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## THE WARREN COURT AND FEDERAL TAX POLICY

Martin Shapiro\*

The subjects of this article are taxes and the Supreme Court. Hardly an unnatural combination, but, nevertheless, one rarely made.<sup>1</sup> Those lawyers and political scientists who view themselves as students of the Court have tended to deal with the most general problems; the relation of *the* Supreme Court to *the* Congress or *the* democratic system.<sup>2</sup> Furthermore, students of the Court are almost invariably engaged in teaching and writing about constitutional law, and the tax jurisdiction of the Supreme Court consists largely of statutory construction rather than constitutional interpretation. On the other hand lawyers whose principal interest is taxation are understandably engrossed in the details of a highly complex subject. Their concern is with the state of the law not the courts, particularly a court which seemingly does little work in the field. When they do discuss a Supreme Court decision, it is usually in terms of its specific impact on a particular provision of the Revenue Code.

Yet the observer of the Court and the tax practitioner have a great deal to offer one another. Tax policy-making involves the interaction of the Congress, an administrative agency (the Internal Revenue Service) and the courts; just the type of intergovernmental problem with which those who analyze judicial review have been struggling on a broader scale. Recent interpretations of the Court have increasingly been phrased in terms of "access," pressure groups etc.<sup>3</sup> The I.R.S. has high access to the Court both in the sense of engaging in constant litigation before it and gaining a relatively sympathetic hearing from it. The Service is also a pressure group at least in so far as it has certain institutional interests and policy preferences which it seeks to persuade the judiciary to support by appropriate decisions. An examination of the Justices' tax decisions, therefore, provides a kind of case study in the politics of the Supreme Court.

Conversely the tax lawyer need not content himself with an approach based entirely on logical and precedential analysis of statutes, regulations, rulings and decisions. Surely no one is more aware than the lawyer that *who* makes a decision profoundly influences what the decision will be. The politics of the Supreme Court in the tax field largely revolve around the question of who shall decide, the I.R.S. or the Court. Moreover, as we shall presently see, Supreme Court treatment of any given piece of tax

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<sup>1</sup>For an important exception see Lowndes, *Federal Taxation and the Supreme Court*, 1960 SUPREME COURT REVIEW 222.

<sup>2</sup>See (*e.g.*) BLACK, *THE PEOPLE AND THE COURT* (1960); MURPHY, *CONGRESS AND THE COURT* (1962).

<sup>3</sup>See MURPHY, *op. cit. supra* note 2; TRUMAN, *THE GOVERNMENTAL PROCESS* 479-501 (1960); Vose, *Litigation As a Form of Pressure Group Activity* in ULMER, ed., *INTRODUCTORY READINGS IN POLITICAL BEHAVIOR* 209 (1961).

litigation is largely dependent on certain general patterns of reaction which the Court has established. And these patterns are related less to the legal aspects of the cases before it than to the Court's vision of its own position in the tax policy-making process vis a vis Congress and the I.R.S. The politics of the Court thus becomes an integral part of tax law. This article will attempt to sketch the Court's present role in the field of federal taxation.

The two most striking features of the Warren Court's<sup>4</sup> record on substantive tax issues are its desire to avoid over-involvement in complex economic matters and its general, but not complete, submission to the guidance of the Internal Revenue Service. The avoidance reaction is, of course, not peculiar to the field of taxation. It has been much commented upon in such other economic areas as bankruptcy and copyright litigation.<sup>5</sup> And, in many instances, the submission to I.R.S. is simply the reciprocal of judicial non-involvement. For if the Court will not take the lead in interpreting the Revenue Code, then the Service is left alone, or at least dominant in the field. In any event judicial retreat from economic complexity and judicial deference to the agency which administers that complexity are so intimately related that their separation in the discussion below is largely for analytical convenience.

### I. JUDICIAL ABSTENTION

The Warren Court's gingerly approach to taxation is not reflected in the absence of tax decisions from the reports. The Court takes a fair number of cases involving both substantive and administrative or procedural problems.<sup>6</sup> However these cases typically reach the Court because of conflicts on the circuits, or between the circuits and the Tax Court,<sup>7</sup> which the Supreme Court has felt unable to ignore because of its special responsibility for maintaining uniformity in federal law. On the whole the Court has kept a very tight rein on its exercise of review.<sup>8</sup>

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<sup>4</sup>I have taken the 1957 term as the beginning of the "Warren Court." In that term Justices Brennan and Whittaker replaced Justices Minton and Reed. Justice Harlan had participated in none of the 1955 term tax decisions and in only one, and there indecisively, in the 1956 term. It was not until 1957 that decisions can be considered even roughly indicative of present Court attitudes.

<sup>5</sup>See Note, 1960 U. ILL. L. FORUM 585.

<sup>6</sup>This article deals only with the former. Cases involving collection rather than assessment such as *United States v. Price*, 361 U.S. 304 (1960) (90 day letters) and *United States v. Massei*, 355 U.S. 595 (1958) (burden of proof in tax evasion prosecution) and the very extensive litigation over federal tax liens have not been treated because this article focuses on the Court's role in the policy making, not the administrative, aspects of taxation.

<sup>7</sup>See e.g., *Putnam v. C.I.R.*, 352 U.S. 82 (1956); *Peurifoy v. C.I.R.*, 358 U.S. 59 (1958); *Tank Truck Rentals, Inc. v. C.I.R.*, 356 U.S. 30 (1958); *C.I.R. v. Sullivan*, 356 U.S. 27 (1958); *C.I.R. v. P. G. Lake, Inc.*, 356 U.S. 260 (1958); *Parsons v. Smith*, 359 U.S. 215 (1959); *C.I.R. v. Hansen*, 360 U.S. 446 (1959); *Hanover Bank v. C.I.R.*, 82 S.Ct. 1080 (1962); *United States v. Davis*, 82 S.Ct. 1190 (1962); *Turnbow v. C.I.R.*, 82 S.Ct. 353 (1962); *C.I.R. v. Bilder*, 82 S.Ct. 881 (1962).

<sup>8</sup>Cary, *Reflections Upon the American Law Institute Tax Project and the Internal Revenue Code: A Plea for a Moratorium and Reappraisal*, 60 COLUM. L. REV. 259, 281 (1960).

The Warren Court's modesty in the tax field has not only been maintained by its limited certiorari policy, but by the very techniques it has adopted for deciding those cases which it has accepted. Foremost among these is the Court's predilection for reducing the case materials to the simplest possible form. Since the legal devices at issue are often exceedingly complex, the Court will frequently ignore the legal form and focus on the economic substance. Thus in *Knetsch v. United States*,<sup>9</sup> where a complex borrowing and insurance transaction in effect found the taxpayer borrowing at 3.5% to earn at 2.5% and claiming his interest payments as a deduction, the Court found the transaction a sham. It held that, in spite of the formal loan arrangement, no borrowing and thus no interest payments had actually occurred. Symptomatically, Justice Black for the dissenters objects not to the reducing of technical and complex legal devices to the simplicity of what "really" happened, but to the possibility that the majority decision will result in a flood of cases in which the Court will be asked to distinguish between transactions of commercial substance and tax avoidance devices. The dissenters modestly assign such a chore to the legislature rather than the courts.

*Libsom Shop v. Koehler*<sup>10</sup> also illustrates the Court's desire to stay out of the complexities of law. The taxpayer, a corporation formed by the merger of sixteen former corporations, attempted to take advantage of the earlier firms' loss carryovers which are available only to "the same taxable entity."<sup>11</sup> The Court exhibited little desire to examine the corporation laws under which the merger took place in order to establish whether the new corporation was technically a continuation of the old. Instead it relied almost entirely on the fact that there had previously been sixteen firms where there was now only one in finding that the new corporation was not entitled to the carryovers.

Similarly in *Putnam v. C.I.R.*,<sup>12</sup> in which a guarantor who discharged a loan claimed a bad debt deduction, the Court, while purporting to decide the case by reference to the common law of subrogation, seems to have looked to the substance of the transaction rather than the technical distinctions between lender, borrower and guarantor.<sup>13</sup> Recently, in *Turnbow v. C.I.R.*,<sup>14</sup> the taxpayer rested his case on a complicated set of assumptions derivable from the complex Code provisions for stock transfer and reorganization. The Court, repeatedly stressing the actual nature of the

<sup>9</sup>364 U.S. 361 (1960).

<sup>10</sup>353 U.S. 382 (1957).

<sup>11</sup>*Id.* at 385. The Code refers to "the tax payer [who] has a net operating loss." Sec. 122 (b) (2) (C), 64 Stat. 937, 938, 65 Stat. 505, 26 U.S.C. Sec. 122 (b) (2) (C) (1954).

<sup>12</sup>352 U.S. 82 (1956).

<sup>13</sup>The guarantor had been the principal organizer and eventually sole stock holder of the corporation whose loans he had guaranteed. The Court concluded that "There is no real or economic difference between the loss of an investment made in the form of a direct loan to a corporation and one made indirectly in the form of a guaranteed bank loan." *Id.* at 92.

<sup>14</sup>82 S.Ct. 353 (1962).

transaction, refused to clothe a factually simple matter in an elaborate set of legal hypotheses and breathed an almost audible sigh of relief in finding that the factual situation made it unnecessary to venture into the legal questions raised by the parties.

However, where the reality might lead the Court deeper into the complexities of taxation, and consideration of the formal aspect of the situation will allow the Court to avoid those complexities, the formal aspect may well triumph. In *Fidelity-Philadelphia Trust Co. v. Smith*,<sup>15</sup> where an annuity plan and insurance policy were so combined as to in fact constitute one parcel, the Court insisted upon maintaining the separate formal identity of the two even while admitting that their purchase constituted a single transaction.<sup>16</sup>

The advantage to the Court of this approach is that it seems to lead to uniform tax treatment of the proceeds of all assigned life insurance policies whether purchased in annuity combinations or not. Such treatment would presumably reduce the Court's need to handle this type of case. Here the Court is willing to go along with, and thus be responsible for interpreting, legal technicalities in a given case if the end result is to reduce the Court's future tax work load.

In *Meyer v. United States*<sup>17</sup> the Court seized upon the fact that a single insurance policy had been issued in order to avoid dividing the proceeds into two properties for estate tax purposes although in common sense terms two properties had come into existence. In *C.I.R. v. Lester*<sup>18</sup> the Court held the periodic payments of a husband to his divorced wife to be entirely deductible alimony although the payments were to be reduced by one-sixth if any of the three children in the wife's custody married, were emancipated or died. (Child support payments, unlike alimony, are not deductible.) In *United States v. Davis*<sup>19</sup> a husband's property settlement in connection with his divorce was treated as an arms-length transaction concerned only with the marital rights of the wife. The Court refused to recognize the fact that while a settlement might formally be such a transaction, in fact husbands are often paying partly in compensation for marital rights and in part simply to obtain release from an unwanted partner. The Court recognized the legalistic but not the emotional elements of divorce. In all three cases the Court tended to ignore the economic and social reality and the result was to allow the Court to avoid examining the complex details of financial arrangements by treating them as simple wholes.

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<sup>15</sup>356 U.S. 274 (1958).

<sup>16</sup>One could argue that this is a realistic position since the annuity and the policy could be sold or otherwise disposed of separately. But the actual fact situation is one in which the purchaser reaps his intended benefits by maintaining the two in combination.

<sup>17</sup>364 U.S. 410 (1960).

<sup>18</sup>366 U.S. 299 (1961).

<sup>19</sup>82 S.Ct. 1190 (1962).

A companion technique to that of reducing complex situations to simple ones has been the Court's policy of refusing to construct or enforce general rules. Instead of establishing legal standards, an approach which would push it head and shoulders into the policy-making realm, the Warren Court has typically decided cases on the particular facts involved.

For instance, in *Automobile Club of Michigan v. C.I.R.*<sup>20</sup> the Club received one lump sum annual dues payment in any month of the calendar year in return for road service in the succeeding twelve months. Its net income was thus the annual dues minus the cost of providing the road service in each of those succeeding months. Therefore, under the accrual method of accounting, it showed one-twelfth of the lump sum as gross income in each of those twelve months even though some of the months fell in the next tax year. The Court, however, found the entire lump sum to be income within the tax year it was received.

Since the auto club's position seemed to be in line with the general principle that taxable income should correspond to business income as determined by normal accounting practices,<sup>21</sup> the Court had the opportunity to make a major pronouncement on the accrual method. Such a pronouncement seems to have been sorely needed. But the Court rests its decision on a determination that the auto club's accounting method was "purely artificial" because there was *in fact* "no relation" between dues and services rendered.<sup>22</sup> Thus the Court avoids making any rule on the treatment of prepayments by taxpayers keeping books on the accrual method by finding that in this particular case, the payments involved were not actually prepayments.

*C.I.R. v. Duberstein*,<sup>23</sup> *United States v. Kaiser*,<sup>24</sup> and *Stanton v. United States*<sup>25</sup> dealt respectively with a Cadillac given to a man who had supplied business leads, a gratuity to a retiring church administrative official and strike benefits. The Court was in effect asked to restate its rule distinguishing gifts from income. By judiciously citing both the majority and dissenting opinions in the formerly governing case, *Bogardus v. C.I.R.*,<sup>26</sup> the Court avoided constructing any rule at all.<sup>27</sup> More important, by stressing questions of fact rather than law<sup>28</sup> and refusing a new rule while muddying the old, the justices have turned the trial court into the court of

<sup>20</sup>353 U.S. 180 (1957).

<sup>21</sup>See Note, 1957 U. ILL. L. FORUM 517, 520-21 (1957).

<sup>22</sup>353 U.S. 180, 189 (1957).

<sup>23</sup>363 U.S. 278 (1960).

<sup>24</sup>363 U.S. 299 (1960).

<sup>25</sup>363 U.S. 278 (1960).

<sup>26</sup>302 U.S. 34 (1937).

<sup>27</sup>By elaborate inference some new rules or at least approaches can be derived. See Hauser, *Business Gifts and the Supreme Court*, 38 TAXES 942 (1960). But the point is that it is only by a kind of guessing game that such rules emerge. The Court has not committed itself to anything.

<sup>28</sup>It reversed *Duberstein* because the Tax Court findings were not "clearly erroneous," remanded *Stanton* for further finding of facts, and upheld a jury finding of fact in *Kaiser*.

last resort for most cases and sought to stem the stream of appeals which used to arise under the *Bogardus* rule.

Even in *Knetsch* where the Court was willing to decide the instant case, it decided solely on the basis that no indebtedness and, therefore, no deductible interest within the intent of the statute had in fact been created. It refused to confirm or deny a circuit court rule that where tax avoidance was the sole motive of a transaction, no interest deduction might be had.<sup>29</sup>

In *Parsons v. Smith*<sup>30</sup> the Court had the opportunity to review a whole catalogue of Tax Court and circuit rules for determining when strippers who did not own the mineral lands they mined had sufficient "economic interest" in them to claim depletion allowances. But Justice Whittaker contented himself with mentioning each test in turn without committing himself to any one or combination of several as decisive.<sup>31</sup> The Court was also asked for a rule, this time on what constituted "away from home" business expenses, in *Pewrifoys v. C.I.R.*<sup>32</sup> It refused a rule by treating the problem as strictly one of fact finding<sup>33</sup> even though there was a long standing legal conflict on the circuits which had not been resolved by a previous Supreme Court opinion.<sup>34</sup>

In avoiding rigorous rules, the Warren Court is frequently aided by the vagueness of both the statutory language and its predecessors' opinions. Thus when *Tank Truck Rentals v. C.I.R.*,<sup>35</sup> *Hoover Motor Express Co. v. United States*<sup>36</sup> and *C.I.R. v. Sullivan*,<sup>37</sup> all cases involving tax deductions for rather atypical (i.e. criminal) "business" expenses, were decided, the Court easily avoided a general rule. The statute speaks of "ordinary and necessary" expenditures and earlier courts had insisted that these words were intended not as terms of art but reflections of business practice.<sup>38</sup>

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<sup>29</sup>This is undoubtedly why the majority felt that Justice Black's fears were excessive. The case does not commit the Court to applying case by case a rule which distinguishes tax avoidance from "legitimate" transactions. It only requires that lower courts make a factual determination as to whether loans actually occurred where interest deductions are claimed.

<sup>30</sup>359 U.S. 215 (1959).

<sup>31</sup>It is not clear in this case whether the Court is rejecting all the tests in favor of a "realistic" examination of the actual economic situation or marshalling a series of black and white tests and saying the taxpayer flunks them all so that there is no reason to determine which test is decisive.

<sup>32</sup>358 U.S. 59 (1958).

<sup>33</sup>It ruled that the decision of the Tax Court (27 T.C. 149 (1957)) hinged on a finding of fact (that the employee's job was "temporary" rather than "indefinite"), that the Circuit found the Tax Court finding "clearly erroneous," (254 F.2d 483 (4th Cir. 1957)) and that in doing so the Circuit made a "fair assessment of the record" so that Supreme Court intervention was not required. See also *Rudolph v. United States* (82 S.Ct. 1277 (1962)) in which, although three of the justices wish to provide some guidance to the lower courts on the tax treatment of expense paid trips, the majority, using the "clearly erroneous rule," dismiss a previously granted writ of certiorari in order to avoid dealing with the problem.

<sup>34</sup>*C.I.R. v. Flowers*, 326 U.S. 465 (1946). See Note, 44 CORNELL L. Q. 270 (1959).

<sup>35</sup>356 U.S. 30 (1958).

<sup>36</sup>356 U.S. 38 (1958).

<sup>37</sup>356 U.S. 27 (1958).

<sup>38</sup>*Deputy v. DuPont*, 308 U.S. 488 (1940) and particularly Robert's dissent at 499; *Welch v. Helvering*, 290 U.S. 111 (1933).

Therefore, the Court can content itself with examining the realities of business practice on a case by case basis without formulating any general explanation of its apparently contradictory decisions in these three cases.

However, just as the Court now and then looks away from reality toward form, particularly if such a glance simplifies its business, it also on occasion makes a rule. In the *Lister*<sup>39</sup> case it holds that unless child support portions are specifically defined in alimony payments, the whole sum may be treated as deductible alimony. The Court had ducked the problem as long as it could.<sup>40</sup> It finally decided the question only in the face of a massive conflict which involved the Tax Court and the 1st, 2nd, 6th, 7th, and 9th Circuits.<sup>41</sup> Under this pressure it chose a rule sufficiently simple to solve the circuits' problems and sufficiently simple-minded to insure that if policy is to be made in the future on this question, it will be made by Congress not the Court.<sup>42</sup>

Penetration from legal form to economic reality and refusal to formulate general legal rules may be the weapons of a politically active Court which refuses to have its discretion limited either by legal mumbo jumbo or its own previously announced formulae. But they are only weapons for an active Court which chooses to use them as such. The Court which adopts a case by case approach may establish for itself a roving commission to decisively supervise the policy-making of the lower courts and other governmental agencies. The Court which consistently looks to economic reality may with sufficient judicial activity markedly influence the tone and trend of governmental supervision of business.<sup>43</sup>

However, when the Court makes only an occasional decision and that under duress, the realistic case by case approach becomes in reality a few isolated decisions limited to their particular facts. The emphasis on facts shifts the burden of supervision to the trial courts. The refusal to make rules in a highly codified and rule-laden area of public policy becomes a refusal to participate in policy-making. The avoidance of technicalities in a technical field produces only a Court which occasionally shouts that what the Revenue Service or the taxpayer is doing in some particular instance is just too damned silly to tolerate. A not very dignified, but I think accurate, picture is that of an adult court wanting to ignore the little circuits—stepping in only when it has to stop a fight, and then quieting the children without taking sides or committing itself to the game because, as the eldest, it would have to take the lead if it decided to play.

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<sup>39</sup>C.I.R. v. Lester, 366 U.S. 299 (1961).

<sup>40</sup>See C.I.R. v. Weil, 353 U.S. 958 (1957) (cert. denied) and Eisinger v. C.I.R., 356 U.S. 913 (1950) (cert. denied).

<sup>41</sup>See Note, 45 MARQ. L. REV. 123 (1961).

<sup>42</sup>Justice Clark grounded his opinion on the supposed Congressional intent that child support portions were to be expressly specified before they became taxable. The whole opinion is a clear declaration to Congress that if it wants to do something in this field it must do it itself.

<sup>43</sup>See NEALE, THE ANTITRUST LAWS OF THE U.S.A. (1960).

But if the Court will not lead or even play, there are others who are eager to do so.

## II. COURT AND I.R.S.

The Warren Court's general reluctance to commit itself in the tax area is, of course, partly a cause and partly a result of its relationship with the I.R.S. The interconnection between general judicial passivity and particular deference to a specific fellow agency can best be seen in those cases involving long standing Treasury Regulations and Service Rulings.<sup>44</sup> For instance, in *Cammarano v. United States*,<sup>45</sup> the Court was confronted with the question of whether lobbying expenditures were deductible as "ordinary and necessary" business expenses. We have already noted the Court's reluctance to establish any rules for interpreting this phrase. In *Cammarano*, it seizes upon two interrelated devices to escape responsibility for rule making. First, it emphasizes the long standing administrative practice of the I.R.S. Then the opinion notes that Congress had reenacted the code provision without alteration subsequent to the establishment of this practice. Congress, therefore, must have approved it. Justice Harlan concludes that the Treasury Regulations had "acquired the force of law" and "themselves constitute an expression of a sharply defined national policy."<sup>46</sup>

The reenactment doctrine is, of course, in and of itself somewhat dubious since it seeks to establish what the legislature meant from what it has *not* said.<sup>47</sup> The doctrine also assumes that the Congress was aware of a clear and consistent line of administrative and judicial interpretation at the time it chose to keep silent. Aside from the general problem of imputing to Congress a clear awareness of anything, particularly in the complex tax field, neither the administrative nor judicial treatment of lobbying expenditures seems to have been sufficiently consistent to warrant application of the reenactment doctrine in this case.<sup>48</sup>

More important than whether reenactment actually applies in this particular case, or in *Massey Motors, Inc. v. United States*<sup>49</sup> another im-

<sup>44</sup>The Court sometimes draws a distinction between Treasury Regulations and Service Rulings viewing only the former as authoritative. See *Higgins v. C.I.R.*, 312 U.S. 212 (1941); *Biddle v. C.I.R.*, 302 U.S. 573 (1938); *Helvering v. New York Trust Co.*, 292 U.S. 455 (1934). But the stronger tendency seems to have been to ignore the distinction. See *Corn Products Refining Co. v. C.I.R.*, 350 U.S. 46 (1955); *Helvering v. Wilshire Oil Co.*, 308 U.S. 90 (1939); *Estate of Sanford v. C.I.R.*, 308 U.S. 39 (1939). The Warren Court seems to be following the latter course. See *Cory Corp. v. Sauber*, 363 U.S. 709 (1960). *Hanover Bank v. C.I.R.*, 82 S.Ct. 1080, 1088 (1962).

<sup>45</sup>358 U.S. 498 (1959).

<sup>46</sup>*Id.* at 508, 510.

<sup>47</sup>See Brown, *Regulations, Reenactment and the Revenue Acts*, 54 HARV. L. REV. 377 (1941); Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398 (1941); Paul, *Use and Abuse of Tax Regulations in Statutory Construction*, 49 YALE L.J. 660 (1940).

<sup>48</sup>See Comment, 69 YALE L.J. 1017 (1960); Spiegel, *Deductibility of Lobbying Initiative and Referendum Expenses: A Problem for Congressional Consideration*, 45 CALIF. L. REV. 1 (1957).

<sup>49</sup>364 U.S. 92 (1960). The Court again relies on a combination of long standing practice and reenactment in *United States v. Davis*, 82 S.Ct. 1190, 1193-94 (1962).

portant case which combines reenactment with long standing practice, is the whole line of tactics applied by the Court. The I.R.S., like any bureaucracy, seeks whenever possible to develop a consistent line of practice. Because of the periodic Code revisions, tax law may be viewed as in a state of nearly constant reenactment. Therefore, when the Court invokes long standing administrative practice and the reenactment doctrine, it tends to contract out of the tax law field entirely. The administrative agency by action and the Congress by inaction have made all the legal decisions. There are none left for the Court to make. And when the Court withdraws, it leaves the field largely in the hands of the agency which makes the long standing practice. Court retreat implies I.R.S. advance.

Of course when the Service vacillates, it may tempt the Court into a more active role and lose its case as it did in *Haynes v. United States*<sup>50</sup> where the Court stressed Service inconsistency. Or when the Service itself wishes to abandon long standing practice, the Court may be unwilling to give up its crutch to please the Commissioner.<sup>51</sup> However, the Service is not always debarred from changing its mind<sup>52</sup> and can hope to be upheld particularly when it has followed a new interpretation consistently after abandoning the old and when the new has been followed for some time before it is tested by the Court.<sup>53</sup>

Thus the Court generally uses long standing practice and reenactment to keep itself out of policy making in the tax field. In those cases in which the Service also uses these doctrines, the situation is ideal because the Court avoids both rule making and conflicts with the Service. Where the Service wishes to break with long standing practice, the doctrines are of less use to the Court because they would involve the justices in a conflict with another tax agency, i.e. involve them in the policy making process—just what the doctrines were designed to avoid. Therefore, as long as the Service can provide some facade of consistency, the Court is unlikely to emphasize the “long” in long standing. Moreover the Court’s limited certiorari policy means that the Service is likely to be provided with a fairly extended period in which to make a new practice “long,” before the taxpayer finally manages to get it before the Court. The inevitable result

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<sup>50</sup>353 U.S. 81 (1957).

<sup>51</sup>*Hanover Bank v. C.I.R.*, 82 S.Ct. 1080, 1089 n. 17 (1962); see *Cory Corp. v. Sauber*, 363 U.S. 709 (1960). The Court again combines reenactment with long standing practice. “Congress did not change the statute though it was specifically advised in 1956 that that was the test which was being applied.” (at 712).

<sup>52</sup>See Comment, 28 U. CHI. L. REV. 380 (1961).

<sup>53</sup>See *Tank Truck Rentals, Inc. v. C.I.R.*, 356 U.S. 30 (ruling 1942, rescinded 1950, case 1958); *C.I.R. v. P.G. Lake, Inc.*, 356 U.S. 260 (service reversed self 1946, case (1958); *Automobile Club of Michigan v. C.I.R.*, 353 U.S. 180 (original rulings 1934 and 38, reversed 1945, case 1956). In the last named case, taxpayer argued unsuccessfully that previous rulings estopped C.I.R.S. from making retroactive assessments. In general the doctrines of collateral estoppel, res judicata and stare decisis have been severely limited in connection with Service and Treasury decisions. See Note, 56 COLUM. L. REV. 1115, 1115-17 (1956).

is that the Court, in attempting to avoid involvement in tax policy, willy-nilly acts in support of the I.R.S.<sup>54</sup>

Nor should the I.R.S. be considered a "neutral" agency which simply does what the courts have left to it. The Service has a strong and persistent sense of its own institutional interests. Quite naturally its view of the public interest—largely in terms of maximizing the flow of tax dollars—becomes inextricably mixed with those institutional interests in its own success and prestige. What is good for the Service is good for the country and vice versa. What is good for both is to get the maximum yield from the taxpayer, perhaps even when the Congress does not desire it so.

Several of the key cases with which the Warren Court has dealt illustrate the Service's skill and persistence in fulfilling its vision of proper tax policy.

*Hertz v. United States*<sup>55</sup> concerned the concepts of useful life and salvage value. Useful life had for 45 years been taken by businessmen, the I.R.S. and the courts to refer to how long an item would perform an economic function no matter how many successive owners used it. Depreciation was calculated as the difference between initial cost and salvage value distributed over the useful life of the item.<sup>56</sup> Until 1939, when an item was sold for more than it cost less depreciation, the proceeds were treated as income. But Sec. 117 (j) of the 1939 Revenue Code shifted these receipts to capital gains. Sec. 167 of the 1954 Code allowed accelerated depreciation for items with useful life of over three years. The capital gains combined with the acceleration provisions may permit substantial tax advantages to businesses which sell some of their capital goods particularly if they "over depreciate."

The Service tried to get Congress to repeal 117 (j). When that move failed, it attempted to narrow the application of both 117 (j) and 167 through a series of its own rulings most of which proved abortive.<sup>57</sup> In 1956, after both approaches had failed, the Service simply redefined useful life as the period in which the item was used by one company. Salvage value then became the sale price of the item to a second company. The new definitions considerably narrowed the difference between initial cost and salvage value, particularly in periods of inflation, and thus reduced total depreciation. At the same time they deprived firms which kept items less than three years of the benefit of the accelerated depreciation provisions.

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<sup>54</sup>The problem of retroactivity in both its legal and moral aspects broods over all these cases. See Comment, 28 U. CHI. L. REV. 380 (1961). From this point of view the Court's general attraction to consistency may be a good thing. We are concerned here, however, with the impact of such an approach on the Court's relation with the Service.

<sup>55</sup>364 U.S. 122 (1960).

<sup>56</sup>Yellon, *Depreciation Development in Congress and the Courts*, 38 TAXES 952, 952-53 (1960); Note, 107 U. PENN. L. REV. 865, 866 (1959) and cases cited there.

<sup>57</sup>Note, *op. cit. supra* note 56 at 569-70.

Thus, if these definitions became good law, the Service would succeed in avoiding what it considered the unfortunate results of the two Congressional enactments. On to the Courts. The 5th and 9th Circuits disagreed on whether the new or traditional definitions were valid.<sup>58</sup> The Supreme Court granted certiorari. The Service's new definitions were upheld. The taxpayer paid more taxes. There is more than one way to skin a cat.

In *C.I.R. v. Hansen*,<sup>59</sup> the Court dealt with a complex problem of accrual bookkeeping, bad debts and the relation of retailers who guaranteed loans to the finance companies who made them. The details are unimportant here. The point is that under the interpretation of the problem adopted by the I.R.S. some retailers would actually be paying taxes on gross rather than net income.<sup>60</sup> At the behest of the American Institute of C.P.A.s Congress passed legislation to solve the problem.<sup>61</sup> The section was repealed shortly after enactment because the I.R.S. failed (refused?) to adopt regulations necessary to restrict the scope of the statute sufficiently to make it workable.<sup>62</sup>

Defeating Congress was not enough. Since the 1930's the Circuits had consistently opposed the Commissioner's interpretation. In 1958 the Commissioner finally succeeded in getting the 6th and 7th Circuits to back him against earlier decisions by the 3rd, 4th, 5th, 8th, and 9th.<sup>63</sup> The Supreme Court affirmed the circuit friends of the Commissioner. The taxpayer left six men on base but was unable to score the crucial run. The Service wins.<sup>64</sup>

*Automobile Club of Michigan v. C.I.R.*, discussed above, concerns another I.R.S. fight. As in *Hansen*, the Service's position ran counter to normal accounting practices and the Congress legislated to bring the Commissioner into line.<sup>65</sup> The Treasury, this time by direct appeal to Congress rather than inaction, got the statute repealed.<sup>66</sup> This Congressional action did not settle the legal question but simply returned it to its original state of uncertainty. So the Service needed and sought Supreme Court confirma-

<sup>58</sup>Cf. *Evans v. C.I.R.*, 264 F.2d 502 (9th Cir. 1959) *rev'd* 364 U.S. 92 (1960) with *United States v. Massey Motors, Inc.*, 264 F.2d 552 (5th Cir. 1959) *aff'd* 364 U.S. 92 (1960).

<sup>59</sup>360 U.S. 446 (1959).

<sup>60</sup>See Note, 7 U.C.L.A. L. REV. 154, 155-6 (1960).

<sup>61</sup>INT. REV. CODE OF 1954, Sec. 462. See *Finance Reserves of Small Installment Sales Dealers*, 97 J. ACCOUNTANCY 201 (1954).

<sup>62</sup>69 Stat. 134 (1955); 26 U.S.C. §462 (1958).

<sup>63</sup>The cases are collected in Note, 1959 U. ILL. L. FORUM 878, 880 (1959).

<sup>64</sup>Another example of Service persistence in the face of Congressional dissatisfaction may be seen in the scholarship and fellowship area. The Service has always attempted to narrow the tax exemptions for such payments as much as possible. In the 1954 Code Congress voiced specific discontent with the old I.R.S. rule and passed a new provision calculated to give scholars more liberal treatment. (Sec. 117). But the Service has in effect continued to use its old rule in interpreting the new statute. See Mansfield, *Income From Prizes and Awards and from Scholarships*, 19 N.Y.U. INST. FED. TAXATION 129, 137-39 (1961). Schedule the C.I.R., *New York Times*, February 19, 1963, the Court's latest pronouncement on accrual appeared too late for comment here.

<sup>65</sup>INT. REV. CODE OF 1954, Sec. 452.

<sup>66</sup>69 Stat. 134 (1955).

tion of its view, particularly since the 10th Circuit had taken the opposite position.<sup>67</sup> But in this instance the Court would not go all the way. It made the taxpayer pay but, deciding on the facts, refused to make a firm rule on the Commissioner's behalf.

Indeed the Service may on rare occasions lose. In 1951 Senator Kefauver introduced legislation to abolish income tax deductions for "business" expenses incurred by professional gamblers. The legislation did not pass.<sup>68</sup> In spite of an American Law Institute recommendation,<sup>69</sup> no such provision appeared in the 1954 Code. The Attorney General then announced that the executive branch would do administratively what Congress had failed to do.<sup>70</sup> In *C.I.R. v. Sullivan*<sup>71</sup> the Supreme Court refused to interpret the business expense provisions to exclude a bookie's rent and salary payments.

We have already seen that the Supreme Court takes tax cases largely because of conflicts on the circuits. The cases just discussed indicate that such conflicts are not merely coincidence. Once the Service has made up its mind, it fights hard and continuously. If it loses in one court in one year it goes to another in the next.

*Pewifoy v. C.I.R.*<sup>72</sup> provides a sort of digest of the whole struggle. Congress used very broad language concerning travel deductions: "[W]hile away from home in the pursuit of a trade or business."<sup>73</sup> The Service immediately set about narrowing the provision by interpretation. "Home" was taken to mean place of business rather than residence so that persons with long-term business dealings at a distance from their residence could not claim extended rent and food expenses as travel connected. Without disclosing whether it intended to support or rebuff the Service, the Congress reenacted the old language in the 1954 Code.<sup>74</sup> The Service thus had a draw in Congress.

Meanwhile the Commissioner had obtained mixed judgments from the Circuits on the domicile vs. business issue.<sup>75</sup> Because of the conflict the Supreme Court took *Flowers v. Commissioner*<sup>76</sup> but avoided reaching a decision on the real issue. Under the new code, a squabble between the Tax Court and the 4th Circuit<sup>77</sup> brought *Pewifoy* to the Court. Again the

<sup>67</sup>Beacon Pub. Co. v. C.I.R., 218 F.2d 697 (1955).

<sup>68</sup>See S. Rep. No. 141, 82d Cong. 1st Sess. 31 (1951).

<sup>69</sup>A.L.I. Fed. Income Tax Stat., Sec. X 165 (i) (1) (Feb. 1954 draft).

<sup>70</sup>Brownell, Address to A.B.A. Annual Meeting, Aug. 27 (1953), 78 A.B.A. Rep. 334, 337-38 (1953).

<sup>71</sup>356 U.S. 27 (1958).

<sup>72</sup>358 U.S. 59 (1958).

<sup>73</sup>INT. REV. CODE OF 1939, Sec. 23 (a) (1) (A).

<sup>74</sup>Sec. 162 (a) (2).

<sup>75</sup>Cf. *Barnhill v. C.I.R.*, 148 F.2d 913 (4th Cir. 1945) with *Flowers v. C.I.R.*, 148 F.2d 163 (5th Cir. 1945) *rev'd* on other grounds 326 U.S. 465 (1946); *Wallace v. C.I.R.*, 144 F.2d 407 (9th Cir. 1944).

<sup>76</sup>326 U.S. 465 (1946).

<sup>77</sup>27 T.C. 149 (1957); 254 F.2d 483 (1957).

Court avoided the issue by holding that the Tax Court decision hinged on a finding of fact which the Circuit found "clearly erroneous" on a "fair assessment of the record" so that there was no reason for the Supreme Court to intervene.

Thus the Service got a little better than a draw in the courts. It generally won its cases but not its rule. However, so long as the Service has a draw from Congress and the courts, it can and does, as the everyday working agency in the field, make its policy views the prevailing ones on this issue.<sup>78</sup> Furthermore it always has the long-term hope of winning from the Court, as a reward for its persistence, an affirmation of its views under the long standing practice and reenactment doctrines.

This kind of situation points up one of the principal difficulties of the long standing practice doctrine. Underlying that doctrine is a rough analogy to *stare decisis*—a long line of consistent decisions supposedly indicating a common kernel of truth. But in the body of law shaped by *stare decisis*, the decision makers are, at least theoretically, impartial judges who have independently arrived at that kernel. Service consistency is not then evidence of the "truth" even in the rather mythical and idealized sense that judges' consistencies are. It is simply an indication of the Service's well developed policy position.

One more episode is worth outlining as a panorama of the battlefield. There is no need here to concern ourselves with what the battle was about. On a question of tax treatment of carved out oil payments, the Service had until 1946, with one exception,<sup>79</sup> taken a position favorable to the taxpayer. As a result various tax avoidance devices had flourished.<sup>80</sup> Beginning in 1946, the Service reversed its position in a series of rulings which sought to close the "loop holes."<sup>81</sup> The new Service position was consistently opposed by the Tax Court<sup>82</sup> which was repeatedly backed by the 5th Circuit.<sup>83</sup> The Service managed to split the 5th from the Tax Court once,<sup>84</sup> but then suffered more reversals.<sup>85</sup> However, in the same year it got the 7th Circuit to reverse a Tax Court decision and thus put itself into conflict with the 5th Circuit.<sup>86</sup> Meanwhile the opponents of the Service

<sup>78</sup>See Note, 107 U. PENN. L. REV. 871, 873 (1959).

<sup>79</sup>R.C. Nail, 27 B.T.A. 333 (1932), acq. XII-1 Cum. Bull. 9, acq. withdrawn and non-acq. 1949-1 Cum. Bull. 6.

<sup>80</sup>Benjamin and Currier, *The Supreme Court and the Taxation of Oil, Gas and Production Payments: The Lake Cases*, 19 LA. L. REV. 579, 582-3 (1959).

<sup>81</sup>G.C.M. 24849, 1946-1 Cum. Bull. 66; I.T. 3935 (1949-1 Cum. Bull. 39); I.T. 4003 (1950-1 Cum. Bull. 10).

<sup>82</sup>John D. Hawn, 23 T.C. 516 (1954); Lester A. Nordan, 22 T.C. 1132 (1954).

<sup>83</sup>The cases are described in Benjamin and Currier, *op. cit. supra* note 80 at 586-589. See also Note, 37 TEXAS L. REV. 100 (1958).

<sup>84</sup>C.I.R. v. Hawn, 231 F.2d 340 (1956).

<sup>85</sup>See note .3 *supra*.

<sup>86</sup>C.I.R. v. Slagter, 238 F.2d 901 (1956).

had tried and failed to get favorable legislation,<sup>87</sup> and the Service had also failed to get Congressional confirmation for its position.<sup>88</sup>

The Supreme Court took *C.I.R. v. P.G. Lake, Inc.*<sup>89</sup> as a result of Circuit conflicts. By the familiar device of hinging its decision on the fact situation, it avoided any real law making. However, by affirming the Commissioner against this one particular taxpayer, it gave some boost to the Service position particularly vis a vis the 5th Circuit. The Service will undoubtedly continue to push its program.

Sometimes the Service can hope for a more decisive victory. Thus on a question of defining "commercially marketable mineral product" in connection with depletion allowances, the lower federal courts had consistently opposed the Service's attempt to narrow the rather broad statutory language.<sup>90</sup> Nevertheless the Supreme Court accepted the case<sup>91</sup> and backed the Service.<sup>92</sup> Indeed, subsequently the Service seems to have obtained some, albeit, rather vague, Congressional support for its stand.<sup>93</sup>

In most of these cases there may be some dispute over what Congress "really" intended either in terms of what it meant when it wrote the statute or what it would have wanted when it saw the practical consequences of the statute it wrote. Since tax legislation is usually written in the vortex of conflicting policies—particularly of Congress' desire to maximize revenue, encourage business investment and at the same time get every man to pay his fair share—it is often difficult to decide which policy to assign the heaviest weight in any particular situation. The point is that the Service has a policy which it persistently tries to implement. If Congress will not respond, it tries the courts, and if the courts won't respond, it tries Congress. If one court will not help, it tries another. If no one else will help it, it helps itself. If it does not make headway on one track it tries another.

Thus the Supreme Court cannot avoid being one of the factors which the Service manipulates to achieve its ends. It is not that the Court must always yield to the Service, witness *Sullivan*, but that it cannot escape from the realm of tax policy because the Service will never let a potential source of support entirely get away. Even its refusal to decide issues is not a "neutral" act but a tactical factor of which the Service can take advantage. For as the day to day decision maker in the field, the Commissioner, unless positively stopped, can continue to lay a line of long

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<sup>87</sup>S.R. No. 2375, 81st Cong., 2d Sess. 66, 91 (1950).

<sup>88</sup>H.R. No. 9559, 84th Cong., 2d Sess. (1956).

<sup>89</sup>356 U.S. 260 (1958).

<sup>90</sup>See Note, 59 MICH. L. REV. 649, 650 (1961) and cases cited there..

<sup>91</sup>"In view of the importance of the question to taxpayers as well as to the Government." 364 U.S. 76, 78 (1960).

<sup>92</sup>*United States v. Cannelton Sewer Pipe Co.*, 364 U.S. 76 (1960).

<sup>93</sup>Public Debt and Tax Rate Extension Act of 1960, Sec. 302 (b); 74 Stat. 292 (1960).

standing practice which collects today's tax money and eventually may become so overpowering as to collect tomorrow's Congressional or judicial ratification.

Complexities must be faced and rules must be made. If the Court refuses to do the hard work, the Service gladly takes on the share of the job given up by a potentially powerful competitor.<sup>94</sup> One of the curious paradoxes of this situation is that in those cases in which the Service does invite the Court to take a more active role in the formulation of tax policy, either by dealing with complexities or formulating rules, it is likely to lose. Thus in the three tax exempt gift cases, *Duberstein*, *Kaiser* and *Stanton*, the Court refused to adopt the rules pressed by the I.R.S. or any others for that matter.<sup>95</sup> The Service also asked for a general rule and lost its case in *Hanover Bank v. C.I.R.*<sup>96</sup> In *C.I.R. v. Lester*<sup>97</sup> and *Fidelity-Philadelphia Trust Co. v. Smith*,<sup>98</sup> where the Service asked the Court to look at the complex realities behind the relatively simple legal forms, the Court refused to back the Commissioner.

Nevertheless the whole pattern of cases discussed here indicates a very high level of success for the Service. However, it would be incorrect to interpret this success entirely as the I.R.S.'s victory over a retreating Court. For the Court's deference to the Service is based not only on misgivings about its own competence but to a certain extent on a parallelism of policy views between the Service and the Court. The factors of judicial modesty and policy preference so interact that it is impossible to accurately weigh the relative importance of each. The Court might be less willing to defer to the Service on grounds of competence if it were less satisfied with the policies the Service is pursuing.

The Warren Court has actually been somewhat ambivalent on tax policy. On the one hand it has inherited the position of its predecessors that "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted. . . ."<sup>99</sup> On the other it seems to have ruled that transactions whose sole purpose is tax benefit will not be countenanced.<sup>100</sup> In a fairly consistent line of opinions it also casts a wary eye on capital gains, depletion, depreciation, accrual, interest, gift, medical deduction, business expense and loss carryover devices which seem to

<sup>94</sup>For instance, after *Cammarano*, where the Court refused to authoritatively interpret the "ordinary and necessary" clause, the Service issued a new set of regulations and stepped up enforcement. Comment, *Deducting Business Expenses Designed to Influence Governmental Policy As "Ordinary and Necessary": Cammarano v. United States and a Bit Beyond*, 69 YALE L.J. 1017 (1960).

<sup>95</sup>See Note, 46 CORNELL L. QUART. 359, 362-3 (1961). The Service actually won the cases but did not get the judicial legislation it was after.

<sup>96</sup>82 S.Ct. 1080, 1085-86 (1962).

<sup>97</sup>366 U.S. 299 (1961).

<sup>98</sup>356 U.S. 274 (1958).

<sup>99</sup>*Gregory v. Helvering*, 293 U.S. 465, 469 (1935) cited with approval *Knetsch v. United States*, 364 U.S. 361, 365 (1960).

<sup>100</sup>*Knetsch v. United States*, 364 U.S. 361 (1960).

shortchange the Treasury.<sup>101</sup> The best advice that two prominent practitioners seem able to offer their clients is that the courts will approve clever tax saving arrangements unless they are *too* clever and *too* successful.<sup>102</sup>

As a court of law the Supreme Court cannot condemn the citizen for taking maximum advantage of the rights and privileges reserved to him or conferred upon him by the statutes. Yet the Justices find something immoral and thus impermissible about devious maneuverings through the complexities of the tax structure to avoid a burden which every citizen should and must bear. The Court is thus placed between morals and law with the usual confusion and ambiguity which results from such a position.<sup>103</sup> What seems to emerge is a judicial distaste for tax avoidance devices, perhaps not as strong a distaste as that of the Service, but one running along parallel lines. Thus judicial preference and judicial modesty become mutually reinforcing factors supporting deference to the Commissioner.

An interesting example of this mutual reinforcement is the Court's general reluctance to make rules. As we have noted, one reason the Court avoids rule making is that the formulation of rules would thrust it into the very center of tax policy making. Another is that rule making would mean potential conflict with the Service. But a third is that precise rules are more easily circumvented than imprecise ones so that the Court remains purposely vague in order to put the damper on tax avoidance maneuvers. Thus the refusal of rules is motivated by, and achieves, judicial retreat from policy making while, at the same time, implementing so much of the Court's policy preferences as can be achieved without cost to the Justices' modesty.

### III. POLICY MAKING AND THE SUPREME COURT

Professor Lowndes in a recent article<sup>104</sup> notes that the case for a Court of Tax Appeals has been convincingly argued<sup>105</sup> and that the continu-

<sup>101</sup>*Libsom Shops v. Koehler*, 353 U.S. 382 (1957) (loss carryover); *Automobile Club of Michigan v. C.I.R.*, 352 U.S. 180 (1957) (accrual); *C.I.R. v. P. G. Lake, Inc.*, 356 U.S. 260 (1958) (capital gains); *Hoover Motor Express Co. v. United States*, 356 U.S. 38 (1958) (business deductions); *Tank Truck Rentals, Inc. v. C.I.R.*, 356 U.S. 30 (1958) (business deductions); *Cammarano v. United States*, 358 U.S. 498 (1959) (business deductions); *Parsons v. Smith*, 359 U.S. 215 (1959) (depletion); *C.I.R. v. Gillette*, 364 U.S. 130 (1960) (capital gains); *Hertz Corp. v. United States*, 364 U.S. 122 (1960) (depreciation and capital gains); *C.I.R. v. Duberstein*, 363 U.S. 278, (1960) (gift); *United States v. Kaiser*, 363 U.S. 299 (1960) (gifts); *Stanton v. United States*, 363 U.S. 278 (1960) (gifts); *Knetsch v. United States*, 364 U.S. 361 (1960) (interest); *United States v. Cannelton Sewer Pipe Co.*, 364 U.S. 76 (1960) (depreciation); *C.I.R. v. Bilder*, 82 S.Ct. 881 (1962) (medical deductions).

<sup>102</sup>*Eustice and Lyon, Federal Income Taxation*, 36 N.Y.U. L. Q. REV. 642, 649-53 (1961).

<sup>103</sup>See Shapiro, *Morals and the Courts: The Reluctant Crusaders*, 45 MINN. L. REV. 897 (1961).

<sup>104</sup>*op. cit. supra* note 1.

<sup>105</sup>Citing Griswold, *The Need For a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944); Pope, *A Court of Tax Appeals: A Call For Re-examination*, 39 A.B.A.J. 275 (1953).

ance of the Supreme Court jurisdiction in this area is only justified if the Court is making a unique contribution to tax law. After an historical survey of the cases, he concludes that the Court has contributed little more than random, confusing and intermittent intervention so that there is no reason for it to continue in the field.

I am arguing here neither for nor against a Court of Tax Appeals. But it does not necessarily follow from the Supreme Court's inactivity that a new Tax Court is desirable. In terms of political reality, there are three governmental agencies making tax policy; the I.R.S., the Congress, and the courts—presumably led by the Supreme Court. One of these agencies, the Supreme Court, is currently reluctant to make policy decisions. Indeed it is this reluctance, rather than any inherent disability, which seems to lead to the randomness and confusion of which Lowndes so rightly complains. The available alternatives are, therefore: (1) To maintain the status quo; (2) To establish a Court of Tax Appeals; (3) To get the Supreme Court back into tax policy making.

The first alternative is, it seems to me, most appealing to the friends of the I.R.S. since the Court's supposed neutrality and passivity are likely to be of considerable advantage to the Service. For those who wish to keep the courts active, either alternative 2 or 3 seem equally available. Since the Court's past unsatisfactory record rests on relative inactivity, it follows just as logically from the record that the Court should now become more active as that it should go out of business all together. The difficulty is that arguments over the Court of Tax Appeal and the more general problem of what and how much the Supreme Court ought to do in the tax area have been conducted in terms of procedure, clarity, consistency and other "legal" niceties. It is time that the problem be viewed in terms of the politics of policy making.

The I.R.S. is constantly in the field and can claim technical skill in a highly technical area. The technician has a marked advantage in our increasingly complex government because he can put on the armor of his expertise to shield his policy preferences against attacks by the non-expert. "It just can't be done" or "it's fine in theory but it just won't work" are the ultimate weapons in the specialized bureaucrat's war with the politician or other generalist.

The Congress has begun to fight back by turning its revenue committees<sup>106</sup> into increasingly technical agencies which develop their own expertise by staying constantly in the business and handling more and more technical details on their own.<sup>107</sup> Congress has realized that constant commitment is the only way to stay in the game.

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<sup>106</sup>House Ways and Means and Senate Finance Committees.

<sup>107</sup>Cary, *op. cit. supra* note 8 at 260. The obvious counter ploy by the friends of the Service is the old routine that runs Congress ought to handle general policy and leave details to the administrators. (See *Id.*)

The courts must realize the same thing. Thus the Supreme Court's refusal to plunge into the day to day complexities and technicalities of tax law means that it largely abdicates any real policy making role. Moreover, since deference to the I.R.S. is one of the principal techniques by which this abdication is carried out, the Court's retreat is not even a neutral act vis a vis the Service and the Congress but tends to increase the power of the contestant whose vast technical skill already gives him a great advantage over his opponent.

Conversely, the establishment of a Court of Tax Appeals would introduce an agency which would be a significant rival to the I.R.S. because its sources of strength would be the same as those of the Service; technical knowledge and its corollary, day to day contact with the problem. In effect, the judiciary would do just what the legislature has been attempting to do; establish its own technicians as a counterweight to the administrative bureaucracy's expertise.

There is, however, something self-defeating about such attempts. The political generalists called Congressmen establish specialized and expert Congressional committees to help them control the technicians called administrators. But the Congressmen are in the long run likely to find themselves dominated by the specialized committee precisely because it knows more about the subject than does the Congress at large. There may be some advantage to being dominated by the technician called Congressional committeeman rather than the technician called administrator, but, either way, the role of the generalist, the reasonable man uncommitted in advance to any specialized program or orthodoxy, is lost. The creation of the technician called Court of Tax Appeals judge involves the same difficulty. We are likely to lose just what we want from judges injected into the policy making process; a relatively balanced and uncommitted outlook.

It is for this reason that the third alternative, a Supreme Court active in the tax field, seems attractive. The Court presumably has shied away from tax matters because it feels a lack of competence. But it is precisely that lack of expertise which may allow the Court to introduce the touch of generalist influence so desirable in an increasingly specialized field. The Court seems to be in an excellent tactical position to perform this task.

First of all, the generalist who enters a technical field often becomes more and more engrossed in technical problems. As we have already noted, this is one of the principal problems of Congress which keeps assigning groups of its generalists to watch the bureaucrats through the committee system only to have the committees evolve special policy views of their own which they press on Congress. The Court is not only not expert, but the Justices have so much work to do in other fields that

they never could become expert. They would always perform bring a wide range of political and legal concerns to their tax decisions.

Secondly, the adversary system provides a unique advantage for the generalists attempting to escape the expert's tactic of disguising his policy preferences as statements of technical fact. Here again the problem of Congress is that having assigned a technical field to a committee, the committee tends to become its sole source of advice in that field.<sup>108</sup> The Court, because it has the opportunity of hearing argument by two opposing technicians, is not the prisoner of either.

In this connection too must be viewed the frequent objection that Court cannot venture very ambitious supervision of the executive or independent regulatory agencies because it cannot and should not attempt to match their staff and research resources. Surely the very basis of the adversary system is that it forces the parties to provide the Court the research results necessary for informed decision. In a very meaningful sense, the Court always has at its disposal for a given case more and better staff resources than does the I.R.S. For it has the Service staff plus the taxpayer's staff providing it with the raw materials for decision. That the two provide only partial and conflicting views is so much the better for the generalist attempting to avoid technical capture. In this sense the Court gets a better staff product than does the Commissioner who hears only his career subordinates.

Thirdly, the Court has its own armor of expertise. Frequently the layman must accept expert advice not so much because he believes it but because, in terms of practical politics, he cannot afford to risk acting against the advice of "the man who knows." "On advice of counsel," "my doctor warns," and more recently "but the engineers told me" or "the lab boys said" are powerful weapons of both offense and defense in the political and social arena. The layman, needing these weapons, must often obey the expert.

But tax law is tax *law*. The Supreme Court has a perhaps diminished, but still considerable, reputation as an authoritative interpreter of law. The I.R.S. may be the expert on taxes but the Court is the expert on law. The Court, therefore, has its own prestige as a "man who knows" to balance that of the technicians with whom it deals.

Here again the Court seems to be in a somewhat better position than its fellow generalist, Congress. When the I.R.S. says I know taxes, the Court says I know law, and law is surely more respected than taxes in

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<sup>108</sup>This is not to say that Congress always listens to its committees and its committees only, but that unfavorable committee report or lack of committee action almost invariably blocks Congressional action no matter how much information individual Congressmen have independently received. See GROSS, *THE LEGISLATIVE STRUGGLE* 265-353 (1953); GRIFFITH, *CONGRESS, ITS CONTEMPORARY ROLE* 75 (3rd ed. 1961).

this country. When the I.R.S. says I know taxes, the Congress can only reply I know politics, and this puts Congress at a disadvantage for somehow Americans believe that politics should have nothing to do with taxes.<sup>109</sup>

To suggest a more active role for the Supreme Court in the tax policy-making process may be somewhat startling to some because it calls up a vision of Court v. Congress as rival law-makers. Such a vision is startling, however, only because it is simplistic. The law-making process is complex. Surely the reply to the question "Who makes law?" is not "Congress and Congress only." Any elementary study of American government begins with the proposition that the Executive branch is the source of most legislation. The bureaucracy drafts the bills which become the President's legislative program and presidential support or opposition is a key factor in determining whether any program becomes law. For that matter, pressure group influences shape, and may even determine the inclusion or exclusion of, many provisions of many laws. Moreover, it has become a commonplace that those who are responsible for administering a statute after its passage have much to do with its final meaning and impact. And surely we need not here go through that whole ancient and tedious battle about whether judges make law or simply discover it. I know of no jurisprudential school or student of law who does not concede that judges do and inevitably must make law.

Thus to say that any governmental or indeed private group does or ought to make law simply means that it makes law *with* Congress not necessarily *against* it. Congress never makes law by itself. It acts under the influence of many outsiders. The suggestion that other agencies enter the law-making process does not imply that such agencies dictate solutions to legislative problems, but only that they add their preferences for certain policy goals to those of others in the internal revenue field. One of these objectives is maximum tax yield. The Internal Revenue Service naturally develops an institutional interest in this particular goal. Therefore, so long as Congress and the Service are alone in the field, the sum total of the tax policy-making process may yield a greater emphasis on revenue than to other goals of Congress such as encouragement of investment. The Supreme Court might well act in this area, as it is urged to do in so many others, as balancer of competing interests. It need not and probably should not develop a rigid tax philosophy of its own but instead seek to intervene by righting the balance of the various interests to which Congress is generally responsive when some of these interests are obscured from time to time in the process of administering and altering tax policy.

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<sup>109</sup>Sec. e.g., Surrey, *The Congress and the Tax Lobbyist — How Special Tax Provisions Get Enacted*, 70 HARV. L. REV. 1145 (1957), in which what Professor Surrey seems to dislike is that nasty old politics keep smudging up the nice neat tax schemes devised by the bureaucratic good guys. (Now Asst. Sec. Surrey undoubtedly has even stronger views.)

Finally, it would be the height of absurdity to counsel Supreme Court withdrawal from policy-making because of some naive theory that only Congress should make law when the result of the withdrawal would be more policy-making by an agency which, according to such a theory, has even less right to make law than the courts, the I.R.S. If any vision emerges from introducing the Supreme Court into tax policy-making, it is *Supreme Court v. I.R.S.* as rival interpreters of Congressional statutes. I cannot see how this vision would be incompatible with even the most naive and uninformed view of Congressional supremacy in the legislative process.

There is, then, a great deal to be said for greater Supreme Court activity in the tax field. By its withdrawal from that field, the Court has created a political vacuum. Perhaps if the Supreme Court will not fill it, a Court of Tax Appeals should. At the moment it is the I.R.S. which seems to have expanded into the empty territory.

#### IV. CONCLUSION

In any event, the Court must come to understand that its hands off policy is not simply an action which pulls the Justices out of the tax policy making process. There is no neutrality in politics. Retreat by one inevitably helps some and hurts other of the remaining contestants. Of course it may be that the Court's present policy preferences are so in harmony with those of the I.R.S. that its retreat makes some political sense. But because the Court cannot, as the legal system is presently constituted, entirely escape tax chores, its present hesitant attitude imparts a confusion and vagueness to the corpus of tax law which appears undesirable in terms of the Court's general institutional interest in the quality of the legal system. Therefore, even if the Court's retreat is a calculated move to help the Service, and I think it is stretching the imagination to say so, it would seem more desirable to help the Service by mild but steady action than by inaction breaking down into sporadic activity under pressure from conflicts on the Circuits.

More practically, the lawyer preparing tax cases with a view toward appellate court decision might do well to occasionally look above and beyond the technicalities of the matter before him to the general pattern of Court activity. At the moment he seems most likely to win those cases in which a decision for his client would allow the Court to avoid legal and factual complexities or rule making while a decision for the Service would deeply involve the Court in tax policy making. Such, for better or worse, is the present position of the Warren Court.