Note

Standing Up to the Treasury: Applying the Procedural Standing Analysis to Post-*Mayo*, Pre-Enforcement APA Treasury Challenges

*Casey N. Epstein**

INTRODUCTION

During the tumultuous debate over the 2017 Tax Cuts and Jobs Act (TCJA),[1] the bill's provisions to cap state and local tax (SALT) deductions[2] came to symbolize the TCJA's partisan nature, stoking controversy around the hastily passed legislation.[3] The SALT cap

* J.D. Candidate 2021, University of Minnesota Law School; B.A. 2014, Clark University. I am grateful to Professor Kristin Hickman for helping me develop this topic and offering guidance along the way. I would also like to thank Lead Note & Comment Editors Sam Cleveland and Meredith Gingold for spending a significant amount of time helping me edit and frame this Note. Finally, I would like to thank my wife, Joey Barrett, and dedicate this Note to my daughter, Yael Epstein.

1. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (codified in scattered sections of I.R.C.). While the 2017 Act is colloquially referred to as the "Tax Cuts and Jobs Act" (TCJA)—the name this Note will use—because of the reconciliation process used to pass the TCJA, its official title is "To Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018." *See* Eli Watkins, *Senate Rules Force Republicans To Go with Lengthy Name for Tax Plan*, CNN POL. (Dec. 19, 2017, 10:14 PM), https://www.cnn.com/2017/12/19/politics/tax-bill-name-delay/index.html [https://perma.cc/K2FD-6SVE].

2. § 11042, 131 Stat. at 2085–86. Under the SALT deduction scheme, taxpayers can deduct state and local real estate taxes as well as income or sales taxes. I.R.C. § 164(a); *see also* GOV'T FIN. OFFICERS ASS'N, THE IMPACT OF ELIMINATING THE STATE AND LOCAL TAX DEDUCTION 4 (2017), https://gfoaorg.cdn.prismic.io/gfoaorg/dfef3d6d-69c1-4d83-97a7-ae2f68e1692a_RCC+Report+on+SALT+Deduction-092017_Final.pdf [https://perma.cc/B5MQ-Y8BR]. SALT deductions decrease the double state-federal taxation assessed to an individual. As of 2015, almost thirty percent of Americans utilized SALT deductions. *Id.* SALT deductions disproportionately benefit the wealthy who live in high-tax states. *See* Jared Walczak, *The State and Local Tax Deduction: A Primer*, TAX FOUND. (Mar. 15, 2017), https://files.taxfoundation.org/20170315142330/Tax-Foundation-FF545.pdf [https://perma.cc/4TVN-YUZZ].

3. *See, e.g.*, Peter S. Goodman & Patricia Cohen, *It Started as a Tax Cut. Now It Could Change American Life*, N.Y. TIMES (Nov. 29, 2017), https://www.nytimes.com/2017/11/29/business/republican-tax-cut.html [https://perma.cc/6UCJ-LXKF]; Annie Nova & Darla Mercado, *How These States Are Rebelling Against the GOP Tax Code*,

appeared to target wealthy citizens in high-tax "blue" states in an apparent attempt to economically kneecap wealthy Democrats.[4] In response, many of these blue states adopted "workarounds" to the SALT legislation.[5]

The Treasury Department worked quickly to eliminate these states' workarounds, preventing them from circumventing the TCJA's SALT laws by promulgating new regulations in the summer of 2019.[6] Less than a month after the Treasury issued these SALT regulations, the same "workaround" blue states attempted to invalidate these new regulations in *New Jersey v. Mnuchin*, arguing that the Treasury's

CNBC (Jan. 23, 2018, 2:34 PM), https://www.cnbc.com/2018/01/23/how-these-states-are-rebelling-against-the-new-gop-tax-code.html [https://perma.cc/6EM8-VHEH]. Even several years after the TCJA was passed, the SALT deductions cap continues to stoke controversy. *See* Jim Tankersley, *The Trump Tax Cuts Were Supposed To Depress Housing Prices. They Haven't.*, N.Y. TIMES (Aug. 27, 2018), https://www.nytimes.com/2018/08/27/business/housing-prices-tax-law.html [https://perma.cc/7KLF-R4JA]; Michelle Singletary, *It's Time To Pay Taxes—and, Boy, Are People Steamed About the Trump 'Tax Cut' Bill*, WASH. POST (Mar. 7, 2019, 6:51 AM), https://www.washingtonpost.com/business/2019/03/07/its-time-pay-taxes-boy-are-people-steamed-about-trump-tax-cut-bill [https://perma.cc/M647-979Q]. For an example of the sloppiness of the TCJA, see DEBORAH A. GEIER, U.S. FEDERAL INCOME TAXATION OF INDIVIDUALS 2021, at 420 n.28 (2020), describing the "internally inconsistent" capital gains treatment of self-created patents under the Internal Revenue Code.

4. *See* Bob Bryan, *Top Trump Advisor Says the GOP Tax Bill Is 'Death to Democrats*,*'* BUS. INSIDER (Dec. 5, 2017, 11:23 AM), https://www.businessinsider.com/trump-gop-tax-bill-democrats-salt-deduction-text-details-2017-12 [https://perma.cc/PY6U-EA6H]. Although the TCJA targeted Democrats, the SALT caps also negatively impacted wealthy conservatives in high-tax states like New Jersey. *See* Alana Abramson, *These Are the 12 House Republicans Who Voted Against the Tax Bill*, TIME (Dec. 19, 2017, 5:44 PM), https://time.com/5072519/house-republicans-voted-against-tax-bill [https://perma.cc/28VN-QKJY].

5. Laura Davison & Lynnley Browning, *New York, New Jersey Pursue Another Battle in SALT Deduction War*, BLOOMBERG (July 17, 2019, 10:43 AM), https://www.bloomberg.com/news/articles/2019-07-17/new-york-new-jersey-pursue-another-battle-in-salt-deduction-war [https://perma.cc/G7RN-DBNR]. These "workarounds" "allow[ed] residents to donate to a state-created charitable fund instead of paying property taxes [which] could then be written off as a charitable gift on an individual's federal taxes [to] get a state tax credit." *Id.*

6. The Treasury issued its Notice of Proposed Rulemaking on August 27, 2018, before promulgating final rules in the summer of 2019. Contributions in Exchange for State or Local Tax Credits, 83 Fed. Reg. 43,563 (proposed Aug. 27, 2018) (to be codified at Treas. Reg. § 1.170A-1(h)(3)); Contributions in Exchange for State or Local Tax Credits, 84 Fed. Reg. 27,513 (June 13, 2019) (to be codified at Treas. Reg. § 1.170A-1(h)(3)). These regulations eliminated state-created charitable funds, preventing the states from implementing their workaround schemes. *Id.*; *see supra* note 5.

promulgation was "arbitrary and capricious" in violation of the Administrative Procedure Act (APA).[7]

Plaintiff-states' challenge to the Treasury's SALT regulations is not only a long-shot on the merits,[8] but it is also unclear whether the states can even command judicial review. In order for the courts to find the plaintiffs' claims justiciable, the states must survive two threshold hurdles for administrative actions against the Treasury: the Anti-Injunction Act (AIA)[9] and the doctrine of standing.[10]

The question of whether these plaintiff-states can even command judicial review is illustrative of a commonplace problem in suing the Treasury over procedurally infirm rules and regulations. While all plaintiffs require standing to maintain their suits, courts are inconsistent in applying the standing analysis to pre-enforcement administrative claims, particularly those against the Treasury.[11]

Until recently it was clear that plaintiffs could not secure judicial review for administrative challenges to the Treasury prior to enforcement.[12] That prohibition, however, unnecessarily undermined the APA.[13] Courts are now granting judicial review for some pre-enforcement administrative challenges to the Treasury; however, it is unclear whether such plaintiffs have standing and even how courts should assess plaintiffs' standing.[14]

Although the field of administrative law generally allows plaintiffs to bring pre-enforcement APA challenges,[15] the Treasury has historically enjoyed a blanket exemption from such pre-enforcement

7. Complaint for Declaratory & Injunctive Relief at 2–3, New Jersey v. Mnuchin, (S.D.N.Y. July 17, 2019) (No. 1:19-cv-06642), https://www.nj.gov/oag/newsreleases19/2019-0717_SALT-Complaint_As-Filed.pdf [https://perma.cc/PZ4U-LWRX]; Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706. This lawsuit constitutes these states' second attempt to overturn the new SALT law—prior to this administrative claim, the states filed a constitutional challenge to the SALT legislation itself which was denied on the merits and is currently pending appeal. *See* New York v. Mnuchin, 408 F. Supp. 3d 399, 402 (S.D.N.Y. 2019).

8. Davison & Browning, *supra* note 5 (quoting Duke University law professor Lawrence Zelenak).

9. I.R.C. § 7421.

10. *See infra* Part I.B.

11. *See infra* Part II.A.

12. *See infra* Part II.A.1.

13. *See infra* Part II.A.

14. *See infra* notes 132–37 and accompanying text.

15. *See* Abbott Lab'ys v. Gardner, 387 U.S. 136, 140 (1967). This Note focuses on *pre*-enforcement APA actions—standing is a non-issue for *post*-enforcement challenges as plaintiffs almost certainly satisfy the injury-in-fact and related standing requirements. *See infra* notes 83–86 and accompanying text.

actions due to the tax-specific AIA.[16] This statute prevents taxpayers from challenging their tax liability before the Internal Revenue Service (IRS) formally assesses the taxpayer's liability or the taxpayer pays their tax liability in full.[17]

The question of whether the AIA does, in fact, bar pre-enforcement APA claims has become a hot topic of late, with now-Justice Kavanaugh concluding that the AIA does preclude APA pre-enforcement claims in his 2015 D.C. Circuit *Florida Bankers* opinion[18] and the Sixth Circuit issuing a strongly divided denial of rehearing en banc in the 2019 *CIC Services* opinion.[19] The Supreme Court recently granted certiorari for *CIC Services* to resolve this question.[20]

Even if plaintiffs survive the AIA, they must still establish standing for their claim to be justiciable.[21] Because the AIA has historically served as the primary barrier to entry for taxpayer pre-enforcement challenges to the Treasury, this specific standing question has received little attention from the courts and the academy.[22] This silence has created a legal vacuum. While this vacuum was relatively unimportant until recently,[23] courts are now granting plaintiffs passage through the AIA gateway, necessitating actual analysis of whether plaintiffs have standing to sue.[24]

Perhaps unsurprisingly, recent district court decisions evaluating standing for pre-enforcement APA challenges to the Treasury are inconsistent in their standing analyses.[25] These decisions evidence the

16. I.R.C. § 7421.

17. *See infra* Part I.A. Thus, a taxpayer may challenge the Treasury/IRS once they have paid the tax that the IRS assessed against them.

18. Fla. Bankers Ass'n v. U.S. Dep't of the Treasury, 799 F.3d 1065, 1067–68 (D.C. Cir. 2015) (holding the APA pre-enforcement challenge to be non-justiciable under the AIA).

19. CIC Servs., LLC v. IRS, 925 F.3d 247, 259 (6th Cir.), *reh'g en banc denied*, 936 F.3d 501 (6th Cir. 2019), *cert. granted*, 140 S. Ct. 2737 (2020) (mem.).

20. *Id.* The Supreme Court held oral argument on *CIC Services* on December 1, 2020. While the Justices indicated significant skepticism of the IRS's position—and seem likely to rule in favor of CIC Services—the Court has not released its opinion at the time of this Note going to print. *See* Jeffery Leon & Aysha Bagchi, *SCOTUS Justices Grill IRS in Fight over Tax Reporting Rule*, BLOOMBERG TAX (Dec. 1, 2020, 12:33 PM), https://news.bloombergtax.com/daily-tax-report/supreme-court-peppers-irs-with-tough-questions-in-tax-rule-fight [https://perma.cc/67Q8-AWWP].

21. *See infra* Part I.B.2.

22. *See infra* note 70 and accompanying text.

23. See the discussion of tax exceptionalism in Part I.A.2, *infra*, which explains that standing was not a pressing issue because tax exceptionalism and the AIA fully barred all such challenges.

24. *See infra* Part II.A.2.

25. *See id.*

beginnings of a jurisdictional split.[26] Should courts apply disparate standing analyses to the same pre-enforcement APA question, they will inject a significant amount of confusion into these administrative claims—confusion that will harm all parties.[27] Instead of courts concocting unique standing analyses, they should take a uniform and consistent approach to plaintiffs' standing inquiries.

Moreover, because pre-enforcement administrative actions necessarily occur *before* the claimant is harmed by the challenged action, these claims demand a special standing analysis with relaxed requirements.[28] The Supreme Court sanctioned the use of such a "procedural standing" doctrine in the seminal case of *Lujan v. Defenders of Wildlife*, where Justice Scalia noted that "procedural rights are special."[29]

A number of courts utilize a relaxed procedural standing inquiry for administrative claims that have yet to directly injure the plaintiff.[30] This analysis eases the requirements that plaintiffs demonstrate that they have been directly injured as well as that their injury is redressable by the courts.[31] Because of the unique nature of a procedural injury, which often has not yet injured the plaintiff but will injure them in the future, courts that invoke the ordinary standing requirements would foreclose the plaintiff's opportunity to challenge such a procedural injury.[32]

While some courts invoke the procedural standing doctrine in pre-enforcement APA claims, including some administrative challenges to the Treasury, many others omit any mention of the doctrine.[33] The judiciary's inconsistency in utilizing procedural standing creates numerous corollary problems, including undermining the core policy of stare decisis, treating like plaintiffs alike, and furthering the confusion over whether the Treasury enjoys—or should enjoy—special status because of its financial importance to the government.[34]

This Note aims to rectify courts' pre-enforcement standing analyses in APA pre-enforcement suits against the Treasury. This Note explains the current problem of pre-enforcement APA taxpayer

26. *Id.*

27. *See infra* note 100 and accompanying text.

28. *See infra* Part I.B.3.

29. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 n.7 (1992) (internal quotation marks omitted).

30. *See infra* Part I.B.3.

31. *See id.*

32. *See id.*

33. *See infra* Part II.A.

34. *See infra* Part II.B.

standing, charts the rationale for the special procedural standing doctrine, and provides a coherent system of analysis for pre-enforcement administrative challenges to the Treasury going forward. Ultimately, this Note argues that the courts' current analytical framework for pre-enforcement APA standing is harmfully inconsistent. Instead, the judiciary should apply a uniform and consistent standing analysis that regularly utilizes the procedural standing doctrine. This solution will increase consistency and efficiency in the courts, provide clear expectations to both plaintiffs and agencies, and ensure that parties have remedies to harmful Treasury promulgations that violate the APA.

This Note proceeds as follows: Part I describes the evolution of tax exceptionalism—the doctrine granting the Treasury special status in the eyes of the law—the AIA, standing, and the procedural standing doctrine. Part II explores the historical difficulty in obtaining standing to challenge the Treasury in pre-enforcement APA claims, the currently developing jurisdictional split over this standing analysis, and the resulting legal tensions and problems created by the courts' inconsistencies. Part III recommends that courts employ greater use of the procedural standing doctrine to ensure fair and consistent application of the standing doctrine and explains how consistent use of the procedural standing doctrine will ameliorate current problems.

Courts should allow plaintiffs to challenge the Treasury for administratively infirm actions. Whether their claims are meritorious or not, this Note argues that plaintiffs, like the states in *New Jersey v. Mnuchin*, should have standing to sue the Treasury for pre-enforcement APA violations. Ultimately, these plaintiffs, like everyone else, should have an opportunity to be heard in court.

I. STANDING, THE APA, AND PRE-ENFORCEMENT ADMINISTRATIVE CHALLENGES TO TREASURY REGULATIONS

While most agencies have been subject to pre-enforcement APA challenges for seventy years, the Treasury enjoyed special protections from administrative law challenges under the doctrine of "tax exceptionalism." These special protections included immunity from pre-enforcement APA suits under the threshold justiciability barrier of the Anti-Injunction Act and, by implication, standing. Recent jurisprudence seemingly eliminated tax exceptionalism—casting doubt on the Treasury's historic protection from pre-enforcement APA claims. Courts, however, are still finding their way in a post-tax exceptionalism world, including learning how to navigate the oft-confounding standing doctrine in pre-enforcement administrative cases.

This Part outlines the evolution of tax exceptionalism and the justiciability doctrines of the AIA, standing, and procedural standing doctrines. Section A describes the history of the APA and tax exceptionalism. Section B describes the threshold barriers of the AIA and standing that serve to bar plaintiffs' administrative challenges against the Treasury. Section B also outlines the relaxed procedural standing doctrine that is central to this Note's solution.

In sum, this Part highlights the currently-in-flux doctrine of standing as applied to pre-enforcement administrative challenges to the Treasury.

A. TAX AGENCIES AND THE ADMINISTRATIVE PROCEDURE ACT

Tax exceptionalism evolved slowly over time, beginning in the 1960s with the Treasury's fairly regular compliance with the APA, to its regular non-compliance (and the corresponding judicial acceptance of its non-compliance) in the 1980s, to today's ostensible, albeit still uncertain, rejection of tax exceptionalism. This Section outlines the history of the on-again-off-again relationship between tax and administrative law. Subsection 1 summarizes administrative agency law and the history of the APA. Subsection 2 details the relationship between the Treasury and the APA, the history of tax exceptionalism, and the current debate over the Treasury's immunity from APA pre-enforcement challenges.

1. Administrative Agencies and the APA

Congress has long delegated its powers to executive branch agencies. Indeed, the First Congress established multiple agencies, including the Treasury, under George Washington's helm.[35] The judiciary has historically upheld such delegations so long as Congress provides some—really *any*—"intelligible principle" to guide the agency.[36]

35. An Act to Establish the Treasury Department, ch. 12, 1 Stat. 65 (1789); *see* Jerry Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1277 (2006).

36. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928); *see* Mistretta v. United States, 488 U.S. 361, 372–73 (1989) ("Accordingly, this Court has deemed it 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" (quoting Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946))).

Note, however, that the "intelligible principle" doctrine has faced recent criticism from multiple Supreme Court Justices. While the doctrine currently remains in force, the Court may limit or eliminate the intelligible principle theory in the future to require that Congress provide more specific delineated agency operational guidelines. *See* Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 77 (2015) (Thomas, J., concurring);

Courts justify such broad delegations of powers to agencies by necessity, as Congress often lacks the subject matter expertise, time, and resources to enumerate the plethora of regulations required by a given piece of legislation.[37] Notably, agencies, using congressional powers under the executive branch, often simultaneously wield adjudicatory, legislative, and executive powers.[38] This consolidation of agency authority has led to separation of powers concerns, particularly where delegations of authority are vague or overbroad.[39]

Congress's enactment of the APA in 1946 codified specific procedural rules that agencies must follow in promulgating regulations with the force of law (i.e., "legislative rules").[40] The APA provides that, prior to finalizing legislative rules, agencies must issue a Notice of Proposed Rulemaking (NOPR) and solicit public notice-and-comment,[41]

Gundy v. United States, 139 S. Ct. 2116, 2144 (2019) (Gorsuch, J., dissenting); Paul v. United States, 140 S. Ct. 342, 342 (2019) (mem.) (Kavanaugh, J., statement) ("I write separately because Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.").

37. *See, e.g.*, Pan. Refin. Co. v. Ryan, 293 U.S. 388, 421 (1935) ("The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function. . . . Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which . . . would be but a futility."); *Mistretta*, 488 U.S. at 372 ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

38. *See, e.g.*, Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions: A Foolish Inconsistency*, 72 CORNELL L. REV. 488, 492–93 (1987).

39. *See Ass'n of Am. R.Rs.*, 575 U.S. at 74 (Thomas, J., concurring) ("The Framers' dedication to the separation of powers has been well-documented, if only half-heartedly honored."); *Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting) ("If the separation of powers means anything, it must mean that Congress cannot give the executive branch a blank check to write a code of conduct governing private conduct for a half-million people."); *see also* THE FEDERALIST NO. 47, at 266 (James Madison) (E.H. Scott ed., 1898) ("The accumulation of all powers, Legislative, Executive, and Judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.").

40. Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706. *See generally* Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 472–509 (2013).

41. 5 U.S.C. § 553(b)–(c); *see* Shell Oil Co. v. EPA, 950 F.2d 741, 747 (D.C. Cir. 1991) (invalidating agency promulgation because the final rule was not a "logical outgrowth" of the NOPR). Note that the APA provides agencies several exemptions from soliciting public comment, including for "good cause"—"when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B); *see* KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., FEDERAL ADMINISTRATIVE LAW 525 (2d ed. 2014) ("Substantively, APA § 553(b)(B) allows for good cause where . . . [the rule is] contrary to the public interest if 'the interest of the public would be defeated by any requirement of advance notice.'" (quoting U.S. DEP'T OF JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT

disclose data relied upon in making the rule,[42] issue a concise general statement of the basis for the rule,[43] refrain from promulgating rules arbitrarily and capriciously,[44] and conduct an impact study on the rule's effect on small businesses.[45]

Moreover, the APA provides a broad standard of judicial review for challenges to agency actions, allowing aggrieved parties to contest agency regulations that violate the APA's requirements.[46] In *Abbott Laboratories*, the Supreme Court expressly held that this standard of judicial review includes "pre-enforcement review"—i.e., review of agency actions that will, but have not yet, injured a party.[47] This review ensures that a party is not put in the catch-22 of choosing "between abandoning his rights or risking prosecution."[48]

The APA thus "serves as a second best proxy for the legislative process" and functions as a check on anti-democratic agency actions.[49] Indeed, Congress anticipated that "'public interest' litigants . . . would prod [an] agency to go further in implementing its statutory

30–31 (1947))).

For examples of successful good cause exemptions from notice-and-comment period requirements, see *Haw. Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995), which allowed the quick adoption of air safety regulations after a wave of fatal air tour incidents; and *Jifry v. FAA*, 370 F.3d 1174, 1178–80 (D.C. Cir. 2004), which allowed the adoption of airline pilot certification requirements shortly after the September 11 terrorist attacks.

42. *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 (D.C. Cir. 1973). *But see* Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 246–47 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (arguing no such duty exists (citing Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978))).

43. 5 U.S.C. § 553(c); *see* United States v. N.S. Food Prods., 568 F.2d 240, 252–53 (2d Cir. 1977).

44. 5 U.S.C. § 706(2)(A); *see* Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41–44 (1983); Judulang v. Holder, 565 U.S. 42, 55 (2011) ("[T]he [agency's] approach must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system.").

45. 5 U.S.C. § 603(a); *see, e.g.*, Silver v. IRS, No. 19-cv-247, 2019 WL 7168625, at *2 (D.D.C. Dec. 24, 2019).

46. 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."); *see* Abbott Lab'ys v. Gardner, 387 U.S. 136, 140 (1967) (holding that the APA "embodies [a] basic presumption of judicial review").

47. *Abbott Lab'ys*, 387 U.S. at 141.

48. *See* MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 129 (2007).

49. *See* Kristin E. Hickman, *A Problem of Remedy: Responding to the Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1204 (2008).

mandate."[50] While judicial review of agency regulatory actions grants putative plaintiffs a powerful tool to ensure that agencies comply with the APA, courts are not permitted to second-guess agency decisions. Rather, the judiciary's role is to ensure agencies' baseline compliance with the APA, not to ensure that agencies make the "best" or most optimized decisions.[51]

2. Tax Agencies and Tax Exceptionalism

As an agency, the Treasury is ostensibly subject to the APA, yet the relationship between the Treasury and the APA is contentious. When the APA was first enacted in 1946, the Treasury followed its requirements closely, conscientiously evaluating whether a given promulgation constituted a legislative, interpretative, or procedural action.[52] Over time, however, due to regulatory backlogs, an increase in specific congressional grants of authority, a 1980s reorganization of IRS attorneys, and an internal reduction in tax agency administrative expertise, the Treasury greatly reduced its compliance with the APA, and tax law generally diverged from the broader principles of administrative law.[53] Scholars dubbed the Treasury's exemption from administrative law "tax exceptionalism."

Tax exceptionalism embodies many forms of divergence between tax and administrative law. For example, virtually every administrative agency enjoys *Chevron* deference.[54] The Treasury, however, received a different—and unique—standard of administrative deference for almost thirty years.[55] Another example is the Treasury's

50. Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1189 (2009).

51. *See* SEC v. Chenery Corp., 318 U.S. 80, 94 (1943) ("If the [agency's] action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so.").

52. *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, 1796 (2007). Professor Hickman's article details one theory for Treasury's contemporary embrace of tax exceptionalism as a "status quo [that] evolved slowly." *Id.* at 1799. *See generally id.* at 1795–99.

53. *Id.* at 1797–99; James M. Puckett, *Structural Tax Exceptionalism*, 49 GA. L. REV. 1067, 1069 (2015).

54. DANIEL T. SHEDD & TODD GARVEY, CONG. RSCH. SERV., R43203, *CHEVRON* DEFERENCE: COURT TREATMENT OF AGENCY INTERPRETATIONS OF AMBIGUOUS STATUTES 1 (2013), https://fas.org/sgp/crs/misc/R43203.pdf [https://perma.cc/M83P-GA79]. *See generally* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

55. *See* Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1542–59 (2006). It took the judiciary more

frequent failure to comply with APA notice-and-comment rulemaking—a failure that the judiciary regularly condones.[56] A third instance of exceptionalism is the Treasury's general non-compliance with the APA's arbitrary and capricious standard as interpreted in *State Farm*, requiring agencies to provide contemporaneous, reasoned explanations for their decisions.[57]

than twenty-five years after the *Chevron* decision to hold that the Treasury was also subject to *Chevron* deference rather than the previous—and inconsistent—*National Muffler* deference standard. *Id.* at 1538, 1554–56; Kristin E. Hickman, *Goodbye* National Muffler*! Hello Administrative Law?*, TAXPROF BLOG (Jan. 11, 2011), https://taxprof.typepad.com/taxprof_blog/2011/01/hickman-.html [https://perma.cc/C7D9-EZAM]; *see* Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 55 (2011) (holding that *Chevron* deference applies to the Treasury); Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472 (1979).

56. *See* Hickman, *supra* note 52, at 1731, 1748 (empirically finding that the Treasury did not perform notice-and-comment rulemaking in about forty percent of promulgations during a three-year period: "Treasury's rulemaking practices are frequently inconsistent with APA requirements, or at least skirt doctrinal lines."); *see also id.* at 1729 n.9 (noting that Treasury contends that its regulations are mere interpretations, not subject to the APA). For example, the Treasury often issues and re-issues temporary regulations as a substitute for following notice-and-comment rulemaking—a tactic that the judiciary accepted for thirty years. *See* Eleanor D. Wood, Note, *Rejecting Tax Exceptionalism: Bringing Temporary Treasury Regulations Back in Line with the APA*, 100 MINN. L. REV. 839, 842–43 (2016). Relatedly, the Treasury uses non-legislative subregulatory guidance to create legally binding penalties for taxpayers and tax preparers who fail to comply with certain revenue rulings and procedures. *See* Hickman, *supra* note 40, at 527–29.

57. *See* Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–44 (1983). Historically the Internal Revenue Manual instructed that "it [was] *not* necessary to justify rules that are being proposed." IRS, INTERNAL REVENUE MANUAL § 32.1.5.4.7.3(1) (2012) (emphasis added). This claim, however, is "precisely the opposite of *State Farm*'s requirement." Kristin E. Hickman, *Administrative Law's Growing Influence on U.S. Tax Administration*, 3 J. TAX ADMIN. 82, 84–85 (2017); *see also* Altera Corp. & Subsidiaries v. Comm'r, 145 T.C. 92, 112–13 (2015), *rev'd*, 926 F.3d 1061 (9th Cir. 2019) (holding IRS regulations as arbitrary and capricious for lacking reasoned explanation).

Yet another example of the Treasury's tax exceptionalism from administrative law is its embrace of retrospective regulations—that is, regulations that apply to the past, without any explanation, in violation of administrative norms. *See* Andrew Pruitt, *Judicial Deference to Retroactive Interpretative Treasury Regulations*, 79 GEO. WASH. L. REV. 1558, 1580–83 (2011); *see also* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.").

The IRS even regularly argues for—and courts often provide, albeit inconsistently—"phantom regulations"; i.e., non-promulgated "rules" that the IRS believes are implied from Congress's delegation of authority. *See* Amandeep S. Grewal, *Substance over Form? Phantom Regulations and the Internal Revenue Code*, 7 HOUS. BUS. & TAX L.J. 42, 45 n.6, 46–60 (2006).

While these examples generally illustrate the contours of tax exceptionalism and the Treasury's myriad deviations from administrative law, one last instance of tax exceptionalism, another deviation from the APA, is centrally relevant to this Note. Notwithstanding the general administrative law principle that parties can obtain judicial review to challenge an agency's regulation prior to said regulation being enforced against the party (pre-enforcement review),[58] the Treasury, under the aegis of the AIA, has historically been exempt from administrative pre-enforcement judicial review.[59]

This creates a dilemma for putative plaintiffs wishing to challenge Treasury regulations: either violate the law—potentially subjecting oneself to civil, or even criminal, penalties—in order to challenge the Treasury's regulations, or else comply with a law that the aggrieved party finds administratively infirm.[60] Until recently, the Treasury's exception from pre-enforcement review appeared ironclad; now, however, it is very much an open question whether the AIA prevents pre-enforcement review of Treasury regulations in the *administrative* context.[61]

The Supreme Court wrote in its 2011 *Mayo Foundation* opinion: "[W]e are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly recognized the importance of maintaining a uniform approach to judicial review of administrative action."[62] The Court's full-throated embrace

58. Abbott Lab'ys v. Gardner, 387 U.S. 136 (1967) (establishing a presumption in favor of judicial review); *see also* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

59. *See* Gerald S. Kerska, *Criminal Consequences and the Anti-Injunction Act*, 104 MINN. L. REV. HEADNOTES 51, 54–55 (2020).

60. *See id.*; *see also* Kristin E. Hickman, *A Slow but Steady Demise for Tax Exceptionalism*, YOUTUBE, at 17:51–19:09 (Feb. 10, 2020), https://www.youtube.com/watch?v=mzkgaujS1iQ.

61. *Compare* Cohen v. United States, 650 F.3d 717, 723 (D.C. Cir. 2011) (en banc) ("The IRS is not special in this regard; no exception exists shielding it . . . from suit under the APA."), *and* CIC Servs., LLC v. IRS, 936 F.3d 501, 505 (6th Cir.) (Thapar, J., dissenting) ("[P]eople should not have to risk prison time in order to challenge the lawfulness of government action."), *denying reh'g en banc of* 925 F.3d 247 (6th Cir. 2019), *cert. granted*, 140 S. Ct. 2737 (2020) (mem.), *with* Fla. Bankers Ass'n v. U.S. Dep't of the Treasury, 799 F.3d 1065, 1067–68 (D.C. Cir. 2015) (holding APA challenge to be nonjusticiable under the AIA), *and* CIC Servs., LLC v. IRS, 925 F.3d 247, 257 (6th Cir. 2019). *See also* Kerska, *supra* note 59, at 74 ("*CIC Services* offers the perfect opportunity to end this unjustified 'approach to administrative review good for tax law only.'" (quoting Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 55 (2011))).

62. *Mayo Found.*, 562 U.S. at 55 (internal quotation marks and alterations omitted) (quoting Dickinson v. Zurko, 527 U.S. 150, 154 (1999)). The Supreme Court held

of administrative-law-as-applicable-to-tax-agencies in *Mayo Foundation* has led a number of courts and scholars to declare that the era of tax exceptionalism is over.[63] Post-*Mayo*, a growing group of taxpayers have challenged Treasury regulations on APA grounds with varying degrees of success.[64] Notwithstanding the judiciary's recent rejection of tax exceptionalism, scholars continue to hotly debate the merits and survival of the tax exceptionalism doctrine.[65] Whether and to what degree the demise of tax exceptionalism—if it is, in fact, dead[66]—will change the results of pre-enforcement APA litigation against tax agencies remains to be seen.

in *Mayo Foundation* that *Chevron* deference does apply to tax agencies, rather than the unique *National Muffler* deference standard that courts had previously applied. *See supra* note 55 and accompanying text.

63. *See, e.g.*, Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Exceptionalism*, 99 MINN. L. REV. 221, 268–89 (2014).

64. *E.g.*, Altera Corp. & Subsidiaries v. Comm'r, 145 T.C. 91 (2015) (invalidating a Treasury regulation), *rev'd*, 926 F.3d 1061 (9th Cir. 2019); QinetiQ U.S. Holdings, Inc. & Subsidiaries v. Comm'r, 845 F.3d 555, 564 (4th Cir. 2017) (rejecting taxpayer's APA argument); *Fla. Bankers Ass'n*, 799 F.3d at 1067–68; Chamber of Com. v. IRS, No. 1:16-CV-944, 2017 WL 4682049, at *8 (W.D. Tex. Sept. 29, 2017) (invalidating a Treasury regulation); *see also* Hickman, *supra* note 57, at 82.

Three recent high-profile APA pre-enforcement challenges to the IRS have all resulted in taxpayer victories. *See Chamber of Com.*, 2017 WL 4682049; Bullock v. IRS, 401 F. Supp. 3d 1144 (D. Mont. 2019); Silver v. IRS, No. 19-cv-247, 2019 WL 7168625, at *3 (D.D.C. Dec. 24, 2019).

65. *See Fla. Bankers Ass'n*, 799 F.3d at 1067–68; *Cohen*, 650 F.3d at 723 ("The IRS is not special . . . ."); Marie Sapirie, *Entering the Next Frontier of Tax and Administrative Law*, 164 TAX NOTES 994 (2019), https://www.taxnotes.com/tax-notes-today-federal/exempt-organizations/entering-next-frontier-tax-and-administrativelaw/2019/08/12/29tgv?; Matthew A. Melone, *Light on the Mayo: Recent Developments May Diminish the Impact of* Mayo Foundation *on Judicial Deference to Tax Regulations*, 13 HASTINGS BUS. L.J. 149, 150 (2017). *Compare, e.g.*, Puckett, *supra* note 53, at 1068 ("Following *Mayo*, it has come into vogue among scholars of tax law to declare the death of tax exceptionalism .... [T]hese pronouncements are exaggerations."), *and* Stephanie Hunter McMahon, *The Perfect Process Is the Enemy of the Good Tax: Tax's Exceptional Regulatory Process*, 35 VA. TAX REV. 553, 612 (2016) ("This is not to suggest the Treasury Department's operation of the federal income tax is perfect. Nonetheless, it does do some things right .... Most certainly these attempts should not be ignored or jettisoned in the guise of eliminating tax exceptionalism."), *with* Hickman, *supra* note 52, at 1731, Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up To Be Tax Lawyers*, 13 VA. TAX REV. 517, 573 (1994) ("[T]he synergistic approach urged by this Article would facilitate the use of general administrative law learning to inform this tax issue."), Hoffer & Walker, *supra* note 63, *and* Wood, *supra* note 56.

66. *See, e.g.*, Hoffer & Walker, *supra* note 63.

B. THRESHOLD JUSTICIABILITY BARRIERS FOR TAXPAYER COMPLAINTS

Doctrines of justiciability act as threshold barriers to judicial review for putative plaintiffs. Two threshold barriers in particular—the AIA and the doctrine of standing—serve as especially thorny and convoluted bars to justiciability for pre-enforcement APA challenges to the Treasury. While the AIA's role in limiting these administrative challenges has received extended recent attention by courts and scholars, which will perhaps prompt the Supreme Court to resolve the issue in *CIC Services*, the role of standing and procedural standing in this context is only now beginning to be addressed.

The doctrine of standing has changed considerably over the course of the last century. The Supreme Court repeatedly tightened the standing requirements over the last thirty years, restricting plaintiffs' ability to obtain judicial review. At the same time, the Court also indicated that procedural injuries are subject to a more lenient standard. Notwithstanding the additional complications of two standing standards, procedural plaintiffs seemingly enjoy "special" status with respect to standing, allowing them to more easily establish standing than a plaintiff subject to "traditional" standing rules.

This Section charts the evolution, application, and convolutions of the standing doctrine and related justiciability barriers to review of pre-enforcement APA challenges to the Treasury. Subsection 1 provides an overview of the AIA as the initial justiciability barrier to entry for taxpayers seeking to enforce their administrative-procedural rights. Subsection 2 summarizes the rules and theory undergirding the doctrine of standing. Subsection 3 describes the "special" nature of procedural administrative claims with respect to standing.

1. The AIA: The Treasury's Primary Protection from Pre-Enforcement APA Claims

The AIA states that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."[67] The AIA serves to limit the options of taxpayers who wish to contest their tax liability to the IRS and Treasury.[68] Only once the taxpayer's tax is assessed can they file a petition in Tax Court prior to payment.[69] Alternatively, the taxpayer can pay the liability in full and then contest

67. I.R.C. § 7421(a). There are a number of statutory exceptions to the AIA, which are beyond the scope of this Note. *See* Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 VA. L. REV. 1683, 1688–89 (2017).

68. Daniel J. Hemel, *The Living Anti-Injunction Act*, 104 VA. L. REV. ONLINE 74, 74–75 (2018).

69. *Id.*

the assessment in federal district or federal claims court.[70] What the taxpayer cannot do, however, is seek an injunction preventing the IRS from assessing or collecting a tax prior to any assessment or enforcement.[71] In effect, a taxpayer must wait for the IRS to affirmatively assess a liability before the taxpayer may contest the tax. Theoretically, even if the taxpayer is aware that the IRS believes they have outstanding tax liability, until the Service formally assesses the tax, the taxpayer cannot sue to challenge the IRS's assessment.[72]

The AIA thus has potentially serious complications for taxpayers who wish to challenge IRS regulations that the taxpayer believes violate the APA. If a court holds that an IRS rule or regulation relates to the "assessment or collection of any tax" as defined in the AIA, then the AIA would presumably bar the taxpayer from challenging the rule or regulation before that rule was "enforced" against the taxpayer.

The relevant issue then is whether the AIA bars plaintiffs from suing the Treasury for an *administrative claim* under the APA. Historically, the answer seemed obvious, as the AIA barred most pre-enforcement suits against the IRS and Treasury.[73] Yet, some courts have recently allowed APA challenges against the Treasury to bypass the AIA.[74] It is an open question whether the AIA does or does not bar APA challenges, with judges and scholars taking strong positions on both sides.[75] The Supreme Court may resolve this issue in *CIC Services*,

70. *Id.*

71. *Id.* at 75.

72. Of course, if the IRS waited too long, the assessment statute expiration date—the IRS's statute of limitations for assessing a tax—would expire. I.R.C. § 6501.

73. The Supreme Court, in *Enochs v. Williams Packing & Navigation Co.*, provided a deadly two-part test allowing a taxpayer judicial review only if "under no circumstances could the government ultimately prevail" *and* "the taxpayer would suffer irreparable injury if collection were effected." 370 U.S. 1, 7 (1962). Professor Kristin Hickman and Gerald Kerska found only three cases that survived the *Williams Packing* test—and none of these opinions were issued by the Supreme Court. Hickman & Kerska, *supra* note 67, at 1693 n.43. This, of course, conflicts with the Supreme Court's precedent in *Abbott Laboratories*, recognizing a presumption in favor of judicial review for final agency actions. Abbott Lab'ys v. Gardner, 387 U.S. 136, 140 (1967).

74. *See, e.g.*, Silver v. IRS, No. 19-cv-247, 2019 WL 7168625, at *3 (D.D.C. Dec. 24, 2019).

75. *Compare id.* ("Plaintiffs do not seek a refund or to impede revenue collection. Instead, they challenge the IRS's adopting of regulations without conducting statutorily mandated reviews . . . . The Anti-Injunction Act therefore presents no barrier to Plaintiffs' claims."), *and* Hickman & Kerska, *supra* note 67, at 1765 ("[T]he courts can restore the AIA to its original scope and purpose of facilitating IRS enforcement efforts while also serving the APA's intended function of checking government overreach."), *with* Bryan Camp, *More on the Successful Challenge to the Anti-Inversion Regulations*, PROCEDURALLY TAXING (Oct. 2, 2017), https://procedurallytaxing.com/more-on-the

determining whether or not the AIA does, in fact, bar administrative claims to the Treasury.[76] Even if the Supreme Court does hold that the AIA mostly or even fully bars APA pre-enforcement challenges to the Treasury, the standing question posed by this Note will still remain important.[77]

2. The Justiciability Doctrine of Standing

The doctrine of standing has evolved considerably throughout the last century, especially over the last three decades, into a confusing set of often inconsistent standards. Standing derives from Article III of the Constitution, which vests "judicial power" in the Supreme Court and lower federal courts extending over all "cases" and "controversies."[78] Although the Constitution does not define "cases" or "controversies," constitutional jurisprudence interprets these terms to "impose a constellation of constraints known collectively as doctrines of justiciability."[79] These threshold requirements to judicial review

-successful-challenge-to-the-anti-inversion-regulations [https://perma.cc/DND3-PFCW] ("This is exactly the kind of suit that the Anti-Injunction Act is supposed to stop."), *and* Fla. Bankers Ass'n v. U.S. Dep't of the Treasury, 799 F.3d 1065, 1067 (D.C. Cir. 2015) ("The question before us is straightforward: Is a challenge to a tax-related statutory or regulatory requirement that is enforced by a 'penalty'—as opposed to a challenge to a statute or regulation that imposes a tax—covered by the Anti-Injunction Act . . . ? [T]he [AIA] bars this suit as premature.").

76. *See supra* notes 19–20 and accompanying text.

77. Now that the Supreme Court has granted certiorari to *CIC Services*, it may very well answer this question. CIC Servs., LLC v. IRS, 925 F.3d 247, 259 (6th Cir. 2019), *cert. granted*, 140 S. Ct. 2737 (2020) (mem.). And even if the Supreme Court does hold that the AIA unequivocally bars APA challenges to the Treasury, the question posed by this Note will remain relevant. In the recent case of *Bullock*, for example, the Department of Justice did not raise an AIA challenge—instead arguing for dismissal on the basis of lack of standing. Bullock v. IRS, 401 F. Supp. 3d 1144, 1155–59 (D. Mont. 2019). It seems rather unlikely that the Court would pronounce such a broad ruling, considering the Court's strongly worded pro-administrative language in *Mayo Foundation*. *See supra* note 62 and accompanying text.

And if, on the other hand, the Supreme Court holds that the AIA does permit all or most pre-enforcement APA challenges to the Treasury, then the standing question posed by this Note will need to be urgently addressed by the courts. *See* Kerska, *supra* note 59, at 74 ("The Supreme Court has said that no litigant should have to choose between asserting his rights and risking prosecution. That is precisely what the AIA now requires for those who wish to challenge reporting regulations. . . . *CIC Services* offers the perfect opportunity to end this unjustified 'approach to administrative review good for tax law only.'" (quoting Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 55 (2011))).

78. U.S. CONST. art. III, §§ 1–2.

79. Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 78 (2007) (noting that "the riddle of justiciability[] is that the constraints the Supreme Court has read into Article III . . . do not serve any apparent purpose"); *see also* Lee A. Albert,

include, for example, the doctrines of ripeness, mootness, political question, and standing.[80]

Standing doctrine in particular has received extended recent attention by the judiciary, with the Supreme Court issuing a number of landmark cases within the last three decades. The premise of standing requires a plaintiff to show that they have some actual personal stake or injury in the lawsuit.[81] Justice Antonin Scalia pithily described the question of standing as: "What's it to you?"[82]

To establish standing, a plaintiff must satisfy three requirements.[83] The plaintiff must demonstrate (1) that they suffered an

Justiciability and Theories of Judicial Review: A Remote Relationship, 50 S. CAL. L. REV. 1139, 1139 (1977) ("[Justiciability] constitute[s] a method of formulating and resolving questions of actionability or entitlement to relief."); Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 677 (1990) ("The entire area of justiciability is a morass that confuses more than it clarifies."); Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connection to Substantive Rights*, 92 VA. L. REV. 633, 636 (2006) ("According to the Remedial Influences on Justiciability Thesis [proposed by Fallon], when the Supreme Court feels apprehensions about the availability or non-availability of remedies, it sometimes responds by adjusting applicable justiciability rules . . . .").

80. *E.g.*, Abbott Lab'ys v. Gardner, 387 U.S. 136, 148 (1967) (ripeness) ("[The] basic rationale is to prevent the courts . . . from entangling themselves in abstract disagreements over administrative policies . . . ."); DeFunis v. Odegaard, 416 U.S. 312, 316 (1974) (mootness) ("[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." (quoting North Carolina v. Rice, 404 U.S. 244, 246 (1971))); Baker v. Carr, 369 U.S. 186, 209–33 (1962) (political question) (finding voting apportionment cases justiciable notwithstanding the political question doctrine); Frothingham v. Mellon, 262 U.S. 447, 488 (1923) (standing) ("That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.").

81. *See, e.g.*, Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RSRV. L. REV. 1061, 1064 (2009).

82. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983).

Notably, the Constitution omits any mention of the word "standing"; nor does it contain any requirement that a plaintiff have some sort of "personal stake" in the litigation. Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 168–69 (1992). The theory of standing, then, is one of significant constitutional interpretation rather than a mandate of express constitutional text. *Id. See generally id.* at 169–97 (detailing the history and evolution of the standing doctrine).

83. This standing analysis omits discussion of the zone-of-interests component of standing. Zone-of-interests standing is statutory standing and not relevant to this Note. *See* Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209 (2012). Zone-of-interests standing is generally not relevant to the tax context.

Additionally, this Note will not address the theory of taxpayer standing based on the person's *status as a taxpayer*. *See, e.g.*, John J. Egan, II, *Analyzing Taxpayer Standing*

injury-in-fact; (2) a causal connection between the injury and the complaint; and (3) that their grievance is redressable by the courts.[84] The injury-in-fact requirement—a tricky element for pre-enforcement administrative claims[85]—must be both "concrete and particularized" and "actual or imminent," as opposed to merely "conjectural or hypothetical."[86]

The Supreme Court has repeatedly emphasized iterations of this same injury-in-fact test, requiring that a plaintiff demonstrate a "personal stake" in the controversy that compels a "real need to exercise the power of judicial review in order to protect . . . the complaining party."[87] The Supreme Court has also articulated that a vague, abstracted future injury is insufficient to establish the "imminence" of an injury-in-fact, requiring instead that such a future injury be "certainly impending."[88] The other elements of standing require the plaintiff to show a causal connection that must be "fairly traceable to the

in Terms of General Standing Principles: The Road Not Taken, 63 B.U. L. REV. 717, 729–30 (1983). While it might be easy to confuse the doctrine of taxpayer standing with pre-enforcement APA standing against tax agencies, they are wholly unrelated doctrines. These taxpayer standing claims usually revolve around taxpayers challenging government policies that a given taxpayer dislikes and are virtually always nonjusticiable. *See, e.g.*, Hickman, *supra* note 49, at 1175 n.104 (citing Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2559, 2563 (2006); and then citing Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 482–83 (1982), among others). While a taxpayer-standing claim will occasionally target an IRS action, taxpayer standing cases are unrelated to tax law and the APA. *See id.*; *see also, e.g.*, Bartley v. United States, 123 F.3d 466, 469 (7th Cir. 1997) (denying standing to taxpayer who argued general IRS overcollection and misuse of taxes).

Note also that prudential standing comes into play in these generalized grievances. *See* Kristin E. Hickman, *How Did We Get Here Anyway?: Considering the Standing Question in* DaimlerChrysler v. Cuno, 4 GEO. J.L. & PUB. POL'Y 47, 48 (2006) [hereinafter Hickman, *How Did We Get Here*]. Prudential standing acts as an additional limit on plaintiffs' ability to establish justiciability; prudential standing relates to "judicially self-imposed limits on the exercise of federal jurisdiction." Allen v. Wright, 468 U.S. 737, 751 (1984). It is thus irrelevant to the pre-enforcement standing inquiry central to this Note.

84. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

85. *See* Christopher T. Burt, Comment, *Procedural Injury Standing After* Lujan v. Defenders of Wildlife, 62 U. CHI. L. REV. 275, 283–84 (1995) ("Unless a plaintiff can identify a concrete harm, establishing that he 'himself [has] suffered an injury,' the plaintiff has not proven injury in fact, and must instead work through the political process if he is to vindicate this interest." (quoting *Lujan*, 504 U.S. at 578)).

86. *Lujan*, 504 U.S. at 560 (internal quotation marks omitted).

87. Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009) (quoting Warth v. Seldin, 422 U.S. 490, 498–99 (1975); and then quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221 (1974)).

88. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 401 (2013) (citing Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).

challenged action of the defendant"[89] and that the court must be able to provide redress that is "likely, as opposed to merely speculative."[90]

Two elements of the standing requirements are particularly problematic for plaintiffs challenging procedurally deficient pre-enforcement administrative actions. First, depending on how the judiciary interprets the injury-in-fact requirement, plaintiffs can struggle to show that they have actually suffered an injury-in-fact. By definition, pre-enforcement administrative actions do not presently injure or affect a party but rather institute a rule or regulation that will impact a party down the line. If a court interprets the injury-in-fact requirement to mean that a plaintiff has "actually" been injured, then plaintiffs will struggle to show that such administrative actions with future impacts constitute present injuries-in-fact.

Second, and relatedly, plaintiffs challenging pre-enforcement administrative actions can fail to satisfy the redressability requirement of standing. A court could determine that addressing the agency's action would, in fact, be purely speculative, rather than likely, for redressability purposes.[91] Because no harmful action has yet been taken, there is nothing for a court to redress. Nor is there any certainty that any such redress would actually remedy the injury because the agency could simply renew its rule or regulation under proper procedures. While such a renewal would potentially fail during notice-and-comment proceedings, failure or other redress would not be guaranteed.

The Supreme Court emphasizes that standing is not a mere "pleading requirement[] but rather an indispensable part of plaintiff's case."[92] Thus, *all* plaintiffs must establish standing in order to bring their suit in court. If a plaintiff lacks standing, his or her suit will be dismissed, even if a court finds that the plaintiff lacks standing well into litigation.[93]

Judges and scholars cite to a variety of theories to justify the standing doctrine. These justifications include the theory that standing ensures that the courts evaluate concrete lawsuits rooted in "an

89. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180 (2000).

90. *Id.* at 181.

91. *See, e.g.*, Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26 (1976).

92. Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992); *see also* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547–48 (2016) (holding that even when Congress elevates a given harm, it cannot erase the personal injury standing requirement).

93. *See, e.g.*, DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006) (dismissing plaintiff's lawsuit for lack of standing after being adjudicated on the merits by both the district and appeals courts); *see also* Hickman, *How Did We Get Here*, *supra* note 83.

actual factual setting" as opposed to hypothetical or remote claims.[94] Relatedly, some argue that standing guarantees that parties are sufficiently adverse and ensures the possibility of judicial resolution and remedy.[95] Another especially prevalent explanation—one extolled by the late Justice Scalia—argues that standing promotes the separation of powers principle among the three branches of government.[96]

Some scholars have challenged that Article III of the Constitution mandates any standing requirement at all, positing that standing is nothing more than "a judicial construct, pure and simple."[97] Others fear that utilizing the cryptic and archaic concept of standing as a harsh gatekeeper to the courts undermines fairness, justice, and an opportunity to be heard.[98] Even amongst judges and Justices who do endorse the constitutionally mandated nature of standing, their standing analyses can and do vary widely.[99] This disparate conception of

94. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

95. Flast v. Cohen, 392 U.S. 83, 101 (1968) ("[T]he question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."). *Contra* Scalia, *supra* note 82, at 892 ("Nor is it true, as *Flast* suggests, that the doctrine of standing cannot possibly have any bearing upon the allocation of power among the branches . . . .").

96. Raines v. Byrd, 521 U.S. 811, 820 (1997) ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers." (quoting *Allen*, 468 U.S. at 752 (1984))); *see* Scalia, *supra* note 82, at 894 ("There is, I think, a functional relationship [between standing and separation of powers], which can best be described by saying that the law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*."). For an extended analysis of Justice Scalia's conception of separation of powers and standing, see Sunstein, *supra* note 82, at 215–20. *But cf.* F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673 (2017) (arguing that some cases should be exempted from the standing requirement because they fail to implicate separation of powers concerns).

97. Raoul Berger, *Standing To Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 818 (1969).

98. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 755–56 (1972) (Blackmun, J., dissenting) ("Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?"); *Flast*, 392 U.S. at 129 (Harlan, J., dissenting) ("To describe those rights and interests as personal, and to intimate that they are in some unspecified fashion to be differentiated from those of the general public, reduces constitutional standing to *a word game played by secret rules*." (emphasis added)).

99. *See* Summers v. Earth Island Inst., 555 U.S. 488, 508 (2009) (Breyer, J., dissenting) ("The law of standing does not require the latter kind of specificity. How could

standing has led administrative scholars to declare that standing jurisprudence is a "maze of often inconsistent statements."[100]

This is especially true for pre-enforcement administrative litigation, where courts apply wildly inconsistent standing analyses, sometimes applying ordinary standing analysis and other times applying the relaxed procedural standing analysis.[101]

3. Procedural Standing

While the APA expressly provides judicial review to plaintiffs challenging administratively violative agency actions,[102] there is often a question of whether and when an administrative procedural injury is sufficient to constitute an injury-in-fact as required by the standing doctrine.[103]

The standing elements of imminence and redressability are theoretically much more challenging for plaintiffs in procedural actions. Can a plaintiff really prove that his purported injury would be fully *redressed* by forcing agencies to re-do their regulating process?[104] Can a plaintiff really demonstrate that a mere failure to follow proper

it?"); Am. Bottom Conservancy v. U.S. Army Corps of Eng'rs, 650 F.3d 652, 655–56 (7th Cir. 2011); Bradford C. Mank, *Judge Posner's Practical Theory of Standing: Closer to Justice Breyer's Approach to Standing than Justice Scalia's*, 50 HOUS. L. REV. 71, 89–103, 115–20 (2012) (noting that both Justice Breyer and Judge Posner have more "pragmatic" (although not identical) approaches to standing); *see also* Clifford M. Gerber, Note, *Standing To Challenge Internal Revenue Service Decisionmaking: The Need for a Better Rationale*, 6 HOFSTRA L. REV. 1041, 1050 n.61 (1978) ("[T]he court in *SCRAP* accepted the smallest degree of injury as sufficient to support a claim of standing." (citing United States v. Students Challenging Regul. Agency Procs., 412 U.S. 669, 689 n.14 (1973))).

100. HICKMAN & PIERCE, *supra* note 41, at 919. These inconsistencies in standing jurisprudence often derive from conflicting political ideologies amongst the Justices—for much of the last three decades the Supreme Court split 4-4 over standing issues with Chief Justice Roberts acting as the deciding vote.

Scholars contend, for example, in the case of *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007), that Chief Justice Roberts compelled the majority to accept his language granting states superior standing claims. *See* HICKMAN & PIERCE, *supra* note 41, at 966. The question, then, is how much of contemporary standing jurisprudence starts and stops exclusively with the swing vote of Chief Justice Roberts. *See id.*

101. *See infra* Part II.A.

102. 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof.").

103. *See, e.g.*, *supra* Part I.B.2.

104. *See* Burt, *supra* note 85, at 275–76 ("[S]ince the agency might have reached the same result even if it had followed the correct procedure. . . . procedural plaintiffs are never able to show that adherence to procedure will definitely avert subsequent harm, [thus] they are always unable to meet the redressability requirement of standing.").

procedure causes him *imminent* harm?[105] Under standing jurisprudence, however, procedural injuries are "special."[106] Courts have long assessed procedural claims based on whether the agency's actions could plausibly cause the plaintiff future harm.[107] The Supreme "Court's acknowledgment that procedural injuries are 'special' for standing purposes was no more than belated recognition of a reality that should have been obvious to any student of administrative law."[108]

"A procedural injury occurs when an agency fails to follow a legally required procedure," such as the APA, "and this failure increases the risk of future harm to some party."[109] The principle behind this procedural theory of standing is that litigants who are procedurally impaired are "special" in the sense that ignoring their procedural rights could lead to injury, even though they have not yet been injured.[110] Indeed, Justice Scalia, a prominent promoter of the importance of standing,[111] explicitly noted this procedural exception to traditional standing rules in the seminal case of *Lujan v. Defenders of Wildlife*, stating that "'procedural rights' are special: 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."[112]

Justice Scalia provided an illustration of such a procedurally special injury. Imagining a hypothetical "construction of a federally licensed dam" where the adjacent neighbor challenges the dam because of "the licensing agency's failure to prepare an environmental impact statement,"[113] Justice Scalia expressly found that "even though the dam will not be completed for many years"—and thus the plaintiff could not meet the traditional standing requirements of imminence

105. *See id.* at 281 ("Procedural plaintiffs will necessarily have difficulty showing imminence because the ultimate substantive harm they seek to prevent will occur, if at all, at some time in the future.").

106. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 n.7 (1992) ("There is this much truth to the assertion that 'procedural rights' are special . . . .").

107. *See* Richard J. Pierce, Jr., *Making Sense of Procedural Injury*, 62 ADMIN. L. REV. 1, 2 (2010) ("In thousands of cases, courts have routinely decided whether an agency erred by refusing to grant . . . required procedure, e.g., a hearing without requiring the petitioner to demonstrate that the agency certainly, or even probably, would have reached a different result if it had granted the [procedure].").

108. *Id.*

109. Burt, *supra* note 85, at 276.

110. *Lujan*, 504 U.S. at 572 n.7.

111. *See, e.g.*, *supra* note 96 and accompanying text.

112. *Lujan*, 504 U.S. at 572 n.7.

113. *Id.*

and redressability—the neighbor-plaintiff would have standing because of the special relaxed standing rules for procedural injuries.[114]

Courts regularly, but not always, analyze procedural claims under these relaxed standards. For example, many courts apply an "easy-to-meet plausibility test in determining whether an alleged deprivation of a procedural right qualifies as a procedural injury sufficient to support a grant of standing."[115] This test relates to redressability, simply asking whether the agency's faulty process plausibly, rather than definitely, harmed the plaintiff.[116] Alternatively, a minority of courts apply a probability test, where a plaintiff must demonstrate that he or she was *probably* injured by the agency's faulty process.[117] Scholars have noted the flaws inherent in a more stringent probability test which, like the application of traditional standing doctrine to procedural injuries, virtually guarantees that petitioner will fail to establish standing.[118]

Notwithstanding Justice Scalia's directive in *Lujan*, courts are far from unanimous in applying special procedural standing analysis.[119] Some courts have flatly disagreed with the *Lujan* proposition that procedural plaintiffs are special with respect to the standing inquiry.[120] Environmental plaintiffs asserting procedural lawsuits have fared

114. *Id.*

115. Pierce, *supra* note 107, at 8.

116. *See id.* at 2–3 ("[A] petitioner prevails by alleging only unlawful deprivation of a procedural right that might plausibly have changed the outcome of a substantive dispute.").

117. *See, e.g.*, Ctr. for L. & Educ. v. Dep't of Educ., 396 F.3d 1152, 1159 (D.C. Cir. 2005) ("[A] procedural-rights plaintiff must demonstrate standing by 'show[ing] . . . that it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest.'" (second alteration in original) (quoting Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 664–65 (D.C. Cir. 1996))).

118. *See* Pierce, *supra* note 107, at 12 ("Because the probability test will almost always yield a holding that a petitioner lacks standing, [that] method of applying the procedural injury test has the potential to eliminate de facto the procedural standing doctrine . . . .").

119. *See, e.g.*, Burt, *supra* note 85, at 277 & n.7 (discussing the "different methods [used] to assess standing in procedural injury cases").

120. *See, e.g.*, Coastal Habitat All. v. Patterson, 601 F. Supp. 2d 868, 880 n.15 (W.D. Tex. 2008) ("*Lujan*'s footnote seven cites no cases . . . . The Alliance asks *Lujan*'s footnote seven to carry more weight here than is warranted . . . ."); Nulankeyutmonen Nkihtaqmikon v. Impson, 462 F. Supp. 2d 86, 99 (D. Me. 2006) (discussing *Lujan* and finding that the Court "specifically rejected" the proposition "that 'the Government's violation of a certain (undescribed) class of procedural duty satisfies the concrete-injury requirement by itself'" (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 573 n.8 (1992))); *see also* Burt, *supra* note 85, at 285 (arguing that special rights for procedural injuries undercuts *Lujan*'s main holding—"eviscerat[ing] the standing requirements of the Constitution").

somewhat better in receiving the relaxed procedural standing doctrine.[121] While pre-enforcement APA challenges against the Treasury have not historically enjoyed special procedural standing rights,[122] recent pre-enforcement tax-administrative cases have begun analyzing plaintiffs' standing with the lenient procedural standing rights theory.[123] With extremely limited precedent, it remains to be seen whether other courts embrace or reject the special standing status of procedurally injured plaintiffs in the pre-enforcement tax-administrative context.

In sum, the Treasury has historically been immune from ordinary pre-enforcement administrative law challenges under the AIA, but that immunity appears to be changing. Courts are now inconsistently providing plaintiffs a pathway to litigate pre-enforcement administrative procedural claims against the Treasury, but these plaintiffs must still establish standing. Whether plaintiffs have standing to sue in these pre-enforcement administrative claims often turns on whether the court analyzes plaintiffs' claims under ordinary or procedural standing analyses. While Justice Scalia indicated in *Lujan* that plaintiffs' standing should be assessed under procedural standing analysis, few courts employ the procedural standing inquiry.

II. EMERGING JURISDICTIONAL SPLIT ON PRE-ENFORCEMENT APA STANDING SUITS AGAINST THE TREASURY

Historically, under tax exceptionalism, plaintiffs struggled to secure standing, with a small but growing set of jurisdictions weighing in on pre-enforcement APA claims against the Treasury. These courts' decisions are inconsistent with one another and reflect an emerging and problematic jurisdictional split. This split, if it continues

121. *Compare* Wash. Env't Council v. Bellon, 741 F.3d 1075, 1077 (9th Cir. 2014) (denying rehearing en banc and rejecting arguments that *Massachusetts v. EPA* grants non-state entities relaxed standing for procedural injuries), *with id.* at 1080 (Gould, J., dissenting) (arguing that "*Massachusetts v. EPA* also confers standing upon individuals seeking to induce state action to protect the environment"), WildEarth Guardians v. Jewell, 738 F.3d 298, 305 (D.C. Cir. 2013) (granting relaxed standing requirements for procedural injuries), *and* Ctr. for Biological Diversity v. EPA, 861 F.3d 174, 182 (D.C. Cir. 2017) ("In a case alleging a procedural injury, we 'relax the redressability and imminence requirements' of standing." (quoting *WildEarth*, 738 F.3d at 305)).

122. Again, from a very limited sample size. *See supra* note 73 and accompanying text.

123. *See, e.g.*, Silver v. IRS, No. 19-CV-247, 2019 WL 7168625, at *1 (D.D.C. Dec. 24, 2019) ("In [procedural injury] cases, the redressability and imminence requirements of standing are relaxed." (citing *WildEarth*, 738 F.3d at 305)). *But cf.* Bullock v. IRS, 401 F. Supp. 3d 1144, 1155–59 (D. Mont. 2019) (omitting mention of the procedural standing doctrine in a discussion of failure to observe APA-mandated procedure).

unabated, undermines core judicial values, including the principles that every right has a remedy, that "global" doctrines are treated uniformly,[124] that persons can challenge their liability stemming from agency decisions without being forced to break the law or incurring civil or criminal liability, and that like persons be treated alike. This emerging jurisdictional split over whether plaintiffs have standing to challenge pre-enforcement APA violations against the Treasury creates a number of serious problems that must be promptly addressed.

This Part documents examples of inconsistent judicial application of standing in the pre-enforcement APA tax agency context as well as policy tensions between the doctrines of traditional standing, procedural standing, and tax exceptionalism. Section A analyzes two recent cases—*Bullock* and *Silver*—that evince the emergence of a jurisdictional split over standing in pre-enforcement APA suits against the Treasury. Section B charts the numerous policy problems inherent in the courts' current use (or lack thereof) of the procedural standing doctrine.

A. EMERGING JURISDICTIONAL SPLIT

Recent cases analyzing standing evince an emerging jurisdictional split in pre-enforcement APA suits against the Treasury. While courts are increasingly granting plaintiffs standing to initiate such administrative suits against the Treasury, the courts' analyses are highly inconsistent. These courts analyze the standing inquiry disparately, differing on whether to apply the ordinary standing doctrine or the procedural standing doctrine.

This Section explores this emerging jurisdictional split over pre-enforcement APA standing in tax cases. Subsection 1 explores courts' historically restrictive standing analyses for tax cases. Subsection 2 documents the recent *Bullock v. IRS* and *Silver v. IRS* decisions. In both cases the court granted plaintiffs standing. However, in finding that plaintiffs had standing, the two courts engaged in divergent standing analyses. Subsection 3 contextualizes these cases and explains how they demonstrate an emerging jurisdictional split.

124. E.g., that a doctrine, especially a constitutionally derived doctrine such as standing, should be applied consistently across jurisdictions.

1. Historical Denial of APA Standing to Pre-Enforcement Tax APA Challenges

Historically, the AIA effectively barred APA pre-enforcement challenges to the Treasury;[125] few courts (and few scholars) have addressed justiciability challenges, like standing, to such administrative claims.[126] However, several courts did analyze pre-enforcement APA challengers' claims of standing in actions against the Treasury. Of the few early decisions to analyze such claimants' standing, courts' analyses were strict and summarily denied plaintiffs' standing.[127]

In *Simon v. Eastern Kentucky Welfare Rights Organization*, for example, indigent rights organizations attempted to invalidate an IRS revenue ruling that reduced the requirement for tax-exempt hospitals to offer emergency care to those unable to pay for violating notice-and-comment rulemaking procedures under the APA.[128] Instead of relying on the AIA, the *Eastern Kentucky* court held that plaintiffs lacked standing, primarily due to the court's inability to redress plaintiffs' alleged harms.[129]

Justice Stewart concurred in *Eastern Kentucky*, writing: "I cannot now imagine a case . . . where a person whose own tax liability was not affected *ever* could have standing to litigate the federal tax liability of someone else."[130] This combination of resistance to standing and the

125. *See supra* note 73 and accompanying text.

126. *E.g.*, Stephanie H. McMahon, *Pre-Enforcement Litigation Needed for Taxing Procedures*, 92 WASH. L. REV. 1317, 1353 (2017) ("[F]ew studies focus on justiciability and taxation because of the limited number of tax standing cases."). For a list of scholars analyzing standing vis-à-vis tax APA challenges, see Jasper L. Cummings, Jr., *Standing To Sue About Taxes*, TAX NOTES FED., July 1, 2019, at 45, 46 n.5, which collects articles. Note that only some of these articles deal with standing specifically in relation to APA tax applications. For a short list of cases hitting the "sweet spot" where plaintiffs avoided the AIA and were found to have standing, see Jasper L. Cummings, Jr., *Standing To Sue About Taxes, Part 2*, TAX NOTES FED., July 15, 2019, at 323, 327–30 [hereinafter Cummings, *Standing To Sue, Part 2*] (attempting "to cite all of the relatively few court decisions" meeting those criteria).

127. *See* Tax Analysts & Advocs. v. Blumenthal, 566 F.2d 130, 134 (D.C. Cir. 1977) ("Appellants . . . seek[] a declaratory judgment that certain published and private rulings of the [IRS] . . . are contrary to the [I.R.C.] and therefore unlawful. . . . We . . . conclude that both appellants lack standing as federal taxpayers . . . ."); Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 28 (1976) ("[Plaintiffs] asserted that the [IRS] violated the Internal Revenue Code . . . and the [APA] by issuing a Revenue Ruling . . . . We conclude that these plaintiffs lack standing to bring this suit.").

128. *E. Ky. Welfare*, 426 U.S. at 32–34.

129. *Id.* at 42–43, 42 n.23.

130. *Id.* at 46 (Stewart, J., concurring) (emphasis added). The D.C. Circuit similarly noted the difficulty of establishing standing, stating that "[i]t is well-recognized that

AIA historically "reduce[d] judicial review through a two-step sieve. If litigation is not stopped by one, it is stopped by the other."[131]

The bulk of these cases denying standing for pre-enforcement APA challenges to the Treasury, however, occurred before *Lujan*, which concluded that plaintiffs who suffered procedural injuries should enjoy a relaxed standing analysis.[132] Moreover, the judiciary's approach to pre-enforcement administrative justiciability matters has fluctuated since the Supreme Court's 2011 *Mayo* decision.[133] Post-*Mayo*, plaintiffs have increasingly challenged and prevailed against the Treasury in pre-enforcement APA actions, including establishing standing.[134]

Notwithstanding the courts' newfound willingness to apply administrative law to the Treasury, pre-enforcement APA tax justiciability jurisprudence is littered with inconsistencies.[135] The standing doctrine, in particular, has been sparsely and inconsistently analyzed by the courts in this context,[136] with the doctrine of procedural standing receiving even more inconsistent and sporadic attention.[137]

Some scholars argue that the judiciary's prior zealous and strict standing jurisprudence for pre-enforcement tax APA challenges stems from tax exceptionalism.[138] "[T]he Court's tax-exceptionalist focus on

the standing inquiry in tax cases is more restrictive than in other cases." Nat'l Taxpayers Union, Inc. v. United States, 68 F.3d 1428, 1434 (D.C. Cir. 1995).

131. McMahon, *supra* note 126, at 1358.

132. *See supra* Part I.B.3.

133. Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 55 (2011) ("Mayo has not advanced any justification for applying a less deferential standard of review to Treasury Department regulations . . . . [W]e are not inclined to carve out an approach to administrative review good for tax law only.").

134. Indeed, since *Mayo* no court has found any Treasury regulation to be interpretative rather than substantive. *See* Sapirie, *supra* note 65, at 995 (citing Professor Kristin E. Hickman).

135. As noted in Part I.B.1, courts and scholars are currently focused on examining the extent of the AIA with respect to APA pre-enforcement challenges. *See supra* Part I.B.1. While a Supreme Court ruling that the AIA fully bars pre-enforcement APA challenges—an unlikely result—would obviate this standing inquiry, the two analyses are wholly separate. *See supra* note 77 and accompanying text.

136. *See, e.g.*, Cummings, *Standing To Sue, Part 2*, *supra* note 126, at 327–28 (noting the "relatively few court decisions . . . finding that plaintiffs were in the sweet spot of avoiding the AIA and having standing" as well as cases where standing was "so obvious" that the court did not even analyze standing).

137. *See supra* notes 119–23 and accompanying text.

138. *See* Lynn D. Lu, *Standing in the Shadow of Tax Exceptionalism: Expanding Access to Judicial Review of Federal Agency Rules*, 66 ADMIN. L. REV. 73, 128 (2014) (arguing that tax exceptionalism implicitly drove the *Eastern Kentucky* and *Wright* Courts to

revenue collection and, relatedly, on individual agency actions to enforce taxpayer compliance, effectively insulated the agency from general administrative law principles supporting judicial review."[139]

The courts' historical harsh standing analysis and myriad inconsistencies in standing analysis for pre-enforcement APA challenges to the Treasury leave plaintiffs, the Treasury, and taxpayers seeking certainty over their taxes left in the lurch. Current jurisprudence is unclear whether and when plaintiffs will meet the justiciability thresholds to successfully make pre-enforcement APA challenges against the Treasury. All parties stand to suffer from this uncertainty.

2. Post-*Mayo* Standing Jurisprudence

Recently, courts have continued their apparent rejection of tax-exceptionalism by granting plaintiffs suing the Treasury standing to launch pre-enforcement APA actions. Two cases highlight courts' recent deviation from their historically harsh standing analyses. Yet these cases also demonstrate that these courts' approaches to standing are far from uniform. Subsection a explores the recent *Bullock v. IRS* ruling, with its emphasis on states' special standing rights via *Massachusetts v. EPA*. Subsection b assesses the recent case of *Silver v. IRS*, which utilizes the procedural standing doctrine to grant the plaintiff standing to challenge the Treasury's administrative actions.

a. Bullock v. IRS

In *Bullock v. IRS*, Montana and New Jersey challenged the IRS's decision to rescind a regulation that required 503(c)(4) "social welfare organizations" to report charitable contributions,[140] allowing "dark money" to flow unreported to these nonprofits.[141] The District of Montana nullified the IRS's new revenue procedure, holding that

deny taxpayers' standing); *see also id.* at 112 ("[I]t is far from clear why the IRC, in particular, should be interpreted to foreclose such standing.").

139. *Id.* at 128.

140. Rev. Proc. 2018-38 (eliminating the charitable reporting requirement found in Treas. Reg. § 1.6033-2).

141. Complaint at 8–9, Bullock v. IRS, 401 F. Supp. 3d 1144 (D. Mont. 2019) (No. 18-CV-00103) ("The names and addresses of significant contributors . . . play a significant role in ferreting out other nefarious activity . . . . [C]ampaign spending by 'dark money' groups—primarily, organizations that are tax-exempt . . . increased more than fifty-fold between 2004 and 2016.").

the promulgation was an invalid attempt to "evade the time-consuming procedures of the APA."[142]

Under Code section 6033(a)(1), nonprofits[143] must file a Form 990 tax return stating "information for the purpose of carrying out the internal revenue laws as the . . . regulations prescribe."[144] In 1969, Congress additionally codified that, for 501(c)(3) charitable nonprofits, their 990s must include "the names and addresses of all substantial contributors."[145] The following year, the Treasury issued regulations extending the substantial contributor filing requirement to other noncharitable tax exempt entities (beyond just 501(c)(3) organizations).[146] Thus, under the Treasury's regulations, 501(c)(4) "social welfare" organizations, which include "politically active groups like the Koch brothers-backed Americans for Prosperity," must report all substantial contributors on their Form 990.[147]

In 2018, the IRS issued Revenue Procedure 2018-38, reversing this regulation by instructing that "tax-exempt organizations required to file the Form 990 . . . other than those described in 501(c)(3), will no longer be required to provide names and addresses of contributors."[148] The IRS stated that it "does not need personally identifiable information of donors . . . to carry out its responsibilities."[149]

Critics, however, decried this new rule as enabling "dark money groups to hide the identities of donors from state regulators and the

142. *Bullock*, 401 F. Supp. 3d at 1159 (quoting Hemp Indus. Ass'n v. DEA, 333 F.3d 1082, 1091 (9th Cir. 2003)); *see also* Sapirie, *supra* note 65, at 994 (summarizing *Bullock*).

143. Or "every organization exempt from taxation under section 501(a)." I.R.C. § 6033(a)(1).

144. *Id.*

145. *Id.* § 6033(b)(5). "Substantial contributor" is defined as a donor who gave more than $5,000 to the organization in a tax year. *Id.* § 507(d)(2)(A).

146. Treas. Reg. § 1.6033-2(a)(2)(ii)(*f*) (2020) ("The information generally required to be furnished by an organization exempt under section 501(a) is . . . . the names and addresses of all persons who contributed, bequeathed, or devised $5,000 or more (in money or other property) during the taxable year."); *see also* Rev. Proc. 2018-38 § 2, 2018-31 I.R.B. 280 (summarizing pre-2018 I.R.C. § 6033(a) reporting requirements).

147. Daniel Hemel, Bullock v. IRS *and the Future of Tax Administrative Law (Part I)*, TAXPROF BLOG (Aug. 20, 2019), https://taxprof.typepad.com/taxprof_blog/2019/08/hemel-bullock-v-irs-and-the-future-of-tax-administrative-law-part-i.html [https://perma.cc/WYE8-YCYC].

148. Rev. Proc. 2018-38 § 3, 2018-31 I.R.B. 280.

149. *Id.* The new policy continued, stating that "[t]he requirement to report such information increases compliance costs for some private parties, consumes IRS resources in connection with the redaction of such information, and poses a risk of inadvertent disclosure of information that is not open to public inspection." *Id.*

public."[150] Some commentators vocalized specific concerns that the Trump administration initiated this new policy in response to heavy lobbying from the Koch brothers.[151] Notwithstanding the effect of this regulation-reversal, critics argued that the new revenue procedure was invalid for violating the APA. Specifically, the states of Montana and New Jersey sued the Treasury, alleging that the tax agency wrongly circumvented notice-and-comment procedures on what constituted a legislative, rather than procedural, rule.[152]

In response to the plaintiff-states' complaint, the IRS moved to dismiss under Rule 12(b)(6) while the plaintiffs simultaneously moved for summary judgment.[153] The IRS's primary argument for dismissing Montana's and New Jersey's suits was that they lacked standing.[154] Specifically, the IRS argued that "Plaintiffs possess[ed] no legally protected interest in receiving donor information from the IRS and thus . . . suffered no actual harm caused by Revenue Procedure

150. Eric Dietrich, *Bullock Notches a Win Against IRS in Dark Money Lawsuit*, MONT. FREE PRESS (Aug. 1, 2019), https://montanafreepress.org/2019/08/01/bullock-notches-a-win-against-irs-in-dark-money-lawsuit [https://perma.cc/98S9-32U5]; *see also* Patricia Cohen, Kenneth P. Vogel & Jim Tankersley, *I.R.S. Will No Longer Force Kochs and Other Groups to Disclose Donors*, N.Y. TIMES (July 17, 2018), https://www.nytimes.com/2018/07/17/us/politics/irs-will-no-longer-force-kochs-and-other-groups-to-disclose-donors.html [https://perma.cc/3Z7H-K5UM] ("The change, which has long been sought by conservatives and Republicans in Congress, will affect . . . groups as varied as arms of the AARP, the United States Chamber of Commerce, the National Rifle Association and Americans for Prosperity . . . .").

151. *See* Daniel Hemel, *Montana Vs. the Koch Brothers*, SLATE (July 24, 2018, 5:51 PM), https://slate.com/news-and-politics/2018/07/montana-is-taking-on-the-trump-administration-and-the-koch-brothers-in-a-new-lawsuit.html [https://perma.cc/N9QZ-H92C] ("[W]hy did the IRS act so hastily to eviscerate a rule that had applied . . . for nearly a half-century? For one thing, it faced heavy pressure from . . . [t]he Koch brothers' Americans for Prosperity group . . . ."); Cohen et al., *supra* note 150 ("'Transparency is meant for the government, not for private individuals,' said Philip Ellender, the head lobbyist for Koch Industries . . . . [which] began lobbying the White House on the issue after President Trump's election, according to lobbying filings.").

152. Complaint, *supra* note 141, at 19–21 ("Before a substantive rule like Revenue Procedure 2018-38 may take effect, the APA requires the agency to issue a notice of proposed rulemaking . . . . Defendants did not comply with this notice-and-comment requirement . . . ."). The complaint additionally argued that Rev. Proc. 2018-38 violated the APA's arbitrary and capricious requirement. *Id.* at 22–24 ("To comply with the APA, an agency must supply a 'reasoned analysis' of its decision to amend a legislative rule. . . . In promulgating Revenue Procedure 2018-38, Defendants did not supply a reasoned analysis . . . ." (citing Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57 (1983))).

153. Bullock v. IRS, 401 F. Supp. 3d 1144, 1147–48 (D. Mont. 2019).

154. *Id.* at 1150 ("Defendants argue that Plaintiffs lack Article III standing.").

2018-38" and therefore lacked standing to challenge the revenue procedure.[155]

The states countered that, while ordinary citizens are not entitled to see a nonprofit's substantial contributor list, state officials can view these lists for the purposes of administering the state's tax laws.[156] Thus, the states argued that the IRS's policy reversal injured them by obviating their ability to review substantial contributor information for their own state tax purposes, thereby conferring them standing.[157]

The District of Montana held that "[t]he deprivation of information can rise to a level sufficient to establish an Article III injury for the purposes of standing."[158] In order for information deprivation to confer standing, a plaintiff must pass a two-part test: First, the plaintiff must demonstrate that "the agency's action or omission to act injured the organization's interest," and second, that "the organization expended resources to counteract that harm."[159]

The *Bullock* court found that both New Jersey and Montana had standing to challenge the IRS, but for different reasons. The court determined that New Jersey easily passed the two-part test and established standing to sue the IRS. The court held that, given New Jersey's allegation "that it had relied on [substantial-contributor information] information to 'protect the public from fraud, deceit, and misrepresentation by charitable organizations operating in or raising money in the State,'" "Revenue Procedure 2018-38 effectively . . . deprived New

155. *Id.*

156. Complaint, *supra* note 141, at 7 ("The disclosures . . . remain confidential from the public, but are available . . . to state tax authorities including Montana, pursuant to [I.R.C.] § 6103(d)."); I.R.C. § 6103(d)(1) ("Returns and return information . . . shall be open to inspection by, or disclosure to, any State agency, body . . . charged under the laws of such State with responsibility for the administration of State tax laws . . . ."). Note that § 6103 is the same tax code section that "gives . . . the Ways and Means chairman, the right to request individual tax returns." Aysha Bagchi, *Here's What You Should Know as Trump Tax Return Battles Brew*, BLOOMBERG TAX (Sept. 27, 2019, 3:46 AM), https://news.bloombergtax.com/daily-tax-report/heres-what-you-should-know-as-trump-tax-return-battles-brew [https://perma.cc/Z6TV-KZH6].

157. Complaint, *supra* note 141, at 12–14 (arguing that the inability to request contributor information from the IRS "frustrates the efficient administration of Montana's tax laws" and "shoulder[s it] with additional financial and administrative burdens" as a result of the resources required to devise and enforce new state tax procedures); *see also* Hemel, *supra* note 151 ("According to the complaint, the state's tax agency relies on information collected by the IRS when making its own tax-exemption determinations . . . .").

158. *Bullock*, 401 F. Supp. 3d at 1150–51 (citing Pub. Citizen v. Carlin, 2 F. Supp. 2d 1, 9 (D.D.C. 1997), *rev'd on other grounds*, 184 F.3d 900 (D.C. Cir. 1999)).

159. *Id.* at 1151 (quoting People for the Ethical Treatment of Animals v. U.S. Dep't of Agric., 797 F.3d 1087, 1093–94 (D.C. Cir. 2015)).

Jersey of previously available information."[160] The court also found that New Jersey "diverted state resources to create new regulatory processes to obtain the previously available information collected by the IRS."[161] Thus, the court concluded that New Jersey's injury—stemming from Revenue Procedure 2018-38—was sufficient to establish standing.[162]

The court acknowledged, however, that "Montana present[ed] a closer case" than New Jersey because Montana did not allege that it had incurred actual costs to counteract the harm from Revenue Procedure 2018-38.[163] Instead Montana only alleged that "it will incur . . . future economic impacts as a consequence."[164] The court sidestepped this concern, citing *Massachusetts v. EPA* for the proposition that "states do not come before the courts as 'normal litigants' . . . . [but as] *quasi*-sovereign" entities.[165] Thus, the court concluded that Revenue Procedure 2018-38 injured Montana and that Montana's special status as a state was sufficient to overcome its failure to expend resources to counteract the revenue procedure.[166]

After establishing that both New Jersey and Montana enjoyed standing to challenge the IRS, the court held Revenue Procedure 2018-38 "a legislative rule, [that] requires the IRS to follow the notice-and-comment procedures pursuant to the APA."[167] Because the IRS failed to follow the APA's procedures, the court granted summary judgment to the plaintiffs, voiding Revenue Procedure 2018-38 entirely and restoring the earlier donor disclosure regulations.[168]

160. *Id.*

161. *Id.*

162. *Id.* at 1152 ("New Jersey's alleged efforts . . . rise to the level of an injury sufficient to meet the standard set by *PETA* for an informational injury.").

163. *Id.*

164. *Id.*

165. *Id.* (quoting Massachusetts v. EPA, 549 U.S. 497, 518 (2007)). "The fact that Montana relies substantially on the IRS's own assessment of tax-exempt organizations 'only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power.'" *Id.* (quoting *Massachusetts v. EPA*, 549 U.S. at 520). For a discussion of *Massachusetts v. EPA*, see *supra* note 100.

166. *Bullock*, 401 F. Supp. 3d at 1152 ("Montana alleges a sufficient basis for standing in the form of having to incur future expenses under these circumstances . . . .").

167. *Id.* at 1158 (citing Hemp Indus. Ass'n v. DEA, 333 F.3d 1082, 1091 (9th Cir. 2003)).

168. *Id.* at 1159 ("IT IS ORDERED that Plaintiffs' Motion for Summary Judgment . . . is GRANTED. This Court holds unlawful and will set aside Revenue Procedure 2018-38 as adopted by the IRS.").

As a coda to this saga, the IRS reissued the same policy in Revenue Procedure 2018-38 as a regulation in the Federal Register under proper notice-and-comment

The *Bullock* court thus chose to employ an ordinary standing analysis to the plaintiff-states.[169] After finding that New Jersey established ordinary standing, the Court struggled to determine whether Montana should also have standing to sue the Treasury.[170] Seeming to find that Montana lacked an injury-in-fact, the Court turned to the precarious *Massachusetts* standing doctrine to grant Montana standing anyway.[171] Had the *Bullock* court simply utilized the procedural standing doctrine, it seems likely that it could have found Montana to have had standing without *Massachusetts v. EPA*.[172]

b. Silver v. IRS

More recently, in *Silver v. IRS*, the District Court for the District of Columbia allowed a plaintiff to challenge the regulations regarding the transition tax that the IRS issued in response to the TCJA.[173] The court found that the plaintiff had standing to proceed over the justiciability challenges of the IRS via the procedural standing doctrine.[174]

procedures. *See* Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 84 Fed. Reg. 47,447 (proposed Sept. 10, 2019) (to be codified at Treas. Reg. § 1.6033-2); Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 85 Fed. Reg. 31,959 (May 28, 2020) (to be codified at Treas. Reg. § 1.6033-2). Thus, once again "social welfare organizations" including Americans for Prosperity will be able to avoid disclosing receipt of donor contributions. As of March 2021, it is unclear whether another state or entity will challenge the IRS's ability to promulgate such a rule.

169. *See Bullock*, 401 F. Supp. 3d at 1150 (invoking Article III standing rules from *Clapper* and *Lujan*). Although this analysis also had to assess whether Plaintiffs were injured via information deprivation. *See id.* at 1150–51 (discussing *Public Citizen*'s deprivation injury standard).

170. *See id.* at 1152 ("New Jersey's alleged efforts . . . rise to the level of an injury sufficient to meet the standard set by *PETA* . . . . Montana presents a closer case. . . . [H]owever, [it] acts on behalf of its citizens.").

171. *Compare id.* ("Montana has alleged 'an injury to it in its capacity of quasi-sovereign' . . . [It] alleges a sufficient basis for standing in the form of having to incur future expenses under these circumstances . . . ." (quoting Massachusetts v. EPA, 549 U.S. 497, 518 (2007))), *with supra* note 100 (discussing the precarity of the *Massachusetts v. EPA* theory of standing).

172. *See infra* Part III.B.1.

173. The Treasury regulations provide details for the TCJA's alterations to international tax collection—specifically I.R.C. § 965. The transition tax is a one-time 15.5% tax on U.S. shareholders of "controlled foreign corporations." *See* 84 Fed. Reg. 1838 (Feb. 5, 2019) (codified at Treas. Reg. § 1.965-1 to -4); Ryan Finley, *Suit Challenging Transition Tax Regs Can Proceed to Merits*, 166 TAX NOTES FED. 155, 155 (Jan. 6, 2020), https://www.taxnotes.com/tax-notes-federal/tax-cuts-and-jobs-act/suit-challenging-transition-tax-regs-can-proceed-merits/2020/01/06/2bqqp; Silver v. IRS, No. 19-cv-247, 2019 WL 7168625 (D.D.C. Dec. 24, 2019).

174. *Silver*, 2019 WL 7168625, at *3.

Domestic corporations are taxed on their world-wide income.[175] However, prior to the TCJA, income that corporations earned indirectly from their foreign corporate subsidiaries was not taxed until that income was distributed or "repatriated" to its domestic parent corporation.[176] This led to domestic corporations stockpiling cash overseas, refusing to repatriate their foreign income in order to avoid (or at least defer) U.S. taxation,[177] of more than $2.6 trillion in untaxed, offshore profits as of 2016.[178]

In response, the GOP's TCJA attempted to force domestic corporations to repatriate their foreign income in exchange for a special tax rate of 15.5% via a one time "transition tax."[179] The IRS enumerated on various aspects of the TCJA's transition tax[180] in regulations issued on February 5, 2019.[181]

The plaintiff in *Silver*—an American citizen with an Israeli legal practice that would be subject to the transition tax—challenged the regulations, arguing that the IRS failed to perform the small-business impact evaluations required by the APA, including the Regulatory Flexibility Act (RFA) and the Paperwork Reduction Act (PRA)

175. *See* Sean P. McElroy, *The Mandatory Repatriation Tax Is Unconstitutional*, YALE J. ON REGUL. BULL. (Nov. 8, 2019), https://www.yalejreg.com/bulletin/the-mandatory-repatriation-tax-is-unconstitutional-2 [https://perma.cc/BAN5-AR9G].

176. *Id.*; Henry Ordower, *Abandoning Realization and the Transition Tax: Toward a Comprehensive Tax Base*, 67 BUFF. L. REV. 1371, 1376 (2019).

177. *See* J. Clifton Fleming Jr., Robert J. Peroni & Stephen E. Shay, *Getting from Here to There: The Transition Tax Issue*, 154 TAX NOTES 69, 72–74 (2017).

178. Press Release, GOP House Ways & Means Comm., Brady, Neal Highlight Another Reason for Pro-Growth Tax Reform (Sept. 29, 2016), https://gop-waysandmeans.house.gov/brady-neal-highlight-another-reason-pro-growth-tax-reform [https://perma.cc/PK6C-U6CR] (quoting Letter from Thomas A. Barthold, Chief of Staff, Joint Comm. on Tax'n, to the Hon. Kevin Brady & Hon. Richard Neal (Aug. 31, 2016)). Silicon Valley tech companies were particularly guilty of refusing to repatriate their offshore profits. *See* Tatyana Shumsky, *Tax Overhaul Could End Record Pileup of Offshore Cash*, WALL ST. J. (Nov. 20, 2017), https://www.wsj.com/articles/tax-overhaul-could-end-record-pileup-of-offshore-cash-1511203340 [https://perma.cc/GDW2-CFQR].

179. Tax Cuts and Jobs Act, H.R. 1, 115th Cong. § 14103(a) (2017) (amending I.R.C. § 965 to include the "transition tax"). Apple, for example, did agree to repatriate $252 billion in response to the transition tax. *See* Daisuke Wakabayashi & Brian X. Chen, *Apple, Capitalizing on New Tax Law, Plans To Bring Billions in Cash Back to the U.S.*, N.Y. TIMES (Jan. 17, 2018), https://www.nytimes.com/2018/01/17/technology/apple-tax-bill-repatriate-cash.html [https://perma.cc/33AN-48M9].

180. *See, e.g.*, *Final Transition Tax Regulations Provide Certainty for Taxpayers*, GRANT THORNTON (Jan. 18, 2019), https://www.grantthornton.com/library/alerts/tax/2019/Flash/final-transition-tax-regulations-provide-certainty-for-taxpayers.aspx.

181. 84 Fed. Reg. 1838 (Feb. 5, 2019) (codified at Treas. Reg. § 1.965).

requirements.[182] The IRS moved to dismiss, arguing both that the plaintiff lacked standing to sue and that his claim was barred by the AIA.[183] In an "unexpected" opinion,[184] Judge Mehta of the D.C. District Court found that the plaintiff had standing because he had suffered a "straightforward injury" in the form of "recordkeeping obligations" and compliance costs.[185] Importantly, Judge Mehta held that, in the case of procedural injuries, elements of the standing inquiry are "relaxed."[186]

While experts note that this holding "is not going out on a limb," other recent courts that have held in favor of plaintiffs through a similar standing inquiry vis-à-vis pre-enforcement APA challenges to tax agencies did not rely on the special procedural standing inquiry.[187]

182. *See* Andrew Velarde, Silver *Strikes Gold for Taxpayer Administrative Law Challenges*, 97 TAX NOTES INT'L 146, 146 (2020); 5 U.S.C. §§ 601, 603(a); 44 U.S.C. § 3506 (requiring reduced compliance burden for small businesses). Although the IRS "regularly fails to comply with the RFA requirements," "circuit courts have not been especially receptive to these challenges." Keith Fogg, *How Does the Regulatory Flexibility Act Impact Tax Regulations?*, PROCEDURALLY TAXING (Jan. 2, 2020), https://proceduralltaxing.com/how-does-the-regulatory-flexibility-act-impact-tax-regulations [https://perma.cc/SL7J-UGEX] (citing U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-256, FINANCIAL SERVICES REGULATIONS: PROCEDURES FOR REVIEWS UNDER REGULATORY FLEXIBILITY ACT NEED TO BE ENHANCED (2018), https://www.gao.gov/assets/690/689732.pdf [https://perma.cc/CPA8-Q239]); Velarde, *supra*, at 147 (quoting Professor Kristin E. Hickman).

183. Silver v. IRS, No. 19-cv-247, 2019 WL 7168625, at *1–2 (D.D.C. Dec. 24, 2019).

184. "Unexpected" because experts anticipated that the courts would continue rejecting plaintiffs' pre-enforcement administrative claims against the Treasury for lacking standing. *See* Velarde, *supra* note 182.

185. *Silver*, 2019 WL 7168625, at *2; Velarde, *supra* note 182. The court also rejected the IRS's contention that the plaintiff lacked standing under the causation element, finding "Plaintiffs are not challenging any specific regulation that might or might not be traceable directly to the TCJA. Rather Plaintiffs allege that the agencies neglected to undertake procedural measures designed to protect small business from the burden of unwieldy and cost-intensive regulations." *Silver*, 2019 WL 7168625, at *2; Velarde, *supra* note 182.

186. *Silver*, 2019 WL 7168625, at *1 ("In such cases, the redressability and imminence requirements of standing are relaxed." (citing WildEarth Guardians v. Jewell, 738 F.3d 298, 305 (D.C. Cir. 2005))). Although the IRS additionally asserted that the plaintiff failed the causation element of standing because his challenge to the regulations was actually an untenable challenge to the TCJA, the court disagreed, finding that "Plaintiff's alleged injuries are[] traceable to Defendants' alleged violation of these separate statutory requirements, not the TCJA." *Id.* at *2.

187. Velarde, *supra* note 182 (quoting Professor Kristin E. Hickman); *see* Bullock v. IRS, 401 F. Supp. 3d 1144 (D. Mont. 2019); Chamber of Com. v. IRS, No. 1:16-CV-944, 2017 WL 4682049 (W.D. Tex. Sept. 29, 2017).

Regardless, after surviving standing and the AIA,[188] the plaintiff in *Silver* believes that he is all but guaranteed to win his APA suit.[189] Some practitioners already argue that *Silver*'s holding goes "beyond the PRA and RFA" into generalized APA challenges against the Treasury.[190]

Silver thus contrasts directly with *Bullock*. While both cases granted plaintiffs standing to challenge the IRS, *Bullock* relied on the relaxed standing analysis for states, whereas *Silver* relied on the relaxed standing analysis for procedural injuries.[191] As this Note will explore, the *Silver* opinion constitutes a more sensible approach to standing analysis for procedural injuries, and the *Bullock* court could have similarly granted standing to Montana under the procedural standing analysis.

3. Contextualizing Contemporary Pre-Enforcement APA Tax Standing Cases

These cases illuminate the current changing composition of courts' standing assessments in pre-enforcement APA challenges to the Treasury. While there is a dearth of older caselaw on the subject,[192] *Bullock* and *Silver* illustrate that the courts, post-*Mayo*, are increasingly granting standing to these plaintiffs' APA claims. While it is impossible to know how much of this modern jurisprudence reflects a rejection of tax exceptionalism,[193] it seems clear that courts'

188. While not the focus of this Note, the *Silver* court dismissed the IRS's argument that the AIA barred the plaintiff's claim, relying heavily on *Cohen*. *Silver*, 2019 WL 7168625, at *2–3 (citing Cohen v. United States, 650 F.3d 717, 730–31 (D.C. Cir. 2011) (en banc)).

189. Finley, *supra* note 173, at 156 ("'The merits are a slam-dunk, and the Treasury knows this,' [Silver] said. Silver said a motion for summary judgment will come shortly. 'We have them on the ropes.'" (quoting plaintiff Monte Silver)).

190. Velarde, *supra* note 182 (quoting Patrick J. Smith). Although Smith readily notes that "the government would be eager to appeal." *Id.* at 148.

191. *See supra* Part II.A.2.a.

192. *See supra* Part II.A.1.

193. If anything, these cases perhaps support a theory that the judiciary is beginning to embrace an *anti*-tax exceptionalist approach to Treasury claims of non-justiciability. Although Professor Kristin E. Hickman broaches the idea of "anti-exceptionalism," her use of the term refers to supporters and detractors of the theory of tax exceptionalism rather than an active willingness on the part of the judiciary to repudiate tax exceptionalism with a sort of reverse exceptionalism. *See* Kristin E. Hickman, *Bridging Exceptionalism and Anti-Exceptionalism with the JCT Canon*, JOTWELL (Dec. 10, 2018), https://tax.jotwell.com/bridging-exceptionalism-and-anti-exceptionalism-with-the-jct-canon [https://perma.cc/7G53-A5A6] (reviewing Clint Wallace, *Congressional Control of Tax Rulemaking*, 71 TAX L. REV. 179 (2017)).

Alternatively, one could argue that the Court's newfound laxity for standing in pre-enforcement administrative tax lawsuits actually represents a repudiation of the

analyses have changed in *some* fashion. Indeed, the progression from the courts' earlier declaration that "[i]t is well-recognized that the standing inquiry in tax cases is more restrictive than in other cases,"[194] to the contemporary refrain that "[t]he IRS is not special in this regard; no exception exists shielding it . . . from suit under the APA,"[195] is striking in this regard.

Moreover, although it is hard to glean from so few cases whether courts are in agreement about their standing analyses for pre-enforcement APA tax challenges. *Bullock* and *Silver* certainly take different paths to grant the plaintiffs standing. A crucial question in the coming years will be whether these early cases are the makings of a full jurisdictional split or merely minor disagreements about how best to afford such APA litigants standing.[196]

Regardless of whether these cases are indicia of a jurisdictional split, it is worth examining their differences closely. To grant Montana standing, *Bullock* relied on the special status of Montana's statehood under *Massachusetts v. EPA*.[197] As discussed earlier, *Massachusetts* represents something of an anomaly in the Supreme Court's standing jurisprudence (perhaps reflecting a tenuous compromise among the

"private-law" model of standing and a return to the "public-law" model. *See supra* note 115 and accompanying text.

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

195. Cohen v. United States, 650 F.3d 717, 723 (D.C. Cir. 2011) (en banc).

196. Other courts have also struggled to apply consistent standing standards to tax APA cases. *See* Texas v. United States, 300 F. Supp. 3d 810, 826–34 (N.D. Tex. 2018) (relying upon 5th Circuit standing jurisprudence that "[o]nce an injury is shown, no attempt is made to ask whether the injury is outweighed by benefits" (quoting Texas v. United States, 809 F.3d 134, 155–56 (5th Cir. 2015))); Liberty Univ., Inc. v. Lew, 733 F.3d 72, 89–90 (4th Cir. 2013) (granting plaintiff standing to challenge the ACA even though its plans appeared to comply with the law and it therefore would not incur any tax/penalty); Cummings, *Standing To Sue, Part 2*, *supra* note 126, at 329 (citing *Liberty*, 733 F.3d 72). *See generally id.*, at 327–30 (collecting cases).

AICPA v. IRS serves as an especially poignant case-in-point; in *AICPA*, the plaintiffs challenged an IRS procedure under the APA. The D.C. District Court dismissed, finding that the plaintiffs lacked standing; the D.C. Circuit reversed; the District Court again dismissed on standing—this time on different grounds—before the D.C. Circuit again reversed, holding for the plaintiffs. Am. Inst. of Certified Pub. Accts. v. IRS, 746 F. App'x 1, 5–13 (D.C. Cir. 2018), *rev'g* 199 F. Supp. 3d 55 (D.D.C. 2016), *rev'd*, 804 F.3d 1193 (D.C. Cir. 2015), *rev'g* No. 14-1190, 2014 WL 5585334 (D.D.C. 2014); *see also* Sally P. Schreiber, *D.C. Circuit Upholds IRS Unenrolled Tax Preparer Program*, J. ACCT. (Aug. 17, 2018), https://www.journalofaccountancy.com/news/2018/aug/dc-circuit-rules-against-aicpa-in-tax-preparer-lawsuit-201819538.html [https://perma.cc/ES7C-7Z7M].

197. Bullock v. IRS, 401 F. Supp. 3d 1144, 1152 (D. Mont. 2019).

Justices).[198] In contrast, *Silver* utilized the procedural standing doctrine, "relaxing" the plaintiff's burden for procedural injuries, specifically lessening his "redressability and imminence requirements."[199] That, of course, contradicts the earlier discussed *Eastern Kentucky* approach, which denied the plaintiff standing for failing the redressability prong, although *Eastern Kentucky* was decided before *Lujan*.[200]

B. POLICY PROBLEMS IN LIMITING STANDING FOR PRE-ENFORCEMENT APA CHALLENGES TO THE TREASURY

Inconsistent standing analyses for pre-enforcement APA challenges to the Treasury cause problems, practical and theoretical, for both plaintiffs *and* the Treasury. This Section analyzes some of the various ways that the judiciary's inconsistent standing analyses harm both parties. Subsection 1 explores how inconsistent application of standing deviates from the core judicial principle of stare decisis and the ways that this negatively impacts litigants. Subsection 2 outlines the specific problem of denying taxpayers the ability to contest their liability *pre*-enforcement, effectively forcing them to ignore their rights or expose themselves to civil, or potentially even criminal, liability. Subsection 3 discusses why procedural standing is an important doctrine and deserves to be recognized by the courts. Finally, Subsection 4 documents various other policy tensions between limiting standing and providing plaintiffs an opportunity to make APA challenges, including the separation of powers principle.

1. Global Doctrines Applied Inconsistently Undermines Stare Decisis

Inconsistent and incomplete standing analyses are problematic for the exact same reason that tax exceptionalism is and was.[201] To quote *Mayo*, "[T]he Court has recognized the importance of maintaining a uniform approach to judicial review of administrative action."[202] Our judicial system is rooted in precedent, or stare decisis, which promotes the core policy goals of predictability, stability, fairness, efficiency, and faith in the judiciary as "founded in the law rather than in

198. *See supra* note 100 and accompanying text.

199. Silver v. IRS, No. 19-cv-247, 2019 WL 7168625, at *1 (D.D.C. Dec. 24, 2019).

200. Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 45–46 (1976); Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 n.7 (1992).

201. *See supra* Part I.A.2.

202. Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 45 (2011) (internal quotation marks omitted) (quoting Dickinson v. Zurko, 527 U.S. 150, 154 (1999)).

the proclivities of individuals."[203] The purposes behind the principle of precedent apply equally to the uniform application of global or universal doctrines, ensuring a consistent application of law to similarly situated plaintiffs, simplifying the application of complex rules, protecting the legal sphere from judicial bias and undue political influence, and promoting parties' reasonable expectations via a predictable application of legal doctrine.[204]

While the standing doctrine *outside* of the tax realm is often already frustratingly inconsistent,[205] the judiciary's approach to pre-enforcement APA standing *within* the tax realm is even more inconsistent. A key example of this inconsistency is courts' general, although not ubiquitous, refusal to apply procedural standing doctrine to pre-enforcement tax challenges.[206]

Courts undermine the Treasury's and taxpayer-petitioners' reasonable expectations as to what result will ultimately be adjudicated in the standing inquiry by inconsistently applying the standing doctrine in the tax-administrative sphere.[207] Notwithstanding the fact that recent cases have held for plaintiffs and against the IRS, Treasury, and tax exceptionalism generally, courts are inconsistent in their use of *procedural* standing (as distinct from traditional standing). The court in *Silver*, for example, did focus on relaxed burdens for procedural injuries,[208] whereas the *Bullock* court never even considered applying procedural standing.[209]

203. JOHN M. WALKER, JR., STAN. L. SCH.: CHINA GUIDING CASES PROJECT, THE ROLE OF PRECEDENT IN THE UNITED STATES: HOW DO PRECEDENTS LOSE THEIR BINDING EFFECT? 3 (2016), https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2016/02/CGCP-English-Commentary-15-Judge-Walker.pdf [https://perma.cc/7GKN-NQUF] (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986)); *see id.*; Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 423 (1988) ("Precedent decentralizes decisionmaking and allows each judge to build on the wisdom of others. In a world where questions arise faster than information necessary to supply answers, this is a boon. Precedent not only economizes on information but also cuts down on idiosyncratic conclusions by subjecting each judge's work to the test of congruence with the conclusion of those confronting the same problem. This increases both the chance of the court's being right and the likelihood that similar cases arising contemporaneously will be treated the same by different judges.").

204. *See* David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1220–22 (charting pros and cons to trans-substantive legal application, wherein the "form and manner of application does not vary from one substantive context to the next").

205. *See supra* note 100 and accompanying text.

206. *See supra* Part I.B.3; *see also supra* Part II.A.

207. *See supra* Part I.B.3; *see also supra* Part II.A.

208. *See supra* note 186 and accompanying text.

209. *See supra* notes 158–60 and accompanying text.

By continuing to inconsistently apply the standing and procedural standing doctrines in pre-enforcement APA actions against tax agencies, the judiciary further enigmatizes the supposedly uniform standing doctrine—propelling it from merely a "maze of often inconsistent statements" into a full-blown labyrinth.[210] This inconsistent application undermines stare decisis and, by extension, stability, fairness, efficiency, and faith in the judiciary.[211]

2. THE CATCH-22 OF DENYING PRE-ENFORCEMENT APA CHALLENGES TO TAXPAYERS

The purpose of pre-enforcement review is to guarantee that regulated parties can challenge an agency rule without being forced to break it and risk "civil and criminal penalties."[212] If a party could not make such a pre-enforcement challenge, they would need to decide whether to break the law, or whether to "abandon [their] rights."[213] A party who cannot make pre-enforcement challenges is stuck in a catch-22. Since the 1960s, pre-enforcement review of challenged agency actions has been administrative law canon[214]—that is, canon for legal subject areas *other* than tax and tax agencies.[215]

While the main rationale for denying pre-enforcement review in the tax sphere has been the AIA, if courts stretch the standing doctrine to deny pre-enforcement review, then a plaintiff is stuck in the exact same predicament. After all, a non-justiciable claim on standing grounds is no better than a non-justiciable claim on AIA grounds. This Note does not advocate that courts should grant artificially relaxed standing rights for pre-enforcement APA challenges. However, as noted above,[216] courts' inconsistent application of standing, coupled with a lack of emphasis on procedural standing rights, suggests that plaintiffs' pre-enforcement APA claims receive harsher standing analyses than they deserve. As courts have appeared to treat the issue of

210. HICKMAN & PIERCE, *supra* note 41, at 919 (explaining the laws governing standing for judicial review of agency actions).

211. *See supra* note 184 and accompanying text.

212. Abbott Lab'ys v. Gardner, 387 U.S. 136, 153 (1967); *see* Kerska, *supra* note 59, at 51.

213. MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 129 (2007); *see* Kerska, *supra* note 59, at 51.

214. *See Abbott Lab'ys*, 387 U.S. at 140–41 (holding that the APA allows for pre-enforcement review of agency actions when such review is not inconsistent with congressional intent).

215. *See* Kerska, *supra* note 59 (discussing how the AIA created a "pay first litigate later" system that works to bar judicial review in federal tax law cases).

216. *See supra* Part II.A.

standing in the tax world differently from other doctrines,[217] there is a risk that even if the AIA is held not to restrict plaintiffs' pre-enforcement administrative challenges, the standing doctrine will fill the AIA's shoes in similarly denying such pre-enforcement claims.[218]

3. Procedural Standing *Is* Special

Failing to treat procedural claims of standing as special risks artificially foreclosing otherwise legitimate pre-enforcement administrative challenges to the Treasury. As Justice Scalia noted in *Lujan*, inquiries into procedural standing must be "special," otherwise plaintiffs will be de facto foreclosed from obtaining judicial review.[219] In *Silver*, for example, but-for the court's application of the lenient procedural standing doctrine, the plaintiff would almost certainly have failed to satisfy the traditional injury-in-fact standing test, showing that his injury-in-fact was definitely derived from and caused by Treasury's procedural foibles.[220] In contrast, the *Bullock* court omitted any mention of the procedural standing doctrine, despite being an obvious candidate for special procedural standing analysis.[221] Plenty of other courts beyond *Bullock* have similarly dismissed or ignored the doctrine of procedural standing for pre-enforcement administrative suits against the Treasury.[222]

Courts' inconsistency in applying procedural standing analysis to procedural claims, like pre-enforcement APA challenges to the Treasury, raises numerous issues. First, inconsistent use of standing doctrines erodes precedent and parties' reasonable expectations, needlessly inducing additional costs and litigation.[223] Second, judicial

217. *See, e.g.*, *supra* note 138.

218. *See* Kerska, *supra* note 59.

219. *See supra* Part I.B.3; Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 n.7 (1992).

220. Silver v. IRS, No. 19-cv-247, 2019 WL 7168625, at *1–2 (D.D.C. Dec. 24, 2019); *see supra* notes 115–23 and accompanying text.

221. Bullock v. IRS, 401 F. Supp. 3d 1144, 1152 (D. Mont. 2019) (relying on *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007), to grant standing); *see also supra* notes 100, 121 and accompanying text.

222. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 750–52, 766 (1984) (holding that the plaintiffs had failed to demonstrate that their injuries were "fairly traceable" to the IRS actions); Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 37–39, 42–45 (1976) (declining to reduce the threshold requirement to actual injury redressable by the Court); *see also* Lu, *supra* note 138, at 101, 111 (discussing the chilling effect of *Wright* and *Eastern Kentucky* on the ability to seek judicial review in cases involving federal tax law); Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635, 637–42 (1985) (describing the Court's application of an "unduly rigorous" causation standard and its express reliance on separation of powers analysis as "troubling").

223. *See supra* Part II.B.1.

refusal to apply procedural standing analysis effectively bars plaintiffs from making legitimate challenges to faulty agency regulations.[224] This, in turn, undermines the core purposes of the APA to serve as a check on agencies[225] and exacerbates the dilemma of plaintiffs having rights but not remedies against an agency.[226]

These issues are magnified in the tax context, where the Treasury has a history of successfully ignoring APA requirements and pre-enforcement administrative lawsuits deriving from the APA.[227] There exists a paucity of tax pre-enforcement APA standing jurisprudence, further confusing what precedent should apply in this context and when;[228] and this uncertainty only induces additional litigation against the Treasury, which further undermines its ability to function successfully.[229] Thus, inconsistent application of the procedural standing doctrine, especially in the post-*Mayo* tax context, unnecessarily harms both taxpayer-petitioners and tax agencies.

4. Policy Tensions Between Tax Exceptionalism and Standing

Besides problems of judicial inconsistencies in conducting the standing analyses described above,[230] there are three additional core policy tensions between tax exceptionalism and expanding access to standing for pre-enforcement APA claims against tax agencies.

First is a concern over separation of powers. Recalling that separation of powers is at the core of the standing doctrine,[231] the judiciary arguably should not utilize standing to promote the consolidation of powers within a single government branch.[232] Yet the primary effect of tax exceptionalism is to insulate Treasury regulations from public oversight, effectively minimizing the separation of taxation powers.[233]

224. *See supra* Part II.B.2.

225. *See supra* notes 49–50 and accompanying text.

226. *See infra* Part II.B.3.

227. *See supra* notes 55–61 and accompanying text.

228. *See supra* notes 73–74 and accompanying text.

229. *See infra* notes 239–44 and accompanying text.

230. *See supra* Part II.A.

231. *See supra* note 96 and accompanying text.

232. *See* Lu, *supra* note 138, at 110 ("[W]here such a judicial check is only available to regulated entities, the risk of agency capture arises. Therefore, in tax, as in other administrative contexts, broader standing in federal court remains essential to correct an imbalance in regulatory stakeholder power and enforce congressional mandates in the implementation of regulatory schemes.").

233. *See supra* note 138; Hoffer & Walker, *supra* note 63, at 271–73 ("[T]he Tax Court has impermissibly substituted its judgment for the discretionary and equitable judgment of the IRS. Indeed, contrary to congressional command, the Tax Court

Tax exceptionalism's function to insulate the Treasury from administrative procedural challenges undercuts the APA's core mission of allowing a public separation of powers check on administrative agencies as well.[234] Relatedly, tax exceptionalism also undermines the foundational legal concept that "every right . . . must have a remedy."[235] While disentangling tax exceptionalism from the standing doctrine from the APA in this context is a Sisyphean task, scholars posit,[236] and the inconsistent standing inquiries described above support,[237] the theory that tax exceptionalism does influence the judiciary's standing inquiry.[238] Thus, there exists a very real concern that tax exceptionalism infects the standing inquiry in the specific context of pre-enforcement APA challenges to tax agencies, undermining the theoretically trans-substantive nature of standing and undercutting the separation of powers.[239]

Second, in direct opposition to the concern over separation of powers, is the need to ensure an effective system of taxation—America's primary revenue collection system.[240] This "revenue imperative" was the impetus for courts to allow the tax exceptionalism doctrine to

decides the issue anew, based on the evidence submitted to the Tax Court, as if the IRS had not acted at all.").

234. *See supra* notes 46, 49–51 and accompanying text.

235. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803); *see* Hickman, *supra* note 49, at 1203–04 ("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. 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.").

236. *See supra* note 138.

237. *See supra* Part II.A.

238. *See supra* Part II.A. In fact, the cases analyzed in that Part—*Bullock* and *Silver*—suggest that the pendulum has swung the other way, with at least a subset of judges actively rejecting tax exceptionalism by aggressively voiding procedurally deficient regulations under the APA. *See supra* Part II.A.

239. *See, e.g.*, Lu, *supra* note 138, at 97 ("Far from maintaining the separation of powers, restrictive standing doctrine absolves federal courts of their unique duty to interpret constitutional mandates and congressional enactments . . . . As a result, the doctrine insulates government action against even congressionally authorized federal court oversight under a range of citizen-suit provisions, including the APA.").

240. *See* Steve R. Johnson, *Preserving Fairness in Tax Administration in the* Mayo *Era*, 32 VA. TAX REV. 269, 279 (2012) ("[T]axation is different from and more important than any other single federal activity. Revenue is the *sina qua non* for all other governmental activities. The modern welfare state could not exist without a robust tax system.").

flourish in the first place.[241] Proponents of tax exceptionalism argue that permitting APA pre-enforcement challenges will bog the IRS and Treasury down in expensive, wasteful, time-consuming, and ultimately warrantless procedural red tape and litigation, limiting the agencies' ability to effectively perform their function of tax administration.[242] Several recent administrative tax lawsuits starkly showcased this conundrum, demonstrating the potentially serious fiscal ramifications that administrative law could wreak on an unprepared tax system.[243] Thus, there is an additional concern that a judiciary that is increasingly amenable to administrative tax suits creates a slippery slope that both incentivizes harmful litigation against the Treasury while also stripping enormous funds from the federal fisc.[244] Importantly, the additional requirements of APA compliance will impose significant costs in time and money that the IRS, especially, does not have.[245]

241. *Id.* at 279–80; *see* Lu, *supra* note 138, at 112–13 ("[R]epresent[ing] a pervasive theory that tax administration is fundamentally different from other administrative contexts because of its revenue-collecting purpose."). *See generally* David Berke, *Reworking the Revolution: Treasury Rulemaking & Administrative Law*, 7 MICH. J. ENV'T & ADMIN. L. 353, 371–420 (2018) (responding to the prevailing pro-tax exceptionalism arguments).

242. *See* Puckett, *supra* note 53, at 1074 & n.33, 1109–18 ("[S]tructural tax exceptionalism may have important benefits."); McMahon, *supra* note 65, at 577–89; Hickman, *supra* note 49, at 1202 (noting critics' fears that the APA "ossifie[s]" agency rulemaking (citing Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1410–26 (1992))); *see also* Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60–61 (1995).

243. *See* Altera Corp. v. Comm'r, 145 T.C. 91 (2015), *rev'd*, 926 F.3d 1061 (9th Cir. 2019); QinetiQ U.S. Holdings, Inc. v. Comm'r, 845 F.3d 555 (4th Cir. 2017). *Altera* and *QinetiQ* both involved APA challenges to Treasury regulations where "[i]f the regulation were invalidated, the U.S. government would lose billions of dollars in tax revenue." Susan C. Morse & Stephen E. Shay, *The Ninth Circuit Reverses the Tax Court Decision in* Altera, PROCEDURALLY TAXING (July 31, 2018), https://proceduralltaxing.com/the-ninth-circuit-reverses-the-tax-court-decision-in-altera [https://perma.cc/967F-JQVC; Bryan Camp, *Tax Exceptionalism Lives?* QinetiQ v. CIR, PROCEDURALLY TAXING (Jan. 12, 2017), https://proceduralltaxing.com/tax-exceptionalism-lives-qinetiq-v-cir [https://perma.cc/3J7V-AD4J].

244. *See, e.g.*, *supra* note 65.

245. *See, e.g.*, Jordan Weissmann, *America Desperately Needs To Rebuild the IRS*, SLATE (Jan. 8, 2020, 5:19 PM), https://slate.com/business/2020/01/irs-audits-revenue-declining.html [https://perma.cc/242D-292B] (noting that the IRS audited just 0.45% of all personal income taxes in 2019—less than half of its 2011 audit rate—due to budget cuts). Indeed, IRS Commissioner Charles Rettig has been explicit that the IRS does not even have a sufficient budget to audit wealthy Americans—choosing instead, out of economic necessity, to audit "the poor." Paul Kiel, *IRS: Sorry, but It's Just Easier and Cheaper To Audit the Poor*, PROPUBLICA (Oct. 2, 2019, 2:47 PM), https://www.propublica.org/article/irs-sorry-but-its-just-easier-and-cheaper-to-audit-the-poor

Third is a central tension over who makes tax law, what its purposes are, and whether tax is or should be "special."[246] While agencies have long been afforded significant rulemaking discretion as experts,[247] the APA requires agencies to solicit input from the public and document their deliberations via public comments, effectively creating a public participation agency model.[248] Tax scholars disagree over whether tax agencies' role as tax gatekeepers should be to open the doors of tax administration to public participation or weld them shut to increase internal efficiency.[249] Relatedly, with the modern tax code often effectuating normative executive policies and administering much of the contemporary welfare system,[250] some scholars have suggested that tax exceptionalism should apply only to traditional tax regulations and not "when Congress uses the tax code to accomplish objectives unrelated to core tax policy."[251]

[https://perma.cc/LY6J-BHWH] ("[T]he IRS has no plan [to increase audits of the wealthy] and won't have one until Congress agrees to restore the funding it slashed from the agency over the past nine years."). Whether this congressionally imposed IRS austerity should encourage continuing the tax exceptionalism doctrine is subject to debate.

246. Lawrence Zelenak, *Maybe Just a Little Bit Special After All?*, 63 DUKE L.J. 1897, 1919 (2014).

247. *See* Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2023 (2015) ("[T]he basic concept that the agencies should preside over specialized information is hard-wired into the design of the administrative state."); Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1404–05 (2013) (discussing the "expertise model" of administrative agency theory).

248. *See* Danshera Cords, *"Let's Get Together": Collaborative Tax Regulation*, 11 PITT. TAX REV. 47, 50 (2013).

249. *Compare* Puckett, *supra* note 53, 1109–12 (arguing that allowing for APA procedural challenges against the IRS and Treasury undermines the agencies' efficiency—detracting from their revenue raising expertise and instead requiring that they develop litigatory acumen), *and* McMahon, *supra* note 65, at 588 ("Instead of the current one-size-fits-all format, procedure should be designed to recognize 'varying levels of expertise, different levels of public interest, and types of responses that typify the government regulatory process.'" (quoting Dorit Rubinstein Reiss, *Tailored Participation: Modernizing the APA Rulemaking Procedures*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 321, 324 (2009))), *with* Cords, *supra* note 248, at 108–11 (arguing for "collaborative rulemaking" and a definition of success "as giving taxpayers a greater voice in the development of tax regulations"), *and* Hoffer & Walker, *supra* note 63, at 273–76 ("[U]nlike in other regulatory contexts where the comparative expertise rationale may predominate other policy rationales for judicial deference to agency action, this justification carries somewhat less force with respect to the Tax Court's review of IRS decisions.").

250. *See, e.g.*, Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717, 1728–33 (2014).

251. Amandeep S. Grewal, *Taking Administrative Law to Tax*, 63 DUKE L.J. 1625, 1627 (2014).

Empirical research suggests, however, that in "recent decades" the tax code "ha[s] seen a dramatic escalation" in non-traditional tax use.[252] That tax agency regulations so heavily and regularly promote non-tax aims should "give some pause to defenders of tax exceptionalism who base their arguments on the importance of raising revenue."[253]

Finally, scholars disagree over whether tax, due to its substantively important revenue raising function, should be subject to special jurisprudential treatment—i.e., tax exceptionalism.[254] Some experts even argue that the theory of tax exceptionalism is not actually exceptional because other agencies also enjoy their own versions of judicial exceptionalism.[255] This view, of course, is hotly contested in other tax-administrative scholarship.[256]

While these final tensions are not standing-specific, they are relevant both in raising questions over whether and to what extent tax should adhere to uniform application of generalized legal doctrines and whether and how courts should utilize the standing doctrine to induce change.

In short, there are many compelling, but also competing, reasons for universally adopting the procedural standing analysis to pre-enforcement administrative challenges to the Treasury. The procedural standing approach allows putative plaintiffs to avoid the catch-22 of either needing to risk civil or criminal liability or else avoid enforcing their rights. Pre-enforcement challenges to NOPRs and other administrative infirmities also incentivizes (or forces) the Treasury to solicit and utilize public comment in crafting tax policy—a boon for public input and for the separation of powers principle. While there are legitimate concerns to easing the ability of taxpayers to challenge pre-enforcement administrative rules and regulations—namely time and money—these concerns pale in comparison to the benefits to the uniform application of administrative rules, as well as benefits to taxpayers and the public generally.

252. Hickman, *supra* note 250, at 1728, 1747 (finding empirically a "substantial portion" of recent tax agency rulemaking projects relate to non-tax policy objectives).

253. *Id.* at 1761.

254. *See supra* note 241 and accompanying text.

255. *See* Zelenak, *supra* note 246, at 1910–13, 1918–20 ("[T]ax is special—at least in the sense that every legal specialty is special, but also in the stronger sense of being more special than the average specialty.").

256. *See, e.g.*, Caron, *supra* note 65, at 590; Alice G. Abreu & Richard K. Greenstein, *Tax: Different, Not Exceptional*, 17 ADMIN. L. REV. 663, 715–17 (2019); Hickman, *supra* note 57, at 93.

Whether the courts embrace the procedural standing analysis or not, courts should strive to apply standing uniformly to all plaintiffs to limit waste and uncertainty. As we have already seen with *Bullock* and *Silver*, even when the judiciary has attempted to ease plaintiffs' ability to establish standing, the courts have not excelled at applying standing doctrines uniformly.

III. COURTS SHOULD APPLY STANDING ANALYSIS—INCLUDING THE PROCEDURAL STANDING ANALYSIS—UNIFORMLY TO PRE-ENFORCEMENT TAX APA CHALLENGES

The judiciary's inconsistency in applying the procedural standing doctrine to pre-enforcement APA challenges against the Treasury creates needless and harmful problems. The judiciary should replace this inconsistency with a uniform approach, allowing plaintiffs to establish standing if they bring legitimate procedural injuries and survive the relaxed procedural standing inquiry. While this approach argues for a uniform application across all doctrines, tax and non-tax, this solution is based around application of the procedural standing doctrine as applied to the Treasury, because of current confusion over whether procedural standing applies in the tax context.

This Part argues for a clear and consistent use of the procedural standing doctrine which will promote, rather than undermine, the tax system. Section A argues that courts should use the procedural standing analysis for pre-enforcement APA actions against the Treasury. Section B applies the procedural standing doctrine to two examples, illustrating where and how courts should apply this relaxed procedural standing inquiry. Section C addresses counterarguments, finding that the benefits from the use of the procedural standing doctrine for pre-enforcement tax APA suits outweigh any drawbacks of applying the doctrine.

A. COURTS SHOULD APPLY THE PROCEDURAL STANDING DOCTRINE TO PRE-ENFORCEMENT APA CHALLENGES AGAINST THE TREASURY

The courts' inconsistent analysis of the standing inquiry and use of the procedural standing doctrine is problematic for numerous reasons. Inconsistent standing application (1) threatens to place putative petitioners in a catch-22 of either needing to abandon their rights or risk penalties;[257] (2) creates poor precedent regarding the commonplace procedural exception to the traditional standing rule, in turn creating additional problems, such as allowing for rights without

257. *See supra* Part II.B.2.

remedies;[258] (3) in the tax context, further confuses the field, increasing the opacity of tax exceptionalism and petitioners' ability to bring an APA claim against the Treasury, ultimately harming every party in the process;[259] and finally, (4) in the pre-enforcement APA tax context, disrupts a theoretically uniform, global doctrine, creating a cascade of further problems.[260]

This inconsistent application of pre-enforcement APA standing, particularly in the tax context, with its history of tax exceptionalism, is thus problematic and should be corrected going forward. For as simple as the standing inquiry is in theory,[261] the carve-outs, exceptions, complications, and relatively recent major changes aggregate to form a complex and nebulous doctrine.[262] Adding courts' inconsistent standing analyses of pre-enforcement tax cases unnecessarily further taints this already confounding doctrine.[263] Indeed, instead of injecting additional tax-specific glosses on the standing question, courts should focus on simplifying, clarifying, and annunciating their analyses as much as possible. That way plaintiffs, courts, and tax agencies all benefit from increased levels of certainty about their litigating positions and avoid wasting time and money on needless lawsuits.[264]

Moving forward, courts conducting the standing inquiry for pre-enforcement APA challenges against the Treasury should embrace the theory of the special procedural standing. Without special rules for procedural injuries, these plaintiffs would be thrust into the problem of having a right without a remedy—a right that Congress expressly mandated.[265]

To conduct this procedural standing analysis, courts should carefully separate the elements of the standing inquiry into a four-step process to determine: (1) whether the procedural standing doctrine applies; (2) whether the plaintiff meets the relaxed injury-in-fact test; (3) whether plaintiff sufficiently alleges causation; and (4) whether plaintiff sufficiently alleges redressability.[266]

258. *See supra* Part II.B.3.

259. *See supra* Part II.B.4.

260. *See supra* Part II.B.1.

261. Recall Justice Scalia's "What's it to you?" definition of standing. *See supra* note 82 and accompanying text.

262. *See supra* Part I.B.1.

263. *See supra* Part II.A.

264. *See supra* notes 211–16 and accompanying text.

265. *See supra* note 235; 5 U.S.C. § 702.

266. While this Part—and this Note as a whole—relates specifically to pre-enforcement APA claims against the *Treasury*, much of this analysis translates to other pre-enforcement administrative actions. Additionally, this Part assumes that the AIA does

1. Determining Whether Procedural Standing Applies

First, the court must assess whether the plaintiff's purported injury is sufficient to fall under the category of procedural injuries. As this Note focuses specifically on pre-enforcement APA challenges against the Treasury, almost all relevant pleadings should be procedural in nature. However, the court should ensure that if, for example, a plaintiff brings multiple claims, only their procedural claims are afforded special standing status. Alternatively, if a plaintiff's "procedural" pleadings are inchoate or illegitimate for some other reason, then the court need not apply the relaxed procedural standing analysis.

2. Applying the Relaxed Procedural Injury-in-Fact Analysis

If the injury does fall into the procedural injury bucket, the court must then determine whether plaintiff's alleged injury is sufficient to satisfy the injury-in-fact test with procedural modifications. Establishing a procedural injury requires only that a plaintiff establish a "risk of harm" from procedural errors.[267] Such a procedural injury can be merely "esthetic,"[268] or "[t]he deprivation of information,"[269] or something as simple as "living adjacent to the site for proposed construction of a federally licensed dam . . . [that] fail[ed] to prepare an environmental impact statement."[270] In short, if the court determines that a plaintiff's injury is procedural, then it should likely find that the

not fully bar pre-enforcement APA challenges against the Treasury. *See supra* notes 73–77 and accompanying text.

267. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549–50 (2016) ("[T]he violation of a procedural right granted by statute can be sufficient . . . to constitute injury in fact."). Under the procedural standing inquiry, the plaintiff need not demonstrate that their injury is "imminent" as they would under the traditional standing doctrine. Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 n.7 (1992). In contrast, under the traditional injury-in-fact analysis, the Supreme Court has interpreted the "imminence" prong to require that a plaintiff's alleged injury must be "certainly impending"—which, while providing some flexibility for future injuries, requires a definiteness that is difficult to establish for procedural injuries. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013) ("'Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose . . . .' Thus, we have repeatedly reiterated that 'threatened injury must be certainly impending to constitute injury in fact,' and that '[a]llegations of possible future injury' are not sufficient." (second alteration in original) (emphasis omitted) (quoting *Lujan*, 504 U.S. at 565 n.2; and then quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990))).

268. *Lujan*, 504 U.S. at 562.

269. Bullock v. IRS, 401 F. Supp. 3d 1144, 1150 (D. Mont. 2019).

270. *Lujan*, 504 U.S. at 572 n.7.

agency's action constitutes an injury-in-fact, as long as the rule or regulation stands to directly impact the plaintiff.

3. Applying the Causation Prong

If the plaintiff establishes a procedural injury, the court must then ensure that the plaintiff demonstrates a proper causal connection between the agency's action and the alleged injury.[271] While this inquiry is not specifically augmented by the procedural standing doctrine, there is some flexibility inherent in its analysis. If a plaintiff is able to establish a procedural injury, they will likely have de facto established causation. Simply showing that the agency's actions caused the alleged procedural injury is sufficient to establish this prong.[272]

4. Applying the Relaxed Redressability Analysis

Finally, if the plaintiff can demonstrate a procedural injury and causal connection, the court must evaluate whether the plaintiff

271. Recall that the traditional test evaluates whether the injury is "fairly traceable to the challenged action of the defendant." Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180 (2000).

272. In *Silver v. IRS*, for example, the IRS argued that the plaintiff's injury was not caused by the agency, because the Treasury was simply promulgating regulations on behalf of Congress's directives from the TCJA. No. 19-cv-247, 2019 WL 7168625, at *2 (D.D.C. Dec. 24, 2019). The *Silver* court rejected this argument, holding that the plaintiff's injuries were not caused by the TCJA but were caused specifically by the IRS's regulations which allegedly violated the APA. *Id.* ("Plaintiffs are not challenging any specific regulation that might or might not be traceable directly to the TCJA. Rather, Plaintiffs allege that the agencies neglected to undertake procedural measures designed to protect small business from the burden of unwieldy and cost-intensive regulations . . . . Plaintiff's alleged injuries are therefore traceable to Defendants' alleged violation of these separate statutory requirements, not the TCJA. Causation is easily satisfied." (citations omitted)).

Some courts occasionally utilize a heightened causation test for procedural standing. *See, e.g.*, Ctr. for L. & Educ. v. Dep't of Educ., 396 F.3d 1152, 1159 (D.C. Cir. 2005) (holding that "[t]he chain of causation between the alleged procedural violation and the concrete interest is speculative at best" and that a "prospective plaintiff must demonstrate that the defendant caused the particularized injury, and *not just* the alleged procedural violation"). The analysis used by the D.C. Circuit in *Center for Law & Education*, however, is not widely applied. *See* Pierce, *supra* note 107, at 11–12. Scholars have assailed the *Center for Law & Education* opinion as "flawed on many grounds." *Id.* at 13; *see id.* at 11–17. Specifically, the D.C. Circuit—applying the procedural standing inquiry—confused causation with redressability, wrongly holding that "[a]ppellants must allege injury beyond mere procedural misstep *per se* to satisfy standing in a procedural-rights case." *Ctr. for L. & Educ.*, 396 F.3d at 1160; Pierce, *supra* note 107, at 13–14.

satisfies the relaxed procedural redressability requirement.[273] While the procedural standing relaxations are intended to lower the plaintiff's burden to satisfy what would otherwise be an impossible barrier for procedural injuries, this test is not intended to provide plaintiffs with a free-pass. Constitutional standing is a ubiquitous requirement for all plaintiffs.[274] Courts use a plausibility test to assess redressability, determining whether the plaintiff alleged claims which "might plausibly have changed the outcome of a substantive dispute."[275]

So long as a plaintiff can demonstrate that it is plausible that a court may redress their injury, the plaintiff's claim is sufficiently redressable. This plausibility threshold is a low bar, as "it is almost always plausible that the provision of a procedural safeguard will change the outcome of a case."[276] Because the court can almost always vacate and remand an agency's faulty procedural action, the court is almost always able to redress a plaintiff's injury.[277]

Easing the redressability prong makes sense for procedural injuries. Otherwise plaintiffs alleging a procedural violation would almost never be able to establish standing, as they would perpetually fail the redressability element.[278] While it is almost always plausible that rectifying a procedural failure could change the outcome of a case, a plaintiff will almost always be unable to show that a favorable court action will absolutely remedy their situation. A court can never

273. The traditional standing inquiry requires plaintiff to show redressability that is "'likely,' as opposed to merely 'speculative.'" *Lujan*, 504 U.S. at 561 (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 38, 43 (1976)).

274. *See supra* note 92 and accompanying text.

275. Pierce, *supra* note 107, at 2–3. While Pierce describes these tests within the causation prong of standing, they fit more naturally under the redressability prong—indeed, the sole other test that Pierce documents he criticizes as being based around redressability rather than causation. *See supra* notes 115–18. Additionally, utilizing this test under the redressability prong clarifies why it is an "easy-to-meet" test, because the redressability element is relaxed. Pierce, *supra* note 107, at 8; *Lujan*, 504 U.S. at 572 n.7. While Pierce describes the *Center for Law & Education v. Department of Education*'s alternative "possibility standard," it clearly does not relax the redressability requirement as the procedural standing analysis mandates. Pierce, *supra* note 107, at 2, 11–13; *see also* Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 450 (1989) ("We likewise find untenable the . . . claim that appellants lack standing because a ruling in their favor would not provide genuine relief.").

276. Pierce, *supra* note 107, at 3.

277. *See id.* at 13 ("In the context of most agency actions, a court can redress an injury only by vacating and remanding the agency action with instructions to the agency to correct the error that led to the judicial rejection of the agency action. Courts routinely hold that an injury caused by an agency can be redressed by a judicial decision that vacates and remands the agency action.").

278. *See, e.g.*, Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26 (1976).

guarantee (or prevent), for example, that the agency would not later re-issue the rule or regulation under proper APA procedures.[279] This is especially true for pre-enforcement challenges where a plaintiff merely faces a future risk rather than a present injury. Taking again the same example of *Lujan*'s dam-neighbor's omitted environmental impact study,[280] a plaintiff there would almost certainly be unable to establish a redressable claim as the dam would not even be built for many years. Yet, this redressability was no barrier at all for Justice Scalia to grant the hypothetical plaintiff standing.[281]

In sum, courts should adopt the procedural standing requirement for plaintiffs making pre-enforcement APA challenges to the Treasury. Once a court determines that such plaintiffs qualify for the procedural standing analysis, the court should go step-by-step to ensure that the plaintiff meets the relaxed requirements to establish standing. As described above, these requirements are not onerous; most plaintiffs should be able to easily establish the necessary elements for procedural standing.

B. ILLUSTRATING THE PROCEDURAL STANDING DOCTRINE

The procedural standing doctrine is an abstract concept that is difficult to fully embrace in solely abstract terms. While Justice Scalia's dam hypothetical is a useful illustration,[282] this Section provides additional examples of how courts should apply the procedural standing doctrine going forward. Subsection 1 revisits the case of *Bullock v. IRS*, arguing that the court should have applied the procedural standing doctrine to assess Montana's standing, rather than relying on *Massachusetts v. EPA*. Subsection 2 conducts the standing inquiry for the plaintiffs in *New Jersey v. Mnuchin*, the case highlighted in the Introduction.

1. Illustration 1: *Bullock v. IRS* Revisited

In *Bullock v. IRS*, the District Court of Montana found that Montana had standing to launch a pre-enforcement APA suit against the IRS only because of Montana's special status as a state under *Massachusetts v. EPA*.[283] But the *Bullock* court ignored the procedural standing doctrine, relying solely on the state's ability to satisfy standing

279. *See, e.g.*, *supra* note 168.

280. *See supra* notes 111–14 and accompanying text.

281. Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 n.7 (1992).

282. *See id.*

283. Bullock v. IRS, 401 F. Supp. 3d 1144, 1152 (D. Mont. 2019) (citing Massachusetts v. EPA, 549 U.S. 497 (2007)).

under the informational deprivation test.[284] This information deprivation test, however, should not override the procedural standing doctrine.[285] Moreover, the *Bullock* court should not have needed to rely on the unstable doctrine of *Massachusetts v. EPA* to grant Montana standing.[286] Instead, *Bullock* could and should have found that Montana had standing under the relaxed procedural standing inquiry.

Montana properly alleged a procedural injury.[287] The plaintiffs properly alleged a pre-enforcement APA violation in that the IRS rescinded regulations which directly affected the plaintiffs without proper APA notice-and-comment procedures.[288] This is a clear-cut pre-enforcement violation that should trigger the procedural standing doctrine. The court should then have assessed whether Montana suffered an injury-in-fact under the procedural doctrine. This analysis should not require Montana to have spent money combating the IRS's regulation rescission but simply should have determined whether Montana suffered a "risk of injury."[289] Montana clearly alleged that the IRS's rescission created a risk of injury because Montana would no longer be able to monitor its nonprofits' donors' substantial contribution information.[290]

After determining that Montana established an injury-in-fact, the court should have then weighed whether this injury was "caused" by the agency. There is no question that the IRS's rescission of regulations caused Montana to experience its injury.[291]

284. This test was concocted by the D.C. Circuit in *PETA v. Department of Agriculture*. *Id.* at 1151 (citing People for the Ethical Treatment of Animals v. U.S. Dep't. of Agric., 797 F.3d 1087, 1093–94 (D.C. Cir. 2015)).

285. The *PETA* court's new test made little sense, *see PETA*, 797 F.3d at 1101 (Millett, J., dubitante) ("As this case illustrates, our organizational standing precedents now hold that the required Article III injury need not be what the defendant has done to the plaintiff; it can also be what the defendant has not done to a third party."), and essentially did not implicate the APA or the procedural standing doctrine. The D.C. Circuit in *PETA* not only found this allegation meritless but concluded that PETA could not even establish judicial review under the APA for its flimsy allegations. *Id.* at 1098 ("[W]e affirm the district court on the alternative ground that PETA failed to plausibly allege that the USDA's decade-long inaction constitutes agency action unlawfully withheld." (citing Munsell v. U.S. Dep't of Agric., 509 F.3d 572, 592–93 (D.C. Cir. 2007))). The court also held that PETA could not obtain judicial review under its APA allegations. *Id.* (citing Norton v. S. Utah Wilderness All., 542 U.S. 55, 61 (2004)).

286. *See supra* note 100.

287. *See supra* note 278 and accompanying text.

288. *See supra* note 152 and accompanying text.

289. *See supra* notes 267–70 and accompanying text.

290. *See supra* notes 156–57 and accompanying text.

291. *See supra* note 272.

Finally, the court should have assessed whether Montana's injury was redressable. This too is an easy lift for Montana, who must simply show that the court could remedy its problems. Considering that the actual *Bullock* court fully invalidated the IRS's rescission,[292] Montana should certainly satisfy this prong.

Montana would have easily satisfied the procedural standing test. Instead, however, the actual *Bullock* court relied on *Massachusetts v. EPA* to establish Montana's standing under the theory that states have special standing status as quasi-sovereign entities.[293] This is a flimsy doctrine,[294] which the *Bullock* court used to dodge its own conclusion that Montana lacked standing. There is no good reason that the *Bullock* court ignored the procedural standing doctrine, which would have more properly granted standing to Montana.[295] And, in contrast, there are many good reasons that the *Bullock* court *should* have utilized the procedural standing doctrine.[296] While the *Bullock* court did find that Montana had standing, its analysis was flawed. Instead of applying *Massachusetts v. EPA*, the court should have conducted a straightforward application of the procedural standing doctrine to find that Montana had standing.

2. Illustration 2: *New Jersey v. Mnuchin*

While the court has not yet weighed in on *New Jersey v. Mnuchin*, the case (described in the Introduction) of whether the IRS's SALT tax regulations were promulgated arbitrarily and capriciously and/or in violation of the Regulatory Flexibility Act,[297] the government will almost certainly assert that the plaintiffs lack standing. Just as in *Bullock*, the court here could rely on *Massachusetts v. EPA* to grant the plaintiff-states standing; however, as in *Bullock*, the better option would be to grant the plaintiffs standing outright under the procedural standing doctrine.

As a reminder, New Jersey, New York, and Connecticut are alleging that the IRS violated the APA through its issuance of new SALT regulations pursuant to the TCJA.[298] The plaintiff-states' allegations almost certainly trigger the procedural standing doctrine. They argue

292. Bullock v. IRS, 401 F. Supp. 3d 1144, 1159 (D. Mont. 2019).

293. *Id.* at 1152.

294. *See supra* note 100.

295. *See supra* notes 185–86 (noting that the *Silver* court did invoke the procedural standing doctrine and found that plaintiff easily met the procedural standard).

296. *See supra* Parts II.B.1–4.

297. *See supra* note 7 and accompanying text.

298. *See* Complaint for Declaratory & Injunctive Relief, *supra* note 7.

that, while they have not yet been injured, the defendants' actions *will* injure them in the future, and their claim directly implicates APA procedures, which provide a right of judicial review. The plaintiffs can establish an injury-in-fact because they are at risk of harm from these allegedly procedurally infirm regulations. This harm is clearly caused by the IRS, as promulgators of the regulations. Finally, the court can almost certainly redress the plaintiffs' injuries by nullifying the regulations, for example. Thus, under the procedural standing doctrine—which the plaintiffs qualify for—they should easily be able to establish standing in order to adjudicate the merits of their claims. While the plaintiffs are not likely to prevail on the merits of their case, they should still be granted this opportunity to be heard in a court of law.[299]

C. APPLICATION OF THE PROCEDURAL STANDING DOCTRINE SOLVES THE STANDING ANALYSIS PROBLEMS OF PRE-ENFORCEMENT APA CLAIMS AGAINST THE TREASURY

The procedural standing analysis provides procedurally injured plaintiffs a substantially easier path to standing than the traditional standing inquiry. Although courts expressly relax only the injury-in-fact and redressability standing requirements, other elements of the standing inquiry—like causation—are inherently easier to establish. While some experts may find that procedural standing provides plaintiffs too easy a road to establishing standing,[300] absent the "special" procedural analysis, few, if any, plaintiffs who suffer procedural injuries would be able to establish standing to enforce their rights and challenge agency abuses.[301] Indeed, analyzing pre-enforcement APA challenges against the Treasury under the procedural standing doctrine solves numerous problems embedded in the tax-standing inquiry. Below, Subsection 1 charts the numerous problems that procedural standing solves in the pre-enforcement APA tax agency context. Subsection 2 refutes potential criticisms of this embrace of procedural standing.

1. Special Procedural Standing Solves the Problems of Procedural Injuries

There are a number of good reasons to embrace the special status of procedural injuries within the standing inquiry. First, applying

299. *See supra* note 8 and accompanying text.

300. Burt, *supra* note 85, at 285 (arguing that special rights for procedural injuries undercuts *Lujan*'s main holding—"eviscerat[ing] the standing requirements of the Constitution").

301. *See supra* Part II.B.3; Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 n.7 (1992).

procedural standing to pre-enforcement APA tax claims provides plaintiffs a pathway to remedy their injuries. Under the traditional standing analysis, pre-enforcement plaintiffs are perpetually hard-pressed to establish the imminence and redressability prongs. For courts to grant standing without the procedural doctrine, plaintiffs will need to get lucky (or, potentially, enlist a state to sue on their behalf in order to enjoy the relaxed *Massachusetts v. EPA* standing analysis).[302]

Yet, providing a remedy for every wrong is a central tenant of our judicial system,[303] especially where the alternative is a catch-22 between plaintiffs abandoning their rights or subjecting themselves to criminal and civil liability.[304] Furthermore, these procedural "wrongs" are issues that Congress has expressly identified as wrongs.[305] Even if one characterizes a procedural injury as a "lesser" injury, disallowing plaintiffs from enforcing their congressionally provided rights and forcing petitioners into impossible catch-22s is poor policy. By utilizing the procedural standing doctrine, the judiciary will alleviate plaintiffs' catch-22 and allow for them to enforce their legitimate rights.

Second and relatedly, the courts should not usurp Congress's role by denying review for claims that Congress expressly directed deserve review. The APA—congressionally enacted legislation—is extremely clear in providing that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review."[306] For courts to restrict plaintiffs' ability to make pre-enforcement APA challenges against the Treasury on a *standing* basis, when Supreme Court jurisprudence has already condoned procedural standing as "special,"[307] smacks of overriding congressional directives. Embracing the procedural standing doctrine, as the Supreme Court and others have, provides the best of both worlds, granting plaintiffs access to their legislatively established rights while also comporting with stare decisis.

This leads to a third point: not only would utilizing the procedural standing doctrine promote rather than usurp congressional legislation, but procedural standing in the tax context incentivizes the Treasury to follow the APA—an incentive that the Treasury still sorely

302. *See, e.g.*, Bullock v. IRS, 401 F. Supp. 3d 1144, 1152 (D. Mont. 2019).
303. *See supra* note 235 and accompanying text.
304. *See supra* Part II.B.2.
305. 5 U.S.C. § 702.
306. *Id.*
307. Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 n.7 (1992).

needs.[308] With courts seemingly indicating that the Treasury is subject to the APA the same as any other agency,[309] the justiciability doctrine of standing should not artificially circumscribe the procedural standing doctrine to shield the Treasury from APA challenges. Conversely, allowing the standing doctrine to bar plaintiffs' administrative claims as non-justiciable will disincentivize the Treasury from properly following the APA. For courts to implement a strict standing inquiry here would simply act as a second version of the AIA, de facto barring plaintiffs' pre-enforcement administrative claims. This strict standing inquiry would undermine the now-widespread theory that the Treasury can no longer violate the APA with impunity. Thus, courts utilizing the procedural standing doctrine furthers the Supreme Court's directive that the Treasury be subject to the APA like any other agency.[310]

Fourth, utilizing the procedural standing doctrine will promote increased uniformity for what should be a consistent, uniform doctrine of standing. As it stands, judicial application of the procedural standing doctrine is woefully inconsistent.[311] By more uniformly utilizing the procedural standing doctrine, courts can improve putative plaintiffs' and agencies' reasonable expectations regarding their likelihood of obtaining judicial review, decrease wasteful litigation over uncertain justiciability claims, and improve consistency, ensuring that like plaintiffs are treated alike.[312]

2. Rebutting Counterarguments: Procedural Standing Does Not Harm the Tax System & Procedural Standing Is No Weaker Precedent than the Alternatives

Critics will lob two main counterarguments against broader utilization of the procedural standing doctrine. Primarily, critics will contend that the procedural standing doctrine ultimately harms the tax system by greatly easing plaintiffs' ability to make administrative challenges against the Treasury, consequently decreasing the Treasury's ability to promulgate regulations, leading to increased taxpayer uncertainty. Additionally, these detractors will argue that increasing plaintiffs' ability to challenge the Treasury via the procedural standing

308. *See supra* note 56.

309. *See supra* notes 62–66 and accompanying text.

310. *See* Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 55 (2011) ("[W]e are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly '[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.'" (quoting Dickinson v. Zurko, 527 U.S. 150, 154 (1999))).

311. *See, e.g.*, *supra* Part II.A.

312. *See supra* Part II.B.

doctrine will harm the tax system by creating costly, time-consuming litigation that the Treasury has neither the time nor the expertise to handle, which detracts from the Treasury's actual function of administering the federal tax system.

While there is certainly a tension between proper administration of the tax system and taxpayers' ability to obtain pre-enforcement review of administratively violative Treasury actions,[313] providing special status for procedural injuries does not seriously nor fundamentally undermine the tax system. Here, the procedural standing doctrine does nothing more than provide putative plaintiffs with a reasonable path to challenging the IRS prior to the IRS expending resources on enforcement. Perhaps critics or the Treasury could argue that by not allowing procedural injuries to survive standing, the injured party would not later re-litigate. Yet this "solution" places the burdens of Treasury violations on the taxpayer and, moreover, looks much like the status quo of tax exceptionalism which courts are in the midst of rejecting.[314] In addition, granting plaintiffs passage through the justiciability hurdle of standing does not guarantee plaintiffs anything. If their claims are meritless, the Treasury can still dismiss plaintiffs' claims easily.

While it is certainly good for taxpayers and the tax system as a whole to have increased certainty over tax regulations, *post*-enforcement APA claims—which non-justiciable plaintiffs would then need to bring and which would then later invalidate Treasury regulations—arguably do much more harm to the certainty of the tax system. Thus, the procedural standing doctrine, while encouraging more up-front litigation, arguably provides taxpayers with certainty by challenging invalid Treasury rules early on in the promulgation process.

Perhaps more importantly, as noted above, the doctrine of procedural standing helps incentivize the Treasury to adhere to the APA in the first place, ensuring that its regulations are not later voidable by the courts. Additionally, properly performed notice-and-comment rulemaking assists the Treasury in gaining greater viewpoints and perspectives, arguably improving regulations—and, as a corollary, the tax system—overall.[315] Moreover, Treasury regulations increasingly

313. *See supra* Part II.B.4.

314. *See Mayo Found.*, 562 U.S. at 55 ("[W]e are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly '[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.'" (quoting Dickinson v. Zurko, 527 U.S. 150, 154 (1999))).

315. *See* Cords, *supra* note 248, at 108–11.

concern normative public policy matters; these, at least, should not be subject to special tax rules.[316] Finally, the Treasury is not and will never be absolutely hamstrung by the APA—there may often be regulatory exceptions, falling under the good cause exemption, for example, which allow the Treasury to properly avoid the most onerous APA procedures.[317] Thus, while the procedural standing doctrine may allow plaintiffs to accelerate their administrative claims against the Treasury, it actually can function to promote the tax system via improved public participation in the promulgation process; catch voidable Treasury regulations earlier on, whereby limit the public's wrongful-reliance; increase the Treasury's adhering to mandatory APA procedures; and not limit the Treasury's ability to utilize exceptions to APA rulemaking.

Second, critics may contend that the argument for greater utilization of the procedural standing doctrine based on global uniformity is overblown; after all, this Note acknowledges that the judiciary's use of the doctrine has been spotty. However, the alternatives to increasing use of the procedural standing doctrine would lead to poor results. One option would be to decrease or even eliminate use of the procedural standing doctrine altogether. However, this ostensibly eliminates many plaintiffs' ability to remedy their injuries while undermining Congress and contradicting the Supreme Court.[318] The other alternative is, of course, to retain the status quo application of the procedural doctrine. Yet, as explored above, this creates its own set of problems by increasing wasteful litigation, decreasing parties' reasonable expectations, keeping putative pre-enforcement tax-APA plaintiffs in a catch-22, and ultimately undermining the core judicial policy of stare decisis.[319] In light of these two alternatives, taxpayers, the judiciary, and even the Treasury all benefit from a more uniform application of the procedural standing doctrine within the global realm of standing.

CONCLUSION

Now that the era of tax exceptionalism, which has long promoted the theory that tax is "special," is over, courts must grapple with how to impose longstanding administrative doctrines onto the historically exempt Treasury. When it comes to pre-enforcement administrative

316. *See supra* notes 250–51 and accompanying text.

317. *See supra* note 41.

318. *See supra* notes 305–06 and accompanying text; Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 n.7 (1992).

319. *See supra* Parts II.B.1–4.

challenges, the judiciary should adhere to *Mayo*'s mandate that courts should not "carve out an approach to administrative review good for tax law only."[320] However, in order to effectively provide the proper congressionally mandated administrative review, courts must embrace the procedural standing doctrine to ensure that pre-enforcement administrative plaintiffs, especially those using the APA to sue the Treasury, have a seat at the table.

While the procedural standing doctrine has not yet been consistently applied, a uniform approach by the judiciary embracing the procedural standing doctrine would benefit all parties, inducing the Treasury into compliance with the APA, rectifying the current pre-enforcement catch-22, and promoting the core judicial doctrine of stare decisis. Whether or not the plaintiffs in *New Jersey v. Mnuchin* are ultimately successful in their gambit to eliminate the SALT regulations, they should have standing under the special procedural standing doctrine to have their day in court and receive the opportunity to be heard.[321]

320. Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 55 (2011).

321. *See supra* notes 7–10 and accompanying text.