A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements

Kristin E. Hickman*

Introduction

> *It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.*[1]
>
> *It is not a case of a wrong without a remedy. It is a case of a wrong without a judicial remedy. It is a case of a wrong where there is a remedy, but that remedy is legislative, not judicial. . . . [W]rongs should be remedied in the right way and not in a wrong way.*[2]

* Associate Professor of Law, University of Minnesota Law School. Many thanks to Michael Abramowicz, Bryan Camp, Leandra Lederman, Richard Pierce, Peter Strauss, and participants in the Junior Tax Scholars' Workshop, the Junior Administrative Law Scholars Mini-Conference, and faculty workshops at Florida State University College of Law and Washington & Lee University School of Law for their helpful comments and suggestions.

1 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803).

2 Preston v. Sturgis Milling Co., 183 F. 1, 19 (6th Cir. 1910).

August 2008 Vol. 76 No. 5

The Treasury Department ("Treasury") promulgates hundreds of regulations interpreting the Internal Revenue Code ("I.R.C.").[3] In a recent article, I outlined and documented empirically why, under general principles of administrative law, a substantial percentage of Treasury regulations interpreting the I.R.C.—more than forty percent of those studied—are susceptible to legal challenge for Treasury's failure to follow procedural requirements imposed by the Administrative Procedure Act ("APA").[4] I also suggested that the failings I identified may not be the only procedural problems with Treasury's rulemaking efforts.[5] Tremendous potential exists for unhappy taxpayers to challenge Treasury regulations in court for their procedural failings.

Yet, despite plenty of tax litigation, including frequent claims that Treasury regulations are substantively flawed,[6] taxpayers rarely contest Treasury regulations on procedural grounds.[7] Given Treasury's

---

3 The I.R.C. typically delegates authority to promulgate regulations to the Secretary of the Treasury, and Treasury formally issues regulations interpreting the I.R.C. *See, e.g.*, I.R.C. § 7805(a) (2000) (granting general authority to develop "all needful rules and regulations for the enforcement of" the I.R.C.); *id.* § 1502 (giving the Secretary of the Treasury broad specific authority to adopt regulations for determining the tax liabilities of affiliated groups of corporations). Nevertheless, IRS attorneys play a prominent role in the process of developing Treasury regulations. *See* INTERNAL REVENUE MANUAL § 32.1.1.4.4 (2004); *see also* LEANDRA LEDERMAN & STEPHEN W. MAZZA, TAX CONTROVERSIES § 1.04 (2d ed. 2002) (comparing Treasury and IRS involvement in regulation drafting); Paul F. Schmid, *The Tax Regulations Making Process—Then and Now*, 24 TAX LAW. 541, 542–46 (1971) (describing historic process for promulgating Treasury regulations). Accordingly, readers should understand references in this Article to Treasury and its practices in promulgating Treasury regulations as including both Treasury and the IRS.

4 *See* Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1740–59 (2007) (documenting methodology and findings of study of 232 regulatory projects for which Treasury published notices of proposed rulemaking, temporary regulations, or final regulations in the *Federal Register* between January 1, 2003, and December 31, 2005); *see also* Administrative Procedure Act, 5 U.S.C. §§ 551–59, 701–06 (2000 & Supp. IV 2004).

5 *See* Hickman, *supra* note 4, at 1747–48.

6 *See, e.g.*, Boeing Co. v. United States, 537 U.S. 437, 446 (2003) (outlining dispute over validity of Treas. Reg. § 1.861-8(e)(3)); Swallows Holding, Ltd. v. Comm'r, 515 F.3d 162, 165–66 (3d Cir. 2008) (summarizing taxpayer's substantive challenge to Treas. Reg. § 1.882-4(a)(3)(i) as an invalid exercise of rulemaking authority); Square D Co. v. Comm'r, 438 F.3d 739, 742–43 (7th Cir. 2006) (recognizing taxpayer's bases for challenging the validity of Treas. Reg. § 1.267(a)-3, all substantive).

7 Searching for such cases methodically has proven difficult; my efforts thus far have turned up only a small number of APA-based procedural challenges to Treasury regulations in the last thirty years. *See* Schwalbach v. Comm'r, 111 T.C. 215, 219 (1998) ("Petitioners' sole argument is that section 1.469-2(f)(6) . . . is invalid as applied to them because, petitioners allege, the Commissioner prescribed section 1.469-4(a) . . . without complying with the notice-and-comment requirements of the Administrative Procedure Act . . . ."); Griffin Indus., Inc. v. United States, 27 Fed. Cl. 183, 188 (1992) ("Griffin further argues that the animal waste exception of

track record, one is left with the question: why do we not see more such claims?

It may well be that many taxpayers are satisfied with any guidance that allows them to arrange their affairs with certainty. But the idea that all taxpayers are so satisfied with Treasury's regulatory efforts as to render procedural challenges unthinkable is simply untenable. Many Treasury regulations are controversial and impose significant tax or reporting burdens on taxpayers. Even those regulations that please many or even most taxpayers nevertheless draw lines that either include taxpayers who think they should be excluded or vice versa. Further, many regulations address questions with sizeable financial consequences that far outstrip the potential costs of litigation and thus arguably justify allocating the resources to challenge rather than acquiesce to the regulation.

Maybe tax lawyers are simply unaware of the procedural arguments available. Some degree of tax community ignorance of nontax administrative law principles undoubtedly contributes to the paucity of procedural challenges. Many years ago, government officials responsible for drafting Treasury regulations were also well versed in the requirements of administrative law.[8] Over time, however, benign neglect and a restructuring of Internal Revenue Service ("IRS") personnel and priorities have yielded contemporary drafters of tax regulations with little knowledge of or regard for administrative law requirements.[9] Correspondingly, other tax scholars have observed the

final Treas. Reg. § 1.48-9(g)(1) (1981) is invalid . . . because the notice requirements of the Administrative Procedure Act (APA) were not met . . . ."); Stephenson v. Brady, 927 F.2d 596, 1991 WL 22835, at *2–3 (4th Cir. 1991) (per curiam) (unpublished table decision) (concerning taxpayer's allegation that implementing Treasury regulation and related tax forms violated the APA notice-and-comment requirements); Dow Corning Corp. v. United States, 22 Cl. Ct. 184, 192 (1990) ("Plaintiff argues that Treasury Regulations § 1.994-2(b)(3) and (c)(2) were issued in violation of the Administrative Procedure Act because there was a failure to comply with the 'notice and comments' requirement."); Wing v. Comm'r, 81 T.C. 17, 26 (1983) ("Petitioner's first contention is that since the regulation was not promulgated in accordance with the Administrative Procedure Act . . . it is invalid."); Am. Med. Ass'n v. United States, 887 F.2d 760, 765 (7th Cir. 1989) ("The AMA argues, most generally, that the allocation regulations are invalid because the IRS did not comply with the notice and comment requirements of the Administrative Procedure Act (the 'APA') in promulgating the rules."); *cf.* Hosp. Corp. of Am. v. Comm'r, 348 F.3d 136, 145 n.3 (6th Cir. 2003) (noting taxpayer's failure to raise potential APA procedural claims in challenging validity of temporary Treasury regulations and thus declining to consider the issue). Other cases raising such claims likely exist, but the mere difficulty in locating them, given the volume of tax cases generally, is indicative of their relative infrequency.

8 *See* Hickman, *supra* note 4, at 1796–97 (describing early attitudes toward APA compliance among Treasury and IRS officials).

9 *See id.* at 1797–99 (documenting changes in IRS organizational structure, priorities, and practices).

tax bar's insular nature and resulting tendency to disregard potentially relevant nontax legal doctrine.[10]

From these trends, one might conclude that many taxpayers and tax lawyers simply accept at face value Treasury's representation that most of its regulations are exempt from APA rulemaking requirements.[11] For others who might be more skeptical of Treasury's exemption claims, the relevant administrative law jurisprudence may be far enough outside their experiential comfort zone to cause them to shy away from raising claims based on administrative law. While any of these possibilities may be true in some cases, they are ultimately unsatisfying as the whole story. Trade and taxpayer groups pay close attention to relevant tax law changes. The tax bar and its clients are, collectively, highly sophisticated. The significant dollars at stake in many high-profile tax cases make it unlikely that the possibility of challenging unfavorable Treasury regulations on procedural grounds lies wholly undetected.

Another possible explanation, the subject of this Article, is that statutory and doctrinal limitations combine in the tax context to deter taxpayers from pursuing APA compliance claims. Part I of this Article offers a brief summary of Treasury's procedural failings. Part II.A of this Article then looks at statutory prohibitions against injunctions and declaratory judgments in the tax context that the courts have applied to preclude virtually all pre-enforcement judicial review of tax matters. Though the jurisprudence is surprisingly underdeveloped, Part II.B examines how broader justiciability limitations such as standing and ripeness may present an additional burden upon taxpayers seeking pre-enforcement review. Part III considers further limita-

---

10 *See, e.g.*, Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 518 (1994) ("[T]ax law too often is mistakenly viewed by lawyers, judges, and law professors as a self-contained body of law . . . . [T]his misperception has impaired the development of tax law by shielding it from other areas of law that should inform the tax debate."); Leandra Lederman, *"Civil"izing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency*, 30 U.C. DAVIS L. REV. 183, 183 (1996) ("Tax law tends to be uninformed by other areas of law. This insularity has the unfortunate consequence of depriving tax and other fields of cross-fertilization."); Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1, 2–3 (2004) (echoing calls for cross-fertilization between tax and nontax legal analysis).

11 *See* INTERNAL REVENUE MANUAL § 32.1.5.4.7.5.1(5) (2004) ("Interpretative rules are not subject to the provisions of 5 U.S.C. [§] 553(b), (c), and (d). Although most IRS/Treasury regulations are interpretative, and therefore not subject to these provisions of the APA, the IRS usually solicits public comment on all NPRMs."); *see also id.* § 32.1.2.3(3) ("Interpretative regulations are generally not subject to the APA provisions on rulemaking, including its notice and comment requirements.").

tions imposed by "enforcement-based" judicial review of tax cases—that is, review of cases commenced after the IRS applies the tax laws to individual taxpayers.[12] Specifically, Part III.A summarizes the administrative burdens imposed upon those seeking judicial review through tax refund or deficiency actions. Part III.B reflects upon the potential futility of challenging temporary regulations in such cases. Part III.C examines the possible impact and resulting deterrent effect of judicial deference doctrines that govern courts' consideration of enforcement-based, as-applied tax challenges.

It is doubtful that any of these limitations independently explains the lack of procedural challenges against Treasury regulations. However, the accumulation of statutory and doctrinal obstacles raises a formidable barrier that undoubtedly operates as a substantial disincentive against pursuing such claims. In other words, statutory provisions and the courts' own jurisprudence combined discourage procedural challenges against Treasury regulations to the point of denying taxpayers an adequate judicial remedy to vindicate procedural rights granted in the APA.

Widespread Treasury noncompliance with the APA in drafting tax regulations and rules may be an unintended price of this remedial failure. Part IV.A explores the tradeoffs inherent in this status quo and, thus, reasons why the courts might care to reconsider their approach to pre-enforcement judicial review in the tax context. Finally, for those who find the balance struck by the courts' jurisprudence to be less than optimal, Part IV.B discusses alternative interpretations of relevant law that might support such pre-enforcement review of facial challenges to Treasury regulations and thus resolve this remedial problem. Ultimately, however, congressional action may be necessary to provide a meaningful remedy.

I. Recapping the Problem

Provisions of the APA that impose procedural requirements for agency rulemaking activity apply generally to Treasury's efforts to promulgate rules and regulations interpreting the I.R.C.[13] Treasury

---

12 *See infra* note 46 and accompanying text (explaining utilization of "enforcement-based" terminology).

13 *See, e.g.*, Treas. Reg. § 601.601(a)(2) (2007) ("Where required by 5 U.S.C. [§] 553 and in such other instances as may be desirable, the Commissioner publishes in the *Federal Register* general notice of proposed rules."); Internal Revenue Manual § 32.1.2.3(1)–(3) (2004) ("Several Federal administrative laws and procedures apply to the regulatory process . . . . The Administrative Procedure Act (APA) requires agencies to publish Notices of Proposed Rulemaking (NPRMs) in the Federal Register and permit the public to submit comments.");

claims that most of its regulations interpreting the I.R.C. are exempt from APA notice-and-comment procedural requirements but also that it follows those procedures anyway in promulgating its regulations.[14] In fact, the opposite is true.

First, under general principles of administrative law, it is difficult to characterize most Treasury regulations as anything other than legislative rules subject to the notice-and-comment rulemaking requirements of APA § 553(b) and (c) and ineligible for the interpretative rule, procedural rule, or good cause exceptions from those procedures.[15] In the preambles to its Notices of Proposed Rulemaking ("NPRMs"), temporary regulations, and final regulations, Treasury almost always denies the applicability of APA § 553(b), but with little or no elaboration.[16] The IRS contends that most Treasury regulations are interpretative rules, and thus exempt from the APA's public notice-and-comment requirements.[17] This position is generally implausible under modern conceptions of the distinction between legislative and interpretative rules, murky as that doctrine is.[18]

Taxpayers are subject to congressionally imposed penalties for failing to follow Treasury regulations in filing tax returns.[19] Congress,

Wing v. Comm'r, 81 T.C. 17, 26–27 (1983) ("[T]he [IRS] Commissioner must conform generally to the requirements of the APA in promulgating regulations . . . .").

14 *See supra* note 11.

15 *See* 5 U.S.C. § 553 (2000); *see also* Hickman, *supra* note 4, at 1759–95 (explaining why Treasury regulations generally are not interpretative rules or procedural rules and do not qualify for the good cause exception).

16 Treasury explicitly claimed that APA notice-and-comment rulemaking requirements did not apply in 213, or 91.8%, of the 232 regulatory projects studied, but asserted the interpretative rule, procedural rule, or good cause exceptions by name roughly 10% of the time, i.e., only 23 times in 232 projects. *See* Hickman, *supra* note 4, at 1749–51. Treasury usually offers only a brief, conclusory statement in support of such claims, e.g., "[i]t has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation," or something to that effect. *See* Internal Revenue Manual § 32.1.5.4.7.5.4.3 (2004) (telling drafters of regulations deemed interpretative to include the quoted language in the Special Analysis section of the preamble); *see also, e.g.*, Corporate Reorganizations; Guidance on the Measurement of Continuity of Interest, T.D. 9225, 70 Fed. Reg. 54,631, 54,634 (Sept. 16, 2005) (using virtually identical language); Guidance Regarding the Simplified Service Cost Method and the Simplified Production Method, T.D. 9217, 70 Fed. Reg. 44,467, 44,468 (Aug. 3, 2005) (same); Section 179 Elections, T.D. 9209, 70 Fed. Reg. 40,189, 40,190 (July 13, 2005) (same). Even Treasury's more extensive explanations in asserting the good cause exception usually consist of only two or three generic sentences about the need for immediate guidance. *See* Hickman, *supra* note 4, at 1781 & n.247 (offering examples); *see also* Internal Revenue Manual § 32.1.5.4.7.5.1(4) (2004) (providing boilerplate language for good cause claims).

17 *See supra* note 11.

18 *See* Hickman, *supra* note 4, at 1760–73 (criticizing application of interpretative rule exception to Treasury regulations).

19 *See* I.R.C. § 6662 (2000).

Treasury, and taxpayers all operate with the understanding that Treasury regulations, whether temporary or final, are legally binding on both taxpayers and the government.[20] At a minimum, the tax community has always understood that Treasury regulations promulgated pursuant to specific grants of authority in substantive I.R.C. provisions are legislative in character.[21] Yet, Treasury often fails to follow APA rulemaking requirements even when it issues regulations pursuant to such authority.[22] On those infrequent occasions when Treasury makes an explicit claim to the good cause exception, Treasury rarely offers the sort of particularized explanation often demanded by the courts.[23]

Moreover, Treasury's actual practice is inconsistent with its claim that it complies with APA notice-and-comment requirements even when those requirements do not apply. Occasionally Treasury ignores notice-and-comment rulemaking altogether and typically either fails to claim good cause or does so with only a few sentences of nonspecific boilerplate unlikely to pass muster with a reviewing court.[24] The

20 *See, e.g.*, Swallows Holding, Ltd. v. Comm'r, 515 F.3d 162, 168–69 (3d Cir. 2008) (holding that reasonable final Treasury regulations promulgated under I.R.C. § 7805 carry the force of law); Estate of Gerson v. Comm'r, 507 F.3d 435, 438 (6th Cir. 2007) (noting that both temporary and final general authority Treasury regulations are legally binding); Bankers Life & Cas. Co. v. United States, 142 F.3d 973, 979 (7th Cir. 1998) (recognizing that all Treasury regulations have the force of law); E. Norman Peterson Marital Trust v. Comm'r, 78 F.3d 795, 798 (2d Cir. 1996) ("[T]emporary regulations are entitled to the same weight we accord to final regulations."); Sheldon I. Banoff, *Dealing with the "Authorities": Determining Valid Legal Authority in Advising Clients, Rendering Opinions, Preparing Tax Returns and Avoiding Penalties*, 66 Tax Notes 1072, 1086, 1092 (1988) (noting legal effect of final and temporary Treasury regulations). *But see* Estate of Gerson v. Comm'r, 127 T.C. 139, 176 (2006) (Vasquez, J., dissenting) (opining that Treasury regulations issued under I.R.C. § 7805 do not carry the force of law).

21 *See, e.g.*, Ellen P. Aprill, *The Interpretive Voice*, 38 Loy. L.A. L. Rev. 2081, 2097 (2005) (recognizing specific authority Treasury regulations as legislative in character); Irving Salem et al., *ABA Section of Taxation Report of the Task Force on Judicial Deference*, 57 Tax Law. 717, 728 (2004) (same); Juan F. Vasquez, Jr. & Peter A. Lowy, *Challenging Temporary Treasury Regulations: An Analysis of the Administrative Procedure Act, Legislative Reenactment Doctrine, Deference, and Invalidity*, 3 Hous. Bus. & Tax L.J. 248, 250 (2003) (same).

22 According to my study of 232 projects, Treasury claimed that APA § 553 notice-and-comment rulemaking requirements did not apply and provided no basis for its claim in 190 projects overall; of those 190 projects, 74 cited a specific grant as authority for the regulations promulgated. *See* Hickman, *supra* note 4, at 1749–57 (providing further detail regarding study results).

23 *See id.* at 1778–91 (criticizing Treasury's utilization of the good cause exception).

24 Treasury issued final regulations without notice and comment in 11, or 4.7%, of the 232 regulatory projects studied. *See id.* at 1749. While many such regulations reflect minor housekeeping efforts, Treasury occasionally skips notice and comment entirely in making arguably more significant changes. *See id.* at 1787–89 (noting how, where Treasury skipped notice and comment in promulgating final regulations, Treasury's reliance on exceptions was generally misplaced and inappropriate).

primary area of noncompliance that I identified, however, stems from Treasury's frequent issuance of binding, temporary regulations with only postpromulgation notice and comment.[25]

With the usual APA notice-and-comment process, the agency issues a notice of proposed rulemaking with nonbinding proposed regulations, considers public comments received in response, and only then promulgates final, legally binding regulations.[26] In other words, regulated parties are only bound by regulations on which they have previously had an opportunity to comment. When Treasury issues temporary regulations, by contrast, it typically follows a pattern of issuing a notice of proposed rulemaking simultaneously with temporary regulations, reviewing the resulting postpromulgation comments, and then finalizing the regulations with or without changes.[27] In other words, Treasury routinely imposes a legal burden upon taxpayers to conform to regulations before submitting those regulations for public comment. Though the APA provides exceptions from its public notice-and-comment requirements, I have argued elsewhere that Treasury regulations rarely, if ever, fall within the scope of those exceptions.[28]

For most of these temporary regulations, the finalization process is a smooth one: Treasury publishes an NPRM in conjunction with the temporary regulations, receives few or no comments responding to the notice, and then issues the final regulations with or without changes some months later.[29] It is not unusual, however, for Treasury

---

25 Of the 232 Treasury regulation projects studied, 95, or 40.9%, did not follow the traditional APA notice-and-comment process. *See id.* at 1748. Of those 95 projects, 84, or 36.2%, involved legally binding temporary regulations. *See id.*

26 *See* 5 U.S.C. § 553(b)–(c) (2000).

27 *See, e.g.*, Guidance Under Section 1502; Application of Section 108 to Members of a Consolidated Group, T.D. 9192, 70 Fed. Reg. 14,395, 14,395–96 (Mar. 22, 2005) (finalizing regulations and removing temporary regulations issued in T.D. 9089, T.D. 9098, and T.D. 9117); Information Reporting and Backup Withholding for Payment Card Transactions, T.D. 9136, 69 Fed. Reg. 41,938 (Jul. 13, 2004) (finalizing and removing temporary regulations issued in T.D. 9041); Excise Tax Relating to Structured Settlement Factoring Transactions, T.D. 9134, 69 Fed. Reg. 41,192 (Jul. 8, 2004) (finalizing and removing temporary regulations issued in T.D. 9042).

28 *See* Hickman, *supra* note 4, at 1759–86.

29 *See, e.g.*, Allocation and Apportionment of Deductions for Charitable Contributions, T.D. 9211, 70 Fed. Reg. 40,661, 40,662 (July 14, 2005) (finalizing temporary regulations without change after rejecting sole comment as "not appropriate"); Transfers of Compensatory Options, T.D. 9148, 69 Fed. Reg. 48,392, 48,392 (Aug. 10, 2004) (finalizing temporary regulations without change after no comments to temporary and proposed regulations were received). In the late 1980s, Congress noted Treasury's habit of issuing but not finalizing temporary regulations and adopted I.R.C. § 7805(e) invalidating temporary Treasury regulations that are not finalized within three years. *See* I.R.C. § 7805(e) (2000); Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX LAW. 343, 363–64 (1991) (discussing history of

to receive significant or extensive comments regarding a temporary regulation and related NPRM and then to make numerous adjustments to the final regulations in response thereto.[30] For some particularly complex matters, Treasury may even issue multiple successive revisions to the temporary regulations, each along with a new NPRM, as it receives and considers comments piecemeal.[31]

Treasury has denied in the press that it has an APA compliance problem, though without specifically addressing any of my findings.[32] But, while my study was the first effort to quantify the actual extent of Treasury's noncompliance with the APA, complaints of Treasury's rulemaking practices are not new. In 1991, Michael Asimow recognized that Treasury's practices "leave[ ] in doubt the validity of numerous temporary and final regulations."[33] More recently, Juan Vasquez and Peter Lowy described Treasury's habits as "obliterat[ing] the APA's notice-and-comment procedures" and "an abuse of the process as well as an abuse of discretion."[34] John Coverdale has questioned Treasury's regular use of temporary regulations without notice

I.R.C. § 7805(e)); Vasquez & Lowy, *supra* note 21, at 249–54 (explaining I.R.C. § 7805(e) background); *see also* Hickman, *supra* note 4, at 1738–40 (discussing relationship between I.R.C. § 7805(e) and the APA). Congress left in place then-existing temporary regulations, some of which still remain in the Code of Federal Regulations in temporary form. *See, e.g.*, Treas. Reg. §§ 1.103(n)-1T, 1.103(n)-2T, 1.103(n)-3T, 1.103(n)-4T, 1.103(n)-5T, 1.103(n)-6T, 1.103(n)-7T (limiting ability of taxpayers to exclude certain state and local bond interest from taxable income since 1984); Treas. Reg. §§ 1.892-1T, 1.892-2T, 1.892-3T, 1.892-4T, 1.892-5T, 1.892-6T, 1.892-7T (elaborating I.R.C. provision exempting certain foreign government and international organization income from U.S. taxation since 1988); *see also* Vasquez & Lowy, *supra* note 21, at 254 ("[T]his 3-year expiration date applies only to temporary regulations issued after November 20, 1988.").

30 *See, e.g.*, Guidance Under Section 355(e); Recognition of Gain on Certain Distributions of Stock or Securities in Connection with an Acquisition, T.D. 9198, 70 Fed. Reg. 20,279, 20,279 (Apr. 19, 2005) (finalizing temporary regulations with modifications in response to comments received); Certain Transfers of Property to Regulated Investment Companies [RICs] and Real Estate Investment Trusts [REITs], T.D. 9047, 68 Fed. Reg. 12,817, 12,817 (Mar. 18, 2003) (same).

31 *See, e.g.*, Guidance Under Section 1502; Application of Section 108 to Members of a Consolidated Group, T.D. 9192, 70 Fed. Reg. 14,395, 14,395–96 (Mar. 22, 2005) (finalizing and summarizing history of first, second, and third temporary regulations issued in response to comments); *see also* Hickman, *supra* note 4, at 1801–02 (summarizing history of T.D. 9192 and related temporary regulations as response to *United Dominion Indus., Inc. v. United States*, 532 U.S. 822 (2001)).

32 *See* Jeremiah Coder, *Study Finds Treasury Isn't Complying with Procedure Act*, 116 TAX NOTES 636, 637 (Aug. 20, 2007) (quoting a Treasury spokesman stating, "We disagree with Ms. Hichman's [sic] assessment that we are not following APA guidelines."). For further discussion of my methodology and findings, see Hickman, *supra* note 4, at 1740–59.

33 Asimow, *supra* note 29, at 369–70.

34 *See* Vasquez & Lowy, *supra* note 21, at 253–54.

and comment.[35] Juan Lavilla has identified Treasury's misuse of the good cause exception from notice-and-comment rulemaking as "particularly remarkable" when compared with other agencies.[36]

Moreover, these observations do not necessarily represent the sum of Treasury's noncompliance with the APA. For reasons of manageability, I limited my own study to a handful of easily observable violations and left for another day more subjective issues such as the substantive adequacy of Treasury's NPRMs for notifying the public of Treasury's intentions and of Treasury's responses to significant comments received in promulgating final regulations.[37] In any given rulemaking effort, Treasury may be susceptible to further procedural challenges on such grounds as well.

II. Limitations on Pre-enforcement Judicial Review

In many if not most areas of administrative law, a track record such as Treasury's would be an open invitation for legal challenges by disgruntled regulated parties. Regulated parties in many areas of administrative law have the option of challenging final regulations either immediately upon promulgation through pre-enforcement review or after the promulgating agency has undertaken an enforcement action.[38] APA § 704 provides a cause of action to challenge "final agency action," which includes issuing temporary as well as final regulations.[39] APA § 702 waives sovereign immunity for actions seeking

---

35 *See* John F. Coverdale, Chevron*'s Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After* Mead, 55 ADMIN. L. REV. 39, 69–70 (2003) ("It is not entirely clear, however, what justification the Treasury believes it has for not using notice and comment for temporary regulations that are legislative in the APA sense.").

36 *See* Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 341 (1989).

37 *See* Hickman, *supra* note 4, at 1747–48 (discussing limitations of empirical study); *see also, e.g.*, 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §§ 7.3–7.4 (4th ed. 2002) (elaborating jurisprudence addressing APA notice-and-comment requirements and range of related challenges).

38 JAMES T. O'REILLY, ADMINISTRATIVE RULEMAKING § 13:1 (2d ed. 2007) ("Pre-enforcement injunction actions sometimes are begun the very day that an agency rule is promulgated, with a request that the implementation of the rule be enjoined and that the court stay the effective date of the rule pending outcome of the litigation."); RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS § 5.7.4. (4th ed. 2004) ("In many circumstances, however, a party displeased with a regulation would prefer to wait and to challenge all aspects of that regulation in a proceeding in which that regulation is applied.").

39 5 U.S.C. § 704 (2000). The Supreme Court has articulated a two-part test for finality that emphasizes the definitiveness and legal force of the ruling in question. *See* Bennett v. Spear, 520 U.S. 154, 177–78 (1997) (describing an agency action as final if it "mark[s] the 'consummation' of the agency's decisionmaking process" and is an action from which "legal consequences will flow"); *see also, e.g.*, Ctr. for Native Ecosystems v. Cables, 509 F.3d 1310, 1328–31 (10th Cir.

relief "other than money damages" for any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."[40] The Supreme Court has interpreted both APA and constitutional standing requirements to allow pre-enforcement judicial review of many agency actions.[41] Finally, since the Court decided *Abbott Laboratories v. Gardner*,[42] the courts generally have construed ripeness doctrine to permit pre-enforcement judicial review of agency regulations interpreting a variety of regulatory statutes.[43]

These APA provisions and judicial interpretations thereof work together such that a variety of regulated and interested parties can and do challenge agency regulations—both temporary and final—as soon as the agency issues them. As a result, pre-enforcement challenges to final agency regulations have become common, if not the norm, in many administrative law contexts.[44] A court that finds a regulation to be invalid pursuant to such a challenge can declare the reg-

---

2007) (applying *Bennett* test to evaluate finality under APA § 704); Rattlesnake Coal. v. EPA, 509 F.3d 1095, 1103–04 (9th Cir. 2007) (same). Final Treasury regulations obviously satisfy these requirements. Whether temporary Treasury regulations satisfy the Court's finality standard is a closer call, as Treasury's general habit of simultaneously issuing an NPRM requesting post-promulgation comments signals its intent for further consideration of the regulation's provisions. Nevertheless, whether or not they explicitly applied the test articulated in *Bennett*, courts have repeatedly considered "interim final" regulations carrying legally binding force to be final agency action for judicial review purposes. *See, e.g.*, Pub. Citizen v. Dep't of Transp., 316 F.3d 1002, 1019 (9th Cir. 2003) (recognizing "interim final" regulation as sufficiently final to support judicial review), *rev'd on other grounds*, 541 U.S. 752 (2004); Career Coll. Ass'n v. Riley, 74 F.3d 1265, 1268 (D.C. Cir. 1996) ("'Interim' refers only to the Rule's intended duration—not its tentative nature."); Thrift Depositors of Am., Inc. v. Office of Thrift Supervision, 862 F. Supp. 586, 590 (D.D.C. 1994) (finding procedural challenge to interim final rule adopted without notice and comment to be justiciable) (citing Tenn. Gas Pipeline Co. v. FERC, 969 F.2d 1141 (D.C. Cir. 1992)).

40 5 U.S.C. § 702 (2000); *see also, e.g.*, Trudeau v. FTC, 456 F.3d 178, 185–87 (D.C. Cir. 2006) (discussing scope of APA § 702 sovereign immunity waiver); High Country Citizens Alliance v. Clarke, 454 F.3d 1177, 1181 (10th Cir. 2006) (limiting scope of waiver where another statute "precludes judicial review").

41 *See, e.g.*, Abbott Labs. v. Gardner, 387 U.S. 136, 154 (1967) (observing that plaintiffs have standing prior to enforcement where they are the subject of regulation and risk penalties if they fail to comply); Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 417–19 (1942) (recognizing pre-enforcement standing of plaintiffs whose contractual rights and business relations were adversely impacted by regulations).

42 Abbot Labs. v. Gardner, 387 U.S. 136 (1967).

43 *See id.* at 153; *see also* PIERCE ET AL., *supra* note 38 § 5.7.3, at 203 (describing pre-enforcement judicial review of agency regulations as routine). *But see* A. Raymond Randolph, *Administrative Law and the Legacy of Henry J. Friendly*, 74 N.Y.U. L. REV. 1, 10–11 (1999) (suggesting that the D.C. Circuit may be narrowing its approach toward pre-enforcement review of agency regulations).

44 *See Abbott Labs.*, 387 U.S. at 140.

ulation invalid, perhaps enjoin enforcement, and tell the agency to start over.[45]

Judicial review in tax cases follows a different norm from that in other areas of administrative law. Taxpayer-initiated tax litigation generally falls into one of two categories which, for purposes of this Article, I will term "enforcement-based": refund litigation, where the taxpayer has paid taxes or penalties allegedly owed and seeks to recover those funds; and deficiency litigation, where the IRS has examined the taxpayer's tax filings and concluded that taxes or penalties are due.[46] There are several reasons for this phenomenon. The APA is a general statute. Consequently, its provisions do not trump more specific provisions regarding judicial review contained in more context-specific statutes.[47] Specifically, I.R.C. § 7421,[48] often labeled the Anti-Injunction Act,[49] and corresponding language in the Declaratory

45 *See, e.g.*, O'Reilly, *supra* note 38, § 13:2 ("The typical remedial action is revision of the rule on remand. When a declaratory judgment invalidating a rule is issued, the matter is sent back to the agency for reconsideration, often with instructions for specific activity or a schedule for compliance."). Courts sometimes employ the lesser remedy of remanding a flawed regulation to the agency without vacating it. *See, e.g.*, Checkosky v. SEC, 23 F.3d 452, 466 (D.C. Cir. 1994) (listing D.C. Circuit cases remanding without vacating agency actions); *see generally* Ronald M. Levin, *"Vacation" at Sea: Judicial Remands and the APA*, 21 Admin. & Reg. L. News 4 (1996) (summarizing issues surrounding the practice of remanding without vacating); Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 Ariz. St. L.J. 599, 624–35 (2004) (criticizing the practice).

46 *See* Gerald A. Kafka & Rita A. Cavanagh, Litigation of Federal Civil Tax Controversies § 1.01 (2d ed. 1995) (dividing tax litigation generally into the refund and deficiency categories). In using the term "enforcement-based" here, my principal intention is to distinguish refund or deficiency actions stemming from a dispute over the liability of a single taxpayer from "pre-enforcement" actions that would challenge Treasury regulations immediately postpromulgation. Of course, refund actions do not precisely entail IRS "enforcement" in the same way that deficiency actions do. Yet both refund actions and deficiency actions typically revolve around the IRS conclusions about the application of the laws to the circumstances of a particular taxpayer, rather than merely disputing more generally the substantive or procedural validity of a regulation. *See generally* Pierce et al., *supra* note 38, § 5.7.4 (discussing tactical considerations in pursuing pre-enforcement and enforcement-based judicial review).

47 *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 550–51 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").

48 I.R.C. § 7421 (2000).

49 *See, e.g.*, Comm'r v. Shapiro, 424 U.S. 614, 616 (1976) (using Anti-Injunction Act label); Laing v. United States, 423 U.S. 161, 166 (1976) (same); We the People Found., Inc. v. United States, 485 F.3d 140, 142 (D.C. Cir. 2007) (same). Courts also occasionally refer to I.R.C. § 7421 as the Tax Anti-Injunction Act. *See, e.g.*, South Carolina v. Regan, 465 U.S. 367, 385 (1984) (O'Connor, J., concurring); Nat'l Trust for Historic Pres. v. FDIC, 21 F.3d 469, 472 (D.C. Cir. 1994) (per curiam); Estate of Johnson v. United States, 836 F.2d 940, 948 (5th Cir. 1988). I.R.C. § 7421 is not the only statute commonly bearing the Anti-Injunction Act label. *See, e.g.*, Hibbs v. Winn, 542 U.S. 88, 102 (2004) (using the Anti-Injunction Act term for 28 U.S.C. § 1341); Raygor

Judgment Act ("DJA")[50] limit the timing of challenges to the tax laws. The courts have responded to these provisions by taking a restrictive approach to other justiciability questions in tax cases.

A. I.R.C. § 7421 and the Declaratory Judgment Act

I.R.C. § 7421 and the DJA offer the first and most significant obstacle to pre-enforcement review of Treasury regulations. I.R.C. § 7421(a) provides generally that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."[51] The same provision contains several narrow exceptions limited to their particular circumstances, most procedural[52] but a few substantive in nature.[53]

Correspondingly, the DJA contains a tax exception that prevents courts from providing declaratory relief for controversies "with respect to Federal taxes."[54] Again, the statute provides a few narrow

---

v. Regents of the Univ. of Minn., 534 U.S. 533, 549 n.1 (2002) (applying the Anti-Injunction Act label to 28 U.S.C. § 2283). To avoid confusion in this Article, therefore, I will simply refer to this provision as I.R.C. § 7421 except when directly quoting another source.

50 28 U.S.C. § 2201 (2000).

51 I.R.C. § 7421(a).

52 For example, I.R.C. § 7421(a) allows judicial review if the IRS tries to collect taxes claimed without first mailing a notice of deficiency to the taxpayer. *See id.* (establishing I.R.C. § 6212(a) as exception); *id.* § 6212(a) (authorizing notices of deficiency by certified or registered mail); *id.* § 6213(a) (precluding assessment without notice of deficiency); Martinez v. IRS, 78 A.F.T.R.2d (RIA) ¶ 96-6129, 96-6130 (E.D. La. 1996) (enjoining IRS from levying wages or assessing taxes where notices of deficiency were not sent).

53 For example, I.R.C. § 7421(a) allows taxpayers to seek Tax Court review of IRS determinations of whether or not a person is an employee for employment tax purposes. *See* I.R.C. § 7421(a) (creating exception for circumstances falling within the scope of I.R.C. § 7436); *id.* § 7436 (governing proceedings for employment status determinations). Still other provisions offer additional exceptions, such as for determinations regarding the qualification of retirement plans for specified tax treatment, *see id.* § 7476(a) (permitting Tax Court review of IRS determinations regarding qualification of retirement plans under subchapter D of I.R.C. chapter 1); *id.* §§ 401–36 (subchapter D of I.R.C. chapter 1, governing deferred compensation arrangements including retirement plans), or whether interest on municipal bonds will be tax-exempt, *see id.* § 7478(a) (permitting Tax Court review of IRS declarations regarding applicability of I.R.C. § 103 to certain State and local government obligations); *id.* § 103(a) (excluding State and local bond interest from gross income generally).

54 28 U.S.C. § 2201(a) (2000). The DJA stands in contrast to 28 U.S.C. § 1346, which gives both federal district courts and the United States Court of Federal Claims jurisdiction over:

> Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

Id. § 1346(a)(1).

exceptions, for certain tax matters in bankruptcy cases[55] or regarding certain entities' qualification for tax-exempt status.[56] The courts have generally interpreted I.R.C. § 7421 and the DJA as coextensive.[57]

The legislative history of I.R.C. § 7421 does little to elucidate the congressional intent behind its enactment.[58] Nevertheless, the Supreme Court has identified the purpose of I.R.C. § 7421 and the DJA as "to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund," assuring the United States the "prompt collection of its lawful revenue."[59] Consistent with these recognized purposes, the courts have interpreted I.R.C. § 7421 and the DJA as imposing a general rule of "pay first, litigate later."[60] Correspondingly, most cases barred by I.R.C. § 7421

---

55 *See id.* § 2201(a) (allowing declaratory judgments regarding certain tax liabilities in bankruptcy cases under 11 U.S.C. §§ 505 and 1146); 11 U.S.C. §§ 505, 1146 (2000).

56 *See* 28 U.S.C. § 2201(a) (permitting declaratory judgments in cases concerning determinations under I.R.C. § 7428(a)); I.R.C. § 7428(a). Congress adopted both I.R.C. § 7428 and the corresponding language in the DJA subsequent to the Supreme Court's decisions in *Bob Jones University v. Simon*, 416 U.S. 725 (1974), and *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974). *See infra* note 69 and accompanying text; Pub. L. No. 94-455, § 1306(a), (b)(8), 90 Stat. 1520 (1976).

57 *See, e.g.*, Ambort v. United States, 392 F.3d 1138, 1140 (10th Cir. 2004) ("In practical effect, these two statutes are coextensive . . . ."); Sigmon Coal Co. v. Apfel, 226 F.3d 291, 300–01 (4th Cir. 2000) ("[T]he two statutory texts are, in underlying intent and practical effect, coextensive." (quoting *In re* Leckie Smokeless Coal Co., 99 F.3d 573, 583 (4th Cir. 1996))); Nat'l Taxpayers Union v. United States, 68 F.3d 1428, 1435 (D.C. Cir. 1995) ("Because the AIA and DJA operate coterminously, the following analysis of the impact of the AIA upon NTU's complaint also determines the effect of the DJA."); *see also* 1 LAURENCE F. CASEY, FEDERAL TAX PRACTICE § 2:47 (2d ed. Supp. 2007) (observing that the language of the DJA seems "more comprehensive" than I.R.C. § 7421, but that "[t]here is considerable authority . . . that the two statutes are 'coterminous' or in pari materia"). The Supreme Court thus far has declined to equate I.R.C. § 7421 and the DJA but has recognized the lower courts' treatment and opined that "the federal tax exception to the Declaratory Judgment Act is at least as broad as the prohibition of the [Tax] Anti-Injunction Act." *"Americans United" Inc.*, 416 U.S. at 759 n.10; *see also Bob Jones Univ.*, 416 U.S. at 732 n.7 (1974) (same). The IRS meanwhile takes the position that the DJA is broader than I.R.C. § 7421. *See* IRS, Litigation Guideline Memorandum GL-52, 1991 WL 1167968, at *4 (June 28, 1991).

58 *See* Note, *Enjoining the Assessment and Collection of Federal Taxes Despite Statutory Prohibition*, 49 HARV. L. REV. 109, 109 & n.9 (1935) (documenting limits of I.R.C. § 7421's history); *Bob Jones Univ.*, 416 U.S. at 736 (same). *But see* ROGER FOSTER & EVERETT V. ABBOT, A TREATISE ON THE FEDERAL INCOME TAX UNDER THE ACT OF 1894 § 72 (1895) (suggesting that Congress adopted similar language in 1867 after several taxpayers requested injunctions against the assessment or collection of the Civil War income tax).

59 Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962); *see also* Hibbs v. Winn, 542 U.S. 88, 103 (2004) (summarizing judicial acceptance of same purposes); South Carolina v. Regan, 465 U.S. 367, 386 (1984) (O'Connor, J., concurring) (acknowledging and elaborating same purposes); *"Americans United" Inc.*, 416 U.S. at 769 (Blackmun, J., dissenting) (same).

60 *See* Bryan T. Camp, *The Equal Protection Problem in Innocent Spouse Procedures*, 112

and the DJA reflect unsurprising applications of these statutory limitations against, for example, tax protesters raising frivolous legal arguments already rejected by the courts[61] or taxpayers asserting technicalities to avoid levies or property seizures for taxes clearly owed.[62] Even where the taxpayer frames its argument as a constitutional challenge rather than a tax claim, the courts have declined to adopt a general exception from I.R.C. § 7421 and the DJA, concluding (probably rightly) that such an exception would quickly swallow the rule.[63]

Yet, the Court also currently interprets I.R.C. § 7421 and DJA limitations broadly to preclude pre-enforcement review of tax cases raising questions far beyond the individual liabilities of taxpayer plaintiffs or related efforts by the IRS to collect particular assessments.[64] In particular, the Supreme Court has recognized the words "for the purpose of" in I.R.C. § 7421[65] and "with respect to" in the DJA[66] as extending to claims with only indirect bearing upon the flow of tax revenues to the government, regardless of the merits of the issues

---

TAX NOTES 281, n.7 (July 17, 2006) (reviewing history of I.R.C. § 7421 and characterizing that provision and the Supreme Court's interpretation thereof as adopting a "pay-first, litigate-later structure").

61 *See, e.g.*, Shrock v. United States, 92 F.3d 1187, 1996 WL 414177, at *1 (7th Cir. 1996) (unpublished table decision) (calling tax protestor's claims "frivolous" and "repeatedly rejected"); Gassei v. DOJ, 968 F.2d 19, 1992 WL 149981, at *2 (10th Cir. 1992) (unpublished table decision) (rejecting taxpayer's argument as clearly contrary to controlling circuit precedent); Purk v. United States, 895 F.2d 1414, 1990 WL 12188, at *1 (6th Cir. 1990) (unpublished table decision) (observing that "other courts have rejected similar claims" to that raised by taxpayer).

62 *See, e.g.*, Weiler v. United States, 82 F.3d 424, 1996 WL 169254, at *4 (9th Cir. 1996) (unpublished table decision) (finding record "replete with evidence" that the Government's assessments were valid, and that taxpayers demonstrated no particularized hardship); Nuttle v. IRS, 69 F.3d 548, 1995 WL 643106, at *2 (10th Cir. 1995) (unpublished table decision) (declining to enjoin collection of taxes recognized as due by the Tax Court so that taxpayer could avoid posting an appeal bond); Knight v. United States, 992 F.2d 1219, 1993 WL 140589, at *2 (9th Cir. 1993) (unpublished table decision) (refusing to find irreparable harm and enjoin collection for lack of deficiency notice where I.R.C. did not require notice).

63 *See, e.g.*, *"Americans United" Inc.*, 416 U.S. at 759 ("[D]ecisions of this Court make it unmistakably clear that the constitutional nature of a taxpayer's claim . . . is of no consequence under the Anti-Injunction Act."); Church of Scientology of Cal. v. United States, 920 F.2d 1481, 1488–89 (9th Cir. 1990) ("No special consideration is granted to injunctions against tax collection sought on constitutional grounds."); Lowrie v. United States, 824 F.2d 827, 830 (10th Cir. 1987) ("Nor can one avoid [I.R.C. § 7421] by raising constitutional claims."). *Cf.* United States v. Clintwood Elkhorn Mining Co., 128 S. Ct. 1511, 1520 (2008) (reiterating lack of constitutional exception to I.R.C. § 7421 in declining to recognize such exception from administrative exhaustion requirement of I.R.C. § 7422).

64 *See* 1 CASEY, *supra* note 57, § 2:36 (observing that I.R.C. § 7421 limits judicial review in virtually all cases regarding a taxpayer's own tax liability).

65 I.R.C. § 7421(a) (2000).

66 28 U.S.C. § 2201(a) (2000).

raised. For example, in *Bob Jones University v. Simon*, a private university sought injunctive and declaratory relief from an IRS threat to withdraw its tax-exempt status due to its race-based admission policies.[67] The Supreme Court noted that the University's petition would have the effect of "restrain[ing] the collection of taxes" not from the University itself but rather "from its donors" by "forc[ing] the [IRS] to continue to provide advance assurance to those donors that contributions to [the University] will be recognized as tax deductible, thereby reducing their tax liability."[68] In other words, because the University's request, if granted, would have the effect of reducing the taxes of its contributors, I.R.C. § 7421 applied.[69]

The lower courts have followed the Supreme Court's lead, rejecting pre-enforcement judicial review of Treasury regulations whether or not they directly related to the individual liabilities of the taxpayers bringing suit. In *Foodservice and Lodging Institute v. Regan*, the court concluded that regulations governing how restaurant employers allocate and report tip income among employees "plainly *concern[ed]* the assessment or collection of federal taxes" of the employees, and thus that I.R.C. § 7421 and the DJA precluded pre-enforcement judicial review.[70] In *Debt Buyers' Ass'n v. Snow*,[71] the court decided that regulations requiring information reporting by the purchasers of delinquent consumer loans could not be reviewed because the regulations would help the IRS determine whether other taxpayers should recognize gross income from discharged debt: "any action that hinders the IRS in determining the accuracy of [gross reported]

67 Bob Jones Univ. v. Simon, 416 U.S. 725, 725 (1974).

68 *Id.* at 739.

69 *Id.* at 739 & n.10, 749–50; *see also* Alexander v. "Americans United" Inc., 416 U.S. 752, 760–61 (1974) (employing similar reasoning to reach comparable conclusion regarding organization's exempt status: "Under any reasonable construction of the statutory term 'purpose,' the objective of this suit was to restrain the assessment and collection of taxes from respondent's contributors."). Congress has since amended the I.R.C. and the DJA to permit declaratory relief with respect to the exempt status of taxpayers such as Bob Jones University and "Americans United" Inc. *See* I.R.C. § 7428(a); 28 U.S.C. § 2201(a); *see also supra* note 56 (discussing enactment of these provisions). This statutory relief is limited to exempt status determinations, however, and does not otherwise alter the breadth of the Court's interpretation of I.R.C. § 7421. *See* I.R.C. § 7428(a).

70 Foodservice & Lodging Inst. v. Regan, 809 F.2d 842, 844 (D.C. Cir. 1987) (emphasis added). The Ninth Circuit reached the same conclusion regarding a similar challenge involving information returns allegedly required under ERISA. *See* California v. Regan, 641 F.2d 721, 722 (9th Cir. 1981).

71 Debt Buyers' Ass'n v. Snow, 481 F. Supp. 2d 1 (D.D.C. 2006).

income will in fact hinder the assessment and collection of taxes . . . ."[72]

Nevertheless, in addition to the statutory exceptions from I.R.C. § 7421 and the DJA that Congress has explicitly adopted, the courts have recognized one class of cases as outside the textual scope of I.R.C. § 7421 as well as the DJA and thus not subject to the limitations of those provisions. In the 1970s and early 1980s, courts concluded that these provisions did not apply in several cases in which plaintiffs challenged tax benefits extended to other taxpayers, on the ground that the suits, if successful, would allow the IRS to increase tax revenues, as opposed to restraining assessments and collections.[73] More recently, in *Hibbs v. Winn*, a case concerning the interpretation of 28 U.S.C. § 1341 with respect to federal court consideration of state tax litigation, the Supreme Court acknowledged these cases favorably in dicta, analogizing the statute under consideration with I.R.C. § 7421.[74] Yet, as is discussed further below, courts in several cases have gone on to reject many such challenges on more general justiciability grounds.[75]

The courts have also recognized two common law exceptions to I.R.C. § 7421. Just as the courts read I.R.C. § 7421 broadly, however, they construe both of these judicially developed exceptions very narrowly. In *Enochs v. Williams Packing & Navigation Co.*, the Supreme Court held that a taxpayer may only avoid these statutory limitations

---

72 *Id.* at 9.

73 Most of these cases address third-party challenges to IRS determinations that various not-for-profit entities were entitled to tax-exempt status. *See, e.g.*, E. Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278, 1284–85 (D.C. Cir. 1974), *rev'd on other grounds*, 426 U.S. 26 (1976); Abortion Rights Mobilization, Inc. v. Regan, 544 F. Supp. 471, 489–90 (S.D.N.Y. 1982), *rev'd on other grounds sub nom.* U.S. Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988); Lugo v. Simon, 453 F. Supp. 677, 690 (N.D. Ohio 1978), *rev'd in part on other grounds sub nom.* Lugo v. Miller, 640 F.2d 823 (6th Cir. 1981); McGlotten v. Connally, 338 F. Supp. 448, 453–54 (D.D.C. 1972). Some such cases, however, involve other tax benefits. *See, e.g.*, Tax Analysts & Advocates v. Shultz, 376 F. Supp. 889, 891–94 (D.D.C. 1974) (challenging IRS application of I.R.C. § 2503(b) gift tax exclusion to congressional campaign contributions in Rev. Rul. 72-355).

74 Hibbs v. Winn, 542 U.S. 88, 103–04 (2003). The dissenters in *Hibbs* questioned the Court's interpretation of both I.R.C. § 7421's text and those earlier cases, noting that the language and holdings in those cases were consistent with the separate exception from I.R.C. § 7421 that the Court subsequently adopted in *South Carolina v. Regan*. *See id.* at 119–21 (Kennedy, J., dissenting); South Carolina v. Regan, 465 U.S. 367, 378–82 (1984); *see also infra* notes 90–94 and accompanying text.

75 *See, e.g.*, Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 44–46 (1975) (declining jurisdiction over such a challenge on standing grounds); Fulani v. Brady, 935 F.2d 1324, 1328–31 (D.C. Cir. 1991) (same); Am. Soc'y of Travel Agents, Inc. v. Blumenthal, 566 F.2d 145, 148 (D.C. Cir. 1977) (same).

and challenge a tax if: (1) "under no circumstances could the Government ultimately prevail," and (2) "the taxpayer would suffer irreparable injury if collection were effected."[76] Only taxpayers who can satisfy both of these factors may seek pre-enforcement review.[77]

A taxpayer satisfies the first of the two elements only if the "IRS flouted the express terms of the Code, or lacked any factual basis for the assessment of taxes against an individual taxpayer,"[78] or "it is . . . apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim."[79] The government must assert its claim against the taxpayer with specificity beyond the "mere good-faith allegation of an unpaid tax."[80] But, beyond that, the burden is on the taxpayer to demonstrate that there are no circumstances under which the government can win.[81] *Williams Packing* itself involved a question whether a company that furnished boats to fishing captains who then hired their own crews was in fact the employer of the fisherman and thus liable for social security and unemployment taxes.[82] The Court found jurisdiction barred, notwithstanding that a liability assessment would bankrupt the company, because the government's liability claim was not obviously meritless.[83] With little difficulty, the Court has found other, subsequent cases similarly wanting, and their claims thus barred from judicial review.[84]

76 Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962).

77 *See, e.g.*, Alexander v. "Americans United" Inc., 416 U.S. 752, 758 (1974) ("Unless both conditions are met, a suit for preventive injunctive relief must be dismissed."). Courts occasionally speak of the two prongs of the *Williams Packing* exception disjunctively as separate exceptions. *See, e.g.*, Martens v. United States, No. 05-1805, 2007 WL 2007580, at *5 (D.D.C. July 6, 2007). I have yet to locate a case that actually applied one prong without the other to find jurisdiction, suggesting that such references may in fact reflect imprecise rhetoric rather than doctrinal interpretation.

78 Inv. Annuity, Inc. v. Blumenthal, 609 F.2d 1, 5–6 (D.C. Cir. 1979) (citation omitted). *See, e.g.*, Comm'r v. Shapiro, 424 U.S. 614, 627–29, 633 (1976) (finding irreparable injury and requiring the Government on remand "to litigate the question whether its assessment has a basis in fact").

79 *Williams Packing*, 370 U.S. at 7; *see also* Bob Jones Univ. v. Simon, 416 U.S. 725, 737 (1974) (same).

80 *Shapiro*, 424 U.S. at 629.

81 *See Williams Packing*, 370 U.S. at 7–8. The Supreme Court subsequently held that the government must provide sufficient basis for its assessment to give the taxpayer the opportunity to satisfy this burden. *See Shapiro*, 424 U.S. at 627–29.

82 *See Williams Packing*, 370 U.S. at 3–4.

83 *See id.* at 6–8.

84 *See, e.g.*, United States v. Am. Friends Serv. Comm., 419 U.S. 7, 10 (1974) (per curiam) (agreeing with taxpayers' concession that government's position would likely prevail); *Bob Jones Univ.*, 416 U.S. at 748–49 (declaring merits of taxpayer's claims "sufficiently debatable").

Of course, in the vast majority of tax cases, one would expect the government's positions to be at least colorable, thus rendering the *Williams Packing* exception inapplicable based solely upon its first prong. Nevertheless, the Court has also paid significant attention to the second element of the *Williams Packing* exception, whether the taxpayer would suffer irreparable harm from being denied equitable relief. In evaluating this element, the Court has emphasized repeatedly the taxpayer's opportunity to pay taxes assessed and then sue for a refund.[85] While recognizing this option as suboptimal practically, the Court nevertheless has declined to find irreparable harm in light of that alternative path to judicial review.[86]

Given the exception's requirements and the Court's application thereof, it is perhaps unsurprising that the Court has never actually applied *Williams Packing* to find jurisdiction over a case.[87] Following the Court's lead, the lower courts typically only apply the *Williams Packing* exception to find jurisdiction in rare cases of obvious and egregious IRS error or flagrant IRS disregard of established law combined with significant financial imposition upon the taxpayer.[88] Even

---

85 *See, e.g.*, *Am. Friends Serv. Comm.*, 419 U.S. at 11; Alexander v. "Americans United" Inc., 416 U.S. 752, 762 (1974).

86 *See, e.g.*, *Am. Friends Serv. Comm.*, 419 U.S. at 11; *"Americans United" Inc.*, 416 U.S. at 762; *Bob Jones Univ.*, 416 U.S. at 747–48.

87 The closest the Court has come to employing the *Williams Packing* exception in the taxpayer's favor was in *Commissioner v. Shapiro*, 424 U.S. 614 (1976). In that case, the Court found that the IRS's retention without judicial review of funds the taxpayer otherwise needed to make bail represented an irreparable injury. *See id.* at 633. The Court was unable to reach a conclusion from the record before it regarding the Government's potential for prevailing on the merits, however, because the IRS had declined to state the basis of its assessment. *See id.* at 632. While acknowledging that subsequent developments in the case since the time of filing could render the *Williams Packing* exception inapplicable, the Court nevertheless remanded the case in effect so that the district court could assemble a record for the purpose of evaluating the applicability of I.R.C. § 7421 and the *Williams Packing* exception. *See id.* at 633–34 & n.15. Separately, in *South Carolina v. Regan*, the Court denied the applicability of the *Williams Packing* exception but found jurisdiction under a different theory. *See* South Carolina v. Regan, 465 U.S. 367, 378–80 (1984); *see also infra* notes 90–94 and accompanying text. Otherwise, the Court has merely declined to find jurisdiction under the *Williams Packing* exception. *See, e.g.*, *Am. Friends Serv. Comm.*, 419 U.S. at 10 (recognizing taxpayers' concession that the *Williams Packing* exception did not apply, but discussing its inapplicability due to availability of alternative legal remedy in any event); *"Americans United" Inc.*, 416 U.S. at 763 (holding *Williams Packing* exception inapplicable); *Bob Jones Univ.*, 416 U.S. at 749 (finding exception inapplicable).

88 My research here was not exhaustive. According to Westlaw, the Court's opinion in *Williams Packing* has been cited in more than 1,400 judicial opinions as of June 2008. A review of roughly 100 federal appellate cases decided in the past twenty years for which Westlaw assigned between two and four Keycite stars revealed only three in which the reviewing court applied the *Williams Packing* exception to *find* jurisdiction, all of which involved postenforcement claims of obvious and egregious IRS error or disregard of established law. *See* Estate of

where the regulation at issue imposes information reporting or other requirements that do not necessarily implicate the immediately affected parties' own tax liabilities, thus limiting their ability to pay a disputed tax and sue for a refund, the lower courts have drawn from the Court's irreparable harm rhetoric to conclude that such parties do not qualify for the *Williams Packing* exception because they can choose not to comply with the regulation, pay any resulting penalties, and then seek a refund of those amounts.[89]

South Carolina v. Regan provides the other judicially recognized exception from I.R.C. § 7421.[90] This case involved a suit by South Carolina over amendments to I.R.C. § 103 limiting the exemption from gross income for interest on certain state bond issuances.[91] The State requested declaratory and injunctive relief and argued both that the amendments were unconstitutional and also that complying with the amendments would adversely impact its ability to price and sell its bonds.[92] In granting the requested relief, the Court noted that, unlike the taxpayers in *Williams Packing* and its progeny, South Carolina did not have the alternative of complying and suing for a refund.[93] Agreeing with the State, the Court held that I.R.C. § 7421 does not apply to preclude pre-enforcement judicial review if there is no other legal remedy available.[94]

As with the *Williams Packing* exception, however, courts applying the *South Carolina v. Regan* exception have done so very sparingly. Courts generally accept the argument that taxpayers who wish to challenge Treasury regulations have the option of paying the tax and suing for a refund.[95] In cases involving information filings requirements

---

Michael v. Lullo, 173 F.3d 503, 505, 512–13 (4th Cir. 1999) (granting *Williams Packing* exception where IRS illegally denied credit to compensate for its own calculation error discovered after the limitations period for adjusting the assessment had expired); Lampert v. United States, 884 F.2d 1395, 1989 WL 104459, at *1–3 (9th Cir. 1989) (unpublished table decision) (applying *Williams Packing* exception where assessed penalty was both very large and obviously miscalculated); Ponchik v. Comm'r, 854 F.2d 1127, 1130–32 (8th Cir. 1988) (extending *Williams Packing* exception where IRS audit file clearly showed IRS error in case of federal prisoner trying to support minor child).

89 *See, e.g.*, California v. Regan, 641 F.2d 721, 723 (9th Cir. 1981) (denying applicability of *Williams Packing* exception on such grounds).

90 South Carolina v. Regan, 465 U.S. 367, 367 (1984).

91 *See id.* at 370–71.

92 *See id.* at 370–72.

93 *See id.* at 373, 378–81 .

94 *See id.* at 378, 380–81.

95 *See* SEC v. Credit Bancorp, Ltd., 297 F.3d 127, 139 (2nd Cir. 2002) (finding *South Carolina v. Regan* exception inapplicable because "the Receiver, like any other taxpayer, has the option of paying taxes immediately and seeking a refund thereafter. The 'pay first, litigate later'

rather than taxes due, courts say that taxpayers can decline to follow the regulation and then sue for a refund of any resulting penalties.[96] Some courts recognize the potential for nonenforcement, and thus nonreviewability, particularly with respect to information filing requirements, but are untroubled by that possibility.[97] For example, in the *Debt Buyers'* case discussed above, the court suggested that, "[i]f the IRS consequently chooses not to assess penalties for such noncompliance . . . , Debt Buyers will have suffered no harm, irreparable or otherwise, and thus would have no basis for injunctive relief."[98]

Regardless, the jurisprudence on the *Williams Packing* and *South Carolina v. Regan* exceptions renders their availability for APA procedural challenges against Treasury regulations unlikely. Case law interpreting many APA rulemaking procedural requirements—the line between legislative and interpretative rules,[99] the applicability of the good cause exception,[100] or whether a NPRM provides adequate notice, to name a few examples[101]—is simply too variable to make re-

procedure is not unusual." (citing Bull v. United States, 295 U.S. 247, 260 (1935); Phillips v. Comm'r, 283 U.S. 589, 595–99 (1931))); Nat'l Taxpayers Union, Inc. v. United States, 68 F.3d 1428, 1436 (D.C. Cir. 1995) (denying applicability of *South Carolina v. Regan* exception to litigation of tax claims by taxpayer membership organizations because "the taxpayer members . . . have 'alternative remedies'"); *In re* Am. Bicycle Ass'n, 895 F.2d 1277, 1281 & n.4 (9th Cir. 1990) (rejecting the applicability of *South Carolina v. Regan* exception because taxpayers could pay taxes owed and sue for refund).

96 *See, e.g.*, Foodservice & Lodging Inst., Inc. v. Regan, 809 F.2d 842, 844–45 (D.C. Cir. 1987) (per curiam) ("[E]mployers can refuse to comply, pay the statutory fine, and sue for a refund of the fine. Therefore, it is clear that alternative remedies are available."); California v. Regan, 641 F.2d 721, 723 (9th Cir. 1981) (concluding that California had a legal remedy because it could pay penalties for noncompliance with information reporting requirements and sue for a refund thereof); Debt Buyers' Ass'n v. Snow, 481 F. Supp. 2d 1, 10 (D.D.C. 2006) (denying applicability of *South Carolina v. Regan* exception for same reason).

97 *See infra* notes 140–143 and accompanying text (regarding deficiency actions).

98 *Debt Buyers' Ass'n*, 481 F. Supp. 2d at 10.

99 *See, e.g.*, Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1108 (D.C. Cir. 1993) ("The distinction between those agency pronouncements subject to APA notice-and-comment requirements and those that are exempt has been aptly described as 'enshrouded in considerable smog.'" (citation omitted)); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 548 (2000) ("[T]he case law in this area is characterized by a great deal of unnecessary confusion and inconsistency.").

100 *See, e.g.*, Lavilla, *supra* note 36, at 416 (recognizing an "absence of uniform case law" regarding the good cause exception); Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 ADMIN. L. REV. 113, 120 (1984) (describing the "ad hoc quality" of good cause exception analysis as courts "examine each claim in context, weighing all the facts and circumstances to decide whether other legitimate interests outweigh the desirability of providing an opportunity for public participation in rulemaking").

101 *See, e.g.*, 1 PIERCE, *supra* note 37, § 7.3 (observing with regard to adequacy of notice question that "[g]eneralization is difficult because the resolution of any particular dispute of this type is critically dependent on the specifics of the dispute").

view of Treasury's practices sufficiently clear-cut to satisfy *Williams Packing*. Perhaps as a result, the few cases in which the courts have considered the applicability of I.R.C. § 7421 and the DJA to APA procedural challenges have more or less assumed the unavailability of the *Williams Packing* exception and focused instead on *South Carolina v. Regan*, though again typically without finding jurisdiction.[102]

B. General Justiciability Limitations as Backstops

Legal scholars have argued that judicial application of justiciability doctrines such as standing and ripeness does not occur in a vacuum, but rather is often influenced by judicial perceptions regarding the availability or wisdom of particular remedial options.[103] The vast majority of pre-enforcement tax cases fall to I.R.C. § 7421 and the DJA. As a result, the courts rarely address more general justiciability issues such as standing or ripeness in dealing with tax controversies. Nevertheless, several judicial opinions that do tread such ground reinforce the unavailability of pre-enforcement judicial review for Treasury regulations by accepting what appears to be a more restrictive view of standing or ripeness doctrine in tax cases as opposed to other areas of administrative law. In other words, consistent with scholarly expectations, the limitations posed by I.R.C. § 7421, the DJA, and judicial interpretations thereof have created a climate that simply disfavors allowing courts to remedy legal wrongs in the tax context through pre-enforcement review. Thus, in this climate, even where courts might be inclined to interpret I.R.C. § 7421 and the DJA to allow pre-enforcement APA procedural challenges against Treasury regulations to proceed, they may nevertheless decline jurisdiction on other more general grounds.

Other than I.R.C. § 7421 and the DJA, constitutional standing requirements have proven the biggest obstacle to pre-enforcement re-

---

102 *See, e.g.*, Foodservice and Lodging Inst., Inc. v. Regan, 809 F.2d 842, 844 (D.C. Cir. 1987) (rejecting *South Carolina v. Regan* exception and omitting discussion of *Williams Packing* exception); California v. Regan, 641 F.2d 721, 723 (9th Cir. 1981) (rejecting *Williams Packing* exception because "the government did prevail in the district court" before evaluating whether California had an available legal remedy).

103 *See, e.g.*, DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 220–22 (1991) (describing ripeness and mootness as at least implicitly remedial); Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 643 (2006) ("Implicit judgments about appropriate judicial remedies exert an important, almost pervasive influence on justiciability doctrines."); Laura E. Little, *It's About Time: Unravelling Standing and Equitable Ripeness*, 41 BUFF. L. REV. 933, 947 (1993) (criticizing the Supreme Court for "collaps[ing] analysis of jurisdictional and remedial concerns into a single threshold enterprise").

view in tax cases, though more for third parties who object to policies reflected in IRS interpretations than for taxpayers concerned about their own tax liabilities.[104] Standing doctrine derives from the "cases" or "controversies" requirement of Article III of the United States Constitution.[105] Ordinarily, to have constitutional standing to bring a claim in federal court, a plaintiff must establish both an "injury in fact" and a causal connection between that injury and the defendant's conduct, and also demonstrate that a decision by the courts in her

---

104 The cases to which I refer here should not be confused with the substantial line of jurisprudence regarding what is known as "taxpayer standing" doctrine. Cases involving taxpayers attempting to use their taxpayer status to challenge various federal government policies are both plentiful and virtually always dismissed as nonjusticiable. *See, e.g.*, Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2559, 2563 (2006); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 482–83 (1982); United States v. Richardson, 418 U.S. 166, 174–75 (1974); *see also* Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 Emory L.J. 771, 804–13 (2003) (documenting empirically poor record of federal taxpayer standing challenges). Occasionally one of these cases objects particularly to IRS action, or at least casts its claim in those terms. *See, e.g.*, Bartley v. United States, 123 F.3d 466, 470–71 (7th Cir. 1997) (challenging alleged IRS overcollection of taxes but on basis that government was improperly spending tax revenues). Usually, however, the objections raised more directly concern government programs not directly related to revenue collection policies. *See, e.g.*, *Hein*, 127 S. Ct. at 2559–60 (challenging President's Faith-Based and Community Initiatives Program as Establishment Clause violation); *Valley Forge Christian Coll.*, 454 U.S. at 468–69 (objecting to sale of property by Department of Health, Education, and Welfare to religious college). Hence, notwithstanding the label, taxpayer standing cases generally have little to do with tax law or APA procedural requirements.

105 *See* U.S. Const. art. III, § 2, cl. 1; *Hein*, 127 S. Ct. at 2562; Massachusetts v. EPA, 127 S. Ct. 1438, 1464 (2007). Generally speaking, pre-enforcement tax challenges may only be filed in the Article III courts because the Tax Court is empowered primarily to hear cases after the IRS has issued a deficiency notice to a taxpayer. *See* I.R.C. §§ 6213, 6214 (2000); *see also* Kafka & Cavanagh, *supra* note 46, § 2.01 (listing other, more limited areas of Tax Court jurisdiction). Nevertheless, there is some disagreement over whether the Article III case or controversy limitation applies to the Tax Court as an Article I court. Although the United States Tax Court is an Article I or legislative court of otherwise limited jurisdiction, standing doctrine applies equally to tax cases arising in that forum. *See, e.g.*, Freytag v. Comm'r, 501 U.S. 868, 897 (1991) (Scalia, J., concurring) (recognizing that Article III jurisdictional questions should apply to non-Article III tribunals as well); Clapp v. Comm'r, 875 F.2d 1396, 1399 (9th Cir. 1989) ("[T]he few cases discussing the differences between the Tax Court and an Article III court indicate that questions of Tax Court jurisdiction are to be resolved in the same manner as for an Article III court."); Anthony v. Comm'r, 66 T.C. 367, 368–69 (1976) ("[W]hether as part of the conceptual formulation of a 'case' or 'controversy' or as a matter of prudent policy considerations, we think the 'standing' doctrine inheres in our exercise of judicial power."). *But see* Baranowicz v. Comm'r, 432 F.3d 972, 975 (9th Cir. 2005) ("Moreover, we must also bear in mind that the Tax Court is not an Article III court and, therefore, is not fully constrained by Article III's case or controversy limitation."); Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 Notre Dame L. Rev. 221, 248 (1999) ("Article I courts are not constrained by the 'case or controversy' clause of Article III of the Constitution.").

favor will likely redress that injury.[106] In particular, the injury in question must be "concrete and particularized" and "actual or imminent," as opposed to "conjectural or hypothetical."[107]

In the context of procedural challenges, however, the courts apply a modified standing analysis that deemphasizes both redressability and the immediacy aspect of injury in fact.[108] Plaintiffs alleging that they have been denied procedural protections need only demonstrate a link between the procedure and substantive agency action in question.[109] Requiring such plaintiffs to prove that procedural adherence would actually change the outcome of the agency's rule, for example, would render APA requirements "a dead letter."[110] Thus, for example, in *Dismas Charities, Inc. v. U.S. Department of Justice*, the court found that an organization that ran community correction centers was sufficiently injured to raise a procedural challenge against a policy, adopted by the Bureau of Prisons ("BOP") without notice and comment, that would have reduced the number of prisoners eligible for confinement in such institutions.[111] "If applicable, [the procedural requirements of notice and comment prior to rulemaking] give Dismas the chance to argue to the BOP that its policy is wrong before the policy is adopted, and Dismas's interest in continuing to provide services to the BOP is certainly concrete."[112]

Employing these rules, courts in a variety of administrative contexts have granted not just regulated parties but a wide range of inter-

106 Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000); Bennett v. Spear, 520 U.S. 154, 167 (1997); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

107 *Friends of the Earth*, 528 U.S. at 180.

108 *See, e.g.*, Massachusetts v. EPA, 127 S. Ct. 1438, 1453 (2007) ("When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant."); *Defenders of Wildlife*, 504 U.S. at 572 n.7 ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."); Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 94–95 (D.C. Cir. 2002) ("A [litigant] who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result.").

109 *See Massachusetts v. EPA*, 127 S. Ct. at 1453; *Defenders of Wildlife*, 504 U.S. at 573 n.8; *Sugar Cane Growers Coop. of Fla.*, 289 F.3d at 94–95.

110 *Sugar Cane Growers Coop. of Fla.*, 289 F.3d at 95.

111 Dismas Charities, Inc. v. DOJ, 401 F.3d 666, 677 (6th Cir. 2005); *see also* Hodges v. Abraham, 300 F.3d 432, 443–44 (4th Cir. 2002) (finding that potential environmental damage to State land and water represented sufficiently concrete injury to allow Governor of South Carolina to sue Department of Energy on procedural grounds).

112 *Dismas Charities*, 401 F.3d at 677.

est groups and their members standing to challenge agency regulations on both substantive and procedural grounds.[113] Nevertheless, plaintiffs raising procedural challenges still must demonstrate that the agency's substantive action has caused a personal and particularized injury.[114] In *Wisconsin Public Power, Inc. v. FERC*,[115] for example, the court concluded that utilities that purchase power from power transmission grids were at best indirectly and speculatively impacted by an agency order levying service charges upon the transmission grid owners, and thus were insufficiently injured to raise an APA procedural challenge against the order, because the agency had not authorized the transmission grid owners to pass through the service charges to their customers, including the appellants.[116]

Taxpayers suffering increased tax liabilities or expanded information reporting requirements imposed by Treasury regulations would seem easily to possess the sort of personal and particularized injury necessary to challenge those regulations for their failure to satisfy APA rulemaking requirements under this relaxed approach to standing. Yet "[i]t is well-recognized that the standing inquiry in tax cases is more restrictive than in other cases."[117] Hence, parties asserting injuries other than their own tax liabilities have generally been unsuccessful in challenging Treasury and IRS rules and regulations, even on procedural grounds.

The leading case on the issue, *Simon v. Eastern Kentucky Welfare Rights Organization*, involved a case brought by indigent rights organizations and their members against a revenue ruling granting exempt status to hospitals that only offered emergency care to persons unable to pay.[118] The plaintiffs alleged both that the IRS's ruling violated the I.R.C. and also that the IRS should have followed the notice-and-com-

113 *See, e.g.*, Ouachita Watch League v. Jacobs, 463 F.3d 1163, 1170–73 (11th Cir. 2006) (holding that group of environmental organizations had standing to challenge Forest Service plans for failure to comply with National Environmental Policy Act and National Forest Management Act); Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1109–14 (9th Cir. 2002) (recognizing standing of state, counties, Indian tribe, recreational groups, and others to raise National Environmental Policy Act and APA challenges); Kelley v. Selin, 42 F.3d 1501, 1507–10 (6th Cir. 1995) (finding that landowners had standing to challenge Nuclear Regulatory Commission waste storage rulemaking).

114 *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.10 (1992) (offering examples of what is or is not a sufficiently concrete injury); Wis. Pub. Power, Inc. v. FERC, 493 F.3d 239, 269 (D.C. Cir. 2007); Tex. Indep. Producers & Royalty Owner Ass'n v. EPA, 410 F.3d 964, 976–77 (7th Cir. 2005) (summarizing precedent illustrating concrete injuries).

115 Wis. Pub. Power, Inc. v. FERC, 493 F.3d 239 (D.C. Cir. 2007).

116 *Id.* at 269.

117 Nat'l Taxpayers Union, Inc. v. United States, 68 F.3d 1428, 1434 (D.C. Cir. 1995).

118 Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 28 (1975).

ment requirements of APA § 553 in adopting its interpretation.[119] Although the IRS asserted I.R.C. § 7421 and the DJA as limitations,[120] the Court dismissed the case for lack of standing, deeming the connection between the IRS's ruling and the denial of services too speculative to sustain judicial review.[121] Concurring in the judgment of the Court, Justice Stewart added, "I cannot now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else."[122] Following the Court's guidance, the lower courts have since declined to grant standing in a series of cases challenging the tax-exempt status of groups unrelated to the plaintiffs.[123]

Nevertheless, it is unclear whether standing doctrine limits pre-enforcement challenges by taxpayers who challenge Treasury regulations that purportedly impact their own tax liabilities or otherwise impose direct burdens upon them. Very few cases even address the question, and those that do reflect inconsistent outcomes. In *National Taxpayers Union, Inc. v. United States*, for example, the D.C. Circuit found that a taxpayer organization had standing on behalf of individually aggrieved taxpayer members to raise a pre-enforcement constitutional challenge against the retroactivity of a congressionally enacted tax rate increase.[124] Yet, in *Stephenson v. Brady*, the Fourth Circuit concluded that a taxpayer who sought declaratory relief on both substantive and procedural grounds from Treasury regulations allegedly requiring him to file certain information returns suffered no injury and thus lacked standing until such time as the IRS actually assessed a penalty against him for failing to file the returns.[125] The courts' rea-

119 *Id.* at 33–34.

120 *Id.* at 34–35.

121 *See id.* at 37, 42–46. Notably, the court below decided that the plaintiffs' claim fell outside the scope of I.R.C. § 7421 and the DJA because "the litigation did not threaten to deny anticipated tax revenues to the Government." E. Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278, 1284–85 (D.C. Cir. 1974). The court's reasoning was consistent with several cases from the 1970s holding that I.R.C. § 7421 and the DJA do not apply to third-party challenges to another organization's exempt status. *See supra* note 64 and accompanying text (discussing this line of cases).

122 *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. at 46 (Stewart, J., concurring).

123 *See, e.g.*, Fulani v. Brady, 935 F.2d 1324, 1326–28, 1331 (D.C. Cir. 1991); *In re* U.S. Catholic Conference, 885 F.2d 1020, 1028–31 (2d Cir. 1989).

124 Nat'l Taxpayers Union, Inc. v. United States, 68 F.3d 1428, 1435 (D.C. Cir. 1995). However, the court separately found that I.R.C. § 7421 and the DJA barred the case in question. *See id.* at 1435–38.

125 Stephenson v. Brady, 927 F.2d 596, 1991 WL 22835, at *2 (4th Cir. 1991) (per curiam) (unpublished table decision).

soning in these cases is simply inadequate to establish any clear pattern of analysis.

Regardless, where standing limitations do not preclude pre-enforcement judicial review, ripeness doctrine may. Like standing, ripeness doctrine is a manifestation of the Article III cases or controversies requirement.[126] Ripeness doctrine is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."[127] The test for ripeness requires a reviewing court to consider two elements: (1) "the fitness of the issues for judicial decision" and (2) "the hardship to the parties of withholding court consideration."[128] The fitness inquiry looks to whether the question presented is "definite and concrete" rather than "hypothetical or abstract."[129] Hardship, in turn, requires a plaintiff to have suffered a legal wrong.[130] In administrative contexts such as this one, the Court often rephrases these criteria as follows: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented."[131]

The standard for establishing ripeness often requires a regulated party to suffer the consequences of enforcement or the denial of a benefit before seeking judicial review.[132] Nevertheless, the case an-

---

126 *See* Nat'l Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 808 (2003).

127 *Id.* at 807–08 (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967)); *accord* Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 732–33 (1998) (same).

128 Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967); *accord* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 479 (2001) (quoting *Abbott Labs.*); *Ohio Forestry Ass'n*, 523 U.S. at 733 (same).

129 Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979).

130 *See Ohio Forestry Ass'n*, 523 U.S. at 733 (defining traditional hardship as "adverse effects of a strictly legal kind").

131 *Id.* at 733; *see also Am. Trucking Ass'ns*, 531 U.S. at 479–80 (quoting *Ohio Forestry Ass'n* to evaluate ripeness).

132 *See, e.g.*, *Nat'l Park Hospitality Ass'n*, 538 U.S. at 810–11 ("Petitioner's argument appears to be that mere uncertainty as to the validity of a legal rule constitutes a hardship for purposes of the ripeness analysis. . . . If we were to follow petitioner's logic, courts would soon be overwhelmed with requests for what essentially would be advisory opinions . . . ."); Reno v. Catholic Soc. Servs., 509 U.S. 43, 57–59 (1993) (requiring parties to pursue administrative application of regulation against them to deny government benefits before permitting judicial review of regulation); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891–94 (1990) (declining to find challenges to agency regulation ripe absent further agency action applying the regulation).

nouncing the modern ripeness standard—*Abbott Laboratories v. Gardner*—also established a broad presumption in favor of early judicial review of agency regulations that directly affect primary behavior.[133] The Court has more recently carved back on this doctrine, indicating, for example, that pre-enforcement review may be more appropriate for regulations imposing burdens rather than conferring benefits.[134] Court precedent is also mixed on whether a statute that provides an alternative path to judicial review precludes pre-enforcement consideration of regulatory challenges.[135] Nevertheless, particularly where a regulated party faces a choice between complying with regulatory requirements and risking penalties for their violation, the courts have generally been sympathetic toward pre-enforcement review.[136]

Few tax cases address the ripeness question. Those that do tend to be so situational as to defy easy analogy. Nevertheless, a few demonstrate the potential relevance of ripeness doctrine in pre-enforcement challenges to Treasury and IRS regulations and rules. In *Stephenson v. Brady*, for example, in addition to finding that the taxpayer lacked standing, the court concluded that his case was not ripe.[137] Although the issues that the taxpayer raised were purely legal and thus arguably fit for judicial review, the court concluded that the taxpayer suffered no hardship unless and until the IRS assessed and he had to pay penalties for his failure to file the information returns in question.[138] Moreover, the court considered the "inconvenience and

---

133 Abbott Labs. v. Gardner, 387 U.S. 136, 139–41 (1967) (recognizing general presumption in favor of pre-enforcement review of agency regulations in APA); *see also Nat'l Wildlife Fed'n*, 497 U.S. at 891 (labeling as ripe for review "a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately"); Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164 (1967) (designating as ripe cases in which "the impact of the administrative action could be said to be felt immediately by those subject to it in conducting their day-to-day affairs").

134 *See Catholic Soc. Servs.*, 509 U.S. at 58–59.

135 *Compare* Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 212, 216 (1994) (distinguishing *Abbott Labs.* and finding that statutory procedures for administrative and judicial review preclude consideration of pre-enforcement challenge), *with Abbott Labs.*, 387 U.S. at 141–42 (concluding that existence of statutory procedures for administrative review did not preclude pre-enforcement challenges and simply provided "an additional remedy"). *See also* 1 PIERCE, *supra* note 37, § 15.14, at 1079–81 (noting the inconsistency between these cases).

136 *See Abbott Labs.*, 387 U.S. at 152–53 (allowing judicial review where plaintiffs faced choice between complying with labeling requirements at significant financial cost and incurring criminal and civil penalties); Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 417–19 (1942) (allowing judicial review where plaintiffs had to comply with costly rules or risk losing broadcasting license).

137 Stephenson v. Brady, 927 F.2d 596, 1991 WL 22835, at *3–4 (4th Cir. 1991) (per curiam) (unpublished table decision).

138 *See id.* at *4.

relatively minor expense" of complying with the regulation and filing the returns not a cognizable injury worthy of judicial concern.[139]

In sum, as interpreted by the courts, I.R.C. § 7421 and the DJA bar most pre-enforcement judicial review of Treasury regulations and other IRS rulings. To the extent those provisions do not, however, the courts are likely to employ more general limitations such as standing and ripeness to foreclose pre-enforcement review. The cases that surmount these obstacles are few and far between, leaving enforcement-based litigation as virtually the only path to judicial review of Treasury's procedural failings.

III. Limitations on Enforcement-Based Judicial Review

The lack of a pre-enforcement litigation option alone does not explain why taxpayers rarely challenge Treasury regulations on procedural grounds. After all, the courts' routine denial of pre-enforcement tax claims generally is predicated, under one doctrine or another, on the notion that taxpayers have the option of paying tax, or alternatively declining to adhere to the law in question and paying any penalties assessed, and then suing for a refund. In the case of deficiency actions, this judicial posture assumes that taxpayers can simply wait for the IRS to seek enforcement of the tax laws through a notice of deficiency and then take the case to the Tax Court.[140] The courts suffer no shortage of tax refund and deficiency cases. Yet, still, these cases tend not to raise APA procedural challenges.

While procedural requirements serve important normative objectives of their own, from the perspective of the typical regulated party, procedural challenges are merely a means for achieving a different, more substantive goal: influencing the government's interpretation of the relevant statute. Taxpayers want substantive regulations that will inure to their benefit, or at least not apply to their detriment, whether in their impact upon liabilities for taxes due, obligations to collect and report information to the IRS, or otherwise. Under the tax law's current enforcement-based litigation regime, successfully prosecuting a procedural challenge against an unfavorable Treasury regulation seems substantially less likely to accomplish the desired substantive

139 *See id.*

140 As already noted, most taxpayer-initiated tax litigation falls into the enforcement-based categories of refund litigation or deficiency litigation. *See* Kafka & Cavanagh, *supra* note 46, § 1.01 (dividing most tax litigation into the refund and deficiency categories); *see also supra* note 46, explaining use of "enforcement-based" terminology in reference to refund and deficiency litigation.

end than a procedural claim raised pre-enforcement, for several reasons.

Contrary to the courts' suggestion and apparent belief, getting to enforcement-based judicial review of Treasury regulations is not quite as simple as paying the tax and suing for a refund. Limiting judicial review to refund and deficiency actions means that many potential regulatory challenges never find their way into court. The reasons for this are largely pragmatic, though again doctrine plays a role: a potentially costly administrative process that a taxpayer must pursue prior to seeking judicial review;[141] a certain degree of futility that would likely accompany many challenges to temporary Treasury regulations finalized before judicial review could be obtained;[142] and the unclear implications of judicial deference doctrines for challenges brought in an enforcement-based context.

Both foes and defenders of pre-enforcement judicial review of agency rulemaking efforts agree that an enforcement-based review regime will likely curtail facial challenges against agency regulations.[143] The tax system seems to offer at least one case that proves their point. Many taxpayers undoubtedly elect to comply with or rearrange their affairs to avoid regulations that they find questionable, rather than put themselves through the effort of raising a challenge, placing themselves in a negative enforcement position or operating indefinitely in a state of uncertainty regarding tax noncompliance and the potential consequences.

141 *See, e.g.*, Quarty v. United States, 170 F.3d 961, 971–72 (9th Cir. 1999) (describing administrative requirements and declining to consider merits because claim "was not administratively exhausted").

142 *See supra* note 25 and accompanying text (recognizing Treasury's use of temporary regulations as its most obvious APA compliance problem).

143 *See, e.g.*, Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW & CONTEMP. PROBS. 185, 225–28 (1994) (arguing with approval that regulated parties are more likely to comply with agency regulations if bringing a pre-enforcement challenge risks a penalty); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 90–91 (1995) (expressing concern that eliminating pre-enforcement judicial review would "induce regulatees to comply with a rule, even if they believe the rule to be invalid, rather than to take the risks attendant to noncompliance and a subsequent challenge to the validity of the rule in an enforcement case"); Mark Seidenfeld, *Playing Games with the Timing of Judicial Review: An Evaluation of Proposals to Restrict Pre-enforcement Review of Agency Rules*, 58 OHIO ST. L.J. 85, 100–01 (1997) (agreeing with predictions that, in the absence of pre-enforcement review, many regulated parties will simply choose to comply, and expressing concerns about negative consequences of that outcome).

A. *The Path to Judicial Review: Refund Claims and Deficiency Notices*

To pursue judicial review either through refund litigation or deficiency litigation, a taxpayer must first pursue an agency-level process dictated by the I.R.C. Depending upon the circumstances of the individual case, these processes may or may not be involved or complicated. Regardless, each raises a certain threshold obstacle to obtaining judicial review that may deter taxpayers from pursuing that course.

Refund actions arise after a taxpayer requests a refund of taxes (or occasionally penalties) paid and the IRS either rejects that claim or fails to act on the refund within six months.[144] The jurisdictional theory in such cases is that the taxpayer has paid the full tax or penalty that the IRS has assessed, has been injured by that payment, and is claiming a refund thereof.

Deficiency litigation is a consequence of (1) the IRS concluding that a taxpayer owes additional taxes or penalties and issuing a statutory notice of deficiency to that effect, and (2) the taxpayer responding by filing a suit contesting the notice with the Tax Court.[145] Jurisdiction in such cases is not predicated on the payment of the tax or penalty assessed; rather, Congress has authorized taxpayers to file claims in Tax Court upon receipt of a deficiency notice.[146]

Courts declining jurisdiction under I.R.C. § 7421 and the DJA tend particularly to emphasize the availability of refund actions.[147] From the above description, the refund claims process sounds simple enough: the taxpayer can simply file the refund request and wait for the IRS's rejection or for six months to pass, whichever comes first. Indeed, some refund claims are just that straightforward. They must be filed on the proper form within the proper time frame and include

---

144 *See* I.R.C. § 7422(a) (2000) (precluding a suit to recover taxes paid until the taxpayer has filed a refund claim and exhausted administrative penalties); *see also id*. § 6532(a)(1) (allowing a suit under I.R.C. § 7422(a) either six months after filing a refund claim or when the IRS rejects to such a request, whichever comes first); Brennan v. Sw. Airlines Co., 134 F.3d 1405, 1412 (9th Cir. 1998) (recognizing administrative exhaustion requirement for refund claim).

145 *See* I.R.C. §§ 6211(a), 6212(a), 6213(a) (defining "deficiency," authorizing notices of deficiency, and authorizing taxpayers to file a petition with the Tax Court after receiving the notice).

146 *See id.* § 6213(a). In addition to challenging the noticed deficiency, a taxpayer may assert further in its Tax Court petition that it has overpaid its taxes for the year in question. *See id.* § 6512(b).

147 *See, e.g.*, *supra* note 95 and accompanying text.

an adequate description of each issue.[148] Issues not properly raised in the refund claim cannot be raised later in court.[149]

The IRS has identified certain types of refund claims as subject to summary rejection, for example, those that raise constitutional issues or are untimely filed, enabling taxpayers with such claims to obtain judicial review that much more quickly.[150] Further, taxpayers filing a refund claim based solely on contested issues arising from tax returns that the IRS has already examined, if they are eager to get to court, can include with their claim a request for immediate disallowance, which the IRS may grant without further review of the claim's merits.[151]

For most taxpayers, however, the refund claim process is much less simple. Refund claims raising interpretive questions are subject to a more involved administrative process. Unless the IRS summarily rejects a refund claim, IRS officials generally subject refund claims to the same sort of administrative examination as when a taxpayer's return is audited.[152] In pursuing such examinations, the IRS often looks beyond the specific issues raised in the refund claim in the hope of identifying offsetting deficiencies.[153] Refund claims that exceed $2

---

148 *See, e.g.*, Treas. Reg. § 601.105(e)(1) (as amended in 1987) (describing form of refund claim); 3 CASEY, *supra* note 57, §§ 10.51, 10.54 (describing the required forms and contents for refund claims); Myron C. Baum, *How to Handle a Tax Controversy at the IRS and in Court*, C573 A.L.I.-A.B.A. 239, 241–48 (1990) (describing forms, contents, and timing requirements for refund claims).

149 *See* Treas. Reg. § 301.6402-2(b)(1) (as amended in 1982). Commonly known as the "doctrine of variance," the courts apply this rule as a jurisdictional requirement. *See, e.g.*, IA 80 Group, Inc. & Subsidiaries v. United States, 347 F.3d 1067, 1074 (8th Cir. 2003); Apollo Fuel Oil v. United States, 195 F.3d 74, 77 (2d Cir. 1999).

150 The circumstances triggering automatic denial of a refund claim vary slightly depending on the context. *See, e.g.*, INTERNAL REVENUE MANUAL § 4.23.13.4 (2003) (employment tax context); *id.* § 4.24.8.8 (excise tax context); *see also* KAFKA & CAVANAGH, *supra* note 46, § 14.01 (listing most common circumstances triggering automatic refund claim denial in all contexts); Donald C. Alexander & Brian S. Gleicher, *IRS Procedures: Examinations and Appeals*, 623-2d Tax Mgmt. (BNA), at A-111–12 (2006) (same).

151 The initial IRS news release announcing this policy limited the availability of immediate refund claim disallowance to "contested income, estate or gift tax issues considered in previously examined returns." Internal Revenue News Release IR-1600, 9 Stand. Fed. Tax Rep. (CCH) ¶ 6609 (Apr. 26, 1976). The current *Internal Revenue Manual* also recognizes the availability of immediate disallowance in the employment tax context. *See* INTERNAL REVENUE MANUAL § 4.23.13.4 (2003). *See also* 15 MERTENS LAW OF FEDERAL INCOME TAXATION § 58.33 (recognizing expedited processing option); KAFKA & CAVANAGH, *supra* note 46, § 14.04 (same).

152 *See* Treas. Reg. § 601.105(e)(2) (as amended in 1987) (prescribing same procedure for general audits and examination of refund claims); KAFKA & CAVANAGH, *supra* note 46, § 14.01 (noting that refund claims not summarily rejected are subject to general audit standards); 3 CASEY, *supra* note 57, § 10.62 (same); Alexander & Gleicher, *supra* note 150, at A-111 (same).

153 *See* KAFKA & CAVANAGH, *supra* note 46, § 14.01; 3 CASEY, *supra* note 57, § 10.62.

million are further subject to review by Congress's Joint Committee on Taxation.[154]

Taxpayers with entirely legitimate complaints regarding the validity of a particular Treasury regulation may be justifiably wary of subjecting themselves to the equivalent of an audit. Even conscientious taxpayers may have returns with "soft spots"—items of income or deduction where the law is unclear and the related tax liability thus is susceptible to challenge and recalculation notwithstanding the taxpayer's best efforts at compliance. Many taxpayers may conclude that the possible costs of having an IRS examiner identify other issues and claim underpayment overwhelm the potential benefits of raising a procedural challenge.

Moreover, as noted, the goal for most taxpayers is not merely to see a procedurally flawed Treasury regulation invalidated on those grounds. Rather, most taxpayers are seeking a particular substantive outcome with respect to their tax liability and the proper tax treatment of their circumstances. One way to accomplish that goal may be to persuade a court to invalidate a Treasury regulation as procedurally invalid, requiring Treasury to pursue additional notice-and-comment procedures and giving the taxpayer an opportunity to present its position to Treasury in that context.[155] Yet, in pursuing that outcome, a taxpayer may be presented with another option that achieves a financially similar (or close enough) substantive result: settlement.

IRS examiners do not have the authority to grant refunds in direct contravention of express regulatory mandates or to consider the relative strength or weakness of the government's position and the corresponding hazards of litigation in reaching conclusions regarding the appropriate disposition of the cases before them.[156] If an IRS examiner and the taxpayer disagree on the merits of the issues underly-

---

154 *See* I.R.C. § 6405(a) (2000); Treas. Reg. §§ 301.6405-1 (as amended in 1978), 601.108 (as amended in 1980). The $2 million threshold for Joint Committee review was adjusted upward over time, from $1 million in 2000 and $100,000 in 1976. *See* Pub. L. No. 106-554, § 1(a)(7), 114 Stat. 2763, 2763 (2000); Pub. L. No. 101-508, § 11834(a), 104 Stat. 1388 (1990); Pub. L. No. 94-455, § 1210(a)–(b), 90 Stat. 1520, 1711 (1976); *see also* Alexander & Gleicher, *supra* note 150, at A-114–15. In most cases, the Joint Committee accepts the judgment of the Appeals Division, but occasionally the Joint Committee will question the Appeals Division's handling of a refund claim. *See* Alexander & Gleicher, *supra* note 150, at A-115.

155 Indeed, giving regulated parties the opportunity to vindicate their interests through the proper application of procedural requirements is rather the point of the relaxed requirements for establishing standing to challenge agency violations of procedural rights. *See supra* notes 109–113 and related text.

156 *See, e.g.*, Internal Revenue Manual § 4.10.7.5.3.1(5) (2006) (denying IRS examiners the authority to consider hazards of litigation in reaching conclusions about case resolution); 1

ing a refund claim, however, the taxpayer has the option of pursuing an administrative appeal of the examiner's determination.[157] IRS Appeals officers, in turn, do possess the authority to consider the hazards of litigation and pursue settlements accordingly, even for a mere percentage of the tax liability in question.[158] Settlement agreements are confidential.[159] Thus, an IRS Appeals officer facing a taxpayer with a colorable substantive argument and a procedural challenge against a Treasury regulation could settle the case without opening the floodgates for copycat claims.

Settlements are generally more likely with IRS Appeals officers than the Department of Justice after a refund action has been filed in court, giving taxpayers an incentive to pursue an internal IRS appeal prior to seeking judicial review.[160] Moreover, a taxpayer who successfully pursues an IRS-level appeal has an opportunity to obtain some reimbursement for administrative costs and fees from the government—an option not available for a taxpayer who chooses instead to

---

CASEY, *supra* note 57, § 3.51 (noting that on issues "involving principles laid down in the regulations, rulings or other expressions of [IRS] policy, . . . the examiner must follow official policy").

157 *See* Treas. Reg. §§ 601.103(c)(1) (as amended in 1984), 601.105(c)–(d) (as amended in 1987), 601.106(b) (as amended in 1987) (recognizing taxpayer's opportunity to dispute liability before IRS Appeals Office); 3 CASEY, *supra* note 57, § 10.62 (discussing taxpayer's right to pursue internal IRS appeal for disagreements with IRS examiner over refund claim issues).

158 *See* INTERNAL REVENUE MANUAL § 8.6.4.1 (2007) ("The Appeals mission is to resolve tax controversies, without litigation, on a basis which is fair and impartial to both the Government and the taxpayer . . . . A fair and impartial resolution is one which reflects on an issue-by-issue basis the probable result in event of litigation, or one which reflects mutual concessions for the purpose of settlement based on relative strength of the opposing positions where there is substantial uncertainty of the result in event of litigation."); *see also* 1 CASEY, *supra* note 57, § 4.13 (describing Appeals Division mission similarly); Alexander & Gleicher, *supra* note 150, at A-79, A-98–99 (noting that the purpose of the Appeals Division "is to resolve as many issues as possible without trial and to resolve them promptly" and describing different bases upon which Appeals settles cases); Richard Lavoie, *Analyzing the Schizoid Agency: Achieving the Proper Balance in Enforcing the Internal Revenue Code*, 23 AKRON TAX J. 1, 10 (2008) (observing that the "primary function" of Appeals Officers "is to settle cases," which often includes "splitting the issue on a percentage basis"). *But see* Lavoie, *supra*, at 10 n.50 (observing that "Appeals officers generally refuse to settle any issue on a percentage basis where they believe the taxpayer has less than a 20% chance of success on the merits . . . to dissuade nuisance settlements").

159 *See* I.R.C. § 6103(a) (2000) (precluding IRS disclosure of return information); *id.* § 6103(b)(2) (defining "return information" as including a wide array of taxpayer information, including tax liabilities or deficiencies and "whether the taxpayer's return was . . . examined or subject to other investigation or processing, or any other data . . . collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability").

160 *See* Gregory P. Mathews, *Using Negotiation, Mediation, and Arbitration to Resolve IRS-Taxpayer Disputes*, 19 OHIO ST. J. ON DISP. RESOL. 709, 723–27 (2004); Theodore D. Peyser, *Refund Litigation*, 631-2d Tax Mgmt. (BNA), at A-41 (2003) (discussing settlement policies of DOJ Tax Division).

go straight to court.[161] Settlements do not establish precedent, so a taxpayer with a recurring interpretive issue may prefer to litigate rather than settle a particular claim.[162] Taxpayers with nonrecurring interpretive questions and colorable procedural challenges for nonrecurring interpretive questions, however, may be better served by raising related procedural claims in the IRS's internal appeals process than by seeking immediate IRS disallowance of their refund requests and filing suit based upon Treasury's procedural failings.[163]

For that matter, in the context of corporations, taxpayers and IRS officials often negotiate and resolve debatable issues even before the taxpayer files a tax return.[164] Like settlement agreements, the results of these negotiations are confidential.[165] These programs work to further reduce the number of challenges to questionable Treasury interpretations of the I.R.C. for their procedural flaws as well as the government's exposure to litigation over controversial or questionable Treasury regulations. If a taxpayer can reach a satisfactory compromise with IRS officials regarding the substance of its tax liability, either before filing a return or while pursuing a refund claim, then the taxpayer has little incentive to pursue litigation challenging a questionable regulation.

Still, for some Treasury regulations that taxpayers may wish to challenge, a refund action is not a readily available option. For example, Treasury regulations requiring third-party information reporting in the *Debt Buyers*' case impose burdens other than the payment of a

---

161 *See* I.R.C. § 7430(a)–(b)(1) (offering prevailing taxpayers the possibility of recovering reasonable administrative and litigation costs incurred in connection with the determination or refund of taxes, interest, or penalties, but only if the taxpayer first exhausts administrative remedies within the IRS); Treas. Reg. § 301.7430-1(b) (as amended in 2003) (including Appeals office conference among the administrative remedies that a taxpayer must exhaust to recover costs under I.R.C. § 7430).

162 *See* Lederman, *supra* note 105, at 254 n.211 ("A 'full concession' by the IRS might leave the taxpayer open to subsequent disputes with the IRS in other years if the issue is a recurring one, so the taxpayer might prefer to reject the concession and litigate in order to obtain a precedent.").

163 *See* Kafka & Cavanagh, *supra* note 46, § 14.01 (comparing taxpayer options).

164 At least two programs specifically allow this: the Advance Pricing Agreement and the Prefiling Agreement Program ("PFA"). *See* Rev. Proc. 96-53, 1996-2 C.B. 375 ("The [Advance Pricing Agreement] process is designed to be a flexible problem-solving process, based on cooperative and principled negotiations between taxpayers and the Service."); Rev. Proc. 2005-12, 2005-02 I.R.B. 311 ("[The PFA] permits a taxpayer . . . to request that the Service examine specific issues relating to tax returns before those returns are filed."); *see also* Sheryl Stratton, *IRS Issues First Report on Prefiling Agreements*, 91 Tax Notes 198, 198–99 (2001) (summarizing initial PFA program results).

165 *See* Stratton, *supra* note 164, at 198 (describing Congress as "exempting PFAs from public disclosure").

tax liability.[166] Courts denying pre-enforcement review of such regulations have emphasized that an employer or other third party who believes a regulatory information filing requirement is inconsistent with the I.R.C. may choose not to file and raise a challenge upon being assessed and paying penalties for that choice.[167] Other taxpayers may simply lack the financial means to pay contested taxes so that they can assert a refund claim, so they must resort to deficiency litigation to bring a procedural challenge against a regulation giving rise to the alleged liability. In short, these taxpayers need the IRS to initiate an enforcement action before they can even begin working their way through the administrative process and seeking judicial review, and thus are essentially reduced to noncompliance with the law in the hope of prompting enforcement.

Yet, declining to file a return or choosing not to comply with a Treasury regulation in filing a tax return will not automatically lead IRS officials to pursue enforcement. The United States tax system operates generally on the basis of voluntary reporting. In other words, the IRS relies upon taxpayers to calculate their tax liabilities, file their tax returns, and pay their taxes when due.[168] Failing to include items of income reported to the IRS by third parties or failing to file a return at all where one is required may prompt IRS investigation.[169] Except for basic computational checks and cross-comparisons

---

166 *See* Debt Buyers' Ass'n v. Snow, 481 F. Supp. 2d 1, 6, 9 (D.D.C. 2006).

167 *See, e.g.*, Foodservice & Lodging Inst. v. Regan, 809 F.2d 842, 844–45 (D.C. Cir. 1987) (per curiam); California v. Regan, 641 F.2d 721, 723 (9th Cir. 1981); *see also supra* note 38 and accompanying text.

168 *See, e.g.*, I.R.C. § 6011(a) (2000) (requiring persons liable for taxes under the I.R.C. to file tax returns in accordance with Treasury regulations and forms); *id.* § 6151(a) (requiring payment of tax without assessment, notice, or demand by the IRS); *see also id.* § 6001 (requiring taxpayers to keep financial records related to tax liability computation); *id.* § 6702 (imposing a frivolous return penalty for returns that omit "information on which the substantial correctness of the self-assessment may be judged" or contain "information that on its face indicates that the self-assessment is substantially incorrect," if such a return is "due to . . . a position which is frivolous, or . . . a desire . . . to delay or impede the administration of Federal income tax laws").

169 The IRS follows a program of electronically comparing tax returns filed by taxpayers with income information received from third parties to identify potential underreporting of taxable income. *See, e.g.*, INTERNAL REVENUE MANUAL § 4.19.2.1 (2003) (describing Automated Underreporter); *see also* Nushin S. Huq, *Panelists Discuss Automated Matching System Changes, Innocent Spouse Form*, 26 TAX MGMT. WKLY. REP. 1311, 1311 (2007) (describing system improvements to Automated Underreporter program); Robert C. Rea, *Automation of Underreporter Program Scheduled for 1992*, 10 Tax Mgm't Wkly. Rep. (BNA) 1575 (1991) (describing original Automated Underreporter Program). The IRS also has a "Substitute for Return" program in which it uses income information received from third parties to generate substitute tax returns for taxpayers who have failed to file. *See, e.g.*, INTERNAL REVENUE MANUAL §§ 4.19.17.1, 4.19.17.1.3.1–3 (2006) (outlining the program and providing procedures); *Tax Man-*

with information returns, however, so long as a taxpayer files a tax return, the IRS usually accepts the taxpayer's self-reported tax liability. The IRS only selects a very small percentage of tax returns for audit—roughly one-to-two percent at most.[170] The audit rate is higher for certain taxpayer categories, such as larger corporations, but review even for those taxpayers is not guaranteed or even particularly likely.[171]

Thus, merely declining to comply with a questionable regulation generally will be inadequate to initiate an IRS enforcement action. Where the regulation at issue involves the filing of a tax return, the taxpayer can highlight its noncompliance in its tax returns by attaching noncompliance disclosure forms and even a cover letter inviting IRS scrutiny.[172] But even that proactive effort does not guarantee that the IRS will pursue enforcement.

In sum, the IRS administrative processes imposed upon taxpayers create a substantial hurdle for taxpayers otherwise seeking to challenge a Treasury regulation for its procedural failings. This is not to suggest that IRS officials are engaged in a coordinated effort to keep procedural challenges out of the courts. Rather, the IRS simply has limited resources with which to pursue enforcement of the tax laws

---

agement Weekly Report In Brief, 6 Tax Mgmt. Wkly. Rep. (BNA) 77 (1987) (describing the program).

170 For example, in 2006, fewer than one percent of all individual income tax returns filed were audited by the IRS. *See TIGTA Examines Compliance Activity Trends Through Fiscal 2006*, 2007 Tax Notes Today 68-46, text accompanying note 34 (2007). The vast majority of those audits were limited "correspondence audits" conducted by mail rather than face-to-face contact. *See id.* The audit rate for corporate returns was slightly higher at 1.25%. *See id.* at text accompanying note 38.

171 In 2006, the audit rate for corporations with assets of $10 million or more was higher at 18.6%. *See id.* at fig.50. The IRS also has the Coordinated Industry Case ("CIC") program, previously known as the Coordinated Examination Program, for very large corporations under which the IRS permanently assigns an agent to audit the corporation's tax compliance over time. *See* Internal Revenue Manual § 4.1.21.2.2.1.1 (2007) (addressing CIC program planning); *id.* § 1.11.2.6.1 (noting change in program name); John W. Lee, *Transaction Costs Relating to Acquisition or Enhancement of Intangible Property: A Populist, Political, but Practical Perspective*, 22 Va. Tax Rev. 273, 285 n.61 (2002) (summarizing CIC program history). The resulting higher overall audit rate for larger corporations nevertheless leaves a lot of corporate activity unexamined, as evidenced by the overall corporate income tax return audit rate of 1.25%. *See TIGTA Examines*, *supra* note 170, at text accompanying note 38.

172 The IRS has made available Form 8275-R for the purpose of "disclos[ing] positions taken on a tax return that are contrary to Treasury regulations." IRS, Dep't of Treasury, Instructions for Form 8275-R, at 1 (2007), *available at* http://www.irs.gov/pub/irs-pdf/i8275r.pdf. *See also* Anthony C. Infanti, Homo Sacer*, Homosexual: Some Thoughts on Waging Tax Guerilla Warfare*, 2 Unbound: Harv. J. Legal Left 27, 53–54 & n.118 (2006), http://www.legalleft.org/wp-content/uploads/2008/04/2unb027-infanti.pdf (suggesting filing Form 8275-R and a cover letter with a tax return to highlight noncompliance and invite IRS scrutiny).

and litigate tax cases. IRS officials thus have substantial flexibility in picking their battles. The administrative review processes in turn offer taxpayers a sufficient bundle of carrots and sticks to resolve their cases without litigation. Consequently, many attempts to "tee up" a challenge to a particular Treasury regulation likely fizzle in the administrative process. There are many reasons to laud such outcomes, for conserving judicial resources and giving the IRS the first chance to correct its own errors, for example.[173] Nevertheless, requiring taxpayers to pursue administrative remedies before obtaining judicial review likely contributes to the lack of taxpayer challenges against procedurally flawed Treasury regulations, and thus helps perpetuate Treasury's noncompliance.

B. *Perceived Futility of Challenging Temporary Treasury Regulations*

The requirement that taxpayers pursue a refund or obtain a deficiency notice before seeking judicial review, however, cannot alone explain the lack of procedural challenges in enforcement-based tax litigation. Irrespective of the low audit rate and the incentives to settle with the IRS, the courts suffer no shortage of tax litigation. Thus, other reasons must exist to explain why taxpayers who get to court fail to bring procedural challenges.

Another practical disincentive to taxpayer procedural challenges stems from the fact that Treasury's most significant APA compliance failure is its utilization of legally-binding temporary regulations without prepromulgation notice and comment.[174] As noted, in finalizing temporary regulations, Treasury typically does pursue the notice-and-comment process. Though some rulemaking involving temporary regulations takes longer,[175] the process of taking regulations from temporary to final status usually takes about a year.[176] Of course, the IRS

---

173 *See, e.g.*, 3 Charles H. Koch, Jr., Administrative Law & Practice § 13.21[2] (2d ed. 1997) (summarizing goals of administrative exhaustion requirements generally).

174 *See also supra* notes 15–37 and accompanying text (summarizing Treasury's APA noncompliance in more detail).

175 *See, e.g.*, Prohibited Allocations of Securities in an S Corporation, T.D. 9302, 71 Fed. Reg. 76,134, 76,135 (Dec. 20, 2006) (taking sixteen months to finalize temporary regulations, which in turn had superseded temporary regulations issued two years earlier); Assumption of Partner Liabilities, T.D. 9207, 70 Fed. Reg. 30,334, 30,335 (May 26, 2005) (finalizing and removing temporary regulations issued almost two years previously).

176 *See, e.g.*, Additional Rules for Exchanges of Personal Property Under Section 1031(a), T.D. 9202, 70 Fed. Reg. 28,818, 28,818 (May 19, 2005) (finalizing and removing temporary regulations issued nine months earlier with T.D. 9151); Collected Excise Taxes; Duties of Collector, T.D. 9221, 70 Fed. Reg. 49,869 (Aug. 25, 2005) (finalizing and removing temporary regulations

administrative processes for refund claims and deficiency notices and subsequent litigation process generally will take significantly longer, even if a taxpayer has requested immediate disallowance of the refund or waived the right to notice thereof in order to get to court more quickly.[177] Hence, the temporary Treasury regulations often will be final before judicial review actually commences.

The question therefore becomes whether the courts will consider Treasury's failure to comply with APA rulemaking requirements in promulgating temporary regulations to have bearing on the validity of the related final regulations.[178] The courts' reaction to this quandary in other administrative contexts has been mixed.

Courts have sometimes held that the procedural invalidity of a temporary or interim-final regulation renders the succeeding final regulations likewise invalid.[179] In other decisions, however, courts have declined to invalidate final regulations on such grounds,[180] based

issued one year earlier with T.D. 9149); Tax Return Preparers—Electronic Filing, T.D. 9119, 69 Fed. Reg. 15,248, 15,248 (Mar. 25, 2004) (finalizing and removing temporary regulations issued eleven months earlier with T.D. 9053); Transfers of Compensatory Options, T.D. 9148, 69 Fed. Reg. 48,392, 48,392 (Aug. 10, 2004) (finalizing temporary regulations issued thirteen months earlier with T.D. 9067).

177 Statistics compiled by the Federal Judiciary Center show that civil cases filed in the federal district courts, where refund actions would be filed, take roughly two years on average to complete the trial process. *See* U.S. District Court—Judicial Caseload Profile Report, http://www.uscourts.gov/cgi-bin/cmsd2007.pl (follow "Generate" button) (recording average time periods from filing to civil trial as ranging from 21.8 months in 2002 to 24.6 months in 2007). An appeal of a federal district court judgment to a federal circuit court of appeals adds approximately another year to the litigation process. *See* U.S. Court of Appeals—Appellate Judicial Caseload Profile Report, http://www.uscourts.gov/cgi-bin/cmsa2007.pl (follow "Generate" button; then follow "Show Page Two" button under chart) (documenting median times from filing notice of appeals to disposition as ranging from 10.7 months in 2002 to 12.2 months in 2007). Of course, many tax cases take much longer to reach judicial review, as taxpayers attempt in good faith to work through the administrative process first. *See, e.g.*, UnionBanCal Corp. v. Comm'r, 305 F.3d 976, 980–81, 983 n.36 (9th Cir. 2002) (documenting case history including commencement of IRS audit of taxpayer's return in 1994 followed by notice of deficiency issued in 1997 and a Tax Court decision in 1999).

178 *See* Petry v. Block, 737 F.2d 1193, 1203–05 (D.C. Cir. 1984) (acknowledging the difficulty in fashioning a remedy under such circumstances).

179 *See, e.g.*, Air Transp. Ass'n of Am. v. Dep't of Transp., 900 F.2d 369, 379–80 (D.C. Cir. 1990) (holding final regulations invalid due to procedural failings of interim-final regulations), *vacated without opinion and remanded*, 498 U.S. 1023 (1991), *vacated as moot*, 933 F.2d 1043 (D.C. Cir. 1991); *cf.* Natural Res. Def. Council, Inc. v. EPA, 683 F.2d 752, 767–68 (3d Cir. 1982) (rejecting postpromulgation notice and comment as inadequate and invalidating regulatory amendments so adopted). *But see also* Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 Admin. L. Rev. 703, 725–26 (1999) (discussing and criticizing this remedy for temporary or interim-final regulations adopted without good cause).

180 *See, e.g.*, Fed. Express Corp. v. Mineta, 373 F.3d 112, 120 (D.C. Cir. 2004) (holding postpromulgation opportunity for comment sufficient); *cf.* Mortgage Investors Corp. of Ohio v.

upon a finding that the agency's handling of postpromulgation comments demonstrated an "open mind" in the process of adopting the final regulations.[181] Some courts have not required an agency to make such a showing so long as it demonstrably accepts and responds to public comments in promulgating its final rules.[182] Other courts are concerned that allowing postpromulgation comment to cure temporary regulation procedural flaws eviscerates the APA rulemaking requirements.[183] Still further, courts are reluctant to undo agency regulations where doing so will yield no substantive difference.[184]

Further complicating matters in the tax context, I.R.C. § 7805(b) explicitly allows Treasury to make its final regulations applicable retroactively to the date on which it published in the Federal Register "any proposed or temporary regulation to which such final regulation relates" or "[t]he date on which any notice substantially describing the expected contents of any temporary, proposed, or final regulation is issued to the public."[185] Treasury often does just that when it adopts

---

Gober, 220 F.3d 1375, 1378–79 (Fed. Cir. 2000) (upholding final regulation "virtually identical to" temporary regulation because agency considered comments).

181 *See, e.g.*, Advocates for Highway & Auto Safety v. Fed. Highway Admin., 28 F.3d 1288, 1292 (D.C. Cir. 1994) ("The touchstone of our inquiry is thus the agency's open-mindedness . . . ."); Levesque v. Block, 723 F.2d 175, 188 (1st Cir. 1983) ("When the response suggests that the agency has been open-minded, the presumption against a late comment period can be overcome and a rule upheld."); *cf.* U.S. Steel Corp. v. EPA, 605 F.2d 283, 291 (7th Cir. 1979) ("Given that the agency was clearly willing to consider, fully and objectively, all comments in the post-promulgation period, there is no reason to believe that its consideration of the comments would have been any different if completed before the effective date.").

182 *See, e.g.*, *Gober*, 220 F.3d at 1379 ("The APA does not expressly require agencies to keep an 'open' mind, whatever such a subjective term might mean.").

183 *See, e.g.*, *NRDC v. EPA*, 683 F.2d at 768 (concluding that allowing postpromulgation notice and comment to cure prepromulgation failure would circumvent the APA); Sharon Steel Corp. v. EPA, 597 F.2d 377, 381 (3d Cir. 1979) ("If a period for comments after issuance of a rule could cure a violation of the APA's requirements, an agency could negate at will the Congressional decision that notice and an opportunity for comment must precede promulgation.").

184 *See, e.g.*, *U.S. Steel Corp.*, 605 F.2d at 291 ("Finally, we cannot say that the rule under review would have been any different if notice and comment had occurred before the effective date."); *cf.* Petry v. Block, 737 F.2d 1193, 1203 (D.C. Cir. 1984) ("[R]emand to the agency for further proceedings would not in any event be necessary.").

185 I.R.C. § 7805(b)(1)(B)–(C) (2000). Prior to 1996, the language of I.R.C. § 7805(b) presumed that all Treasury regulations would apply retroactively unless Treasury stated otherwise; but in the Taxpayer Bill of Rights 2 enacted in 1996, Congress amended I.R.C. § 7805(b) to limit retroactive application to specified dates or circumstances, including those listed in I.R.C. § 7805(b)(1)(B). *See, e.g.*, Meserve Drilling Partners v. Comm'r, 152 F.3d 1181, 1183–84 & n.4 (9th Cir. 1998) (recognizing both pre-1996 presumption in favor of retroactivity and 1996 amendment); Boris I. Bittker & Lawrence Lokken, Federal Taxation of Income, Estates and Gifts ¶ 110.4.3 (summarizing I.R.C. § 7805(b) history); Benjamin J. Cohen & Catherine A. Harrington, *Is the Internal Revenue Service Bound by Its Own Regulations and Rulings?*, 51 Tax Law. 675, 696–706 (1998) (summarizing history of I.R.C. § 7805(b) and the 1996 amendments).

final regulations predicated on temporary ones.[186] Retroactive application of regulations is judicially reviewable for abuse of discretion, but this is a difficult threshold for taxpayers to surmount.[187] Thus, even if a reviewing court vacates and remands a procedurally invalid Treasury regulation for further agency action, I.R.C. § 7805(b) would appear by its terms to permit Treasury to apply a subsequent, properly promulgated final regulation retroactively to the date of a related prelitigation NPRM, temporary regulation, or notice. Under such circumstances, the taxpayer bringing the original regulatory challenge could find itself subject to the same substantive regulation not just prospectively but for the same time period as if it had never challenged the regulation in the first place.[188]

In short, taxpayers may perceive that challenging temporary Treasury regulations on APA procedural grounds is a futile act not worth the effort. If a reviewing court is likely to conclude that Treasury's pursuit of notice and comment in finalizing regulations cures the procedural flaws of the preceding temporary ones, then taxpayers gain nothing from raising procedural challenges against Treasury's

---

186 *See, e.g.*, Treas. Reg. § 1.263A-15(a)(3) (as amended in 2005) (making regulatory language finalized with T.D. 9203 retroactively applicable to date related temporary regulations were published); Treas. Reg. § 1.163(d)-1(d) (as amended in 2005) (applying regulations finalized with T.D. 9191 retroactively applicable to date temporary regulations were published); Assumption of Partner Liabilities, T.D. 9207, 70 Fed. Reg. 30,334, 30,334–35 (May 26, 2005) (same with respect to other temporary regulations); Section 1374 Effective Dates, T.D. 9236, 70 Fed. Reg. 75,730, 75,731 (Dec. 21, 2005) (same).

187 The courts have long applied the abuse of discretion standard to evaluate Treasury's decisions to apply regulations retroactively. *See, e.g.*, Snap-Drape Inc. v. Comm'r, 98 F.3d 194, 203 (5th Cir. 1996) (applying abuse of discretion standard and upholding retroactive application, despite "inordinately harsh results" produced, because the regulations at issue were not wholly unforeseeable); Tate & Lyle, Inc. v. Comm'r, 87 F.3d 99, 107–08 (3d Cir. 1996) (finding retroactive application of Treasury regulation not an abuse of discretion and also consistent with due process); Anderson, Clayton & Co. v. United States, 562 F.2d 972, 979, 981 (5th Cir. 1977) (articulating relevant factors for reviewing retroactive application of Treasury regulations under the abuse of discretion standard); Cohen & Harrington, *supra* note 185, at 679–80 (indicating that retroactivity may represent abuse of discretion if it has harsh effects on taxpayers, creates irrational distinctions between taxpayers, or undermines taxpayer reliance on previously valid regulations). Although Congress in 1996 curtailed Treasury's ability to apply its regulations retroactively, *see supra* note 185, the changes to I.R.C. § 7805(b) appear not to have altered that standard of review. *See* Klamath Strategic Inv. Fund, LLC v. United States, 440 F. Supp. 2d 608, 625 (E.D. Tex. 2006) (applying abuse of discretion standard to post-1996 retroactivity determination but rejecting retroactive application of regulation because of taxpayer reliance on the twenty-five year history of court interpretations of the previous regulation). *Cf.* Kandi v. United States, No. C05-0840C, 2006 WL 83463, at *3 (W.D. Wash. Jan. 11, 2006) (applying abuse of discretion standard to Treasury's decision to apply new regulations prospectively only).

188 See Cohen & Harrington, *supra* note 185, at 701–02 (observing lack of clarity in temporal reach of amended I.R.C. § 7805(b)(1)(B)).

earlier procedural failures. Likewise, if Treasury is able to make a Treasury regulation retroactively applicable to the date of the prelitigation NPRM or other notice, then procedural challenges are of little use to the taxpayers who raise them. The combination of the inability of the courts to settle on a remedy when agencies attempt to cure procedurally flawed temporary regulations and the potential for retroactive application of Treasury regulations offers further disincentive against taxpayer procedural challenges in the postenforcement context.

C. *Other Doctrinal Disincentives Within Judicial Review*

The uncertainties surrounding the appropriate remedy for Treasury's overutilization of temporary regulations without good cause are not the only possible reason that taxpayers who otherwise find themselves in refund or deficiency litigation decline to raise procedural challenges. The enforcement-based posture of tax cases raises additional questions regarding the handling of APA procedural violations in the tax context and, relatedly, the applicability of judicial deference doctrines in reviewing IRS adjudications of taxpayer liabilities—questions with implications that in turn may dissuade taxpayers from asserting their procedural rights.

The standard remedy for agency errors in the course of administrative rulemaking is a remand to the agency, coupled with declaratory or perhaps injunctive relief in cases of nonstatutory review.[189] With procedural errors, the court will generally remand with instructions to follow the required procedures properly, though the court may or may not vacate the offending rule in the interim.[190] Even where the court finds a regulation's interpretation of the relevant statute unreasonable, unless the court finds the statute's meaning clear,

---

189 *See* 2 Koch, *supra* note 173, § 8.31 (recognizing prominence of remand in administrative law cases, "including such orders as remand for further proceedings, remand with instruction, and reversal and remand. Remand allows for correction while still maintaining the proper allocation of responsibilities between the courts and the agencies."); 3 Pierce, *supra* note 37, § 18.1 ("In most cases, successful prosecution of a review proceeding yields instead a judicial decision setting aside the agency action and remanding the proceeding for further agency action not inconsistent with the decision of the reviewing court."); *id.* § 18.4 (recognizing role of declaratory and injunctive relief in the course of nonstatutory review).

190 *See, e.g.*, Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005) (considering but declining to remand without vacating regulation promulgated without notice and comment); Fertilizer Inst. v. EPA, 935 F.2d 1303, 1312–13 (D.C. Cir. 1991) (remanding regulation for inadequate notice and comment); *see also* 2 Koch, *supra* note 173, § 8.31[1][b] (recognizing remand without vacation as a remedy, but noting judicial disagreement over remedy's legality); *supra* note 45 (citing sources debating merits of remanding a rule without also vacating it).

the court will generally remand the matter to the agency to reconsider the appropriate interpretation.[191] With pre-enforcement facial challenges, remanding a regulation is a conceptually simple outcome, as the validity of the regulation is the only issue at bar and a remand respects the agency's dominant policymaking role. Similarly, where a court is considering a regulation's validity in connection with an enforcement-based, as-applied challenge, remand with an instruction that the agency reconsider its decision is generally considered the appropriate remedy.[192] Occasionally courts will proceed to consider the merits of a regulated party's underlying claim rather than remand to the agency for further consideration; but those cases are rare.[193]

This is one area in which tax cases may be different. In either refund or deficiency litigation, the case that challenges the validity of a regulation, whether on procedural or substantive grounds, also comes to the court as the product of an informal adjudication in which the

---

191 *See, e.g.*, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 392, 397 (1999) (invalidating regulation as unreasonable but declining to impose an interpretation and instead remanding because "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency"); *cf.* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (instructing courts to defer to reasonable agency interpretations of ambiguous statutes they administer).

192 *See, e.g.*, NLRB v. Pipefitters, 429 U.S. 507, 522 n.9 (1977) ("When an administrative agency has made an error of law, the duty of the Court is to 'correct the error of law committed by that body, and after doing so to remand the case to the (agency) so as to afford it the opportunity of examining the evidence and finding the facts as required by law." (quoting ICC v. Clyde S.S. Co., 181 U.S. 29, 32–33 (1901))); *see also* 2 Koch, *supra* note 173, § 8.32[3](a)–(f) (recommending remand as an appropriate remedy for a variety of agency errors, including mistakes of law, in applying the law, and in failing to follow procedural requirements).

193 *See* 3 Pierce, *supra* note 37, § 18.1 ("A reviewing court can order an agency to provide the relief it denied only in the unusual case where the court concludes that the underlying law and facts are such that the agency has no discretion to act in any other manner, and then only when the court concludes that a remand to the agency would produce substantial injustice in the form of further delay of the action to which the petitioner is clearly entitled."). One prominent exception seems to be Social Security Administration denials of applications for disability benefits, where reviewing courts occasionally do order the agency to award benefits rather than merely reconsider its decision. *See, e.g.*, Rivera v. Sullivan, 923 F.2d 964, 970 (2d Cir. 1991) (declaring applicant disabled in addition to reversing agency denial of benefits as unsupported by the record). However, the statutory provision governing judicial review in that context explicitly authorizes the courts to intrude more deeply into the agency's sphere, which likely accounts for why the courts treat such cases differently. *See* 42 U.S.C. § 405(g) (2000) ("The court shall have the power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing."); *see also* Sullivan v. Hudson, 490 U.S. 877, 885 (1989) (recognizing that 42 U.S.C. § 405(g) "suggest[s] a degree of direct interaction between a federal court and an administrative agency alien to traditional review of agency action under the [APA]"). *But see* Williams v. Apfel, 204 F.3d 48, 50 (2d Cir. 1999) (remanding disability benefit denial so that agency could further develop the record).

IRS applies that regulation to reach a conclusion about a taxpayer's liability, either denying a refund or determining a deficiency. When the dispute is over whether Treasury's or the taxpayer's substantive interpretation of the tax laws should prevail, the court typically resolves the interpretive question and thus the issue of the taxpayer's liability as well, even if the court then remands the case to the IRS for the purpose of performing the actual tax calculations.[194] The I.R.C. explicitly grants the Tax Court jurisdiction to redetermine a taxpayer's liability in the course of judicial review.[195] So, if a court vacates and remands a Treasury regulation on procedural rather than substantive grounds, that court must consider what to do with the IRS's adjudicatory decision and the question of the taxpayer's liability. Theoretically, the court could also remand the taxpayer's individual case to the IRS for further adjudication in light of its invalidation of the underlying regulation, but to what end?

Many if not most Treasury regulations merely codify the government's choice among alternative interpretations of ambiguous I.R.C. provisions—interpretations that the IRS could, if it chose, pursue case by case through adjudication rather than through regulation. Consider, for example, language in Treasury Regulation § 1.61-2(a) characterizing tips as "compensation for services" and thus as an item of "gross income" under I.R.C. § 61.[196] Because Treasury has adopted in regulatory form its conclusion that tips are gross income, taxpayers as well as the IRS are legally bound to comply.[197] Before Treasury amended Treasury Regulation § 1.61-2(a) to include tips, however, the IRS pursued the same interpretive position on a case-by-case basis as a matter of enforcement policy against taxpayers who asserted that tips were nontaxable gifts.[198]

---

194 *See, e.g.*, United Dominion Indus., Inc. v. United States, 532 U.S. 822, 834, 838 (2001) (disagreeing with the government's interpretation of the consolidated return regulations in favor of taxpayer's approach as "the better answer" while allowing that Treasury could amend regulations to reflect its view).

195 For example, in deficiency litigation, the I.R.C. gives the Tax Court jurisdiction to "redetermine the correct amount of the deficiency . . . ." I.R.C. § 6214(a) (2000). Further, if in the course of the litigation the Tax Court "finds that there is a deficiency but that the taxpayer has made an overpayment of such tax, the Tax Court shall have jurisdiction to determine the amount of such overpayment." *Id.* § 6512(b)(1).

196 I.R.C. § 61(a)(1) (designating "compensation for services" as "gross income"); Treas. Reg. § 1.61-2(a) (as amended in 2003) (characterizing tips as "compensation for services").

197 *See* I.R.C. § 6662 (West Supp. 2006), amended by Pub. L. No. 109-280, § 1219, 120 Stat. 1083 (imposing penalties for noncompliance with Treasury regulations); Treas. Reg. § 1.6662-3 (as amended in 2003) (same).

198 *See, e.g.*, Roberts v. Comm'r, 176 F.2d 221, 223–26 (9th Cir. 1949) (siding with the IRS in concluding that tips are income).

A procedurally invalid Treasury regulation has no legal force. In invalidating the regulation for procedural inadequacy, however, a reviewing court has not correspondingly rejected Treasury's substantive interpretation of the I.R.C. From the perspective of an IRS examiner, an interpretation of the I.R.C. incorporated in a procedurally invalid regulation still represents IRS policy regarding the proper interpretation of the statute.[199] To continue the tips example, if a reviewing court were to invalidate Treasury Regulation § 1.61-2(a) on procedural grounds and remand the question of the taxpayer's individual liability to the IRS for reconsideration, it is all but inconceivable that the IRS examiner would reach a different substantive conclusion; nor would such an outcome necessarily be arbitrary. For that matter, if the reviewing court chooses to remand the procedurally flawed regulation without simultaneously vacating it, any substantive interpretation advanced in that regulation retains its legal effect, at least temporarily, on taxpayers as well as the IRS.

In short, remanding the question of the taxpayer's liability to the IRS for further evaluation upon declaring a Treasury regulation invalid on procedural grounds seems rather pointless. Moreover, as noted above, tax controversies often take a long time to navigate the IRS administrative processes and reach judicial review, which further renders a remand for additional agency consideration unattractive.[200] In deficiency litigation in particular, where the taxpayer is not required actually to pay the tax in advance of litigation, interest on the unpaid tax liability and related potential penalties continue to accrue so long as the dispute continues and the tax remains unpaid.[201] Accordingly, tax cases invalidating Treasury regulations on procedural grounds may represent a situation in which it may be appropriate for the reviewing court to decide the question of the taxpayer's liability rather than remand the merits to the agency pending resolution of the procedural error.

Still, just because a court decides to address the merits of the substantive interpretation underlying the taxpayer's liability rather than remand the case to the IRS for reconsideration of that issue does not

---

199 One way to think of a regulation invalidated on procedural grounds is as the equivalent of a proposed regulation, which likewise carries no legal force but may be worthy of some consideration in evaluating how to interpret the I.R.C. *Accord* Butka v. Comm'r, 91 T.C. 110, 130 (1988) (describing proposed regulation as "not a complete nullity" despite its lack of legal effect).

200 *See supra* note 178 and accompanying text.

201 *See* I.R.C. § 6601(a), (b)(5) (imposing interest on underpaid taxes beginning with the date the taxpayer accrued the liability for the tax).

mean that the taxpayer will prevail. Generally in administrative law cases, unless the statutory language at issue is unambiguous, the courts accord an agency's interpretation of a statute it administers some degree of judicial deference. Following the Supreme Court's decision in *United States v. Mead Corp.*, reviewing courts are obligated to grant what is known as *Chevron* deference to statutory interpretations expressed in formats that carry the force and effect of law.[202] Although the nature and scope of *Chevron* deference is hotly debated,[203] this much is clear: Where the *Chevron* standard applies, a reviewing court must defer to a reasonable interpretation of an ambiguous statute by the administering agency.[204] If the agency's interpretation does not have legal force, then the lesser but still deferential *Skidmore* doctrine provides the appropriate evaluative standard.[205] The *Skidmore* standard calls upon a reviewing court to evaluate the extent to which an agency's legal interpretation is entitled to deference through a series of factors: "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[206]

---

202 United States v. Mead Corp., 533 U.S. 218, 226–27 (2001); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984). I have argued elsewhere that Treasury regulations are entitled to *Chevron* deference, meaning that unless the I.R.C. is clear, then the courts must defer to Treasury's reasonable interpretations of the I.R.C. as advanced through Treasury regulations. *See Chevron*, 467 U.S. at 865–66; *see also* Swallows Holding, Ltd. v. Comm'r, 515 F.3d 162, 167–68 (3d Cir. 2008) (holding that all Treasury regulations are entitled to *Chevron* deference); Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1617–18 (2006). Others in the tax community have argued instead that the pre-*Chevron* deference doctrine of *National Muffler Dealers Association v. United States*, 440 U.S. 472, 477 (1979), should apply to evaluate tax cases. *See* Hickman, *supra*, at 1554–63 (summarizing *National Muffler* analysis and tax community dispute regarding its ongoing vitality).

203 The scholarly literature analyzing the *Chevron* deference doctrine is simply too vast to even try to summarize in a footnote. To name just a few of the numerous articles on the subject, see generally Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001); Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984; Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071 (1990).

204 *See Chevron*, 467 U.S. at 837.

205 *See Mead*, 533 U.S. at 227; *see also* Christensen v. Harris County, 529 U.S. 576, 587 (2000) (identifying *Skidmore* rather than *Chevron* as the standard for evaluating interpretations lacking the force of law).

206 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Citing *Skidmore*, the *Mead* court

Odd as it may seem, a court that invalidates a regulation on procedural grounds may nevertheless defer to the substantive interpretation of the I.R.C. contained in that regulation. Though it is unclear whether IRS interpretations of the I.R.C. that are expressed through informal adjudication are entitled to *Chevron* or merely *Skidmore* deference, it seems likely that one or the other deference standard would apply.[207] *Mead* suggests that many, if not most, statutory interpretations advanced through informal adjudications are only eligible for *Skidmore* deference.[208] IRS adjudications of taxpayer liabilities take place without public input regarding interpretive issues,[209] and the IRS remains largely free to change its litigating positions so long as it offers a reasonable justification for its inconsistency[210]—both factors potentially suggesting that *Chevron* deference may be inappropriate in the context of IRS adjudications of taxpayer liabilities. While appealable to the courts, however, IRS evaluations of refund claims or determinations regarding taxpayer liabilities are the product of semiformal proceedings mandated by Congress and are legally binding and enforceable without resort to the courts, and thus appear potentially

paraphrased these factors, saying that agency interpretations not entitled to *Chevron* deference should be evaluated based upon "the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *Mead*, 533 U.S. at 228 (citations omitted).

207 *See, e.g.*, Ronald M. Levin, Mead *and the Prospective Exercise of Discretion*, 54 ADMIN. L. REV. 771, 772 (2002) (noting that *Mead's* analysis will apply to render *Chevron* deference appropriate for some informal adjudications and only *Skidmore* deference for others); Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 821 (2002) (characterizing the question of whether *Chevron* or *Skidmore* provides the appropriate standard for evaluating informal adjudications as an "area of uncertainty" after *Mead*).

208 The agency interpretation at issue in *Mead* was the product of an informal adjudication—a ruling letter that classified day planners imported by Mead as "[d]iaries . . . , bound" subject to a 4% tariff rather than as "[o]ther items" upon which no tariff was imposed. *Mead*, 533 U.S. at 224–25. The Court concluded that such ruling letters did not carry the force of law and thus should be evaluated under *Skidmore* rather than *Chevron*. *See id.* at 231. *But see* Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347, 349 (2003) (suggesting that informal adjudications may possess "[t]he requisite delegatory intent" for *Chevron* deference).

209 *See, e.g.*, Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts—Except When They're Not*, 59 ADMIN. L. REV. 79, 118 (2007) (suggesting that *Chevron* only applies when agencies reach their interpretations through "more or less formal proceeding[s], in which input from outside the agency is sought—a rarity in informal adjudications").

210 *See, e.g.*, Richard Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1043 (2005) (contending that the informal adjudication at issue in *Mead* lacked the force of law necessary for *Chevron* deference because it "left [the agency] free to change course whenever it pleased in any minimally rational way").

Chevron-eligible.[211] Regardless, even under the purportedly less deferential *Skidmore* review standard, judicial review of interpretations of the I.R.C. advanced in connection with refund claim denials and deficiency notices may be quite deferential.[212]

In sum, doctrinal questions abound concerning both how a reviewing court should handle a taxpayer's case after invalidating a Treasury regulation on procedural grounds and the standard by which a reviewing court should evaluate the merits of the IRS's substantive interpretation of the I.R.C. under such circumstances. In other words, the law in this area is a mess. Compounded by the uncertainty regarding the appropriate remedy for temporary regulations promulgated without good cause, it is hardly surprising that taxpayers would decide that the costs of wading into the doctrinal quagmire are simply too great. Again, however, the result may be a lack of an effective check against Treasury's noncompliance with APA procedural requirements.

IV. Rethinking Pre-enforcement Judicial Review

As this Article documents, the courts and the IRS have adopted the position that I.R.C. § 7421 and the DJA should be interpreted broadly to protect the public fisc against even the most indirect or speculative threat to the inflow of tax revenues posed by pre-enforcement litigation.[213] The sum of this jurisprudence stands almost unyieldingly against pre-enforcement challenges to Treasury regulations promulgated in violation of APA procedural requirements. Yet, statutory, regulatory, doctrinal, and practical hurdles together strongly discourage taxpayers from pursuing procedural challenges in the context of refund or deficiency actions—to the point that judicial review of Treasury's procedural failings is virtually nonexistent. The practical consequence of the courts' current approach to I.R.C. § 7421 and the

---

211 *See* Merrill, *supra* note 207, at 814–15 (suggesting that congressional imposition of adjudication procedures may signal *Chevron* eligibility); *id.* at 827 (contending that agency orders "regarded as res judicata and . . . no longer open to challenge on the merits" after a given time for appeal has elapsed carry force and effect of law).

212 In another article, my coauthor and I document a study demonstrating that, in a five-year period, the government won 60.4% of cases in which the courts of appeals employed the *Skidmore* standard to evaluate agency interpretations of ambiguous statutes. *See* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1275 (2007). By comparison, Orin S. Kerr published a study several years ago finding that the government won eighty-nine percent of cases in which the courts of appeals applied the *Chevron* evaluative standard under similar circumstances. *See* Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 30–31 (1998).

213 *See supra* notes 64–72 and accompanying text.

DJA is a lack of a meaningful judicial remedy for Treasury's procedural failings.

It is perhaps quixotic to suggest that the courts rethink doctrine firmly rooted in forty years of jurisprudence. Nevertheless, while lower courts have occasionally interpreted I.R.C. § 7421 and the DJA as precluding pre-enforcement review of APA procedural challenges against Treasury or IRS actions,[214] the Supreme Court has never addressed that particular question.[215]

Though the APA is only a general statute as compared to the more specific I.R.C., the APA complements the I.R.C. in that Treasury and the IRS are bound by both statutes. The APA and its notice-and-comment rulemaking procedures reflect congressional goals of simultaneously facilitating government rulemaking and protecting individual rights through public participation.[216] Treasury's frequent noncompliance with APA procedural requirements arguably thwarts these goals and represents an unintended consequence of the Court's jurisprudence that may occasion some doctrinal rethinking.

The courts may have some flexibility in their interpretation of I.R.C. § 7421 and the DJA. Revisiting those provisions to allow some greater amount of pre-enforcement judicial review of facial challenges to Treasury regulations seems likely to resolve the problems identified in this Article.[217] In this Part, I offer thoughts on why and how the

---

214 *See, e.g.*, Stephenson v. Brady, 927 F.2d 596, 1991 WL 22835, at *2, *4–5 (4th Cir. 1991) (per curiam) (unpublished table decision); Reimer v. United States 919 F.2d 145, 1990 WL 186825, at *1–2 (9th Cir. 1990) (unpublished table decision). *Cf.* Inv. Annuity, Inc. v. Blumenthal, 609 F.2d 1, 8–9 (D.C. Cir. 1979) (reading I.R.C. § 7421 and the DJA as statutory limitations on pre-enforcement judicial review in tax context generally, notwithstanding APA presumption in favor thereof). *But see* E. Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278, 1285–86 (D.C. Cir. 1974), *overruled on other grounds*, 426 U.S. 26 (1976) (concluding that I.R.C. § 7421, the DJA, and APA § 701 do not operate to preclude judicial review of all pre-enforcement tax claims).

215 In *Simon v. Eastern Kentucky Welfare Rights Organization*, the plaintiff-appellants raised an APA procedural claim, contending that the IRS failed to put a Revenue Ruling to which they objected through notice-and-comment rulemaking. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 33–34 (1976). Although the government claimed that the court lacked jurisdiction to consider this and other claims pursuant to I.R.C. § 7421 and the DJA, *see id.* at 34–35, 37, the Court declined to consider that issue and instead dismissed the case on standing grounds. *See id.* at 37.

216 *See, e.g.*, George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1635, 1651 (1996) (characterizing notice-and-comment rulemaking as "balanc[ing] the interests of agencies in speed and efficiency and the interests of the public in participating in the rulemaking process"); *id.* at 1558–60 (describing the APA generally as a "hard-fought compromise" that struck a balance "between promoting individuals' rights and maintaining agencies' policy-making flexibility").

217 *Cf.* Seidenfeld, *supra* note 143, at 97–99 (observing that "the possibility of facing a rule challenge prompts the agency to take greater care when promulgating the rule"). Rightly or

courts might wish to consider a change and suggestions toward that end. Yet, I.R.C. § 7421 and the DJA may inevitably constrain the courts' ability to offer taxpayers a remedy for Treasury's procedural failings. Thus, in the end, a legislative solution may be necessary.

A. Recognizing and Balancing Competing Congressional Goals

Before contemplating how the courts might mitigate the current obstacles that discourage taxpayers from challenging Treasury's procedural failures, one must consider whether Treasury's noncompliance with APA procedural requirements represents the sort of problem the courts should extend themselves to consider. After all, Treasury and the IRS may not be perfect, but their attorneys are generally well regarded among the tax community as doing the best they can with the difficult job of administering the I.R.C. To paraphrase Voltaire, we should not allow perfect to be the enemy of good enough.[218]

Indeed, many in the tax community are skeptical of the need for change. A common though not universal view that I have encountered, and one clearly held by Treasury as it promulgates one temporary regulation after another, is that taxpayers just want guidance, even if the cost of that guidance is some deviation from APA rulemaking requirements.[219] This view coincides with accepted wisdom among administrative scholars holding that pre-enforcement review has substantially "ossified" agency rulemaking.[220] The public notice-and-

---

wrongly, I am presuming that the courts' jurisprudence regarding the applicability of standing and ripeness limitations in tax cases would follow, as I argue it has already done. *See supra* Part II.B.

218 THE OXFORD DICTIONARY OF QUOTATIONS 716 (Angela Partington ed., 4th ed. 1996) (translating "le mieux est l'ennemi du bien" as "[t]he best is the enemy of the good" and attributing the saying to VOLTAIRE, DICTIONNAIRE PHILOSOPHIQUE (1770)); *see also* United Hosp. v. Thompson, 383 F.3d 728, 733 (8th Cir. 2004) (rejecting process challenge against agency action deemed "incomplete" but reasonable because "[t]he perfect must not become the enemy of the good"); MCI Telecomm. Corp. v. FCC, 627 F.2d 322, 340–41 (D.C. Cir. 1980) (observing of agency regulatory efforts that "[c]omplex regulation must still be credible regulation" and "[t]he best must not become the enemy of the good"). There is little doubt that taxpayers and their advisers seek as much guidance as possible in interpreting the I.R.C. Why Treasury must satisfy this demand with legally-binding temporary regulations rather than nonbinding revenue rulings, revenue procedures, and notices is less clear, but is a topic for another day.

219 When Treasury bothers to claim good cause for issuing temporary regulations without prepromulgation notice and comment, it typically asserts the need for "immediate guidance." *See, e.g.*, Guidance Under Section 1502, T.D. 9155, 69 Fed. Reg. 51,175, 51,176 (Aug. 18, 2004); Return of Partnership Income, T.D. 9117, 69 Fed. Reg. 12,068, 12,068 (Mar. 15, 2004); Effect of Elections in Certain Multi-Step Transactions, T.D. 9071, 68 Fed. Reg. 40,766, 40,767 (July 9, 2003); *see also* INTERNAL REVENUE MANUAL § 32.1.5.4.7.5.1 (2004) (recommending for invoking good cause, "These regulations are necessary to provide taxpayers with immediate guidance.").

220 *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Pro-*

comment process alone consumes a significant amount of agency time and resources.[221] Pre-enforcement litigation of final regulations merely adds to that burden and prevents agencies from acting expeditiously to serve the public good.[222] One could argue particularly that Treasury's regular promulgation of temporary regulations is an example of an agency doing its job of providing regulatory guidance as expeditiously as possible; and that Treasury's pursuit of postpromulgation notice and comment after issuing temporary regulations, even if technically inconsistent with APA requirements, still represents a good faith effort to seek and consider outside viewpoints.

Moreover, one must take care in proposing judicial solutions for even evident governmental wrongdoing. Whether and when judges should fashion remedies is a subject of much debate. While the sentiments of *Marbury v. Madison*[223]—that every right deserves a remedy—may be laudable,[224] the courts have also long recognized that not all wrongs can or should be resolved through the judicial process.[225] Particularly when Congress has gone to great lengths to construct a remedial process, as it has done in the tax context, the courts are rightly hesitant to circumvent that process needlessly.[226] Yet, reaching

---

cess, 41 DUKE L.J. 1385, 1410–26 (1992) (listing burdens of judicial review among contributors to a more cumbersome modern APA rulemaking process); Pierce, *supra* note 143, at 88–89 (citing pre-enforcement judicial review under Abbott Labs. v. Gardner, 387 U.S. 136 (1967), as a major cause of rulemaking ossification); Mashaw, *supra* note 143, at 233–35 (criticizing pre-enforcement judicial review).

221 *See, e.g.*, PIERCE ET AL., *supra* note 38, § 6.4.6b, at 336 ("Promulgation of a single major rule often requires five to ten years and tens of thousands of agency staff hours.").

222 *See, e.g.*, Pierce, *supra* note 143, at 88–89 (advocating reversal of *Abbott Laboratories* and a return to enforcement-based judicial review); Mashaw, *supra* note 143, at 235 (extolling the virtues of postenforcement judicial review). *But see* Seidenfeld, *supra* note 143, at 97–99 (noting potential problems with APA compliance and regulation quality arising from delaying judicial review).

223 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

224 *See supra* note 1 and accompanying text.

225 *See, e.g.*, *supra* note 2 and accompanying text; *see also, e.g.*, Bush v. Lucas, 462 U.S. 367, 388 (1983) (counseling caution in supplementing comprehensive statutory and regulatory remedial schemes with judicial remedies). *But see* Schweiker v. Chilicky, 487 U.S. 412, 440 (1988) (recognizing in dicta that congressional failure to remedy apparent agency wrongs "in no way suggests a conscious choice to leave those wrongs unremedied").

226 *Cf. Schweiker*, 487 U.S. at 429 (declining to interfere with congressionally adopted remedial scheme for wrongful termination of disability benefits, "[w]hether or not we believe that its response was the best response"); *Bush*, 462 U.S. at 388 ("The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the . . . violation at issue. That question obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff.").

such a conclusion should be a matter of informed consideration rather than mere inertia.[227]

As noted, the courts have identified the congressional purpose behind I.R.C. § 7421 and the DJA as protecting the government's ability to collect tax revenues without judicial interference.[228] In other words, one could say that, in adopting I.R.C. § 7421 and the DJA, Congress has expressed a preference for legal, enforcement-based remedies for governmental error as a means of achieving its goal of protecting the fisc. The courts have steadfastly defended this perceived congressional objective through their broad interpretation of the limits on judicial review posted by I.R.C. § 7421 and the DJA.

Yet, the APA also reflects congressional purposes. For the modern regulatory state to function, Congress must delegate tremendous lawmaking power and policymaking discretion to agencies like Treasury. Nevertheless, while such delegations may be practically necessary, they are also antidemocratic. While perhaps less than ideal, the APA notice-and-comment process, coupled with judicial review of the agency's adherence to that process, serves as a second-best proxy for the legislative process when Treasury or any other agency seeks to bind the public with regulations having the force and effect of the statutes they purport to interpret. Hence, Congress intended the APA's notice-and-comment requirements not only to facilitate government rulemaking efforts but also to protect individual rights through public participation before agencies adopt binding regulations.[229] Congress provided further for the protection of individual rights with the judicial review provisions of the APA, which contemplate a broad judicial role in checking agency utilization of delegated power.[230]

The current approach to judicial review in the tax context focuses all but exclusively on the purported purposes of Congress with I.R.C. § 7421 and the DJA while essentially ignoring APA-reflected congressional goals. Though Treasury's noncompliance is not limited to its

227 *Cf. Bush*, 462 U.S. at 388 ("The [remedial] policy judgment should be informed by a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy . . . .").

228 *See, e.g.*, Hibbs v. Winn, 542 U.S. 88, 103 (2004); South Carolina v. Regan, 465 U.S. 367, 386 (1984) (O'Connor, J., concurring); Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962); *see also supra* note 59 and accompanying text.

229 *See supra* note 216 and accompanying text.

230 *See* 5 U.S.C. §§ 701–706 (2000); *see also, e.g.*, Abbott Labs. v. Gardner, 387 U.S. 136, 140–41 (1967) (recognizing APA's broad presumption in favor of judicial review of agency action); *see also supra* notes 38–43 (outlining APA and judicial support for pre-enforcement review of agency action).

regular use of temporary regulations, that particular aspect of Treasury's haphazard attitude toward APA procedural requirements offers a nice example of the potential consequences of this imbalance.

Treasury claims to value public input in promulgating regulations and demonstrates its sincerity regularly, not least through its pursuit of postpromulgation notice and comment, even as it declaims the legal necessity of doing so, and otherwise.[231] Yet, seeking public comment only after promulgating legally binding, if temporary, regulations leaves substantial room for interested parties to conclude that Treasury has made up its mind and to refrain from commenting as a result.[232]

The public participants most likely discouraged from this process are not the big firm tax attorneys and sophisticated professional organizations. The relationship between Treasury and IRS attorneys, big firm practitioners, and organizations like the American Bar Association and New York Bar Association Tax Sections is a close one; sophisticated industry groups accustomed to lobbying similarly have ways of making their views on prospective regulations known outside the notice-and-comment process.[233] Yet, while Treasury and IRS attorneys value input from these sources, they may not necessarily associate it with the APA's notice-and-comment process, as Treasury often receives informal and unsolicited feedback on regulatory projects from such parties even before proposed or temporary regulations are published. In other words, whether or not Treasury complies with notice-and-comment rulemaking requirements in promulgating its regu-

231 *See, e.g.*, I.R.S. Notice 2008-47, 2008-18 I.R.B. 869 (Apr. 17, 2008) (asking the public to identify issues for guidance projects); I.R.S. Notice 2007-17, 2007-12 I.R.B. 748 (Feb. 28, 2007) (announcing pilot program designed to increase public participation in Treasury's rulemaking efforts); Hickman, *supra* note 4, at 1797–99 (discussing evolution of Treasury and IRS attitudes toward APA compliance and citing Treasury and IRS officials concerning the value of the notice-and-comment process).

232 *See* Notice: Administrative Conference of the United States, Adoption of Recommendations, 60 Fed. Reg. 43,108, 43,111–12 (Aug. 18, 1995) (expressing concern that agency use of temporary or interim final regulations in the absence of good cause would promote perceptions of agency bias in the rulemaking process and consequently discourage public participation). *Cf.* Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. Pitt. L. Rev. 589, 620–30 (2002) (suggesting that even the standard notice-and-comment rulemaking process discourages public participation by committing agency officials to a single approach and creating perceptions of agency bias in favor thereof).

233 *Korb Laments Penalty Pileup, Promises More Practitioner-Initiated Guidance*, 2007 Tax Notes Today 206-2 (Oct. 24, 2007) (quoting IRS Chief Counsel Donald Korb as acknowledging that "this has been going on forever where people come in and give us proposed ideas—often in secret").

lations, it seems likely that Treasury will both seek and receive feedback from powerful private attorneys and organizations.

Instead, it is those who are not so well connected—small-firm tax attorneys and their clients, for example—who are most likely to be marginalized by Treasury's haphazard approach to notice-and-comment rulemaking. Though not tax-specific, a recent study by Mariano-Florentino Cuéllar of public comments in different agency rulemakings found high levels of lay public participation yielding legally relevant, if less sophisticated, comments that were clearly worthy of agency consideration.[234]

This leads to a second concern, that Treasury's failure to comply with APA procedural requirements undermines taxpayer respect for the tax system more generally. The I.R.C. and Treasury regulations interpreting its provisions collectively impose direct legal consequences upon a far larger segment of the population than any other federal regulatory scheme. Consequently, few areas of government regulation fall under as dark a cloud of public suspicion as the tax system. By discouraging taxpayer participation in the notice-and-comment process, Treasury likely encourages, or at least offers little to mitigate, public cynicism about the tax system's legitimacy.

Whether or not one accepts that premise, however, it should at least be clear that Treasury's failure to follow the laws that govern its behavior undermines the government's credibility in enforcing the tax laws as they apply to taxpayers. The government is currently engaged in a protracted war against both sophisticated tax shelter participants and unsophisticated tax protestors. Neither group is likely to point directly at Treasury's failure to follow APA procedural requirements to excuse their own actions; but Treasury plays right into the hands of its critics when it supports the aggressive pursuit of rule breakers while breaking the rules itself.[235]

We may be content with prioritizing revenue collection over more symbolic and abstract concerns about public participation and democratic legitimacy. Correspondingly, we may be satisfied with facilitat-

---

234 *See* Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 414, 460–61, 468–69 (2005).

235 *Cf.* Hartman v. Comm'r, T.C.M. (RIA) 2008-124 (2008), app. A (appending statement of former IRS Chief Counsel B. John Williams in response to finding that IRS attorneys perpetrated a fraud on the courts in battling a set of tax shelter cases: "Although some would like to deny that the tax system plays a vital role in society, and few of us actually like paying taxes, confidence in the integrity and fairness of the tax system is vital to our democracy. The tax system touches more people in this country than any other part of the government or our laws. The loss of confidence in its integrity is the loss of confidence in the government itself.").

ing interpretive guidance at the expense of public participation. Further, we may decide that there are better ways of encouraging either public participation in the rulemaking process or public faith in the tax system than requiring Treasury to adhere more faithfully to APA procedural requirements. Finally, if Congress truly intended the stark prioritization that the courts have implicitly assumed, then the choice was Congress's to make. Ultimately, however, these choices are not costless, and it is not at all clear that either Congress or the courts actually intended the consequences of the courts' current interpretation of I.R.C. § 7421 and the DJA.

In fact, the evolution of the courts' interpretation of I.R.C. § 7421 suggests the opposite: a conscious effort to balance the competing goals of safeguarding taxpayers from arbitrary action and protecting the fisc. Before the Court decided *Williams Packing* and even before Congress adopted the APA, the courts were significantly more receptive to the availability of equitable relief in tax cases. In a line of jurisprudence originating with *Miller v. Standard Nut Margarine Co.*, decided in 1932, the courts required only a demonstration of "special and extraordinary circumstances," the sort of irreparable injury ordinarily required to establish equitable jurisdiction, to allow pre-enforcement judicial review in tax cases.[236] As the courts found many taxpayers' cases eligible for equitable jurisdiction and thus entitled to judicial review, the more lenient approach of *Standard Nut Margarine* was sharply criticized as eviscerating I.R.C. § 7421.[237] Meanwhile, in the decades immediately after Congress adopted the APA in 1946, the now-disbanded Legislation and Regulation ("L&R") Division of the Office of Chief Counsel of the IRS was both heavily involved in

---

236 Miller v. Standard Nut Margarine Co., 284 U.S. 498, 551 (1932) (interpreting predecessor of I.R.C. § 7421 as inapplicable in the presence of "special and extraordinary facts and circumstances"); *see also* Bob Jones Univ. v. Simon, 416 U.S. 725, 744–45 (1974) (recognizing *Standard Nut Margarine* as equating I.R.C. § 7421 with traditional equitable principles); Paul H. Asofsky, *Injunctions and Declaratory Judgments in Federal Tax Controversies*, 28 RUTGERS L. REV. 785, 791–93 (1975) (recognizing support of *Standard Nut Margarine* and its progeny for substantial equity jurisdiction in tax cases).

237 *See, e.g.*, *Bob Jones Univ.*, 416 U.S. at 744 (describing *Standard Nut Margarine* as "effectively repealing [I.R.C. § 7421]"); James J. Lenoir, *Congressional Control over Suits to Restrain the Assessment or Collection of Federal Taxes*, 3 ARIZ. L. REV. 177, 195 (1961) (criticizing *Standard Nut Margarine* as "den[ying] any force whatever to [I.R.C. § 7421] except as declaratory of an equitable rule previously followed by the courts"); Gale Ann Norton, *The Limitless Federal Taxing Power*, 8 HARV. J.L. & PUB. POL'Y 591, 622–23 (1985) (observing that jurisprudence based on *Standard Nut Margarine* "virtually negated the Anti-Injunction Act, as taxpayers could often prove that payment of taxes would inflict irreparable financial loss").

promulgating Treasury regulations and highly attentive to administrative law requirements.[238]

Such was the climate in 1962 when the Supreme Court decided the *Williams Packing* case, replacing the exceptional circumstances view of the courts' equitable jurisdiction over tax cases with the present restrictive model.[239] In fact, Treasury did not issue temporary regulations at all until the 1970s, and then did so only on a very limited basis; it was only in the 1980s that Treasury's utilization of temporary regulations escalated dramatically.[240] Due at least in part to a reorganization of the IRS and resulting elimination of the L&R Division in the 1980s, IRS attorneys today seem much less aware of the law surrounding the APA rulemaking requirements than the IRS attorneys of that era.[241]

In short, the Court decided *Williams Packing* and opted to foreclose virtually all pre-enforcement review in the tax context at a time when Treasury and the IRS were substantially more attuned to and compliant with APA procedural requirements. The pendulum between safeguarding individual taxpayers and protecting the fisc had swung too far in one direction, and the Court with *Williams Packing* sought to correct that imbalance. Since then, of course, Treasury's lack of compliance with the APA has shifted significantly, and that pendulum arguably has swung too far the other direction, to the substantial detriment of taxpayers' procedural rights under the APA. Hence, one could argue not only that the history of jurisprudence interpreting I.R.C. § 7421 and the DJA demonstrates the susceptibility of those provisions to more than one reasonable judicial interpretation, but also that changes in the way that Treasury conducts its rulemaking efforts suggest that the courts should reconsider the implications of their jurisprudence.

---

238 *See* Hickman, *supra* note 4, at 1796–97 (documenting history of Treasury and IRS perceptions of APA requirements based on interviews with former government officials and other sources); Laurens Williams, *Preparation and Promulgation of Treasury Department Regulations Under Internal Revenue Code of 1954*, *in* 8 MAJOR TAX PLANNING 733, 748–50 (1956) (discussing role of L&R Division in drafting and reviewing Treasury regulations).

239 *See* Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 5–6 (1962) (adopting current restrictive standard); *see also Bob Jones Univ.*, 416 U.S. at 744–45 (reiterating Court's repudiation in *Williams Packing* of *Standard Nut Margarine's* "extraordinary and exceptional circumstances test").

240 *See* Hickman, *supra* note 4, at 1797.

241 *See* Hickman, *supra* note 4, at 1796–99 (documenting evolution of IRS lack of attention to IRS procedural requirements based on interviews with former Treasury and IRS officials and attorneys and commentary by others).

Moreover, though Congress rarely acts in this area, some contemporary support exists for the idea that Congress continues to care about how Treasury goes about administering the I.R.C. For example, in 1988, Congress adopted I.R.C. § 7805(e), which requires Treasury to publish an NPRM whenever it issues a temporary regulation and sunsets temporary Treasury regulations not finalized within three years.[242] Although legislative history offers little meaningful insight into Congress's intent with I.R.C. § 7805(e), scholars have documented a general understanding that Congress was sufficiently unhappy with Treasury's practice of allowing temporary regulations to sit on the books for years without any noticeable effort toward finalization to mandate that Treasury pursue at least some degree of public participation in the regulatory process.[243]

More recently, in 2007, the IRS issued Notice 2007-17 in which it announced a new pilot program that would give interested taxpayers a chance to respond to notification that the IRS is considering regulations by submitting their own draft proposals.[244] Treasury could then draw from taxpayer-submitted draft regulations in putting together its own proposed regulations.[245] Congressional reaction to this proposal was sharply negative, reflecting concerns that the regulatory process would be hijacked by special interests at the expense of broader public participation.[246]

In summary, substantial justification exists for at least considering a more relaxed approach to equitable jurisdiction and pre-enforcement judicial review in tax cases. A more cooperative interpretation of I.R.C. § 7421, the DJA, and the APA would allow the courts to effectuate both congressionally expressed goals of defending the fisc from premature judicial meddling in tax policy and of protecting individual taxpayers from arbitrary action by Treasury, rather than promoting one exclusively to the detriment of the other. All that remains is how to accomplish this task.

---

242 *See* I.R.C. § 7805(e)(1) (2000) ("Any temporary regulation issued by the Secretary shall also be issued as a proposed regulation."); *id.* § 7805(e)(2) ("Any temporary regulation shall expire within 3 years after the date of issuance of such regulation.").

243 *See, e.g.*, Asimow, *supra* note 29, at 363–64 (discussing history of I.R.C. § 7805(e)); Vasquez & Lowy, *supra* note 21, at 254 (identifying reasons for adopting I.R.C. § 7805(e)).

244 *See* I.R.S. Notice 2007-17, 2007-12 I.R.B. 748 (Feb. 28, 2007).

245 *See id.*

246 *See generally Baucus, Grassley Oppose IRS Plan to Outsource Writing of Agency Rules*, 2007 Tax Notes Today 52-32 (Mar. 15, 2007); *Tax Administration: Letting Practitioners Help Write Guidance Poses No More Risk of Influence, TIGTA Says*, Daily Rep. for Executives (BNA), at G-6 (Mar. 12, 2008).

B. Potential Doctrinal Alternatives

Should the courts be amenable to rethinking their approach to interpreting I.R.C. § 7421 and the DJA without congressional intervention, at least two possible alternatives exist for reading those provisions more cooperatively with the APA. The first option derives from statutory language, reading I.R.C. § 7421 more narrowly based on its text and thus in conjunction with, rather than displacing, the APA's waiver of sovereign immunity. The second expands the *South Carolina v. Regan* exception to render the courts' conception of the adequacy of legal remedies in tax cases more consistent with the conception in other contexts.

First, the courts could interpret the text of I.R.C. § 7421 more narrowly to permit pre-enforcement review of facial challenges to Treasury regulation validity. I.R.C. § 7421 prohibits suits "for the purpose of restraining the assessment or collection of any tax . . . ." In their quest to protect the fisc, the courts have interpreted this language not just broadly but holistically to encompass any suit that ultimately might reduce the flow of tax revenues into government coffers. Yet the text is also susceptible of a narrower interpretation focused more specifically on and temporally proximate to "assessment" and "collection" as the I.R.C. uses those terms.

Although taxpayers are obliged to file returns and pay taxes based on their own determinations of taxes owed pursuant to the I.R.C. and the many rules and regulations thereunder, the I.R.C. recognizes assessment and collection as discrete actions taken by the IRS to obtain payment of taxes, interest, and penalties determined to be due.[247] Assessment is an action taken by the government to record a taxpayer's liability for taxes, interest, or penalties on its books of account.[248] The I.R.C. both authorizes and provides rules for the circumstances and timing of that recording.[249] Collection, in turn, is the

247 *Cf.* Comm'r v. Shapiro, 424 U.S. 614, 616–17 (1976) (discussing prerequisites to IRS's ability to assess or collect taxes); Bull v. United States, 295 U.S. 247, 259–60 (1935) (discussing more generally the particular role of assessment in the exaction of taxes by the sovereign).

248 *See* I.R.C. § 6203 (2000) (prescribing the method of assessment as "by recording the liability of the taxpayer in the office of the Secretary [of the Treasury] in accordance with rules or regulations prescribed by the Secretary"); *see also* Casey, *supra* note 57, § 2:02 (describing assessment as the act of recording a taxpayer's liability).

249 I.R.C. § 6201(a) authorizes the Secretary of the Treasury "to make . . . assessments of all taxes." I.R.C. § 6201(a). I.R.C. § 6501(a) imposes a general three-year limitation period on tax assessments but provides several exceptions from that rule. *See* I.R.C. § 6501(a), (c). Other I.R.C. provisions further authorize and impose rules upon the government for making "supplemental assessments," "termination assessments," and "jeopardy assessments." I.R.C. § 6204 (authorizing supplemental assessments "whenever it is ascertained that any assessment is imper-

process by which the government obtains payment of liabilities after the IRS has made an assessment.[250] As with assessments, the I.R.C. authorizes and establishes parameters for the execution of the collection function.[251]

A plausible reading of I.R.C. § 7421 would preclude courts only from enjoining the IRS from pursuing the discrete actions of making an assessment or pursuing the collection process with respect to taxes the IRS has otherwise concluded are due.[252] In other words, one can reasonably read the text of I.R.C. § 7421 as limited to as-applied challenges in the course of IRS enforcement, more immediately in temporal proximity with assessment and collection processes. Indeed, as noted, many if not most tax cases seeking injunctive relief involve taxpayers disclaiming the IRS's actual, in-process application of the tax laws to their own particular factual circumstances, either in the course of assessment and collection or immediately prior thereto.[253] Additionally, with its statements in *Hibbs v. Winn* suggesting the availability of pre-enforcement challenges to taxpayer benefits that, if successful, would increase tax revenues, the Court has signaled some

---

fect or incomplete in any material respect"); *id.* § 6851(a), (b) (authorizing termination assessments of taxes, interest, and penalties upon finding that the taxpayer intends to leave the country or hide his assets to avoid collection, but requiring the Secretary also to notify the taxpayer immediately of such assessment); *id.* § 6852 (granting authority and imposing requirements for termination assessments in cases involving political expenditures by tax-exempt organizations); *id.* § 6861(a)–(b) (authorizing the Secretary to assess identified tax deficiencies immediately "[i]f the Secretary believes that the assessment or collection of a deficiency . . . will be jeopardized by delay," but requiring the Secretary to notify the taxpayer "within 60 days after the making of the assessment"). I.R.C. § 6215 provides for the assessment of tax deficiencies found by the Tax Court, while I.R.C. § 7485 allows a taxpayer who loses before the Tax Court to post a bond for the purpose of staying assessment pending appeal. I.R.C. §§ 6215, 7485.

250 *See, e.g.*, Casey, *supra* note 57, § 13C:01 (noting that, while the framework for the collection process is outlined in I.R.C. §§ 6302–05 and 6331–44, most collection procedure detail is prescribed through Treasury regulations and informal instructions to IRS personnel).

251 For example, I.R.C. § 6303 instructs the IRS to give notice to taxpayers and demand payment within sixty days of making an assessment. *See* I.R.C. § 6303. I.R.C. § 6306 authorizes the IRS to contract with private parties to assist in certain aspects of collecting amounts due. *See* I.R.C. § 6306. Other provisions authorize and establish extensive rules for levying upon taxpayers' property as part of IRS collection efforts. *See, e.g.*, I.R.C. § 6331(a) (authorizing the IRS to collect taxes by levy if a taxpayer neglects or refuses to pay after notice and demand); *id.* § 6334 (exempting certain property from levy by the IRS); *id.* § 6342 (instructing the IRS in how to apply the proceeds from taxpayer property seized and sold in the course of collection).

252 *Cf.* Asofsky, *supra* note 236, at 803 (recognizing the plausibility of interpreting I.R.C. § 7421 as applying only "at a relatively late stage in the taxing process, *i.e.*, after the tax has been determined").

253 *See, e.g.*, Comm'r v. Shapiro, 424 U.S. 614, 616–19 (1976) (recognizing assessment as a particular act under the I.R.C. and noting that the IRS has made an assessment in the case at bar); *supra* note 62 and accompanying text (identifying other such cases).

sympathy for a more textually oriented approach to interpreting I.R.C. § 7421.[254]

Adopting a narrower, text-based interpretation of I.R.C. § 7421, however, presents a few difficulties. First, this approach sets up a potential conflict with the DJA. The DJA's tax exception does not utilize the same potentially limiting language as I.R.C. § 7421. Instead, the DJA simply denies declaratory relief in cases "with respect to Federal taxes" except as otherwise explicitly provided.[255] Given the breadth of this language, conclusions by many lower courts that I.R.C. § 7421 and the DJA should be interpreted *in pari materia*[256] seem to derive at least partly from the courts' broad interpretation of I.R.C. § 7421.[257]

Deciding that the DJA broadly and independently limits the availability of the declaratory remedy would not necessarily preclude the courts from interpreting I.R.C. § 7421 to allow injunctive relief. Yet, declaratory relief is more commonly utilized to remedy agency procedural violations because injunctive relief requires a showing of irreparable harm, among other reasons, and thus is less likely to be appropriate.[258] Moreover, granting an injunction while denying declaratory relief seems decidedly odd.

Prior to *Williams Packing*, when the more lenient "extraordinary circumstances" test from *Standard Nut Margarine* prevailed, at least some courts interpreted the DJA as coextensive with I.R.C. § 7421, notwithstanding the former's more restrictive language, on the theory

---

254 *See* Hibbs v. Winn, 542 U.S. 88, 103–04 (2004); *see also supra* notes 73–75 and accompanying text. *Cf.* Foodservice & Lodging Inst., Inc. v. Regan, 809 F.2d 842, 846 & n.10 (D.C. Cir. 1987) (per curiam) (recognizing jurisdiction for pre-enforcement review over regulatory provision requiring employers to report data so that the IRS could study tipping patterns, tip-sharing arrangements, and tip compliance patterns as unrelated to the assessment or collection of taxes).

255 28 U.S.C. § 2201(a) (2000).

256 *See supra* note 57 and accompanying text (citing sources).

257 Hence the suggestions by some that the scope of the DJA's limitation may be broader than that of I.R.C. § 7421. *See, e.g.*, Alexander v. "Americans United" Inc., 416 U.S. 752, 759 n.10 (1974) (opining that the DJA's tax exception "is at least as broad as the prohibition of the Anti-Injunction Act"); Bob Jones Univ. v. Simon, 416 U.S. 725, 732 n.7 (1974) (same); IRS, Litigation Guideline Memorandum GL-52, 1991 WL 1167968, at *4 (June 28, 1991) (taking the position that the DJA is broader in scope than I.R.C. § 7421); CASEY, *supra* note 57, § 2:47 (recognizing existing jurisprudence treating I.R.C. § 7421 and DJA as coterminous but observing that the language of the DJA seems "more comprehensive" than I.R.C. § 7421).

258 *See* 3 PIERCE, *supra* note 37, § 18.4 ("It is more difficult to obtain injunctive relief than declaratory relief. Injunctive relief is available only when the plaintiff establishes irreparable harm and, in the context of past unlawful official conduct, only when the court determines that the conduct will persist in the absence of an injunction.").

that any other outcome would be illogical.[259] Legislative history similarly suggests that Congress intended the DJA primarily to buttress I.R.C. § 7421, rather than operate as a separate limitation upon judicial review.[260] In short, reconciling a narrower, text-based view of I.R.C. § 7421 with the broader language of the DJA presents a bit of an interpretive conundrum, though not necessarily an insurmountable one.

Second, while plausible, a narrow, text-based interpretation of I.R.C. § 7421 could, in theory, prove even less restrictive of judicial review than the approach that the Court in *Williams Packing* sought to curtail. As noted, the *Standard Nut Margarine* extraordinary circumstances test focused on traditional equitable jurisdiction doctrine rather than the text of I.R.C. § 7421.[261] That approach allowed the courts to decide on a case-by-case basis whether facts and circumstances justified equitable jurisdiction. Limiting the scope of I.R.C. § 7421 and potentially the DJA to preclude judicial review only when assessment and collection are imminent draws a more absolute jurisdictional line, potentially opening the door to any case that raises a colorable facial challenge. In other words, pursuing a narrow, text-based interpretation of I.R.C. § 7421 risks pushing the pendulum again back too far in favor of judicial review.

A second alternative modification to the current jurisprudence may prove less problematic: expanding the reach of the exception from I.R.C. § 7421 and the DJA announced in *South Carolina v. Regan*.[262] As discussed above, the Court in that case declined to impose the restrictions of I.R.C. § 7421 and the DJA to foreclose pre-enforcement judicial review where the challenging party had no legal remedy available.[263] *South Carolina v. Regan* was an unusual case in that the State was not itself the object of the challenged tax provision, and thus could never be the subject of any enforcement-based action.[264] In

259 *See, e.g.*, Bullock v. Latham, 306 F.2d 45, 47–48 (2d Cir. 1962) (recognizing jurisprudence permitting equitable jurisdiction under I.R.C. § 7421 and opining that "[i]t is unreasonable to think that a court with authority to issue a restraining order is without power to declare the rights of the parties in connection therewith" (quoting Tomlinson v. Smith, 128 F.2d 808 (7th Cir. 1942))); *see also* Asofsky, *supra* note 236, at 799–80 ("Those courts dealing explicitly with the issue [of the relationship between I.R.C. § 7421 and the DJA] have held that the two statutes are coterminous.").

260 *See* S. Rep. No. 74-1240 (1935).

261 *See supra* note 236 and accompanying text.

262 South Carolina v. Regan, 465 U.S. 367 (1984).

263 *See id.* at 378, 380–81; *see also supra* notes 90–94 and accompanying text (summarizing *South Carolina v. Regan* exception from I.R.C. § 7421).

264 *See South Carolina v. Regan*, 465 U.S. at 373, 378–81.

other words, the State had no tax, interest, or penalties to pay for which it could seek a refund, nor could the State hope to obtain Tax Court jurisdiction through a deficiency notice. The Supreme Court, however, has not expressly restricted this exception to such limited circumstances.

In theory, the courts could reasonably extend the *South Carolina v. Regan* exception to apply not only where a legal remedy is absolutely unavailable but also where a legal remedy is practically unavailable. As documented in this Article, a court could credibly conclude that the statutory, regulatory, and doctrinal limitations have such an effect on APA procedural challenges against Treasury regulations. Though there is some potential that an expanded *South Carolina v. Regan* exception might swamp the limitations of I.R.C. § 7421 and the DJA, the courts would arguably retain the flexibility to prevent that occurrence.

At a minimum, the courts could apply the *South Carolina v. Regan* exception to allow judicial review of Treasury regulations that impose information reporting requirements or other similar obligations only indirectly related to taxes due. Recall that the courts' current approach to I.R.C. § 7421 and the DJA under such circumstances, expressed in *Debt Buyers' Association v. Snow* and other cases, is that parties subject to such regulations simply decline to comply and sue for a refund of any penalties that may result.[265] The courts' present position in such cases is wholly contrary to the dominant principle behind *Abbott Laboratories v. Gardner*: that regulated parties should not be forced to choose between complying with an arguably invalid regulation or risking penalties for noncompliance.[266] Ultimately, however, extending the *South Carolina v. Regan* exception from I.R.C. § 7421 and the DJA may prove too limited to incentivize Treasury to follow APA procedural requirements more consistently.

Conclusion

Despite Treasury's claims to the contrary, the evidence is strong that Treasury has an APA compliance problem. While Treasury's public rejection of the findings of my study is perhaps predictable, it also suggests that Treasury may not reform its practices without

---

265 Debt Buyers' Ass'n v. Snow, 481 F. Supp. 2d 1, 10 (D.D.C. 2006); *see also* Foodservice & Lodging Inst. v. Regan, 809 F.2d 842, 844–45 (D.C. Cir. 1987) (per curiam) (reaching same conclusion); California v. Regan, 641 F.2d 721, 723 (9th Cir. 1981) (same); *supra* notes 96–98 and accompanying text (summarizing this jurisprudence).

266 *See* Abbott Labs. v. Gardner, 387 U.S. 136, 152–53 (1967).

outside intervention. Thus, the question is what, if anything, can be done to remedy the situation.

It is unlikely that any one explanation exists for why taxpayers fail to challenge Treasury's procedural failings in court. Undoubtedly, satisfaction with any amount of guidance regarding the meaning of the I.R.C. and a general lack of awareness of administrative law doctrines and jurisprudence among the tax bar play a role. Nevertheless, as this Article documents, it seems clear that the statutory and doctrinal limitations on judicial review in the tax context are a contributing factor as well.

Neither Congress nor the courts can force taxpayers who are satisfied with the status quo to raise legal challenges against Treasury regulations for their procedural failings. Similarly, Congress and the courts are largely powerless to educate tax lawyers and their clients regarding the availability of potential APA-based claims. For those who may be deterred by statutory and doctrinal obstacles, however, Congress and the courts have the power to effect a remedy.

Traditionally, the courts have been the primary vehicle by which regulated parties vindicate their procedural rights. Prevailing jurisprudence notwithstanding, the courts seem to have sufficient room to effect some degree of doctrinal change toward that end here. Whether the courts can or should provide the remedy for Treasury's lack of compliance with APA rulemaking requirements is not a given, however. If the courts decline to act, then hopefully Congress will. At a minimum, should Congress and the courts choose to perpetuate the status quo, they should do so after thoughtful and informed consideration of the costs rather than from inadvertence, ignorance, and inertia.