Fairness and Function in the New York State Tax Appeals System: Proposals for Reform

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FAIRNESS AND FUNCTION IN THE NEW YORK STATE TAX APPEALS SYSTEM: PROPOSALS FOR REFORM†

Richard D. Pomp*
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The views expressed herein are those of the authors and do not necessarily represent those of the Tax Study Commission.


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INTRODUCTION

Under current New York law, taxpayers who contest their assessments must rely upon a system of review conducted by the New York State Department of Taxation and Finance. Taxpayers, lawyers, and accountants have strongly attacked this system. Critical comment has also come from other, disinterested quarters. A 1975 report by the Governor's Task Force on Court Reform, for example, concluded that "the power to adjudicate tax disputes now given the State Tax Commission should be withdrawn from it." The 1979 Governor's Temporary Commission to Review the Sales and Use Tax Laws recommended the consideration of an independent tax appeals board. Most recently, a 1984 report by the Office of the State Comptroller identified major deficiencies in the processing and resolution of tax controversies. Criticisms of the tax appeals system have focused on a number of claimed defects, including the inefficiency of the appeals process, the quality of the decisions rendered and, most importantly, the unfairness of the procedural structure used to hear and resolve disputes. This Article evaluates these complaints and explores alternatives to the present system.

Section I of this Article describes the existing New York tax ap-

1 The Tax Section of the New York State Bar Association has been the most vocal critic of the New York State tax appeals system; this criticism dates back several years. See, e.g., NEW YORK STATE BAR ASSOC., TAX SECTION, SPECIAL REPORT ON A NEW YORK TAX COURT PROPOSAL (1975); Creating a New York State Tax Court, Statement of Martin D. Ginsburg, Chairman of the Tax Section, New York State Bar Association, Before the Select Task Force on Court Reorganization on N.Y.S. Bill 6760 and N.Y.A. Bill 7802 (Nov. 20, 1975) [hereinafter cited as Ginsburg Statement]; see also Comeau & Rosen, The Need for an Independent Tax Tribunal, 2 J. ST. TAX'N 259 (1983).

2 Governor's Task Force on Judicial Selection & Court Reform, The Integration and Unification of the New York State Trial Courts 2 (June 26, 1975) [hereinafter cited as Governor's Task Force Report]. The Task Force was chaired by Cyrus Vance and had among its distinguished members then New York Secretary of State, Mario Cuomo. The report recommends consolidating the entire New York State trial court system to increase procedural efficiency and to improve the administration of justice. To this end it suggests, inter alia, removing the power to adjudicate tax disputes from the State Tax Commission and placing it in a specialized tax section of the Supreme Court. Id. at 2. In addressing the merger of the tax appeals system, the task force specifically noted the lack of independence of the current appeals system, and the resulting perceptions of unfairness by taxpayers. Id. at 9-10.

3 Governor's Temporary Commission to Review the Sales and Use Tax Laws of New York State, Final Report 77 (Dec. 15, 1979). In 1975, changes were made in the procedures for adjudicating tax disputes, see infra note 145, but as discussed in section II(A) of this Article, taxpayers still perceive the resulting system as unfair. See infra notes 98-143 and accompanying text.

peals system in detail. It then surveys the tax appeals procedures of other jurisdictions, focusing on the procedures of selected states and of the federal government. A review and evaluation of the complaints leveled against the New York system are presented in section II. Section III concludes the Article by setting forth a range of policy options that are alternatives to the current scheme.

I. TAX ADJUDICATION SYSTEMS

The federal government and each of the fifty states have established different approaches for the adjudication of tax disputes. These approaches fall into three broad categories. The first category consists of tax courts, which are established either as separate courts or as divisions of the lower courts of general jurisdiction. A second category consists of independent review agencies. These may occasionally be referred to as courts, as in the case of the United States Tax Court. They are, however, actually a part of the legislative or executive rather than the judicial branch of government. These independent agencies exist wholly outside of the tax departments. A third category of tax appeals systems, which includes that of New York, consists of internal review mechanisms. In such systems, a taxpayer's dispute is heard by the same agency responsible for the administration and collection of taxes.

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* For example, the United States Tax Court is a legislative court under Article I, rather than a judicial court under Article III, of the United States Constitution. See I.R.C. § 7441 (1982); see also Ex Parte Bakelite Corp., 279 U.S. 438 (1929); American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511 (1828); Continental Equities, Inc. v. Commissioner, 551 F.2d 74 (5th Cir. 1977); Burns, Stix Friedman & Co. v. Commissioner, 57 T.C. 392 (1971).

Apart from their distinct structural frameworks, tax appeals systems differ in numerous ways that can affect the fairness or the efficiency of the adjudicatory appeal process. The formalities of the proceedings, the qualifications of those who hear cases, and the mechanisms for prehearing settlement all vary among such systems. The following sections of this Article describe the structures and procedures of the various approaches. This examination reveals how the policy concerns that must be addressed in New York have been resolved elsewhere.

A. Internal Review Mechanisms: New York’s Current Approach

New York’s current system for adjudicating tax disputes provides an example of an internal review system. In New York, the State Tax Commission oversees the Taxation Division of the Department of Taxation and Finance. The President of the three-member Commis-

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* N.Y. TAX LAW § 170(5) (McKinney Supp. 1984-1985). Among the various powers and duties of the Commission set forth in § 171 of the Tax Law are the following:

First. Make such reasonable rules and regulations, not inconsistent with law, as may be necessary for the exercise of its powers and the performance of its duties under this chapter.

Second. Assess, determine, revise, readjust and impose the corporation taxes . . . have the power and perform the duties of the state comptroller in the collection of such taxes and the crediting of such taxes erroneously paid, as jurisdiction thereof is vested in such commission by section one hundred and seventy-six of this chapter.

Third. . . . have the powers and perform the duties of the state comptroller in relation to the assessment, determination and collection of the tax on transfers of property . . . .

. . . .

Fifth. . . . have the power and perform the duties of the state comptroller in the assessment, determination, review, readjustment and collection of taxes upon and with respect to personal income . . . .

. . . .

Fifteenth. Have authority to compromise any taxes or any warrant or judgment for taxes imposed by this chapter, and the penalties and interest in connection therewith, if the tax debtor has been discharged in bankruptcy, or is shown by proofs submitted to be insolvent, but the amount payable in compromise shall in no event be less than the amount, if any, recoverable through legal proceedings, and provided that where the amount owing for taxes, penalties and interest or the warrant or judgment is more than twenty-five thousand dollars, such compromise shall be effective only when approved by a justice of the supreme court.
Seventeenth. Have authority to release any real property or chattels real from the lien of any warrant for unpaid taxes upon such conditions as it may exact, if it finds that the interests of the state will not thereby be jeopardized. Such release may be recorded in the office of any recording officer in which such warrant has been filed.

Eighteenth. Have authority to enter into a written agreement with any person, relating to the liability of such person (or of the person for whom he acts) in respect of any tax or fee imposed by the tax law or by a law enacted pursuant to the authority of the tax law which agreement shall be final and conclusive, and except upon a showing of fraud, malfeasance, or misrepresentation of a material fact: (a) the case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of this state, and (b) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, cancellation, abatement, refund or credit made in accordance therewith, shall not be annulled, modified, set aside or disregarded.

Twentieth. Have authority, of its own motion, to abate any small unpaid balance of an assessment of tax, or any liability in respect thereof if the tax commission determines under uniform rules prescribed by its [sic] that the administration and collection costs involved would not warrant collection of the amount due. It may also abate, of its own motion, the unpaid portion of the assessment of any of such taxes, or any liability in respect thereof, which is excessive in amount, or is assessed after the expiration of the period of limitation properly applicable thereto, or is erroneously or illegally assessed. No claim for abatement under this subdivision shall be filed for any of such taxes.

Twenty-first. Provide a hearing, as a matter of right, to any taxpayer upon such taxpayer's request, pursuant to such rules, regulations, forms and instructions as the tax commission may prescribe, unless a right to a hearing is specifically provided for, modified in [sic] denied by another provision of this chapter. Where the request for a hearing is made by a person seeking review of any taxes determined or claimed to be due under this chapter, the liability of such person shall become finally and irrevocably fixed unless such person, within ninety days from the time such liability is assessed, shall petition the tax commission for a hearing to review such liability. After such hearing, the tax commission shall give notice of its decision to such person. The decision of the tax commission shall be reviewable by a proceeding under article seventy-eight of the civil practice law and rules if application therefor is made within four months after the giving of such decision.

Twenty-second. Be required to render a determination after a hearing, within nine months after submission of briefs subsequent to completion of such a hearing or, if such briefs are not submitted, then within nine months after completion of such a hearing. Such nine month period may be extended by the tax commission, for good cause shown, to no more than three additional months. If the tax commission fails to render a decision or determination within such nine month period (or such period as extended pursuant to this subdivision), the applicant for such hearing may institute a proceeding under article seventy-eight of the civil practice law and rules to compel the issuance of such decision or determination.

Twenty-third. Be required to publish and make available to the public all decisions and determinations of the tax commission rendered after a hearing. The tax commission may charge a reasonable fee for a copy of such a decision or determination.

Twenty-fourth. Be required to render advisory opinions with respect to taxes administered by the tax commission within ninety days of the receipt of a petition for such an opinion. Such ninety day period may be extended by the tax commission, for good cause shown, to no more than thirty additional days. Such advisory opinion shall be rendered to any person subject to a tax or liability under this chapter or claiming exemption from
chief executive officer of the Department. He is appointed by the Governor for a term coinciding with that of the Governor.10 The remaining two members of the Commission serve for fixed terms of six years.11 Although the Commission is granted broad powers to administer the state’s tax laws,12 most of these powers are, in fact, executed by the Department. The Commission’s primary task is to rule on contested tax matters; it has promulgated Rules of Practice and Procedure to govern proceedings before it.13 The Commission also reviews and promulgates regulations that are proposed by the Department of Taxation and Finance.14

The Tax Appeals Bureau is the administrative adjudicatory arm of

such tax or liability. Such advisory opinions, which shall be published and made available to the public, shall not be binding upon the tax commission except with respect to the person to whom such opinion is rendered provided, however, that a subsequent tax commission modification of such an advisory opinion shall operate prospectively only. A petition for an advisory opinion shall contain a specific set of facts and be submitted in such form as may be prescribed by the tax commission and subject to such rules and regulations as the tax commission may promulgate with respect to the procedures for submission of such a petition. Nothing herein shall be construed to limit or otherwise alter the rights of any applicant or a declaratory ruling pursuant to section two hundred four of the state administrative procedure act.

Id. (footnote omitted).

10 See id. § 170(1) (McKinney 1966). Section 170(1) reads in relevant part:

The commissioner of taxation and finance shall be appointed by the governor by and with the advice and consent of the senate and shall hold office as commissioner of taxation and finance until the end of the term of the governor by whom he was appointed and until his successor has been appointed and has qualified.

Id.


12 For a description of the Commission’s powers, see id. § 171 which is quoted in part supra note 9. The issuance of advisory opinions illustrates the dichotomy between what the statute requires and what occurs in practice. Statutorily, the Commission is charged with the rendering of advisory opinions. Id. In practice, however, the Commission is rarely involved in the rendering of such opinions, notwithstanding that all advisory opinions carry the name of the Tax Commission. The State Tax Commission has expressly delegated the authority to issue advisory opinions to the Director or Deputy Director of the Technical Services Bureau. N.Y. ADMIN. CODE tit. 20, § 901.1(a) (1983).

13 See N.Y. ADMIN. CODE tit. 20, § 601.0 (1981); id. §§ 601.1-.4 (1982); id. §§ 601.5-.7 (1976); id. §§ 610.8-.9 (1981); id. §§ 601.10-.16 (1976).

14 Letter from Paul B. Coburn, Secretary of the State Tax Commission, to Robert D. Plattner, Counsel to the Tax Study Commission (Feb. 14, 1984) [hereinafter cited as Coburn Letter]. As chief executive officer of the Department, the Commissioner of Taxation and Finance is responsible for every aspect of the Department’s activities, including the promulgation of regulations which he then reviews in his capacity as one of the three members of the Commission. Usually, however, the Commissioner of Taxation and Finance is not personally involved in the early stages of the regulatory process. Initial drafts of the regulations are prepared by the Technical Services Bureau of the Department and are then reviewed by the Law Bureau and placed in final form. The Commissioner of Taxation and Finance may see a proposed regulation for the first time only shortly before it is to be considered for approval at a meeting of the Tax Commission.
the State Tax Commission. The Bureau processes and reviews petitions for the redetermination of a tax deficiency or refund. A taxpayer generally has ninety days after a notice of deficiency is mailed in which to file a petition for redetermination. In most cases, once a petition is filed, the review begins with an informal prehearing conference which is conducted by a Bureau conferee. Conferences are available at every district office of the Department and are scheduled at the taxpayer's convenience. Conferees are typically auditors and accountants with ten to fifteen years of experience with the Department. Their role in the conference proceeding is that of an arbiter. The Department is represented at the conference by a member of the audit staff. In situations in which taxpayers appear without professional representation, the conferee ensures that they have the opportunity to present their cases.

A dispute may be resolved in conference if the taxpayer and the Department can arrive at an agreement. The conferee may propose...
a settlement which, if accepted by the taxpayer, is binding on the Department. The conferee acts with the delegated authority of the Commission in resolving cases. The Commission may revoke the conferee’s authority as it sees fit, although it seldom does so.

A taxpayer who is dissatisfied with the outcome of the conference may perfect a petition for a hearing. Small claims hearings are available for matters involving up to $10,000 in sales and compensation use tax per calendar year or up to $3,000 in personal income or unincorporated business tax per taxable year, exclusive of penalties and interest. Formal hearings are available for New York State and local sales and income taxes in excess of the small claims limits and for all other cases concerning state and local taxes under the purview of the State Tax Commission.

grants the Commission the authority to compromise taxes under certain narrowly defined circumstances. N.Y. Tax Law § 171 (McKinney 1966 & Supp. 1983-1984). See also supra note 9. By inference, these sections would seem to deny the power to do so in any other cases. Section 171, however, also grants the Commission broad powers to enter into agreements with taxpayers relating to their liability. This section has not been interpreted by the Commission as a grant of settlement authority. Rather, this section is viewed as protecting taxpayers from having an agreement or determination of the Commission reopened in the future, except under very limited conditions. Interview with Saul Heckelman, Special Counsel to the Department of Taxation and Finance (Dec. 8, 1983). The ramifications of this policy are discussed in Part II(B)(2) of the text. See infra text accompanying notes 152-63.

N.Y. ADMIN. CODE tit. 20, § 601.4(c)(3) (1976). Some members of the State Bar have claimed that in practice the conferee usually defers to the auditor. See Comeau & Rosen, supra note 1, at 260. The Department contends, on the contrary, that auditors often do not propose resolutions on their own initiative but concur with those proposed by a conferee. See Coburn Letter, supra note 14.


Sollecito 1983 Interview, supra note 18.

N.Y. ADMIN. CODE tit. 20, § 601.5(a) (1976). In order to be perfected, a petition must satisfy the requirements set forth in the New York Administrative Code, see id. § 601.5(b), which include a clear and concise statement of the facts, allegations, and relief sought. Id. § 601.5(b)(5), (6). Once the petition has been perfected, it is served on the Secretary to the State Tax Commission and forwarded to the law bureau for an answer. Id. § 601.4(c)(4). Hearings are held in New York City and at various upstate locations. Sollecito 1983 Interview, supra note 18. The travel schedule for the circuit-riding hearing officers is set 12 months in advance; a taxpayer’s actual hearing date is set 60 to 90 days in advance. Id. A transcript of the record is made in formal hearings. In small claims hearings, the proceedings are recorded on tape but usually are not transcribed. See N.Y. ADMIN. CODE tit. 20, § 601.8(g)(3) (1983). The taxpayer may, however, request the Commission to provide a copy of the record. Id. § 601.12(a). In such case, the Commission may charge the taxpayer for the transcript at a price not to exceed rates fixed by the Comptroller or reasonably fixed by the Commission. Id. § 601.12(b). A fee of one dollar per page is currently charged. Coburn Letter, supra note 14.

N.Y. ADMIN. CODE tit. 20, § 601.8(b) (1981).

Coburn Letter, supra note 14. “Other cases” include corporate franchise tax; stock transfer tax; mortgage recording tax; truck mileage tax; cigarette tax; motor fuel tax; gift tax; and license revocation for cigarette vendors. Id. The formal hearings unit also manages pre-decision warrants. Id.; Letter from John Sollecito, Director, Tax Appeals Bureau, to the Legislative
The hearing is conducted by a hearing officer, a Tax Appeals Bureau employee whose qualifications are established by the Commission. The Commission conducts a four-year formal hearing officer trainee program for recent law school graduates. The hearing officer has the authority to administer oaths, regulate the course of the hearing, set the time and place for continuances and for filing legal documents, and issue subpoenas. These subpoenas, which require the production of witnesses or documents, are available upon a taxpayer's request. Parties are encouraged to stipulate to relevant, unprivileged facts to the extent possible. During a hearing, parties may examine, cross-examine, and impeach witnesses, introduce exhibits, and rebut evidence. Section 306 of the New York State Administrative Procedure Act contains a provision that requires that all evidence, including records and documents in the possession of the agency, be offered and made a part of the record. The hearing officer may clarify an ambiguous record by asking questions of the parties or witnesses. The burden of proof generally rests upon the taxpayer. The Commission bears the burden, however, of determining whether the taxpayer is (1) guilty of fraud with intent to evade taxation, (2) liable as the transferee of another taxpayer's property, or (3) liable for any increase in a deficiency, provided the increase is asserted for the first time after a petition for redetermination of deficiency is filed.

After the formal proceedings, the hearing officer reviews the evidence and makes written proposals for conclusions of law and find-
ings of fact for the Commission.36 These recommendations are reviewed by a post-hearing review unit37 which reports its findings to the Director of the Tax Appeals Bureau. The Director can write a dissent if he disagrees with a hearing officer's recommendation, but he may not alter the opinion.38 The hearing officer can write a justification in response to the Director's dissent. The opinion and any dissent or justification are forwarded to the Commission for its final decision. In the case of a formal hearing, the entire record, including a stenographic transcript of the proceedings, is also sent to the Commission.39

In small claims cases, the Commission must render its final decision within ninety days of the submission of either the written arguments or the completion of the hearing.40 For formal hearings, the decision is due within nine months after the submission of briefs or, if briefs are not filed, nine months after completion of the hearing.41 The nine-month period may be extended to twelve months for good cause.42 If the Commission fails to render a timely decision, the taxpayer may institute a mandamus proceeding under Article 78 of the New York Civil Practice Law and Rules (CPLR).43

The full Commission reviews all recommendations for writing style and soundness of legal reasoning, as well as for the reasonableness and application of any regulations at issue in the case.44 The Commission is assisted by an initial review performed by the Secretary to the Commission, who is appointed by vote of the Commission.45 A Commission member who has a question concerning the facts of the case may examine the record or contact the Tax Appeals Bureau.46 In rare cases in which a specific procedural point is unclear, the Com-

36 N.Y. ADMIN. CODE tit. 20, § 601.9(e) (1976).
37 The post-hearing review unit consists of five technicians and two supervisors, one in charge of sales and one in charge of income tax. They review decisions for technical accuracy, conformity with precedent, and general form. Sollecito 1983 Interview, supra note 18.
38 Sollecito 1983 Interview, supra note 18.
39 N.Y. ADMIN. CODE tit. 20, § 601.9(e) (1976).
40 Id. § 601.8(h).
42 Id.
43 Id. (incorporating by reference NEW YORK CIV. PRAC. LAW §§ 7801-7806 (McKinney 1981 & Supp. 1984-1985)).
44 In about 15% of the cases, the Commission sends the decision back to the hearing officer for a rewrite in accordance with the Commission's directions. Interview with Mark Friedlander, Commissioner, and Thomas Lynch, former Commissioner, New York State Tax Commission (Aug. 24, 1982) [hereinafter cited as Friedlander & Lynch Interview].
45 Sollecito 1982 Interview, supra note 19.
46 The Commissioners usually open the record only if there is a disputed fact, novel issue involved, or large sum of money at stake. See Friedlander & Lynch Interview, supra note 44.
Tax Reform

Commission decisions are provided immediately to both the taxpayer and the Department. Subsequently, the Department's Division of Taxpayer Services publishes and disseminates Commission decisions with an annotation stating whether the decision conforms with Departmental policy. An annotation indicating nonconformity with audit policy requires the express approval of the Commission in compliance with a procedure outlined in a Departmental Executive Memorandum. Such annotations are relatively rare. All other Commission decisions become official Departmental policy. Commission decisions are available to all persons on the Commission mailing list and are reproduced as headnotes, excerpts, and occasionally in full by two privately published tax law services.

Only the taxpayer can appeal an adverse decision of the Commission by bringing an Article 78 proceeding, the standard procedure in New York for contesting the determination of a state agency. This proceeding is initiated in the Supreme Court of Albany County, from which it may be transferred to the Appellate Division, Third Department in Albany. Article 78 authorizes reversal of an agency decision if "affected by an error of law." The standard of review used for questions of fact is much less clear. The statute states that reversal of an agency decision will turn on "whether a determination was . . . arbitrary and capricious," but also provides for reversal unless "a determination made as a result of a hearing . . . is, on the entire record, supported by substantial evidence." In practice, judicial decisions reviewing determinations of the Commission have not

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47 Commissioner Mark Friedlander estimates that this occurs in approximately one case out of one hundred, although there are no procedural barriers to more extensive contact. His own experience involved inquiring on one occasion whether audit division procedures would permit an entirely fresh audit of the matter at issue. Id.
48 N.Y. ADMIN. CODE tit. 20, § 601.8(h) (1981); id. § 601.9(e) (1976).
50 Id.
51 Commerce Clearing House and Prentice Hall provide this service. The complete texts of decisions of the Commission dating back to 1979 are also available through LEXIS, a computerized legal research service.
52 N.Y. TAX LAW §§ 690(b), 1090(b) (McKinney 1975).
53 N.Y. CIV. PRAC. LAW § 7801 commentary at C7801:4 (McKinney 1981). See also supra note 43 and accompanying text.
55 Id. § 7803(3) (1981).
56 Id.
57 Id. § 7803(4).
strictly applied these statutory standards. Instead, they have adopted a deferential but ill-defined standard of review.\(^5\)

B. Tax Courts

Three states — Oregon, Hawaii, and New Jersey — and the District of Columbia have judicial tax courts.\(^5\) New Jersey, the most recent state to establish a tax court,\(^6\) is representative of the tax court system and therefore may serve as a case study. The New Jersey Tax Court is a full-fledged judicial court, hearing both state tax and local property tax cases. The court replaced the New Jersey State Division of Tax Appeals, a quasi-judicial body within the State Division of the Treasury. The court is an inferior court of limited jurisdiction.\(^6\) Its six to twelve judges are appointed by the Governor and confirmed by the Senate for an initial seven-year term with lifetime tenure upon reappointment.\(^6\) At present, eight judges have been appointed. Requirements for appointment include special expertise in tax law and admission to the New Jersey Bar for at least ten years. There must be an equal number of Democrat and Republican judges.\(^6\)

The tax court is a court of record having the power to determine all matters in controversy.\(^6\) Individual judges hear and decide all issues of fact and law de novo.\(^6\) Judges also conduct pre-trial and settlement conferences and a large majority of cases are resolved prior to trial.\(^6\) The court is empowered to grant legal and equitable relief...

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\(^62\) Id. § 2A:3A-1.

\(^63\) Id. §§ 2A:3A-2, -11, -15.

\(^64\) Id. § 2A:3A-12. The judges of the tax court receive the same salary, pension rights, and other privileges as do judges of the New Jersey Superior Court (the equivalent of the New York Supreme Court). Id. §§ 2A:3A-18, -19. The Chief Justice of the New Jersey Supreme Court may assign superior court judges to the tax court, id. § 2A:3A-21, and tax court judges in fact may be assigned to hear superior court cases from time to time. Id. This authority has not yet been exercised. Interview with Lawrence L. Lasser, Presiding Judge of the New Jersey Tax Court (June 16, 1983) [hereinafter cited as Lasser Interview].


\(^66\) Id. § 2A:3A-4.

\(^67\) During the year ending August 31, 1982, the court received 6,376 cases and disposed of 12,288. PRESIDING JUDGE OF THE TAX COURT OF NEW JERSEY, ANNUAL REPORT FOR THE COURT YEAR ENDING AUGUST 31, 1982, at 2 [hereinafter cited as ANNUAL REPORT]. Ninety-three percent of these cases were property tax cases. Eighty-eight percent of property tax cases and
and has jurisdiction to hear and resolve federal and state constitutional questions. The tax court’s rules of procedure incorporate the rules of the New Jersey State Supreme Court wherever possible. Deviations occur if required by the tax court enabling statute, other tax statutes, by the special nature of the case at bar, or the desire of the court to achieve speedy dispositions. Except in small claims matters, only attorneys may practice before the court.

New Jersey Tax Court judges are not required to write formal opinions in each case and do so only in cases considered significant or novel. In certain instances, judges will rule from the bench. In most other situations, decisions are disposed of in letter opinions. Formal opinions are reported in a bound volume of New Jersey Tax Court decisions.

There are two ways in which the presiding judge attempts to assure substantial uniformity in the decisions rendered. First, the judges meet monthly to discuss issues and review opinions that have been prepared for publication. Second, the presiding judge can assign to a single judge a number of cases involving the same issue. This judge’s decisions can then provide future guidance to other judges faced with similar issues. Ultimately, of course, appellate review may be necessary to resolve differences of opinion.

The court maintains six permanent locations and travels to hear cases in other locations. Each judge’s courtroom staff is limited to a single clerk. Hearings are recorded on sound equipment, obviating the need for additional courtroom personnel. The court has a small claims division for cases involving refunds or additional tax assessments of $2,000 or less, exclusive of interest and penalties. Small claims hearings are informal; the judge hears testimony and receives any evidence that is necessary or desirable for a just determination. Tax court decisions, including those of the small claims division, may be appealed to the appellate division of the supreme court.

eighty-three percent of state tax cases were resolved prior to trial. Id. at 4.


69 Lasser Interview, supra note 63.


71 Id. §§ 2A:3A-4.1, -10.
C. Independent Review Boards

1. Overview

Independent review boards are quasi-judicial agencies located within either the executive or legislative branches. Unlike internal review mechanisms, an independent review board is separate from the tax department. Generally, independent boards have jurisdiction to review all rulings related to taxes, including property tax valuations. Members of the review board are usually appointed by the Governor, with Senate confirmation required in about one-half of the states. The number of board members ranges from two to eleven, with three to five being typical. Most states have some criteria for choosing members, such as political party affiliation, expertise in tax matters, and residency.

Procedures before review boards vary widely, with approximately one third of such boards providing both formal and informal hearings, one third only formal hearings, and one third primarily informal hearings. Testimony is either tape-recorded or recorded by a stenographer. Strict rules of evidence rarely apply. Very few review boards have separate small claims proceedings.

Judicial review of a review board's decision is always available, and may be lodged in an inferior court, or in the state's highest court. Ordinarily, review is limited in scope; it may be limited to the record, to questions of law, or to the record and any evidence specially admitted for good cause. Taxpayers generally begin an appeal in a review agency by filing a petition and paying a fee ranging from two to forty dollars. Although they need not be represented by counsel, few taxpayers appear pro se for formal hearings. Taxpayers generally may be represented by either an attorney or an accountant.

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84 C.J.S. Taxation §§ 510(f), 537(b) (1954).


See, e.g., Alaska Stat. § 43.05.240 (1977).

2. The United States Tax Court: A Federal Review Board

The United States Tax Court, another type of independent review board, provides a principal forum for contested federal tax claims. Despite its name, the tax court is not part of the federal judiciary. Rather, it is a legislative court, subject to congressional appropriation and oversight. In many aspects, however, it resembles a federal district court.

Tax court judges are appointed for fifteen-year terms and their salaries are identical to those of federal district court judges. The rules of practice and evidence are generally similar to those used for non-jury trials in the United States District Court of the District of Columbia. Streamlined procedures are available for hearing cases involving less than $5,000; such procedures provide for no formal rules of evidence, no formal opinion, and no right of appeal.

Tax court judges sit primarily in Washington, D.C., although each travels fifteen to twenty weeks per year. Cases are heard in approximately one-hundred cities. Judges generally sit in each city for two weeks at a time. Ordinarily, the judges sit individually and, until recently, their opinions were forwarded to the Chief Judge for review. Since March 1, 1983, however, Tax Court judges have been authorized to issue bench opinions that are not subject to review. Although it is too early to assess the impact of this new power, bench opinions will probably be used primarily to expedite decisions in small claims cases.

Uniformity in decisionmaking is ensured through conferences among the judges. A judge's decision becomes final thirty days after being rendered, unless the Chief Judge directs that it be reviewed in conference. Generally a review is called for only if a conflicting opinion exists, a case raises a significant issue of law that has not yet been decided, or a judge seeks to overturn an earlier decision of the court.

Attorneys can practice before the court without demonstrating any

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80 26 U.S.C. § 7442 (1982). Tax disputes can also be litigated in district courts or in the United States Claims Court. See id. §§ 7402, 7428.
81 Id. §§ 7441, 7442. See also Burns, Stix Friedman & Co. v. Commissioner, 57 T.C. 392 (1971).
83 Id. § 7453.
84 Id. § 7463(a).
86 Interview with Charles S. Casazza, Clerk of the United States Tax Court (June 28, 1983).
proficiency in tax matters. All others, including certified public accountants, must pass an examination before they are allowed to practice.88

3. Wisconsin: A State Review Board

The Wisconsin Tax Appeals Commission is an example of a state independent review board.89 The Commission consists of four part-time members and one full-time member, appointed for six-year terms by the Governor with the advice and consent of the Wisconsin State Senate.90 The Commission handles all state tax matters and also reviews the property tax assessment of manufacturing equipment. These assessments are made by the Wisconsin State Department of Revenue on behalf of local governments.91 A taxpayer first meets with one of eleven conferees within the Department of Revenue for an informal conference.92 If the conference mechanism fails to resolve the dispute, the taxpayer may then appeal to the independent Tax Appeals Commission.93 The commissioners travel to designated central locations around the state. Generally, one commissioner presides at a hearing. Commissioners may issue oral opinions, but generally do so only in small claims cases that do not involve significant questions of law or fact. The Commission usually issues written opinions that are circulated among, and signed by, all five members. The members meet approximately once a month to discuss cases and to help achieve uniformity in their treatment of issues.94

Attorneys, accountants, and taxpayers may appear before the Tax Appeals Commission. The rules of evidence are strict, generally following the Wisconsin Circuit Court rules.95 Taxpayers who subsequently seek judicial review take their cases to the Wisconsin Circuit Court, then to the Wisconsin Court of Appeals.96 Final judicial review rests with the Wisconsin Supreme Court.97

88 See id. § 7452.
89 See Wis. Stat. Ann. § 73.01 (West 1957).
90 Id. § 1506(1).
91 Id. § 73.01(5) (West Supp. 1984-1985).
92 Interview with Clayton Seth, Director of the Appellate Division, Wisconsin State Department of Revenue (Jan. 9, 1985).
93 Interview with Joe Ziesel, Administrative Assistant to the Wisconsin Tax Appeals Commission (Jan. 9, 1985).
94 Id.
96 Id. § 73.015 (West 1957 & Supp. 1984-1985).
97 Id.
II. CRITICISMS OF THE NEW YORK STATE TAX APPEALS SYSTEM

New York's existing tax appeals system has been sharply criticized. The complaints have taken several forms, but most question the fairness and efficiency of the process. Both of these qualities are obviously desirable in any public agency that determines the legal rights and liabilities of citizens.

A. Lack of Independence

The Tax Appeals Bureau operates within the Department of Taxation and Finance as an internal review mechanism. This institutional linkage provides the basis for what over the years has become a persistent criticism of the New York system — its lack of independence and consequent bias in favor of the Department. This criticism arises because tax appeals in New York are decided by an agency that is organizationally related to one of the parties in the dispute. Some criticize that relationship on the ground that human beings tend to favor themselves or their associates, a tendency that underlies the ancient common law maxim that no person should be a judge of his own case. In response to these concerns, governmental institutions typically display a separation of powers, and more specifically, an independent judiciary. Judicial independence ensures an investigation into relevant facts and law, untainted by the favoritism that is suspected if an adjudicator has a direct or indirect interest in the outcome of a case. To the extent that the judges in New York tax appeals are associated with one party, the Tax Department, it is inevitable that perceptions and fears of bias will be asserted by taxpayers or their representatives.

1. Institutional Links Between the Tax Department and the State Tax Commission

The structure of the New York State Department of Taxation and Finance described in subsection A of section I should allay some fears of bias. The Tax Appeals Bureau is organized and operated sepa-

** See supra note 1 and accompanying text.

** See supra note 1 and accompanying text. The perception of unfairness in the system was highlighted by the 1975 Governor's Task Force on Court Reform. See generally Governor's Task Force Report, supra note 2.

100 See supra note 1.
rately from the rest of the Department. Yet other institutional links still remain, and thus the risk of bias and perceptions of unfairness persist.

First, the findings of fact and conclusions of law by the Bureau are merely recommendations to the New York State Tax Commission. Final authority in this matter rests with the Commission. The President of the Commission is also the Commissioner of Taxation and Finance. He is directly charged with the administration of the Department, which is the state’s revenue collection agency. Because the Department is always one of the parties in the contested matters upon which the Commission rules, the Commissioner is required to sit in judgment of the very acts for which he and his subordinates are responsible. Moreover, some perceive that the performance of the Commissioner of Taxation and Finance may be evaluated by the amount of revenue, or the increase in revenue, collected under the Commissioner’s tenure. While this criterion is an improper basis upon which to measure the Commissioner, there nonetheless is a fear that such an evaluation may exert subtle, perhaps subconscious pressure upon him.

Second, the Commissioner of Taxation and Finance is directly involved in the promulgation of regulations. As President of the Commission, the Commissioner is asked to apply these regulations neutrally in cases before him. This confusion of regulatory and adjudicative functions increases the risk that the strict application of pre-existing regulations will be subordinated to other policy considerations. Although these policy considerations are properly the Commissioner’s concern when he acts in a regulatory function, they should have no influence when he acts as a judge.

Third, quite apart from the double role of the Commissioner-President, risks of bias are inherent in the existing structure. While the Tax Appeals Bureau is separately organized, it remains a component of the Department of Taxation and Finance. Common institutional identity, transfers of personnel between divisions, physical proximity, and budgetary links provide opportunities for the development of bias. The structural interrelationship between the Bureau and the

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102 See supra note 14 and accompanying text.
103 The two other Commission members also serve multiple roles. They not only sit in judgment of tax cases, but also are responsible for the promulgation of regulations. Additionally, they “perform such other duties in the department as the commissioner of taxation and finance may prescribe.” N.Y. TAX LAW § 170(5) (McKinney Supp. 1984-1985).
104 Currently all formal hearing officers, including the supervising tax hearing officer, have
Department is illustrated by current institutional procedures that attach the Commission's name, and not the Department's, to official actions that are taken by the Department. These actions include the issuance of advisory opinions and warrants. In addition, hearings in Albany and Rochester are held at offices located within the Department. In New York City, hearings are held at offices next to those of the Department. It is hardly surprising that under these circumstances, any distinction between the Tax Commission and the Department becomes blurred to taxpayers and their representatives.

A final source of the perceived risk of bias grows out of the Department's inability to appeal from an adverse decision of the Commission, a limitation that makes some sense in the current structural scheme in which the roles of "judge" and "prosecutor" are intertwined. The Department's inability to appeal, however, reinforces taxpayers' perceptions that the Commission is an arm of the Department, rather than an independent entity. If the Commission were truly independent, little reason would exist for denying the Department a right of appeal. Furthermore, although the Department's inability to appeal adverse decisions would appear to favor taxpayers, the opposite result is said to occur. Some persons assert that because the Department has no right to appeal, the Commission has a tendency to rule against taxpayers in close cases. This perception, coupled with the limited review afforded by the courts, creates another area of taxpayer resentment.

Other than undocumented reports, there is no factual evidence of actual bias in specific instances. However, the validity of the argu-
ment regarding the lack of independence of the Tax Commission and the resulting risk of unfairness ought not to turn on the presence or absence of such proof. Improper influences cannot be expected to manifest themselves in easily apparent or visible ways. Nor can the behavior of past and current commission members, hearing officers, and Tax Appeals Bureau directors, no matter how impeccable, assure similar behavior by their successors. Furthermore, when a perception of unfairness exists among a large body of tax practitioners, that perception becomes identified with reality. The best method, indeed the only method, available to ensure fair and sound determinations, is to establish structures and procedures that are most likely to produce the desired results. Structures and procedures that avoid the appearance of injustice do more than simply that, they also represent the best means of achieving the reality of justice.\(^\text{110}\)

2. Tax Appeals in the Context of Administrative Adjudication

Admittedly, the institutional arrangements that characterize the New York State tax appeals system and the criticism they inspire are not unusual in administrative agencies.\(^\text{111}\) The New York tax appeals
system follows the approaches of the Federal and the State Administrative Procedures Acts, which require that persons responsible for initiating, investigating, and prosecuting cases, be separated within the agency from persons responsible for adjudicating such cases. Agency heads, however, retain final control of all aspects of their agencies’ work, including administrative adjudication. This framework has been held to be consistent with the federal constitutional requirement of due process. Standing alone, however, the prevalence of this kind of administrative agency adjudication cannot justify its retention in the context of New York tax appeals. Indeed, consideration of the reasons for the usual administrative arrangements and the inapplicability of those reasons to the New York State tax appeals system lead to exactly the opposite conclusion. The norm for adjudication in our legal tradition includes an independent decisionmaker. The presumption is that no person should sit in judgment of himself. Combining functions in administrative

Rabin ed. 1979).


114 Ordinary, adjudication is thought of as a process in which a court decides a concrete controversy by impartially applying pre-existing and impersonal rules. A court does not assert its own opinion of the merits, but utilizes more general judgments that have already been made and which have been embodied in the applicable rules of law. Modern students of jurisprudence may find this orthodox view unrealistic but there is little doubt that it describes the deep seated expectations of most litigants and lawyers concerning the task of courts of law. For discussions and criticisms of this view of adjudication, see, e.g., M. COHEN, LAW AND THE SOCIAL ORDER 112-47 (1967); K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 27-51 (1969).

There is, of course, an inevitable legislative, and therefore discretionary, aspect to adjudication under the common law. Common law adjudication, however, is severely constrained by precedent, and it is usually the exceptional and novel case in which judicial creativity plays a major role. Common law policymaking by courts is, in Justice Holmes’ phrase, “confined from molar to molecular motions.” Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). Such adjudication, therefore, is not inconsistent with the general view that courts apply established rules and standards.

The wide support for this view probably reflects a conviction that the coercive power of legal authority ought to be applied only if the individuals who are subject to it can be presumed to have advance warning. In this way, both liberty and security from arbitrary government action are promoted. The insistence on government action through a priori, general, and known rules, lies at the heart of our traditional concept of the “rule of law.” See generally L. FULLER, THE MORALITY OF LAW (1964).

Because this standard view of adjudication considers courts as acting on the basis of objective rules, notions of the character or worth of the particular litigants or of some judicially defined idea of the general welfare are improper considerations for a court. An independent and impartial judiciary reduces the likelihood that these factors will intrude into judicial decisionmaking. It therefore satisfies a critical element of the concept of fair adjudication.

116 See In-House Judges, supra note 104, at 158. One of the federal changes being considered
agencies clearly conflicts with this standard model of independent adjudication. Departures from this model have, however, been defended on the ground that the tasks committed to administrative agencies are significantly different from those expected of courts of law.\textsuperscript{116} In contrast to a court, which applies static, predetermined rules,\textsuperscript{117} an administrative agency is action oriented, created to achieve certain goals often only broadly defined in statute,\textsuperscript{118} such as discouraging unfair and deceptive practices,\textsuperscript{118} or insuring “the safe and sound conduct of [the banking] business . . . and . . . [maintaining] public confidence in such business and protect[ing] the public interest.”\textsuperscript{120} This mission requires that the agency constantly make new policy decisions within the broad boundaries suggested by the governing legislation. These particular policy decisions are purposely left to the discretion of the agency which is assumed to be more capable in this regard than a legislature. In addition, these powers should be exercised in whatever form is most likely to advance the agency’s general purpose, and, if appropriate, ought to extend to the agency’s adjudication. Consequently, adjudication should be under the control of the policymakers, that is, the agency heads.\textsuperscript{121}

These special needs of administrative agencies, which are thought to justify a departure from the model of an independent decisionmaker, are sometimes illustrated by analogy to the management is the creation of a centralized corps of administrative law judges who would not be employed by the agency involved in the adjudication. According to Business Week, the reason for the change is the “judges’ own worry that parties challenging an agency’s action grow suspicious when they discover that the judge hearing the case is an employee of the agency.” Id. An administrative law judge at the Agriculture Department, stated: “‘I don’t think you can have public confidence until the public is convinced we really are independent and impartial.'” Id. (quoting Victor W. Palmer).


\textsuperscript{117} See J. Freedman, supra note 116, at 23-25 (1978); J. Landis, The Administrative Process 6-46 (1938); see also supra note 114.

\textsuperscript{118} See Stewart, supra note 116, at 1699.


\textsuperscript{120} N.Y. Banking Law § 10 (McKinney 1971).

of a business enterprise. Certainly it would be unnatural when designing a business to divide it between two entirely independent departments, one having responsibility for setting business policy and the other having responsibility for applying that policy in specific instances. This organizational scheme would clearly be an inefficient way of achieving the goals of the business.\textsuperscript{122}

 Nonetheless, it is exactly this "inefficient" structure that has been chosen for the conduct of most "public business" insofar as it directly controls individual activity. The desire for effective government is subordinated to a general distrust of governmental power. The safety and security of restricting government by rule of law is preferred to whatever social benefits might be attained by implementing policy on a case-by-case basis, without warning, in the course of governmental decisionmaking.\textsuperscript{123} Notwithstanding the now well-established exception of administrative agencies, this separation of powers is still the norm in American government. Each departure from this norm — such as that inherent in the New York State Tax Commission — must be shown to be essential to carrying out the duties committed to the agency.

 The arguments in favor of utilizing agency adjudication as a tool for policy implementation rely on important assumptions about the type of policy that the agency should make and on the various tools that are available to it. These arguments are strongest if four conditions are satisfied. First, the area of law being administered must require frequent policy decisions that cannot be implemented by ordinary legislation. Second, those policy decisions must require case-by-case formulation so that they cannot be adequately addressed by prospective and general rules. Third, the necessary case-by-case formulation must be undertaken by the same agency to which the other aspects of policymaking and implementation have been committed and policymaking cannot be competently performed by an independent board or tribunal. Fourth, the need for combining adjudicatory and supervisory functions must be so acute that it outweighs the risk of injury that is always inherent in abandoning the ordinary adherence to the principle of separation of powers. Only if these four conditions are satisfied can a case be made for vesting the adjudicatory function in the same persons who are responsible for supervising the other af-

\textsuperscript{122} James M. Landis put the point this way: "If in private life we were to organize a unit for the operation of an industry it would scarcely follow Montesquieu's lines." \textsc{Landis, supra} note 117, at 10.

\textsuperscript{123} "The known certaintie of the law is the safetie of all." \textsc{Coke, Institutes of the Laws of England} 395 (F. Hargrave & C. Butler) (1st ed. Philadelphia 1853).
fairs of the administrative agency.

An examination of these factors indicates that the New York State tax appeals system represents an unjustified deviation from independent decisionmaking. First, the administration of the state's tax laws is not the kind of government activity that requires constant and detailed policymaking. The subject matter to be regulated is not so elusive that general rules made in advance by the Legislature cannot adequately achieve their principal goals. Unlike such general legislative objectives as discouraging "unfair and deceptive practices," promoting "fair competition," or serving "the public interest and convenience," the goals of the tax system have been traditionally regarded as attainable through precise formulation by legislation. Certainly the actions of the Legislature, which has set forth its tax policies in a lengthy and detailed statutory code, are consistent with this view.

Second, even assuming a need exists for the New York State Tax Commission to make some discretionary policy decisions, vesting it with adjudicatory power can only be justified if that policy must be made on a case-by-case basis, instead of through the use of prospective rules. Perhaps in some areas of regulation, policymaking through prospective rules may not be effective, such as where the subject matter being regulated is prone to substantial and frequent changes. In that case, a fixed policy prescription designed for one set of circumstances cannot be relied upon to meet the overall objective in a different situation. In addition to rapidly changing circumstances, some areas of administrative jurisdiction may be so varied and complex that policy must be enunciated somewhat differently in each case — conditions that favor policymaking by adjudication.

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124 The same conclusion was reached in 1942 by a New York State commission examining the issue of administrative adjudication throughout state government. The Commission was established on March 3, 1939. The report of the Commission concluded:

[This] argument is not applicable to the field of taxation. The administrative process in taxation is clearly separable from the adjudicative process; the former will have ended before the latter begins. Audit, assessment and related steps result in the controverted case, in a conclusion which is challenged by the taxpayers. Such controversies involve typical justiciable issues of fact and law, and lend themselves peculiarly to adjudication of the ordinary type.

4 R.M. BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK, REPORT ON THE DEPARTMENT OF TAXATION AND FINANCE TO HONORABLE HERBERT H. LEHMAN 270 (1942).

125 See K. DAVIS, supra note 114, at 20-21, 48.


Although the subject matter of policymaking in the tax field is extremely varied, the types of factual situations usually present in contested determinations do not demand truly novel policy decisions. Rather, they typically require applying established policy to new circumstances. Moreover, as the length and detail of the New York tax law indicate, the Legislature has responded to the complexity of fact situations with great particularity. Furthermore, even in circumstances for which adjudication might be a particularly appropriate policymaking vehicle, the rulemaking process might still be workable. A leading commentator has argued that the flexibility of regulation by prior rule has been seriously underestimated, stating that “an adjudicatory opinion can never say anything that cannot be said as well or better in a rule.”

Third, even if substantial policy decisions must be made on a flexible case-by-case basis, a further need must be demonstrated. Such flexible policy formation might also be developed through decisions made by a tribunal that is independent of the agency responsible for prosecuting the cases. Consequently, the propriety of uniting all functions in one agency is dependent on the assumption that this policymaking must be in the hands of those who otherwise make policy through rulemaking and enforcement decisions. This argument is difficult to maintain because divided policymaking is far from unusual. In most areas of law, rules are promulgated not only by a legislature, but also, in a subordinate and limited way, by the independent common law courts. Divided policymaking also exists with respect to tax policy, insofar as interstitial policy decisions are made by the United States Tax Court and other federal courts deciding tax matters. To justify retaining the adjudicatory function in the New York State Tax Commission, it is necessary to prove that policymaking by an independent tribunal would create unacceptable problems of coordination. But the examples of federal tax adjudication, as

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129 K. Davis, supra note 114, at 64. The full quote reads:
A rule can be written in the form of a set of facts and an answer, and the rule can specifically provide that all the words used in the rule are to be evaluated against the single set of facts. A rule can do anything an adjudicatory opinion can do . . . An adjudicatory opinion can never say anything that cannot be said as well or better in a rule. Id. (emphasis in original). See also id. at 65-66. In SEC v. Chenery Corp., 332 U.S. 194 (1947), which endorsed agency policymaking by adjudication, the Supreme Court noted that “[t]he function of filling the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.” Id. at 202.
131 See Committee on Administrative Procedure, Administrative Procedure in Government Agencies 57-59 (1941).
well as those of other agencies in which cases are decided by independent boards, demonstrate that these problems need not result.\textsuperscript{132}

A somewhat different defense of uniting judicial with legislative and executive functions in the area of tax appeals might be based on the claim that an independent adjudicator could lack the technical competence to make policy determinations. Although this position might be plausible with respect to a system that transfers adjudication from the agency to the common law courts, it is unconvincing if the independent tribunal contemplated would itself be limited to determinations of tax issues and its members were qualified in that field.

Finally, the need to retain the adjudicatory function in the primary agency may be based on the desirability of using the decisionmaking process in individual cases to inform the agency's other activities.\textsuperscript{133} The experience of adjudication is deemed valuable in allowing agency heads to understand the concrete impact of their actions. This argument is also unpersuasive with regard to tax appeals. Whatever information the agency acquires from adjudication could be easily acquired from its participation in the same matters as an advocate and from the decisions rendered by the independent review agency.

Thus, none of the justifications that might support a departure from the norm of independent adjudication is especially persuasive in the particular context of tax appeals in New York. They do not, in this situation, outweigh the presumptive values already discussed which underlie the doctrine of separation of powers and which are threatened by the institutional arrangements now in place.

The lack of independent adjudication is particularly striking because of the ubiquitous nature of the tax system. Although deviations from the principle should not be tolerated even if the number of affected individuals is small,\textsuperscript{134} the inevitable tangible and intangible expense associated with the transition to a separate and independent adjudicative body may not, as a practical matter, be justified unless a minimum number of controversies occur. The large number and value of contested tax matters, however, make this area a clear and compelling target for reform.

\textsuperscript{132} See Auerbach, Some Thoughts on the Hector Memorandum, in Perspectives on the Administrative Process 239 (R. Rabin ed. 1979).


\textsuperscript{134} See supra notes 111-24 and accompanying text.
The New Jersey and federal tax appeals systems originally resembled New York's internal review mechanism in structure. They also were the subject of many of the same criticisms now leveled against the New York system. Both were subsequently reformed after legislative investigations to provide for a fully independent review of contested tax matters. New Jersey created a judicial tax court. In 1924 the United States Board of Tax Appeals was created, which eventually was transformed into the current legislative United States Tax Court.

A brief review of the federal experience is instructive because of similarities between the previous federal tax appeal system and New York's current system. The Tax Simplification Board, created by statute in 1921 to investigate the administration of the federal revenue laws, criticized the internal review mechanism then used for the adjudication of tax matters. It identified as a fundamental weakness in the system the lack of independence of the decisionmaking body from the revenue department. As the federal system grew more burdensome and intrusive on the citizenry, the question of its independence became more significant. In 1975, a parallel between the New York and federal systems was drawn by a former Commissioner of Taxation and Finance. Testifying in support of a New York tax court, he stated that as a result of the state's present rate structure and the large number of taxpaying citizens, New York had come to the approximate point which the Federal Government had reached in 1924, when the United States Board of Tax Appeals was created.

Parallels to other states exist as well. In 1979, the Commission on California State Government Organization and Economy issued a report on the California state tax appeals system. The report noted

135 See supra notes 59-97 and accompanying text.
137 See supra notes 60-71 and accompanying text.
138 See supra notes 80-88 and accompanying text. The Board of Tax Appeals was created as an entirely independent agency in the executive branch of the government. In 1942, its name was changed to Tax Court of the United States and in 1969, the court was moved to the legislative branch. For a detailed history of the United States Tax Court, see Dubroff, The U.S. Tax Court: An Historical Analysis, 40 ALB. L. REV. 7 (1975); see also Comeau & Rosen, supra note 1, at 267.
139 REPORT OF TAX SIMPLIFICATION BOARD, supra note 136, at 4.
140 Statement of Joseph H. Murphy, President of the New York State Bar Association, before the New York State Legislature's Select Task Force on Judicial Reorganization (Oct. 2, 1975).
that most tax appeals are adjudicated by boards that are directly or closely connected with the agencies that administer the taxes. It also stated that the members of most of these boards are not required to possess expertise in tax matters. The report concluded that these and other features of the California tax appeals system leave it susceptible to influences of bias and incompetence. The report recommended that a new appellate body be created which would be completely independent of those agencies and officials responsible for collecting taxes or administering tax laws. To date, however, these recommendations have been ignored.

B. Inefficiency

1. Overview

Practicality requires that tax appeals procedures be measured not only against the principles of fairness, but also against the need for efficiency. Any realistic framework must meet both these concerns. Ideally, an efficient tax appeals system would be simple, rapid, inexpensive, and effective. Such a system would resolve controversies within a reasonable period of time, minimize the use of time-consuming and costly formal procedures, and encourage the settlement of disputes. These attributes need not be inconsistent with fairness. For example, informal procedures not only may dispose of simple cases more rapidly, but also may reduce the need for professional representation, thereby allowing taxpayers to pursue their rights even in cases in which limited sums of money are at stake. In other instances, however, fairness and efficiency may conflict. The desire to protect individual rights may result in procedures that are more complex and

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\[142\] Id. Other current tax issues in New York also have parallels elsewhere. The United States Congress, for example, in creating the Board of Tax Appeals, was concerned about the lack of published precedents of the prior tax appeals system. See Dubroff, supra note 138, at 50. The California report, see supra note 141, speaks to issues of expertise and timeliness as well as the issue of independence. Each of the policy issues faced by New York has been addressed by the federal government, New Jersey, California, and other jurisdictions that have examined their tax appeals procedures. See, e.g., Dubroff, supra note 138, at 60-72.

\[143\] Most recently, the West Virginia State Tax Study Commission recommended that a “tribunal independent of the State Tax Department should be established to hear disputes.” WEST VIRGINIA TAX STUDY COMM’N, A TAX STUDY FOR WEST VIRGINIA IN THE 1980’s: FINAL REPORT TO THE WEST VIRGINIA LEGISLATURE 127-28 (1984). The Commission recommended that either a tax court or a board of tax appeals be established. Id.
time consuming than efficiency concerns would dictate. Conversely, efficiency considerations may suggest that some deviations from the judicial model of adjudication, with its often elaborate rules (jury rules, strict rules of evidence, etc.), are proper.

The New York State tax appeals system has been criticized in the past for being inefficient, although some of the delays that are cited are undoubtedly attributable to taxpayers. A 1974 report recognized that "extreme time delays existed throughout the conference and hearings process for all taxes, and that the worst delays occur in the income tax area, where cases can remain unresolved for over 10 years." In 1975, the tax appeals system was revamped, partially in response to criticisms of inefficiency. In recent years, such criticism has abated and some would argue that the system has achieved a reasonable measure of efficiency.

Two recent studies of the Tax Appeals Bureau suggest, however, that serious problems of inefficiency persist. A recent report by the Office of the State Comptroller concluded that extensive delays occur in the processing of protests through the prehearing mechanism and that long periods of time elapse before tax matters are resolved. Prehearing conferences require more than a year to close and some small claims and formal hearings take more than five years. The second study, a review of sales tax cases decided between June 1982 and April 1983, indicated that the average elapsed time between notice of deficiency and hearing was thirty-five months and that the average elapsed time between hearing and decision was approximately twenty months — a total of fifty-five months or nearly five years.

The New York system does meet many of the criteria required for

144 Administrative Management & Systs. Group, Org. & Management Unit, Div. of the Budget, Study of Tax Department Conference and Hearing System (June 1974) (emphasis deleted). For additional criticism of tax appeals system, see Ginsburg Statement, supra note 1.
145 Prior to 1975, a case was handled by the same bureau of the Department of Taxation and Finance that originally assessed the tax (i.e., appeals in personal income tax cases were heard by the Income Tax Bureau). The 1975 changes established the Tax Appeals Bureau, initiated the prehearing conference, created a small claims procedure, and significantly increased the number of hearing officers. Sollecito 1982 Interview, supra note 19.
146 In 1981, for example, the Commission closed 4,242 cases, while receiving 3,696 new matters. It reduced its case inventory by 8.4% — from 6,441 to 5,895. Of these cases, 2,917 were resolved in conference, including 411 defaults, while 1,325 were decided by the Commission. Sollecito Sept. 1982 Letter, supra note 26.
147 REPORT 84-S-104, supra note 4, at 5. For the Department’s responses to the criticisms contained in the report, see id. at A-3 to A-4.
148 Id. at 5-6.
149 Unpublished data obtained from the fiscal staff of the New York Assembly Ways and Means Committee.
an efficient system and, the Tax Appeals Bureau continues to improve its procedures. The appeals process begins with an informal conference mechanism that is designed to encourage the early resolution of most disputes.\textsuperscript{150} It then provides increasingly formal procedures — hearings and an Article 78 judicial review — to deal with disputes that cannot be otherwise resolved.\textsuperscript{151} Further, cases destined for hearing are sorted into formal and small claims hearings. Less formal procedures are appropriately utilized in trying the small claims matters. Nonetheless, several aspects of the current system continue to be inefficient and could be corrected, either as part of other significant structural changes, or in some cases without major changes in the basic framework.

2. Obstacles to Settlements

Settlements are essential to the efficient operation of a tax appeals system. A system that does not resolve a substantial majority of its disputes at an early stage is likely to be inordinately expensive, agonizingly slow, or both. Not all tax disputes are, from the perspective of the state, appropriate for full litigation. Certain disputes are neither essential to the New York State Tax Department’s litigation policy nor capable of clarifying the law in any meaningful way.\textsuperscript{152} No issues of public policy may be involved. Litigation of these cases may, therefore, be time-consuming and expensive without having any sufficiently redeeming attributes.\textsuperscript{153}

Settlements do not necessarily reduce the fairness of a system. In certain respects, settlements may enhance the uniformity with which taxpayers having legitimate claims are treated.\textsuperscript{154} Expeditious settle-

\textsuperscript{150} See N.Y. ADMIN. CODE tit. 20, § 601.4 (1983). In October, 1982, the Tax Appeals Bureau revised its petition review procedures to assure that all petitions are either filed with or immediately forwarded to the Bureau. Previously, petitions filed with the Bureau were sent to the Audit Division where they had to be retrieved and returned to the Bureau. The revised system allows for a more expeditious petition review and calendaring of conferences. Coburn Letter, supra note 14. Mr. Coburn describes this change as “eliminat[ing] any review of the Department file by the conferee, thus ensuring impartiality.” Id. This admission highlights the indirect ways in which partiality can intrude upon the system if the structural framework is flawed.


\textsuperscript{152} See L. WRIGHT, J. HOUTTE, P. KERLAN, H. DEBATIN, J. JOHNSTONE, H. SCHUTTEVAER & E. BROWN, COMPARATIVE CONFLICT RESOLUTION PROCEDURES IN TAXATION 88 (1968) [hereinafter cited as L. WRIGHT].

\textsuperscript{153} Id. at 11, 86-90.

\textsuperscript{154} See generally id. at 1-101.
ments may also permit the state to collect revenues in disputed cases more quickly.

The Department gains little from trying cases that are inappropriate for litigation other than protecting the revenue at stake in the individual dispute. In such cases, the value of the state’s interest is no greater than the amount of the assessment, discounted by the probability of prevailing should the dispute be litigated, less any costs that would be incurred. Taxpayers should value their interests similarly. In this light, it is sensible for the system to be satisfied with results that generally conform with the parties’ assessment of their interests. This valuation must take into account the hazards of litigation, i.e., the probability of prevailing in court. Settlements achieved in this manner may produce more uniformity among taxpayers than would the attempt to decide such cases entirely for one side or the other. The ability to settle cases based on a realistic appraisal of the litigation hazards faced by both the Department and a taxpayer facilitates agreements at the administrative level, thereby enhancing greatly the efficiency of the appeals process while preserving general fairness.

The New York State Department of Taxation and Finance has interpreted state law as prohibiting the agency from entering into settlements based on hazards of litigation. In effect, the Department

155 “Hazards of litigation” does not imply that the Department should settle cases simply to avoid the costs of litigation. The Internal Revenue Service (IRS), for example, cannot compromise an assessment based upon the nuisance value of a case to either party. The Department could adopt a similar policy or establish a rule that it will not settle any legal issue if there is a better than perhaps an 80% chance of prevailing in court.

156 See supra note 155 for a discussion of “hazards of litigation.”

157 See supra note 20. In reviewing a draft of this Article, the Secretary to the Tax Commission suggested that the gift and loan provisions of the New York State Constitution may ban the settlement of disputes based on hazards of litigation. The New York State Constitution prohibits gifts or loans of state credit or money. N.Y. Const. art. VII, § 8. Contrary to the Secretary’s assertion, however, the settlement of a tax or other kind of dispute, for less than the full amount of the claim, would appear to provide sufficient consideration so that a gift would not be involved. Indeed, precedent exists for the proposition that legislative action resulting in refunds of a previously paid, disputed tax does not violate the constitution. See People ex rel. Clark v. Gilchrist, 243 N.Y. 173, 153 N.E. 39 (1926); Yeaton v. Levitt, 19 A.D.2d 935, 244 N.Y.S.2d 334 (1963), aff’d, 14 N.Y.2d 912, 200 N.E.2d 860, 252 N.Y.S.2d 317 (1964). Consequently, it is difficult to maintain that legislative action granting the Department the power to settle disputed claims based on the hazards of litigation would violate the New York State Constitution. If the settlement of a dispute were viewed as a gift, the Department should be asserting gift tax liabilities against private litigants who compromise cases for something less than their original claims.

As a matter of practice, cases involving factual disputes may sometimes be resolved in a way that approaches a compromise based on hazards of litigation. In these cases, the Department’s resolution of factual issues will reflect the merits of each side’s case. Legal issues, however, are
asks a taxpayer to pay voluntarily one-hundred percent of an assessment notwithstanding that the taxpayer has a realistic chance of prevailing in litigation. A well-represented taxpayer is not likely to make such a concession. The administrative process cannot efficiently dispose of these kinds of disputes if the Department cannot offer a sensible compromise prior to litigation that is based on an evaluation of its probability of success.

The power to settle cases on the basis of hazards of litigation is sometimes criticized as being susceptible to undue influence or unprincipled decisionmaking, although similar fears can also be raised about the conference mechanism. The experience of the Internal Revenue Service (IRS), however, which exercises precisely this power, indicates that appropriate procedural safeguards can be incorporated to prevent abuse. First, the IRS generally places authority for approving settlements within a small group who have no direct contact with the taxpayer and who review all proposed settlements based only on the paper record. Second, approved settlements are subject to further review in order to gauge the overall quality of the actions taken. This post-review may occur within the IRS Regional or Na-

never the subject of compromise.

At present, over 70% of all disputes are resolved at the conference stage. Sollecito 1983 Interview, supra note 18. In addition to those cases involving factual disputes that are truly compromised, cases may also be resolved because of (1) new factual material presented by the taxpayer; (2) better communication of the law by the Department to the taxpayer; (3) the disposal of cases in which auditors failed to follow established Departmental policy; or (4) the fear by the taxpayers that an appeal to the Commission would not receive fair consideration because of perceived bias. Id. If only legal issues are in controversy, cases may be assigned for a hearing without a conference. Id. The settlement process could be substantially improved if the Department were allowed to consider the hazards of litigation in negotiating settlements if legal issues in addition to factual issues are disputed.

If the conference mechanism fails to resolve a matter, it is unlikely that it will be resolved before or during the hearing. Approximately 25% of cases that are not resolved in conference are disposed of prior to hearing. Id. This figure, however, includes cancellations and withdrawals, as well as settlements. Id. This experience differs greatly from that of certain other jurisdictions, where a majority of cases which have not been settled at the conference level (or its equivalent) are settled before or during the hearing stage (or its equivalent). See, e.g., ANNUAL REPORT, supra note 66. The Clerk of the United States Tax Court, Charles S. Casazza, stated that 28,945 cases were closed by the court in the 12 month period ending September 30, 1983. Nearly 80% of those cases were closed as the result of settlement between the parties. Approximately 9% were disposed of through trial and opinion. The remainder of cases closed consisted largely of dismissals. Interview with Charles S. Casazza, Clerk of the United States Tax Court (Dec. 8, 1983) [hereinafter cited as Casazza Interview]. The inability of the Department to offer a settlement based on the hazards of litigation no doubt contributes to the different experiences of the Commission and the United States Tax Court.

See L. WRIGHT, supra note 152, at 87-88.

See 4 INTERNAL REVENUE MAN. (CCH) §§ 8281 to 8282.2 (1984).

Interview with Bart McGowan, Staff Assistant to the IRS Appeals Division, North Atlan-
There are no reported occurrences of improprieties with respect to the IRS's exercise of its power to settle cases based on hazards of litigation.

Even if the Department had the power to settle cases based on the hazards of litigation, some taxpayers assert that another obstacle to settlement would stem from the lack of an independent tax commission. In the absence of such an independent forum, these taxpayers argue that the Tax Department is not compelled to examine each dispute with the degree of objectivity and impartiality that is necessary to reach fair settlements. If, however, the Department were faced with the prospect of a full hearing before an independent agency, it would be more likely to make a detached evaluation, weigh its chances for success in that forum, and offer a settlement based on a calculation of its relative chance to prevail.163

3. The Use of Hearing Officers

The use of hearing officers in New York decreases the opportunity for reaching a settlement. Once a case is scheduled for hearing, a strong likelihood exists that it will, in fact, be tried.164 The state system affords no other fertile opportunity for settlement at the hearing stage. Hearing officers do not schedule pretrial or settlement conferences, nor do they view as their major role the attempted resolution of cases prior to hearing. Even if they were interested in achieving prehearing settlements, hearing officers may lack the stature or leverage necessary to persuade the parties to consider compromise. Evidence from other jurisdictions, however, indicates that additional settlement efforts at the hearing stage produce significant results.165

In the New Jersey Tax Court and the United States Tax Court, as well as in tribunals in other states, individual judges or board members actually hear and decide cases.166 In New York, however, hearing officers take testimony and write recommended findings of fact and conclusions of law. These are forwarded to the New York State Tax

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162 Id.

163 See L. Wright, supra note 152, at 70-101.

164 Approximately 75% of cases scheduled for hearing are in fact tried. Sollecito 1983 Interview, supra note 18.

165 Casazza Interview, supra note 159.

Commission which alone has the statutory power to render a decision. Having the final decisionmaker actually hear as well as rule on cases would seem clearly preferable. First, from both a theoretical and practical viewpoint, it is better for a decisionmaker to see and hear live testimony than merely to review a record (or a tape recording) and the recommendations of a third party who did see and hear the testimony. Second, taxpayer confidence is likely to be increased if the final decisionmaker hears testimony because litigants would confront the decisionmaker directly. Taxpayers are thus more likely to come away with the sense that they have had their “day in court.” Finally, because judges or commissioners are likely to be highly-skilled, experienced, and well-paid tax experts, the quality of decisionmaking should be better than in the case of even well-trained hearing officers.

The hearing officer format does, however, facilitate uniformity in the decisionmaking process. Because the New York State Tax Commission, as a whole, ultimately rules on every case, it speaks with a single voice. In other jurisdictions, individual judges may rule differently on similar fact patterns, leaving it to a higher court to ultimately resolve an issue one way or another.

The use of hearing officers has also been defended as reducing the number of highly paid personnel in the system. If individual “judges” were to hear cases, the number required for an efficient system would probably exceed the current number of Commission members — three — and would at least equal the number of existing hearing officers — five. These “judges” would presumably receive salaries higher than those of the hearing officers.

Nonetheless, the use of hearing officers has attendant costs. For every case heard, a hearing officer must write up recommended findings of fact and conclusions of law. This recommended decision is then reviewed by the formal or small claims supervising hearing officer, the post-hearing review unit, and, in some cases, by the Di-

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168 Lasser Interview, supra note 63.
169 The recent Comptroller’s report on the Tax Appeals Bureau criticizes the role of the post-hearing review in this multi-layered process:

The reviewer is required to examine the entire Bureau file, including the hearing transcript or tapes, applicable briefs and evidence submitted by the taxpayer and the Department, and the recommended decisions of the hearing officers. The decisions are reviewed for format, to determine whether conclusions are supported by findings, and to determine consistency with past decisions, applicable laws, and court rulings. The reviewer also proofreads the decision to ensure dates, dollar amounts, assessment numbers,
rector of the Tax Appeals Bureau. The Director may write a dissent to accompany the hearing officer’s recommendation to the Commission. These are then reviewed by the Secretary to the Commission and next by the Commission members themselves, who may also need to consult the record. The hearing officer’s opinion may then be sent back for redrafting.

Under other formats, a single judge can hear and rule on a case. A formal written opinion may or may not be required in all instances. The presiding judge can require the court (board) to sit en banc for cases of unusual importance. Additionally, the judge can establish a system to review all opinions or just those that deal with novel or complex cases. Both the New Jersey and the United States Tax Courts use tools of this kind to achieve uniformity and to categorize and sort cases according to their significance. In New Jersey, for example, decisions in only a small percentage of cases are accompanied by full written opinions; in other cases, letter opinions are deemed sufficient.

Some have questioned how many judges (board members) would be required to handle the Commission’s current caseload efficiently if they were to hear each case individually. Currently, the Tax Appeals Bureau has five attorneys who conduct formal hearings, three small claims hearing officers, and seven individuals who conduct post-hear-

tax years, and decision references are cited properly and to correct for grammatical errors. When the reviewer disagrees with a hearing officer’s decision, he prepares a memo citing the differences for supervisory review. The review of small claims hearing requires about a day while formal hearing cases require three to four days. Additionally, all cases are reviewed by the unit supervisors and may also be reviewed by the Bureau’s managers.

The Post Hearing review duplicates the work of the hearing officers as well as that of the supervisors of the Small Claims and Formal Hearing Units and the Bureau’s managers. Although there may be a need for a review function, such reviews could be done on a test basis, focusing on items such as specific issues or certain hearing officers. With a supervisory review already in place, complete reviews of all cases does not seem warranted. The existing post-hearing review staff could then be used in assisting the hearing units prepare decisions, or conduct hearings, especially since these units have significant backlogs.

Department officials disagree that this function duplicates the responsibilities of others. Management considers the Post Hearing Review function vital to assure that decisions are informative, correct and consistent and that it offers an objective review by someone independent of the hearing process.

REPORT 84-S-104, supra note 4, at 13-14.

170 Sollecito 1983 Interview, supra note 18.
171 See supra note 44.
173 Lasser Interview, supra note 63.
There is no apparent reason why an independent board consisting of five members, which hears cases individually and uses other staff to hear and decide small claims cases, could not handle the Commission's current caseload. Five board members should be able to dispose of as many cases annually as the current five hearing officers, while simultaneously avoiding the various layers of review that retard the efficiency of the existing system.

Furthermore, as discussed above, the use of judges rather than hearing officers may significantly improve the probability of settlement at the hearing stage. In New Jersey, over eighty percent of state tax cases are settled prior to hearing but after filing with the court. The New Jersey Tax Court judges take an active role in the settlement of cases. Their stature and leverage no doubt facilitate the negotiations. Overall, a system that relies on individual judges to hear cases could well enhance both the efficiency and fairness of the tax appeals process.

C. Unclear Standards of Judicial Review

The actual standard of review employed by the New York Appellate Division in scrutinizing decisions of the State Tax Commission is a matter of some confusion. Article 78 of the CPLR authorizes reversal of an agency decision if "affected by an error of law." Thus, apart from the ordinary and reasonable deference a court should give to the interpretation of a statute or rule by the administering agency, all questions of law are open to review with no presumption in favor of the Commission's decision.

With regard to questions of fact, New York courts purport to apply an "arbitrary and capricious" standard which seems to be at odds with the statutory scheme. The requirement that an agency decision be arbitrary and capricious before it may be judicially reversed is based on CPLR section 7803(3). Conventional usage in administrative law employs the term "arbitrary and capricious" as a standard for the propriety of a decision that is committed to an agency's dis-

\* Sollecito 1983 Interview, supra note 18.
\* See Annual Report, supra note 66.
\* See 5 N.Y. Jur. 2d Article 78 and Related Proceedings § 15 (1980); B. Schwartz, supra note 111, at 596.
In such a case, an arbitrary and capricious exercise of discretion is itself illegal and cause for reversal. Determinations that apply the law to facts developed on an administrative record, such as those involving tax issues, are usually reviewed under a substantial evidence test, such as that embodied in CPLR section 7803(4). Section 7803(4) requires reversal unless a determination made as a result of a hearing is, on the entire record, supported by substantial evidence. Because all of the determinations of the Commission are decisions on a record, they are presumably covered by section 7803(4). Therefore, a decision that is not "arbitrary and capricious," but is unsupported by substantial evidence on the whole record, is still subject to reversal. Judicial decisions reviewing determinations of the Commission have failed to maintain this distinction. Although the courts purport to use an arbitrary and capricious standard, the actual standard applied is vague, but deferential.

The "substantial evidence" test should be the standard of review, particularly if the decision being heard is that of an independent tax tribunal. A court should accord considerable deference to the factual findings of such a body. In addition to the advantages an administrative tribunal has in its first-hand observation of the presentation of evidence, the decisionmakers have the added benefit of their experience and expertise in considering questions of taxation. Moreover, in the area of taxation, the courts have no special competency to justify a more liberal standard of review than that ordinarily used to review administrative agencies.

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180 One treatise states:

The arbitrary and capricious test is apparently regarded as more restrictive [with respect to the reviewing power of the court] than the substantial evidence rule; that is, something less than substantial evidence can support a determination as not being arbitrary or capricious. The difference in approach seems to be that the arbitrary or capricious rule is applied where there is no right to a hearing. It is said that the substantial evidence rule and the arbitrary or capricious rule are but two different expressions of the judicial power and duty to check administrative abuses, the former applicable where evidence is required and the latter applicable where there is no requirement of evidence. Thus, where there is neither a statutory nor a constitutional right to a hearing, the determination is a matter of judgment or discretion confined by the legislature to the administrative agency and the aim of judicial review is to determine whether its action was arbitrary or capricious.

5 N.Y. Jur. 2d Article 78 and Related Proceedings § 31, at 393-94 (1980) (citations omitted). See also B. Schwartz, supra note 111, at 605-06.

181 B. Schwartz, supra note 111, at 605-06.


183 See cases cited supra note 58.
D. Absence of Accessible Precedents

A final problem with the current system is its failure to provide taxpayers with a coherent and conveniently accessible body of decisions and opinions. A body of well-indexed cases would help provide predictability, uniformity, and fairness in the decisionmaking process and assure taxpayers of a principled and unbiased hearing. It may also improve the efficiency of the system over time by serving to reduce the number of cases filed.

The question of how decisions are disseminated involves considerations of fairness and notice. All New York State Tax Commission decisions are now published and distributed by the Taxpayer Services Division of the Department of Taxation and Finance to persons requesting them. The state has been unable, however, to obtain full publication of opinions by private publishing companies. If private companies are unwilling to publish Commission opinions in full, the state might consider publishing its own decisions that it could sell at cost. In order to have an adequate dissemination system, however, all Commission decisions should be distributed without charge to public libraries. At very least, every written decision should be published in full within a predetermined time limit; the only delay should be the actual time required to transmit an opinion to the printer and the time necessary to print and mail it. The Department should have no role in this process in order to avoid any temptation to delay the publication of decisions with which it disagrees.

III. Options for Change

Section II of this Article identified and analyzed a number of weaknesses in New York's current system for resolving tax disputes. This section sets forth seven policy options that respond to these problems. These options are not intended to be exhaustive. Clearly, the existing structure could be modified in countless ways. The options presented, however, generally focus on basic thematic issues and serve to identify various stages along a continuum of possible changes. The options are presented according to the magnitude of the structural changes that would be required in existing procedures, and range from preserving the status quo to creating a judicial tax court.

184 See L. Wright, supra note 152, at 131-38.
A. Option One — Preserve the Status Quo

The first option would be to preserve the status quo. There is little, if any, evidence of actual bias in the current system.\(^{185}\) Although isolated incidents have been cited by the tax bar and others that purport to show actual bias in the decisionmaking process,\(^{186}\) no one has been willing or able to identify any pattern of ongoing or systematic bias. Moreover, in recent years, the efficiency of the system has improved.

This option, however, would be unresponsive to taxpayers' fears of bias that are attributable to the absence of an independent forum. In effect, Option One would require that the present system remain unchanged because no hard evidence exists that it produces unfair results despite the risks inherent in its structure.\(^{187}\) This alternative, however, would fail to address the increased efficiency that would likely result from granting the Department of Taxation and Finance the clear authority to settle cases based on hazards of litigation.

B. Option Two — Minor Statutory Changes

Even if the state decides not to alter the structure of the appeals process, certain statutory and operating changes could be made to eliminate some characteristics of the current system which needlessly underscore taxpayers' perceptions of bias. This process should begin with changes in the tax law to allocate appropriately responsibilities between the New York State Tax Commission and the Department of Taxation and Finance. The current statutory framework formally makes the Commission both the tax assessor and collector — roles it no longer plays in any meaningful way.\(^{188}\) The Commission should surrender all vestiges of these responsibilities and the statute should be amended accordingly. The Commission would issue regulations and decide contested tax matters — and nothing else. The Commission's name would be removed from advisory opinions and warrants.\(^{189}\)

Another improvement in this direction would be to hold hearings at offices not associated with the Department. In addition, the Commission, rather than the Department's Division of Taxpayer Services,

\(^{185}\) See supra note 109 and accompanying text.

\(^{186}\) See supra note 109.

\(^{187}\) See supra notes 101-08 and accompanying text.

\(^{188}\) Coburn Letter, supra note 14.

\(^{189}\) See supra note 105 and accompanying text.
should publish and disseminate all decisions. Although these changes would not address more fundamental problems, they would at least mitigate some of the confusion over the roles of the Commission which reinforces taxpayers' fears of unfairness in the appeals process.

C. Option Three — Settlement Authority Based on Hazards of Litigation

Even if all other features of the existing system remain unchanged, the state should grant the Department the clear authority to settle cases based on the hazards of litigation.\textsuperscript{190} Procedural safeguards similar to those used by the IRS would be required to prevent an abuse of discretion.\textsuperscript{191} This modification is not incompatible with any of the other options outlined in this section of the Article and should therefore be considered regardless of what other changes might be made in the existing structure or procedures.

D. Option Four — Remove the Commissioner of Taxation and Finance from the Tax Commission

The least disruptive structural change in the existing system would be to remove the Commissioner of Taxation and Finance from the Commission and to replace him with a third person. This proposal has a number of advantages. First, it would remove some of the actual and perceived risks of bias in the present process by separating the administrative and adjudicative roles now united in the Commission.\textsuperscript{192} Second, the changes required would be relatively few and easy to implement. The increased cost would be small: the amount of the additional salary for a new Commission member. Third, it may well be that the skills required to administer a large revenue collection agency are very different from those needed to rule on contested tax matters. There is no particular reason why an excellent Commissioner of Taxation and Finance should necessarily make an excellent "judge," or vice versa, and it may be unfair to impose both sets of responsibilities on the same person. Fourth, this proposal would remove a significant and time-consuming burden from the Commissioner of Taxation and Finance, who must review transcripts and decide contested cases in addition to his other considerable responsibilities.

\textsuperscript{190} See supra notes 152-63 and accompanying text.
\textsuperscript{191} See supra notes 160-62 and accompanying text.
\textsuperscript{192} See supra notes 101-10 and accompanying text.
administrative duties. Administering the Department is obviously a full-time commitment as is the adjudication of tax disputes. In an earlier age of lower taxes, simpler tax laws, and consequently less litigation, the Commissioner of Taxation and Finance might have been expected both to administer the Department and to rule on cases. Today, however, these duties impose a heavy burden on one person, no matter how hardworking or talented he may be. Perhaps because of this concern, the Commission uses a procedure under which the other two members review all cases before they are sent to the Commissioner of Taxation and Finance. If these two agree, and they take pains to do so, the Commissioner does not have to spend time thoroughly reviewing the case. The temptation, therefore, is to accede to the decision reached by the other two Commission members. The result could be that a taxpayer’s case will receive full consideration only by two members of the Commission. If one of these persons is a tax expert but the other is not, a taxpayer’s case may receive a complete and thorough review by only one Commission member.

The greatest drawback of Option Four is that it would fail to separate completely the Commission from the rest of the Department and would continue to mix rulemaking and adjudicatory functions. The Commission, for example, might be asked to judge the validity of regulations that it had promulgated. Additionally, the Tax Commission and the Department of Taxation and Finance would remain as two components of a single organization. Many of the subtle opportunities for the development of bias would continue. A taxpayer pursuing a claim through the administrative process might still perceive that the same entity is both a party in the dispute as well as the judge that will hear and rule upon the contested matter.

E. Option Five — Remove the Regulatory Functions from the Commission

A variation of Option Four would be both to replace the Commissioner of Taxation and Finance with a third party and to remove the Commission from the regulatory process. By taking away the rulemaking role from the Commission, this option would respond

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183 Interview with Mark Friedlander, New York State Tax Commissioner (Oct. 27, 1983).
184 Commissioner Mark Friedlander has suggested that the benefits of this overlap might outweigh the drawbacks. The Commissioners, who would not be responsible for the collection of revenue, would review potential regulations from a “neutral” or even “pro-taxpayer” perspective. The Commission could thus ensure additional outside input into the regulatory process and perhaps temper any occasional “overzealousness” of the Department. Id.
better than Option Four to concerns regarding violations of the doctrine of separation of powers. Under this proposal, tax regulations would be the sole responsibility of the Commissioner of Taxation and Finance, with a continuation of the present opportunities within the Department for public input into the process.

One version of this alternative might require the Commission to have its own budget, separate from that of the Department of Taxation and Finance. An independent budget would remove another possible source of control or leverage over the Commission and would achieve a further separation of the adjudicatory body from the rest of the Department. A more complete separation would be accomplished if the Commission was housed in a separate physical structure from the Department, a change that would entail additional expense.

These aspects of Option Five constitute an almost complete separation of the Commission from the Department. Nonetheless, a weakness in Option Five is that taxpayers might still perceive the revamped Commission as merely a continuation of the past, without fully appreciating the extent of change. Once at this stage along the continuum of possible changes, it may be more sensible to take the next step and restructure the entire adjudicatory process rather than to make only patchwork changes. Additionally, a restructuring of the process, discussed in Options Six and Seven, could involve other significant improvements, such as the replacement of hearing officers by "judges."

F. Option Six — An Independent Tribunal

At the core of this option is the creation of an independent tribunal located not in the judiciary, but in the legislative or executive branch, similar to the United States Tax Court or the Wisconsin State Tax Appeals Commission. As a natural consequence of this proposal, the State Tax Commission would be abolished. The Department of Taxation and Finance would continue to be headed by a Commissioner, appointed by and serving at the pleasure of the Governor. The Department, through the Commissioner, would continue to be responsible for the promulgation of regulations.

Beyond this basic structural framework, a host of other issues remain unresolved. Independent review boards can differ from one another in a variety of ways, including the formality of the proceedings,

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the qualifications of those who hear cases, and the standard for appellate review. Some of these issues are discussed below. The creation of an independent tribunal does not necessarily require some or all of the additional changes discussed, but does provide an opportunity to address or reconsider these issues.

1. Tribunal Membership, Appointment, Tenure, Etc.

The independent tribunal might consist of five to seven individuals, appointed by the Governor with the advice and consent of the Senate. The exact number would obviously depend on the tribunal’s expected workload. Each member of the tribunal should be an attorney who has practiced law for some minimum period of time, and who possesses special expertise in tax matters. An advisory group representing lawyers and accountants might be established to certify a candidate’s expertise or, at the least, to have the opportunity to provide some comment and evaluation.

Appointments would be for a term of years. To increase the prestige and status of the tribunal so that qualified and dedicated tax experts will be attracted as members, the salaries and other benefits should be equivalent to those received by judges of the New York State Supreme Court.

2. Tribunal Procedures

The tribunal would have a presiding member, designated by the Governor, who would bear primary responsibility for its administration. The tribunal would hear all cases de novo, with full opportunity for the examination and cross-examination of witnesses. Ordinarily, the members of the tribunal would hear cases individually and would not rely on hearing officers. The presiding judge, however, could

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197 Judges of the New York State Court of Appeals and justices of the New York State Supreme Court must have been admitted to practice law in New York for at least 10 years before assuming office. N.Y. Const. art. VI, § 20.
198 An official commission on judicial nomination evaluates qualifications of candidates for appointment to the court of appeals and prepares a written report to the Governor. See id. § 2(c).
199 For a description of the salaries and other benefits received by judges of the New York State Supreme Court, see N.Y. Jud. Law §§ 221-b, 221-bb, 222 (McKinney 1983).
schedule cases of particular importance to be heard *en banc*. Additionally, the presiding judge could require a case that was heard by one of the judges to be reviewed on the record by the tribunal as a whole. Tribunal members should conduct prehearing and settlement conferences to maximize the resolution of cases prior to hearing.

Tribunal members should not be required to render formal written opinions in all cases. Instead, formal opinions might be issued only in cases of some importance. In other cases, letter opinions would suffice. The presiding tribunal member could have the power to review formal opinions and the members might meet relatively often to discuss issues of mutual concern. Tribunal members would maintain both permanent locations and ride circuit as well, using available court room space.

The presiding member would have the authority to appoint members of the bar with experience in tax matters to hear and rule on small claims cases. The taxpayer would have the right to choose the small claims forum if the dispute were within established jurisdictional limits. The rules and proceedings for small claims should be simple and designed to expedite cases; otherwise, a taxpayer would have no incentive to choose this forum. The choice of the small claims forum would constitute a waiver of the right to judicial appeal, but there could be an appeal to the tribunal in egregious cases.

The rules of practice and evidence would be adopted by the tribunal itself. The rules should provide the safeguards embodied in the State's Administrative Procedure Act, but they need not be as complex as the CPLR. The rules should be designed to encourage the simple, inexpensive, and rapid disposition of cases, while preserving fundamental requirements of fairness. Accountants, as well as lawyers should be allowed to represent clients before the tribunal.

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200 New Jersey uses a similar approach. Lasser Interview, supra note 63. Care must be exercised, however, to ensure that letter opinions are properly limited only to insignificant cases having no precedential value.

201 For example, an appeal could be granted upon a showing that "a serious miscarriage of justice" had taken place before the tribunal would hear the case *de novo*. Bias on the part of the hearing officer, or some fundamental denial of due process would constitute such a miscarriage.


203 The New York State Civil Practice Law and Rules occupy 15 volumes of McKinney's Laws of New York Annotated and have been the bane of law school graduates studying for the New York bar examination.

204 Lawyers, accountants, and persons admitted to practice before the IRS or the United States Tax Court, can represent clients under the current appeals process. Other individuals may apply to the Tax Commission to be certified to represent clients. Coburn Letter, supra note 14.
The factors that a taxpayer now considers in deciding whether to appeal pro se, or to retain an attorney or an accountant, would not be very different when litigating in an independent tribunal.

3. Continuing an Administrative Forum Within the Tax Department

It is essential that a forum for settlement continues to exist within the Department of Taxation and Finance itself. The current conference format is well designed to accomplish this goal. The conference proceeding is a valuable tool for efficient management of the Department and a simple and inexpensive forum for taxpayers to air grievances, resolve certain factual issues, and reach settlements. Aggrieved taxpayers would first pursue their claims at conference. If a resolution could not be reached, the taxpayer would then file a petition with the independent tribunal.

One argument raised against an independent tribunal is that it would be less efficient than the current system. Because the Department would no longer be responsible for managing the hearing process, it would have no stake, as it does now, in seeing that a large percentage of cases were resolved in conference. The Department, with no interest in settlement, might force too many taxpayers to pursue their claims to the independent tribunal, overloading the system. This argument, however, improperly characterizes the Department’s interest in resolving disputes prior to hearing. Faced with the prospect of defending its position before an independent tribunal, along with the corresponding staffing required for such a defense, the Department should have a real interest in disposing of cases at the conference level. The experiences of the federal government and other jurisdictions with independent tribunals indicate that revenue departments do resolve a majority of cases through their internal, informal conference mechanisms. Nonetheless, if the Department does not, for whatever reason, facilitate the resolution of cases at the conference level, the independent tribunal will face an increased workload that could hamper its efficiency and perhaps necessitate further changes to encourage more settlements. The Department, for exam-

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305 See N.Y. ADMIN. CODE tit. 20, § 601.4 (1982); see also supra notes 18-26 and accompanying text.
306 This argument has been offered in various interviews. Coburn Letter, supra note 14; Sollecito 1983 Interview, supra note 18.
ple, could be made liable for a certain percentage of a successful taxpayer's costs of litigation.

4. Right to Appeal

At present, the Department of Taxation has no right to appeal an adverse decision. This makes some sense under the current system in which the judge (the Commission) and the prosecutor (the Department) are components of a single agency. If a new independent tribunal were created, no compelling reason would exist to deny the Department the right to appeal decisions of the tribunal to the courts.

The inability to appeal an adverse decision is cited by the Department as a benefit of the current system which would be lost to taxpayers. Some tax lawyers and accountants feel, however, that the Commission rules against taxpayers in close cases for the very reason that the Department has no right to appeal. The relatively narrow scope of judicial review of Commission decisions might also encourage this practice because a case is unlikely to be overturned on appeal. Whatever the reality, characterizing the issue in this manner obfuscates a more fundamental point. The right to appeal from a system that is structurally designed to increase the likelihood of fair and unbiased results, whether actual or perceived, is preferable to speculating about who gains from the ramifications of the present system.

5. Publication of Tax Appeals Decisions

The written decisions and opinions of the tax tribunal should be regularly published in full, in an easily accessible form, and suitably indexed. A tax tribunal that issues formal opinions in only selected, noteworthy cases might influence a private publisher to publish New York tax cases. If not, the state should do so and sell the publication at cost and distribute it to libraries.

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208 See supra note 52 and accompanying text.
209 See supra note 107 and accompanying text.
210 Under this option, the standard of appellate review, which perhaps needs statutory clarification, would be the current "substantial evidence" rule. For a full discussion of standards of judicial review, see supra notes 176-83 and accompanying text.
6. Summary

Option Six would completely satisfy the requirements for a fully independent and impartial decisionmaking body. Moreover, the use of individual judges to hear cases would be an improvement over the current structure. Some of the additional features outlined could also enhance the overall quality and fairness of the system.

Whether Option Six would improve the efficiency of the current system is difficult to assess. It seems clear that the existing system cannot be defended on efficiency grounds. Certainly, the grant to the Department of Taxation and Finance of full settlement authority, along with the complete publication of a coherent and accessible body of precedent, should promote the goal of efficiency. Speculation about other issues of efficiency should not be allowed to divert attention from the more fundamental issues of fairness, which Option Six clearly addresses.

G. Option Seven — A Judicial Tax Court

The most far-reaching reform would be the establishment of a New York Tax Court, which would be located in the judicial branch of the government, and would be entirely separate from the Tax Department. This option would achieve in the most unambiguous and resolute fashion an independent and impartial forum for hearing tax disputes. Unlike an independent tax tribunal that would be located in either the legislative or executive branch, a judicial tax court would not be viewed as being sensitive to revenue raising considerations.

A tax court would be likely to bring other advantages, although many of these could be achieved under Option Six as well. The position of a judge, with the prestige that it implies, would be almost certain to attract highly talented and experienced individuals, promoting the quality of the entire process. A tax court would probably operate so that judges would actually hear testimony rather than rely on hearing officers. Additionally, a tax court would be more likely to develop a body of published precedents, which would encourage fair-

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[211] See L. Wright, supra note 152, at 86-90, 131-38; see also supra text accompanying notes 164-75.

[212] See N.Y. Const. art. VI.

[213] Most tax practitioners, however, do not view the United States Tax Court, which is a legislative court, see supra notes 80-88 and accompanying text, as being influenced by revenue considerations.
ness and efficiency.  Finally, because the court would be within the judicial system, its operations would be subject to the scrutiny of the New York State Office of Court Administration. An office would therefore exist which would be specifically charged with the task of reviewing the efficiency and effectiveness of the court's operations.

This option, however, poses some significant problems. Foremost is that the creation of a tax court would entail a revision of the judiciary article of the New York State Constitution.  The adoption of a constitutional amendment would be a cumbersome and lengthy process.  Moreover, a proposal for a full judicial court would also raise concerns regarding the wisdom of adding one more specialized court to the New York court system. Advocates of broad court reform generally view these specialized courts with disfavor.  Further, there is opposition in some quarters to the use of full judicial courts to resolve disputes if less formal, less expensive, and less time-consuming forums are suitable alternatives.  Even those who might concede that taxation would be an appropriate area for the creation of a specialized court, may nonetheless oppose Option Seven because of the precedent it would set.

Further problems exist concerning client representation. The pressure to adopt the rather complex CPLR, or rules modeled on the CPLR, would be substantial if a new tribunal were part of the state's unified court system. Consequently, client representation by accountants, now common, might well be prohibited in a tax court.  The New Jersey Tax Court, for example, allows accountants to represent clients only in its small claims division, where relatively small sums are involved.

Because of these drawbacks, Option Seven probably is less desirable than Option Six. The experience of the United States Tax Court seems to indicate that a court that is not part of the judiciary can nonetheless achieve both the perception and reality of a fully independent forum. In light of this experience, the disadvantages in pur-

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814 See L. Wright, supra note 152, at 131-38.
815 N.Y. Const. art. VI, § 7.
816 For the procedures involved in amending the New York State constitution, see N.Y. Const. art. XIX.
817 See, e.g., Transcript of the Minutes of a Hearing of the Select Task Force on Court Reorganization 15-28 (Nov. 20, 1975).
818 Id.
819 At present, only attorneys can practice before the courts established under N.Y. Const. art. VI. Allowing accountants to practice before an Article VI Tax Court might be resisted because it would represent a major exception to a long-standing rule.
suing a judicial court might outweigh the possible benefits that such a court could offer over an independent, non-judicial tribunal of the kind outlined in Option Six. The changes discussed under Option Six would be just as effective in correcting the fundamental weaknesses in the current system, providing for decisionmakers who actually hear live testimony, and allowing for a rapid, inexpensive hearing process. Furthermore, it would avoid the problems that would be likely to surround the creation of a judicial tax court.

H. Costs of Implementation

The additional costs, if any, imposed by each of the various options above are difficult to quantify accurately. A precise estimate cannot be made until the details of a particular option are formulated with specificity, especially regarding Options Six and Seven. Some generalizations, however, are possible.

Implementation of Options Two and Three would involve trivial costs. Option Four would involve the cost of an additional commissioner's salary, currently $51,200. Option Five would probably not impose any costs over those imposed by Option Four. Options Six and Seven would result in additional costs. Expenses for services such as mailroom, personnel processing, secretarial support, library and housing — now incurred by the Department of Taxation and Finance — would be borne by a new independent tribunal. Because of economies of scale, the Department's savings under Options Six and Seven in not performing these functions would likely be less than the costs incurred by the new tribunal.

It should be noted, however, that the New York State Tax Commission's appropriation for the 1984-1985 fiscal year is $2.56 million. While not all of these funds can be attributed solely to the Commission's adjudication function, certainly some of the existing appropriation could be re-allocated to an independent tribunal and would not represent "new money." Moreover, a new, independent

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221 A proposal for a judicial tax court would be likely to become entangled in the debate concerning other knotty, highly publicized issues involving the judiciary, which are now before the New York State Legislature, thus creating additional obstacles to its full consideration.

222 See supra text accompanying notes 188-91.


224 See supra pp. 393-94.

225 See supra text accompanying notes 195-221.

226 The appropriation to the Tax Department is contained in 1984 N.Y. Laws ch. 50 (McKinney).
body would almost certainly charge a filing fee. The revenues from these fees would help offset the tribunal’s costs. Furthermore, if a new independent tribunal settled cases faster, and was generally more efficient, state revenues would be enhanced. Finally, increased revenue might result if the Department were given the right to appeal. These potential sources of revenue, however, would be offset to some extent if taxpayers were encouraged to litigate issues that they now concede. Additional costs might also result if the Department, because it would no longer be responsible for managing the entire hearing process, had less incentive to settle cases and thereby forced more taxpayers to pursue their claims than at present.

CONCLUSION

The current system of tax appeals fails to satisfy certain fundamental principles concerning the independence of decisionmakers. This failure to comply fully with the precept of “separation of powers” fuels taxpayer perceptions of possible unfairness and creates inherent risks of actual bias in the adjudication of tax disputes.

This Article has not attempted to document specific instances of actual bias. The validity of the argument regarding the lack of independence of the New York State Tax Commission and the resulting risk of unfairness ought not to turn on the presence of proof of bias. The best method to ensure fair determinations is to establish procedures that are most likely to produce the desired results. Such procedures not only improve perceptions of fairness; but also are the best means of achieving actual fairness.

Other administrative agencies are marked by the same institutional arrangement that has been criticized in the context of tax appeals. Nonetheless, the arguments offered in favor of the involvement of the Department of Taxation and Finance in the adjudicatory process are unconvincing.

The efficiency of competing tax adjudication systems is difficult to assess. The current New York State tax appeals system can be criticized on efficiency grounds, but other systems will not necessarily prove more efficient. The central issue, however, is one of fairness and taxpayers’ perceptions of fairness. Attention should not be inappropriately diverted from that issue.

Based on information compiled in 1982, the filing fees charged by independent tax tribunals in other states range from approximately $2 to $40. See Legislative Tax Study Comm’n, supra note 166.