Spring 2003

The Canon That Tax Penalties Should Be Strictly Construed

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THE CANON THAT TAX PENALTIES SHOULD BE STRICTLY CONSTRUED

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After a period of quiescence,[1] statutory interpretation has become a matter of intense interest among practitioners and scholars,[2] and of self-conscious reexamination by judges.[3] An important part of the discussion is inquiry into canons or maxims of statutory construction.[4] Courts have attempted to revivify such canons in recent decades.[5]

Most canons of statutory construction are general in nature, applicable to statutes of all types. There also are canons particular to subject areas and specialties. Canons particular to tax include: (1) Congress intended to fully exercise its power under the Sixteenth Amendment, and thus, inclusions into income are read expansively;[6] (2) deductions are matters of legislative grace, and so are applied narrowly,[7] (3) as are exemptions;[8] (4) remedial provisions

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[1] *See* Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992).

[2] *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 1 (1994):

> Although the interpretation of statutes has been an ongoing topic of interest since the colonial period, only since the early 1980s have American legal academics become intensely excited about statutory interpretation as an object of theoretical interest. In that time, theories of statutory interpretation have blossomed like dandelions in spring. They now eclipse theories of common law and compete with constitutional law theories for space in the public law agenda.

For a summary of leading theories of statutory construction and exploration of whether construction of tax statutes should differ from construction of other types of statutes, see Michael A. Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819, 823-44 (1991).

[3] Beyond the discussion appearing in their opinions, judges have written many provocative articles and essays on statutory interpretation. As examples, see ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW: AN ESSAY (1996); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. Chi. L. Rev. 263 (1982); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983).

[4] *E.g.*, Richard A. Posner, *Statutory Interpretation – In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 805-22 (1983).

[5] *See, e.g.*, ESKRIDGE, *supra* note 2, ch. 9 & app. 3; KENT GREENAWALT, STATUTORY INTERPRETION: 20 QUESTIONS 208-10 (1999) (both describing the increased emphasis on canons of construction as part of the agenda of the Supreme Court under Chief Justice Rehnquist).

[6] *E.g.*, Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 429 (1955); Irwin v. Gavit, 268 U.S. 161, 168 (1925).

[7] *E.g.*, INDOPCO, Inc. v. Comm'r, 503 U.S. 79, 84 (1992); Intermet Corp. v. Comm'r, 209 F.3d 901, 904 (6th Cir. 2000). This canon has been strongly challenged. *See* WILLIAM D.

are applied liberally to further their purposes;[9] (5) charitable deductions and exemptions are read broadly;[10] (6) deductions and exemptions are not construed as applicable to activities that are illegal or contrary to public policy;[11] (7) tax statutes are not extended beyond their clear import, especially when doing so would disrupt a well established field;[12] (8) courts "will not lightly assume that Congress intended to subordinate the [revenue-raising] efficacy of the federal tax laws to other considerations";[13] (9) "the statute must be construed uniformly, whether it helps or hurts a taxpayer in a give case";[14] (10) the Code should be applied consistently on a nationwide basis, without distortion by local law variations;[15] (11) absent specific contrary direction by Congress, Code provisions should be interpreted consistently with the basic premises of the tax system;[16] (12) tax sections should be interpreted so as to minimize abuse and circumvention;[17] (13) ambiguous tax statutes should be construed favorably to taxpayers;[18] and (14) tax penalties should be read narrowly.[19]

Generally, I am skeptical about the utility of canons of construction,[20] both in their general application and as applied to the field of tax.[21] For instance, it is apparent simply from their recitation that some of the above tax

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POPKIN, FUNDAMENTALS OF FEDERAL INCOME TAX LAW 367 (4th ed. 2002); Peter Lowy, *Deductions Should Not Be Narrowly Construed*, TAX NOTES, Nov. 27, 2000, at 1181; Erwin N. Griswold, *An Argument Against the Doctrine that Deductions Should Be Narrowly Construed as a Matter of Legislative Grace*, 56 HARV. L. REV. 1142 (1943).

[8] *E.g.*, Comm'r v. Schleier, 515 U.S. 323, 328 (1995); Lima Surgical Assocs., Inc. Voluntary Employees' Beneficiary Ass'n Plan Trust v. United States, 944 F.2d 885, 888 (Fed. Cir. 1991); Puritan Lawn Mem'l Park Cemetery v. United States, 15 Ct. Cl. 234, 240 (1988).

[9] *E.g.*, Helvering v. Bliss, 293 U.S. 144, 150-51 (1934); Moore v. United States, 465 F.2d 514, 518 (5th Cir. 1972); United States v. Chi. & E. Ill. R.R., 349 F. Supp. 1157, 1161 (N.D. Ill. 1972), *aff'd without opinion*, 486 F.2d 1406 (7th Cir. 1973).

[10] *E.g.*, Hartwick Coll. v. United States, 801 F.2d 608, 615 (2d Cir. 1986) (citing cases). This involves conflict between the third and fourth of our enumerated tax canons, and the apparent triumph of the fourth in at least some decisions.

[11] *E.g.*, Green v. Connally, 330 F. Supp. 1150, 1161 (D.D.C. 1971), *aff'd mem.*, 404 U.S. 997 (1971).

[12] *E.g.*, Minn. Tea Co. v. Comm'r, 76 F.2d 797, 799-800 (8th Cir. 1935), *aff'd*, 296 U.S. 378 (1935); Safe Deposit & Trust Co. of Balt. v. Tait, 54 F.2d 383, 386 (D. Md. 1931).

[13] Berg v. United States, 121 F.3d 535, 537 (9th Cir. 1997).

[14] Cummins Diesel Sales Corp. v. United States, 323 F. Supp. 1114, 1117 (S.D. Ind. 1971), *aff'd per curiam*, 459 F.2d 668 (7th Cir. 1972).

[15] *E.g.*, Burnet v. Harmel, 287 U.S. 103, 110 (1932).

[16] *E.g.*, Comm'r v. Gordon, 391 U.S. 83, 96 (1968) (annual system of accounting); Lucas v. Earl, 281 U.S. 111, 114-15 (1930) (by implication; progressivity); Taft v. Bowers, 278 U.S. 470, 482-83 (1929).

[17] *E.g.*, Gitlitz v. Comm'r, 531 U.S. 206, 223 (2001) (Breyer, J., dissenting).

[18] *E.g.*, McFeely v. Comm'r, 296 U.S. 102, 111 (1935); Bowers v. N.Y. & Albany Lighterage Co., 273 U.S. 346, 350 (1972); *see* Steve R. Johnson, *Should Ambiguous Revenue Laws Be Interpreted in Favor of Taxpayers?*, NEV. LAW., April 2002, at 15.

[19] *E.g.*, Comm'r v. Acker, 361 U.S. 87, 91 (1959).

[20] A distinction sometimes is drawn between interpreting statutes and construing them. *See, e.g.*, WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 68-69 (1999). I follow the more common practice of using the terms as synonyms. *See, e.g.*, NORMAN J. SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 45:04 (6th ed. 2000).

[21] I am not alone. *See, e.g.*, KARL LLEWELLYN, THE COMMON LAW TRADITION 521-35 (1960); Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* FELIX

canons are contradictory or, at the least, in tension. Not surprisingly, then, courts and commentators disagree as to the validity of given canons and the weights to be accorded them.[22] Nonetheless, I subscribe to the suggestion that "canons should no longer be treated as an undifferentiated lump,"[23] but should be evaluated individually.[24] Thus, I undertake here no broadside challenge to the tax canons. Instead, this Article focuses on one of them, the one last enumerated above: that tax penalties should be applied only strictly.

I believe this canon produces more harm than good; consequently, it should be abandoned. This Article has four parts. Part I describes the "interpret tax penalties strictly" canon. The remaining parts are evaluative. They set forth the reasons why this canon should be interred. The critique has both functional and conceptual aspects.

Specifically, Part II demonstrates that the canon is unnecessary. It is entirely appropriate as a goal that taxpayers be penalized only when Congress determined that they should be, that tax penalties not be extended beyond that determination. But that goal can be reliably achieved through the existing statutory framework supplemented by established judicial principles. The "read tax penalties strictly" maxim provides no additional useful protection.

Part III argues that the canon, if it actually influences how judges decide cases, distorts the proper relationship of the courts and Congress. The legitimate role of the courts in our constitutional system is to determine what the statute coming before it means. The courts have ample tools and sources from which to make such determinations as to the penalty provisions in the Internal Revenue Code. The courts should constrain themselves to those tools and sources. Reliance on the broad-brush "construe tax penalties narrowly" precept abdicates the judicial responsibility to ascertain the precise reach and boundaries of the specific penalty before the court in the case at hand. Congress' authority to write the revenue laws is made subject to a judicial generalization.

Part IV shows that the canon is hopelessly unclear in application. Significant uncertainties exist as to the areas in which the canon is supposed to apply, the likelihood that it actually will be applied within these areas, its strength, and its relationship to other interpretational devices. Thus, the canon, in its application and non-application in actual cases, injects unpredictability and confusion into the law.

FRANKFURTER: THE JUDGE 30 (W. Mendelson ed., 1964), *reprinted in* HENRY FRIENDLY, BENCHMARKS 196 (1967); Posner, *supra* note 4, at 805-22.

[22] For example, after its citation in several hundred cases (*see* Griswald, *supra* note 7, at 1142), the Supreme Court appeared to repudiate the "interpret tax laws favorably to taxpayers" canon in *White v. United States*, 305 U.S. 281, 292 (1938). Nonetheless, it occasionally still is invoked. *E.g.*, United Dominion Indus., Inc. v. United States, 532 U.S. 822, 839 (2001) (Thomas, J., concurring); *id.* at 839 n.1 (Stevens, J., dissenting).

[23] ESKRIDGE, *supra* note 2, at 276.

[24] *See, e.g.*, GREENAWALT, *supra* note 5, ch. XIII; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 462-63 (1989).

I. NATURE OF THE "CONSTRUE TAX PENALTIES STRICTLY" CANON

Statutory construction is an endeavor with deep roots. Sources from ancient Greece,[25] the Roman Empire,[26] medieval Europe,[27] and early America,[28] among others, complement the torrent of contemporary commentary.[29] Over that span, numerous flowers (or weeds) have bloomed in the garden of canons of interpretation.[30] Regrettably, devices like Deadwood provisions, Sunset rules, and Restatements that have usefully pruned other areas have not been employed to rid us of never-sound or once-but-no-longer-sound canons.

We can achieve some order by sorting the maxims into categories. Eskridge offered this taxonomy: "[The canons] are readily segregable into three separate clusters: precepts of grammar, syntax, and logical inference (the textual canons); rules of deference to the interpretations others have placed on the statutory language (the extrinsic source canons); and policy rules and presumptions (the substantive canons)."[31]

Our subject – the "read tax penalties strictly" precept – is an example of the third category. The canon exists to further a policy end: that a taxpayer should not be subject to a penalty unless the statute plainly imposes it.[32] Most cases have involved penalties requiring some mental element,[33] but the principle need not be limited to them. Of course, anti-penalty maxims are not unique to tax. Courts speak of the strict construction of penalties in many contexts.[34]

Although the principle is irregular in its application, it is of long familiarity. Cases involving it arose long ago, before our revenue structure attained its current form. For example, it was tested in cases involving property forfeitures

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[25] *E.g.*, ARISTOTLE, DE INTERPRETATIONE (J.L. Ackrill trans., rev. Oxford ed. 1984); ARISTOTLE, THE NICOMACHEAN ETHICS, bk. 4, ch. 10 (W.D. Ross trans., revised by J.O. Urmson, rev. Oxford ed. 1984).

[26] *E.g.*, THE DIGEST OF JUSTINIAN, vol.1, bk. 1 (Alan Watson ed., 1985).

[27] A systematic discussion of statutory interpretation in England was probably written before 1567. *See* SAMUEL E. THORNE, A DISCOURSE UPON THE EXPOSITION & UNDERSTANDING OF STATUTES (1942).

[28] *See, e.g.*, WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS § 2.04 (3d ed. 2001).

[29] "About fifty percent of the decisions written by the U.S. Supreme Court each year involve statutory interpretation. Similar percentages have been reported for other common law systems." ESKRIDGE, *supra* note 2, at 335 n.3 (citing Australian and Scottish sources).

[30] In 1950, Llewellyn listed fifty-six canons. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950). In 1994, Eskridge identified 106 canons used by the Supreme Court in its 1986 to 1991 terms. ESKRIDGE, *supra* note 2, at 323-33. Needless to say, neither these nor any other enumerations have captured all the extant canons.

[31] ESKRIDGE, *supra* note 2, at 276. *See id.* at 323-33 for examples of canons in these three classes.

[32] Comm'r v. Acker, 361 U.S. 87, 91 (1959).

[33] *See, e.g.*, Salley v. United States, 239 F. Supp. 161, 163-64 (S.D. Tex. 1965).

[34] *E.g.*, Keppel v. Tiffin Sav. Bank, 197 U.S. 356, 362 (1905) (bankruptcy law); Tiffany v. Nat'l Bank of Mo., 85 U.S. 409, 410 (1874) (banking law); Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan, 24 F.3d 1491, 1505 (3d Cir. 1994) (penalty under ERISA).

incident to excise and other revenue laws during the Civil War,[35] the post-bellum period,[36] and the Prohibition era.[37]

More modernly, the applicability of the "strict construction of tax penalties" canon has been tested in cases involving what clearly are penalties. This includes penalties for failure to file a timely tax return,[38] failure to file an information return,[39] failure to file a personal holding company return,[40] failure to file a declaration of estimated tax,[41] substantial underestimation of estimated tax,[42] filing a frivolous return,[43] and negligence.[44]

In addition to these straightforward contexts, the applicability of the canon has been tested in less obviously relevant areas. Specifically, it has been tested as to the accumulated earnings tax,[45] the personal holding company tax,[46] the Trust Fund Recovery Tax (also known as the Responsible Officer Penalty or 100% Penalty),[47] and the personal liability that attaches to persons who fail to honor an IRS notice of levy.[48]

Of course, judicial opinion about the maxim has not been uniform over these decisions. That point will be developed in Part IV. For now, though, it is worth noting that the validity of the maxim has received impressive endorse-

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35 United States v. Thirty-Six Barrels of High Wines, 28 F. Cas. 67, 68 (N.D.N.Y. 1870); United States v. One Hundred and Twenty-Nine Packages, 27 F. Cas. 284, 285 (E.D. Mo. 1862).

36 United States v. Stowell, 133 U.S. 1, 12 (1890).

37 United States v. Ryan, 284 U.S. 167, 172 (1931).

38 *E.g.*, Bassett v. Comm'r, 67 F.3d 29, 34 (2d Cir. 1995) (penalty under I.R.C. § 6651(a)(1)); Uhl Estate Co. v. Comm'r, 116 F.2d 403, 406 (9th Cir. 1940) (penalty under § 291 of Revenue Act of 1932).

39 *E.g.*, Tech. Adv. Mem. 96-27-004 (July 5, 1996) (penalty under I.R.C. § 6698).

40 Hatfried v. Comm'r, 162 F.2d 628, 633 (3d Cir. 1947) (penalty under § 291 of the I.R.C. of 1939).

41 Comm'r v. Acker, 361 U.S. 87, 91 (1959); Baca v. Comm'r, 326 F.2d 189, 191 (5th Cir. 1964); Patchen v. Comm'r, 258 F.2d 544, 552 (5th Cir. 1958); Stephan v. Comm'r, 197 F.2d 712, 714 (5th Cir. 1952) (all involving penalty under § 294(d)(1)(A) of I.R.C. of 1939).

42 *E.g.*, *Acker*, 361 U.S. at 91; Salley v. United States, 239 F. Supp. 161, 163-64 (S.D. Tex 1965); *Patchen*, 258 F.2d at 552; *Stephan*, 197 F.2d at 714 (all involving penalty under § 294(d)(2) of I.R.C. of 1939).

43 Bradley v. United States, 817 F.2d 1400, 1402-03 (9th Cir. 1987) (penalty under I.R.C. § 6702).

44 Bassett v. Comm'r, 67 F.3d 29, 34 (2d Cir. 1995); *Baca*, 326 F.2d at 191 (penalty under ancestors of current I.R.C. § 6662(b)(1)).

45 *E.g.*, Ivan Allen Co. v. United States, 422 U.S. 617, 626-27 (1975); Cent. Motor Co. v. United States, 583 F.2d 470, 477, 481 (10th Cir. 1978); Mead Corp v. Comm'r, 116 F.2d 187, 192 (3d Cir. 1940); Beim Co. v. Landy, 26 A.F.T.R. 1189 (D. Minn. 1939), *aff'd*, 113 F.2d 897 (8th Cir. 1940); Charleston Lumber Co. v. United States, 20 F. Supp. 83, 87 (S.D. W. Va. 1937); Kaminsky, Inc. v. Comm'r, 60 T.C.M. (CCH) 740, 744; United Bus. Corp. of Am. v. Comm'r, 19 B.T.A. 809, 826 (1930), *aff'd*, 62 F.2d 754 (2d Cir. 1933), *cert. denied*, 290 U.S. 635 (1933); Tech. Adv. Mem. 88-21-002 (May 27, 1988) (all involving liability under I.R.C. § 531 or its ancestors).

46 Fulman v. United States, 434 U.S. 528, 533 n.8 (1978); Hatfried, Inc. v. Comm'r, 162 F.2d 628, 633 (3d Cir. 1947) (liability under I.R.C. § 541 or its ancestors).

47 *Compare* United States v. Hill, 368 F.2d 617, 621 (5th Cir. 1966) (holding the canon applicable) *with* Moore v. United States, 465 F.2d 514, 518 (5th Cir. 1972) (holding it inapplicable) (both involving liability under I.R.C. § 6672 or its ancestors).

48 Hoye v. United States, 172 F. Supp. 532, 534 (S.D. Cal. 1959), *aff'd*, 277 F.2d 116 (9th Cir. 1960) (liability imposed by ancestor of current I.R.C. § 6332(c)).

ment from time to time. In addition to its acceptance by many lower courts, the Supreme Court has invoked the maxim.[49] Moreover, although disputing its applicability in various litigated cases, the IRS has accepted the validity of the canon in several rulings.[50]

Alas, such support is misguided. We should abandon the "construe tax penalties strictly" maxim. The remaining Parts of this Article show why.

II. Lack of Necessity or Benefit

At the outset, a note as to purposes and the likely effects of discarding the "construe tax penalties strictly" canon. I do not urge abandoning the canon out of an ideological preference that federal revenues increase. My objections are to the ill effects of canons of construction generally – pro-Government canons as well as pro-taxpayer canons.[51]

Moreover, I quite expect that penalty cases would, in the great majority of instances, continue to be decided the same way with or without our canon. That canon should not be discarded in order to allow tax penalties to be imposed much more often – they wouldn't be. Instead, it should be discarded because it is unnecessary and because it inflicts harm on both the administration of the tax system and the legitimate relation between judicial and legislative powers. The first of these is developed in this Part, the others in Parts III and IV.

A. *Criminal Cases*

Our canon has not loomed large in criminal tax cases,[52] probably because of the alternative protections described below. Still, it is not always clear whether a statutory provision is criminal or civil.[53] For purposes of comprehensiveness, we briefly address below why the "construe tax penalties strictly" maxim is unnecessary in the criminal context.

The Internal Revenue Code sets out nearly a score of tax crimes,[54] as well as a number of other offenses and forfeitures.[55] Some crimes provided for in

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49 *See* Ivan Allen Co. v. United States, 422 U.S. 617, 627 (1975); Comm'r v. Acker, 361 U.S. 87, 91 (1959).

50 *See* Tech. Adv. Mem. 96-27-004 (July 5, 1996); Tech. Adv. Mem. 88-21-002 (May 27, 1988).

51 For instance, I find the case against the "deductions should be construed narrowly" canon (see the Lowy and Griswold articles in note 7, *supra*), to be persuasive, and I join the call for its abolition.

52 It is not always clear whether decisions in criminal tax cases are invoking our maxim, the rule of lenity, or some other defendant-protective rule. *E.g.*, United States v. Scharton, 285 U.S. 518, 521 (1932) ("statutes will not be read as creating crimes or classes of crimes unless clearly so intended") (tax evasion prosecution under predecessor of current I.R.C. § 7201).

53 In *Helvering v. Mitchell*, 303 U.S. 391 (1938), the Supreme Court had to decide whether the sanction imposed by a tax section was criminal or only civil in nature. The Court held: "that question is one of statutory construction." *Id.* at 399; *cf.* Hudson v. United States, 522 U.S. 93, 98-100 (1997) (applying *Mitchell* in a non-tax case).

54 *See* I.R.C. §§ 7201-7217.

55 *See* I.R.C. ch. 75, subchs. B-D.

other titles of the United States Code also are asserted along with tax charges in the same prosecutions with some frequency.[56]

No special penalty canon is needed in criminal tax cases. At least three other statutory and judicial arrangements render the canon unnecessary. First, as in criminal cases generally, the Government can secure conviction in criminal tax cases only by meeting a beyond-a-reasonable-doubt standard of proof.[57] Second, the rule of lenity is well established in criminal cases.[58] That principle provides that criminal statutes will be read narrowly[59] and that "the harsher of two possible readings of a criminal statute will be enforced only when Congress has spoken clearly."[60] Third, many of the federal tax crimes have as an element that the taxpayer specifically intended to violate the Code.[61] Congress added that element in order to make sure that criminal sanctions are visited only on knowing violators, not taxpayers whose errors resulted from a bona fide misunderstanding of the law.[62]

A maxim construing tax penalties strictly can add nothing to the beyond-a reasonable-doubt standard of proof complemented by specific intent elements and the rule of lenity. The maxim is therefore unnecessary in criminal cases.

B. Civil Cases

1. Civil Penalty Structure

Congress has visited civil penalties many times in recent decades, sometimes individually and other times on a more nearly global basis. During the 1970s and 1980s, penalties were in vogue in Congress. They were viewed as part of the campaign to curb tax shelters[63] and as a "back door" means of narrowing the federal budget deficit with little or no political cost. Thus, these

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[56] As examples in 18 U.S.C., see §§ 2 (aiding and abetting), 371 (conspiracy), 1001 (false statements), and in 31 U.S.C., see § 5322 (currency violations).

[57] *E.g.*, Holland v. United States, 348 U.S. 121, 138 (1954); United States v. Garber, 607 F.2d 92, 94 (5th Cir. 1979).

[58] *See, e.g.*, United States v. Universal Corp., 344 U.S. 218, 221-22 (1952); United States v. Wiltberger, 18 U.S. 76, 95 (1820); United States v. Hartec Enter., Inc., 967 F.2d 130, 133 (5th Cir. 1992); United States v. Callanan, 173 F. Supp. 98, 100, n.3 (E.D. Mo. 1959).

[59] *See, e.g.*, United States v. Campos-Serrano, 404 U.S. 293, 297 (1971); FCC v. Am. Broad. Co., Inc., 347 U.S. 284, 296 (1954); Fasulo v. United States, 272 U.S. 620, 629 (1926).

[60] United States v. Boots, 80 F.3d 580, 588 (1st Cir. 1996); *see, e.g.*, McNally v. United States, 483 U.S. 350, 359-60 (1987).

[61] The most commonly prescribed specific intent is that the taxpayer acted "willfully." *See, e.g.*, I.R.C. §§ 7201, 7202, 7203, 7204, 7205(a) & (b), 7206(1), (2), & (5), 7207. For these purposes, "willfully" means "a voluntary, intentional violation of a known legal duty." United States v. Pomponio, 429 U.S. 10, 12 (1976) (per curiam); United States v. Bishop, 412 U.S. 346, 360 (1973).

[62] Cheek v. United States, 498 U.S. 192, 199-200 (1991).

[63] *See, e.g.*, POPKIN, *supra* note 7, at § 17.06[A]. The shelter problem then was individual shelters. Currently, the system is wrestling with corporate tax shelters. Again, more or stiffer penalties are part of the proposals to address the problem. *See, e.g.*, Lee A. Sheppard, *Tax Shelter Opponents Turn Practical*, TAX NOTES, May 20, 2002, at 1111; *TEI Comments on Tax Shelter Transparency Act*, TAX NOTES TODAY, July 2, 2002, at 127-17.

years witnessed a proliferation of penalty sections and a sharp increase in penalty numbers and amounts assessed by the IRS.[64]

By 1989, the pendulum had swung. Code § 469, enacted in 1986, dealt a mortal blow to individual tax shelters, and a backlash had developed against penalties that often were uncoordinated, duplicative, and too aggressively asserted.[65] The consequence was enactment of the IMPACT legislation in 1989[66] which rationalized part of the penalty structure.[67] Currently, civil tax penalties divide into four groups:

(1) Timeliness penalties on taxpayers. The Code contains various provisions to encourage taxpayers to file returns and pay taxes promptly, and to penalize them when they don't. Prominent among them are penalties for failing to timely file returns,[68] pay the amount shown as due on the return,[69] pay additional taxes later assessed,[70] pay stamp a tax,[71] file and deposit estimated tax,[72] and deposit employment taxes.[73]

(2) Accuracy-related penalties on taxpayers. This is the most visible of the penalty sectors in terms of frequency of litigation and volume of discussion. The principal provision is § 6662, created by IMPACT to consolidate several previously separate penalties. Section 6662 imposes a penalty equal to twenty percent of the tax underpayment attributable to any of five bases: negligence, substantial understatement of income tax, substantial valuation misstatement, substantial overstatement of pension liabilities, and substantial estate or gift tax valuation understatement.[74] In more egregious cases, § 6663 authorizes a penalty of seventy-five percent of an underpayment attributable to fraud.[75] A variety of other inaccuracy-based penalties also exist.[76]

(3) Penalties with respect to information returns. The IRS's ability to match information reported on taxpayers' returns with information reported by

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64 In 1954, there were 13 penalty provisions in the Code; in 1967, 25; in 1987, 150. Between 1978 and 1987, the number of penalties assessed by the IRS almost doubled while their dollar amount increased about tenfold. INTERNAL REVENUE SERVICE COMMISSIONER'S STUDY OF CIVIL TAX PENALTIES V-1 (Feb. 1989).

65 *See, e.g.*, MARVIN J. GARBIS, RONALD B. RUBIN, & PATRICIA T. MORGAN, TAX PROCEDURE & TAX FRAUD 217-18 (3d ed. 1992).

66 Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 239, H.R. 3299, 101st Cong., 1st Sess., tit. VII, subtit. G "Improved Penalty Administration and Compliance Tax Act," 103 Stat. 2388-2406 (amending various sections of ch. 68 of I.R.C).

67 *See* Richard C. Stark, *IMPACT Makes Fundamental Changes in Civil Penalties*, 72 J. TAX'N 132 (1990), for a description of the IMPACT legislation. For discussion of current civil tax penalties generally, see LEANDRA LEDERMAN & STEPHEN W. MAZZA, TAX CONTROVERSIES: PRACTICE AND PROCEDURE ch. 10 (2000).

68 I.R.C. § 6651(a)(1).

69 I.R.C. § 6651(a)(2).

70 I.R.C. § 6651(a)(3).

71 I.R.C. § 6653.

72 I.R.C. §§ 6654 (individuals), 6655 (corporations).

73 I.R.C. § 6656.

74 I.R.C. § 6662(a), (b).

75 I.R.C. § 6663(a).

76 *E.g.*, I.R.C. §§ 6673 (frivolous positions asserted in court), 6702 (frivolous returns).

others with whom the taxpayers engaged in transactions is a key part of tax compliance. Matching both deters inaccuracies and omissions by taxpayers in the first place and helps the IRS detect those inaccuracies and omissions that do occur. Thus, timely and correct information returns are of central significance to tax administration. Congress has created a substantial number of penalties for failures as to information returns and the data reporting that underlies such returns.[77]

(4) Penalties on preparers and advisors. Those who assist and advise taxpayers may be under ethical obligations imposed by their professions[78] or by governmental bodies.[79] Because ethical rules alone proved insufficient to deter the giving of meretricious tax advice or the rendering of other kinds of assistance to tax misconduct, Congress established an array of penalty and related[80] sections. The civil penalty sections reach conduct such as negligence, recklessness, or disregard in tax return preparation,[81] other return preparation misconduct,[82] promoting abusive tax shelters,[83] and aiding and abetting tax understatement.[84]

2. *Defenses Against Penalties*

Penalties cannot be imposed, of course, if any of their predicate elements are absent. Moreover, the Code provides for a variety of affirmative defenses against penalties. Some of these are situational to individual penalties.[85] Others apply more broadly.

Of particular importance is the "reasonable cause" defense that exists with respect to many penalties. The larger the possible dollar amount of the penalty, the more likely that a reasonable cause defense will exist as to it or that absence of reasonable cause will be an element of it. The defense or element exists as to the delinquency penalty,[86] the accuracy-related and fraud penalties,[87] the § 6721 penalty for failure to file correct information returns,[88] and others.

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[77] The bulk of these are in Subtitle F, chapter 68B of the Code, the single most important being § 6721. Other penalties related to information reporting and returns are located elsewhere in the Code. *E.g.*, I.R.C. § 6652.

[78] *E.g.*, ABA Formal Op. 85-352; ABA Comm. on Ethics and Prof'l Responsibility Formal Op. 346 (1982).

[79] *E.g.*, Treas. Circ. 230, 31 C.F.R. § 10 (as amended July 26, 2002).

[80] *E.g.*, I.R.C. § 7408 (injunctions against those who promote abusive tax shelters or aid and abet tax understatement).

[81] I.R.C. § 6694.

[82] I.R.C. §§ 6695, 6713.

[83] I.R.C. § 6700.

[84] I.R.C. § 6701.

[85] For instance, the "substantial understatement of income tax" base of the § 6662 accuracy penalty can be avoided if the taxpayer had "substantial authority" for the position taken, I.R.C. § 6662(d)(2)(B)(i), or adequately disclosed the item, I.R.C. § 6662(d)(2)(B)(ii).

[86] Each of I.R.C. §§ 6651(a)(1), (2), and (3) contain the language "unless it is shown that such failure is due to reasonable cause and not due to willful neglect." The IRS has identified a number of conditions that constitute such "reasonable cause," *see* I.R.M. 4562.2, MT 4500-448, and this list is not exclusive.

[87] I.R.C. § 6664(c).

[88] I.R.C. § 6724(a).

A procedural feature also should be noted. As a result of 1998 legislation,[89] there now is a detailed burden of proof rule – § 7491 – in the Code. Section 7491(c) deals with penalties. It provides, with respect to individual taxpayers, that the IRS has "the burden of production in any court proceeding with respect to the liability . . . for any penalty [or similar addition to tax]." This is the burden of production (also known as the burden of going forward) only.[90] Section 7491(a) deals with the risk of nonpersuasion. It purports to shift that risk from the taxpayer (where it typically has been in civil tax cases[91]) to the Government under certain circumstances. Those circumstances are so narrow, however, and so hedged by exceptions and limitations that, at the end of the day, taxpayers typically will continue to bear the risk of nonpersuasion (at a "preponderance of the evidence" level), notwithstanding § 7491(a).[92]

Nonetheless, § 7491(c) probably has some significance. The IRS's recognition that it bears the burden of production – that it will have to make a *prima facie* case before the taxpayer will be required to rebut the penalty asserted – should help to discourage the IRS from asserting penalties too lightly.[93]

3. *Canon Unnecessary*

The "construe tax penalties strictly" canon does not add, in any appreciable fashion, to legitimate protection for taxpayers. First, the canon is mentioned in distinctly a minority of judicial opinions disposing of tax penalty issues.[94] Second, in many – probably most – of the decisions in which it has been mentioned, the Government prevailed regardless. Third, those cases which invoke the canon and in which the taxpayer does and should prevail would, I believe, come out the same way – with few, if any, exceptions – even were the canon discarded.

The third of these points is particularly important. I offer the following three examples in support of it:

(1) A 1996 Technical Advice Memorandum[95] involved an S corporation which filed its Form 1120S several years late, in violation of § 6037.[96] The issue was whether a penalty should be imposed under § 6698 on account of this violation. In essential part, § 6698 provides:

> If any partnership required to file a return under section 6031 for any taxable year –

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[89] Internal Revenue Service Restructuring and Reform Act, § 3100, Pub. L. No. 105-206, 112 Stat. 685, 726 (1998).

[90] It is customary to distinguish between two aspects of the burden of proof: the burden of production and the risk of nonpersuasion. *See, e.g.*, Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries, 512 U.S. 267, 272-75 (1994); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-58 (1981); John T. McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382, 1382-83 (1955).

[91] *E.g.*, Welch v. Helvering, 290 U.S. 111, 115 (1933). There are numerous exceptions, though. *See* Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules*, 84 IOWA L. REV. 413, 482-88 (1999).

[92] *See, e.g.*, Johnson, *supra* note 91, at 427-46.

[93] For discussion of § 7491(c), see LEDERMAN & MAZZA, *supra* note 67, at 461.

[94] *See* Subpart IV.A, *infra*.

[95] Tech. Adv. Mem. 96-27-004 (July 5, 1996).

[96] *See* I.R.C. § 6037(a); Treas. Reg. § 1.6037-1 (1969).

(1) fails to file such return at the time prescribed therefor . . ., or
(2) files a return which fails to show the information required under section 6031, such partnership shall be liable for a penalty determined under subsection (b).[97]

The IRS ruled that the penalty did not apply. It based this conclusion on technical analysis, to which it added the following: "This interpretation is in accord with accepted principles of statutory construction. It is a settled rule that statutes imposing penalties should be strictly construed. All questions in doubt must be resolved in favor of those from whom the penalties are sought."[98]

Invocation of the canon added nothing. This issue clearly should have been resolved against imposition of the penalty, and would have been based on technical analysis alone. First, § 6698 refers to a "partnership" required to file a return. An S corporation is not a partnership.[99] Second, § 6698 refers to returns required "under section 6031." S corporation returns are required under § 6037, not § 6031.

Thus, it is crystal clear that § 6698 did not apply. The only argument for application would be that there is a glitch, a mistaken omission from the statutory penalty scheme, such that the partnership penalty provision should be extended to cover S corporations as well as partnerships (both afterall, are pass-through entities). At one time, such "equitable extension of the statute" was an established, though controversial, technique.[100] It has fallen into appropriate disrepute in our day, however.[101] The predominant contemporary judicial attitude is that if Congress, by inadvertence, left a hole in a statutory scheme, it is up to Congress, and no one else, to plug it.[102]

In short, the IRS concluded in the 1996 technical advice that the penalty in question did not apply. That was the correct result, and it surely would have been reached without our canon. The reference to the canon in the memorandum was unnecessary and added no meaningful level of protection for taxpayers' legitimate interests.

(2) The frequently cited *Hatfried* case[103] involved a corporation owned wholly by one individual. The corporation's returns for the year were prepared and filed by a certified public accountant who had been "advised of the facts and circumstances surrounding the [business of the corporation]. He never suggested the filing of a personal holding company surtax return and none was

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[97] I.R.C. § 6698(a). No penalty provision applied directly to delinquent S corporation returns, so it was § 6698 or nothing.

[98] Citing MERTENS LAW of FEDERAL INCOME TAX § 3.53 (1996) & SUTHERLAND ON STATUTORY CONSTRUCTION §§ 66.01 & 66.02 (5th ed. 1994).

[99] *See* I.R.C. §§ 761(a), 7701(a)(2).

[100] *See* POPKIN, *supra* note 20, at 3-4, 118.

[101] *See id.* at 67-73; *see also* Easterbrook, *Statutes Domains*, *supra* note 3 (arguing that statutes should more often be held inapplicable instead of being construed).

[102] *E.g.*, *In re* Young, 233 F.3d 56, 59 (1st Cir. 2000) ("If Congress imposed a new tax on two classes of taxpayers and patently omitted a third comparable class only through oversight, a court could not properly read the third class into the tax statute, however confident judges might be about what Congress would have done if it had thought of the defect."), *aff'd*, 122 S. Ct. 1036 (2002); Beneficial Corp. v. United States, 814 F.2d 1570, 1576 (Fed. Cir. 1987).

[103] Hatfried, Inc. v. Comm'r, 162 F.2d 628 (3d Cir. 1947).

filed."[104] Indeed, the corporate income tax return prepared and filed by the accountant answered "no" to the question asking whether the entity was a personal holding company.[105]

The IRS asserted that the corporation was a personal holding company, thus liable for the personal holding company tax[106] and a twenty-five percent penalty for failure to file a personal holding company return.[107] The Tax Court held for the IRS on both issues. The Third Circuit affirmed as to the first. However, it reversed as to the penalty.

The circuit court noted that the penalty section contained a reasonable cause defense.[108] It found that, on the facts, "there can be only one possible conclusion: the statement in the return that the [corporation] was not a personal holding company was made on accountant's advice and in reliance upon that advice."[109] Such reliance, the court held, constituted "reasonable cause" obviating the penalty.[110] In the course of this discussion, the court remarked: "Further, it is well-settled that in the application of penalties all questions in doubt must be resolved in favor of those from whom the penalty is sought."[111]

Accepting its factual conclusion as correct, the court surely was right in holding for the taxpayer on the penalty issue. The invocation of the "construe penalties strictly" canon was not necessary to that holding – the court's statement that "there can be only one possible conclusion" as to reliance shows that.

Hatfried illustrates a larger point. The use of the canon is unnecessary with respect to any penalty that has a "reasonable cause" defense, and the major penalties do.[112] Indeed, "reasonable cause" is a stronger taxpayer shield today than it was when *Hatfried* was decided in 1947.[113] In that case, the Government offered an argument in support of the penalty that is shocking to modern ears. It maintained that "ignorance of the law is no excuse, whether the ignorance is on the part of the taxpayer or his advisor. Thus, . . . even assuming that the taxpayer relied on its accountant's advice . . ., no case of 'reasonable cause' is established."[114] There even was some arguable case law support for that position then.[115]

Of course, we are well past that point now. Congress has made clear, in its various reworkings of tax crimes and penalties, that the old "ignorance of

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104 *Id.* at 630.
105 *Id.*
106 I.R.C. § 501 (1939), currently I.R.C. § 541.
107 I.R.C. § 291 (1939). Currently, I.R.C. § 6683 imposes a penalty on foreign corporations that fail to file personal holding company tax returns.
108 Although the penalty was mandatory when enacted in 1934, 1936 amendments to § 291 added: "unless it is shown that such failure is due to reasonable cause and not due to willful neglect." *Hatfried*, 162 F.2d at 632. This is standard "reasonable cause" language in major contemporary penalties. *See* I.R.C. §§ 6651(a)(1),(2), (3), 6664(c), 6724(a). Similar language also appears in current I.R.C. § 6683.
109 *Hatfried*, 162 F.2d at 632.
110 *Id.* at 633.
111 *Id.* (internal quotation marks omitted).
112 *See supra* text accompanying notes 86-88.
113 For description of the reasonable cause defense, *see, e.g.*, MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE ¶ 7B.03 (2d ed. 1991).
114 *Hatfried*, 162 F.2d at 633.
115 *See, e.g.*, Fides v. Comm'r, 137 F.2d 731, 735-36 (4th Cir. 1943).

the law . . . is no excuse" notion no longer governs this area.[116] Courts have gotten the message. For instance, as to the issue in *Hatfield*, there now is no doubt that reliance on the advice of a qualified tax expert[117] constitutes reasonable cause.[118]

(3) *Acker*[119] is the case most frequently cited for the "construe tax penalties narrowly" precept, so it warrants consideration here. The taxpayer, without reasonable cause, failed to file a declaration of estimated income tax for the years in question. The IRS asserted two penalties: (1) the penalty under § 294(d)(1)(A) of the 1939 Code for failure to file a declaration of estimated tax and (2) the penalty under § 294(d)(2) of the 1939 Code for substantial underestimation of estimated tax.[120] By the time the case reached the Supreme Court, it was uncontroversial that the first penalty applied. The issue was as to the second.

The Government argued that the two penalties could be applied concurrently, and it relied on a Regulation that provided: "in the event of a failure to file the required declaration, the amount of the estimated tax [which the taxpayer has declared] is zero."[121] A declaration of estimated tax of zero would mean there had been a substantial underestimation when positive liability existed. There had been many previous lower court cases as to the validity of the Regulation, and they were split.[122]

Reversing the Tax Court, the Sixth Circuit held against the second penalty. It reasoned that Congress had created two distinct penalties but that the effect of the Regulation was to make the second automatically applicable when the first applied. Finding it unreasonable and plainly inconsistent with the statute, the circuit court invalidated the Regulation.[123] In the course of its discussion, the court twice cited *Hatfried* in invoking the "strict construction of the penalties" precept.[124]

The Supreme Court affirmed the Sixth Circuit's decision. It began its analysis by referring to the above precept.[125] It then remarked: "we fail to find any expressed or necessarily implied provision or language [in the statute] that purports to authorize the treatment of a taxpayer's failure to file a declaration of estimated tax as, or the equivalent of, a declaration estimating his tax to be zero."[126] Indeed, the Court concluded, the language of the second penalty

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[116] *See* Cheek v. United States, 498 U.S. 192, 199 (1991).

[117] C.P.A.s and attorneys are deemed experts for this purpose; the qualifications of others have to be proved by the taxpayer. *E.g.*, Mayflower Inv. Co. v. Comm'r, 239 F.2d 624, 627 (5th Cir. 1956).

[118] *E.g.*, McIntyre v. Comm'r, 272 F.2d 188 (6th Cir. 1959) (per curiam); Fisk v. Comm'r, 203 F.2d 358 (6th Cir. 1953).

[119] Comm'r v. Acker, 361 U.S. 87 (1959), *aff'g* 258 F.2d 568 (6th Cir. 1958), *aff'g in part & rev'g in part* 16 T.C.M. (CCH) 89 (1957).

[120] The 1954 Code collapsed these into a single penalty for underpayment of estimated tax, and this continues under the 1986 Code. *See* I.R.C. § 6654.

[121] Former Treas. Reg. § 29.294-1(b)(3)(i) (1949).

[122] *See* cases cited at *Acker*, 258 F.2d at 572-75; *Acker*, 361 U.S. at 89 n.3.

[123] *Acker*, 258 F.2d at 573-74.

[124] *Id.* at 573, 576.

[125] *Acker*, 361 U.S. at 91.

[126] *Id.*

seemed to contemplate that a declaration be filed.[127] A three-justice dissent agreed that a normal-English reading of the statute was to that effect, but it argued, based on statements in committee reports, that Congress had intended a different meaning, one consistent with the Regulation.[128]

Acker is a close case, as the division among the lower courts and within the Supreme Court suggests.[129] Certainly, *Acker* is closer than the 1996 Technical Advice Memorandum and *Hatfield* discussed above. The case for the penalty rests on a Regulation, committee reports consistent with the Regulation, and the fact that Congress did not amend the statute after promulgation of the Regulation. And yet, there are counters to each of these, none of which depends upon the strict-construction-of-penalties maxim. Take the above supports in reverse order.

The "reenactment without change" argument is easily dispatched. Although that sort of argument has appeared in many judicial decisions,[130] many[131] – including me – have scant regard for it. It often is unclear that Congress even knew about the interpretation allegedly sanctified by subsequent action or inaction.[132] If it did, did it care, or was its action or inaction explicable by factors other than approval of the interpretation?[133] Most importantly, it is the will of the enacting Congress that matters. The preference of some later Congress is not law.[134]

The controversy in *Acker* about the committee reports has a ring familiar from recent debates. The Sixth Circuit weighed in forcefully on this:

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[127] *Id.* at 92.

[128] *Id.* at 94-95 (Frankfurter, J., dissenting).

[129] One thing that made it close was the Government's argument that § 294(d)(2) was not a penalty section at all. Like current §§ 6654 and 6655, the "penalty" amount under § 294(d)(2) was calculated by reference to an interest rate. Thus, the Government argued that it was an interest section, not a penalty section. *Compare Acker*, 361 U.S. at 91 n.4 (majority rejected the argument) *with id.* at 95 n.* (dissent accepted the argument). We need not, for our purposes, pass on this characterization contention.

[130] *E.g.*, Johnson v. Transp. Agency, Santa Clara County, 480 U.S. 616, 629-30 n.7 (1987); Bob Jones Univ. v. United States, 461 U.S. 574, 600-02 (1983) (applying the notion to an unusual situation but stating that "[o]rdinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation").

[131] *E.g.*, Oscar Mayer & Co. v. Evans, 441 U.S. 750, 758 (1979); United States v. Wise, 370 U.S. 405, 411 (1962) (post-enactment expressions of legislative intent should be given little or no weight).

[132] And who is "Congress" for this purpose? Do all members of each house have to be aware of the interpretation? A majority? The chairs of the tax-writing committees? To say that Congress was or was not aware of an interpretation suggests some institutional mind when what really exist are individual minds, which may not be aggregated. *See, e.g.*, Easterbrook, *Statutes' Domain*, *supra* note 3, at 547-48.

[133] For instance, the *Acker* Court found the argument unpersuasive, in part, because, if Congress knew of the Regulation, "it must be presumed that Congress also knew that the courts, except the Tax Court, had almost uniformly held that § 294(d)(2) does not authorize an addition to the tax in a case where no declaration has been filed, and that the regulation is invalid." 361 U.S. at 93.

[134] Ultimately, the *Acker* Court concluded, the preference of any subsequent Congress was "immaterial, for Congress could not add to or expand this statute by impliedly approving the regulation." *Id.*; *see also* United States v. Price, 361 U.S. 304, 313 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one").

> It seems to us a policy of first order that taxpayers under this "government of laws and not of men" be entitled to expect that whenever the Congress intends to exact a penalty for a particular commission, this will be done by unequivocal language embodied in a statute regularly enacted conformably to the Constitution, and not by a committee report that is neither voted on by members of both Houses nor submitted to the President for his approval.[135]

More modestly, the Supreme Court majority concluded that the committee reports were not "so persuasive as to overcome the [statutory language] which seems clearly to contemplate the filing of an estimate before there can be an underestimate."[136]

A major front in current battles over statutory interpretation is what role committee reports should be allowed to play.[137] The position advanced by the Sixth Circuit has been echoed more recently by Justice Scalia[138] and others.[139] Not surprisingly, other judges and commentators oppose that position.[140]

Plainly, the proper role of committee reports as a guide to statutory construction is a matter too large to resolve here. My point, as germane to our inquiry, simply is that there is a recognized (though controversial) tradition on the basis of which the committee reports in *Acker* could have been – indeed, were – excluded from consideration. This tradition exists independently of any canon as to penalties.

This brings us to the Regulation. Treasury regulations typically are entitled to deference, although this is not absolute and the degree of deference varies. The one at issue in *Acker* was an interpretive regulation, not a legislative regulation which, at least in theory, receives greater deference.[141] The courts have been less than consistent as to how the validity of Treasury regulations is to be measured.[142] Still, it is safe to say that an interpretive regulation

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[135] *Acker*, 258 F.2d at 576.

[136] *Acker*, 361 U.S. at 93.

[137] *See, e.g.*, GREENAWALT, *supra* note 5, at ch. XIII (summarizing the positions and the arguments both for and against substantial use of committee reports); Reed Dickerson, *Statutory Interpretation: A Peek into the Mind and Will of a Legislature*, 50 IND. L.J. 206 (1975); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

[138] *E.g.*, SCALIA, *supra* note 3, at 29-37.

[139] The debate is international. For example, the *Acker* dissent acknowledged that the English Courts would have decided the case as the Court did "because English courts do not recognize the relevance of legislative explanations of the meaning of a statute made in the course of its enactment. If Parliament desires to put a gloss on the meaning of ordinary language, it must incorporate it in the text of the legislation." 361 U.S. at 94 (citing sources).

[140] *E.g.*, Posner, *supra* note 3, at 274-75; Wald, *supra* note 3.

[141] *See, e.g.*, Metro. Sch. Dist. v. Davila, 969 F.2d 485, 490 (7th Cir. 1992).

[142] For instance, in *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979), the Court described a multi-factorial analysis. More recently, a number of courts have held that the *Chevron* two-step analysis applies to tax regulations. *E.g.*, Atl. Mut. Ins. Co. v. Comm'r, 523 U.S. 382, 387 (1998); Bankers Life & Cas. Co. v. United States, 142 F.3d 973, 977-83 (7th Cir. 1998); Square D Co. v. Comm'r, 118 T.C. 299, 307 (2002) (en banc); *see* Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984). *But see* Cent. Pa. Sav. Ass'n v. Comm'r, 104 T.C. 384, 391-92 (1995) ("Chevron has had a checkered career in the tax arena."). For discussion of *Chevron* in the tax area, *see, e.g.*, Ellen P. Aprill, *Muffled Chevron: Judicial Review of Tax Regulations*, 3 FLA. TAX REV. 51 (1996); John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the Chevron Era*, 64 GEO. WASH. L. REV. 35 (1995).

will be held invalid, under both traditional[143] and *Chevron*[144] standards, if it is inconsistent with the underlying statute.[145]

The *Acker* Court found the Regulation to be inconsistent with the statute's language, and so invalid. This conclusion is surely within the range of reason. Several analogies support the conclusion that not filing a return is a non-statement, not an affirmative statement declaring zero tax.[146] Also, the 18 U.S.C. § 1001 "false statement" offense requires, as an element, that the taxpayer or other defendant have made a "statement;" a mere non-statement will not do.[147] If a defendant filed a form or application that left a line blank, that is construed as a representation of "zero" as to that item.[148] But that is because "[h]aving undertaken to file a report, defendant was required to file a full report."[149] In *Acker*, the taxpayer did not undertake to file a declaration of estimated tax, and so would not be viewed, under the *McCarthy* reasoning, as having made a "zero" representation. Moreover, Congress made precisely that distinction in the subsequent IMPACT legislation.[150] Under it, the delinquency penalty is the sole penalty for non-filing. The accuracy-related penalties can come into play only when a return has been filed.[151] Once again, there was a satisfactory rationale on which to base the *Acker* result, a rationale not dependent on the canon as to tax penalties.

Thus, in penalty cases that taxpayers should win – both easy cases like Technical Advice Memorandum 9627004 and *Hatfried*, and close cases like *Acker* – there will be grounds on which to base a decision for the taxpayer that are independent of our canon. Moreover, as shown in Part III, those grounds will have a higher degree of legitimacy than the canon and so should be the grounds on which the decision rests. The "construe tax penalties strictly" canon is unnecessary to safeguard legitimate taxpayer interests.

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143 *See, e.g.*, Rowan Cos., Inc. v. United States, 452 U.S. 247, 253 (1981); Comm'r v. S. Tex. Lumber Co., 333 U.S. 496, 501 (1948); Thomas Int'l Ltd. v. United States, 773 F.2d 300, 303 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986).

144 Under step one of *Chevron*, one first looks to the statute. If the statute is clear, the court applies that clear meaning regardless of any inconsistent regulation. *Chevron*, 467 U.S. at 842-43.

145 A recent case invalidating a tax regulation is *Rite Aid Corp. v. United States*, 255 F.3d 1357 (Fed. Cir. 2001).

146 The § 7201 criminal penalty for tax evasion requires, among other elements, that the taxpayer have taken some affirmative act of evasion. Non-filing is a non-act, not an affirmative act, and will not suffice by itself to support a § 7201 charge. Spies v. United States, 317 U.S. 492 (1943).

147 *E.g.*, United States v. Irwin, 654 F.2d 671, 675 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982).

148 *Id.* at 676.

149 United States v. McCarthy, 422 F.2d 160, 162 (2d Cir. 1970), *cert. dismissed*, 398 U.S. 946 (1970).

150 *See supra* text accompanying notes 66-67.

151 I.R.C. § 6664(b); *compare* I.R.C. § 6651 *with* I.R.C. §§ 6662, 6663.

III. Distortion of Proper Role of Courts

A. Taking the Canon Seriously

Interpretational maxims often appear in judicial opinions without truly having played a role in the judge's mental process in reaching the decision. The judge will reach his or her preferred outcome on the basis of some other consideration(s). Then, one or more canons may be used either rationalizationally or ritualistically.

Rationalization. For any of a variety of personal or institutional reasons, the judge may be reluctant to state in the opinion the consideration(s) which really drove the outcome choice. But the choice will nonetheless have to be explained – or rationalized – in the court's written opinion. To supply this rhetorical need, one or more canons may be plugged in.[152]

Ritual. In other – hopefully far more – cases, the judge has no reticence about stating in the opinion the consideration(s) that actually led to the outcome chosen and does state it or them. Nonetheless, one or more canons may be thrown into the opinion as well, as make-weights or window-dressing.[153]

These uses may explain, but cannot defend, the inclusion of "read tax penalties strictly" or any other canon of construction in the body of a judicial opinion. The rationalization function is simply deceptive. The transparency of judicial decisionmaking would be improved by abandoning the practice.[154] The ritual function also undercuts transparency (albeit to a lesser degree), since one must separate the wheat from the chaff in the opinions. At best, ritualisticallyinvoked canons are surplusage.

Thus, the tax penalties canon, like other canons, can be justified, if at all, only on the assumption that they are, at least sometimes, used meaningfully by judges. That is, the canons can be useful only if they actually influence judges' decisionmaking, not merely their decision-explaining. But the assumption of potency is precisely what gives rise to the concern developed in the remainder of this Part.

B. Undermining the Judicial Function

The constitutional position of Congress and the courts is that the former writes the laws and the latter interpret them in the event of controversy. The courts owe a duty of fidelity. A court's charge is to fathom, as best as legiti-

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152 *See, e.g.*, Guido Calabresi, A Common Law for the Age of Statutes 180-81 (1982); Karl N. Llewellyn, The Common Law Tradition 521-35 (1960); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan. L. Rev. 321, 353-62 (1990); Robert A. Leflar, *Honest Judicial Opinions*, 74 Nw. U. L. Rev. 721 (1979); David L. Shapiro, *In Defense of Judicial Candor*, 100 Harv. L. Rev. 731 (1987).

153 *See, e.g.*, Walter F. Murphy, Elements of Judicial Strategy 31 (1964); Lawrence C. Marshall, *The Canons of Statutory Construction and Judicial Constraints: A Response to Macey and Miller*, 45 Vand. L. Rev. 673, 674 (1992) ("the pressure created by the dominant legal culture and institutions therein requires judges to announce their decisions on interpretive grounds whenever possible").

154 "[J]udicial opinions continue to pretend far more often than they should that the interpretation of statutes is the mechanical application of well understood interpretive principles – the canons – to legislative materials." Posner, *supra* note 4, at 805-06.

mate tools will allow, the precise meaning of the statute before it in the given case.[155] Courts have recognized this in tax and other cases from an early date.[156]

When the courts resort to the "construe tax penalties narrowly" maxim, they forfeit this responsibility. Each statute reflects a calibration. Congress wanted to move in a certain direction – but only so far. It balanced competing objectives and struck compromises among factions and interests.[157] The maxim is a generalization that bears only accidental correspondence to the unique calibration each section represents. The sometimes difficult – but, from the standpoint of legitimacy, always essential – task of ascertaining the precise meaning of the particular statute at hand is forgone when the canon drives the decision.

The imperative of applying the laws as Congress wrote them, without a "thumb on the scale" for either the IRS or the taxpayer, was recognized early in our revenue history, even before adoption of our contemporary tax structure. In an 1890 case, the Supreme Court declared:

> By the now settled doctrine of this court, . . . statutes to prevent frauds upon the revenue are considered as enacted for the public good and to suppress a public wrong, and therefore, although they impose penalties or forfeitures, not to be construed, like penal laws generally, strictly in favor of the defendant; but they are to be fairly and reasonably construed, so as to carry out the intention of the legislature.[158]

After adoption of the modern income tax, the Supreme Court made the same point forcefully in repudiating another tax canon. *White v. United*

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[155] "[N]o one will gainsay that the [court's] function in construing a statute is to ascertain the meaning of words used by the legislature." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947).

Regrettably, some do gainsay it. *E.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986) (arguing that interpretation should be guided by determination of morally right answers and best legal practices); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21 (1988) (urging that the legislature sets the initial course of a statute but that the statute's ultimate destination, as applied by the courts, should depend on other factors); Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 656 (1992) (arguing that courts should be guided mainly by policy outcomes in evaluating competing interpretations of statutes).

Fortunately, the "most prominent conception of the role of courts . . . in statutory construction" remains that the courts "are agents or servants of the legislature." CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 112 (1990).

[156] *See, e.g.*, Eidman v. Martinez, 184 U.S. 578, 582 (1902); De Bary v. Souer, 101 F. 425, 428 (5th Cir. 1900); Commercial Health & Accident Co. v. Pickering, 281 F. 539, 541 (S.D. Ill. 1922) ("it is the duty of the courts, in construing statutes, to observe the fundamental rule, to ascertain and give effect to the intention of Congress").

[157] *See, e.g.*, Indianapolis Life Ins. Co. v. United States, 115 F.3d 430, 434-36 (7th Cir. 1997); Easterbrook, *Statutes' Domains*, *supra* note 3, at 540-42.

[158] United States v. Stowell, 133 U.S. 1, 12 (1890) (citing cases). Earlier, another court said:

> A law imposing a tax is not to be construed strictly . . . for it is taken as a share of a necessary public burden; nor liberally, like laws intended to effect directly some great public object; but fairly for the government and justly for the citizen; and so as to carry out the intention of the legislature . . . ."

Hubbard v. Brainard, 35 Conn. 563, 1869 WL 149, at *4 (Conn. Super. Ct. 1869) (emphasis added), *rev'd on other grounds sub nom.* Collector v. Hubbard, 79 U.S. 1 (1870).

States[159] involved the question whether, under the income tax statutes then prevailing,[160] the losses suffered by shareholders upon the liquidation of their corporation were ordinary or capital in nature. The taxpayers relied, in part, on the canon that ambiguous revenue laws should be construed strictly against the Government,[161] a precept that had been espoused by numerous prior cases.[162] Finding ambiguities in the statute, the taxpayers urged that the canon should control over language and legislative history favorable to the Government.

The Supreme Court rejected the taxpayers' suggestion, deeming it inconsistent with the proper role of the courts in interpreting tax statutes. The Court said:

> We are not impressed by the argument that, as the question here decided is doubtful, all doubts should be resolved in favor of the taxpayer. It is the function and duty of courts to resolve doubts. We know of no reason why that function should be abdicated in a tax case more than in any other where the rights of suitors turn on the construction of a statute and it is our duty to decide what that construction fairly should be. Here doubts which may arise upon a cursory examination of [the sections] disappear when they are read, as they must be, with every other material part of the statute . . . and in the light of their legislative history.[163]

This teaching of *White* has been followed by many subsequent courts.[164] Compatible observations, although without citation to *White*, appear in many other cases: "Our part is simply to enforce the Code as it stands";[165] "Our task is to construe and apply, not to write, [tax] legislation";[166] and "we must construe the language of the [tax] act as we find it."[167]

The same that *White* said about the "construe tax statutes in favor of the taxpayer" canon also can be said of the "construe tax penalties strictly" canon. The latter canon displaces particularized statutory exegesis and abdicates the courts' true role no less than did the former canon. Because it forfeits the courts' legitimate function, our canon should be discarded.[168]

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159 305 U.S. 281 (1938).

160 Revenue Act of 1928, §§ 23, 101, 45 Stat. 791, 799, 811 (codified at former I.R.C. §§ 23, 101).

161 *See supra* note 18.

162 *See* Griswold, *supra* note 7, at 1142 (that canon had been "cited in more than two hundred reported decisions, and must have been set out in full many thousands of taxpayers' briefs").

163 305 U.S. at 292.

164 *E.g.*, Reddert v. United States, 925 F. Supp. 261, 270 (D.N.J. 1996); Welder v. United States, 329 F. Supp. 739, 751 (S.D. Tex. 1971); Endler v. United States, 110 F. Supp. 945, 949 (D.N.J. 1953); Booth v. Comm'r, 108 T.C. 524, 568 (1997).

165 Indianapolis Life Ins. Co. v. United States, 115 F.3d 430, 434 (7th Cir. 1997); *see also* Shriners Hosp. for Crippled Children v. United States, 862 F.2d 1561, 1563 (Fed. Cir. 1988).

166 Int'l Trading Co. v. Comm'r, 484 F.2d 707, 711 (7th Cir. 1973).

167 St. Louis Refrigerating & Cold Storage Co. v. United States, 43 F. Supp. 476, 484 (Ct. Cl. 1942).

168 My argument is limited to the canon here under discussion. It would go too far to seek to expel all canons of construction on the basis of *White*. Earlier, we divided canons into three classes: textual canons, extrinsic source canons, and substantive canons. *See supra* text accompanying note 31. The argument made here has no application to the first and second classes, nor does it apply even to all substantive canons. For instance, some substantive canons are based on constitutional policies. *See* ESKRIDGE, *supra* note 2, at 276, 325-27. These would not be displaced by even a strong reading of *White*.

This is particularly so because there typically are ample materials specific to the penalty statute at issue from which a court can define the statute's meaning. The statutory language is primary, of course, but for most judges it need not be exclusive. The Supreme Court said generations ago in a tax case that statutory language should be considered "in connection with the context, the general purposes of the statute in which it is found, the occasion and circumstances of its use, and other appropriate tests for the ascertainment of the legislative will."[169] Numerous subsequent tax opinions have followed that approach.[170] In addition, courts may look to administrative interpretations of the section at issue.[171] Regulations have been written under virtually every penalty section, and courts also may consult revenue rulings and other lesser IRS positions.[172]

To be sure, there are disagreements as to the proper use of some of these materials. We have already noted controversy as to use of committee reports[173] and disagreement as to the degree of deference accorded regulations.[174] Other instances of disagreement exist as well.[175] Nonetheless, the general point remains true. Combining the statutory penalty provisions with whatever secondary materials the particular judge feels it permissible and instructive to use will usually result in a considerable amount of information from which the judge can make her decision as to whether or not the penalty applies in the case at hand. Deciding the case on the basis of that information will avoid the legitimacy problems that resort to the penalty canon can entail.

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[169] Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 93-94 (1934).

[170] *E.g.*, United States v. Consol. Edison Co. of N.Y., Inc., 366 U.S. 380, 391 (1961); Harrison v. N. Trust Co., 317 U.S. 476, 479 (1943); United States v. Am. Trucking Ass'n, Inc., 310 U.S. 534, 543-44 (1940); Goldstein v. Comm'r, 364 F.2d 734, 741-42 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005 (1967); Emery v. Comm'r, 166 F.2d 27, 30-31 (2d Cir. 1948); Mercantile-Commerce Bank & Trust Co. v. Comm'r, 165 F.2d 307, 310-11 (8th Cir. 1948), *cert. denied*, 333 U.S. 868 (1948); Newman & Co. v. United States, 290 F. Supp. 170, 175 (S.D.N.Y. 1968), *rev'd on other grounds*, 423 F.2d 49 (2d Cir. 1970); Mo. Pac. Truck Lines, Inc. v. United States, 3 Cl. Ct. 14, 22 (1983) (citing cases).

[171] *See, e.g.*, Minn. Tea Co. v. Comm'r, 76 F.2d 797, 800 (8th Cir. 1935) (citing cases), *aff'd*, 296 U.S. 378 (1935).

[172] *See, e.g.*, Am. Express Co. v. United States, 262 F.3d 1376, 1382-83 (Fed. Cir. 2001) (according "substantial deference" to a General Counsel Memorandum and an IRS decision interpreting an ambiguous Revenue Procedure); *Minn. Tea Co.*, 76 F.2d at 801 (relying in part on a General Counsel Memorandum). For description of administrative interpretations in tax, *see, e.g.*, GAIL LEVIN RICHMOND, FEDERAL TAX RESEARCH 106-71 (6th ed. 2002).

[173] *See* text accompanying notes 132-135, *supra*. It is well to observe that even Justice Scalia, the most prominent critic of reliance on committee reports, accepts their use in some situations and has used them in some of his opinions. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (Scalia, J., concurring); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 852-53 (1992).

[174] *See supra* text accompanying notes 137-140.

[175] For example, see the debate between Professors Caron and Galler about the weight to be accorded revenue rulings. *Compare* Paul L. Caron, *Tax Myopia Meets Tax Hyperopia: The Unproven Case of Increased Judicial Deference to Revenue Rulings*, 57 OHIO ST. L.J. 637 (1996); *and* Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up To Be Tax Lawyers*, 13 VA. TAX REV. 517 (1994); *with* Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 OHIO ST. L.J. 1037 (1995); *and* Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, 72 B.U. L. REV. 841 (1992).

C. Examples

This Part has argued that use of the canon can distort the courts' proper role – close analysis of the statute to determine precisely what it means for the particular case at hand – and that courts should instead confine their analysis in penalty cases to materials specific to the statute. Now, two sets of examples of the distortion.

(1) In the *Hill* case, the Fifth Circuit said that "[s]ection 6672 is on its face penal and must be strictly construed."[176] But slogans and categorizations have a way of substituting for deeper thought. That happened in *Hill*. Section 6672 is a collection device, a secondary liability measure, rather than a penalty. Its labeling as a penalty and its consequent strict construction inappropriately limits the section.

One can understand why the mistake was made. Each of the paragraphs of the section uses the word "penalty," some several times.[177] And § 6672 is lodged in a subchapter entitled "Assessable Penalties" of a chapter entitled "Additions to the Tax, Additional Amounts, and Assessable Penalties."[178] But labels are only one indicator. The underlying nature and substance of the provision is more important. This is the teaching in many analogous areas, including deductibility of payments,[179] excludability of receipts from income,[180] and Double Jeopardy consequences of punishments.[181]

When a business fails to pay trust fund employment taxes over to the IRS, § 6672 allows the IRS to collect them from the control persons in the business who were responsible for the failure to pay.[182] Thus, it is a secondary liability collection device, not unlike others authorized by the Code and other laws.[183] In practical effect, § 6672 is not a penalty, a fact that has often been recognized.[184] Section 6672 should be construed and applied consistently with its

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[176] United States v. Hill, 368 F.2d 617, 621 (5th Cir. 1966). Six years later, that court again called the section a penalty but refused strict application, preferring instead to view it as remedial, thus appropriate to be applied "broadly and liberally . . . to fulfill the purposes for which it was intended." Moore v. United States, 465 F.2d 514, 518 (5th Cir. 1972).

[177] *See* I.R.C. § 6672(a), (b)(1)-(4), (c)(1)-(5), (d), (e).

[178] I.R.C. ch. 68, subch. B.

[179] I.R.C. § 162(f) disallows deduction of fines and penalties. Whether a particular payment is a fine or penalty turns on the item's underlying substance. *E.g.*, True v. United States, 894 F.2d 1197, 1204 (10th Cir. 1990); Colt Indus., Inc. v. United States, 880 F.2d 1311, 1313-14 (Fed. Cir. 1989); Jerry Rossman Corp. v. Comm'r, 175 F.2d 711, 713 (2d Cir. 1949); Hawronsky v. Comm'r, 105 T.C. 94, 98-99 (1995).

[180] *See* Comm'r v. Schleier, 515 U.S. 323, 331 (1995) (determining whether receipts constitute excludible damages under I.R.C. § 104(a)(2) and looking to the punitive nature of the item).

[181] *See, e.g.*, Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 777-78 (1994) (deciding whether a "tax" constituted a punishment for Double Jeopardy purposes by reference to the substance, not the label, attached to it).

[182] I.R.C. § 6672(a).

[183] *See, e.g.*, I.R.C. §§ 3505 (lender and surety liability), 6901 (transferee liability); 31 U.S.C. § 3713 (2000) (fiduciary liability).

[184] Newsome v. United States, 431 F.2d 742, 745 (5th Cir. 1970); Monday v. United States, 421 F.2d 1210, 1216 (7th Cir. 1970); Botta v. Scanlon, 314 F.2d 392, 393 (2d Cir. 1963); IRA L. SHAFIROFF, INTERNAL REVENUE SERVICE PRACTICE & PROCEDURE DESKBOOK 9-3 (3d ed. 1998).

true nature as a collection section. The existence of the tax penalty canon creates the opportunity for misclassification and inappropriate limitation, a peril that materialized in *Hill*.

(2) As we have seen, the maxim as to tax penalty construction has frequently been invoked in accumulated earnings tax (hereafter "AET") cases.[185] But that is an area where the canon is particularly unhelpful. This is so because the AET is rich in statutory elaboration and factual development and because a strong "thumb on the scale" in favor of taxpayers already exists in the area.

First, the statutory scheme is extraordinarily detailed as to what is to be determined and when the information necessary for the determination is to be developed. The AET is imposed when a corporation is formed or availed of for the purpose of avoiding shareholder-level income tax "by permitting earnings and profits to accumulate instead of being divided and distributed."[186] Before issuing the notice of deficiency, the IRS may mail the corporation a notification that an AET adjustment is intended.[187] The corporation may reply with a statement setting out its grounds as to why earnings and profits were not accumulated beyond the reasonable needs of the business.[188] In ensuing Tax Court litigation, the burden of proof as to unreasonable accumulation is on the IRS if no initial notification was given. It shifts to the corporation if notification was given and no responsive statement was timely filed or the statement lacked sufficient detail.[189] If the IRS has and meets its burden as to unreasonable accumulation, the burden shifts to the corporation to show that it nonetheless was not formed or availed of to avoid shareholder-level tax.[190] The whole point of this statutory scheme is to encourage early and full development of the relevant facts and to establish which party will lose if these facts aren't adequately developed.[191]

Second, taxpayers typically already benefit from a favorable judicial perspective in AET cases without any constructional maxim dealing with penalties. As seen above, AET cases involve determining whether accumulations of earnings were reasonable in light of the anticipated needs of the particular business. Taxpayers know their own business best. Courts are understandably reluctant to let the IRS "second guess" the taxpayer's business judgment or to do so themselves.[192] This does not constitute a formal canon or presumption,

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[185] *See supra* note 45.
[186] I.R.C. § 532(a).
[187] I.R.C. § 534(b).
[188] I.R.C. § 534(c).
[189] I.R.C. § 534(a); Treas. Reg. §§ 1.534-2(b) and (d).
[190] I.R.C. § 533(a); Treas. Reg. §§ 1.533-1(a) and (b).
[191] Indeed, it has become commonplace in AET litigation for the parties to move for a determination before trial as to which of them bears the burden of proof in the case in light of the various notices given and their sufficiency or lack thereof, and for the court to issue lengthy opinions commenting on such notices and fixing the burden. *E.g.*, Gustafson's Dairy, Inc. v. Comm'r, 69 T.C.M. (CCH) 1639 (1995); Iowa Sch. of Men's Hairstyling, Inc. v. Comm'r, 64 T.C.M. (CCH) 1114 (1992).
[192] *Cf.* Welch v. Helvering, 290 U.S. 111, 113 (1933) (in a case under the ancestor of current I.R.C. § 162(a), saying that the taxpayer "certainly thought [the expenditures at issue were necessary for the development of his business], and we should be slow to override his judgment").

but the attitude can operate powerfully in favor of the taxpayer in an AET case. It has been said that:

> A court should be particularly wary of overturning a finding of a trial court *supporting* the taxpayer's determination of its anticipated business needs, since, in the first instance, the "reasonableness of the needs is necessarily for determination by those concerned with the management of the particular enterprise. This determination must prevail unless the facts show clearly the accumulations were for prohibited purposes."[193]

In a detailed statutory environment, with a scheme that creates strong incentive for full development, and in which there already is a tilt in favor of the taxpayer, there is little warrant for invoking canons of construction. AET cases can and should be decided on readily ascertainable legitimate grounds. The likely effect of using canons, if they influence the decision at all, would be short-circuiting the detailed, case-specific inquiry that AET controversies require.

IV. Unpredictability and Confusion

The "tax penalties should be strictly construed" canon has proved hopelessly unpredictable in practice. First, there is great uncertainty as to whether the canon will be applied at all in a given penalty case. Second, there is great uncertainty as to the weight and importance assigned to the canon in those cases in which it is applied.

A. *Uncertainty as to Whether Applied*

When will a court deciding a tax penalty case invoke the strict construction canon? One seldom knows. Untold thousands of tax penalty cases have been reported. The canon appears in the opinions written in distinctly a minority of these cases, and there are few reliable bases on which to predict its appearance or non-appearance.

One of the few predictors is the identity of the court rendering the opinion. The Tax Court hardly ever invokes the canon. Some might suggest that the reason for this is that this court tilts towards the IRS, a suspicion that has been voiced for years.[194] I think that view is wrong, as studies[195] and recent

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[193] Myron's Enters. v. United States, 548 F.2d 331, 334 (9th Cir. 1977) (emphasis in original) (quoting Henry Van Hummell, Inc. v. Comm'r, 364 F.2d 746, 749 (10th Cir. 1966), *cert. denied*, 386 U.S. 956 (1967)).

[194] *See, e.g.*, Henry J. Friendly, Federal Jurisdiction: A General View 166 (1973); 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, 998-99 (1991). This appears to be an example of the "agency capture" theory well known in Administrative Law. The idea is that the IRS appears before the Tax Court in every case, and the familiar tend to receive better treatment than the unfamiliar. Moreover, Tax Court judges sometimes were IRS, Treasury, or Department of Justice lawyers before their elevation to the bench, although this is less true of recent appointees. The suspicion that a specialized tax tribunal will tend to favor the IRS is behind much of the opposition to the oft-suggested and oft-rejected idea to create a national court of tax appeals. *See, e.g.*, Steve R. Johnson, *The Phoenix and the Perils of the Second Best: Why Heightened Appellate Deference to Tax Court Decisions Is Undesirable*, 77 Or. L. Rev. 235, 244-47 (1998).

events[196] have shown. A more likely explanation lies in the greater expertise of the Tax Court. Tax Court judges usually (though not always) had considerably more experience with tax law before their installation on the bench than did generalist district court or circuit court judges, and, of course, Tax Court judges hear only tax cases after such installation.[197] It may well be that the Tax Court, as a result of its greater expertise, feels greater confidence in applying the copious interpretive materials that, I have argued,[198] should be the proper bases for construing tax penalty statutes.[199]

In other courts, fortuity is probably the leading cause as to whether the canon will appear in an opinion. Did taxpayer's counsel happen to argue the canon in her brief? Did the judge's clerk notice the canon in some prior opinion during research? Had this judge previously authored an opinion mentioning the canon and saved it in the "boilerplate" files of the chambers' word processor? Sometimes one or another of these transpires. Far more often, they do not.[200]

But this is unacceptable. A coherent and transparent legal system must have a substantial degree of predictability. A canon that usually is missing in action and which materializes, when it does, only fortuitously decreases the predictability of the law. Consider three examples:

(1) *Asphalt Products*[201] was an important case as to the pre-IMPACT version of the negligence penalty. Two substantive issues were resolved against

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[195] *See, e.g.*, James Edward Maule, *Instant Replay, Weak Teams, and Disputed Calls: An Empirical Study of Alleged Tax Court Judge Bias*, 66 TENN. L. REV. 351 (1999).

[196] A number of times in recent years, the Tax Court has invalidated a tax regulation only to be reversed by a generalist circuit court. Redlark v. Comm'r, 106 T.C. 31 (1996), *rev'd*, 141 F.3d 936 (9th Cir. 1998); Atlanta Mut. Ins. Co. v. Comm'r, 71 T.C.M. (CCH) 2154 (1996), *rev'd*, 111 F.3d 1056 (3d Cir. 1997), *aff'd*, 523 U.S. 382 (1998); Tate & Lyle, Inc. v. Comm'r, 103 T.C. 656 (1994), *rev'd*, 87 F.3d 99 (3d Cir. 1996). Of course, pro-IRS Tax Court decisions also have been reversed during the same period. But the invalidation of a Treasury regulation is a "big deal" in the tax world, and the willingness of the Tax Court to do it repeatedly (and, in the eyes of the appellate courts, wrongfully) is a hard bit of evidence to explain away for one who clings to the notion that the Tax Court tilts towards the IRS.

[197] As a result, it once was the rule that Tax Court decisions were entitled to heightened deference (*see* Dobson v. Comm'r, 320 U.S. 489, 498-99 (1943) (legislatively reversed by I.R.C. § 7482)), and some courts still incline in that direction today (*see* Johnson, *supra* note 194, at 253-54). For debate as to whether Dobson deference should be resurrected, see David F. Shores, *Rethinking Deferential Review of Tax Court Decisions*, 53 TAX LAW. 35 (1999); Johnson, *supra* note 194; David F. Shores, *Deferential Review of Tax Court Decisions: Dobson Revisited*, 49 TAX LAW. 629 (1996).

[198] *See* Part III.B, *supra*.

[199] *Cf.* Booth v. Comm'r, 108 T.C. 524, 568 (1997) (rejecting another canon because "[i]t is the function and duty of courts to resolve doubts" and "that function should [not] be abdicated in a tax case"; in short, "it is our duty to decide what [the proper] construction fairly should be") (quoting White v. United States, 305 U.S. 281, 292 (1938)).

[200] Moreover, merely knowing that the canon exists does not guarantee a court will discuss it. In *Bassett v. Comm'r*, 67 F.3d 29 (2d Cir. 1995), the circuit court upheld imposition of delinquency and negligence penalties. The canon on strictly construing tax penalties was a significant part of the dissent. *Id.* at 34 (Leval, J., dissenting). Despite this, the majority chose not to address the canon in its opinion.

[201] Akers v. Comm'r, 47 T.C.M. (CCH) 1621 (1984), *rev'd sub nom.* Asphalt Prods. Co., Inc. v. Comm'r, 796 F.2d 843 (6th Cir. 1986), *rev'd*, 482 U.S. 117 (1987) (per curiam).

the taxpayer, resulting in a deficiency of over $133,000. About $1100 of that came from improper deduction by a corporation of personal expenses of its shareholders. The rest resulted from an accounting issue. The IRS asserted a negligence penalty under former Code § 6653(a)(1), which provided: "If any part of any underpayment . . . is due to negligence or intentional disregard of rules or regulations (but without intent to defraud), there shall be added to the tax an amount equal to 5% of the underpayment." Five percent of the total $133,000 deficiency was over $6,900.

By the time the case reached the Supreme Court, only one issue remained. The correctness of the two substantive adjustments was uncontroversial. Also, it was settled that the major adjustment (the accounting adjustment) did not reflect negligence,[202] but that the small adjustment did. Thus, an $1,100 item triggered a $6,900 penalty (since the five percent applied to the whole deficiency if "any part" of it was due to the taxpayer's negligence).

The Tax Court upheld the penalty on that basis.[203] The Sixth Circuit reversed. It could not swallow the disproportion between the amount of the negligence item and the amount of the penalty, deeming it an "absurd result."[204] Saying "[w]e will not let the tail wag the dog," the circuit court held that the penalty "should be applied only to that portion of the deficiency attributable to the disallowed deduction."[205]

The Supreme Court reversed the Sixth Circuit, thus reinstating the penalty on the full amount of the deficiency. The Court noted that § 6653(a)(1)'s language "could not be clearer" and that the Sixth Circuit's decision was "in obvious conflict with the plain language of the statute."[206] The Sixth Circuit's rewriting of the statute was impermissible. "Judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but it cannot justify disregard of what Congress has plainly and intentionally provided."[207]

For our purposes, the striking fact about *Asphalt Products* is the complete absence of the "construe tax penalties strictly" maxim. None of the opinions – neither the Tax Court and Supreme Court opinions upholding the penalty on the

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[202] The corporation showed that its accounting treatment was based on good faith reliance on its accountant. Thus, the "reasonable cause" defense applied. *Ackers*, 47 T.C.M. at 1639.

[203] *Id.*

[204] *Asphalt Prods.*, 796 F.2d at 849.

[205] *Id.* at 850. Other circuits had held to the contrary. *E.g.*, Vnuk v. Comm'r, 621 F.2d 1318 (8th Cir. 1980); Abrams v. United States, 449 F.2d 662 (2d Cir. 1971). However, *Abrams* reserved judgment on the situation in which a comparatively insignificant item gave rise to the penalty. *Id.* at 664.

[206] *Asphalt Prods.*, 482 U.S. at 120. This was reinforced by reference to other provisions. Section 6653(a)(1) was complemented by § 6653(a)(2), which imposed penalty interest not on the whole deficiency but only "the portion of the underpayment . . . which is attributable to . . . negligence." Similar language appeared in § 6653(b)(2)(A), the additional interest component of the fraud penalty. In contrast, the fixed percentage portion of the fraud penalty applied not to the whole underpayment but only the portion of it attributable to fraud. Former I.R.C. § 6653(b)(1)(A). Taken as a whole, the statutory provisions made it quite clear that the language of § 6653(a)(1) reflected a congressional intention, not sloppy drafting.

[207] *Asphalt Prods.*, 482 U.S. at 121.

full deficiency amount nor the Sixth Circuit opinion limiting the penalty – mention the maxim.

(2) *Pallottini*[208] involved the correct rate of the substantial understatement penalty of former I.R.C. § 6661 for tax year 1982. When § 6661 was enacted in 1982, its rate was ten percent of the amount of any underpayment attributable to a substantial understatement of income tax liability.[209] In 1986, Congress passed two acts amending § 6661. The Tax Reform Act of 1986 (hereafter "TRA") provided for a penalty rate of twenty percent.[210] The Omnibus Budget Reconciliation Act of 1986 (hereafter "OBRA") provided for a penalty rate of twenty-five percent.[211] OBRA also expressly repealed the TRA change as to the penalty rate.[212]

The rub was that, although TRA passed Congress first,[213] OBRA was signed by the President,[214] so became law, first. Could OBRA repeal TRA as to § 6661 when TRA was not in effect when OBRA was enacted? Did the fact that TRA was enacted after OBRA mean that the penalty rate was twenty percent, not the twenty-five percent that Congress had intended? The Tax Court said: "our task is to resolve this conflict."[215]

The court unanimously held for the twenty-five percent rate. The majority found the intent of Congress to be controlling and saw that intent as being clearly for the twenty-five percent rate.[216] Judge Korner's concurrence suggested that the majority had "overlooked a longstanding and broadly accepted principle of statutory construction in reaching [its] result."[217]

Significantly, however, that principle was not the canon as to strict construction of tax penalties.[218] That canon is absent from the *Pallottini* opinions just as it was absent from the *Asphalt Products* opinions.

(3) The final example involves a set of cases addressing a common issue. I.R.C. § 6700 imposes a penalty on persons promoting or selling certain tax shelter interests. We are interested in the pre-1990 version of part of the section, which provided: "Any person who . . . participates (directly or indirectly) in the sale of any interest in [an illegal or overvalued tax shelter] . . . shall pay

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208 Pallottini v. Comm'r, 90 T.C. 498 (1988) (en banc).

209 Tax Equity and Fiscal Responsibility Act of 1982, § 323(a), Pub. L. 97-248, 96 Stat. 324, 613 (codified at former I.R.C. § 6661(a)).

210 § 1504(a), Pub. L. 99-514, 100 Stat. 2085, 2743 (1986).

211 § 8002(b), Pub. L. 99-509, 100 Stat. 1874, 1951 (1986). Both TRA and OBRA, as to their penalty provisions, were part of the wave of penalty increases in the 1970s and early to mid-1980s. See text accompanying notes 63-64, *supra*.

212 § 8002(c), Pub. L. 99-509, 100 Stat. 1874, 1951 (1986).

213 TRA was passed by the House on September 25 and the Senate on September 27 of 1986. OBRA was passed by both houses on October 17, 1986.

214 OBRA was signed into law on October 21 and TRA on October 22 of 1986.

215 Pallottini v. Comm'r, 90 T.C. 498, 502 (1988).

216 *Id.* at 503.

217 *Id.* at 504.

218 Instead, it was "that when, as here, two acts that contain conflicting and irreconcilable provisions are passed by the legislature during the same legislative session, the provisions of the last act passed by the legislature control." *Id.* (citing cases).

. . . a penalty equal to the greater of $1,000 or 10 percent of the gross income derived or to be derived by such person from such activity."[219]

Thus, the minimum penalty was $1000 per "activity," but what constituted the "activity" for this purpose? The IRS maintained that each sale was an activity while penalty targets asserted that all of the sales with respect to a particular shelter constituted one activity. Thus, if the target sold thirty interests in the same shelter, the IRS would claim that the minimum penalty was $30,000 while the target would claim it to be only $1000. The controversy was ended by legislation effective for 1990 and later years.[220]

Before the legislative fix, however, the issue was confronted in a score of judicial opinions. All of the circuit courts considering the issue held against the IRS's position.[221] The district courts and bankruptcy court[222] were about equally split between endorsing[223] and rejecting[224] the IRS's view.

I think that the courts rejecting the IRS's view of the $1000 penalty base had the better of the argument, but – as the split among the courts indicates – the issue was a close one. The noteworthy point for our purposes is the relative absence of the "construe tax penalties strictly" canon from the decisions in this line. Only one of the score of opinions – an early one[225] – invoked it.[226] All of the others resolved the issue, in whichever direction, on the basis of standard – and better – devices, such as statutory language, structure of analogous sections, committee reports, policy arguments,[227] and deference to the administering agency.[228]

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[219] I.R.C. § 6700(a) (before amendment in 1989).

[220] Omnibus Budget Reconciliation Act of 1989, Pub. L. 101-239, § 7734(a), 103 Stat. 2106 (1989). As a result of that Act, § 6700(a) now provides that "participation in each sale" is treated as an activity, adopting the IRS's position, effective for activities after December 31, 1989.

[221] Lampert v. United States, 884 F.2d 1395 (9th Cir. 1989) (per curiam); Gates v. United States, 874 F.2d 584, 586-88 (8th Cir. 1989), *aff'g in part & rev'g in part* 694 F. Supp. 610 (E.D. Ark. 1988); Bond v. United States, 872 F.2d 898 (9th Cir. 1989), *aff'g* United States v. H&L Schwartz, Inc., 1988 WL 70011 (C.D. Cal., Jan. 15, 1988); Spriggs v. United States, 850 F.2d 690 (4th Cir. 1988) (per curiam), *aff'g* 660 F. Supp. 789 (E.D. Va. 1987).

[222] Bowen v. United States, 84 B.R. 214 (Bankr. D. Utah 1988). The Tax Court lacks jurisdiction over § 6700 cases. I.R.C. § 6703(c)(2).

[223] Hill v. United States, 720 F. Supp. 95 (W.D. Mich. 1989); Sisk v. United States, No. A-86-CA-604 (E.D. Tex. 1989); Popkin v. United States, 699 F. Supp. 893 (N.D. Ga. 1988); Johnson v. United States, 677 F. Supp. 529 (E.D. Mich. 1988), *appeal dismissed sub nom.* Cooper v. United States, 875 F.2d 862 (6th Cir. 1989); Waltman v. United States, 618 F. Supp. 718 (M.D. Fla. 1985); Bean v. United States, 618 F. Supp. 652, 659 (N.D. Ga. 1985); McGrew v. United States, 1985 WL 6374, at *4 (M.D. Fla. July 19, 1985).

[224] Reno v. United States, 717 F. Supp. 1198, 1202 (S.D. Miss. 1989); Weir v. United States, 716 F. Supp. 574, 581 (N.D. Ala. 1989); Emanuel v. United States, 705 F. Supp. 434, 436-37 (N.D. Ill. 1989); *In re* Tax Refund Litig., 698 F. Supp. 439 (E.D.N.Y. 1988); Hersch v. United States, 685 F. Supp. 325, 329-31 (E.D.N.Y. 1988); Ostrow v. United States, 1985 WL 5961, at *10-11 (M.D. Fla. Dec. 20, 1985).

[225] *Ostrow*, 1985 WL 5961, at *8.

[226] Another mentioned a more general "principle . . . of statutory construction which require[s] courts to avoid harsh, unjust, oppressive or arbitrary results." *In re Tax Refund Litig.*, 698 F. Supp. at 442.

[227] The best opinion exploring the foregoing dimensions was *Spriggs v. United States*, 660 F. Supp. at 790-93.

[228] *See, e.g.*, *Johnson*, 677 F. Supp. at 531.

To summarize this Subpart – *Asphalt Products* presented a conflict between statutory language and apparent fairness. *Pallottini* and the § 6700 cases involved close questions of law. These are just the kinds of situations in which one would expect our canon to be invoked or at least expressly considered. Yet in almost none of these cases was that canon invoked, demonstrating that the canon is highly unpredictable in its appearance.

B. *Uncertainty Even When Applied*

When a court does choose to inject the canon as to tax penalties into its opinion, how large a role will the canon play in either decisionmaking or decision-explaining? Once again, the matter is ill-defined and unpredictable.

A canon of construction may be either weak or strong. A weak precept operates only as a tie-breaker. That is, if the other factors relevant to the decision are found to be in equipoise, the court will turn to the precept to resolve the case. In contrast, a strong precept is not limited to situations of equipoise. It may operate at the start, not the end, of the decisional process, and have positive weight. This is, a taxpayer with a slightly weaker case than the IRS (leaving aside the canon) might prevail if the court applies the canon and treats it as a strong one.

For example, assume a close case tilting (without the canon) slightly in the IRS's favor: the taxpayer's probability of success is forty-seven percent and the IRS's is fifty-three percent.[229] Further assume that, as is typical in a civil penalty case, the IRS bears the burden of production but the taxpayer bears the ultimate risk of nonpersuasion.[230] Counsel for both sides need to assess the case, in order to decide whether to settle or try the case and, if the former, to determine the settlement range.

Counsels' assessment of this case will hinge on the role the "construe tax penalties narrowly" maxim is expected to play. With a fifty-three percent case, the IRS will meet its burden of production, so the risk of nonpersuasion will come into play. There are three possibilities. First, if the court does not consider the maxim at all, the taxpayer can expect to lose at trial (assuming no major gaffe by Government counsel). Second, if the court considers the maxim but treats it as a weak factor, the taxpayer again can expect to lose, since the precept would matter only in a fifty-fifty case. Third, if the court considers the precept and treats it as a strong factor, the taxpayer can expect to win, since a strong factor likely is worth more than three percent in the probabilities calculation. Thus, in close cases, it should be important to counsel to know whether the precept is likely to be invoked and, if so, whether it is strong or weak, since counsels' handling of the case will be affected. Unfortunately, we already have seen that the former (likelihood of appearance) is unpredictable, and, as we now see, so is the latter (weight).

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[229] It is rarely possible to calculate victory probabilities so precisely, but this is useful for illustration. Also, counsel sometimes have to make finely calibrated predictions when deciding whether and for how much to settle the case. A further objection is that counsel for the two sides often reach different probabilities conclusions. In our example, then, assume the stated percentages to be those calculated by taxpayer's counsel.

[230] *See* text accompanying notes 90-92, *supra*.

There are two reasons why the role accorded our maxim (when it is invoked) is unpredictable. First, the courts have not achieved consensus as to whether it is a weak or a strong factor.[231] Indeed, the matter is essentially unexplored in the decisions. Opinions adverting to the canon almost never attempt to fix its strength with any clarity. One wanting to argue for a strong view of the canon could refer to language in some opinions,[232] while those preferring a weak view could stress language in other cases.[233] But both such efforts would be stretches. The various formulations are not so clear, and their use is not so widespread, as to furnish any basis for confident assertion.

Perhaps the failure of the cases to clarify the "weak versus strong" question simply reflects that courts haven't thought about the question. Or, it might reflect a deliberate decision on the part of judges to preserve maximum flexibility for future cases. We have noted the rationalization and ritual uses of the canon.[234] The former use often would be better served by a strong maxim; the latter use by a weak one. Leaving the matter fluid in the current decision preserves space for the judge to maneuver in future decisions.[235] Whatever the explanation of the phenomenon, it is a fact that the courts have not addressed, in any useful fashion, whether the tax penalties canon is strong or weak.

There is a second, closely related, basis of unpredictability. The canon, of course, will not be the only factor bearing on the interpretation of the statute at issue in the case. How does the canon compare to the other factors or interpretive aids? Is the relationship hierarchical, i.e., does the canon come into play before some other aids or only after them? Or, are all of the aids thrown together into a great constructional cauldron where something – we are not really sure which – will bubble to the surface to become primary? Perhaps most importantly, when our canon conflicts with some other principle, how is the court to resolve the conflict? Which aid should the court prefer over the other?

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231 Quite apart from unpredictability, there is no good choice here. A weak precept is meaningless. Equipoise is a theoretical concept that almost never happens in civil litigation if the parties develop and present their facts and arguments. *See* Johnson, *supra* note 91, at 444-45. A strong precept exacerbates the "distortion of courts' proper role" concern described in Part III. For instance, the IRS (possessed of a fifty-three percent case) *should* win in our hypothetical. Applying a strong canon to alter that result would lead to a wrong result.

232 Sometimes courts talk of the canon as a basis for construction "liberally in favor of the taxpayer." *E.g.*, Stephan v. Comm'r, 197 F.2d 712, 714 (5th Cir. 1952). Other courts talk about resolving "all questions in doubt" in favor of the taxpayer because of the maxim. *E.g.*, Acker v. Comm'r, 258 F.2d 568, 573 (6th Cir. 1958), *aff'd*, 361 U.S. 87 (1959); Hatfried, Inc. v. Comm'r, 162 F.2d 628, 633 (3rd Cir. 1947); *see also* Tech. Adv. Mem. 96-27-004 (July 5, 1996).

233 *E.g.*, Uhl Estate Co. v. Comm'r, 116 F.2d 403, 406 (9th Cir. 1940) (despite the strict construction canon, "[w]e cannot construe out of the statutes their meaning on matters that go to the essence"); *cf.* King v. United States, 10 F. Supp. 206, 209 (D. Md. 1935) (the maxim that doubts in tax statutes are to be resolved in favor of the taxpayer "does not justify the creating of a doubt where none naturally arises from the language used" in the statute).

234 *See* Subpart III.A, *supra*.

235 That judges attempt to preserve their decisional flexibility is an oft-noted fact. For examples in the tax area, *see* Johnson, *supra* note 194, at 267-68.

There is a dearth of guidance in the case law as to these relational questions. We earlier divided canons of construction into textual, extrinsic source, and substantive.[236] How does our maxim relate to canons in these categories?

Textual: One would expect all courts to view our canon as lower on the interpretational totem pole than statutory language.[237] But the priority of the canon relative to most other textual canons has not been explored in the case law.

Extrinsic source canons: Surely, for all or nearly all judges, a regulation will trump our canon. And, for most judges, so will congressional purposes as expressed in committee reports.[238] But what about IRS interpretations of lesser status than a regulation? This relationship too has not been explored by the case law.[239]

An example. The presumption of correctness is an extrinsic source rule, part of administrative deference. Determinations by the IRS are presumed correct.[240] A number of courts have applied this presumption of correctness to penalty determinations by the IRS.[241] It would be helpful to know whether courts think the "construe tax penalties strictly" canon trumps or is trumped by the presumption of correctness. Alas, the cases do not tell us.

Other substantive canons: One relationship has received significant attention in the cases: the relationship between our canon and the well known canon that remedial or corrective statutes are to be construed broadly to further their purposes.[242] There are some cases suggesting that the latter trumps the former. They involve the AET,[243] the § 6672 Trust Fund Recovery Tax,[244] and many old, non-income-tax revenue cases.[245]

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236 *See* text accompanying note 31, *supra*.
237 *E.g.*, Patchen v. Comm'r, 258 F.2d 544, 551 (5th Cir. 1958).
238 *See, e.g.*, Bradley v. United States, 817 F.2d 1400, 1402-04 (9th Cir. 1987) (mentioning the canon but emphasizing purpose as expressed in committee reports).
239 An opportunity existed in the line of cases testing the meaning of the $1000 minimum penalty under the pre-1990 version of § 6700. See text accompanying notes 217-225, *supra*. The extent of deference to sub-regulation IRS positions was substantially debated in the conflicting cases. Unfortunately, as we noted, almost none of the § 6700 cases mentioned the tax penalties precept, and the one that did, Ostrow v. United States, 1985 WL 5961 (M.D. Fla., Dec. 20, 1985), did not consider the precept in relation to administrative interpretations.
240 *E.g.*, Welch v. Helvering, 290 U.S. 111, 115 (1933); Travelers Ins. Co. v. United States, 35 Fed. Cl. 138, 141 (1996) (labelling this as "strong presumption"); Johnson, *supra* note 91, at 441-42 (arguing that this presumption survives despite § 7491).
241 *E.g.*, *In re* Tax Refund Litig., 766 F. Supp. 1248, 1254 (E.D.N.Y. 1991) ("[i]t is well-settled that the penalty assessments of the IRS are generally presumed to be correct"), *aff'd in part & rev'd in part on other grounds sub nom. In re* MDL-731 Tax Refund Litig., 989 F.2d 1290 (2d Cir. 1993), *cert. denied sub nom.* Madison Library, Inc. v. United States, 510 U.S. 964 (1993).
242 *See* note 9, *supra*.
243 Beim Co. v. Landy, 26 A.F.T.R. 1189 (D. Minn. 1939), *aff'd*, 113 F.2d 897 (8th Cir. 1940).
244 Moore v. United States, 465 F.2d 514, 518 (5th Cir. 1972) (per curiam).
245 *E.g.*, United States v. Ryan, 284 U.S. 167, 172 (1931); Smythe v. Fiske, 90 U.S. (23 Wall.) 374, 380 (1874); United States v. Hodson, 77 U.S. 395, 406 (1870); Cliquot's Cham-

And yet, there are many other cases that do not observe this priority. Most of the AET cases invoking our canon do not address the competing "liberal construction" canon,[246] and that is true as well for at least one § 6672 case.[247] Thus, no consensus exists as to the relationship of the two canons. Moreover, how the tax penalties maxim compares in strength to substantive canons other than the "liberal construction" precept is essentially wholly unexplored in the cases.

V. CONCLUSION

The precept that tax penalties should be construed narrowly has appeal at first impression. Yet, because of statutory provisions and other judicial rules, the precept is unnecessary to protect taxpayers in penalty cases that they should win. The laudable goal can be amply accomplished without this precept.

Worse, the precept creates harms both in theory and in practice. To the extent it actually influences case outcomes, it distorts the legitimate role of the courts, which is to focus on precisely what Congress did in the statute at hand, rather than to impose an interpretational generalization which may or may not accord with the thrust of that statute. Moreover, the precept is hopelessly unclear and unpredictable in its actual use, both as to when it will be applied and what significance it will have when it is applied. The parties in penalty cases need greater certainty in order to resolve controversies intelligently and effectively. They don't have it now, and the fact that the precept has been around for well over a century without clarification being achieved suggests that they never will have it.

Thus, we would do better simply to junk the precept. The majority of tax penalty cases do not invoke it even now. We should go all the way, discarding it completely. Although this Article has focused on this one canon, there are good reasons – some parallel to those developed here – to question the utility of a number of other canons of construction in tax. I intend to explore those topics in future articles.

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pagne, 70 U.S. (3 Wall.) 114, 145 (1865); Taylor v. United States, 44 U.S. 197, 210 (1845); United States v. Thirty-Six Barrels of High Wines, 28 F. Cas. 67, 68 (N.D.N.Y. 1870); United States v. One Hundred & Twenty-Nine Packages, 27 F. Cas. 284, 285 (E.D. Mo. 1862).

[246] *See* the remainder of the cases cited in note 45, *supra*.

[247] United States v. Hill, 368 F.2d 617, 621 (5th Cir. 1966).