION, DESCRIPTION OF THE CHAIRMAN'S MARK OF VARIOUS PROPOSALS RELATING TO ACCESS AND ADMINISTRATION OF THE U.S. TAX COURT, JCX-19-15, at 9 (2015) (describing proposal to "clarif[y] that the Tax Court is not within the Executive Branch"). Unfortunately, the proposal does not indicate *where* the Tax Court resides in the constitutional structure. And it is highly doubtful that Congress can, through a mere label, establish the status of an entity under the Constitution. See *Mistretta v. United States*, 488 U.S. 361, 420 (1989) (Scalia, J., dissenting) ("I doubt whether Congress can 'locate' an entity within one Branch or another for constitutional purposes by merely saying so."). Cf. *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1231 (2015) ("Congressional pronouncements, though instructive as to matters within Congress' authority to address . . . are not dispositive of [an entity's] status as a governmental entity for purposes of separation of powers analysis under the Constitution.").