
Old Regs: The Default Six-Year Time Bar for Administrative Procedure Claims

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*Abstract. Old regs should not be subject indefinitely to litigation that seeks to validate the public right to legal administrative procedure. Instead, the six-year limitations period under 28 U.S.C. § 2401(a) should accrue for an administrative procedure claim when an agency promulgates a regulation, making all of the elements of the claim available and common to all plaintiffs. The Supreme Court should confirm this result when it considers accrual timing under 28 U.S.C. § 2401(a) this Term in *Corner Post, Inc. v. Federal Reserve*. If the government delays a claim despite the diligence of available plaintiffs, courts can use equity to provide appropriate adjustments.*

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Introduction

As the administrative state ages, its regulations accumulate. Many are decades old. How long do administrative procedure claims last? Can an old reg still be challenged on grounds of administrative procedure defects that happened years ago, when the regulation was promulgated? The question is pressing as federal courts field a wave of challenges to the actions of the administrative state.

This Article argues that we should leave old regs alone. It uses tax cases to explore the question of when old regs are and should be open to administrative procedure challenges. But the issue goes well beyond tax.

For example, in *Alliance for Hippocratic Medicine v. FDA* (“AHM”), a Texas case filed in 2022, plaintiffs challenged the Federal Drug Administration’s (“FDA’s”) 2000 approval of the abortion-inducing medicine mifepristone.² The Court of Appeals for the Fifth Circuit agreed with the government that the six-year limitations period of 28 U.S.C. § 2401(a)—the subject of this Article—blocked the plaintiffs from challenging the FDA’s 2000 action.³ The Supreme Court recently granted a request for certiorari.⁴

This term, the Supreme Court also will consider 28 U.S.C. § 2401(a) in *Corner Post, Inc. v. Federal Reserve*.⁵ There, petitioners appealed a decision by the Court of Appeals for the Eighth Circuit that time-barred a 2021 challenge to a 2011 Federal Reserve (“Fed”) regulation. In *Corner Post*, the petitioner came into existence after the expiration of the six-year period.⁶ The petitioner claims that a Fed regulation was both contrary to law and also arbitrary and capricious.⁷ The analysis in this Article solves half of the *Corner Post* puzzle by revealing that the administrative procedure claim of arbitrary and capricious action in *Corner Post* was filed too late.

In tax, in contrast to *AHM* and *Corner Post*, administrative procedure challenges to old agency actions have gone forward despite the six-year statutory time bar. In one case, *Hewitt v. Commissioner*,⁸ taxpayers

¹ 78 F.4th 210 (5th Cir. 2023).

² *Id.* at 223–26.

³ *See id.* at 242–45 (agreeing with the FDA that 28 U.S.C. § 2401 time-bars the FDA’s 2000 action, later challenged by a citizen petition denied in 2016).

⁴ *FDA v. All. for Hippocratic Med.*, No. 23-235, 2023 WL 8605746 (U.S. Dec. 13, 2023).

⁵ *See* N.D. Retail Ass’n v. Bd. of Governors of the Fed. Rsrv. Sys., 55 F.4th 634 (8th Cir. 2022), *cert. granted sub nom.* *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, No. 22-1008, 2023 WL 6319653 (U.S. Sept. 29, 2023).

⁶ *See id.* at 637–38 (providing timeline).

⁷ *See id.* at 637.

⁸ 21 F.4th 1336 (11th Cir. 2021).

claimed a deduction of millions of dollars from the 2012 donation of a so-called “conservation easement” on their cattle ranch.⁹ But the deduction failed a requirement set out in a 1986 Treasury regulation, so the Internal Revenue Service (“IRS”) denied it.¹⁰ The Court of Appeals for the Eleventh Circuit decided that the 1986 regulation promulgation had not met all Administrative Procedure Act (“APA”) requirements.¹¹ It invalidated the government’s application of the decades-old regulation and allowed the claimed deduction.¹²

The statutory provision at 28 U.S.C. § 2401(a) provides that “every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.”¹³ It is the default limitations period for claims against the federal government.¹⁴ It applies for administrative procedure claims in areas, such as tax, where there is no other specific, shorter period.¹⁵ It exists against the background of sovereign immunity, meaning that it “is a central condition” under which “the United States consents to be sued.”¹⁶

At least eight courts of appeals have adopted the doctrine outlined in *Wind River Mining Corp. v. United States*¹⁷ and concluded that this six-year limitations period for an administrative procedure challenge “first accrues,” or begins to run, when a regulation is promulgated.¹⁸ No court of

⁹ *Id.* at 1340–41.

¹⁰ *Id.* at 1338, 1341, 1343.

¹¹ *Id.* at 1339.

¹² *Id.* at 1339, 1350 (holding invalid the application of Treas. Reg. § 1.170A-14(g)(ii)).

¹³ 28 U.S.C. § 2401(a).

¹⁴ *See* *United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 8–9 (2008) (calling the period an “outside limit”).

¹⁵ *Id.* Shorter limitations periods often apply. *See, e.g.*, 28 U.S.C. § 2344 (providing a sixty-day limitations period under the Hobbs Act to challenge certain agency actions).

¹⁶ *United States v. Mottaz*, 476 U.S. 834, 834, 841–42 (1986) (interpreting an analogous limitations period in the Quiet Title Act, 28 U.S.C. § 2409a(f) (current version at 28 U.S.C. § 2409a(g))).

¹⁷ 946 F.2d 710 (9th Cir. 1991).

¹⁸ *See, e.g.*, *Preminger v. Sec’y of Veterans Affs.*, 517 F.3d 1299, 1307–08 (Fed. Cir. 2008) (time-barring a notice-and-comment challenge to a 1973 federal regulation); *Sai Kwan Wong v. Doar*, 571 F.3d 247, 263 (2d Cir. 2009) (time-barring a notice-and-comment challenge to 1980 Medicaid regulation on the grounds of no notice and comment); *Hire Order Ltd. v. Marianos*, 698 F.3d 168, 170 (4th Cir. 2012) (time-barring a notice-and-comment challenge to a 1969 Revenue Ruling); *Texas v. Rettig*, 987 F.3d 518, 523–24, 529–30 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1308 (2022) (time-barring a notice-and-comment challenge to a 2002 HHS regulation); *Sierra Club v. Slater*, 120 F.3d 623, 628–29, 631 (6th Cir. 1997) (time-barring a claim brought under the National Environmental Protection Act via the Administrative Procedure Act (“APA”) to a 1984 Federal Highway Administration Record of Decision); *N.D. Retail Ass’n v. Bd. of Governors of the Fed. Rsrv. Sys.*, 55 F.4th 634 (8th Cir. 2022), *cert. granted sub nom.* *Corner Post Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, No. 22-1008, 2023 WL 6319653 (U.S. Sep. 29, 2023) (time-barring an arbitrary and capricious APA challenge to a 2011

appeals disagrees with this analysis, which would time-bar administrative procedure challenges to decades-old administrative agency actions like regulations or Notices.¹⁹ On the other hand, neither the Supreme Court²⁰ nor the Court of Appeals for the D.C. Circuit²¹ has squarely addressed this limitations period question. Moreover, the existing case law neither provides a careful examination of the statutory text nor considers the policy issues presented by the limitations period.

This Article argues against the main alternative interpretation, which would analyze the limitations period for administrative procedure claims separately for every specific plaintiff and would begin the period for a specific plaintiff when that plaintiff acquires standing.²² This alternative approach works for contract or tort claims, but not for administrative

Federal Reserve regulation limiting certain debit card fees); *Cedars-Sinai Med. Ctr. v. Shalala*, 177 F.3d 1126, 1128–29 (9th Cir. 1999) (time-barring a notice-and-comment challenge to a 1986 Medicare manual); *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1292–93 (11th Cir. 2015) (time-barring an APA challenge to the Secretary of the Interior’s decisions to take lands into trust in 1984, 1992 and 1995).

¹⁹ See *Wind River*, 946 F.2d at 715–16 (holding that the six-year period accrues earlier, at promulgation, for administrative procedure claims and later, at application, for *ultra vires* claims that a regulation is inconsistent with an authorizing statute). The *Corner Post* petition for certiorari argued that a circuit split existed regarding the time of accrual. See *Petition for Writ of Certiorari at 11–14, Corner Post*, 2023 WL 6319653 (2023) (No. 22-1008). The Sixth Circuit case the petition pointed to, however, did not conclude that the six years should start running later for pure administrative procedure claims, because it involved a claim about the violation of a state property right. See *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 819 (6th Cir. 2015) (allowing a claim that the Forest Service order banning motorboats on a lake violated an individual’s state property right under the Michigan Wilderness Act).

²⁰ See *Petition for a Writ of Certiorari at 28 & n.11, Texas v. Comm’r.*, 142 S. Ct. 1308 (No. 21-379) (admitting that APA claims are subject to a six-year statute of limitations, which accrues upon final agency action, but stating that the Supreme Court has never decided when a final agency action occurs for the purpose of this limitations period).

²¹ The Court of Appeals for the D.C. Circuit has held that the limitations period accrues at the time of promulgation in some cases. See, e.g., *Harris v. FAA*, 353 F.3d 1006, 1011, 1013 (D.C. Cir. 2004) (time-barring a challenge to a 1993 FAA Notice); cf. *JEM Broad. Co. v. FCC*, 22 F.3d 320, 324, 326 (D.C. Cir. 1994) (“[T]he failure to provide notice and comment is a ground for complaint that is or should be fully known to all interested parties at the time the rules are promulgated.”) (interpreting the Hobbs Act limitations period to require accrual upon agency’s entry of a final order under 28 U.S.C. § 2344). But it has not yet held that accrual-at-promulgation applies no matter when a plaintiff knows about or can pursue such a challenge. See *Hardin v. Jackson*, 625 F.3d 739, 743 (D.C. Cir. 2010) (declining to decide whether the discovery rule applies to determine accrual under 28 U.S.C. § 2401(a) when the plaintiff claimed the EPA should have followed non-APA statutory procedural requirements and concluding that challenge was time barred in any event).

²² See John Kendrick, *(Un)Limiting Administrative Review: Wind River, Section 2401(a), and the Right to Challenge Federal Agencies*, 103 VA. L. REV. 157, 191, 209 (2017) (arguing that *Wind River* precludes injured plaintiffs from suing when they do not have standing within six years of the agency final action and that, instead, the right of action should accrue when a particular plaintiff exists and suffers a legal wrong).

procedure. Under this alternative interpretation, old regs would remain open to administrative procedure challenges forever, since a plaintiff could become subject to a reg and acquire standing many years after its promulgation.

The *Wind River* consensus is the better approach, though for reasons that the case law does not develop. That is, the six-year limitations period for administrative procedure challenge should start when a regulation is promulgated. Tax cases provide the ideal test case for the *Wind River* position, because it is difficult to bring tax cases immediately after a regulation's promulgation. This is because the Anti-Injunction Act generally prevents facial challenges to tax regulations and thus constrains taxpayers' ability to raise administrative procedure claims.²³ But even in tax, the right to challenge old regs should accrue at the time of promulgation, consistent with the *Wind River* doctrine. This should be the answer even if the Anti-Injunction Act blocks plaintiff taxpayers from immediately challenging regulations upon promulgation. However, it should be subject to appropriate adjustments, such as equitable estoppel and equitable tolling.

In tax, the government has historically waived the limitations period defense, sometimes explicitly but more often simply by ignoring it.²⁴ Applying the six-year period and accruing it at promulgation would dramatically change the landscape of administrative procedure case law in tax. It could shut down many challenges to established anti-tax shelters and other anti-abuse regulations, like the 1986 regulation used to deny the conservation easement deduction in *Hewitt*.²⁵

One policy reason for starting the limitations period upon promulgation, instead of waiting until a plaintiff acquires standing, is that administrative procedure concerns—in contrast with contract and tort claims—do not arise out of a specific interaction between a plaintiff and the government.²⁶ Instead, administrative procedure is a matter of general

²³ I.R.C. § 7421(a) (providing that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person”). *But see* *CIC Servs., LLC v. IRS*, 141 S. Ct. 1582, 1590–92 (2021) (allowing a pre-enforcement challenge and discussing three factors of the reporting obligation at issue—affirmative reporting obligation, distance from possible statutory tax penalty, and possible criminal penalties—that distinguished the suit from an assessment or collection suit).

²⁴ *See, e.g.*, *Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1142 (6th Cir. 2022) (omitting any consideration of a potential limitation-period defense in a lawsuit filed in 2020 challenging a 2007 regulation). The government has recently begun to raise the six-year time-bar defense, including in a case called *Govig*. *See Govig & Assocs., Inc. v. United States*, No. CV-22-00579, 2023 WL 2614910, at *14 (D. Ariz. Mar. 23, 2023).

²⁵ *See supra* notes 8–12 and accompanying text.

²⁶ *See* *Kendrick*, *supra* note 22, at 181–89 (comparing historical accrual of tort and contract claims with accrual of claims against the government for violation of public duties).

public interest, analogous to the general public interest in a legal election. The public interest in a legal election does not allow every eligible voter—let alone every person adversely affected by the action of an illegally elected official—to challenge an election result.²⁷ Likewise, the public interest in administrative procedure does not mean that every person adversely affected by a regulation should have the right to challenge the administrative procedure that produced the regulation. Rather, the public interest in legal administrative procedure is secured by several more general mechanisms. These mechanisms include congressional oversight, presidential oversight, and government restraint.²⁸ Private litigation—the mechanism considered in this Article—provides one avenue to ensure legal administrative procedure, but it is not the only way.²⁹

Another reason for starting the limitations period when a regulation is promulgated is the value of repose. Limitations periods are a classic, tested tool for balancing the value of accuracy with the value of repose in law.³⁰ One typical justification for a statute of limitations is to encourage a plaintiff to raise a claim promptly by penalizing the plaintiff's negligence or delay.³¹ This justification is consistent with starting the accrual of the limitations period for an administrative procedure claim for all plaintiffs when any plaintiff can raise that claim. This may seem counterintuitive because of the plaintiff-specific accrual that applies in claims like contract or tort.³² But it makes sense for an administrative procedure claim, which is not specific to a particular plaintiff, but rather is common to all plaintiffs. Unless the limitations period begins to run as a general matter with respect to all plaintiffs, the claim will survive into the indefinite future, regardless of eligible plaintiffs' negligence and delay.

The text of the statute—which says that the six-year limitations period begins to run when “the right of action first accrues”³³—also supports starting accrual at promulgation. This is different from the rule in a contract or tort action, where “accrual” means the limitations period starts to run for each specific plaintiff at the moment when a specific

²⁷ See *infra* notes 369–377 (illustrating narrow right to challenge election); *cf.* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220–21 (1974) (holding “that standing to sue may not be predicated upon an interest . . . which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share”).

²⁸ See *infra* Section III.D (discussing alternative mechanisms for constraining administrative action).

²⁹ See *id.*

³⁰ See Kendrick, *supra* note 22, at 160–61.

³¹ See *id.* at 181 (arguing that a plaintiff cannot be held responsible for delay before the plaintiff has a claim).

³² *Id.* at 182–83.

³³ 28 U.S.C. § 2401(a).

plaintiff can sue.³⁴ Consistent with this, separate accrual for each specific plaintiff's cause of action does apply to many cases covered by 28 U.S.C. § 2401(a).³⁵ The provision was enacted in 1887 as part of the Tucker Act, which allows certain contract suits against the federal government.³⁶ In the Tucker Act contract context, starting the limitations period anew for every specific plaintiff's claim makes sense, since the right of action arises out of a contract between the specific plaintiff and the government, and does not even exist until that specific agreement has been breached.³⁷

Eight courts of appeals have chosen a reading of 28 U.S.C. § 2401(a) for administrative procedure claims that differs from the private law concept that a statute of limitations accrues for a specific plaintiff when a specific plaintiff can sue.³⁸ Instead, the administrative procedure cases embrace the concept of accrual at the moment of a regulation's promulgation.³⁹ The doctrine starts the limitations period by reference to an action taken by the defendant agency, rather than by reference to an action taken by the plaintiff.⁴⁰ Thus there is a tension with the plaintiff-focused approach taken when interpreting 28 U.S.C. § 2401(a)'s application to, for instance, contract claims.⁴¹

The statutory text, when read together with the APA, supports accrual at promulgation rather than the plaintiff-focused approach applicable for contract claims. An administrative procedure claim does not arise out of a transaction between the government and a specific plaintiff.⁴² The administrative procedure right of action arises under the APA.⁴³ The APA makes clear that the unlawful act is the agency's failure to follow proper administrative procedure.⁴⁴ When notice and comment is missing or

³⁴ *CTS Corp. v. Waldburger*, 573 U.S. 1, 7–8 (2014) (quoting *Accrue*, BLACK'S LAW DICTIONARY (9th ed. 2009), to explain that a statute of limitations begins to run when the cause of action accrues, generally when “the plaintiff can file suit and obtain relief” (citation omitted)).

³⁵ See *infra* notes 36–37 and accompanying text.

³⁶ Tucker Act, 28 U.S.C. § 1491 (1887).

³⁷ See *id.*

³⁸ See *supra* note 18 (collecting cases).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See, e.g., *Cal. Pub. Emps' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049 (2017) (citing 15 U.S.C. § 77m) (distinguishing between a three-year statute of repose that gives “more explicit and certain protection to defendants” and a one-year statute of limitations that “runs from the time when the plaintiff discovers (or should have discovered) the securities-law violation”).

⁴² See, e.g., *Suburban Mortg. Assocs., Inc. v. U.S. Dep't of Hous. and Urb. Dev.*, 480 F.3d 1116, 1122 (Fed. Cir. 2007) (contrasting procedural claims under the APA with substantive claims under the Tucker Act).

⁴³ See 5 U.S.C. § 706 (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law . . .”).

⁴⁴ *Id.*

defective,⁴⁵ the unlawful procedural defect arises no later than the time when the regulation is promulgated (or other final agency action is taken).⁴⁶ The information needed to discover the defect is available, and in the public record, at the time the regulation is promulgated.

In an administrative procedure case, the statutory text “after the right of action first accrues”⁴⁷ should be interpreted to mean the moment of promulgation—which is typically when the first eligible plaintiff can bring a case to challenge the unchanging administrative procedure violation. The administrative procedure right of action arises (and is discoverable) when the regulation is promulgated. Also, it is common to all potential plaintiffs. A specific plaintiff’s later experience with enforcement or application does not produce a new administrative procedure right of action or change anything about the facts that might support that right of action. Rather, that right of action remains the same regardless of which plaintiff raises it. Pursuant to the APA, the action arises at promulgation (or other final agency action), then exists and continues, waiting unchanged for an eligible plaintiff to come along and raise the claim.

The ability of the first available plaintiff to sue is often supported by the availability of facial, pre-enforcement challenge.⁴⁸ But sometimes, the Anti-Injunction Act, pre-litigation procedure, nonenforcement, lack of standing, or other factors delay a plaintiff’s ability to raise a claim.⁴⁹ Nevertheless, administrative procedure claims should still accrue when the regulation is promulgated—otherwise, there will be no time limit to challenge a regulation.

Existing tools can adjust the limitations period where appropriate. These include the judicial doctrines of equitable estoppel and equitable tolling and the discipline of government restraint.⁵⁰ Against the backdrop of appropriate adjustments in appropriate cases, courts, including the Supreme Court and the Court of Appeals for the D.C. Circuit, should hold that administrative procedure claims—even in tax—“first accrue” under 28 U.S.C. § 2401(a) when a regulation is promulgated. The issue of structural features that delay a plaintiff’s ability to raise a claim is acute in

⁴⁵ See 5 U.S.C. § 553 (requiring notice and comment for rulemaking, subject to exceptions including “interpretative rules” and “good cause” exceptions).

⁴⁶ See 5 U.S.C. § 704 (providing for judicial review of final agency action).

⁴⁷ 28 U.S.C. § 2401(a).

⁴⁸ See, e.g., *Abbott Labs. v. Gardner*, 387 U.S. 136, 139–41 (1967) (concluding that judicial review of an FDA regulation for an “aggrieved person” was available even though the statute did not specifically provide for judicial review).

⁴⁹ See, e.g., Stephanie Hunter McMahon, *Pre-Enforcement Litigation Needed for Taxing Procedures*, 92 WASH. L. REV. 1317, 1392–98 (2017) (proposing amendment to the Anti-Injunction Act to allow a ninety-day window for administrative procedure challenges to tax regulations).

⁵⁰ See *CTS Corp. v. Waldburger*, 573 U.S. 1, 9–10 (2014).

tax, but not unique to tax.⁵¹ Thus this Article's analysis of why claims accrue at the time of promulgation serves the development of administrative procedure law generally.

This Article proceeds as follows.

Part I establishes the example of old tax regulations and outlines the debate about whether they violate administrative procedure requirements. Part II discusses the six-year limitations period, explains how it has applied to tax and non-tax claims, and analyzes the text of 28 U.S.C. § 2401(a) in conjunction with the APA. Part III makes the normative and policy case for leaving old regs alone, based on the importance of repose, the nature of administrative procedure as a general public right, and the availability of congressional and presidential oversight. Part IV argues that the limitations period should begin to run at the moment of promulgation even in tax, where the Anti-Injunction Act may delay plaintiffs' ability to litigate. Part V discusses the availability of adjustments to the limitations period through equitable estoppel, equitable tolling, and government restraint.

I. Old Regs in Tax

Administrative regulations and guidance under the federal income tax date back to before 1913, when Congress enacted the first modern income tax statute.⁵² More recently, administrative procedure tussles over old tax regulations have bloomed because of a bureaucratic anomaly at the Department of the Treasury, including its sub-agency, the IRS.⁵³

For about three decades, spanning approximately 1980 to 2010, Treasury and the IRS took various regulatory and other actions to constrain tax shelters or other taxpayer abuses.⁵⁴ Sometimes, the government took the position that Treasury regulations issued under the general authority of the Internal Revenue Code, specifically I.R.C. § 7805, did not require notice and comment because they qualified for the APA's

⁵¹ See McMahon, *supra* note 49, at 1362.

⁵² See Bryan T. Camp, *A History of Tax Regulation Prior to the Administrative Procedure Act*, 63 DUKE L.J. 1673, 1686–87 (2014) (reviewing the 150-year long history of tax administration before the APA, including the issuance of circular letters by Secretary of the Treasury Alexander Hamilton starting in 1789 and the issuance of “rules and regulations” under the Tariff Act of 1832).

⁵³ 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, 1796–99 (2007) [hereinafter Hickman, *Coloring Outside the Lines*] (suggesting that an internal reorganization of IRS operations may have been one cause of the Treasury's approach to APA requirements).

⁵⁴ See, e.g., *id.* at 1785–86 (suggesting that the Treasury “might plausibly assert good cause . . . to combat abusive tax shelters”).

“interpretative” guidance exception.⁵⁵ The government also issued sub-regulatory guidance through the IRS, such as Notices, Revenue Procedures and Revenue Rulings, without the full notice-and-comment procedure detailed in the APA.⁵⁶ Some of this guidance appeared to impose legally binding requirements on taxpayers or other regulated parties, for instance because it produced a requirement to pay penalties if a tax shelter transaction was not reported.⁵⁷

Professor Kristin Hickman argues that in 1946, when the APA was enacted, courts and agencies alike treated general-authority regulations,⁵⁸ as well as IRS guidance,⁵⁹ as not binding on regulated parties, even if such regulations or guidance might bind agencies themselves through constraints on enforcement practices or litigation positions.⁶⁰ Hickman argues that “the general consensus . . . held that a general authority grant that authorized legally binding regulations would violate the nondelegation doctrine and thus be constitutionally invalid.”⁶¹ But by the 1980s, courts had relaxed the nondelegation doctrine and began to treat general-authority regulations as legally binding.⁶² For instance, in the 1984 case *Chevron v. Natural Resources Defense Council, Inc.*,⁶³ the Supreme Court held that an EPA regulation was entitled to strong judicial deference—meaning that it would bind regulated parties, not just the government, and entitle the agency to penalize regulated parties if they violated the regulation.⁶⁴

Hickman has long argued that when an administrative agency imposes legally binding requirements, including through general-

⁵⁵ *Id.* at 1751.

⁵⁶ *Id.* at 1804–05.

⁵⁷ *See id.* at 1765–67 (explaining the connection between “force of law” and penalties).

⁵⁸ *See* Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1564–72 (2006) [hereinafter Hickman, *The Need for Mead*] (tracing the distinction drawn between specific authority and general-authority regulations across different subject areas through the early years of the APA).

⁵⁹ *Id.* at 1567–69 (explaining that courts treated the Treasury’s general-authority regulations as interpretive and non-binding).

⁶⁰ Hickman, *Coloring Outside the Lines*, *supra* note 53, at 1762.

⁶¹ *Id.* at 1761–62.

⁶² *See* Hickman, *The Need for Mead*, *supra* note 58, at 1574–78 (chronicling case law evolution in the 1970s and 1980s).

⁶³ 467 U.S. 837 (1984).

⁶⁴ *See id.* at 846 (explaining that the statute at issue directed the EPA to promulgate air quality standards that would protect public welfare and establish source performance standards for different pollutants). The Supreme Court has recently limited the availability of *Chevron* deference, most prominently through its expansion of the major questions doctrine. *See, e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2615–16 (2022) (invalidating an EPA rule); *King v. Burwell*, 576 U.S. 473, 485, 498 (2015) (upholding a Treasury rule).

authority regulations, courts should require agencies, including Treasury, to follow more stringent administrative procedure requirements.⁶⁵ But from about 1980 to about 2010, Treasury issued some general-authority Treasury regulations and IRS guidance consistent with its historical practice—in other words, sometimes without notice and comment.⁶⁶ The period from 1980–2010 includes examples that constrain taxpayers’ ability to claim tax benefits, such as deductions generated by tax shelter transactions.⁶⁷ These examples provide targets for administrative procedure challenge, even decades later. Thus, in the 2020s, taxpayers penalized by old tax shelter regulations see opportunities to bring administrative procedure challenges to those regulations, for instance by claiming that Treasury or the IRS used inadequate notice-and-comment procedure or omitted it altogether.⁶⁸

Claims of required notice-and-comment procedure do not apply equally to every item issued by Treasury and the IRS.⁶⁹ Some items require more administrative procedure than others.⁷⁰ Tax guidance includes Treasury final, temporary, and proposed regulations; IRS Notices, Revenue Procedures, and Revenue Rulings; and countless other items such as forms, publications, and internal agency manuals.⁷¹ To determine which items require notice and comment, courts have increasingly adopted the functional “force-of-law” or “legally binding” test proposed by Hickman.⁷² This test attributes notice-and-comment requirements for administrative agency actions that require taxpayers to take specific actions and (at least technically) impose penalties if taxpayers fail to do so.⁷³ For instance, if a taxpayer refuses to follow a final regulation and fails to disclose that its reporting position deviates from a final regulation,

⁶⁵ See, e.g., Hickman, *Coloring Outside the Lines*, *supra* note 53, at 1773.

⁶⁶ *Id.* at 1751, 1753.

⁶⁷ See, e.g., *id.* at 1785–86; see also I.R.C. § 1502 (2006). Many temporary regulations were promulgated without notice and comment during this period. See *infra* note 83 and accompanying text (counting temporary regulations issued with and without a notice of proposed rulemaking).

⁶⁸ See, e.g., *CIC Servs., LLC v. IRS*, 141 S. Ct. 1582, 1588 (2021) (noting that “CIC’s complaint mainly asserts that the IRS violated the Administrative Procedure Act (APA) by issuing” a legally binding notice).

⁶⁹ See Hickman, *Coloring Outside the Lines*, *supra* note 53, at 1736–38.

⁷⁰ See *id.*

⁷¹ See generally *id.* at 1740–59 (describing what Treasury does in promulgating guidance).

⁷² See, e.g., *Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1143 (6th Cir. 2022); see also Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 492–502 (2013) [hereinafter Hickman, *Unpacking the Force of Law*] (developing this argument in the case of temporary Treasury regulations).

⁷³ See Hickman, *Unpacking the Force of Law*, *supra* note 72, at 471, 532.

penalties (technically) automatically apply under applicable Treasury regulations.⁷⁴

Under the Hickman framework, sub-regulatory guidance that is not legally binding is still eligible for the interpretive guidance exception to the APA's notice-and-comment requirement.⁷⁵ In *United States v. Mead Corp.*,⁷⁶ the Supreme Court held in the analogous context of *Chevron* deference that a tariff ruling that categorized items for purposes of applying customs duties lacked the force of law.⁷⁷ Because it is not legally binding, under the Hickman analysis, such a tariff ruling does not require notice-and-comment rulemaking.⁷⁸ Some categories of tax administrative action, such as Revenue Rulings and Revenue Procedures, should not require notice-and-comment assuming that they do not impose legally binding requirements on taxpayers, even if they constrain government action and litigating positions.⁷⁹

But courts have held that other categories of tax administrative action sometimes require notice-and-comment rulemaking—including temporary regulations, final regulations, and certain IRS Notices that list reportable transactions and interact with a tax shelter penalty regime.⁸⁰ Temporary Treasury regulations provide a good illustration of a typical administrative procedure controversy. For decades, Treasury allowed the

⁷⁴ See Hickman, *Coloring Outside the Lines*, *supra* note 53, at 1763 & n.142 (citing I.R.C. § 6662(a)–(b) and Treas. Reg. § 1.6662-3(b)(2) (as amended in 2003) (explaining that penalties technically automatically apply for certain underpayments “attributable to . . . disregard of rules or regulations,” including “temporary or final Treasury regulations” (internal quotation marks omitted))).

⁷⁵ See Hickman, *Unpacking the Force of Law*, *supra* note 72, at 513–15.

⁷⁶ 533 U.S. 218 (2001).

⁷⁷ See *id.* at 225–27, 232 (holding a letter ruling that changed an imported item's categorization, and thus made the item subject to tariff, failed to qualify for *Chevron* deference as the ruling did not carry the force of law).

⁷⁸ See Hickman, *Coloring Outside the Lines*, *supra* note 53, at 1734.

⁷⁹ See Leandra Lederman, *The Fight over “Fighting Regs” and Judicial Deference in Tax Litigation*, 92 B.U. L. REV. 643, 659–68 (2012) (evaluating historical treatment of Revenue Rulings and suggesting that *Skidmore* deference might apply); see also Hickman, *Unpacking the Force of Law*, *supra* note 72, at 502–07 (placing IRB guidance such as Revenue Rulings into the “force of law gray zone with respect to both APA procedural requirements and *Chevron* eligibility”). Revenue Rulings do not even technically automatically produce understatement penalties. The applicable regulation states that “a taxpayer who takes a position (other than with respect to a reportable transaction . . .) contrary to a revenue ruling or notice has not disregarded the ruling or notice if the contrary position has a realistic possibility of being sustained on its merits.” Treas. Reg. § 1.6662-3(b)(2).

⁸⁰ See, e.g., *Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1148 (6th Cir. 2022) (setting aside an IRS Notice because it “did not satisfy the notice-and-comment procedures . . . under the APA”).

promulgation of temporary regulations without notice and comment,⁸¹ based on a section of the Internal Revenue Code that anticipated finalizing such temporary rules within three years.⁸² Between 1986 and 2019, over one hundred were promulgated.⁸³ Temporary regulations do not have a notice-and-comment period before they become effective.⁸⁴ Instead, the Internal Revenue Code requires that temporary regulations must be issued simultaneously with a proposed regulation and that temporary regulations expire within three years from issuance.⁸⁵

The argument that temporary tax regulations often violate the APA starts with the idea that temporary regulations are legally binding.⁸⁶ They are “legally binding” because penalties technically apply for certain underpayments “attributable to . . . disregard of rules or regulations,” including “temporary or final Treasury regulations.”⁸⁷ Penalties are not always or automatically assessed, which weakens the “legally binding” argument.⁸⁸ Nevertheless, the argument proceeds that temporary regulations are legally binding, cannot qualify as “interpretive” regulations

⁸¹ See generally Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX LAW. 343, 372 (1991) [hereinafter Asimow, *Public Participation*] (analyzing whether temporary regulations promulgated by the Treasury comply with the APA and recommending that Congress enact an amnesty statute for existing temporary regulations); Juan F. Vasquez, Jr. & Peter A. Lowy, *Challenging Temporary Treasury Regulations: An Analysis of the Administrative Procedure Act, Legislative Reenactment Doctrine, Deference, and Invalidity*, 3 HOUS. BUS. & TAX L.J. 248 (2003) (analyzing the deference given by courts to regulations and recommending a path for invalidating a temporary regulation that did not comply to APA requirements).

⁸² See I.R.C. § 7805(e).

⁸³ See Hickman, *Coloring Outside the Lines*, *supra* note 53, at 1748 & n.89, 1750 (counting eighty-four temporary Treasury regulations issued with a notice of proposed rulemaking between 2003 and 2005); Clinton G. Wallace & Jeffrey M. Blaylock, *Administering Taxes Democratically?*, 94 TEMP. LAW REV. 49, 54, 74 (2021) (counting fifty-seven temporary regulations between 1986 and 1988 to implement the Tax Reform Act of 1986, one temporary regulation issued in 2001, and one temporary regulation issued in 2019).

⁸⁴ See I.R.C. § 7805(e)-(f).

⁸⁵ I.R.C. § 7805(e) (providing that any temporary regulation must also be issued as a proposed regulation and will expire three years after the issuance date).

⁸⁶ See Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 719-20 (1999) [hereinafter Asimow, *Interim-Final Rules*] (explaining that agency adoption of interim-final rules usually requires a good-cause justification, which courts only sometimes accept); Hickman, *Coloring Outside the Lines*, *supra* note 53, at 1764-66 (arguing that courts have moved away from differentiating between legislative and interpretive rules on the basis of the source of their statutory authority).

⁸⁷ Treas. Reg. § 1.6662-3(a), (b)(2).

⁸⁸ See, e.g., *Hewitt v. Comm’r*, No. 23809-17, 2020 WL 3267993, at *2-3 (T.C. June 17, 2020), *rev’d and remanded*, *Hewitt v. Comm’r*, 21 F.4th 1336 (11th Cir. 2021) (explaining that penalties were not imposed in the *Hewitt* case).

and generally require a notice-and-comment process.⁸⁹ Although some commentators challenge the view that temporary regulations should require notice and comment,⁹⁰ the view has persuaded several courts.⁹¹ The government has conceded the point going forward, but has also signaled that it will continue to defend old temporary tax regulations in court.⁹²

Successful case law challenges have targeted final tax regulations as well. In 2021, in *Hewitt*, the Court of Appeals for the Eleventh Circuit held that the application of a final regulation, relating to deductions for donated conservation easements and promulgated in 1986, was invalid.⁹³ The court explained that Treasury's Preamble did not cover the government's consideration of a "significant" comment.⁹⁴ In 2022, in

⁸⁹ See Hickman, *Coloring Outside the Lines*, *supra* note 53, at 1786 (arguing that temporary tax regulations would typically not meet the good cause or procedural exceptions to notice-and-comment under the APA, even if those exceptions were invoked).

⁹⁰ See Wallace & Blaylock, *supra* note 83, at 86 (explaining that section 559 of the APA allows for agency-specific modification of APA procedures if expressly granted by Congress, and that Congress has expressly modified APA procedures for temporary regulations in I.R.C. § 7805(e) (citing *Asiana Airlines v. FAA*, 134 F.3d 393, 397 (D.C. Cir. 1988) (stating that the requirement for Congress to modify "expressly" is satisfied if Congress has "established procedures so clearly different from those required by the APA that it must have intended to displace the[m]")). See generally David A. Weisbach, *Against Anti-Tax Exceptionalism*, (Univ. of Chi. Coase-Sandor Inst. for L. & Econ., Research Paper No. 967, 2023) (arguing that the goals of administrative law do not require Treasury and the IRS to use notice-and-comment so broadly).

⁹¹ See, e.g., *Liberty Glob., Inc. v. United States*, No. 20-cv-03501, 2022 WL 1001568, at *4-5 (D. Colo. Apr. 4, 2022) (holding that temporary regulations promulgated under I.R.C. § 245A in 2019 required notice and comment unless "good cause" or another APA exception applied); see also, e.g., *Chamber of Com. of the U.S. v. IRS*, No. 16-CV-944, 2017 WL 46820489, at *6-8 (W.D. Tex. Sept. 29, 2017) (evaluating a temporary tax reg); *Coal. for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10, 19-24 (D.D.C. 2010) (holding that interim final rules promulgated by HHS required notice and comment absent "good cause" or another APA exception). See generally Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1162 & n.39 (2008) (considering justiciability of temporary and interim final regulations and citing test of finality under *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

⁹² See IRM 8.1.1.2.1 (Sept. 14, 2022) (stating that vulnerability to administrative procedure challenges is not a "litigating hazard" that would encourage settlement).

⁹³ *Hewitt*, 21 F.4th at 1353.

⁹⁴ See *id.* 1341, 1343, 1353 (invalidating a regulation promulgated in 1986 as it applied to a return presumably filed in 2013 relating to a 2012 donation). This holding reversed the Tax Court, see *id.* at 1347-48, 1353, although the Tax Court had held that *Hewitt* was not liable for accuracy-related penalties. See *Hewitt v. Comm'r*, No. 23809-17, 2020 WL 3267993, at *2-3, n.2 (T.C. June 17, 2020); see also *id.* at *5, *8-9, *11 (reciting that *Hewitt* in 2012 granted a conservation easement; in 2012, 2013, and 2014 claimed related charitable contribution deductions (including carryover deductions); received a notice of deficiency for 2013 and 2014 tax returns (presumably filed in 2014 and 2015 respectively); and timely petitioned for Tax Court review). *Hewitt* involved the so-called

Oakbrook Land Holdings, LLC v. Commissioner,⁹⁵ the Court of Appeals for the Sixth Circuit disagreed and held for the government on the same administrative procedure claim.⁹⁶ The circuit split remains unresolved, as does the question of how significant a “significant” comment must be.⁹⁷

Finally, courts have also considered the administrative procedure sufficiency of IRS Notices that list tax shelter transactions. When the IRS issues these Notices, it gives some opportunity for comment, but does not follow a full APA-prescribed notice-and-comment process.⁹⁸ Litigated Notices implement I.R.C. §§ 6707 and 6707A, which are part of a tax shelter information-reporting statute enacted in 2004.⁹⁹ About forty items are listed as listed reportable transactions and transactions of interest.¹⁰⁰ If

“extinguishment regulation” that imposes a requirement for a valid charitable deduction for a conservation easement. *Id.* at *8. This regulation requires that the donee’s property interest have “a fair market value that is at least equal to the proportionate value that the perpetual conservation restriction at the time of the gift, bears to the value of the property as a whole at that time.” Treas. Reg. § 1.170A-14(g)(6)(ii). The regulation does not modify this proportionate-share approach if an increase in value is factually connected more to the donee’s interest (i.e., the easement) or more to the donor’s interest (i.e., the balance of the property), even if the increase in value relates to a subsequent improvement by the donor. *Id.* The *Hewitt* court held that the regulation was procedurally invalid because Treasury had not addressed a “significant” comment from the New York Landmarks Conservancy in the regulatory Preamble. *Hewitt*, 21 F.4th at 1353. Thus, the *Hewitt* court did not reach the substantive or deference-based validity of the regulation. *Id.* at 1347; *cf.* PBBM-Rose Hill, Ltd. v. Comm’r, 900 F.3d 193, 205–09 (5th Cir. 2018) (holding that the regulation validly interpreted I.R.C. § 170(h)(5)(A)’s requirement that a qualified conservation easement be “protected in perpetuity,” and rejecting taxpayer’s reliance on I.R.S. Priv. Ltr. Rul. 200836014 (Sept. 5, 2008) on the grounds that the private letter ruling “does not reflect the Commissioner’s current position and cannot be used as precedent or to alter the plain meaning of a regulation”).

⁹⁵ 28 F.4th 700 (6th Cir. 2022), *reh’g en banc denied*, No. 20-2117, 2022 WL 2526695 (6th Cir. July 6, 2022), *cert. denied*, 143 S. Ct. 626 (2023).

⁹⁶ *Id.* at 711, 722 (affirming Tax Court and concluding that “[j]uxtaposing the final version of [the regulation] with the notice of proposed rulemaking reveals that the basis and purpose of the rule are apparent”); *see also* *Oakbrook Land Holdings, LLC v. Comm’r*, 154 T.C. 180, 180–82 (2020) (reciting that Oakbrook purchased land in 2007, granted a conservation easement in 2008, timely filed a tax return (presumably in 2009), received a notice of final partnership adjustment from the IRS through its tax matters partner in 2012, and timely petitioned the Tax Court for readjustment).

⁹⁷ *See, e.g.*, 3M Co. v. Comm’r, 160 T.C. No. 3, at *150 (2023) (explaining that significant comments are those which would require a change in the proposed rule and holding that the comments submitted were not significant and required no response from Treasury). *But see id.* at *180 (Toro, J., dissenting) (giving a laxer view of what qualifies as a “significant” comment including comments that challenge the fundamental premise of the rule or the reasonableness of the regulatory structure).

⁹⁸ *See* *Govig & Assocs., Inc. v. United States*, No. CV-22-00579, 2023 WL 2614910, at *3 (D. Ariz. Mar. 23, 2023); *Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1141–43 (6th Cir. 2022).

⁹⁹ *See Govig*, 2023 WL 2614910, at *1.

¹⁰⁰ *See Recognized Abusive and Listed Transactions*, IRS (Jan. 31, 2020), <https://perma.cc/JK2M-M37C>. *See generally Transactions of Interest*, IRS (Jan. 31, 2020), <https://perma.cc/HM3E-G6HY>.

a tax shelter promoter or taxpayer fails to report such transactions, the government has the authority to impose penalties simply for the failure to report.¹⁰¹

IRS tax shelter Notices issued more than six years ago squarely raise the question of whether the six-year limitations period of 28 U.S.C. § 2401(a) time-bars taxpayer challenges to the administrative procedure used to issue the Notices. In 2023, in *Govig & Associates, Inc. v. United States*,¹⁰² the District Court of Arizona explicitly embraced the precedent defined in *Shiny Rock Mining Corp. v. United States*¹⁰³ and time-barred procedural challenges to Notice 2007-83, relating to tax shelter employee welfare benefit arrangements.¹⁰⁴ All of the relevant facts in *Govig* occurred after the expiration of the six-year limitations period.¹⁰⁵ The *Govig* taxpayer first established the employee welfare benefit arrangement in 2015—eight years after the issuance of Notice 2007-83,¹⁰⁶ and *Govig* involves penalties first proposed (though not assessed) for the 2016 tax year, presumably relating to tax returns filed in 2017, or ten years after the issuance of the Notice.¹⁰⁷

Govig is the first time that the government has raised the six-year limitations period as a defense in a tax case.¹⁰⁸ It did not raise the issue, for instance, in *Hewitt* or *Mann Construction, Inc. v. United States*¹⁰⁹—even though the relevant facts in each of those cases arose more than six years

¹⁰¹ American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418, 1575–77 (2004).

¹⁰² No. CV-22-00579, 2023 WL 2614910 (D. Ariz. Mar. 23, 2023).

¹⁰³ 906 F.2d 1362 (9th Cir. 1990).

¹⁰⁴ *Govig*, 2023 WL 2614910, at *14–16 (time-barring each procedural count of plaintiffs' claim and noting that the limitations period could run against the plaintiff before the plaintiff came into existence).

¹⁰⁵ *Id.*

¹⁰⁶ *See id.* at *2 (explaining that *Govig* had a reporting requirement under § 6707A for the 2015 year). In this earlier litigation, which occurred prior to the Supreme Court's decision in *CIC Services*, the *Govig* court time-barred the case because of the Anti-Injunction Act, since the government had not assessed penalties. *See Govig & Assocs., Inc. v. United States*, No. CV-19-05185, 2020 WL 6048301, at *2, *5 (D. Ariz. Oct. 13, 2020). In *Govig*, the plaintiffs established an employee welfare benefit arrangement designed to produce immediate tax deductions on account of premiums paid for life insurance policies. *Id.* at *2. They also claimed that the employer's payment of premiums did not produce taxable income for the employees or the beneficiaries of the insurance policies. *Id.* Notice 2007-83 made the kind of employee welfare benefit plan used in *Govig* a listed transaction, meaning a tax shelter transaction that taxpayers and tax shelter promoters must report to the IRS, or face penalties. *Id.* at *2 & n.1.

¹⁰⁷ *Govig*, 2023 WL 2614910, at *2–3.

¹⁰⁸ *See United States' Motion to Dismiss and Supporting Memorandum* at 22, *Govig & Assocs., Inc. v. United States*, No. CV-22-00579, 2023 WL 2614910 (D. Ariz. Mar. 23, 2023).

¹⁰⁹ 27 F.4th 1138 (6th Cir. 2022).

after the relevant regulation was promulgated or Notice was issued.¹¹⁰ Instead, historically, neither the IRS nor the Department of Justice Tax Division raised this limitations period defense to administrative procedure claims,¹¹¹ despite the strong basis for the defense in the decisions of at least eight courts of appeals.¹¹² Prior to *Govig*, the practice of the IRS and the Department of Justice Tax Division had been either to ignore the limitations period of 28 U.S.C. § 2401(a) in enforcement proceedings involving administrative procedure challenges or, in at least one case, to explicitly waive the provision.¹¹³ Now that the government has raised the limitations period issue in *Govig*, the stage is set for tax cases to develop the law on old regs and administrative procedure challenge.

II. The Six-Year Limitations Period

A. *IRS and Tax Examples*

Courts have consistently held that the six-year limitations period of 28 USC § 2401(a) begins to run for administrative procedure claims when final agency rulemaking action occurs, for instance when an agency promulgates a regulation.¹¹⁴ This would (absent an equitable or other exception) bar most of the administrative procedure claims in the

¹¹⁰ See generally *Hewitt v. Comm'r*, 21 F.4th 1336, 1353 (11th Cir. 2021) (invalidating a regulation promulgated in 1986 as it applied to a return presumably filed in 2013 relating to a 2012 donation); *Mann Constr.*, 27 F.4th at 1148 (invalidating Notice 2007-83 for failure to comply with notice-and-comment procedures; taxpayer's claim related to returns presumably filed starting in 2014 as they related to deductions claimed for the 2013–2017 tax years).

¹¹¹ For example, consider *Altera Corp. v. Commissioner*, where the Court of Appeals for the Ninth Circuit concluded that Treasury did not act arbitrarily or capriciously in promulgating a transfer pricing regulation relating to the sharing of stock-based compensation costs. See *Altera Corp. v. Comm'r*, 926 F.3d 1061, 1087 (9th Cir. 2019). *Altera* involved a regulation promulgated in 2003 and tax returns filed with respect to tax liability in years 2004 through 2006. *Id.* at 1067, 1072–73. In *Altera*, one of the panel judges raised the question of whether 28 U.S.C. § 2401(a) might block the taxpayer's procedural challenge. *Id.* at 1075 n.6. In response, the government confirmed that it had waived the limitations period defense. *Id.* See James M. Puckett, *Reasonable Tax Rules: Advancing Process Values with Remedial Restraint*, 24 FLA. TAX REV. 277, 296–97, 297 n.82 (2020) (citing government's letter brief).

¹¹² See *supra* note 18 (collecting cases).

¹¹³ See Puckett, *supra* note 111, at 296–97 (citing government's letter brief in *Altera*). In the course of the Ninth Circuit *Altera* case, the government noted that “given [the Ninth Circuit's] holding that the six-year statute of limitations set forth in 28 U.S.C. § 2401(a) is not jurisdictional, the Commissioner waived any defense under that provision by not raising it in the Tax Court.” Letter-Brief in Response to the Court's Order Dated September 28, 2018, at 4, *Altera Corp., v. Comm'r*, 926 F.3d 1061 (9th Cir. 2019) (No. 16-70496) (internal citation omitted).

¹¹⁴ See, e.g., *Wind River Min. Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991).

developing tax case law considered here.¹¹⁵ For instance, the limitations period would have begun in 1986 and expired in 1992 for administrative procedure claims arising from the conservation easement final regulation at issue at *Hewitt* and *Oakbrook*.¹¹⁶ The period would have begun in 2007 and expired in 2013 for administrative procedure claims arising from the Notice at issue in *Mann Construction* and *Govig*, which listed certain employee welfare benefit arrangements as reportable listed transactions.¹¹⁷

The prevailing rule of earlier accrual for 28 U.S.C. § 2401(a) applies for claims of alleged violations of administrative procedure.¹¹⁸ In contrast, courts have generally held that the same six-year period accrues later, for instance when an agency applies a regulation in an enforcement action, for certain claims that are not limited to administrative procedure.¹¹⁹ For instance, later, as-applied accrual is the rule if a plaintiff challenges an agency enforcement action on the grounds that a regulation is *ultra vires*, or beyond the authority of the statute.¹²⁰

The six-year period provided in 28 U.S.C. § 2401(a) is not the typical limitations period for federal income tax claims.¹²¹ That honor goes to the three-year period generally allowed from time of filing for the government to challenge a return,¹²² or for a taxpayer to amend a return and claim a refund.¹²³ But some examples, discussed below, illustrate that the limitations period has been applied in IRS and tax cases, including to block a pre-enforcement, facial challenge to an IRS Revenue Ruling and to fill in when specific tax limitations periods do not preclude a claim.¹²⁴ These cases confirm the general applicability of the six-year limitations period, including in tax law.

¹¹⁵ See, e.g., *Hewitt*, 21 F.4th at 1338–39 (challenging a tax regulation promulgated in 1986 in 2021). The *Liberty Global* case provides an example of a claim that would not be time barred. *Liberty Global* was a 2022 decision involving a 2019 temporary regulation. See *Liberty Glob., Inc. v. United States*, No. 20-cv-03501, 2022 WL 1001568, at *2 (D. Colo. Apr. 4, 2022).

¹¹⁶ *Hewitt*, 21 F.4th at 1338–39; *Oakbrook Land Holdings, LLC v. Comm’r*, 28 F.4th 700, 707–08 (6th Cir. 2022).

¹¹⁷ See *Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1142 (6th Cir. 2022); *Govig & Assocs., Inc. v. United States*, No. CV-22-00579, 2023 WL 2614910, at *2 (D. Ariz. Mar. 23, 2023).

¹¹⁸ See *Wind River*, 946 F.2d at 715–16.

¹¹⁹ See, e.g., *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 819 (6th Cir. 2015) (allowing a claim that the Forest Service order banning motorboats on a lake violated an individual’s state property right under the Michigan Wilderness Act).

¹²⁰ See *Wind River*, 946 F.2d at 714, 716 (arguing that the regulation at issue was *ultra vires*, leading to the court holding that the as-applied accrual rule is correct); see also *infra* Section II.B.

¹²¹ See I.R.C. § 6501(a).

¹²² See *id.* (allowing three years from filing a return for the IRS to assess tax).

¹²³ See I.R.C. § 6511(a) (allowing refund claims filed three years from time of filing or two years from time of tax payment, whichever is later).

¹²⁴ See *infra* notes 125–144 and accompanying text.

One type of case involves a pre-enforcement, facial challenge, like the one brought by two gun dealers in the 2008 case *Hire Order Ltd. v. Marianos*.¹²⁵ They challenged a 1969 Revenue Ruling promulgated by the Alcohol, Tobacco and Firearms division of the Internal Revenue Service.¹²⁶ The Revenue Ruling provides that a firearm dealer's license only covers the business premises specified in the license, and does not cover off-premise gun shows.¹²⁷ The IRS did not apply the requirement to the plaintiffs.¹²⁸ Instead, the plaintiffs pursued a facial challenge to the Revenue Ruling.¹²⁹ The Court of Appeals for the Fourth Circuit affirmed the dismissal of the case based on 28 U.S.C. § 2401(a) because the limitations period had begun to run in 1969.¹³⁰ The court explained that “[t]he contention of Hire Order and Privott that their cause of action did not accrue until they became federally licensed firearms dealers in 2008 utterly fails.”¹³¹ The argument that these plaintiffs earlier lacked standing and therefore would never be able to raise a facial challenge to the Revenue Ruling did not sway the court.¹³²

The six-year limitations period also applies to certain kinds of as-applied tax claims.¹³³ For instance, when a taxpayer pays too much tax to the government and is later entitled to a refund, the taxpayer may be entitled to overpayment interest.¹³⁴ Although disputes may arise as to the correct amount of interest payable, the Internal Revenue Code does not provide a limitations period to govern the time the taxpayer has to file suit on such a “stand-alone” overpayment interest claim.¹³⁵ Thus, the default six-year limitations period for suits against the federal government applies.¹³⁶

¹²⁵ 698 F.3d 168 (4th Cir. 2012).

¹²⁶ *Id.* at 169.

¹²⁷ See Firearms Matters Issued Under Chapter 53 of the Internal Revenue Code of 1954, Rev. Rul. 69-59, 1969 C.B. 360 (1969) (interpreting the “separate fee” requirement of 18 U.S.C. § 923(a)).

¹²⁸ *Hire Order*, 698 F.3d at 169.

¹²⁹ *Id.*

¹³⁰ *Id.* at 170.

¹³¹ *Id.*

¹³² *Id.*

¹³³ See, e.g., *Nesovic v. United States*, 71 F.3d 776, 777 (9th Cir. 1995) (considering the application of the six-year time bar where the IRS sought a lien on taxpayer property).

¹³⁴ See I.R.C. § 6611 (providing for the payment of interest to taxpayers on overpayments of tax).

¹³⁵ See *Bank of Am. Corp. v. United States*, 964 F.3d 1099, 1105 (Fed. Cir. 2020).

¹³⁶ See, e.g., *id.* (explaining that the refund limitations period of I.R.C. § 6511(a) does not apply because the Internal Revenue Code does not include overpayment in the definition of “tax”); see also *Nesovic*, 71 F.3d at 778–79 (time-barring a quiet title action filed under 28 U.S.C. § 2410 to challenge a tax lien is under 28 U.S.C. § 2401(a) because limitations period accrued at the time of assessment in 1985).

Another tax fact pattern that activates 28 U.S.C. § 2401(a) involves a taxpayer refund claim that the government ignores.¹³⁷ The time period for filing a lawsuit to litigate a refund claim is two years from the time the IRS disallows the claim.¹³⁸ But sometimes the IRS fails to respond to a refund claim.¹³⁹ If the IRS does nothing, a question arises about the time limitation for the claim: Does the six-year limitations period run beginning when the taxpayer filed the refund claim, or does the two-year period control, meaning that the limitations period does not start because the IRS has not disallowed the claim?

In this fact pattern involving IRS nonresponse to a refund claim, a 1955 Court of Claims case held that the Internal Revenue Code's two-year period, starting when the IRS responded, controlled, so that the statute was held open indefinitely if the IRS failed to respond.¹⁴⁰ But this holding is outdated. More recent cases conclude that the six-year limitations period bars a refund suit even if the two-year refund period does not start because the IRS fails to respond to a refund claim.¹⁴¹ These recent cases find support in Supreme Court case law that observes that the longer general limitations period provides an "outside limit on the period within which all suits might be initiated."¹⁴² Thus the updated case law explains

¹³⁷ See, e.g., *Wagenet v. United States*, No. SACV 08-00142, 2009 WL 4895363, at *1 (C.D. Cal. Sept. 14, 2009).

¹³⁸ See I.R.C. § 6532(a)(1) (providing a two-year limitation period from date of mailing of notice of disallowance); see also I.R.C. § 6532(a)(3) (allowing a waiver of notice of disallowance and providing a two-year limitation period from the date such waiver is filed).

¹³⁹ See, e.g., *Wagenet*, 2009 WL 4895363, at *1.

¹⁴⁰ See *Detroit Tr. Co. v. United States*, 130 F. Supp 815, 815-16, 818 (Cl. Ct. 1955) (holding that the limitations period had not run in 1953 where plaintiff demanded refund in 1923 and government did not respond until 1951); see also *Bruno v. United States*, 547 F.2d 71, 73-74 (8th Cir. 1976) (refusing to toll the statute based on a legal disability provision within 28 U.S.C. § 2401(a) because a "more specific" tax refund period of limitation controlled rather than 28 U.S.C. § 2401(a)).

¹⁴¹ See *Wagenet*, 2009 WL 4895363, at *2-3 (time-barring a 2008 suit under 28 U.S.C. § 2401(a) even if not under I.R.C. § 6532(a)(1) after the government failed to respond to a refund claim in the 1980s); *Hale v. United States*, 143 Fed. Cl. 180, 188 n.5 (2019) (following *Wagenet* and stating that the Supreme Court "suggested" that six years was the "outside limit" in tax cases rather than irrelevant in tax cases); *Finkelstein v. United States*, 943 F. Supp. 425, 432 (D.N.J. 1996) (concluding that if the lack of certified or registered mailing prevented the two-year period from running, the "general statute of limitations period in 28 U.S.C. § 2401(a) applies" and "[i]n either case, more than six years has passed since accrual of the action and, therefore, the action is barred"); see also Nancy T. Bowen, *A Trap for the Unwary: Is the Six-Year General Statute of Limitations an Outside Limit for Refund Suits?*, 23 PRAC. TAX LAW. 5, 7 (2009) (providing an overview of *Finkelstein* and predicting that IRS lawyers will likely argue that the six-year statute of limitations should apply even when the two-year statute of limitations does not).

¹⁴² See *United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 8-9 (2008) (holding that the shorter tax limitations period applied but stating that longer general limitations period was an "outside limit" (quoting *United States v. A.S. Kreider Co.*, 313 U.S. 443, 447 (1941) (holding that 28

that a more specific time limit, including the two-year limitations period for refund claims, controls only if it ends earlier than the six-year period does.¹⁴³ If that two-year limitations period never starts, because the IRS ignores the refund claim, then the default period applies to bar a suit filed outside the six-year window.¹⁴⁴

B. *Non-Tax Claims and the Six-Year Period*

The examples offered above in Section II.A confirm that the six-year limitations period of 28 U.S.C. § 2401(a) has been recognized in cases involving the Internal Revenue Service or federal income tax law. But they do not specifically involve administrative procedure challenges to old Treasury regulations or IRS Notices. The Department of Justice Tax Division has recognized at least since 2019 that it may choose whether or not to waive its 28 U.S.C. § 2401(a) defense,¹⁴⁵ at least under the majority view that the limitations period is not jurisdictional.¹⁴⁶ Nevertheless, the usual government practice had been to ignore the limitations period of 28 U.S.C. § 2401 when it faced administrative procedure challenges in tax.¹⁴⁷

This changed in July 2022, with the first instance of an assertion of the 28 U.S.C. § 2401(a) limitations period defense in a tax administrative procedure case.¹⁴⁸ The government raised the defense in *Govig*, in a filing in federal district court in Arizona.¹⁴⁹ In March 2023, the *Govig* court agreed with the government, embraced the reasoning of the Ninth Circuit's *Shiny Rock* precedent,¹⁵⁰ and time-barred the plaintiff's claim that

U.S.C. § 2401(a) “was intended merely to place an outside limit on the period within which all suits might be initiated,” but observing that nothing precludes the application of a shorter period of limitation)); *Christie-Street Comm'n Co. v. United States*, 126 F. 991, 992, 997–98 (W.D. Mo. 1903) (stating that 28 U.S.C. § 2401(a) fixes the “ultimate limit” and “does not conflict with a special limitation declared in another statute” and applying a shorter period applicable to tax collection under War Revenue Law of 1898).

¹⁴³ See, e.g., *Finkelstein*, 943 F. Supp. at 432.

¹⁴⁴ See *id.*

¹⁴⁵ See *Altera Corp. v. Comm'r*, 926 F.3d 1061, 1075 n.6 (9th Cir. 2019). An example of waiving the statute of limitations is provided by the 2019 *Altera* case in the Ninth Circuit. See *supra* notes 111, 113 and accompanying text (explaining government's explicit in-writing waiver in response to a bench question from a panel judge).

¹⁴⁶ See, e.g., *Jackson v. Modly*, 949 F.3d 763, 766 (D.C. Cir. 2020) (holding 28 U.S.C. § 2401(a) not jurisdictional); see also *infra* note 464 (collecting cases).

¹⁴⁷ See, e.g., *Altera Corp.*, 926 F.3d at 1075 n.6.

¹⁴⁸ See *Govig & Assocs., Inc. v. United States*, No. CV-22-00579, 2023 WL 2614910, at *14 (D. Ariz. Mar. 23, 2023).

¹⁴⁹ See *id.* at *1, *14.

¹⁵⁰ *Id.* at *14–15. See *infra* notes 161–175 and accompanying text (explaining the *Shiny Rock* case).

a 2007 Notice listing a tax shelter transaction should have undergone notice and comment.¹⁵¹

Despite the district court *Govig* precedent, though, there is little tax-specific law regarding the application of the six-year limitations period to administrative procedure claims against Treasury or the IRS. Instead, the most relevant law comes from similar challenges brought against other agencies.¹⁵² At least eight courts of appeals have held that the period begins to run for administrative procedure claims when a final agency rulemaking action is taken, even if this means that the plaintiff will never have an opportunity to challenge an alleged administrative procedure defect.¹⁵³

The Court of Appeals for the D.C. Circuit has not squarely held that the 28 U.S.C. § 2401(a) accrues for administrative procedure challenges at promulgation no matter when a plaintiff knows about or can pursue such a challenge.¹⁵⁴ But it has distinguished between two kinds of limitations period defenses that an administrative agency may raise.¹⁵⁵ One kind consists of as-applied *ultra vires* challenges that an agency regulation “conflicts with the statute from which its authority derives,” as to which the period begins running at the later time of application.¹⁵⁶ Another kind consists of “challenges to the *procedural lineage of agency regulations*, whether raised by direct appeal, by petition for amendment . . . or as a defense to an agency enforcement proceeding.”¹⁵⁷

As to “procedural lineage” claims—whether raised in facial or as-applied challenges—every court of appeals that has considered the issue has held that the 28 U.S.C. § 2401(a) period begins running at the earlier time of final agency action, for instance, the time when a regulation is promulgated.¹⁵⁸ This is why (to take the facts of *Hire Order* as an example) a taxpayer (or gun dealer) formed in 2008 cannot raise an administrative procedure challenge to a Revenue Ruling issued in 1969.¹⁵⁹ This is the law even though it means that such a plaintiff will never have the ability to

¹⁵¹ *Id.* (time-barring each procedural count of plaintiffs’ claim and noting that the limitations period could run against the plaintiff before the plaintiff came into existence).

¹⁵² *See supra* note 18 (collecting cases).

¹⁵³ *Id.*

¹⁵⁴ *See supra* note 21 (collecting D.C. Circuit cases).

¹⁵⁵ *See Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145 (D.C. Cir. 2014); *JEM Broad. Co. v. FCC*, 22 F.3d 320, 325 (D.C. Cir. 1994).

¹⁵⁶ *Weaver*, 744 F.3d at 145 (quoting *Nat’l Air Transp. Ass’n v. McArtor*, 866 F.2d 483, 487 (D.C. Cir. 1989)).

¹⁵⁷ *JEM Broad. Co.*, 22 F.3d at 325.

¹⁵⁸ *See supra* note 18 (collecting cases).

¹⁵⁹ *See Hire Order Ltd. v. Marianos*, 698 F.3d 168, 170 (4th Cir. 2012).

challenge the administrative procedure validity of the 1969 Revenue Ruling.¹⁶⁰

Shiny Rock Mining Corporation v. United States is a key case holding that the 28 U.S.C. § 2401(a) six-year period begins to accrue earlier, when a final agency rulemaking action occurs—and not later, when it is applied.¹⁶¹ *Shiny Rock's* facts involved an administrative procedure claim raised in an as-applied enforcement action.¹⁶² In *Shiny Rock*, the Bureau of Land Management issued a public land order in 1964, which withdrew certain lands from the public domain.¹⁶³ In 1979, the plaintiff applied for a mineral patent, which was rejected as to the lands identified in the 1964 order.¹⁶⁴

In *Shiny Rock*, the plaintiff raised a due process claim based on the 1964 issuance of the land order.¹⁶⁵ The plaintiff argued that the limitations period for that claim should not accrue until the plaintiff had standing to challenge the related agency action.¹⁶⁶ The court disagreed, and held the claim was barred under 28 U.S.C. § 2401(a).¹⁶⁷ It explained that “[a]doption of *Shiny Rock's* rationale would virtually nullify the statute of limitations.”¹⁶⁸ Any injury, explained the court, “was that incurred by all persons when, in 1964 . . . the amount of land available for mining claims was decreased.”¹⁶⁹

Thus, the *Shiny Rock* court’s theory is that the administrative procedure claim related to public process rights that were allegedly violated when the Bureau of Land Management produced the 1964 public land order.¹⁷⁰ The court held that the limitations period for challenging the order accrued in 1964, with the final agency action (i.e., the order).¹⁷¹ The *Shiny Rock* plaintiff did not have a new administrative procedure claim

¹⁶⁰ See *id.*; see also *infra* Section V.B (explaining that the doctrines of equitable estoppel or equitable tolling may provide some relief if the agency delays enforcement of a regulation or guidance).

¹⁶¹ *Shiny Rock Min. Corp. v. United States*, 906 F.2d 1362, 1366 (9th Cir. 1990).

¹⁶² *Id.* at 1363–64.

¹⁶³ *Id.* at 1363.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1363–64.

¹⁶⁶ *Shiny Rock*, 906 F.2d at 1365.

¹⁶⁷ See *id.* at 1365–66 (holding that the six-year period began to run in 1964).

¹⁶⁸ *Id.* at 1365 (citing *Sierra Club v. Penfold*, 857 F.2d 1307, 1316 (9th Cir. 1988) (stating that adopting *Shiny Rock's* rationale would have the result the court avoided in *Penfold* and allow for a new challenge every time a mining application is denied)).

¹⁶⁹ *Id.* at 1365–66.

¹⁷⁰ See *id.* at 1366.

¹⁷¹ *Id.* at 1363, 1366.

arising from the 1983 injury.¹⁷² Instead, the alleged administrative defect arose from the 1964 order.¹⁷³ Moreover, the fact that the *Shiny Rock* plaintiff lacked standing to sue in 1964 did not change the result that the statute began to run at the time of the 1964 agency action.¹⁷⁴ As the court explained, “a party must make a showing that it has standing *and* that the cause of action was filed within six years of the publication [of the order].”¹⁷⁵

Similar language appears in a more recent Court of Appeals for the Sixth Circuit opinion, *Herr v. U.S. Forest Service*.¹⁷⁶ There, the court explained that a “classic example” showing accrual of an APA claim at the time of promulgation is when “an agency . . . issues a rule without following all requirements of notice-and-comment rulemaking.”¹⁷⁷ The court wrote that “denial of process to the public at large violates the statute, and any party concretely injured by the action (say, a party who has to pay a fee because of the rule) may sue to correct that wrong.”¹⁷⁸

In 1991, just one year after *Shiny Rock*, the Court of Appeals for the Ninth Circuit decided a contrasting case about the accrual of 28 U.S.C. § 2401(a), *Wind River Mining Corp. v. United States*. In *Wind River*, the Bureau of Land Management had established a Wilderness Study Area in 1979.¹⁷⁹ Starting in 1986, the Wind River Mining Corporation sought to defend and validate certain claims within that area.¹⁸⁰ It argued that Wilderness Study Areas must under the applicable statute be “roadless,” which, it argued, the established area was not.¹⁸¹ The court held that the six-year limitations period accrued in 1987, the later date on which the agency rejected Wind River’s appeal of an initial decision denying Wind River permission to mine—and not on the earlier date when the Bureau of Land Management had established the Wilderness Study Area.¹⁸²

What distinguishes the earlier-accrual holding in *Shiny Rock* from the later-accrual holding in *Wind River*? The answer is that *Shiny Rock* involved a claim about administrative procedure¹⁸³ while *Wind River*

¹⁷² *Shiny Rock*, 906 F.2d at 1365–66.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 1365.

¹⁷⁵ *Id.*

¹⁷⁶ 803 F.3d 809 (6th Cir. 2015).

¹⁷⁷ *Id.* at 819–20.

¹⁷⁸ *Id.* at 820.

¹⁷⁹ *Wind River Min. Corp. v. United States*, 946 F.2d 710, 711 (9th Cir. 1991).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *See id.* at 716 (holding that the claim must be brought within six years of the guidance being applied to the challenger).

¹⁸³ *See Shiny Rock Min. Corp. v. United States*, 906 F.2d 1362, 1363 (9th Cir. 1990).

involved a claim about whether the regulation was consistent with the authorizing substantive statute.¹⁸⁴ The claim in *Wind River* was that the designation of the Wilderness Study Area “was *ultra vires* as exceeding the agency’s statutory authority,” because the agency misinterpreted the statutory “roadless” requirement.¹⁸⁵ To support the distinction, the court cited several Court of Appeals for the D.C. Circuit cases that allowed later accrual for *ultra vires* challenges.¹⁸⁶ The court emphasized that the *Shiny Rock* precedent survived as to procedural challenges.¹⁸⁷

The *Wind River* doctrine thus provides that the limitations period for administrative procedure claims accrues when an agency takes a final action, for instance by promulgating a regulation.¹⁸⁸ The limitations period for as-applied *ultra vires* claims accrues later, when the agency applies a rule.¹⁸⁹ This distinction has been embraced by every court of appeals that has considered it.¹⁹⁰ Where the limitations period accrues later for an as-applied claim, there is more to the underlying claim than a pure violation of administrative procedure.¹⁹¹

Another illustration of the distinction between *ultra vires* and procedural lineage claims is provided by the *Corner Post* case, which is pending on the Supreme Court’s October 2023 merits docket.¹⁹² In *Corner Post*, petitioners have raised two facial claims—rather than as-applied claims. One facial claim is an *ultra vires* claim; the other is an arbitrary and capricious administrative procedure claim relating to the Federal Reserve’s actions and process when it promulgated the regulation.¹⁹³

¹⁸⁴ See *Wind River Min. Corp. v. United States*, 946 F.2d 710, 714 (9th Cir. 1991).

¹⁸⁵ *Id.* at 711, 714.

¹⁸⁶ See *id.* at 714–15 (stating that allowing for a later accrual of *ultra vires* challenges strikes a balance between the interest in finality and the interest in contesting agency overreaching).

¹⁸⁷ See *id.* at 715 (“The government’s interest in finality outweighs a late-comer’s desire to protest the agency’s action as a matter of policy or procedure.”).

¹⁸⁸ See *id.*

¹⁸⁹ See, e.g., *Citizens for Resp. and Ethics in Wash. v. FEC*, 971 F.3d 340, 343, 348 (D.C. Cir. 2020) (requiring later accrual under 28 U.S.C. § 2401(a) where plaintiff claimed that disclosure obligations for “independent expenditures” under 1980 FEC rules were impermissibly narrower than those required by 52 U.S.C. § 30104); cf. *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2062 (2019) (Kavanaugh, J., concurring) (articulating default rule of “permitting judicial review of agency legal interpretations in enforcement actions”).

¹⁹⁰ See *supra* note 18 (collecting cases).

¹⁹¹ See, e.g., *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 819 (6th Cir. 2015) (allowing a claim that the Forest Service order banning motorboats on a lake violated an individual’s state property right under the Michigan Wilderness Act).

¹⁹² See *N.D. Retail Ass’n v. Bd. of Governors of the Fed. Rsv. Sys.*, 55 F.4th 634 (8th Cir. 2022), *cert. granted sub nom.* *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsv.*, No. 22-1008, 2023 WL 6319653 (U.S. Sept. 29, 2023).

¹⁹³ See *id.* at 638 (identifying both claims in the plaintiff’s complaint).

The analysis in this Article solves half of the *Corner Post* case. The Supreme Court should conclude that the six-year period for the arbitrary and capricious claim accrues earlier, when the Fed promulgated the regulations. (This Article does not address the question of when the facial *ultra vires* claim accrues in *Corner Post*.)

Several case law examples where the limitations period accrues earlier, and where the facts involve time-barred challenges to old agency rulemaking actions, are described below.

In a 2021 case, *Texas v. Rettig*,¹⁹⁴ several states joined to challenge a 2002 Department of Health and Human Services (“HHS”) Certification Rule on the grounds that it had been promulgated without proper notice and comment and exceeded the authority of the statute.¹⁹⁵ Under the 1965 Medicaid Act, a state can pay a third-party health insurer for coverage of Medicaid beneficiaries and receive reimbursement from the federal government, subject to the requirement of an “actuarially sound” contract with the insurer.¹⁹⁶ The 2002 HHS Certification Rule defined “actuarially sound” requirements.¹⁹⁷ The Court of Appeals for the Fifth Circuit held that final agency action occurred, and the administrative procedure claim began to accrue, in 2002 on promulgation of the certification rule and not later, in 2015, when HHS applied the rule through an actuarial board to evaluate a contract with Texas which contained adjustments because of the intervening passage of the Affordable Care Act in 2010.¹⁹⁸

In a 2009 case, *Sai Kwan Wong v. Doar*,¹⁹⁹ a Medicaid recipient sought to challenge a 1980 regulation on the basis that it had been issued without notice and comment.²⁰⁰ The regulation treated the Social Security income of a disabled individual as a required contribution for nursing home care.²⁰¹

¹⁹⁴ 987 F.3d 518 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1308 (2022).

¹⁹⁵ *Id.* at 523 (rejecting the challengers’ APA claim as time barred by 28 USC § 2401(a) but considering the challengers’ nondelegation claim); see Petition for a Writ of Certiorari at 65a–68a, *Texas v. Rettig*, 142 S. Ct. 1308 (2022) (No. 21-379) (admitting that APA claims are subject to six-year statute of limitations which accrues upon final agency action, but explaining that the Supreme Court has never decided when “final agency action” occurs).

¹⁹⁶ *Rettig*, 987 F.3d at 524.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 529–30 (explaining that the final agency action must “mark the ‘consummation’ of the agency’s decisionmaking process” and be an action “by which rights or obligations have been determined” (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (internal quotation marks omitted))). The 2015 agency action pointed to by the district court and plaintiffs was a 2015 letter from the HHS approving Texas’s amended insurer contract, the governments collection of a Provider Fee, and a 2015 guidance document for setting capitation rates. *Id.* The court rejected these actions as final agency actions for purposes of the limitations period. *Id.*

¹⁹⁹ 571 F.3d 247 (2d Cir. 2009).

²⁰⁰ See *id.* at 262–63.

²⁰¹ See *id.* at 250–51.

The facts of the case included the deposit of the income (and its use to offset Medicaid contributions) starting in 2006.²⁰² The Court of Appeals for the Second Circuit barred this administrative procedure claim under 28 U.S.C. § 2401(a).²⁰³

In a 2008 case, *Preminger v. Secretary of Veterans Affairs*,²⁰⁴ the leader of a local Democratic Party committee challenged a 1973 election regulation because it had been issued without notice and comment.²⁰⁵ The regulation prohibits visitors to Department of Veteran Affairs property from engaging in unauthorized demonstrations.²⁰⁶ The plaintiff had attempted to register voters at a Veterans Affairs hospital in Menlo Park, California.²⁰⁷ The Court of Appeals for the Federal Circuit barred the plaintiff's administrative procedure claim under 28 U.S.C. § 2401(a).²⁰⁸

In a 1999 case, a neighborhood association representing residents who would be disrupted by a planned highway challenged a Record of Decision issued by the Federal Highway Administration in 1989.²⁰⁹ They claimed that the procedure leading to the Record of Decision was inadequate because notice-and-hearing requirements were not followed; the Court of Appeals for the Fourth Circuit barred the claim under 28 U.S.C. § 2401(a).²¹⁰

In another 1999 case, *Cedars-Sinai Medical Center v. Shalala*,²¹¹ plaintiff hospitals argued that a 1986 Health and Human Services Manual should have been issued with notice-and-comment procedures.²¹² The manual removed coverage for devices and procedures that the FDA had not approved.²¹³ HHS did not begin denying payment for the use of such

²⁰² *See id.* at 254.

²⁰³ *See id.* at 263 (holding that the procedural challenge is time barred under 28 U.S.C. § 2401(a) as the statute of limitations began to run upon final agency action in 1980). On the other hand, the court considered (and rejected) a claim that the regulation was inconsistent with the statute. *See id.* at 261 (rejecting *ultra vires* claim).

²⁰⁴ 517 F.3d 1299 (Fed. Cir. 2008).

²⁰⁵ *See id.* at 1304.

²⁰⁶ *Id.*

²⁰⁷ *See id.*

²⁰⁸ *See id.* at 1307–08 (holding that the plaintiff's procedural claim is time barred by 28 U.S.C. § 2401(a) and that the claim accrued, at latest, in 1991, six years after the regulation was last amended). The court considered (and rejected) a claim that the regulation violated the First Amendment. *See id.* at 1309–11, 1316, 1318–19 (considering and rejecting the plaintiff's constitutional challenges).

²⁰⁹ *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 185 (4th Cir. 1999).

²¹⁰ *See id.* at 186–87 (holding that 28 U.S.C. § 2401(a) six-year statute of limitations accrued upon final agency action which here was the issuance of the Record of Decision).

²¹¹ 177 F.3d 1126 (9th Cir. 1999).

²¹² *Id.* at 1128–30.

²¹³ *Id.* at 1130.

devices until 1994, and the plaintiff hospitals claimed that the policy was ambiguous and that they did not know it would be applied adversely to them until that later date.²¹⁴ Nevertheless, the Court of Appeals for the Ninth Circuit held that 28 U.S.C. § 2401(a) barred the claim.²¹⁵

C. *Textual Analysis of 28 USC § 2401(a) and the APA*

Earlier accrual, at the time a regulation is promulgated, is consistent with the text of the APA and 28 U.S.C. § 2401(a). The case law to date does not carefully discuss the statute's text.²¹⁶ This Article provides the missing textual analysis.

The two statutes, read together, do not guarantee to all future plaintiffs affected by an agency rule the right to avoid the rule because of administrative procedure defects. Nor do they grant to all administrative procedure participants the right to object to the process. Rather they provide a limited avenue to challenge administrative procedure defects. This avenue is constrained by justiciability requirements as well as limitations periods. It is within this context that the six-year time bar operates.

Consider the text of 28 U.S.C. § 2401(a): "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."²¹⁷

In the case of administrative procedure, both the "civil action" mentioned in the statute and the related "right of action" derive from the APA.²¹⁸ The APA provides the basis for an action when a plaintiff sues the federal government to challenge an administrative procedure defect.²¹⁹ Thus it is the APA that provides the meaning of "civil action" and "right of action" under 28 U.S.C. § 2401(a) for an administrative procedure claim.

Section 706(2)(D) of the APA uses the following language to describe the key entitlement to raise an administrative procedure challenge: "The reviewing court shall . . . hold unlawful and set aside agency action, findings, findings, and conclusions found to be . . . without observance of procedure required by law."²²⁰ The unlawful agency action described in the

²¹⁴ *Id.* at 1129.

²¹⁵ *Id.* at 1130. The court also rejected equitable tolling and equitable estoppel arguments. *See id.* (rejecting the plaintiff's equitable tolling and collateral estoppel arguments on the basis that the government did not delay enforcement for an improper purpose, and explaining that if the hospital did not understand the policy, it could have asked for clarification from the government).

²¹⁶ *See supra* Section II.B (discussing cases).

²¹⁷ 28 U.S.C. § 2401(a).

²¹⁸ *See* 5 U.S.C. § 706.

²¹⁹ *Id.*

²²⁰ 5 U.S.C. § 706(2)(D).

APA is clearly the action that failed to follow proper administrative procedure.²²¹ For example, if a regulation is improperly promulgated without notice and comment—contrary to another section of the APA²²²—the unlawful action is the procedurally defective promulgation of the regulation.²²³ If the regulation is promulgated in, say, 1986, then any violation of administrative procedure (for instance, because of inadequate notice and comment) must have occurred no later than 1986.

If a plaintiff were to use APA § 706(2)(C) to frame an administrative procedure claim, a similar result would follow. That section authorizes suit on the basis that an agency action is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”²²⁴ If the agency failed to meet the APA’s terms of statutory authority when issuing a rule, it did so at the time of issuance. For a regulation promulgated in 1986, the alleged APA violation must have occurred no later than 1986.

The APA does not provide a guaranteed path to raise challenges to administrative procedure flaws.²²⁵ Instead the APA only allows claims that are properly presented to a court.²²⁶ It reads: “[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”²²⁷ The “when presented” requirement is consistent with the independent requirement of justiciability for APA challenges.²²⁸ For instance, a plaintiff does not automatically have standing as a result of the APA, but rather must independently show injury, causation and redress.²²⁹ This is true even for facial or pre-enforcement challenges.²³⁰

Another section of the APA covers the requirement of timeliness for an APA claim.²³¹ It confirms that statutes limit the time within which an agency action may be challenged,²³² as it provides that claims may not be

²²¹ *Id.*

²²² 5 U.S.C. § 553 (requiring notice and comment for rulemaking subject to exceptions for “interpretative rules” and “good cause”).

²²³ 5 U.S.C. § 702.

²²⁴ 5 U.S.C. § 706(2)(C).

²²⁵ *See* 5 U.S.C. § 704 (providing for review of agency actions).

²²⁶ *See id.*

²²⁷ 5 U.S.C. § 706.

²²⁸ *See, e.g.,* *Abbott Labs. v. Gardner*, 387 U.S. 136, 139–41 (1967).

²²⁹ *Id.*

²³⁰ *Id.* (concluding that judicial review of an FDA regulation for an “aggrieved person” was available even though the statute did not specifically provide for judicial review).

²³¹ *See* 5 U.S.C. § 701(a) (indicating that statutes may preclude judicial review).

²³² *Id.*; *see* KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 13.1, at 1256 (6th ed. 2018) (discussing the application of limitations periods to APA claims).

made under the APA when “statutes preclude judicial review.”²³³ This further confirms that the default six-year limitations period applies to limit administrative procedure claims.

Beginning the limitations period when an agency promulgates a regulation stands in contrast to the application of a limitations period for private law claims such as contract or tort. In contract or tort, the limitations period is plaintiff-focused.²³⁴ Statutes of limitation for such private-law causes of action begin to run no earlier than the moment when the plaintiff can sue.²³⁵ In this private law context, a statute of limitations does not run for a particular plaintiff until that plaintiff has standing.²³⁶

The plaintiff-focused, later-accrual approach may at first appear relevant because 28 U.S.C. § 2401(a) was written against a contract claim background.²³⁷ The predecessor of 28 U.S.C. § 2401(a) became law in 1887 in connection with the enactment of the Tucker Act.²³⁸ The Tucker Act waives sovereign immunity and provides federal courts with jurisdiction to hear various actions against the United States for money damages.²³⁹ Cases arising out of “any express or implied contract with the United States” form an important category of authorized Tucker Act claims.²⁴⁰

In a contract case, both the “civil action” mentioned in 28 U.S.C. § 2401(a) and also the related “right of action” derive from the plaintiff’s contract with the federal government.²⁴¹ A body of contract case law—well established at the 1887 enactment date—specifies the meaning of “accrual” for purposes of a contract statute of limitations.²⁴² Under this established understanding, such an action accrues when the plaintiff can sue.²⁴³ The plaintiff acquires the ability to sue after a specific interaction between the plaintiff and defendant: the alleged breach of the contract

²³³ 5 U.S.C. § 701(a).

²³⁴ See Kendrick, *supra* note 22, at 181–83.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ See Act of Jan. 4, 2011, Pub. L. 111-350, § 5(g)(8), 124 Stat. 3677, 3848 (2011) (codified at 28 U.S.C. § 2401) (replacing the chapter’s original title, “the Contract Disputes Act of 1978”).

²³⁸ Tucker Act, 24 Stat. 505 (1887) (codified as amended at 28 U.S.C. §§ 1346(a)(2), 1491). Recodification occurred in 1948, two years after the enactment of the APA. Act of June 25, 1948, 62 Stat. 869, 871.

²³⁹ 28 U.S.C. § 1491.

²⁴⁰ *Id.*

²⁴¹ See Meridian Invs., Inc. v. Fed. Home Loan Mortg. Corp., 855 F.3d 573, 578 (4th Cir. 2017) (explaining the relationship between the six-year limitations period and contract claims under the Tucker Act).

²⁴² See Kendrick, *supra* note 22, at 181–82.

²⁴³ *Id.*

between them.²⁴⁴ This squares with the often-recited purpose of a statute of limitations, which is to encourage a plaintiff to come forward promptly with a claim, once the plaintiff has a claim, and to penalize the plaintiff's negligence or delay.²⁴⁵

The plaintiff-focused approach makes sense when a right of action covered by 28 U.S.C. § 2401 arises from a transaction or interaction between the government and a specific plaintiff, as when the government breaches a contract with a specific plaintiff. But the premise that the right derives from a transaction or interaction between plaintiff and the government does not hold for administrative procedure claims. When there is a failure of administrative procedure for a tax regulation, the problem is not an error made in the filing or examination of a particular tax return. Rather it is an error that was a failure to allow or respond to public participation in the administrative procedure process.²⁴⁶ The allegedly illegal administrative procedure does not happen at the later moment of the filing or examination of a tax return.²⁴⁷ The allegedly illegal administrative procedure happens when Treasury promulgates the tax regulation, and all of the information needed to formulate the claim is available—and in the public record—at that earlier time.²⁴⁸

This accrual-at-promulgation approach squares with the statutory text of 28 U.S.C. § 2401(a), which prescribes that the limitations period starts to run “[when] the right of action first accrues.”²⁴⁹ The administrative procedure “right of action” arises from an alleged defect at the moment of promulgation and is not modified by the later application of the reg.²⁵⁰ Rather, the right of action remains unchanged and discoverable, waiting for an eligible plaintiff to raise the claim.²⁵¹ The right of action is a single, common right; it is the same regardless of which plaintiff brings it. Accordingly, the “right of action” first accrues with respect to all plaintiffs when any one plaintiff can bring the claim.²⁵² At

²⁴⁴ *Id.*

²⁴⁵ This justification was established in 1887, when the predecessor of 28 U.S.C. § 2401(a) was enacted. *See id.* (citing H.G. WOOD, A TREATISE ON THE LIMITATION OF ACTIONS AT LAW AND IN EQUITY 11 (1883)).

²⁴⁶ *See, e.g.,* Govig & Assocs., Inc. v. United States, No. CV-22-00579, 2023 WL 2614910, at *3, *14 (D. Ariz. Mar. 23, 2023).

²⁴⁷ *Id.* at *14.

²⁴⁸ *Id.*

²⁴⁹ 28 U.S.C. § 2401(a).

²⁵⁰ *See Govig*, 2023 WL 2614910, at *14.

²⁵¹ *See Wind River Min. Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991).

²⁵² *See id.* at 716.

that moment, the limitations period begins to run with respect to the right of action for all plaintiffs who share that cause of action.²⁵³

In contrast, the private law approach, with its focus on plaintiff injury and standing, would delay the start of the limitations period with respect to a specific plaintiff until the specific plaintiff had standing.²⁵⁴ This would hold open the ability to challenge an administrative procedure defect indefinitely. If the limitations period were indefinite, it would always be possible for a plaintiff to come into existence decades after the issuance of a procedurally defective regulation, for that plaintiff to suffer injury as a result of the ongoing application of a procedurally defective regulation, and for that plaintiff to sue. In other words, an indefinite limitations period would defeat the purpose of a limitations period in the first place. Limitations periods are supposed to balance accuracy and repose and to encourage any eligible plaintiff to come forward promptly with a claim, once any plaintiff has a claim, and to penalize the plaintiff's negligence or delay.²⁵⁵ An indefinite limitations period gives no weight to the value of repose.

Starting the limitations period when a regulation is promulgated suggests that at least one plaintiff could challenge any administrative procedure defect when the regulation is promulgated. But as the tax context so nicely illustrates, this is not always the case. Sometimes, no plaintiff is able to sue immediately, for instance because of a statute like the Anti-Injunction Act.²⁵⁶ Or, it could be because intermediate procedural steps are required before a plaintiff can bring an administrative procedure claim to court.²⁵⁷ But the law offers tools to address these issues of delay. As Part V discusses, equitable judicial doctrines such as tolling and estoppel, as well as government restraint, are available to suspend the running of the six-year limitations period in appropriate cases or block the government from raising the limitations period as a defense in appropriate cases. Additionally, as Section III.C explains, check-and-balance oversight from Congress and the President also constrains administrative agency action.

²⁵³ *Id.* at 715.

²⁵⁴ See Kendrick, *supra* note 22, at 181–84 (analogizing to contract and tort actions in an analysis of Section 2401(a)). Kendrick also gives several examples of later, as-applied accrual for claims “arising out of public duties,” but his examples also involve interactions between the government and a particular private citizen, such as the failure to record a certain lien. See *id.* at 185–87.

²⁵⁵ See *CTS Corp. v. Waldburger*, 573 U.S. 1, 7–9 (2014) (reciting the importance of encouraging plaintiffs to bring timely actions).

²⁵⁶ See I.R.C. § 7421(a) (providing that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person”).

²⁵⁷ See, e.g., I.R.C. § 7422(a) (requiring the initial procedural step of filing a claim for refund).

III. The Policy of the Six-Year Period

A. *Repose*

What is at stake in 28 U.S.C. § 2401(a) is a timeworn balancing of two interests in law: accuracy and repose. The tradeoff is classic.²⁵⁸ The law has an interest in ensuring that administrative procedure requirements are correctly followed, which supports allowing plaintiffs to challenge defective procedures.²⁵⁹ The law also has an interest in repose, meaning an interest in refraining from disturbing reliance interests that rest on the law established by administrative agency action.²⁶⁰

The interest in repose includes the context that the six-year limitations period operates against the background of sovereign immunity.²⁶¹ The limitations period, in other words, “is a central condition” under which “the United States consents to be sued.”²⁶² Both the interest of repose and the background of sovereign immunity support restricting the ability to challenge existing law in court.

In addition to sovereign immunity, the policy reasons of avoiding error and protecting reliance support repose for administrative procedure claims. Error costs, for instance arising from stale evidence, are well-

²⁵⁸ See, e.g., Katharine F. Nelson, *The 1990 Federal “Fallback” Statute of Limitations: Limitations by Default*, 72 NEB. L. REV. 454, 513 (1993) (observing similar policy interests in an analysis of a different federal statutory limitations period).

²⁵⁹ Some other rules appear to give greater priority to accuracy. See, e.g., FED. R. CIV. P. 60(b)(4) (providing no time limit for a challenge to void judgments); *Durukan Am., LLC v. Rain Trading, Inc.*, 787 F.3d 1161, 1162 (7th Cir. 2015) (holding a judgment void for lack of personal jurisdiction, after “[a]lmost a year”). Nevertheless, despite the formal lack of a time limit in this civil procedure rule, some courts still appear to consider delays in rejecting a claim to void a judgment. See, e.g., *United States v. Dailide*, 316 F.3d 611, 617–19 (6th Cir. 2003) (rejecting prayer of relief on grounds of no subject-matter jurisdiction where motion filed four years after district court had entered summary judgment).

²⁶⁰ See, e.g., *JEM Broad. Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994) (“[S]ome parties—such as those not yet in existence when a rule is promulgated—never will have the opportunity to challenge the procedural lineage of rules that are applied to their detriment. In our view, the law countenances this result because of the value of repose.”).

²⁶¹ See, e.g., *Texas v. Rettig*, 987 F.3d 518, 529 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1308 (2022).

²⁶² *United States v. Mottaz*, 476 U.S. 834, 841–43 (1986) (interpreting an analogous limitations period in the Quiet Title Act, 28 U.S.C. § 2409a(a)); cf. *United States v. Dalm*, 494 U.S. 596, 608–09 (1990) (requiring “unequivocal[]” consent to suit and suggesting that limitations periods are jurisdictional). The Court of Appeals for the D.C. Circuit and other courts of appeals have concluded, however, that 28 U.S.C. § 2401(a) is not jurisdictional. See *Jackson v. Modly*, 949 F.3d 763, 766 (D.C. Cir. 2020) (acknowledging “that our long-standing interpretation of . . . 28 U.S.C. § 2401(a) as jurisdictional is no longer correct” (citing *United States v. Kwai Fun Wong*, 575 U.S. 402, 420 (2015))); see also *infra* note 464 (collecting cases).

known reasons for limitations periods.²⁶³ The error cost concern applies for administrative procedure claims, because the more time that has passed since the issuance of a rule, the less clear the evidence will be about what happened in the administrative process. Questions like whether a comment is a “significant” one that merits a direct response from the agency require the consideration of the administrative process at the time of issuance.²⁶⁴ Contemporaneous context matters, for instance if a court is trying to determine whether the comment would have changed the rule or if a court is trying to determine whether the comment addressed the fundamental premise of the rule.²⁶⁵

In addition, reliance is an important reason for time bars in the public law administrative context. Regulated parties (like taxpayers), third parties (like advisors and tax preparers), and the government (for instance, through administrative practice) rely on administrative rules as soon as Treasury or the IRS issues them. The reliance interest in repose increases with the passage of time, because the reliance interests that different parties have based on the issued administrative guidance increases with time.

The six-year limitations period of 28 U.S.C. § 2401(a) is one of several time-bar provisions that balance the interests of accuracy and repose for challenges to administrative agency action. Six years is the outer limit, since many specific limitations periods are shorter. For example, in environmental law, the Clean Air Act requires a petition for judicial review of an emission standard to be filed within thirty days of the issuance of the standard.²⁶⁶ Challenges to certain National Highway Traffic Safety Administration (“NHTSA”) regulations must be filed within fifty-nine

²⁶³ See Richard A. Epstein, *The Temporal Dimension of Tort Law*, 53 U. CHI. L. REV. 1175, 1182–83 (1986) (giving error avoidance as a key reason for statutes of limitations).

²⁶⁴ See Donald J. Kochan, *The Commenting Power: Agency Accountability Through Public Participation*, 70 OKLA. L. REV. 601, 601–02 (2018) (emphasizing the public and available nature of the “commenting power”).

²⁶⁵ See *3M Co. v. Comm’r*, 160 T.C. No. 3, at *150 (2023); *id.* at *181 (Toro, J., dissenting) (explaining contrasting views of the meaning of a “significant” comment in the majority and dissenting opinions).

²⁶⁶ See *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 277 (1978) (explaining and quoting the thirty-day limitation). The Supreme Court has upheld this limit generally, although it has allowed a challenge to a criminal liability provision to go forward on a narrow statutory interpretation ground. *See id.* at 282–83 (upholding the strict thirty-day statute of limitations prescribed in the Clean Air Act for judicial review of emissions standards promulgated by the EPA in general but allowing claim to go forward on very narrow statutory interpretation grounds, because proceedings involved criminal liability). *But see id.* at 289–90 (Powell, J., concurring) (reasoning that thirty days may not be adequate time for notice and that there is potentially room for a due process challenge; however, the majority does not take this up).

days.²⁶⁷ Under the Hobbs Act,²⁶⁸ which applies to actions taken by agencies including the Federal Communications Commission (“FCC”), the Nuclear Regulatory Commission, and the Secretary of Agriculture, challenges to certain agency final orders²⁶⁹ must be raised within sixty days of an agency’s “entry of a final order.”²⁷⁰ Compared to these limits, six years is a long time.

B. *Administrative Procedure Rights Held by the General Public*

The law’s interest in correct administrative procedure derives from the purpose of administrative procedure: “to provide interested members of the public an opportunity to comment in a meaningful way on the agency’s proposal.”²⁷¹ An administrative procedure injury is “incurred by all persons” at the earlier moment of final agency action, and not at the later moment of enforcement or application.²⁷² In other words, administrative procedure provides a democratic-adjacent participation interest that relates to the moment when an agency takes a final rulemaking action, for instance by promulgating a regulation.²⁷³

Accordingly, when there is an administrative procedure harm—for instance, the denial of notice and comment, or a refusal to consider a comment, or arbitrary and capricious conduct of the rulemaking process—the harm occurs during the administrative procedure process, which ends when the agency takes its final action, for instance by promulgating a regulation. This squares with the choice to start the

²⁶⁷ 49 U.S.C. § 32909(b); see *Nat’l Res. Def. Council v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95, 105 (2d Cir. 2018) (holding petitioners’ challenge of a NHTSA rule timely because it was filed within fifty-nine days of the rule’s publication in the Federal Register).

²⁶⁸ See 28 U.S.C. § 2344.

²⁶⁹ The Hobbs Act applies to actions taken by agencies including the Federal Communications Commission, the Nuclear Regulatory Commission, and the Secretary of Agriculture. See 33 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 8367 (2d ed. 1982) (describing application of the Hobbs Act).

²⁷⁰ 28 U.S.C. § 2344; see *JEM Broad. Co. v. FCC*, 22 F.3d 320, 324, 326 (D.C. Cir. 1994) (“[T]he failure to provide notice and comment is a ground for complaint that is or should be fully known to all interested parties at the time the rules are promulgated.”) (applying the Hobbs Act and holding that the limitations period accrues when an order is entered, even if the plaintiff then lacked standing).

²⁷¹ HICKMAN & PIERCE, *supra* note 232, § 5.3, at 563; see also KENNETH CULP DAVIS, *ADMINISTRATIVE LAW AND GOVERNMENT* 121 (2d ed. 1975) (“The system prescribed by § 553 of the APA . . . is probably one of the greatest inventions of modern government. The system is informal and efficient, and yet it gives affected parties a chance to influence the content of rules.”).

²⁷² *Shiny Rock Min. Corp. v. United States*, 906 F.2d 1362, 1365–66 (9th Cir. 1990).

²⁷³ See, e.g., JERRY L. MASHAW, *REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT* 100–17 (2018) (explaining a theory of reason-giving, judicial oversight, and democratic legitimacy in administrative law).

running of the limitations period at the time a regulation is promulgated for administrative procedure claims.

The right to challenge the procedural lineage of an agency action proceeds from the general public's interest in adequate administrative procedure. The enforcement mechanisms, as for most public rights, are messy. There is no pledge to all regulated parties in the future that they will be exempt from rules with purely procedural defects.²⁷⁴

The case law under 28 U.S.C. § 2401(a) squares with the theory that the right to challenge defective administrative procedure accrues earlier, when an agency takes a final rulemaking action, rather than later, when a plaintiff has standing and otherwise can sue. In the key *Shiny Rock* case, the Court of Appeals for the Ninth Circuit made this explicit.²⁷⁵ There, the court explained that any injury, "was that incurred by all persons when, in 1964 . . . the amount of land available for mining claims was decreased."²⁷⁶ Similarly, the Court of Appeals for the Sixth Circuit has identified an administrative procedure violation as a "denial of [administrative] process to the public at large" and explained that a "classic example" of accrual of an APA claim at the time of promulgation is when "an agency . . . issues a rule without following all requirements of notice-and-comment rulemaking"²⁷⁷

As the Courts of Appeals for the Ninth and Sixth Circuits perceived in *Shiny Rock* and *Herr* respectively, the administrative procedure interest relates to the general interest in the public participation process that is supposed to happen in connection with the final agency rulemaking action.²⁷⁸ The overwhelming weight of the case law is consistent with this theory.²⁷⁹ An illustrative example is offered below.

A 2009 Court of Appeals for the Second Circuit case, also mentioned above, provides one example of a fact pattern that clearly shows that the

²⁷⁴ A related question arises regarding which standard for administrative procedure should be applied. Should it be the contemporaneous standard that applied (so far as it can be divined from Supreme Court or other case law) when the guidance issued? Cf. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007) (concluding that a Department of Labor explanation of regulation for home companionship work "remains a reasonable, albeit brief, explanation" under the Fair Labor Standards Act "more than 30 years later"), *rev'g Coke v. Long Island Care at Home, Ltd.*, 462 F.3d 48, 52 (2d Cir. 2006) (concluding that in promulgating a 1974 regulation, the Department of Labor reversed the position taken in the proposed regulation and "ignored the plain language of the statute"). This question is set aside for the purposes of this Article.

²⁷⁵ See *Shiny Rock*, 906 F.2d at 1366.

²⁷⁶ *Id.* at 1365-66.

²⁷⁷ *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 819-20 (6th Cir. 2015).

²⁷⁸ *But cf. Kendrick*, *supra* note 22, at 204-07 (suggesting the sole policy rationale of repose for earlier accrual and not mentioning the public participation right foundation of administrative procedure claims that is emphasized in *Shiny Rock* and *Herr*).

²⁷⁹ See *supra* note 18 (collecting cases).

six-year period to challenge an administrative rule begins to run earlier, when an agency takes final action on the rule rather than later, when a plaintiff has standing and otherwise can sue.²⁸⁰ In *Sai Kwan Wong*, the plaintiff sought to challenge a Medicaid rule that treated Social Security income as a required contribution for the nursing home care of a disabled individual, even if the income was deposited into a special needs trust.²⁸¹ HHS had promulgated a rule providing this offset treatment in 1980, without using notice and comment.²⁸² The plaintiff did not have standing until 2006, when his legal guardian began to direct the plaintiff's Social Security income to a special needs trust, thus raising the question of whether the HHS offset rule would control.²⁸³ The court of appeals held that the six-year limitation period began to run in 1980, when the rule was issued, and not in 2006, when the plaintiff had standing.²⁸⁴ It barred the plaintiff's administrative procedure claim.²⁸⁵

This case illustrates the connection between administrative procedure law and public participation rights because it refuses to treat an administrative procedure claim as a fresh claim generated by an interaction between a plaintiff and the government. Even though the plaintiff in *Sai Kwon Wong* had no reason to complain about the 1980 Medicare regulation until 2006, his contemporaneous injury did not allow him to reopen the question of whether the public participation in rulemaking had been sufficient in 1980.²⁸⁶ The case confirms that for administrative procedure cases, the key interest and source of harm is the public's interest in legal administrative procedure process at the time a regulation is issued or other final agency action is taken.²⁸⁷ Private litigation is one enforcement mechanism, held by plaintiffs who happen to have standing to sue within six years. But if these plaintiffs fail to sue on behalf of the public's interest in legal administrative procedure (and equitable exceptions do not apply) the matter is closed to private litigation challenges. Specific injury suffered by later plaintiffs does not modify or reopen the ability to raise an administrative procedure challenge.

²⁸⁰ See *Sai Kwan Wong v. Doar*, 571 F.3d 247, 263 (2d Cir. 2009).

²⁸¹ See *id.* at 250.

²⁸² See *id.* at 262–63.

²⁸³ See *id.* at 254 & n.10.

²⁸⁴ See *id.* at 263.

²⁸⁵ See *id.*

²⁸⁶ See *Sai Kwon Wong v. Doar*, 571 F.3d 247, 254, 263 (2d Cir. 2009).

²⁸⁷ See *id.* at 263.

C. *Compare Ultra Vires and Constitutional Claims*

This Article argues that administrative procedure—such as the right to notice and comment and the right to require agencies to promulgate regulations using a process that is not arbitrary or capricious—offers a general public right and a related general public claim that accrues when an agency issues a rule. This differs from the law that applies when the claim is that an administrative rule exceeds the authority of the underlying substantive statute.²⁸⁸ For such *ultra vires* claims, the *Wind River* doctrine indicates that the six-year limitations period begins to run later for as-applied claims, at the time that the government applies the allegedly *ultra vires* statute, when a specific plaintiff acquires standing.²⁸⁹ (Neither *Wind River* nor this Article analyzes the question of accrual timing for a facial *ultra vires* claim, which is raised in *Corner Post*, a current Supreme Court case.²⁹⁰)

At least two objections might be made to this distinction between administrative procedure claims on the one hand and as-applied *ultra vires* claims on the other. The first objection is that a violation of administrative procedure, like an *ultra vires* claim, involves an argument that an administrative rule exceeds the authority of an underlying statute. That the statute is procedural rather than substantive should not make a difference. The second objection is the possibility that there might be a constitutional right to be free of a violation of administrative procedure.

The answer to the first objection—that violations of rights under procedural and substantive statutes should be treated similarly—is that they are treated similarly, in the sense that each right is derived from relevant statutory law and circumscribed by that same statutory law. The reason that a pure administrative procedure challenge accrues when an agency issues a rule is that this is the moment of the administrative

²⁸⁸ See *Wind River Min. Corp. v. United States*, 946 F.2d 710, 714 (9th Cir. 1991). A claim that an administrative rule is not eligible for *Chevron* deference because the major questions doctrine applies is an example of an *ultra vires* claim. See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2615–16 (2022) (invalidating an EPA rule); *King v. Burwell*, 576 U.S. 473, 485, 498 (2015) (upholding a Treasury rule).

²⁸⁹ See *Wind River*, 946 F.2d at 714–15 (distinguishing between a substantive challenge that accrues at the time of application of guidance and a procedural challenge that accrues at the time guidance issues (citing *Oppenheim v. Coleman*, 571 F.2d 660, 662–63 (D.C. Cir. 1978) (holding that 28 U.S.C. § 2401(a) did not bar a 1974 challenge under the APA to 1946 Civil Service Commission guidance with respect to rehiring returning World War II service members where the challenge was based on “an incorrect interpretation” of the statute))).

²⁹⁰ One claim in *Corner Post* is a facial *ultra vires* claim, and this Article does not take a view on the timeliness of that claim. See *supra* notes 192–193 and accompanying text. The other claim in *Corner Post* is a facial administrative procedure claim, about arbitrary and capricious agency action in the promulgation of a regulation. See *id.* This Article’s analysis reveals that the arbitrary and capricious claim in *Corner Post* was filed too late.

procedure violation identified by the APA. As explained in Section II.C, a textual analysis of the APA read together with 28 U.S.C. § 2401(a) reveals that the cause of action is complete when the agency issues the rule.²⁹¹ Whether the basis of the claim is the “without observance of procedure” claim of Section 706(2)(D) of the APA or it is the “in excess of statutory . . . authority” claim of Section 706(2)(C) of the APA, an administrative procedure violation happens at the moment when a rule is issued.²⁹²

In contrast, if a plaintiff claims that the agency violates a substantive statute in an enforcement action, the claim arises not because of the administrative procedure process, but rather because of a specific interaction between the plaintiff and the agency, such as an enforcement action under the substantive statute. The question is whether the government violates the substantive statute when it takes a specific action against a taxpayer or other regulated party. Whether the government’s interpretation of a regulation deserves deference or is *ultra vires* is bound up in this as-applied question.

Later accrual for an as-applied *ultra vires* claim makes sense because a substantive statute has continuous application.²⁹³ It sets out ongoing legal rights and responsibilities.²⁹⁴ The Internal Revenue Code, for instance, provides continuing substantive rights about tax law entitlements and responsibilities to the taxpayer.²⁹⁵ An *ultra vires* claim in tax is based on the IRC, not the APA. The IRC has its own limitations periods, which usually apply,²⁹⁶ and when 28 U.S.C. § 2401(a) is relevant to substantive tax claims, it accrues in connection with an enforcement transaction between taxpayer and government.²⁹⁷

The second objection—the possibility that there might be a constitutional right to be free of a violation of administrative procedure—is a more sweeping idea. Indeed, it might be termed a “valid regulation doctrine.” Such a “valid regulation doctrine” would resemble the “valid

²⁹¹ See *supra* Section II.C.

²⁹² 5 U.S.C. § 706; see *supra* Section II.C (discussing APA § 706(2)(C) and (D)).

²⁹³ Statutory interpretation’s effort to interpret old statutes under contemporary circumstances evidences the continuous application of statutory law. See, e.g., John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 83 (2006) (describing the statutory interpretation task of “decipher[ing] an obscure legal term of art”).

²⁹⁴ See *id.*

²⁹⁵ See, e.g., I.R.C. § 61 (defining “gross income,” a statutory term used in the measurement of the income tax base since 1913).

²⁹⁶ See *supra* Section II.A (describing applicable limitations periods in tax).

²⁹⁷ See *id.* (describing the historical application of 28 U.S.C. § 2401(a) in tax claims).

rule doctrine” first identified in the context of cases that invalidated statutes because of overbreadth under the First Amendment.²⁹⁸

The valid rule doctrine describes an unusually strong method for protecting an important constitutional right.²⁹⁹ It allows a court to invalidate a statute based on the statute’s possible unconstitutional application to third parties, even if the statute is not unconstitutional when applied to the challenger in the instance before the court.³⁰⁰ The valid rule doctrine considers third parties’ rights, in that it draws attention to potential applications of the rule to persons not parties to instant litigation.³⁰¹ But, the doctrine does not grant third-party standing.³⁰² Rather, the overbreadth “claimant is asserting his own right not to be burdened by an unconstitutional law.”³⁰³

Likewise, a valid regulation doctrine plaintiff might assert their own right to be free of an unconstitutional law based on the theory that the government had violated others’ rights by failing to offer adequate administrative procedure and public participation.³⁰⁴ For instance, if a rule should have had notice and comment but did not, the “others” whose rights were violated would be those who would have participated in the notice-and-comment process, if only the agency had properly offered the notice-and-comment opportunity.

The parallel between the valid rule doctrine and a possible valid regulation doctrine is intriguing. But in the end, it does not support the idea of a right not to be burdened by a procedurally invalid regulation. The valid rule doctrine is about constitutional rights, not statutory rights, and administrative procedure rights are best viewed as statutory rights, not constitutional rights.³⁰⁵ Also, the valid rule doctrine typically describes case

²⁹⁸ See Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 24 (1981) [hereinafter Monaghan, *Overbreadth*].

²⁹⁹ See Henry Paul Monaghan, *Harmless Error and the Valid Rule Requirement*, 1989 SUP. CT. REV. 195, 196 (1989) [Monaghan, *Harmless Error*] (“The claim that the Constitution forbids the imposition of sanctions except in accordance with a constitutionally valid rule . . . seems to me embedded in our conception of the ‘rule of law.’”).

³⁰⁰ See *id.* at 195 (explaining that a party “can resist sanctions unless they are imposed in accordance with a constitutionally valid rule, whether or not [the party’s] own conduct is constitutionally privileged”).

³⁰¹ See Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 848 (1970).

³⁰² See *id.*

³⁰³ *Id.*

³⁰⁴ For a case allowing a plaintiff to challenge a constitutional violation of others’ rights, see *infra* note 329.

³⁰⁵ See *infra* notes 313–321 (considering the possible overlap between constitutional and administrative law).

law relating to substantive or structural rights, not procedural rights.³⁰⁶ Even when a plaintiff appears to have a claim that a rule is invalid because of a violation of a procedural provision of the Constitution, such as the Origination Clause, relevant law as a practical matter generally does not afford a remedy.³⁰⁷

Consider first that the valid rule doctrine is about rights that arise under the Constitution.³⁰⁸ In contrast, a valid regulation doctrine would relate to an entitlement that arises under federal statutory law—the APA, for instance—as it applies to regulations promulgated under a substantive statute such as the IRC. In tax, it is particularly clear that relevant procedural entitlements arise under federal statute (and that they are not related to any extra-statutory or pre-existing private right), since tax regulations arise from federal tax statutes and lack any extra-statutory source.³⁰⁹

Sovereign immunity doctrine confirms that Congress holds the power to specify the circumstances under which the federal government may be sued when statutory entitlements are at issue.³¹⁰ This sovereign immunity power clearly applies to claims of statutory rights violations, and generally includes the right to specify limitations periods.³¹¹ Some statutes provide very short limitations periods, for instance thirty to sixty days after an agency’s final action, to raise a claim.³¹²

The Supreme Court has said that there is, in general, no constitutional requirement in addition to the APA for sufficient

³⁰⁶ See *infra* notes 322–328 (considering the valid rule doctrine’s focus on substantive and structural rights).

³⁰⁷ See, e.g., Rebecca M. Kysar, *The ‘Shell Bill’ Game: Avoidance and the Origination Clause*, 91 WASH. U. L. REV. 659, 672–73 (2014) (noting a law fell out of scope of the Origination Clause despite the court holding the issue of the law’s compliance was justiciable).

³⁰⁸ Monaghan, *Harmless Error*, *supra* note 299, at 195. See also Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1331 (2000) (asserting the right to be free of sanctions if a rule is not “constitutionally valid”).

³⁰⁹ See John M. Golden & Thomas H. Lee, *Congressional Power, Public Rights, and Non-Article III Adjudication*, 98 NOTRE DAME L. REV. 1113, 1138–41 (2023) [hereinafter Golden & Lee, *Congressional Power*]; John M. Golden & Thomas H. Lee, *Federalism, Private Rights, and Article III Adjudication*, 108 VA. L. REV. 1547, 1551 (2022) [hereinafter Golden & Lee, *Federalism, Private Rights*] (exploring the distinction between public rights and private rights).

³¹⁰ *Nesovic v. United States*, 71 F.3d 776, 777 (9th Cir. 1995).

³¹¹ See Paul R. Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 TUL. L. REV. 733, 745 (1983) (explaining Congressional right to limit administrative procedure claims in rulemakings as opposed to adjudications); see, e.g., *Nesovic*, 71 F.3d at 777–78 (concluding that § 2401(a) constitutes a condition on the waiver of sovereign immunity).

³¹² See *supra* notes 266–270 and accompanying text (giving examples of shorter limitations periods for administrative procedure claims).

administrative procedure rulemaking.³¹³ Additional constitutional due process requirements can apply in specific rulemaking cases, such as those that have only a narrow effect on specific regulated parties,³¹⁴ and they can apply in adjudication.³¹⁵ It is generally accepted, however, that they do not apply to rulemaking that establishes more general policies.³¹⁶

It is nevertheless possible—as other scholars have acknowledged³¹⁷—that the APA has constitutional content. Perhaps the APA subsumes and makes unnecessary the independent protection of procedural due process rights for rulemaking that otherwise would be relevant. Perhaps due process requirements for rulemaking exist but remain obscured because the APA has occupied the field since 1946.

At least one tax case indicates that any procedural due process requirements for general rulemaking are minimal, and perhaps nonexistent.³¹⁸ In 1915, the Supreme Court decided *Bi-Metallic Investment v. State Board of Equalization*.³¹⁹ The case involved a claim that a due process violation occurred when the property tax board of Denver increased all property tax valuations by 40% without holding a hearing.³²⁰ The Court found no due process violation, due in large part to the general nature of the rulemaking.³²¹ The case suggests that the procedural due

³¹³ See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) (holding that the APA established the “maximum procedur[es]” required), *rev’g Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regul. Comm’n*, 547 F.2d 633, 643, 653–54 (D.C. Cir. 1976) (adjudicating due process claim and concluding that the Atomic Energy Agency was required to add procedures such as discovery and cross-examination to nuclear plant permit process). See also *Yakus v. United States*, 321 U.S. 414, 421–22, 433–34 (1944) (concluding that due process did not require more opportunity for review than the statutory sixty-day period for challenge to a price control regulation).

³¹⁴ See *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 244–45 (1973) (distinguishing between rulemaking of general application and rulemaking with disproportionate effect on specific persons).

³¹⁵ See, e.g., Verkuil, *supra* note 311, at 744 (noting due process claims with respect to agency adjudication (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976))). See generally *Goldberg v. Kelly*, 397 U.S. 254 (1970) (affirming that due process requires a fair hearing prior to termination of welfare benefits).

³¹⁶ Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking*, 87 HARV. L. REV. 782, 785–87 (1974).

³¹⁷ See, e.g., Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 518–19 (2010) (arguing that “many core doctrines and administrative requirements are simultaneously constitutional and nonconstitutional”).

³¹⁸ 239 U.S. 441, 445 (1915).

³¹⁹ *Id.* at 441.

³²⁰ *Id.* at 443–44.

³²¹ See *id.* at 445 (explaining that “[t]he Constitution does not require all public acts to be done in town meeting or an assembly of the whole” assuming “that the proper state machinery has been used”). *But see Londoner v. Denver*, 201 U.S. 373, 385–86 (1908) (requiring a hearing for a local levy that would affect a small number of persons who would be disproportionately affected).

process requirements of the Constitution are minimal, and perhaps nonexistent, for general administrative rulemakings.

In general and as a practical matter, a violation of the APA does not amount to a violation of the Constitution. This undermines the claim that a valid regulation theory should allow a plaintiff to assert his own right not to be burdened by a procedurally invalid regulation. In other words, the absence of any practical constitutional issue with APA noncompliance undermines the idea of a valid regulation doctrine akin to the First Amendment-derived constitutional valid rule doctrine.

Also, the constitutional valid rule doctrine typically applies to substantive or structural constitutional rights—not to procedural rights.³²² The idea of the valid rule doctrine arose from the Supreme Court’s willingness to invalidate a speech restriction for overbreadth.³²³ The idea is that the person objecting to the restriction can find relief because a First Amendment violation would result if the restriction applied to different persons.³²⁴ Overbreadth doctrine under the First Amendment finds justification in the substantive concern about the chilling effect of an overbroad speech limitation.³²⁵

Other substantive or structural arguments might also be characterized as related to valid rule doctrine claims. For instance, in the area of pretrial detention, the Court has articulated the broad test that a statute would be invalid under the Eighth Amendment if “no set of circumstances exists under which the Act would be valid.”³²⁶ Also, in Commerce Clause jurisprudence, the Court’s “internal consistency test” asks whether a cross-border tax disadvantage would result if every state

³²² See Monaghan, *Overbreadth*, *supra* note 298, at 8–10; Monaghan, *Harmless Error*, *supra* note 299, at 195.

³²³ See Monaghan, *Overbreadth*, *supra* note 298, at 1–3.

³²⁴ See *id.* at 1–2, 6; see also Monaghan, *Harmless Error*, *supra* note 299, at 196 (explaining that a challenger’s activity need not be protected for the challenger to show that a statute is overbroad, but rather that a challenge may find a basis in its invalid applications against third parties not present). For example, a defendant who whistled during a court proceeding and is charged under a rule against whistling in any building may challenge the whistling ban as overbroad and unconstitutional, though his whistling specifically is not a protected activity. *Id.*

³²⁵ Monaghan, *Overbreadth*, *supra* note 298, at 1 (stating the overbreadth doctrine is “justified by the special vulnerability of protected expression to impermissible deterrence”); see Monaghan, *Harmless Error*, *supra* note 299, at 197–98.

³²⁶ See *United States v. Salerno*, 481 U.S. 739, 745 (1987) (reasoning that a facial challenge to the Bail Reform under the Eighth Amendment would not succeed if the application of the Act would be constitutional in at least some circumstances); see also Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 371–77 (1998) (describing and rebutting criticism of *Salerno* as draconian).

had a tax system identical to the challenged structure.³²⁷ This test uses a hypothetical, valid-rule-like test to determine whether a state tax structure should be set aside.³²⁸ These examples suggest that it is substantive or structural constitutional claims, not procedural constitutional claims, that populate prominent examples of the valid rule doctrine.

Yet still one might argue that a valid rule doctrine claim could logically follow from a procedural constitutional claim.³²⁹ In other words, a plaintiff might logically claim that a law was invalid because it was enacted in violation of a procedural constitutional requirement. But when we look to procedural constitutional challenges, it is difficult to discern a procedural valid rule doctrine, at least as a practical matter.

For example, the Supreme Court as a practical evidentiary matter has dismissed the idea that a statute would be void if enacted in violation of Article I's Origination Clause, for instance, because a revenue bill does not originate in the House.³³⁰ When a revenue bill originates in the Senate, rather than in the House as Article I requires, it presumably violates Article I.³³¹ But the Supreme Court treats an "enrolled act," which is certified by Congress and the President, as "unimpeachable" evidence of an enacted statute.³³² The Court does not go back to daily legislative journals (or, presumably, video evidence) to see whether these reveal an Origination Clause violation.³³³

³²⁷ See *Comptroller of the Treasury of Md. v. Wynne*, 575 U.S. 542, 562–64 (2015); see also Michael S. Knoll & Ruth Mason, *The Dormant Foreign Commerce Clause After Wynne*, 39 VA. TAX REV. 357, 359, 365–70 (2020) (describing the reasoning in *Wynne*). Thanks to Tara Grove for this example.

³²⁸ See Knoll & Mason, *supra* note 327, at 367–68 (illustrating the hypothetical internal consistency test).

³²⁹ See, e.g., *Wuchter v. Pizzutti*, 276 U.S. 13, 15–16, 18–19 (1928) (invalidating a New Jersey statute which did not require notice of execution of damages on non-resident motorists, although the plaintiff had actually received notice); see also Monaghan, *Overbreadth*, *supra* note 298, at 12 (analyzing *Wuchter*).

³³⁰ See Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1934 n.141 (2015) (explaining that the Court adopted a rule of evidence with respect to the Origination Clause cases rather than treating them as a nonjusticiable political question).

³³¹ See U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives").

³³² *Field v. Clark*, 143 U.S. 649, 672–73 (1892) (precluding the validity of congressional enactments from judicial review of the journals of the respective houses because of the respect due to "coequal and independent departments"); see also *United States v. Munoz-Flores*, 495 U.S. 385, 407–09 (1990) (Scalia, J., concurring in the judgment) (arguing that an authenticated enrolled act is sufficient evidence that Congress followed the Constitution's procedure).

³³³ The Court of Appeals for the D.C. Circuit has also taken pains to sidestep the task of adjudicating an Origination Clause challenge. See *Sissel v. U.S. Dep't of Health & Hum. Servs.*, 760

The mechanism is evidentiary.³³⁴ But the practical result is that the Court does not apply an effective valid rule doctrine for violations of Constitutional legislative procedure.³³⁵ This further weakens the argument for a parallel valid regulation doctrine for violations of statutory administrative procedure. Instead, it supports the argument here that administrative procedure claims are properly subject to the six-year time bar of 28 U.S.C. § 2401(a), and that such claims accrue when the agency issues a rule.

D. *Administrative Procedure and Private Litigation in Context*

The time limitations on private litigation to enforce general, democratic-adjacent administrative procedure rights also make sense because they are contextual. In addition to enforcement through private litigation, democratic-adjacent administrative procedure rights are supervised by other institutions within the branches of the federal government, in check-and-balance fashion.³³⁶ Oversight of agency action comes through a patchy mix of check-and-balance mechanisms and private litigation.

First consider the check-and-balance mechanism of Congress. It can wield various powers to limit the activities of administrative agencies, including Treasury and the IRS. One example is the ability of Congress to change substantive tax statutes to direct or constrain agency action.³³⁷ Another example is congressional control of appropriations needed to fund the agency's activities.³³⁸ A third example is soft power—the capacity of Senators and Representatives to use public speech and disclosure to

F.3d 1, 10 (D.C. Cir. 2014), *reh'g en banc denied*, 799 F.3d 1035 (D.C. Cir. 2015), *cert. denied*, 577 U.S. 1113 (2016) (holding that the Affordable Care Act was not a revenue bill and thus did not have to originate in the house); *see also id.*, 799 F.3d at 1049, 1060–61 (Kavanaugh, J., dissenting from denial of rehearing en banc) (arguing that the ACA should be treated as a revenue bill and that it did validly originate in the House, even though the language of the House bill submitted to the Senate was deleted in its entirety and replaced by the text of the ACA); Kysar, *supra* note 307, 672–73.

³³⁴ *Field*, 143 U.S. at 672–73.

³³⁵ *See* Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1453–54 (2013) (giving examples of valid Origination Clause and Emoluments Clause cases and arguing more generally that the valid rule doctrine does not provide any general right to be free of an unconstitutional rule).

³³⁶ *Cf. Munoz-Flores*, 495 U.S. at 389–94 (discussing the role of the different branches of government in the context of the political question doctrine).

³³⁷ *See* U.S. CONST. art. I, § 8 (providing Congress with the power to tax).

³³⁸ *See* JOSH CHAVETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 61–62 (2017) (explaining the custom of annual appropriations, including discretionary spending for federal agencies).

affect administrative policy.³³⁹ For example, in tax, administrative actions such as the remarkably high audit rate for earned income tax credit recipients³⁴⁰ or the policy on the disclosure of Presidential tax returns³⁴¹ arguably relate to the exercise of the congressional soft power of speech.

As a second structural check and balance on agency activities, consider the President. As the presidency has evolved along with the administrative state, it has sometimes treated administrative agencies as instruments of presidential policy. The available “techniques” include review, such as by the White House Office of Information and Regulatory Affairs (“OIRA”), directives, and appropriation.³⁴² OIRA review applies to many agency regulations and at least for a period of some years also applied to tax regulations.³⁴³

Thus, the purpose of private litigation as a check on administrative agency power is contextual.³⁴⁴ Other mechanisms, including the check-and-balance powers of Congress and the President, have the capacity to direct or constrain administrative agency action.³⁴⁵ This context helps explain the patchiness of private litigation avenues to challenge administrative procedure.

The uneven nature of private litigation in administrative procedure features a mismatch between persons that hold administrative procedure participation rights and eligible plaintiffs who have the right to enforce those rights. This mismatch is underinclusive, because eligible plaintiffs must have standing and otherwise show justiciability.³⁴⁶ This mismatch is also overinclusive, because eligible plaintiffs may include persons who did not hold administrative procedure participation rights, for instance, in the

³³⁹ See *id.* at 229–31 (giving examples of Congressional speech that has influenced international relations policy).

³⁴⁰ See INTERNAL REVENUE SERV., INTERNAL REVENUE SERVICE DATA BOOK 44 tbl.17 (2022).

³⁴¹ See Joshua D. Blank, *Presidential Tax Transparency*, 40 YALE L. & POL’Y REV. 1, 11–16 (2021).

³⁴² Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2285–87 (2001).

³⁴³ See Kristin E. Hickman, *An Overlooked Dimension to OIRA Review of Tax Regulatory Actions*, 105 MINN. L. REV. HEADNOTES 454, 455 (2021) (describing a 2018 Memorandum of Understanding between Treasury and OIRA). This MOU has since been withdrawn. DEP’T OF THE TREASURY & OFF. OF MGMT. & BUDGET, MEMORANDUM OF AGREEMENT § 2 (June 9, 2023).

³⁴⁴ Cf. Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 684–89 (2006) (arguing that the judicial inclination to expand justiciability doctrines such as standing links to the judicial conviction about the importance of defending rights and securing remedies through litigation).

³⁴⁵ See *supra* notes 337–343 and accompanying text.

³⁴⁶ See Fallon, *supra* note 344, at 684–89.

case of an entity organized after the agency takes a final rulemaking action.³⁴⁷

No identity exists between persons wrongly denied an administrative procedure right and persons permitted to challenge the resulting rule on grounds that administrative procedure was lacking.³⁴⁸ Consider the right to have one's significant comment considered in a notice-and-comment rulemaking process.³⁴⁹ Some persons possess the right to comment, but lack the right to challenge the resulting rule.³⁵⁰ Other persons possess the right to challenge the resulting rule, but lack the right to comment.³⁵¹ Thus the overlap between those who possess administrative procedure rights and those who qualify as plaintiffs to challenge the validity of a rule's administrative procedure is both underinclusive and overinclusive.

On the underinclusive side of the ledger, consider a commenter without standing to sue. Even where a "facial challenge" is allowed on administrative procedure grounds, a plaintiff must show the traditional standing requirements of injury, causation, and redressability.³⁵² For instance, in the *Shiny Rock* case, the plaintiff did not have standing to challenge the withdrawal of lands from the public domain until fifteen years later, when the Bureau of Land Management denied the plaintiff's mining application.³⁵³ Note that even if facial challenges are allowed, interested plaintiffs often lack standing to sue.³⁵⁴ For example, a company in existence when the Bureau of Land Management took final action in 1964 might have had some general interest in commenting on the withdrawal of lands, for instance, because it might in the future decide to pursue a mining permit—but the company might not have had standing until a later permit denial.³⁵⁵

³⁴⁷ See, e.g., *Govig & Assocs., Inc. v. United States*, No. CV-22-00579, 2023 WL 2614910, at *1–2 (D. Ariz. Mar. 23, 2023).

³⁴⁸ See Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1319 (2014) ("[O]ne implication of standing doctrine, the political question doctrine, and the state secrets doctrine is that certain agency actions can never be challenged in court.").

³⁴⁹ *Hewitt v. Comm'r*, 21 F.4th 1336, 1342–43 (11th Cir. 2021).

³⁵⁰ See *Frothingham v. Mellon*, 262 U.S. 447, 486–88 (1923) (holding that a taxpayer lacks standing based on the general loss that results from potentially higher taxes in the future).

³⁵¹ See, e.g., *Govig*, 2023 WL 2614910, at *1–2 (ruling on an APA challenge to a rule when the plaintiff company was formed after the rule was made).

³⁵² See *Shiny Rock Min. Corp. v. United States*, 906 F.2d 1362, 1365 (9th Cir. 1990) ("In order for us to sustain a challenge to the legal sufficiency of a [claim], a party must make a showing that it has standing.").

³⁵³ See *id.*

³⁵⁴ See *id.*; *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 28, 33–34 (1976).

³⁵⁵ In contrast, the plaintiff hospitals in *Cedars-Sinai* presumably could have mounted a facial challenge to the Medicare manual change in that case, even before it was directly enforced against them. See *infra* note 493 and accompanying text.

In tax, one example of a commenter without standing to sue involves an argument that would tighten a rule and increase revenue.³⁵⁶ Assume that a proposed regulation is lenient, and would allow taxpayers to pay less tax, and that the commenter argues on tax policy grounds that the regulation should be tighter and require taxpayers to pay more tax. Because the commenter's own tax returns are unaffected by the final regulation, the commenter lacks standing to challenge the final regulation in its finalized, more lenient form—even if the government ignored the commenter's comment.³⁵⁷ This is because of longstanding case law denying general taxpayer standing.³⁵⁸

On the overinclusive side of the ledger, consider plaintiffs who come into existence after a final agency rulemaking action. Some of these plaintiffs may challenge the rule even though they could not have participated in the administrative procedure process.³⁵⁹ They are limited in the sense that they must acquire standing within six years of the issuance of the rule, but it is still possible for an eligible plaintiff to have the right to sue even though the plaintiff did not exist when the rule was issued.³⁶⁰

The bottom line is that the causes of action available to challenge administrative procedure defects are messy. The plaintiffs who can sue are not the same as the persons who hold the right to participate in administrative procedure. Some plaintiffs can participate but cannot sue. Other plaintiffs can sue but cannot participate.

This lack of perfect identity between rightsholders and plaintiffs may seem uncomfortable or incorrect. But it is not unusual to have an enforcement mechanism that lacks this identity. Private attorney general

³⁵⁶ For a non-tax example of this lack of standing, see *Masias v. EPA*, 906 F.3d 1069, 1073 (D.C. Cir. 2018), which held that a petitioner could not challenge an agency action because it was not subjected to a higher regulatory burden.

³⁵⁷ See 5 U.S.C. § 553(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."). It is not generally used, however, to challenge a regulation, presumably in part because the remedy appears to be to remand so that the government should provide more process. See, e.g., *Moore v. United States*, No. C13-2063, 2015 WL 1510007, at *11, *13 (W.D. Wash. Apr. 1, 2015) (district court ordered the IRS to provide a more detailed response to a § 553(e) petition challenging a penalty).

³⁵⁸ See *Frothingham v. Mellon*, 262 U.S. 447, 487–88 (1923) (refusing taxpayer standing); *Simon*, 426 U.S. at 38 (refusing taxpayer standing). But see *Flast v. Cohen*, 392 U.S. 83, 102–03 (1968) (allowing taxpayer standing based on Establishment Clause); cf. Linda Sugin, *Invisible Taxpayers*, 69 TAX L. REV. 617, 633–35 (2016) (arguing that taxpayer standing should be broadened).

³⁵⁹ See, e.g., *Govig & Assocs., Inc. v. United States*, No. CV-22-00579, 2023 WL 2614910, at *1–2 (D. Ariz. Mar. 23, 2023) (describing facts that reveal that the plaintiff company was formed after the rule was issued).

³⁶⁰ See *id.*; see also 28 U.S.C. § 2401(a) (limiting suits to within six years of the right of action accruing).

provisions provide one example.³⁶¹ Other examples arise from other general rights, such as the right to the procedural validity of a legislative act or the right to a legal election.³⁶²

With respect to the procedural validity of a legislative act, such as a local ordinance, there is a lack of identity between interested parties and plaintiffs that is analogous to the lack of identity described above for administrative procedure claims. Some jurisdictions set no time limit for challenging such a procedural defect.³⁶³ This is the rule in Pennsylvania, where a procedural defect (such as the lack of a hearing) in the enactment of a township ordinance may always be challenged.³⁶⁴ But other jurisdictions set extremely strict time limits.³⁶⁵ In Florida, procedural challenges to certain ordinances must be brought within thirty days of the passage of the ordinance.³⁶⁶

The federal approach to challenging congressional procedural violations is even tighter than Florida's thirty-day rule for ordinances. As explained further above, there is no practical avenue available to challenge procedural missteps committed by Congress.³⁶⁷ This includes for example, a violation of the Origination Clause, which provides that revenue bills must originate in the House.³⁶⁸

Another example involves the enforcement of election law. State election law is an important source of examples here because federal election law generally defers to processes set by state law.³⁶⁹ Texas law, for

³⁶¹ See, e.g., Sugin, *supra* note 358, at 668 (analyzing private attorney general provisions). See generally Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 345 (1989) (explaining that, in a *qui tam* suit, Congress creates the right that gives private individuals standing to enforce public rights).

³⁶² See, e.g., *Glen-Gery Corp. v. Zoning Hearing Bd. of Dover Twp.*, 907 A.2d 1033, 1035 (Pa. 2006) (finding that claims “alleging a procedural defect” in “enactment of an ordinance may be brought notwithstanding” statutory limits); TEX. ELEC. CODE ANN. § 212.022 (2023).

³⁶³ See, e.g., *Glen-Gery*, 907 A.2d at 1035 (finding that claims “alleging a procedural defect” in the “enactment of an ordinance may be brought notwithstanding” statutory limits).

³⁶⁴ See *id.* at 1044–45 (holding that statute of limitations did not apply even though statute stated that it would).

³⁶⁵ See, e.g., FLA. STAT. § 171.081 (2023) (establishing strict time limits for procedural challenges).

³⁶⁶ See *id.*; see also *Rowley v. City of Fort Pierce*, 745 Fed. App'x 325, 327–28 (11th Cir. 2018) (citing Florida case law that determined that a Florida statute with a thirty-day time limit provided the only avenue to raise a procedural lack-of-notice challenge to an annexation ordinance).

³⁶⁷ See *supra* notes 330–335 and accompanying text (explaining evidentiary rule that as a practical matter blocks Origination Clause challenges).

³⁶⁸ U.S. CONST. art. I, § 7, cl. 1.

³⁶⁹ See U.S. CONST. art. I, § 4, cl. 1 (providing that state legislatures prescribe the “times, places and manner” for congressional elections, subject to certain “regulations” of Congress); see also Franita Tolson, *The Spectrum of Congressional Authority Over Elections*, 99 B.U. L. REV. 317, 322 (2019)

example, allows the filing of a recount petition by a candidate or, for a referendum, by a group of citizens.³⁷⁰ The petition must state a “valid ground,” such as a vote differential of less than 10%.³⁷¹ Texas law mandates the payment of a fee³⁷² and establishes a very short deadline that falls on the first or second day after the election.³⁷³

The election law example illustrates an underinclusive and overinclusive enforcement mechanism for a generally held public right. Not every person who can vote can bring a recount action.³⁷⁴ For instance, Texas law only allows a group of citizens to do so, and only in certain circumstances, such as a challenge to a referendum.³⁷⁵ Meanwhile, the law authorizes suit by a candidate, who can bring a recount action not in the capacity of a holder of voting rights, but rather as a proxy.³⁷⁶ Also, the ability to enforce voting rights is strictly limited, including by time, since cases must be brought within a day or two of the election.³⁷⁷

In administrative procedure, as in election law, the law does not allow every aggrieved person to sue to vindicate a general public right. But administrative procedure does provide other enforcement mechanisms, including congressional and presidential oversight. Private administrative procedure litigation is not the only pathway to ensure that the law is followed. Instead, it is one of several pathways.

(arguing that the Supreme Court should defer more to Congress and less to states on matters of election law).

³⁷⁰ TEX. ELEC. CODE ANN. § 212.022 (2023) (allowing candidate to petition); *id.* § 212.024 (2023) (allowing campaign treasurer of specific-purpose political committee or twenty-five or more eligible voters to petition for recount of a measure election).

³⁷¹ *Id.* § 212.022 (2023).

³⁷² *See id.* § 212.112 (2023) (providing for per-polling-location fee calculation).

³⁷³ *See id.* §§ 2.001, 212.028 (2023) (mandating a deadline of 5:00 PM by second day after canvass for plurality vote rule or only two candidates); *id.* §§ 2.025, 2.023, 212.083, 212.088 (2023) (giving a deadline of 2:00 PM by day after canvass for majority vote required and more than two candidates).

³⁷⁴ *See, e.g., id.* § 212.022 (2023) (allowing candidate to petition); *id.* § 212.024 (allowing campaign treasurer of specific-purpose political committee or twenty-five or more eligible voters to petition for recount of a measure election).

³⁷⁵ *Id.* § 212.024 (2023).

³⁷⁶ TEX. ELEC. CODE ANN. § 212.022 (2023).

³⁷⁷ *See id.* §§ 2.001, 212.028 (2023) (mandating a deadline of 5:00 PM by second day after canvass for plurality vote rule or only two candidates); *id.* §§ 2.025, 2.023, 212.083, 212.088 (2023) (giving a deadline of 2:00 PM by day after canvass for majority vote required and more than two candidates).

IV. Applying the Six-Year Period in Tax

A. *Achieving Administrative Law Consistency and Avoiding Tax Exceptionalism*

When it comes to translating the law about the six-year limitations period to the tax context, the Supreme Court's 2011 case, *Mayo Foundation for Medical Education and Research v. United States*,³⁷⁸ provides a touchstone. *Mayo* stands for anti-tax-exceptionalism, or in other words, for the idea that administrative procedure law should apply identically in tax as in other administrative areas.³⁷⁹ In *Mayo*, the Court insisted that the same standard of deference applied when reviewing Treasury regulations as applied when reviewing other agencies' regulations.³⁸⁰ It explained that "we are not inclined to carve out an approach to administrative review good for tax law only."³⁸¹

Mayo indicates that 28 U.S.C. § 2401(a)'s six-year time bar should be applied the same way in tax law as in other areas of law.³⁸² That is, the six-year limitations period begins when an agency takes final rulemaking action in non-tax contexts.³⁸³ So, it should also begin at the moment when Treasury promulgates a regulation.³⁸⁴

This approach at first may seem harsh. As explored further below, although facial challenges are sometimes allowed in tax, the Anti-Injunction Act often prevents the usual, non-tax path of raising a pre-enforcement, facial challenge to the administrative procedure bona fides of a just-promulgated reg.³⁸⁵ Taxpayers may not get to court for years—if ever—in the usual course of deficiency litigation.³⁸⁶ But taxpayers can engineer litigation through the mechanism of a refund action.³⁸⁷ In addition, as explored in Part V, the doctrines of equitable estoppel and

³⁷⁸ 562 U.S. 44 (2011).

³⁷⁹ *Id.* at 55.

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ 28 U.S.C. § 2401(a).

³⁸⁴ *Id.*

³⁸⁵ *See* 28 U.S.C. § 7421(a).

³⁸⁶ *See, e.g.,* Govig & Assocs., Inc. v. United States, No. CV-22-00579, 2023 WL 2614910, at *2–3 (D. Ariz. Mar. 23, 2023) (addressing plaintiffs who received initial assessment in 2015 and a final judicial ruling in 2023).

³⁸⁷ *See infra* notes 454–456 and accompanying text.

equitable tolling, as well as government restraint, can make appropriate adjustments.³⁸⁸

Taking the earlier-accrual path in tax would faithfully translate non-tax administrative law to the tax context. A later-accrual approach would depart from the case law in other areas. Moreover, later accrual would refresh the limitations period for administrative procedure claims every time any taxpayer acquired standing to file a petition in Tax Court or a complaint in district court. Accruing the statute when taxpayers acquired standing would mean no effective statute of limitations. It would expose tax rules to a significantly different and broader possibility of challenge compared to other areas, because it would mean that there would in effect be no time limitation at all for administrative procedure claims in tax.

B. *Facial Challenges to Tax Rules*

The application of the six-year limitations period in tax is most straightforward in the limited category of tax cases where a facial challenge is allowed.³⁸⁹ A facial challenge means a pre-enforcement challenge to the validity of an administrative rule, without any application of the rule to a specific case.³⁹⁰ In non-tax areas, interested parties generally may bring facial challenges to final agency actions.³⁹¹

In tax, facial challenges are infrequently allowed.³⁹² This is because a federal statute, the Anti-Injunction Act, blocks most facial challenges in tax.³⁹³ In general, tax litigation can proceed only after there has been an “assessment”—meaning, roughly, that the government argues that a particular tax (or related penalty or interest) amount is due.³⁹⁴ In tax law, most challenges outside the circumstance of a deficiency or refund suit are barred.³⁹⁵ This means that most litigation arises not as a facial challenge, but rather later, when the taxpayer disagrees with the

³⁸⁸ See, e.g., Fallon, *supra* note 344, at 684–89 (arguing that justiciability doctrine interacts with the importance of granting remedies).

³⁸⁹ See, e.g., *CIC Servs., LLC v. IRS*, 141 S. Ct. 1582, 1594 (2021).

³⁹⁰ See *Hire Order Ltd. v. Marianos*, 698 F.3d 168, 169 (4th Cir. 2014).

³⁹¹ See, e.g., *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (establishing presumption of availability for pre-enforcement review).

³⁹² See *infra* notes 393–397 and accompanying text.

³⁹³ See I.R.C. § 7421(a).

³⁹⁴ See I.R.C. § 7422(a).

³⁹⁵ See I.R.C. § 7421(a) (providing that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person”).

government and argues that the tax (or related penalty or interest) is not due.³⁹⁶

Sometimes, despite the Anti-Injunction Act, facial challenges are allowed in tax law.³⁹⁷ This was confirmed in a 2021 Supreme Court decision. In *CIC Services, LLC v. IRS*,³⁹⁸ a tax advisor alleged that the IRS violated the APA when it issued a 2016 Notice listing certain micro-captive insurance transactions as reportable transactions.³⁹⁹ The government had not assessed penalties, and so it argued that the Anti-Injunction Act blocked the tax adviser's challenge because there had been no assessment.⁴⁰⁰

The *CIC Services* Court rejected the government's claim that the Anti-Injunction Act prevented the tax adviser from challenging the Notice on administrative procedure grounds.⁴⁰¹ Instead, the Court allowed the tax adviser's facial challenge to proceed even without any government enforcement action.⁴⁰² The Court concluded that the reportable transaction Notice constituted a regulatory mandate, not a tax.⁴⁰³ It wrote that three factors supported the decision: the notice produced a reporting obligation, not (directly) an obligation to pay tax; the reporting required by the notice would be linked only through an attenuated series of steps to a direct obligation to pay tax; and violating the reporting obligation could technically produce criminal penalties.⁴⁰⁴

CIC Services supports the availability of facial challenges for at least some tax reporting obligations as regulatory mandates.⁴⁰⁵ Naturally it has left observers wondering which reporting obligations will be open to challenge. The decision does not say that the three factors are conjunctive, or disjunctive, or exclusive.⁴⁰⁶ It leaves much open to interpretation. This interpretative issue, however, lies outside the bounds of this Article. It is enough to motivate the analysis here that *CIC Services* allows some plaintiffs to bring some facial challenges arguing that tax regulations or

³⁹⁶ See I.R.C. §§ 7421–22 (requiring that taxpayers wait to file suit until after an assessment is made).

³⁹⁷ Even prior to *CIC Services*, some lower federal court cases involved the review of tax guidance pre-enforcement, that is, outside the channels of tax deficiency or refund actions. See Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717, 1755–56 (2014) (reviewing cases).

³⁹⁸ 141 S. Ct. 1582 (2021).

³⁹⁹ *Id.* at 1588.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.* at 1594.

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ See *CIC Servs.*, 141 S. Ct. at 1592 (discussing three factors).

⁴⁰⁵ *Id.* at 1594.

⁴⁰⁶ See *id.* at 1592.

other tax guidance was issued in violation of administrative procedure requirements.⁴⁰⁷

When a facial challenge to a tax rule is available, applying the 28 U.S.C. § 2401(a) limitations period should be straightforward. That is, the facial challenge, or complaint, must be filed within six years of the final agency rulemaking action.⁴⁰⁸ The fact pattern is analogous to that in *Hire Order*, where the Court of Appeals for the Fourth Circuit held that a facial challenge to a 1969 Revenue Ruling issued by the Alcohol, Tobacco and Firearms division of the IRS was barred when raised in 2008.⁴⁰⁹

The category of facial challenges may be small relative to the total number of tax cases,⁴¹⁰ but it is disproportionately important for administrative procedure tax cases. This is because of tax shelter Notices, which involve reporting obligations like those open to facial challenge after the decision in *CIC Services*.⁴¹¹ Plaintiffs have a strong incentive to challenge tax shelter Notices, since they are guidance that supports the imposition of tax penalties.⁴¹² Also, following *CIC Services*, plaintiffs have won in cases including the Court of Appeals for the Sixth Circuit case *Mann Construction*, which held that the practice of listing tax shelter Notices without notice and comment violated administrative procedure requirements.⁴¹³

The clearest and most immediate result of bringing 28 U.S.C. § 2401(a) into the tax law will be to shut down challenges to tax shelter Notices. This has already begun to happen, in the *Govig* case, also discussed above.⁴¹⁴ *Govig* involved a pre-enforcement challenge to the same Notice that had been challenged in *Mann Construction*, and on the same theory—that the IRS had failed to follow required notice-and-comment procedures.⁴¹⁵ The difference was that the government raised

⁴⁰⁷ See *id.* at 1594.

⁴⁰⁸ 28 U.S.C. § 2401(a).

⁴⁰⁹ See *Hire Order Ltd. v. Marianos*, 698 F.3d 168, 169–70 (4th Cir. 2012) (holding a “facial challenge” arising out of 2008 facts to Revenue Ruling 69-59 is time barred under 28 U.S.C. § 2401(a)). The Revenue Ruling, issued by the Alcohol, Tobacco, and Firearms Division of the Internal Revenue Service, limited gun sales at out-of-state shows. See *Firearms Matters Issued Under Chapter 53 of the Internal Revenue Code of 1954*, Rev. Rul. 69-59, 1969 C.B. 360 (1969).

⁴¹⁰ See, e.g., *CIC Servs.*, 141 S. Ct. at 1588 (discussing a facial challenge of tax rule).

⁴¹¹ See *id.* at 1592.

⁴¹² See I.R.C. § 6303 (defining notice and demand for tax)

⁴¹³ See *Mann Constr., Inc. v. United States*, 27 F. 4th 1138, 1148 (6th Cir. 2022) (setting a tax shelter Notice aside because it did not satisfy notice and comment).

⁴¹⁴ See *supra* notes 103–109 and accompanying text.

⁴¹⁵ See United States’ Motion to Dismiss and Supporting Memorandum at 22, *Govig & Assocs., Inc. v. United States*, No. 22-CV-00579, 2023 WL 2614910 (D. Ariz. Mar. 23, 2023).

the six-year time bar—for the first time ever—as a defense in *Govig*.⁴¹⁶ The *Govig* district court time-barred the taxpayer’s claim, and the government won.⁴¹⁷

C. *Enforcement Challenges and Lengthy Tax Procedure*

Section IV.B described the possibility of facial challenges to a regulation in tax. But such challenges are relatively rare.⁴¹⁸ This is because the Anti-Injunction Act blocks most facial challenges in tax.⁴¹⁹ Under the Anti-Injunction Act, in general, tax litigation can proceed only after there has been an “assessment”—meaning, roughly, that the government argues that a particular tax (or related penalty or interest) amount is due.⁴²⁰

This means that administrative procedure challenges arise in the course of regular tax controversy, in a deficiency or refund action.⁴²¹ Regular tax controversy includes three pre-litigation steps: taxpayer return filing, IRS examination, and IRS Appeals.⁴²² These steps may take longer than six years before a complaint can be filed in court.⁴²³

Deficiency and refund actions are two sides of the coin when it comes to tax assessments and litigation. A deficiency action involves a claim of underpaid tax,⁴²⁴ while a refund action involves a claim of overpaid tax.⁴²⁵ Deficiency actions make up about ninety-five percent of regular tax cases.⁴²⁶ In a deficiency action, the government challenges the tax return

⁴¹⁶ *Id.* at 23. All of the relevant facts in *Govig* occurred after the expiration of the six-year period, starting with the establishment of the problematic employee welfare benefit plan eight years after the issuance of the relevant Notice. *See Govig & Assocs., Inc. v. United States*, No. CV-22-00579, 2023 WL 2614910, at *2 (D. Ariz. Mar. 23, 2023) (explaining that *Govig* had a reporting requirement under § 6707A for the 2015 year). In earlier litigation, which occurred prior to the Supreme Court’s decision in *CIC Services*, the *Govig* court barred the case because of the Anti-Injunction Act, since the government had not assessed penalties. *See id.*

⁴¹⁷ *Govig*, 2023 WL 2614910, at *15.

⁴¹⁸ *See* I.R.C. § 7421(a) (restraining challenges until after an assessment is made).

⁴¹⁹ *See id.* (providing that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person”).

⁴²⁰ *Id.*; I.R.C. § 7422(a).

⁴²¹ *See infra* note 429–432 (describing procedure for deficiency or refund suits).

⁴²² *See infra* note 430 and accompanying text (describing filing, examination, and appeals procedure).

⁴²³ *See infra* note 434–438 and accompanying text (explaining the mechanism for extending limitations period).

⁴²⁴ *Deficiency*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁴²⁵ I.R.C. § 6402(a).

⁴²⁶ *See* MICHAEL I. SALTZMAN & LESLIE BOOK, IRS PRACTICE & PROCEDURE ¶ 9.05[1] (2d ed. 1991) (giving Tax Court case statistics).

and demands that the taxpayer pay additional tax.⁴²⁷ In a refund action, the taxpayer claims that a filed tax return overpaid tax, typically by filing an amended return and demanding a refund.⁴²⁸

Specific tax controversy rules govern deficiency actions and refund actions.⁴²⁹ In both cases, the rules provide a series of steps for taxpayer return filing, IRS examination, and IRS Appeals.⁴³⁰ But control over the pre-litigation process differs as between a deficiency action and a refund action. In a deficiency action, the government exerts more control over the process, including the question of whether the action is initiated at all.⁴³¹ In a refund action, the taxpayer has more control.⁴³²

To compare the two, consider first the process for a deficiency action. Say for instance that a regulation was promulgated in and effective for tax years starting in Year Zero, and that a taxpayer wishes to challenge the regulation on administrative procedure grounds. The taxpayer would likely first have the opportunity to file a tax return with a position that challenged the regulation in Year One. The statutory limitations period for the government to assess a deficiency is three years from the time the taxpayer files the return,⁴³³ so the government has until at least Year Four to assess a deficiency.

In addition, the government often asks the taxpayer to voluntarily extend the three-year tax limitations period, and the taxpayer often does so.⁴³⁴ So the limitations period may be, and often is, extended.⁴³⁵ An extension can allow time for IRS examination, which includes fact-gathering and negotiation steps, and for an internal IRS appeals “protest”

⁴²⁷ See Treas. Reg. § 301.6212-1(a) (noting the taxpayer is notified of the deficiency by mail).

⁴²⁸ See *id.* § 301.6402-3(a)(2) (providing procedure for filing refund claim).

⁴²⁹ See I.R.C. §§ 6211–16 (containing deficiency procedures); see also *id.* §§ 6401–09 (containing abatement, credit, and refund procedures).

⁴³⁰ See INTERNAL REVENUE SERV., PUB. NO. 501, DEPENDENTS, STANDARD DEDUCTION, AND FILING INFORMATION (2022) (reviewing filing information); see also U.S. DEP’T OF THE TREASURY, INTERNAL REVENUE SERV., PUB. NO. 556, EXAMINATION OF RETURNS, APPEAL RIGHTS, AND CLAIMS FOR REFUND (2013) (providing IRS examination and appeals information).

⁴³¹ See I.R.C. § 6212(a) (stating that the Secretary is authorized to send a notice of deficiency to the taxpayer); see also Treas. Reg. § 301.6212-1(a) (extending authority to notify the taxpayer of the deficiency to a district director or director of a service center).

⁴³² See Treas. Reg. § 301.6402-3(a) (requiring a claim for credit or refund be initiated by the taxpayer on the appropriate income tax return).

⁴³³ I.R.C. § 6501(a).

⁴³⁴ See DAVID M. RICHARDSON, JEROME BORISON & STEVE JOHNSON, CIVIL TAX PROCEDURE 105 (2d ed. 2007).

⁴³⁵ See *id.*; see also Hale E. Sheppard, *Clarifying Misconceptions About Extending Assessment-Periods and “Cooperating” During IRS Audits*, 21 J. TAX PRAC. & PROC. 41, 41, 42 (2019) (“The norm in modern times is for the IRS to seek one or more Forms 872 from taxpayers in essentially every audit.”).

process.⁴³⁶ An extension of the limitations period involves tolling certain limitations periods, but it currently does not cover the limitations period under 28 U.S.C. § 2401(a),⁴³⁷ although it could be modified to do so.⁴³⁸ If the period is tolled for say, two years, then the six years of the 28 U.S.C. § 2401(a) limitations period may elapse before the IRS even begins the deficiency action.

Once this internal tax controversy practice is complete, the IRS issues a notice of deficiency.⁴³⁹ “Deficiency” is a term of art in the tax law.⁴⁴⁰ Tax controversy practitioners refer to the notice of deficiency as a “ninety-day letter,” because a taxpayer typically has ninety days to file a petition for redetermination of a notice of deficiency in the Tax Court.⁴⁴¹ The ninety-day letter signifies the availability of judicial review, in particular prepayment judicial review in Tax Court.⁴⁴² For a deficiency action, prepayment judicial review is the last step available before the case moves into the collections phase.⁴⁴³ Such a petition for Tax Court redetermination most comfortably meets the definition of the “complaint” referred to in 28 U.S.C. § 2401(a).⁴⁴⁴ It is the first moment when a taxpayer in a deficiency action has the ability to raise an administrative procedure claim in court.

⁴³⁶ The pre-litigation “protest” process is a pre-litigation path for a taxpayer to obtain an Appeals Office hearing. See SALTZMAN & BOOK, *supra* note 426, ¶ 9.05[1]. It involves the filing of a protest with Appeals within thirty days of a preliminary letter submitted by the IRS examination revenue agent to the taxpayer. *Id.* The taxpayer also has the option of obtaining an Appeals Office hearing after filing a notice of determination in the Tax Court. *Id.* There are various differences between the Appeals office “protest” procedure and the Appeals office procedure for docketed cases. *Id.*

⁴³⁷ See INTERNAL REVENUE SERV., U.S. DEP’T OF THE TREASURY, FORM 872, CATALOG NO. 207551, CONSENT TO EXTEND THE TIME TO ASSESS TAX (2014) (omitting 28 U.S.C. § 2401(a) from the applicable I.R.C. sections).

⁴³⁸ See *id.* (explaining that the taxpayer has the right to extend or limit a government request to modify an extension, by mutual consent).

⁴³⁹ See I.R.S. Deleg. Order 1–69, IRM 4.8.9.2 (Aug. 11, 2016); *id.*, IRM 4.8.9.3 (July 9, 2013); *id.*, IRM 4.8.9.4 (Aug. 11, 2016). These are all available at <https://perma.cc/B2G5-Y8XW>.

⁴⁴⁰ SALTZMAN & BOOK, *supra* note 426, ¶ 10.03.

⁴⁴¹ I.R.C. § 6213 (allowing for filing of petition for redetermination with the Tax Court within ninety days for persons within the United States).

⁴⁴² See, e.g., *Lewis v. Comm’r*, 128 T.C. 48, 55 (2007) (stating the Tax Court’s de novo standard of review for a notice of deficiency).

⁴⁴³ See SALTZMAN & BOOK, *supra* note 426, ¶ 10.03 (noting that prepayment review is the usual last step “before the Service is permitted to assess and collect the tax”). Prepayment review is not permitted, however, for all tax-related amounts owed to the federal government. *Id.* For instance, it is not available for certain penalties. See Keith Fogg, *Access to Judicial Review in Nondeficiency Tax Cases*, 73 TAX LAW. 435, 435–36 (2020) (discussing the so-called *Flora* rule and recommending changes).

⁴⁴⁴ See 28 U.S.C. § 2401(a); see also *Schussel v. Comm’r*, 149 T.C. 363, 363 (2017) (showing a redetermination of liability is appropriate for the Tax Court).

Deficiency actions raise another and even more stubborn procedural problem. This is the possibility that the government will not challenge the taxpayer's position. Resource constraints and administrative discretion combine to produce the result that only a very tiny percentage of tax returns are ever audited—even among the highest-income taxpayers.⁴⁴⁵ The government may also face an incentive to avoid auditing those returns for which taxpayers have a strong administrative procedure claim—at least until the six-year limitations period has run.

The problem of lengthy pre-litigation tax procedure, or the problem of waiting for a government challenge that never comes, is alleviated by the prospect of a refund action. Taxpayers who pursue refund actions must accept costs and risks that accompany such actions, including the cost of prepaying tax or penalties.⁴⁴⁶ Nevertheless, refund actions offer taxpayers a well-worn pathway to ensure that their case gets to court.⁴⁴⁷ The refund action has long been the tool of choice for a taxpayer who wants to insist that the government address and resolve an issue.⁴⁴⁸ *United States v. Windsor*⁴⁴⁹ provides a famous example of this strategy. There, Edith Windsor presented the question of the constitutionality of federal nonrecognition of same-sex marriage to the federal courts through the mechanism of a suit for refund of federal estate taxes, which she had paid after the death of her spouse.⁴⁵⁰

The tax procedure steps on the books at first suggest that the pre-litigation process for a refund action could consume more than six years. Assume for instance that Treasury promulgates a regulation in Year Zero and that the taxpayer files an initial return consistent with that regulation in Year One. The taxpayer has three years to file an amended return claiming a refund.⁴⁵¹ Say, then, that the taxpayer files an amended return in Year Four. The IRS has six months to respond.⁴⁵² If the IRS denies the

⁴⁴⁵ See INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, UPDATED IRS AUDIT NUMBERS (2022) (showing in tax year 2019, the IRS audited 1.3% of returns with total positive income of \$1 million to \$5 million, 2.0% with income \$5 million to \$10 million, and 8.7% with income above \$10 million).

⁴⁴⁶ See I.R.C. § 6676(a); see also I.R.S. Deleg. Order 1-69, IRM 20.1.5.9.3 (Jan. 24, 2012).

⁴⁴⁷ See I.R.C. § 7422(a) (stating “[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed”).

⁴⁴⁸ See, e.g., *United States v. Windsor*, 570 U.S. 744, 753 (2013) (using the denial of a refund action to commence a refund suit in court).

⁴⁴⁹ 570 U.S. 744 (2013).

⁴⁵⁰ See *id.* at 749–51 (explaining refund suit in procedural history of case).

⁴⁵¹ I.R.C. § 6511(a) (stating a claim for refund shall be filed within three years from the time the original return was filed or two years from the time the tax was paid, *whichever is later*).

⁴⁵² *Id.* § 6532(a)(1) (stating no suit shall begin prior to six months after the filing date).

refund in Year Five, the taxpayer has two years—until Year Seven—to file suit in court challenging the IRS decision and demanding a refund.⁴⁵³ All of these steps could make the beginning of the lawsuit later than six years from the promulgation of the regulation.

But these lengthy limitations periods do not really control the timing of a refund action. Instead, the taxpayer is in the driver's seat. The taxpayer does not have to wait until the limitations periods expire before taking action.⁴⁵⁴ For instance, the taxpayer can file an amended return immediately after the initial return—there is no rule requiring the taxpayer to wait until the expiration of the three-year period following the initial return.⁴⁵⁵ Also, the taxpayer can challenge an IRS decision to deny a refund before the expiration of the two years allowed for that challenge.⁴⁵⁶ Because the taxpayer can control not only the initiation of a refund action, but also the pace of a refund action, it generally would be possible for a taxpayer to engineer a refund action that brings an administrative procedure claim to court before the expiration of the six-year limitations period of 28 U.S.C. § 2401(a).

It is true that a taxpayer seeking to engineer an administrative procedure claim through a refund action might bear other burdens—such as paying taxes in advance and exposing their return to audit-like review.⁴⁵⁷ But it is not clear that these burdens are systematically heavier than the burdens a non-tax regulated party would have to bear in order to bring a facial administrative procedure challenge to a regulation. Whenever a regulated party brings an administrative procedure challenge (for instance, to a non-tax regulation) the regulated party must bear the costs of litigation and the risk that the litigation will increase the agency's awareness of the regulated party in a way that could increase the chance of enforcement action.

⁴⁵³ *Id.* (mandating suits be brought not “after the expiration of 2 years from . . . a notice of the disallowance”).

⁴⁵⁴ *Id.* § 6511(b)(1) (noting the filing period as not *after* the expiration of the period of limitation prescribed at I.R.C. § 6511(a)).

⁴⁵⁵ *Id.* § 6511(a) (requiring a claim for refund be filed *within* three years from the time the original return was filed or two years from the time the tax was paid).

⁴⁵⁶ *Id.* § 6532(a)(1) (noting suits must be brought not *after* the two-year period).

⁴⁵⁷ *See* Hickman, *supra* note 91, at 1181, 1184–85, 1187–88 (describing limitations on enforcement-based judicial review, including the possibility that it will generate “the equivalent of an audit” or will be complicated by the fact that one person (such as a third-party reporter) may be subject to a tax regulation that also burdens another person (such as the subject of the reporting)).

V. Appropriate Adjustments

A. *A Non-jurisdictional Limitations Period*

Tax provides a good test case for the application of the 28 U.S.C. § 2401(a) statute of limitations. It presents several recurring fact patterns where a plaintiff might argue that adjustments to the six-year limitations period are appropriate because strict application of the period would produce an inappropriate or inequitable result. For instance, in tax, pre-litigation tax procedure can delay litigation.⁴⁵⁸ In addition, taxpayers and other plaintiffs might have been unaware of the possibility of bringing an administrative procedure claim when tax regulations were promulgated in the 1980s or 1990s, before cases like *Mayo* in 2011 and *CIC Services* in 2021 made clear that such a claim could be available.⁴⁵⁹ Also, because of enforcement discretion and limited resources, the IRS initiates deficiency actions in a very low proportion of cases, which further decreases the chance that an administrative procedure claim will get to court.⁴⁶⁰ A taxpayer who wants to raise an administrative procedure claim may have to take the initiative and engineer a refund action in order to litigate the claim.

These features of pre-litigation delay, intervening case law, and nonenforcement are apparent in tax, but they are not unique to tax. They raise the general question of appropriate adjustments. What methods exist to adjust the statute of limitations and make exceptions to its strict application? If appropriate adjustments and exceptions are available, this provides some assurance that the background rule of accruing the six-year limitations period when a regulation is promulgated for administrative procedure claims makes sense.

Exceptions and adjustments to a limitations period that arise from the application of equity by a court, or from government waiver in

⁴⁵⁸ See 5 U.S.C. § 704 (limiting judicial review to final agency action, which necessarily takes place after the completion of pre-litigation processes such as return filing, IRS examination, and IRS appeals).

⁴⁵⁹ See *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 52 (2011) (deferring to a regulation's interpretation of a statute and confirming that general administrative law principles apply in tax); see also *CIC Servs., LLC v. IRS*, 141 S. Ct. 1582, 1588 (2021) (allowing pre-enforcement challenge to a tax shelter notice that authorized penalties).

⁴⁶⁰ Compare *Income Tax Return, e-File Statistics*, E-FILE.COM (Sept. 8, 2023, 3:49 PM), <https://perma.cc/Y87G-MHD4> (showing 154,444,000 returns filed in 2017), with IRS, NATIONAL TAXPAYER ADVOCATE ANNUAL REPORT TO CONGRESS 202 (2018) (showing 2,719,177 deficiency notices sent the same tax year, representing approximately 1.8% of all returns filed).

litigation, are available if the limitations period is non-judicial.⁴⁶¹ If a limitations period is non-judicial, the government may waive it.⁴⁶² Also, if a limitations period is non-judicial, it is generally subject to judicial exceptions such as equitable tolling and equitable estoppel.⁴⁶³

Courts should hold that 28 U.S.C. § 2401(a) is not judicial and is thus subject to administrative and equitable adjustment. The Court of Appeals for the D.C. Circuit and some other courts of appeals have already done so.⁴⁶⁴ This is the better reading of applicable current case law. Mixed case law in the Fifth Circuit is the main exception to the developing consensus that § 2401(a) is non-judicial.⁴⁶⁵ Under earlier Supreme Court precedent, lower federal courts held that 28 U.S.C. § 2401(a) was judicial.⁴⁶⁶ But under current Supreme Court case law, statutory limitations periods are presumed non-judicial absent a clear statement of jurisdiction, which 28 U.S.C. § 2401(a) lacks.⁴⁶⁷

The judicial question for 28 U.S.C. § 2401(a) should follow the analysis in *United States v. Kwai Fun Wong*,⁴⁶⁸ a Supreme Court case which concluded that an analogous limitations period under the Federal Tort

⁴⁶¹ See *Boechler v. Comm'r*, 596 U.S. 199, 203 (2022) (“Jurisdictional requirements cannot be waived or forfeited, must be raised by courts *sua sponte*, and . . . do not allow for equitable exceptions.”); see also Steve R. Johnson, *Congressional Primacy, Equitable Tolling, and Tax Court Deficiency Litigation*, 76 TAX LAW. 451, 454, 459 (2023) (analyzing the *Boechler* case in the context of federal income tax procedure).

⁴⁶² See *Boechler*, 596 U.S. at 202 (distinguishing between judicial and non-judicial limitations periods).

⁴⁶³ See *Irwin v. Dep’t of Veterans Affs.*, 498 U.S. 89, 91, 95–96 (1990) (allowing consideration of equitable tolling of thirty-day period to challenge an EEOC decision).

⁴⁶⁴ See *Jackson v. Modly*, 949 F.3d 763, 765–66 (D.C. Cir. 2020) (“We . . . recognize that our long-standing interpretation of . . . 28 U.S.C. § 2401(a) as judicial is no longer correct.”); see also, e.g., *Desuze v. Ammon*, 990 F.3d 264, 269–71 (2d Cir. 2021) (holding the 28 U.S.C. § 2401(a) limitations period is not judicial); *Chance v. Zinke*, 898 F.3d 1025, 1033 (10th Cir. 2018) (same); *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 822 (6th Cir. 2015) (same).

⁴⁶⁵ Compare *Texas v. Rettig*, 987 F.3d 518, 529 (5th Cir. 2021) (concluding that 28 U.S.C. § 2401(a) is a term of consent to suit under sovereign immunity doctrine and that the court “lack[s] jurisdiction” to hear plaintiff’s APA claims), *cert. denied*, 142 S. Ct. 1308 (2022) and *Gen. Land Off. v. U.S. Dep’t of Interior*, 947 F.3d 309, 318 (5th Cir. 2020) (holding timing requirement as judicial), with *All. for Hippocratic Med. v. FDA*, 78 F.4th 210, 244–45 (2023) (considering equitable tolling issue without considering judicial question) and *Louisiana v. U.S. Army Corps of Eng’rs*, 834 F.3d 574, 584 (5th Cir. 2016) (holding timeliness does not raise a judicial issue).

⁴⁶⁶ See, e.g., *Spannaus v. U.S. Dep’t of Just.*, 824 F.2d 52, 55 (D.C. Cir. 1987) (treating 28 U.S.C. § 2401(a) as a “judicial condition attached to the government’s waiver of sovereign immunity”), *overruled by* *Jackson v. Modly* 949 F.3d 763, 776 (2020) (citing *United States v. Kwai Fun Wong*, 575 U.S. 402 (2015)).

⁴⁶⁷ See *United States v. Kwai Fun Wong*, 575 U.S. 402, 412 (2015) (holding 28 U.S.C. § 2401(b) not judicial).

⁴⁶⁸ 575 U.S. 402 (2015).

Claims Act, found at 28 U.S.C. § 2401(b), was not jurisdictional.⁴⁶⁹ In *Kwai Fun Wong*, the Court developed and applied its requirement of a “clear statement” of jurisdiction and found none⁴⁷⁰ in 28 U.S.C. § 2401(b), which reads that a claim “shall be forever barred unless it is presented . . . within two years after such claim accrues.”⁴⁷¹ The Court concluded that this is “mandatory” and “emphatic” language, but not jurisdictional language.⁴⁷² The Court explained that only a “rare statute of limitations . . . can deprive a court of jurisdiction” and dismissed § 2401(b) as “mundane statute-of-limitations language” that simply stated a time bar and did not provide a jurisdictional statement about a court’s power to hear a claim.⁴⁷³ The same analysis should apply to 28 U.S.C. § 2401(a), with its similar language that a claim “shall be barred unless the complaint is filed within six years after the right of action first accrues.”⁴⁷⁴

In *Kwai Fun Wong*, the Court also noted that a different statutory provision, separate from 28 U.S.C. § 2401(b), grants federal courts jurisdiction over tort claims involving the federal government.⁴⁷⁵ A similar parallel statutory scheme separate from 28 U.S.C. § 2401(a) confers jurisdictional power on the federal courts, such as in cases of federal tax claims or contract claims involving the federal government.⁴⁷⁶ In 2022, a unanimous Supreme Court held in *Boechler v. Commissioner*,⁴⁷⁷ a tax case, that a limitations period can be non-jurisdictional even if a single provision both includes the word “jurisdictional” and establishes a limitations period.⁴⁷⁸ Thus the separateness of a jurisdiction-conferring provision and a limitations-period provision is not necessary for a non-jurisdictional result, but the separateness helps to confirm the result in the case of 28 U.S.C. § 2401(a).

⁴⁶⁹ *Id.* at 405.

⁴⁷⁰ *Id.* at 412.

⁴⁷¹ 28 U.S.C. § 2401(b).

⁴⁷² *Kwai Fun Wong*, 575 U.S. at 411.

⁴⁷³ *Id.* at 410.

⁴⁷⁴ 28 U.S.C. § 2401(a).

⁴⁷⁵ *See Kwai Fun Wong*, 575 U.S. at 411–12 (citing 28 U.S.C. § 1346(b)(1)).

⁴⁷⁶ 28 U.S.C. § 1346(a)(1) (conferring jurisdiction for the recovery of illegally assessed taxes); *id.* § 1346(a)(2) (conferring jurisdiction for contract claims).

⁴⁷⁷ 596 U.S. 199 (2022).

⁴⁷⁸ *See Boechler*, 596 U.S. at 208–11 (concluding that I.R.C. § 6330 is not jurisdictional). The *Boechler* Court distinguished I.R.C. § 6511, which provides a deadline for taxpayers to file refund claims and lists six specific exceptions. *See id.* *Compare* *United States v. Brockamp*, 519 U.S. 347, 354 (1997) (holding equitable tolling not applicable to I.R.C. § 6511), *with* *Arellano v. McDonough*, 598 U.S. 1, 4, 8–9 (2023) (following *Brockamp* and holding 38 U.S.C. § 5110(a)(1), a one-year grace period for the filing of veteran disability benefits, not subject to equitable tolling).

Since 28 U.S.C. § 2401(a) is non-jurisdictional, it is subject to equitable exceptions that a court can use to modify it in specific cases.⁴⁷⁹ Also, it is subject to the possibility of waiver—so the IRS and the Department of Justice can use waiver policy to modify the time bar by choosing whether to raise the time bar as a defense when they litigate cases.⁴⁸⁰

The legislature, in addition to the judicial and administrative branches, could also modify the time bar, since it is statutory.⁴⁸¹ For example, Congress could enact a limitations period that would specify in so many words that the six-year period for administrative procedure claims begins to run at the time of regulation promulgation or other final agency action.⁴⁸² The possibility of Congressional modification is set aside for purposes of this Article in order to focus on evaluating the limitations period under current law. The point here is that courts can appropriately balance accuracy and repose based on the existing statutory limitations period. Legislative action remains an option, but courts need not wait for Congress to act.

B. *Equitable Tolling and Equitable Estoppel*

Given the non-jurisdictional nature of 28 U.S.C. § 2401(a), a court could adjust the six-year limitations period in a specific case using at least two doctrines: equitable estoppel and equitable tolling.⁴⁸³ These might help to produce a better result when pre-litigation procedure delays a claim, or when a plaintiff becomes aware of a claim thanks to intervening

⁴⁷⁹ See *Boechler*, 596 U.S. at 208–09 (holding that equitable tolling is available where statutory limitations period is non-jurisdictional).

⁴⁸⁰ Generally, a limitations period defense must be included in the answer to a complaint to avoid waiver. See FED. R. CIV. P. 8(b)(6).

⁴⁸¹ Cf. McMahon, *supra* note 49, at 1392–98 (proposing amendment to the Anti-Injunction Act to allow a ninety-day window for administrative procedure challenges to tax regulations). One precedent is the 1959 enactment of the sixty-day period for challenging final Federal Trade Commission orders. See Thomas E. Kauper, *Cease and Desist: The History, Effect, and Scope of Clayton Act Orders of the Federal Trade Commission*, 66 MICH. L. REV. 1095, 1099–100 (1968) (describing statute and context for enactment). Thanks to John Golden for this example.

⁴⁸² Another tax scholar has endorsed this approach in a contemporaneous paper. See Ellen P. Aprill, *Section 501(c)(3) Purpose Meets Administrative Law* 1–3, 56 (Loyola L. Sch., L.A. Legal Studs. Research Paper No. 2023-18, 2023), <https://perma.cc/E88T-HYR5> (recommending Congressional action in order to protect “longstanding” administrative interpretations such as Revenue Rulings expanding the meaning of “charitable” in the tax-exempt organization context).

⁴⁸³ Ripeness could also be explored, although typically APA claims are said to be ripe for review even if substantive claims are not. See, e.g., *Cohen v. United States*, 650 F.3d 717, 735–36 (D.C. Cir. 2011) (holding that an APA challenge to IRS Notice relating to process for refund of telephone excise tax ripe for review although taxpayers did not bring substantive claim). But see *id.* at 744–45 (Kavanaugh, J., dissenting) (arguing that claim is not ripe separate from enforcement in that case).

case law, or when nonenforcement makes it difficult or impossible for a claim to surface.

Consider for instance a situation where a claim is delayed because of pre-litigation tax procedure outside the taxpayer's control. Even if a taxpayer pursues a refund claim (rather than waiting for the government to initiate a deficiency action), pre-litigation tax procedure can delay a claim. For instance, in a refund action, a taxpayer must file a tax return, as well as an amended tax return claiming a refund.⁴⁸⁴ Then, the taxpayer must wait six months for the IRS to respond (unless the government responds earlier) before proceeding in district court or in another federal trial court (other than the Tax Court).⁴⁸⁵ Even if the taxpayer proceeds as rapidly as possible, there is still at least one six-month waiting period that is outside the taxpayer's control.

Consider next the question of intervening case law. Equitable tolling typically gives weight to the question of whether a plaintiff has diligently pursued a claim.⁴⁸⁶ Sometimes a plaintiff does not know about a claim, as may have been the case before the *CIC Services* case made clear the availability of some pre-enforcement or facial challenges in tax.⁴⁸⁷ Will equitable tolling afford a remedy in such a case?

Consider finally that nonenforcement could delay a claim for a reason outside the taxpayer's control. In the extreme, a prospective regulatory effective date could delay a taxpayer's ability to bring a claim.⁴⁸⁸ Statutory tax provisions sometimes have dates delayed for years, and the enforcement of a regulation interpreting such a statute could also be delayed.⁴⁸⁹ Could equitable estoppel or equitable tolling provide an adjustment to the limitations period for administrative procedure claims in such a case? What if, for instance, a regulation had an effective date delayed by seven years—meaning that no collection or assessment issue could possibly arise within six years of promulgation?

The case law under 28 U.S.C. § 2401(a) shows that equitable estoppel and tolling are unusual remedies. As an example of an exceptional case, the Court of Appeals for the D.C. Circuit equitably tolled the limitations periods with respect to claims arising from 1940s internment of Japanese-Americans because of the government's concealment of internment camp

⁴⁸⁴ Treas. Reg. § 301.6402-2(a)(1).

⁴⁸⁵ I.R.C. § 6532(a)(1).

⁴⁸⁶ See *Cedars-Sinai Med. Ctr. v. Shalala*, 117 F.3d 1126, 1130 (9th Cir. 1999) (emphasizing question of the plaintiff's negligence or diligence for equitable tolling defense).

⁴⁸⁷ *CIC Servs., LLC, v. IRS*, 141 S. Ct. 1582, 1591–92, 1594 (2021).

⁴⁸⁸ See, e.g., Press Release, IRS, IRS Announces Delay for Implementation of \$600 Reporting Threshold for Third-Party Payment Platforms' Forms 1099-K (Jan. 3, 2023), <https://perma.cc/DC8D-E6BM>.

⁴⁸⁹ See, e.g., *id.*

information from the judicial system.⁴⁹⁰ But in a more typical case, *Cedars-Sinai*, the Court of Appeals for the Ninth Circuit rejected both equitable tolling and equitable estoppel claims.⁴⁹¹ *Cedars-Sinai* involved the claim that HHS did not enforce a reimbursement rule in a 1986 HHS Medicare manual until 1994.⁴⁹² The fact of nonenforcement, without more, was not enough to justify an equitable estoppel or equitable tolling result.

These results suggest that equitable tolling and equitable estoppel are unusual remedies. Yet there are important, and equitably relevant, differences in tax. The *Cedars-Sinai* court, which rejected equitable remedies after nonenforcement of the HHS Medicare manual, observed that plaintiff hospitals could have raised facial challenges earlier, before HHS applied the changed rule in the Medicare manual to them.⁴⁹³ But in tax, the Anti-Injunction Act often requires taxpayers to wait for collection or assessment before they can sue.⁴⁹⁴ As a result, administrative procedure plaintiffs in tax may be more vulnerable to the possibility of delay because of pre-litigation procedure or nonenforcement. Also in tax, case law developments, including at the Supreme Court, have changed plaintiffs' appraisal of whether and how to bring administrative procedure claims.⁴⁹⁵ A court might be more sympathetic to claims of equitable estoppel or equitable tolling in a context like tax if the court were persuaded that a plaintiff had less control over the timing of litigation.

The question of how these equitable doctrines should apply in tax is a question courts should answer.⁴⁹⁶ Their judicial expertise is well-situated to develop equitable case-by-case decisions on the question of when to adjust a limitations period. Thus, the right framework is for the government to raise the six-year limitations period, for courts to continue to hold that the period accrues as a general matter when an agency promulgates a regulation or issues a rule, and for courts to judge plaintiffs' counterarguments that equitable adjustments should be made in specific cases. When courts do this, they can draw guidance from a significant body of law on equitable estoppel and equitable tolling.

Equitable estoppel is the more challenging claim. A plaintiff can only rarely estop the government on the basis of an administrative action. In a

⁴⁹⁰ See *Hohri v. United States*, 782 F.2d 227, 233, 235, 246 (D.C. Cir. 1986) (applying equitable tolling to 28 U.S.C. § 2401(a)).

⁴⁹¹ See *Cedars-Sinai Med. Ctr. v. Shalala*, 177 F.3d 1126, 1130 (9th Cir. 1999) (rejecting equitable tolling and equitable estoppel claims).

⁴⁹² *Id.* at 1128–29.

⁴⁹³ *Id.* at 1129–30.

⁴⁹⁴ I.R.C. § 7421(a)–(b).

⁴⁹⁵ See, e.g., *CIC Servs., LLC v. IRS*, 141 S. Ct. 1582, 1586, 1588–92, 1594 (2021).

⁴⁹⁶ *Cf. Boechler v. Comm'r*, 596 U.S. 199, 208–09 (2022) (confirming availability of equitable tolling in Tax Court as in other federal courts).

leading case, *Federal Crop Insurance Corp. v. Merrill*,⁴⁹⁷ a federal agent represented to a farmer that a wheat crop was insurable even though federal regulations made the crop uninsurable.⁴⁹⁸ After the farmer lost his crop to drought, the federal insurer refused to satisfy the resulting insurance claim.⁴⁹⁹ The Supreme Court agreed that equitable estoppel did not apply and could not require the FCIC to make payments on the insurance claim; its concern related to separation of powers.⁵⁰⁰ A 1990 Supreme Court case produced a similar result in *Office of Personnel Management v. Richmond*.⁵⁰¹ There, the Court of Appeals for the Federal Circuit had held that the equitable estoppel required the government to make payments to a former Navy employee who was repeatedly given incorrect information about the maximum amount he could earn without losing his disability annuity.⁵⁰² But the Supreme Court reversed and explained that it would be an unconstitutional violation of the Appropriations Clause for a court to require the government to pay an amount not authorized by statute.⁵⁰³

Despite these cases, there may be a path forward for equitable estoppel of a government assertion of the six-year statute of limitations in an appropriate administrative procedure case. The result produced by equitable estoppel in such a case arguably would not be an unconstitutional violation of separation of powers. Rather the result would be that 28 U.S.C. § 2401(a) did not apply in a particular case. Since the government already has discretion to waive the limitations period,⁵⁰⁴ requiring this result might not produce the separation of powers concerns that may be present in other cases.⁵⁰⁵

The application of equitable estoppel, including against the government, generally requires a showing of misconduct, reasonable

⁴⁹⁷ 332 U.S. 280 (1947).

⁴⁹⁸ *Id.* at 381–82.

⁴⁹⁹ *Id.* at 382.

⁵⁰⁰ *See id.* at 384–85 (concluding that “the Wheat Crop Insurance Regulations were binding”).

⁵⁰¹ 496 U.S. 414 (1990).

⁵⁰² *Id.* at 415–17.

⁵⁰³ *See id.* at 419–24 (rejecting equitable estoppel claim but leaving open the possibility in theory).

⁵⁰⁴ *See supra* Section V.A (explaining why 28 U.S.C. § 2401(a) is not jurisdictional).

⁵⁰⁵ *See* David K. Thompson, *Equitable Estoppel of the Government*, 79 COLUM. L. REV. 551, 560–62 (1979) (explaining that equitable estoppel relating to authorized government conduct should face a much lower bar than that relating to unauthorized government conduct because the former does not raise separation of powers or other Constitutional concerns); *see also* Emily Cauble, *Detrimental Reliance on IRS Guidance*, 2015 WISC. L. REV. 421, 432–37 (explaining the requirements of misrepresentation and reasonable reliance in government estoppel cases including tax cases).

reliance, and resulting grave prejudice.⁵⁰⁶ The Court of Appeals for the Second Circuit has applied equitable estoppel against the government where a government agency failed to follow its own regulations relating to notifying an applicant regarding an immigration status decision.⁵⁰⁷ The Court of Appeals for the Third Circuit has applied equitable estoppel against the government in a case where IRS employees led a taxpayer to believe that the IRS had not received the taxpayer's initial consent form, extending the statute of limitations indefinitely.⁵⁰⁸ If the government misled a taxpayer, for instance, by claiming that the statute of limitations had run when it had not, equitable estoppel could be a colorable claim.

Equitable tolling is a more straightforward claim for adjustment of the six-year limitations period under 28 U.S.C. § 2401(a). The idea of tolling is precisely the idea of suspending a limitations period for equitable reasons.⁵⁰⁹ The Supreme Court has said that equitable tolling can apply against the government in a similar—but no more favorable—way compared to the application of the doctrine as between private citizens.⁵¹⁰ The Court has explained the doctrine as follows: “[w]e have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.”⁵¹¹ A key question is whether the claimant has “exercise[d] due diligence in preserving his legal rights.”⁵¹²

Since the refund litigation route is a well-known way to bring a tax claim to court, it should be reasonable for a court to require the pursuit of refund litigation as part of “due diligence,” at least in many cases. Since the question is the application of equitable relief, other factors, such as the resources of the taxpayer or other plaintiff, could be relevant in determining what is required for “due diligence” in a particular case. But in at least some cases, it seems likely that a court would require a plaintiff

⁵⁰⁶ See, e.g., Fatma E. Marouf, *Invoking Federal Common Law Defenses in Immigration Cases*, 66 UCLA L. REV. 142, 173–74 (2019) (identifying misconduct, reliance, and detriment elements and reviewing the application of equitable estoppel in immigration cases).

⁵⁰⁷ See *Schwebel v. Crandall*, 967 F.3d 96, 104–06 (2d Cir. 2020) (applying equitable estoppel test in immigration context and holding that equitable estoppel applied in the given case).

⁵⁰⁸ See *Fredericks v. Comm’r*, 126 F.3d 433, 437–39 (3d Cir. 1997) (applying test and considering the public interest both for and against estoppel).

⁵⁰⁹ See *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451–52 (7th Cir. 1990) (explaining that equitable estoppel and equitable tolling are “grafted on to federal statutes of limitation”).

⁵¹⁰ *Irwin v. Dep’t of Veterans Affs.*, 498 U.S. 89, 95–96 (1990).

⁵¹¹ *Id.* at 96 (citations omitted).

⁵¹² *Id.* (citing *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984)).

to pursue refund litigation in order to preserve its right to bring an administrative procedure challenge to a tax regulation.

Even within refund litigation, however, the plaintiff does not fully control the time when it can file a claim in court. For instance, after a taxpayer files an amended return claiming a refund,⁵¹³ the IRS has six months to respond before the taxpayer can file a claim in court.⁵¹⁴ If the taxpayer files the amended return toward the end of the six-year limitations period, but cannot file a claim in court within the six-year period because the taxpayer is waiting for the IRS to respond, then equitable tolling might provide an appropriate adjustment.

A somewhat similar situation was presented in the 2002 Supreme Court case *Young v. United States*,⁵¹⁵ with the difference that the government, not the taxpayer, successfully pursued an equitable tolling claim.⁵¹⁶ In *Young*, a taxpayer who filed bankruptcy under Chapter 7 claimed that a tax debt was dischargeable because more than three years had passed since the tax return was due.⁵¹⁷ But during some of that three-year period, the IRS had been precluded from enforcing the tax debt as a result of an earlier Chapter 13 bankruptcy petition.⁵¹⁸ The Court held that the Chapter 7 three-year lookback period that would otherwise have discharged the debt was tolled while the Chapter 13 petition prevented the IRS from collecting.⁵¹⁹ Likewise, if a taxpayer is precluded from bringing to court a refund case (and related administrative procedure claim) because the law requires the taxpayer to wait for the IRS to respond to a refund request, a court might make an equitable tolling adjustment. The *Young* case supports tolling the statute for the six months during which a taxpayer cannot file a court complaint in a refund case⁵²⁰ because the statute requires the taxpayer to wait for the IRS to respond.⁵²¹

Intervening case law might also encourage a plaintiff to argue that the limitations period should be equitably tolled.⁵²² It is not unheard of for a

⁵¹³ I.R.C. § 6511(a).

⁵¹⁴ I.R.C. § 6532(a)(1).

⁵¹⁵ 535 U.S. 43 (2002).

⁵¹⁶ *Id.* at 47, 54.

⁵¹⁷ *Id.* at 44–45.

⁵¹⁸ *Id.* at 45–46.

⁵¹⁹ *See id.* at 50–51 (noting that “[t]he Youngs’ Chapter 13 petition erected an automatic stay . . . which prevented the IRS from taking steps to protect its claim”).

⁵²⁰ *Id.* at 49–51.

⁵²¹ I.R.C. § 6532(a)(1).

⁵²² For example, the *Govig* case arguably presents this issue. *See Govig & Assocs., Inc. v. United States*, No. CV-22-00579, 2023 WL 2614910, at *2–3 (D. Ariz. Mar. 23, 2023); *see supra* notes 103–110 and accompanying text (explaining that prior to *CIC Services*, the *Govig* district court dismissed *Govig*’s claim on the basis that the Anti-Injunction Act barred it). However, since all of the *Govig* facts

court to equitably toll a limitations period because of a “lack of clarity” and subsequent change in the law.⁵²³ However, if a plaintiff claims that a Supreme Court case like *CIC Services* should toll the limitations period, they would have to contend with the law that provides that Supreme Court case law has retroactive effect.⁵²⁴ A court would likely decide that lack of knowledge of the availability of an APA claim prior to a case like *CIC Services* is not grounds for granting equitable tolling.⁵²⁵

Under the Supreme Court’s modern approach to retroactivity, Supreme Court cases “must be given full retroactive effect . . . as to all events, regardless of whether such events predate or postdate our announcement of that rule.”⁵²⁶ This suggests that the law must operate as if *CIC Services* was in effect in all relevant prior years.⁵²⁷ Under this analysis, *CIC Services* would not provide a reason to restart the limitations period.

In addition, the *CIC Services* case was consistent with case law allowing regulatory mandates such as reporting to face challenge without the strictures of the Anti-Injunction Act.⁵²⁸ Earlier case law on retroactivity examined the degree of departure from prior precedent. But *CIC Services* does not seem to be a departure that would justify restarting the limitations period.⁵²⁹

occurred after six years had expired from the time that the 2007 Notice was issued, tolling the period for the time during which Govig could not pursue the suit because of the district court holding would not revive the claim.

⁵²³ See, e.g., *Capital Tracing, Inc. v. United States*, 63 F.3d 859, 862–63 (9th Cir. 1995) (equitably tolling a limitations period for taxpayer to challenge a government levy because of “[t]he lack of clarity in our circuit’s law on the district court’s jurisdiction to determine ownership of bail funds and the absence of demonstrated prejudice to the government”).

⁵²⁴ See *infra* note 526 and accompanying text (discussing case law that concludes that Supreme Court decisions generally do not restart the 28 U.S.C. § 2401(a) limitations period).

⁵²⁵ Cf. *DeSuze v. Ammon*, 990 F.3d 264, 271 (2d Cir. 2021) (denying equitable tolling for APA claims where plaintiffs “litigated for years before discovering the exact regulatory process responsible for their rent increases”).

⁵²⁶ *Harper v. Va. Dep’t. of Tax’n*, 509 U.S. 86, 86, 90 (1993) (citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991)).

⁵²⁷ See *id.* at 89–90.

⁵²⁸ See *CIC Servs., LLC v. IRS*, 141 S. Ct. 1582, 1592 (2021) (“CIC’s suit targets the upstream reporting mandate, not the downstream tax.”).

⁵²⁹ Compare *Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 595–96 (9th Cir. 1990) (rejecting tolling argument based on a 1983 Ninth Circuit case that clarified the availability of a contract claim with respect to a 1972 settlement agreement involving millions of acres) and *Gen. Elec. Co. v. United States*, 792 F.2d 107, 109–10 (8th Cir. 1986) (holding that Supreme Court’s decision that a contribution might be available under the Federal Tort Claims Act did not toll limitations period) (“[I]n this case we are not presented with a situation where a totally new rule of law was announced.”) with *Cap. Tracing, Inc. v. United States*, 63 F.3d 859, 862–63 (9th Cir. 1995) (equitably tolling a limitations period for taxpayer to challenge a government levy because of “[t]he lack of clarity in our

Nonenforcement could also help a plaintiff make a colorable claim for equitable tolling. This was the plaintiff's approach in *Cedars-Sinai*, based on the fact that HHS did not enforce the manual at issue until years after the agency wrote and published it.⁵³⁰ Although the *Cedars-Sinai* plaintiff did not succeed, the court noted that the plaintiff hospital could have made a facial challenge to the manual at any time, even before HHS began to enforce the manual.⁵³¹ On the *Cedars-Sinai* facts, in other words, a facial challenge would have been allowed.⁵³² A challenge to a tax regulation that the government refuses to enforce might be different because of the inability to file most administrative procedure challenges in tax before assessment, due to the Anti-Injunction Act.⁵³³ For example, equitable tolling would be an appropriate remedy if the government promulgates a regulation with an effective date seven years into the future to avoid an administrative procedure challenge.⁵³⁴

C. Government Restraint

In addition to the adjustments of equitable tolling and equitable estoppel, which a court would provide, the government could fashion administrative exceptions to the six-year limitations period through its internal policy simply by waiving the time bar in appropriate cases.⁵³⁵ As with the analysis of equitable estoppel and equitable tolling, nonenforcement, pre-litigation delay, and intervening case law might each be circumstances which the government might consider for its waiver policy. These are considered below.

The government might adopt a limitations period waiver policy that related to the question of nonenforcement. Such a policy could consider

circuit's law on the district court's jurisdiction to determine ownership of bail funds and the absence of demonstrated prejudice to the government"). See also *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1355, 1358 (5th Cir. 1972) (limitations period restarted for criminal cases following case concluding that privilege against self-incrimination was a defense to property seizure for nonpayment of federal excise taxes on gambling). But see *United States v. Sams*, 521 F.2d 421, 429-30 (3d Cir. 1975) (concluding that the claim was barred because accrual began no later than a certain decision, but declining to decide whether that decision restarted limitations period, on facts similar to those in *One 1981 Red Chevrolet Impala*).

⁵³⁰ See *Cedars-Sinai Med. Ctr. v. Shalala*, 177 F.3d 1126, 1129 (9th Cir. 1999).

⁵³¹ *Id.* at 1130.

⁵³² *Id.* at 1128-30.

⁵³³ I.R.C. § 7422(a).

⁵³⁴ *Cf. Glarner v. U.S. Dep't of Veterans Admin.*, 30 F.3d 697, 699 (6th Cir. 1994) (tolling limitations period for the filing of a claim under the Federal Tort Claims Act after a Disabled American Veterans office failed to inform plaintiff that a separate tort claim could be made and failed to provide the appropriate form).

⁵³⁵ See *supra* note 479.

the record of the IRS with respect to enforcement or nonenforcement of a particular regulation. The regulation at issue in *Hewitt* and *Oakbrook* may raise this issue of nonenforcement.⁵³⁶ A 2008 private letter ruling suggests in passing that the perhaps the government did not consistently enforce the proportionate-share conservation easement regulation at issue in the cases from the moment of that regulation's 1986 promulgation.⁵³⁷ Perhaps the government will consider this question of nonenforcement when deciding whether to raise the limitations period defense in conservation easement cases involving the same regulation as in *Hewitt* and *Oakbrook*. The government's decision about whether to waive a limitations period defense due to nonenforcement might also consider the strength of the plaintiff's ability to claim a judicial exception if the litigation proceeded, including an exception grounded in equitable estoppel or equitable tolling.

The government's policy of restraint could consider appropriate responses in cases that involve pre-litigation delay. With respect to pre-litigation delay, one possible policy might waive the limitations period with respect to an administrative procedure case involving a *tax return*, rather than a *court complaint*, filed within six years of the promulgation of a regulation. Under such a policy, a tax return filed within the six-year period could support an administrative procedure claim even if the first related Tax Court petition or other initial pleading was filed outside the six-year period.

Under this government restraint proposal—to waive the 28 U.S.C. § 2401(a) defense for administrative procedure claims relating to tax returns filed within six years of a final agency rulemaking action—many of the recent tax administrative procedure cases would still have been barred by the six-year limitations period. *Hewitt* and *Oakbrook* involved an administrative procedure claim that related to a 1986 regulation and tax returns filed in 2013 and 2009, respectively.⁵³⁸ *Govig* involved a 2007 Notice and a tax return filed in 2017.⁵³⁹ *Mann Construction* involved a Notice issued in 2007 and a tax return filed in 2014.⁵⁴⁰

The *Altera* case in the Court of Appeals for the Ninth Circuit provides an example of a case in which the government restraint policy outlined

⁵³⁶ See *Hewitt v. Comm'r*, 21 F.4th 1336, 1338–39 (2021); *Oakbrook Land Holdings v. Comm'r*, 28 F.4th 700, 705 (6th Cir. 2022).

⁵³⁷ See *supra* note 94 (discussing 2008 private letter ruling description of a conservation easement that appears not to meet the requirements of the regulation at issue in *Hewitt* and *Oakbrook*).

⁵³⁸ See *Hewitt*, 21 F.4th at 1338, 1340–41; *Oakbrook*, 28 F.4th at 705, 707–08.

⁵³⁹ See *Govig & Assocs., Inc. v. United States*, No. CV-22-00579, 2023 WL 2614910, at *2 (D. Ariz. Mar. 23, 2023).

⁵⁴⁰ *Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1142 (6th Cir. 2022).

here would have prompted the government to waive its limitations period defense.⁵⁴¹ *Altera* involved a regulation promulgated in 2003, the tax years 2004–2007, and a Tax Court petition filed in 2012.⁵⁴²

A government restraint policy could also address situations of intervening case law. The *Govig* case provides a good example. In *Govig*, the government decided to raise—rather than waive—the six-year limitations period.⁵⁴³ Govig first established its welfare benefit plan in 2015—eight years after the government issued and began to enforce Notice 2007-83, which explained that such plans were abusive or “listed” transactions.⁵⁴⁴ But the *Govig* taxpayer might argue that the government should refrain from raising the six-year limitations period because of intervening case law, particularly the 2021 *CIC Services* case. *Govig* involves a pre-enforcement challenge to a tax shelter Notice⁵⁴⁵ and is similar to the pre-enforcement challenge that the Supreme Court allowed to proceed in the *CIC Services* case.⁵⁴⁶

The government could implement an internal policy of limitations period waiver for, say, six years after a relevant watershed Supreme Court decision. But note that with respect to *Govig*, even if it did adopt such a policy of restraint and waiver, it is not clear that the right watershed case would be the 2021 *CIC Services* case rather than the 2011 *Mayo* case. In addition, the government’s decision to raise the limitations periods defense in *Govig* draws support from case law, described above,⁵⁴⁷ which holds that intervening case law rarely will restart a limitations period defense.

⁵⁴¹ See *Altera Corp. v. Comm’r*, 926 F.3d 1061, 1067, 1072–74 (9th Cir. 2019) (stating that the case involved a 2003 regulation, tax returns filed in 2004–2007, and timely notices of deficiency and Tax Court filings).

⁵⁴² *Id.*

⁵⁴³ *Govig*, 2023 WL 2614910, at *14–15.

⁵⁴⁴ See *id.* at *1–2. Notice 2007-83 was enforced from issuance. For instance, a 2007 Revenue Ruling endorsed and cited Notice 2007-83 and emphasized its listed transaction penalties. See Treatment of Funded Welfare Benefit Plans, Rev. Rul. 2007-65, 2007-45 I.R.B. 949–52 (limiting deduction for contributions to certain welfare benefit plans and noting that similar plans might be subject to reporting as reportable transactions). The government also used the theory of Notice 2007-83 to challenge pre-2007 welfare benefit plans on the grounds they created improper tax deductions. See, e.g., Complaint for Permanent Injunction and Other Relief at 11–12, 25, *United States v. Sunderlage*, No. 11-cv-04713 (N.D. Ill. July 13, 2011) (challenging “abusive” welfare benefit plan for years ending in 2006 and citing Notice 2007-83).

⁵⁴⁵ See *Govig*, 2023 WL 2614910, at *2.

⁵⁴⁶ See *CIC Servs., LLC v. IRS*, 141 S. Ct. 1582, 1591–92 (2021).

⁵⁴⁷ See *supra* text accompanying notes 522–527.

Conclusion

The puzzle presented by administrative procedure challenges to old regs amounts to a classic tension in law: the tradeoff between accuracy and repose. The puzzle is solved by the default six-year limitations period of 28 U.S.C. § 2401(a). Applicable case law correctly holds, although without carefully explaining its reasoning, that this period begins to run when a regulation is promulgated for administrative procedure claims. Tax provides a good test case, meaning a difficult test case, for exploring this issue. It systematically raises issues of pre-litigation delay, intervening case law, and nonenforcement that raise the question of whether exceptions to the six-year limitations period should be made.

The right solution in tax and in other areas of law is that the six-year limitations period should begin to run for administrative procedure claims when a regulation is promulgated. When considered in isolation, the statutory text that refers to the time when the claim “first accrues” might be read to suggest instead that accrual should occur later and begin separately for each specific plaintiff’s claim. But when considered together with the APA, 28 U.S.C. § 2401(a) reveals that accrual at promulgation is the better textual analysis.

As a policy matter, accrual at promulgation is better than accruing the limitations period separately for separate plaintiffs, which would hold the period open indefinitely and would ignore the value of repose. Accrual at promulgation is consistent with the fact that all of the elements of the administrative procedure claim exist, are discoverable, and are common to all potential plaintiffs at the time of the alleged administrative procedure error. Appropriate adjustments in specific cases can be achieved through the judicial doctrines of equitable tolling and equitable estoppel and through an administrative policy of government waiver and restraint.