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Restoring the Lost Anti-Injunction Act

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RESTORING THE LOST ANTI-INJUNCTION ACT

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Should Treasury regulations and IRS guidance documents be eligible for pre-enforcement judicial review? The D.C. Circuit's 2015 decision in Florida Bankers Ass'n v. U.S. Department of the Treasury *puts its interpretation of the Anti-Injunction Act at odds with both general administrative law norms in favor of pre-enforcement review of final agency action and also the Supreme Court's interpretation of the nearly identical Tax Injunction Act. A 2017 federal district court decision in* Chamber of Commerce v. IRS, *appealable to the Fifth Circuit, interprets the Anti-Injunction Act differently and could lead to a circuit split regarding pre-enforcement judicial review of Treasury regulations and IRS guidance documents. Other cases interpreting the Anti-Injunction Act more generally are fragmented and inconsistent. In an effort to gain greater understanding of the Anti-Injunction Act and its role in tax administration, this Article looks back to the Anti-Injunction Act's origin in 1867 as part of Civil War–era revenue legislation and the evolution of both tax administrative practices and Anti-Injunction Act jurisprudence since that time.*

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INTRODUCTION

TIMING matters. In *Abbott Laboratories v. Gardner*, the Supreme Court recognized in the Administrative Procedure Act ("APA") a presumption in favor of judicial review of final agency actions.[1] Consistent with that presumption, the *Abbott Labs* Court adopted a general policy of reviewing final agency action, including but not necessarily limited to legally binding agency regulations, on a pre-enforcement basis.[2] This presumption spares regulated parties the Hobson's choice of "comply[ing] with . . . requirement[s] and incur[ring] the costs of changing" business practices or "follow[ing] their present course and risk[ing] prosecution."[3] Courts and

[1] 387 U.S. 136, 140 (1967).

[2] Id. at 139–41; see Ronald M. Levin, Understanding Unreviewability in Administrative Law, 74 Minn. L. Rev. 689, 702 (1990) (observing that *Abbott Labs* "establish[es] a presumption in favor of judicial review").

[3] *Abbott Labs*., 387 U.S. at 152.

commentators alike defend pre-enforcement review as essential to public confidence in the quality and legitimacy of agency action.[4]

In *Mayo Foundation for Medical Education & Research v. United States*, the Supreme Court proclaimed that it was "not inclined to carve out an approach to administrative review good for tax law only."[5] But the *Abbott Labs* presumption of reviewability for final agency action is rebuttable; Congress can and often does create exceptions.[6] In *Florida Bankers Ass'n v. U.S. Department of the Treasury*, a divided panel of the U.S. Court of Appeals for the D.C. Circuit interpreted a provision of the Internal Revenue Code ("IRC") known as the Anti-Injunction Act ("AIA")[7] as precluding pre-enforcement judicial review of one set of Treasury regulations, with reasoning that would extend to most if not all Treasury regulations and IRS guidance documents.[8] The *Florida Bankers* decision thus sends judicial review of Treasury Department ("Treasury") regulations and Internal Revenue Service ("IRS") guidance documents interpreting the IRC down a different path than the rest of administrative law.

The D.C. Circuit's decision in *Florida Bankers* not only places AIA interpretation at odds with *Abbott Labs* and the general administrative law norm in favor of pre-enforcement judicial review of final agency action. *Florida Bankers* also arguably contradicts the Supreme Court's reading in *Direct Marketing Ass'n v. Brohl*[9] of the similarly worded Tax Injunction Act ("TIA") concerning judicial review of state tax matters.[10] A more recent federal district court decision in *Chamber of Commerce v. IRS* cites *Direct Marketing* in concluding that the AIA does not bar pre-

[4] See, e.g., Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 670–72 (1986) (discussing the importance of judicial review to the legitimacy of administrative action); Levin, supra note 2, at 742 (acknowledging standard justifications for pre-enforcement review); Keith Werhan, The Neoclassical Revival in Administrative Law, 44 Admin. L. Rev. 567, 597 (1992) ("The proposition that judicial review will generally be available to secure the legitimacy of agency action is a central component of the traditional model of administrative law.").

[5] 562 U.S. 44, 55 (2011).

[6] See, e.g., *Mich. Acad. of Family Physicians*, 476 U.S. at 672–73 ("Subject to constitutional constraints, Congress can, of course, make exceptions to the historic practice whereby courts review agency action.").

[7] I.R.C. § 7421(a) (2012).

[8] 799 F.3d 1065, 1067 (D.C. Cir. 2015).

[9] 135 S. Ct. 1124 (2015).

[10] 28 U.S.C. § 1341 (2012).

enforcement judicial review of Treasury regulations and sets up the possibility of a circuit split.[11] Meanwhile, the dueling *Florida Bankers* majority and dissenting opinions and *Chamber of Commerce* decision together underscore the courts' ad hoc and inconsistent efforts to interpret and apply the AIA in cases challenging Treasury and IRS actions. To be blunt, the courts lack an overarching theory of the AIA's meaning and scope against which to evaluate individual tax cases, and the result is jurisprudential chaos.

Developing a coherent understanding of the AIA's meaning and scope is important, especially regarding pre-enforcement judicial review of APA challenges against Treasury regulations and IRS guidance documents. Treasury and the IRS have not been faithful adherents to the requirements of the APA.[12] In the aftermath of *Mayo Foundation*, APA-based court challenges to Treasury regulations and IRS guidance documents are on the rise.[13] As was the case for the regulations at issue in *Florida Bankers*, many of those complaints do not fall neatly into traditional, post-enforcement avenues for judicial review of tax cases—leaving many regulations and guidance documents effectively unreviewable.[14] Even where judicial review through traditional avenues is potentially available, however, the resulting delay significantly limits the courts' ability to provide a meaningful remedy.[15]

Recent judicial treatments of both the AIA and the TIA have focused almost exclusively on shallow parsings of isolated phrases of current

[11] Chamber of Commerce v. IRS, No. 1:16-CV-944-LY, 2017 WL 4682049 (W.D. Tex. Sept. 29, 2017).

[12] See, e.g., 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 (2007); Patrick J. Smith, The APA's Arbitrary and Capricious Standard and IRS Regulations, 136 Tax Notes 271, 274–75 (2012).

[13] See Kristin E. Hickman, Administrative Law's Growing Influence on U.S. Tax Administration, 3 J. Tax Admin. 82 (2017) (surveying strands of post–*Mayo Foundation* jurisprudence).

[14] See Kristin E. Hickman, Administering the Tax System We Have, 63 Duke L.J. 1717, 1746–53 (2014) [hereinafter Hickman, Tax System We Have] (documenting that a substantial percentage of Treasury regulations address social welfare and regulatory issues unlikely to be reflected in the sort of tax filings that traditionally lead to judicial review); 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, 1181–200 (2008) [hereinafter Hickman, A Problem of Remedy] (discussing traditional avenues for pursuing and barriers to judicial review of Treasury regulations).

[15] Hickman, A Problem of Remedy, supra note 14, at 1181–200.

statutory text and cherry-picked support from the Supreme Court's haphazard AIA jurisprudence, with only superficial attention paid to the AIA's long history, its interactive relationship with the IRC's other administrative provisions, or its role in the larger context of tax administration.[16] In particular, contemporary debates regarding the AIA's meaning fail to recognize that the AIA is not a modern congressional enactment but rather dates back to the Civil War era—long before the adoption of the modern income tax or the APA, and even before the emergence of the modern regulatory state.[17] Understanding the AIA requires appreciating not only how it relates to contemporary IRC provisions and tax administration practices, but also how those provisions and practices have evolved since the AIA was adopted in 1867. A comprehensive analysis of the AIA in context over time reveals a substantially narrower limitation on judicial review than at least the *Florida Bankers* court was willing to accept.

Our goal with this Article is not wholly descriptive. As history demonstrates, the AIA plays a critical role in efficient administration of the tax laws. We also believe, however, that the tax system is best served by hewing more closely to general administrative law norms. Correspondingly, we perceive judicial review as an important check against agency arbitrariness and contend that sheltering Treasury regulations and IRS guidance documents from judicial scrutiny simply encourages the IRS in its casual disregard for those general administrative law norms. The IRS's noncompliance with the law undermines public perceptions of the tax system and tax administration as fair and legitimate, which in turn discourages compliance with the tax laws and diminishes the fisc. At a minimum, a better understanding of the AIA is needed to ascertain whether the remedy to the question of pre-enforcement review must be legislative or could be judicial.

To that end, Part I of this Article elaborates the jurisprudential muddle surrounding the interpretation of the AIA and the increasing significance of the conflict in light of the D.C. Circuit's *Florida Bankers* decision. To provide context for better understanding the AIA, Part II turns to the provision's history as it relates to tax administration more generally, from its Civil War–era origins to the present. Part III draws upon that

[16] See infra Section I.A.

[17] Revenue Act of 1867, ch. 169, § 10, 14 Stat. 471, 475 (codified as amended at I.R.C. § 7421 (2012)).

history to offer a more comprehensive theory for when courts should read the AIA as limiting judicial review and, perhaps more importantly, when they should not. Given the AIA's history, however, legislation to clarify the AIA's scope may be warranted and is proposed.

I. A JURISPRUDENTIAL MESS, AND WHY IT MATTERS

The AIA mandates that, except as otherwise provided by the IRC, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."[18] The AIA itself lists several exceptions including, for example, for deficiency actions, where the IRS seeks to enforce the tax laws by issuing a notice of deficiency that the taxpayer can then challenge in the U.S. Tax Court ("Tax Court");[19] for premature IRS adjustments of partnership return items;[20] and for certain cases concerning IRS efforts to impose a levy on the taxpayer's property, where the IRC imposes additional procedures and limitations that the IRS must satisfy.[21] I.R.C. § 7422 contains another exception for refund actions, where the taxpayer pays the disputed taxes and sues the IRS for a refund.[22] I.R.C. § 7428 provides yet another exception for controversies concerning IRS exempt status determinations (or failure to make certain exempt status determinations).[23]

Parsing the AIA's core text carefully, four words are key: restraining, assessment, collection, and tax. The last three of these terms—

[18] I.R.C. § 7421(a).

[19] Id. (cross-referencing §§ 6015(e), 6212(a) and (c), and 6213(a), all of which are among the provisions concerning the issuance of deficiency notices and Tax Court review thereof); see also Gerald A. Kafka & Rita A. Cavanagh, Litigation of Federal Civil Tax Controversies ¶ 1.01 (2d ed. 1997) (recognizing deficiency actions as one of two principal types of tax litigation, refund actions being the other).

[20] I.R.C. § 7421(a) (cross-referencing §§ 6225(b) and 6246(b)). The Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584, amended the partnership audit and assessment provisions and replaced these cross-references with a single cross-reference to § 6232(c), effective January 1, 2018. Nevertheless, the substance of this exception from the AIA appears unchanged by the amendment.

[21] I.R.C. § 7421(a) (cross-referencing §§ 6330(e)(1), 6331(i), 6672(c), 7426(a) and (b)(1), and 7429(b), all of which concern levy actions).

[22] Id. § 7422(a); see also Kafka & Cavanagh, supra note 19, at ¶ 1.01 (recognizing refund actions as one of two principal types of tax litigation, deficiency actions being the other).

[23] Id. § 7428(a). The Declaratory Judgment Act recognizes this same exception. See 28 U.S.C. § 2201 (2012).

assessment, collection, and tax—are easy enough to understand. Restraining is much less so.

Assessment and collection are statutorily defined processes performed by IRS personnel in accordance with extensive procedures contained within the IRC. Chapter 63 of the IRC is entitled "Assessment." It describes an assessment as "made by recording the liability of the taxpayer in the office of the [Treasury] Secretary in accordance with rules or regulations prescribed by the Secretary"[24] and contains several detailed provisions governing the assessment function.[25] Correspondingly, Chapter 64 of the IRC, entitled "Collection," authorizes the IRS to "collect the taxes imposed by the internal revenue laws"[26] and includes several provisions governing the collection function.[27]

In theory, not every remittance to the IRS contemplated by the IRC neatly fits the most obvious conception of what constitutes a tax. The Supreme Court has said that penalties are not taxes, for example.[28] Yet the courts have generally defined a tax for AIA purposes quite broadly, at times so much so as to include remittances with characteristics that arguably resemble penalties and interest.[29]

Courts have struggled a bit more to settle the meaning of restraining. Does restraining the assessment and collection of taxes mean to stop them outright only when they are temporally imminent? Or does restraining extend to any action that merely makes those functions more challenging to accomplish at some future time?[30] Is there some

[24] I.R.C. § 6203. In this, the IRS serves as the Treasury Secretary's delegee.

[25] Id. §§ 6201–6255.

[26] Id. § 6301. Again, in this, the IRS serves as the Treasury Secretary's delegee.

[27] Id. §§ 6301–6344.

[28] See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 543–46 (2012) (concluding that shared responsibility payments to be collected by the IRS are not taxes for AIA purposes because the IRC labels them penalties); Lipke v. Lederer, 259 U.S. 557, 561–62 (1922) (holding the AIA inapplicable because the assessment at issue was in the nature of a penalty); see also infra Section II.D (elaborating these cases as regards this issue).

[29] See infra Section II.D (discussing the distinction between penalties and taxes at greater length).

[30] See, e.g., California v. Regan, 641 F.2d 721, 722 (9th Cir. 1981) (finding that a challenge to information reports about pension funds falls under the AIA because such reports would aid the IRS in determining tax liability in the future).

principled midpoint between those two interpretations?[31] Many Supreme Court and federal circuit court cases grapple with these interpretive questions, even if their reasoning is not always framed in such explicitly textual terms as defining restraining. How courts answer these questions, however, determines whether the AIA precludes judicial review of virtually all tax cases except those expressly authorized by the IRC itself or, alternatively, whether the AIA only covers a subset of tax cases which the various exceptions then limit further.

Courts applying the AIA have not resolved these questions consistently. The fragmented and inconsistent character of AIA jurisprudence, while sometimes frustrating, has not been hugely problematic until recently. The sweeping reasoning of the D.C. Circuit's opinion in *Florida Bankers Ass'n v. U.S. Department of the Treasury* puts AIA interpretation directly in conflict with *Abbott Laboratories v. Gardner* and *Direct Marketing Ass'n v. Brohl*. Further, *Florida Bankers* would shield many Treasury regulations and IRS guidance documents from judicial review altogether.

In short, cases interpreting the AIA have created a convoluted mess. Meanwhile, tax administrative practices and changes in how Congress utilizes the tax system have elevated the impact of how courts interpret the AIA. This Part lays out the troubled state of AIA jurisprudence and then explains why clarifying the AIA's scope is important.

A. Exploring the Doctrinal Tensions

Understanding the AIA's jurisprudential morass requires appreciating three separate strands of case law relevant to AIA interpretation. The first, obviously, consists of cases interpreting and applying the AIA itself. But the AIA does not exist in a vacuum. One must also appreciate the larger administrative law context of which judicial review of tax cases is a part. Additionally, because the courts have linked the AIA and the TIA so closely, cases concerning the TIA are relevant to thinking about the AIA as well.

[31] Compare Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1133 (2015), with Fla. Bankers Ass'n v. U.S. Dep't of the Treasury, 799 F.3d 1065, 1069–70 (D.C. Cir. 2015).

1. Confused Anti-Injunction Act Jurisprudence

AIA cases from the past several decades reflect an interesting combination of mostly questionable and even frivolous legal claims resolved with little legal analysis, punctuated by the occasional truly unusual dispute. Most of the more substantial opinions analyzing the AIA fall within the latter group. Yet because the circumstances of those cases are so unique and readily distinguishable from one another, the inconsistencies in the courts' reasoning from one to the next have been relatively benign up to now.

Most AIA cases involve a rather typical, if colorful, assortment of tax scofflaws. Tax protesters—often filing pro se and forever tilting at windmills[32]—bring frivolous suits to avoid wage withholding and government tax collection efforts based on claims long rejected by the IRS and the courts. They claim, for example, that wages are not income[33] or that the litigants are exempt from federal taxation because they are sovereign citizens of a particular state rather than citizens of the United States.[34] Another subset of typical litigants asserts obscure technicalities to avoid IRS collection of taxes clearly owed.[35] In one such case, for example, after a taxpayer sent the IRS a check for $179,501, but an IRS recording error caused the bank to pay only $179.50, the taxpayer sought to enjoin collection of the remaining taxes

[32] See Marjorie E. Kornhauser, Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America, 50 Buff. L. Rev. 819, 919–22 (2002) (documenting increased tax protester activity and tax protester motivations and claims).

[33] See, e.g., Taliaferro v. United States, 677 F. App'x 536 (11th Cir. 2017) (per curiam); Capps v. Eggers, 782 F.2d 1341 (5th Cir. 1986); Hansen v. United States, 744 F.2d 658 (8th Cir. 1984).

[34] See, e.g., Lewis v. BNSF Ry. Co., 671 F. App'x 386, 386 (7th Cir. 2016) (challenging wage withholding and a levy for back taxes based on the taxpayer's self-identification as an "indigenous inhabitant traveler" and "One of We the People"); Stites v. U.S. Gov't, 746 F.2d 1085, 1085–86 (5th Cir. 1984) (per curiam) (claiming exemption from taxation as "free, soverign [sic], and natural citizen(s)"); Betz v. United States, 40 Fed. Cl. 286, 294–95 (1998) (claiming citizenship of Washington State rather than the United States).

[35] See, e.g., Weiler v. United States, No. 94-56465, 1996 WL 169254, at *4 (9th Cir. Apr. 10, 1996) (unpublished table decision) (finding record "replete with evidence" that the IRS's assessments were valid and declining to consider taxpayers' suit to quiet title against tax liens); Nuttle v. IRS, No. 95-2089, 1995 WL 643106, at *2 (10th Cir. Nov. 2, 1995) (unpublished table decision) (declining to enjoin collection of taxes recognized as due by the Tax Court so that the taxpayer could avoid posting an appeal bond); Knight v. United States, No. 93-35039, 1993 WL 140589, at *2 (9th Cir. May 4, 1993) (unpublished table decision) (refusing to enjoin collection for lack of a deficiency notice where the Internal Revenue Code did not require notice).

owed based on the IRS's "gross negligence."[36] In another case, the taxpayer voluntarily entered into a settlement agreement with the IRS, but when the IRS began collections under that agreement, the taxpayer sought an injunction on the ground that the IRS also should have sent him a formal notice of deficiency.[37] In still another case, taxpayers who did not prepare or file tax returns claimed deficiency notices issued to them by the IRS were invalid because the IRS had not first prepared tax returns on their behalf.[38]

A second, overlapping subset of AIA cases concerns taxpayers claiming the courts should overlook the AIA in their particular circumstances. In 1962, the Supreme Court attempted something of a reset of its AIA jurisprudence in *Enochs v. Williams Packing & Navigation Co*.[39] The case concerned an effort to avoid the collection of past-due payroll taxes which the taxpayer contended had been assessed contrary to the law and would, if collected, throw it into bankruptcy.[40] Somewhat ironically, the IRS had been willing to go along with a preliminary injunction restraining collection but objected to permanent injunctive relief.[41] The court below had applied then-existing Court precedent regarding the AIA's scope to conclude that the AIA did not apply. While not precisely disavowing its earlier decisions, the Supreme Court reinterpreted the AIA quite broadly, holding that a taxpayer might avoid the AIA only if "under no circumstances could the Government ultimately prevail" and if "the taxpayer would suffer irreparable injury if collection were effected."[42] In the case at bar, notwithstanding that collection would bankrupt the taxpayer, the government's liability assessment was not obviously meritless, so the Court found jurisdiction barred.

In the more than fifty years since deciding *Williams Packing*, the Supreme Court has yet to find a case that satisfies its two-part test. Claims of justiciability under *Williams Packing* have been only

[36] Zarra v. United States, 254 F. App'x 931, 933 (3d Cir. 2007).

[37] Flynn v. United States, 786 F.2d 586 (3d Cir. 1986).

[38] Roat v. Comm'r, 847 F.2d 1379 (9th Cir. 1988).

[39] 370 U.S. 1 (1962); see also Bob Jones Univ. v. Simon, 416 U.S. 725, 742 (1974) (characterizing *Williams Packing* thusly).

[40] *Williams Packing*, 370 U.S. at 4–5.

[41] Id. at 2.

[42] Id. at 7.

marginally more successful in the lower courts.[43] Many litigants assert the egregiousness of the IRS's actions in their particular cases. But, of course, the IRS's litigating positions typically are at least colorable. Correspondingly, many litigants claim the hardships they will face if forced to pay their taxes are especially unique and distinguishable from those of other taxpayers against whom the courts have invoked the AIA. Again, such is rarely the case.

In short, as has been true for at least the past several decades, most of the cases in which a contemporary court considers whether the AIA poses an obstacle to judicial review are easy ones. They arise in the context of IRS enforcement efforts, as the IRS is auditing or making inquiries about a particular taxpayer's facts and circumstances or trying to collect taxes already assessed. The taxpayers in these cases simply cannot demonstrate that the IRS's actions are so questionable or that their circumstances are so unique to fall under the *Williams Packing* exception. More often than not, even without the AIA, these taxpayers would lose on the merits anyway. Unsurprisingly, courts with crowded dockets have seized upon the AIA as a convenient and straightforward rationale for disposing of such suits. The analysis of the AIA offered in these cases, however, is often minimal. Unpublished opinions are common.

By comparison with the lower courts, for at least the fifty-five years since *Williams Packing*, the Supreme Court's own AIA jurisprudence is notable for two reasons. First, and perhaps not surprisingly given the Court's limited docket, the cases in which the Court has considered the AIA's meaning and scope are all highly unique. Second, the Court's analysis in these cases is highly variable. It is often said that hard cases make bad law. The Court's AIA decisions over the past half century fit that maxim.

[43] Although not precisely systematic, a review of roughly 100 federal circuit court decisions applying the *Williams Packing* exception found only three in which the reviewing court claimed jurisdiction to consider the merits. See Estate of Michael v. Lullo, 173 F.3d 503, 505, 512–13 (4th Cir. 1999) (finding jurisdiction notwithstanding the APA where the IRS illegally denied credit to compensate for its own calculation error discovered after the limitations period for adjusting the assessment had expired); Lampert v. United States, No. 87-2421, 1989 WL 104459, at *1–3 (9th Cir. Aug. 31, 1989) (finding jurisdiction where assessed penalty was both very large and obviously miscalculated); Ponchik v. Comm'r, 854 F.2d 1127, 1130–32 (8th Cir. 1988) (allowing case to proceed where IRS audit file clearly showed IRS error in the case of a federal prisoner trying to support a minor child).

Some of the Court's AIA cases in recent decades show the Court adopting an extremely broad interpretation of the AIA as precluding judicial review of virtually any case having to do with the federal tax laws. In *Bob Jones University v. Simon*, for example, the Court concluded that the AIA precluded judicial review of an IRS decision to revoke a university's tax-exempt status due to its racially discriminatory admissions practices.[44] In a companion case decided the same day, *Alexander v. "Americans United" Inc.*, the Court reached the same conclusion regarding an IRS decision to revoke a nonprofit organization's tax-exempt status due to its engaging in prohibited lobbying activities.[45] Revoking an organization's exempt status will eventually increase tax collections, as the organization will henceforth be required to pay income taxes and contributors to that organization will not be able to deduct their contributions. But the act of revoking an organization's exempt status is not, in and of itself, a determination of taxes due.

In *Bob Jones*, the Court recognized that its past AIA jurisprudence had been mixed—interpreting the AIA broadly as a limit to judicial review but subject to frequent judicial exceptions.[46] The Court then characterized its opinion in *Williams Packing*, with its limited two-part test for avoiding the AIA, as "spell[ing] an end to a cyclical pattern of [judicial] allegiance to the plain meaning of the [AIA], followed by periods of uncertainty caused by a judicial departure from that meaning, and followed in turn by the Court's rediscovery of the [AIA's] purpose."[47] In both *Bob Jones* and *Americans United*, in addressing the litigants' claims that suits over their exempt status did not directly and immediately restrain the assessment or collection of taxes, the Court said it was enough that the revocations would in the future deny tax deductions to the organizations' donors.[48] In other words, because future donors to the organizations would not be able to claim related tax deductions and would thus pay more taxes themselves, the

[44] 416 U.S. 725 (1974).

[45] 416 U.S. 752 (1974).

[46] 416 U.S. at 742–45.

[47] Id. at 742.

[48] Id. at 740; *Ams. United*, 416 U.S. at 760–61.

organizations' suits to overturn the revocation of their exempt status in turn restrained the collection of taxes and were barred by the AIA.[49]

Shortly after the Court decided *Bob Jones* and *Americans United*, Congress amended the AIA and the Declaratory Judgment Act to allow judicial review of exempt status determinations and revocations, signaling its view that the Court resolved those cases incorrectly.[50] Nevertheless, the Court continued to advance the reasoning of those cases in other AIA decisions. In *United States v. American Friends Service Committee*, the Court issued a per curiam opinion citing the AIA and *Bob Jones* as barring a suit by anti-war protesters who claimed that requiring their employers to withhold taxes from their wages violated their First Amendment right to free exercise of religion.[51] More than thirty years later, in *United States v. Clintwood Elkhorn Mining Co.*, the Court cited *Americans United* in holding that the AIA barred judicial consideration of a taxpayer's Tucker Act claim to a refund of taxes.[52] Seemingly satisfying the requirements for invoking the *Williams Packing* exception, the IRS in *Clintwood Elkhorn Mining* admitted to collecting the taxes unconstitutionally.[53] The taxpayer fell outside the IRC's deadline to file for a refund, and the Tucker Act offered a longer limitations period.[54] The Court nevertheless invoked the AIA and dismissed the lawsuit rather than evaluate the taxpayer's Tucker Act claim.[55]

Despite its cautionary rhetoric in *Bob Jones*, the Court has created additional judicial exceptions from the AIA anyway—several times. One example comes from a pair of cases in 1976 concerning jeopardy assessments.[56] In *Laing v. United States*, the Court considered the case

[49] *Ams. United*, 416 U.S. at 760–61 ("The obvious purpose of respondent's action was to restore advance assurance that donations to it would qualify as charitable deductions . . . that would reduce the level of taxes of its donors.").

[50] See Tax Reform Act of 1976, Pub. L. No. 94-455, § 1306, 90 Stat. 1520, 1717 (adopting I.R.C. § 7428(a) and corresponding cross-references in the AIA and the Declaratory Judgment Act, 28 U.S.C. § 2201 (2012)).

[51] 419 U.S. 7, 11–12 (1974) (per curiam).

[52] 553 U.S. 1, 9–10 (2008).

[53] Id. at 5–6.

[54] Id. at 6.

[55] Id. at 10.

[56] See I.R.C. § 6861(a) (2012) (authorizing immediate assessment and collection of a deficiency if the IRS believes such "will be jeopardized by delay"); see also Laing v. United

of a New Zealand citizen who was caught by customs officials taking more than $300,000 in U.S. currency out of the country.[57] The IRS interpreted the IRC as allowing it to assess a tax deficiency and seize the funds without first issuing a deficiency notice.[58] The Court disagreed and also held that the IRS's noncompliance with its own procedures exempted the case from the AIA.[59] Shortly thereafter, in *Commissioner v. Shapiro*, the Court considered a case in which the IRS assessed a deficiency and seized assets belonging to a taxpayer who three days later was extradited to Israel on criminal charges, thereby subjecting the taxpayer to incarceration by taking the funds he otherwise would have used to make bail.[60] The Court had said in *Americans United* that the AIA precluded judicial review even of constitutional issues.[61] Nevertheless, the *Shapiro* Court said that the Due Process Clause required the IRS to establish a factual basis (beyond a "mere good-faith allegation") for its assertions of taxes owed and held correspondingly that the AIA did not apply to cut off the taxpayer's suit.[62]

A few years after *Laing* and *Shapiro*, in *South Carolina v. Regan*, the Court created another exception from the AIA.[63] That case involved a suit by South Carolina over amendments to the tax laws limiting the statutory exemption from gross income for interest received on certain state bond issuances.[64] The State argued both that the amendments were unconstitutional and that complying with them would adversely impact its ability to price and sell its bonds.[65] Again, the *Americans United* Court had said that constitutional claims were not exempt from the AIA, and the Court in that case also had considered the inadequacy of a refund suit as a remedy more or less irrelevant for AIA purposes.[66] Nevertheless, in *South Carolina v. Regan*, the Court placed great

States, 423 U.S. 161, 169–73 (1976) (documenting some of the history of jeopardy assessments).

[57] 423 U.S. at 164–65.

[58] Id. at 165.

[59] Id. at 183–84.

[60] 424 U.S. 614, 619–20 (1976).

[61] 416 U.S. at 759.

[62] 424 U.S. at 628–30.

[63] 465 U.S. 367 (1984).

[64] Id. at 370–71.

[65] Id. at 370–72.

[66] 416 U.S. at 759, 762.

emphasis on the State's inability to comply with the law and sue for a refund, holding that the AIA does not preclude pre-enforcement judicial review where no other legal remedy is available—reasoning the Court more or less had rejected in *Bob Jones*.[67]

Most recently, in *National Federation of Independent Business (NFIB) v*. *Sebelius*, the Court held that the AIA did not prevent it from considering the constitutionality of the Affordable Care Act's "shared responsibility payment," which is assessed and collected by the IRS like a tax but labeled statutorily as a penalty.[68] The circuits had divided over this question. The Sixth and D.C. Circuits reached conclusions similar to that of the Court—that the shared responsibility payments were not taxes and thus not within the AIA's scope.[69] By contrast, citing past Court precedent interpreting the AIA, the Fourth Circuit reasoned that any "exaction for the support of the government" qualifies as a tax, even if it "raises 'obviously negligible' revenue and furthers a revenue purpose 'secondary' to the primary goal of regulation," so the AIA precluded judicial review of the shared responsibility payment's constitutionality.[70] In agreeing with the Sixth and D.C. Circuits regarding the applicability of the AIA to the shared responsibility payment, however, the Court neither distinguished the circumstances at bar from those of previous AIA cases treating penalties as taxes nor invoked one of its established exceptions. Instead, the Court completely ignored its existing AIA precedents and focused exclusively on the text of various provisions of the IRC.[71]

From this survey of the Supreme Court's AIA jurisprudence, it seems clear that the Court lacks any overarching theory regarding the AIA's meaning and scope, with the result that its decisions over the past fifty years seem very result oriented. And, given the Court's fragmented and inconsistent guidance, it is perhaps not too surprising that federal circuit

[67] *South Carolina v*. *Regan*, 465 U.S. at 373, 378, 380–81.

[68] 567 U.S. 519, 543–46 (2012); see also I.R.C. § 5000A(b), (g) (imposing the penalty, though describing those against whom the penalty is assessed as "taxpayer[s]" and calling for the penalty to be "assessed and collected in the same manner as" penalties that are administered like taxes).

[69] Seven-Sky v. Holder, 661 F.3d 1, 10 (D.C. Cir. 2011); Thomas More Law Ctr. v. Obama, 651 F.3d 529, 540 (6th Cir. 2011).

[70] Liberty Univ. v. Geithner, 671 F.3d 391, 401–02 (4th Cir. 2011) (quoting United States v. Butler, 297 U.S. 1, 61 (1936), and United States v. Sanchez, 340 U.S. 42, 44 (1950)).

[71] *NFIB*, 567 U.S. at 543–46.

court opinions are muddled as well regarding the reviewability of pre-enforcement claims that Treasury regulations and IRS guidance documents are invalid under the APA.

Before the Supreme Court's embrace of general administrative law applicability in the tax context in the *Mayo Foundation for Medical Education & Research v. United States* decision, jurisprudence on that question was limited. In 1981, in *California v. Regan*, the Ninth Circuit considered a challenge to a regulation interpreting the Employee Retirement Income Security Act ("ERISA") as requiring the State of California to file annual information returns concerning its employees' pension plan.[72] Observing that such reports would provide the IRS with data that, in turn, would enable the IRS to evaluate the eligibility of plan beneficiaries for favorable tax treatment and, thus, would "have an impact on the assessment of federal taxes," the court concluded that the AIA precluded judicial review of the regulation.[73]

Several years later, in *Foodservice & Lodging Institute v. Regan* in 1987, the D.C. Circuit concluded that the AIA permitted judicial review of one regulation but precluded consideration of three others governing how restaurant employers allocate and report tip income among employees.[74] The reviewable regulation concerned a statutory requirement that employers report the aggregate amounts of their gross receipts, receipts paid by credit card, and tips listed on the credit card slips.[75] According to the court, "On its face, the regulation does not relate to the assessment or collection of taxes, but to IRS efforts to determine the extent of tip compliance in the food and beverage industry."[76] Consequently, notwithstanding that the purpose of collecting such information was to facilitate IRS efforts to assess and collect taxes on tip income, the court said that the AIA did not preclude pre-enforcement review of that regulation.[77] Of the three unreviewable regulations, the first addressed which employees' tips should be allocated; the second defined "employee" for determining when an establishment employed "more than ten employees" and, thus, was

[72] 641 F.2d 721, 722 (9th Cir. 1981).

[73] Id. at 722–23.

[74] 809 F.2d 842, 843–44, 846 (D.C. Cir. 1987) (per curiam).

[75] Id. at 845–46.

[76] Id. at 846.

[77] Id.

subject to the statutory and regulatory requirements regarding tip allocation and reporting; and the third regulation prioritized withholding of federal taxes from an employee's tips over other claims to that income.[78] Observing that those regulations "plainly *concern*[*ed*] the assessment or collection of federal taxes" of employees, the court held the AIA precluded pre-enforcement judicial review of the regulations' validity.[79]

Since the Supreme Court decided the *Mayo Foundation* case, the federal circuit courts have had several opportunities to consider the relationship between the AIA and the APA's judicial review provisions. The results, again, have been decidedly mixed.

One key case was *Cohen v. United States*, which concerned a unique mechanism created by the IRS to refund a telephone excise tax made defunct by changes in telephone technology and long-distance billing practices.[80] The excise tax had been collected from consumers by telephone companies as part of their routine billing process, then remitted by the telephone companies to the IRS.[81] After several federal circuit courts rejected the IRS's arguments for continuing to collect the tax,[82] the IRS adopted special refund procedures for the tax by issuing an informal guidance document—Notice 2006-50—without using APA notice-and-comment rulemaking procedures.[83] Taxpayers who believed that the IRS's special refund procedures were inadequate challenged Notice 2006-50, claiming that the IRS should have used notice-and-comment rulemaking to identify flaws and fashion a better special refund process.[84]

The en banc D.C. Circuit held that the *Cohen* taxpayers could bring their APA claim against Notice 2006-50. The en banc court said that, because the taxes at issue had already been paid, a challenge to the

[78] Id. at 843–44.

[79] Id. at 844 (emphasis added).

[80] 650 F.3d 717, 719–21 (D.C. Cir. 2011) (en banc).

[81] See id. at 719–20 (summarizing the history of the tax); see also I.R.C. §§ 4251–4254 (imposing the tax).

[82] See, e.g., Nat'l R.R. Passenger Corp. v. United States, 431 F.3d 374, 374, 379 (D.C. Cir. 2005); OfficeMax v. United States, 428 F.3d 583, 584–85 (6th Cir. 2005); Am. Bankers Ins. Grp. v. United States, 408 F.3d 1328, 1330, 1338 (11th Cir. 2005).

[83] See I.R.S. Notice 2006-50, 2006-1 C.B. 1141.

[84] *Cohen*, 650 F.3d at 721.

refund mechanism would not restrain assessment or collection.[85] Speaking more broadly, however, the court also reasoned that the AIA's prohibition against suits that restrain the "assessment or collection of any tax" is not "synonymous with the entire plan of taxation."[86] Instead, noted the court, "assessment" and "collection" are defined terms in the IRC: assessment represents "the trigger for levy and collection efforts," and collection is "the actual imposition of tax against a plaintiff."[87] The *Cohen* appellants' APA procedural claim did not concern the assessment or collection of taxes, the court said, because "[t]he IRS previously assessed and collected the excise tax at issue"; their suit was instead merely about the procedures by which the IRS would refund taxes that it has already collected.[88] The mere fact that the case *concerned* taxes was insufficient for the AIA to apply, and claims to the contrary "neglect[] the nuance."[89]

According to the *Cohen* court, the AIA "requires a careful inquiry into the remedy sought, the statutory basis for that remedy, and any implication the remedy may have on assessment and collection."[90] Although a dissenting opinion authored by Judge Brett Kavanaugh contended that statutory refund actions authorized by I.R.C. § 7422 offered the appellants an appropriate legal remedy,[91] the majority disagreed. Specifically, the majority observed that the taxpayers' APA challenge sought equitable relief in the form of additional administrative procedures, rather than a tax refund (even if a refund was their ultimate goal), and I.R.C. § 7422 does not offer that remedy.[92]

As already noted, the circuits divided over whether the AIA precluded judicial review of constitutional challenges to the Affordable Care Act's shared responsibility payments, culminating in the Supreme Court's decision in *NFIB*.[93] The D.C. Circuit, for one, concluded in *Seven-Sky v. Holder* that the AIA did not apply in part because the shared

[85] Id. at 725.

[86] Id. at 726–27.

[87] Id. at 726.

[88] Id. at 725–26.

[89] Id. at 726.

[90] Id. at 727.

[91] See id. at 738–41 (Kavanaugh, J., dissenting).

[92] See id. at 731–32 (majority opinion).

[93] See supra notes 68–70 and accompanying text (describing the circuit split in general terms).

responsibility payment was a penalty rather than a tax.[94] The court also separately determined that the AIA does not apply to regulatory requirements because the plaintiffs claimed an injury independent of incurring taxes and irrespective of whether an assessable penalty ever becomes assessed.[95] As in *Cohen*, however, Judge Kavanaugh dissented, claiming that the AIA denied the court jurisdiction over the case because the IRC equates penalties and taxes when speaking of assessment and collection. "In short," he said, the court "cannot avoid the [AIA] either by characterizing plaintiffs' complaint as a challenge to the mandate and not to the tax penalty, or by characterizing the Government's goal as regulating the decision to buy health insurance rather than as raising revenue."[96]

Just a few years later, in *Florida Bankers*, yet another divided D.C. Circuit panel held that the AIA blocked a lawsuit challenging third-party reporting by banks regarding interest income earned by their non-U.S. customers.[97] The interest income in question is not taxable in the United States.[98] Rather, the government wants the information covered by the regulation to trade with foreign governments in exchange for information regarding interest earned by U.S. citizens and residents abroad.[99] Nevertheless, violating the reporting requirements carries civil penalties assessed and collected like taxes under the IRC.[100] Judge Kavanaugh—this time writing for the panel's majority rather than dissenting—said that enjoining the regulation would mean that no one could be found to violate it and, therefore, the penalty for violating the regulation would never be assessed or collected.[101] Pointing to one sentence in I.R.C. § 6671 that would treat the penalty like a tax, Judge Kavanaugh held that a straightforward reading of the AIA would

[94] 661 F.3d 1, 8–10 (D.C. Cir. 2011), abrogated on other grounds by *NFIB*, 567 U.S. at 588.

[95] *Seven-Sky*, 661 F.3d at 9–10.

[96] Id. at 45 (Kavanaugh, J., dissenting as to jurisdiction).

[97] 799 F.3d at 1067.

[98] I.R.C. § 871(i)(2)(A) (2012).

[99] Guidance on Reporting Interest Paid to Nonresident Aliens, T.D. 9584, 77 Fed. Reg. 23,391 (Apr. 19, 2012), 2012-20 I.R.B. 900.

[100] I.R.C. § 6721(a); see also *Fla. Bankers*, 799 F.3d at 1067 (discussing the penalty); discussion infra Section II.D (discussing penalty types under the IRC).

[101] *Fla. Bankers*, 799 F.3d at 1068.

preclude the banks' suit.[102] He also rejected any distinction between regulatory mandates or information reporting requirements and more traditional tax obligations for AIA purposes.[103]

Judge Karen LeCraft Henderson dissented, arguing that the *Florida Bankers* majority opinion was inconsistent with both Supreme Court and other D.C. Circuit decisions, which she said exempted information reporting requirements from the AIA.[104] As Judge Henderson observed, the plaintiffs in *Florida Bankers* were not ordinary taxpayers who could simply pay their taxes and seek a refund from the IRS.[105] Unlike actual taxes, penalties imposed for failing to file information returns do not become due at the end of a taxable year and are not assessed as a matter of course.[106] Only after a person violates a regulatory requirement will assessment take place. Thus, absent pre-enforcement review, the *Florida Bankers* plaintiffs, like those in *Cohen*, have no lawful means of challenging the regulations at issue.[107]

Florida Bankers also arguably conflicts with the D.C. Circuit's decision in *Seven-Sky*. In *Seven-Sky*, religious objectors claimed the individual mandate imposed a nonmonetary injury to their religious beliefs by forcing them to buy health insurance.[108] Hence, the *Seven-Sky* court said the AIA did not apply.[109] Similarly, the banking association plaintiffs in *Florida Bankers* claimed an injury separate from any assessable penalties.[110] Specifically, the banks alleged that the reporting requirements would cause capital flight—i.e. the rapid withdrawal of funds from banks—once foreign citizens learned that the interest accrued on their U.S. bank accounts would be reported to the IRS and eventually their home countries.[111] Writing in concurrence in *Florida*

[102] Id. at 1068–70 (finding the case "at the heartland of the Anti–Injunction Act").

[103] Id. at 1070–72.

[104] Id. at 1072–73 (Henderson, J., dissenting).

[105] Id. at 1083–84.

[106] Id.

[107] Compare id. at 1083 (stating that the plaintiffs "cannot obtain judicial review of the 2012 Rule unless it refuses to submit a" tax form), with *Cohen*, 650 F.3d at 736 (holding that "[b]ecause Appellants have no other adequate remedy at law," the AIA does not apply).

[108] 661 F.3d at 8–9, abrogated on other grounds by *NFIB*, 567 U.S. at 541, 588.

[109] 661 F.3d at 10.

[110] 799 F.3d at 1078 (Henderson, J., dissenting).

[111] Id. at 1077–78.

Bankers, however, Judge Raymond Randolph maintained that Judge Henderson overread the court's holding in *Seven-Sky*.[112]

In fairness to the *Florida Bankers* majority, the circumstances of the precedents cited by Judge Henderson are distinguishable from those of *Florida Bankers*, involving different taxes, different penalties, and different types of taxpayers. The *Cohen* litigants, for example, had no possible avenue for seeking judicial review, lawful or otherwise, whereas in *Florida Bankers*, the plaintiffs could otherwise pursue judicial review by violating the regulatory requirement. The individual litigants in *Seven-Sky* were raising constitutional and religious freedom challenges, whereas the plaintiff banks in *Florida Bankers* were contesting an obscure paperwork burden. Nevertheless, *Florida Bankers* and the D.C. Circuit's other AIA precedents differ most in their very different approaches toward interpreting and applying the AIA, suggesting a more fundamental intracircuit disagreement regarding the AIA's meaning and scope that may have shifted along with personnel changes on that court.

Finally, the *Florida Bankers* court's position regarding penalties and the AIA arguably places the D.C. Circuit in conflict with the Seventh and Tenth Circuits.[113] In litigation over whether Affordable Care Act regulations requiring employers to provide contraceptive coverage violated the Religious Freedom Restoration Act, the government did not assert the AIA as a jurisdictional bar. Nevertheless, the Seventh and Tenth Circuits raised the issue sua sponte, recognizing that the regulations in question were enforceable through penalties contained in the IRC that are assessed and collected like taxes.[114] Again, the penalties at issue in these cases were different from that in *Florida Bankers*.[115] Regardless, both the Seventh and Tenth Circuits recognized the contraceptive mandate as more regulatory than revenue raising, and the

[112] Id. at 1072 (Randolph, J., concurring).

[113] See Korte v. Sebelius, 735 F.3d 654, 669 (7th Cir. 2013); Hobby Lobby Stores v. Sebelius, 723 F.3d 1114, 1126–28 (10th Cir. 2013).

[114] *Korte*, 735 F.3d at 669–70; *Hobby Lobby Stores*, 723 F.3d at 1126–27.

[115] Compare *Korte*, 735 F.3d at 669 (identifying the relevant penalty provision as in I.R.C. §§ 4980D and 4980H), with *Fla*. *Bankers*, 799 F.3d at 1068 (discussing the penalty imposed by I.R.C. § 6721(a), in a different subtitle of Title 26).

penalties as incidental.[116] Citing *Cohen*, both courts rejected the AIA's applicability in such circumstances.[117]

2. The Administrative Procedure Act's Presumption of Reviewability

The assumptions and interpretations of the APA and general administrative law doctrine are much different than those attributed to the AIA. To foster compliance with APA requirements, courts generally favor judicial review of final agency action on a pre-enforcement timetable. In *Abbott Labs*, the Supreme Court recognized that the APA "embodies [a] basic presumption of judicial review . . . so long as no statute precludes such relief or the action is not one committed by law to agency discretion."[118] Timely judicial review to ascertain the validity of agency rules and regulations ensures that aggrieved persons have a fair opportunity to make their case before they incur the costs of compliance or risk penalties for noncompliance.[119] Judicial review has been instrumental in ensuring meaningful agency compliance with statutory requirements. Pre-enforcement judicial review is thus believed to enhance public perceptions regarding the fairness and legitimacy of administrative action.

The APA rulemaking procedures mimic aspects of the legislative process[120] by requiring agencies to engage in public notice and comment and by requiring a preamble to final regulations.[121] Much like the legislative process, the APA's notice and comment requirements provide an agency with "the facts and information relevant to a particular administrative problem, as well as suggestions for alternative

[116] *Korte*, 735 F.3d at 669–70; cf. *Hobby Lobby Stores*, 723 F.3d at 1127 ("[T]he corporations' suit is not challenging the IRS's ability to collect taxes. Rather, they seek to enjoin the enforcement of one HHS regulation . . . that they claim violates their RFRA rights.").

[117] *Korte*, 735 F.3d at 670 (quoting *Cohen* for the proposition that "the [AIA] does not reach 'all disputes tangentially related to taxes'"); *Hobby Lobby Stores*, 723 F.3d at 1127 (same).

[118] 387 U.S. at 140.

[119] Id. at 152–53.

[120] See Hickman, A Problem of Remedy, supra note 14, at 1204 (suggesting that APA notice-and-comment rulemaking, enforced by judicial review, represents "a second-best proxy for the legislative process").

[121] 5 U.S.C. § 553(b)–(c) (2012).

solutions,"[122] and "reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies."[123]

Recognizing these concerns, courts have interpreted the APA as requiring a notice of proposed rulemaking issued by an agency to include sufficient information about the data upon which the agency relied in developing its proposed rules.[124] This gives the public a fair opportunity to address and potentially contradict that data.[125] If an agency changes its mind about a critical aspect of regulations it has proposed, courts have interpreted the APA as requiring the agency to issue an additional notice of proposed rulemaking and allow further opportunity to comment.[126] Without this requirement, agencies could sidestep public participation by excluding controversial provisions from an initial notice and later adding them to the final rule.[127] Lastly, courts have interpreted the APA as requiring agencies to respond to all significant comments made by the public in the preamble to the final rule.[128] All of these requirements exist to ensure that the public has a meaningful opportunity to participate in the development of binding legal rules that will govern their behavior.

Beyond procedural requirements, courts have also interpreted the APA as requiring agencies to adequately explain their regulatory choices contemporaneously with their decision making. Section 706 of the APA requires a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law."[129] In *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual*

[122] Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp., 589 F.2d 658, 662 (D.C. Cir. 1978).

[123] Batterton v. Marshall, 648 F.2d 694, 703 (D.C. Cir. 1980).

[124] See, e.g., Sprint Corp. v. FCC, 315 F.3d 369, 373 (D.C. Cir. 2003) (describing the function of the notice requirement).

[125] See, e.g., Am. Radio Relay League v. FCC, 524 F.3d 227, 236–40 (D.C. Cir. 2008).

[126] See, e.g., Shell Oil Co. v. EPA, 950 F.2d 741, 750–52 (D.C. Cir. 1991).

[127] Id. at 747 ("If the deviation from the proposal is too sharp, the affected parties will not have had adequate notice and opportunity for comment.").

[128] Cf. Rodway v. USDA, 514 F.2d 809, 817 (D.C. Cir. 1975) (stating that the agency must "respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule").

[129] 5 U.S.C. § 706(2)(A) (2012).

Automobile Insurance Co., the Supreme Court interpreted this arbitrary and capricious standard as requiring agencies to offer contemporaneous explanations in support of their actions.[130] When deciding these "hard look" cases,[131] courts examine whether an agency considered all of the relevant data, statutorily required factors, and policy alternatives and whether the agency adequately justified its choices.[132]

Finally, through judicial review, courts ensure that agencies do not exceed their statutory authority to adopt rules and regulations in the first instance.[133] Agency rules and regulations carrying the force and effect of law are eligible for the *Chevron* standard of review. If a statute is ambiguous, the administering agency has discretion in choosing between reasonable alternative interpretations. Under the familiar two-step *Chevron* framework, however, courts ask first whether the statute in question is ambiguous and thus extends such interpretive discretion to the administering agency. Where the statute confers such discretion, *Chevron*'s second step asks further whether the agency's interpretation is among the reasonable alternatives.[134] Empirical data shows that agency rules and regulations more often than not pass *Chevron* muster, but the standard nevertheless constrains agencies to that realm of reasonability.[135]

Congress subjected the Treasury Department and IRS, like other executive agencies, to the requirements of the APA.[136] Without judicial review, however, the good government principles embodied by the APA are largely left to the IRS's good intentions.

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[130] 463 U.S. 29, 43–44, 57 (1983).

[131] See, e.g., Neighborhood TV Co. v. FCC, 742 F.2d 629, 639 (D.C. Cir. 1984) (referring to the arbitrary and capricious standard as requiring the agency to take a "hard look" at the relevant issues).

[132] See *State Farm*, 463 U.S. at 43 (describing the factors that courts should look to in deciding arbitrary and capriciousness challenges).

[133] Chevron U.S.A. v. Nat. Res. Def. Council, 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

[134] Id. at 842–43 (describing the two questions a court must ask when dealing with a challenge to an agency's chosen interpretation of a statute).

[135] See Kent Barnett & Christopher J. Walker, *Chevron* in the Circuit Courts, 116 Mich. L. Rev. 1, 28–31 (2017) (finding that federal circuit courts uphold agency interpretations in seventy-one percent of cases overall and in seventy-seven percent of cases when the *Chevron* standard is applied).

[136] Cf. *Mayo Found*., 562 U.S. at 55 (rejecting "an approach to administrative review good for tax law only").

3. The Tax Injunction Act

And then we have the TIA. Passed by Congress in 1937,[137] the TIA states that "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."[138] Although the wording of the TIA is slightly different from that of the AIA, Congress used the latter as a model for the former.[139] The Supreme Court has observed that the TIA "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations."[140] The legislative history of the TIA sheds more light on Congress's intent.

As with the AIA at the federal level, Congress's main objective in passing the TIA was to protect state revenue collection.[141] Indeed, the House Report on the TIA details a specific problem that Congress intended the TIA to solve. Before the TIA came into existence, many states maintained statutes prohibiting their own courts from entertaining tax suits unless taxpayers paid their liabilities under protest and then later sought a refund.[142] These statutes did not, of course, have any effect on federal courts. Problems arose when foreign corporations—those domiciled out of state—invoked diversity jurisdiction in federal court to challenge state tax liability.[143] The House Report further notes that states were choosing to settle these tax lawsuits with corporations rather than

[137] Act of Aug. 21, 1937, ch. 726, 50 Stat. 738 (codified as amended at 28 U.S.C. § 1341 (2012)).

[138] 28 U.S.C. § 1341.

[139] Compare I.R.C. § 7421(a) (2012) (providing that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court"), with 28 U.S.C. § 1341 ("The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.").

[140] Tully v. Griffin, Inc., 429 U.S. 68, 73 (1976).

[141] See H.R. Rep. No. 75-1503, at 1–2 (1937) (describing the circumstances justifying passage of the TIA and the effects of that Act).

[142] See id. at 2 ("[F]oreign corporations . . . withhold from [states] and their governmental subdivisions, taxes in such vast amounts . . . as to seriously disrupt State and county finances.").

[143] Id. ("The existing practice of the Federal courts in entertaining tax-injunction suits against State officers makes it possible for foreign corporations . . . to withhold [taxes].").

litigating.[144] As a result, corporations were able to use litigation or the threat thereof to reduce their tax burdens, which in turn reduced state revenue collection. Congress passed the TIA to close this federal court loophole, protecting the revenue-raising ability of the states.[145]

In interpreting the TIA, the Supreme Court has taken a distinctly textual approach. Specifically, in *Direct Marketing*, the Court held that the terms contained within the TIA refer to distinct phases of the tax administration process, and the Court determined the meaning of those terms by referring to past and present provisions of the federal tax laws.[146] For instance, assessment means "the official recording of a taxpayer's liability" and "an official action taken based on information already reported to the taxing authority."[147] Collection is "the act of obtaining payment of taxes due."[148] And levy is "a specific mode of collection under which the Secretary of the Treasury distrains and seizes a recalcitrant taxpayer's property."[149] Lawsuits then fall under the TIA when a taxpayer seeks, via judicial review, to stop state officials from taking those specific and discrete administrative steps listed—assessment, collection, and levy.[150] The facts of *Direct Marketing* illustrate how this works.

At issue in *Direct Marketing* was a Colorado law requiring retailers who do not collect sales taxes to inform customers directly about their obligation to pay corresponding use taxes to the state.[151] The state of Colorado made a straightforward argument recognizable from some of

[144] Id. ("The pressing needs of these States . . . is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost . . . .").

[145] S. Rep. No. 75-1035, at 3 (1937) (stating that the TIA was needed because of "the compelling needs of many States for a more prompt disposition of tax controversies of the character referred to").

[146] 135 S. Ct. 1124, 1129–30 (2015).

[147] Id. at 1130 (citing § 1530 of the federal tax laws as of 1937, when the TIA was enacted, and § 6203 of the present IRC, as well as § 277(a) of the Revenue Act of 1924).

[148] Id. at 1129–31 (citing several provisions from the federal tax laws as of 1937 and § 6302 of the present IRC).

[149] Id. at 1130 (citing §§ 1540, 1544, and 1582 of the federal tax laws as of 1937 and § 6331 of the present IRC).

[150] Id. at 1132 (holding that "'restrain' acts on a carefully selected list of technical terms—'assessment, levy, collection'—not on an all-encompassing term, like 'taxation,'" and "'restrain' . . . captures only those orders that stop" those technical terms).

[151] Id. at 1127.

the AIA cases described above: if retailers were able to challenge this statute in court, then the state would receive less tax revenue when parties otherwise subject to use taxes were not apprised of their tax obligations.[152] The Court rejected this argument in an equally straightforward fashion. The challenged law imposed notice and reporting requirements, and the Court said that enforcing those requirements was not "an act[] of assessment, levy, [or] collection."[153] Thus, according to the Court, although a lawsuit challenging notice and reporting requirements might *inhibit* the assessment, levy, or collection of taxes, it does not *stop*, and thus cannot be said to "restrain" those acts.[154]

For the purposes of this Article, it is most important to note the close relationship between the TIA and the AIA. From the very beginning of the TIA, these two statutes have been closely linked. Introducing the TIA during floor debates in the Senate, Senator Homer Bone explained that the language of the TIA "is not novel in character" and then proceeded to read the text of the AIA.[155] As early as 1962, the Supreme Court looked to the legislative history of the TIA to guide its analysis of the AIA, observing that "[t]he enactment of the comparable Tax Injunction Act of 1937 . . . throws light on the proper construction to be given [the AIA]."[156] Almost forty years later, the Court noted that "Congress modeled the Tax Injunction Act . . . upon previously enacted federal statutes of similar import" and that "[t]he federal statute Congress had in plain view was" the AIA.[157] In the Court's most recent TIA cases, *Hibbs v*. *Winn* and *Direct Marketing*, it again reiterated the close relationship between these two statutes: "The TIA was modeled on the anti-injunction provision; it incorporates the same terminology employed by the provision; and it employs that terminology for the same

[152] Id. at 1132–33 (describing the opinion of the court below as relying on an interpretation of restrain that extends to any lawsuit merely inhibiting assessment, collection, or levy).

[153] Id. at 1131 ("The TIA is keyed to the acts of assessment, levy, and collection themselves, and enforcement of the notice and reporting requirements is none of these.").

[154] Id. at 1133 ("Applying the correct definition, a suit cannot be understood to 'restrain' the 'assessment, levy or collection' of a state tax if it merely inhibits those activities.").

[155] 81 Cong. Rec. 1415 (1937) (statement of Sen. Bone).

[156] *Williams Packing*, 370 U.S. at 6.

[157] Jefferson County v. Acker, 527 U.S. 423, 434 (1999) (internal quotation marks omitted) (citing S. Rep. No. 75-1035, at 1 (1937)).

purpose. It is sensible, then, to interpret the TIA's terms by reference to the [IRC's] use of the term."[158]

The Supreme Court is not the only branch of the federal government to take this view. Participating as amicus curiae in *Winn*, the federal government took the position that courts should interpret the AIA and the TIA similarly. *Winn* concerned the proper definition of the word "assessment."[159] In the statement of interest portion of its amicus brief, the government explained that the United States "has a substantial interest in the proper interpretation and application of these parallel statutory provisions"—meaning the AIA and the TIA.[160] In other words, the government filed a brief in a TIA suit because it worried that any resulting Court holding would directly implicate future interpretations of the AIA. This same reasoning is present throughout the government's brief. The government argued that, "[i]n incorporating this same terminology into the Tax Injunction Act, Congress presumably meant the term 'assessment' to have the same meaning in both provisions [the other being the AIA]."[161] Later, the government again referred to the TIA and AIA as "parallel statutory prohibitions against judicial restraints on the assessment of taxes."[162]

In sum, Congress created the TIA to protect state tax revenue collection, just as it created the AIA to protect federal tax revenue collection. The TIA shields the actions of state tax officials from judicial review in federal courts when litigants seek to stop discrete steps in the tax administration process—assessment, collection, levy.[163] For many years, the Supreme Court has taken the position that a close relationship exists between the TIA and AIA, which justifies "interpret[ing] the TIA's terms by reference to the [AIA's] use of the [same] term."[164] This is a position adopted and advocated for by federal government litigators

[158] *Winn*, 542 U.S. 88, 115 (2004) (Kennedy, J., dissenting) (citation omitted); see also *Direct Mktg.*, 135 S. Ct. at 1129 ("Although the TIA does not concern federal taxes, it was modeled on the Anti–Injunction Act (AIA), which does.").

[159] The case was a dispute about whether Arizona could offer tax credits to be used for private religious education. See generally *Winn*, 542 U.S. at 92–94.

[160] Brief for the United States as Amicus Curiae Supporting Petitioner at 1–2, Hibbs v. Winn, 542 U.S. 88 (2004) (No. 02-1809).

[161] Id. at 11.

[162] Id. at 18.

[163] See 28 U.S.C. § 1341 (2012).

[164] *Winn*, 542 U.S. at 115 (Kennedy, J., dissenting).

during the George W. Bush administration.[165] But lower federal courts often have not interpreted the AIA in harmony with developments in the Supreme Court's TIA jurisprudence—creating yet another unresolved tension in the AIA case law.

The Supreme Court with *Direct Marketing* and the D.C. Circuit with *Florida Bankers* have put the TIA and the AIA on a collision course. Specifically, the reasoning of *Direct Marketing* is different from and difficult to square with at least some of the Court's past AIA precedents. For example, in both *Bob Jones* and *Americans United*, the Court held that the AIA blocks pre-enforcement review of 501(c)(3) exempt status determinations because enjoining the IRS from denying or revoking a nonprofit's charitable status would allow the nonprofit's donors to deduct their contributions, reducing their own tax liabilities, and thus would stop the agency from collecting taxes.[166] This rationale is not consistent with the holding and reasoning of the Court in *Direct Marketing*. Like the third-party reporting requirements at issue in *Direct Marketing*, 501(c)(3) exempt status determinations are tangential to and temporally remote from the eventual tax assessments and collections associated with them.[167] Based on the analysis of the *Direct Marketing* decision, a challenge to a 501(c)(3) exempt status determination should not fall under the AIA because it does not stop assessment and collection.[168] Yet, the Court in *Bob Jones* and *Americans United* concluded otherwise.[169]

Similarly, recall that *Florida Bankers*, like *Direct Marketing*, involved third-party reporting requirements, albeit with one key difference: the IRS enforces the *Florida Bankers* requirements through penalties.[170] Focusing on language in the IRC equating taxes and

[165] See supra notes 159–62 and accompanying text (documenting the government's position as amicus in *Winn*).

[166] *Bob Jones*, 416 U.S. at 726–27, 749–50; *Ams. United*, 416 U.S. at 754–56, 760–63; see also supra notes 44–55 (describing these cases at greater length and documenting others with similar reasoning).

[167] Frances R. Hill & Douglas M. Mancino, Taxation of Exempt Organizations ¶ 32.08 (2002).

[168] *Direct Mktg.*, 135 S. Ct. at 1132–33 (determining that "'[r]estrain' . . . captures only those orders that stop (or perhaps compel) acts of 'assessment, levy and collection'").

[169] See supra notes 44–49 and accompanying text (describing the *Bob Jones* and *Americans United* decisions).

[170] *Fla. Bankers*, 799 F.3d at 1068–69.

penalties for purposes of assessment and collection, the D.C. Circuit panel majority reasoned that the AIA applied because a challenge to the third-party reporting requirements would stop any penalty for noncompliance from being assessed or collected. In other words, because declining or otherwise failing to comply with Treasury's regulations can result in a penalty, invalidating a Treasury regulation will eliminate the possibility that the IRS might someday assess and collect those penalties.[171] The penalty assessment contemplated in *Florida Bankers* was at least one step removed from the regulatory challenge at issue. *Direct Marketing* would require greater proximity to the assessment or collection function.

B. Why the Conflict Matters

How the Supreme Court or the federal circuit courts go about untangling the AIA mess carries real practical implications. Treasury and the IRS do not have a great history of complying with APA procedures, having claimed for several decades that their rules and regulations are exempt from those requirements. At best, applying the AIA to preclude pre-enforcement review of Treasury regulations and IRS guidance documents delays judicial review for years or even decades. As a practical matter, many rules and regulations will be shielded from judicial review in perpetuity. In a world where the sole or even primary function of Treasury and the IRS was restricted to raising revenue for the federal government, and the federal government's ability to raise revenue truly rose and fell on Treasury's ability to promulgate regulations free from judicial review, this balance might be worth striking. But the mission of Treasury and the IRS via the IRC is now much broader than simply raising revenue. Treasury and the IRS are now responsible for a variety of social welfare and regulatory functions and programs that are largely indistinguishable from those of agencies subject to pre-enforcement review.

1. A History of Loose Administrative Procedure Act Compliance

Understanding how Treasury and the IRS flout the APA requires a bit more backstory. APA requirements apply to those regulations that are

[171] Id. at 1069–70.

considered to be "legislative."[172] Regulations are considered legislative when they carry the "force and effect of law."[173] Generally speaking, there are two kinds of Treasury regulations—specific authority and general authority.[174] Specific authority regulations are those passed under grants of rulemaking authority contained in substantive provisions of the IRC to fill congressionally identified statutory gaps.[175] Most Treasury regulations, however, are adopted under the general authority provided by I.R.C. § 7805(a) to the Secretary of the Treasury to "prescribe all needful rules and regulations for the enforcement of" the IRC.[176]

Both types of Treasury regulations carry the force of law, largely (though perhaps not always exclusively) because taxpayers and tax return preparers are subject to the same congressionally imposed penalties for violating either specific or general regulations.[177] In *Mayo Foundation*, the Supreme Court confirmed that both types of Treasury regulations carry the force of law for purposes of eligibility for *Chevron* deference.[178] Building upon that decision, the full Tax Court has unanimously held that Treasury regulations promulgated pursuant to I.R.C. § 7805(a) are legislative rules for APA purposes.[179]

For several decades, however, the tax community separated specific from general authority Treasury regulations by labeling the former as

[172] United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Fed. Highway Admin., 151 F. Supp. 3d 76, 86 (D.D.C. 2015) ("Agencies need not subject interpretive rules to Section 553's notice and comment rulemaking requirements.").

[173] Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015) (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 302–03 (1979)).

[174] *Mayo Found.*, 562 U.S. at 56–58 (recognizing the distinction); Altera Corp. & Subsidiaries v. Comm'r, 145 T.C. 91, 114 (2015) (same); Kimberly S. Blanchard, NYSBA Tax Section Comments on Legislative Grants of Regulatory Authority (Nov. 3, 2006), *reprinted in* Tax Notes Today, Nov. 7, 2006, 2006 TNT 215–22 (LexisNexis) (same).

[175] See, e.g., I.R.C. § 1502 (2012).

[176] Id. § 7805(a).

[177] See, e.g., id. § 6662(a)–(b)(1), (c) (imposing penalties for failure to comply with "rules or regulations"); id. § 6694(b) (same); see also Treas. Reg. § 1.6662-3(b)(2) (1991) (defining "rules or regulations"); Treas. Reg. § 1.6694-3(e) (1991) (same).

[178] 562 U.S. at 56–58.

[179] See *Altera*, 145 T.C. at 116–17.

"legislative" and the latter as "interpretative" (i.e., nonlegislative).[180] Based on this outdated labelling, Treasury and the IRS have maintained for decades that most Treasury regulations are exempt from APA procedural requirements as interpretative rules.[181] Even after the Supreme Court's pronouncement in *Mayo Foundation* that both specific and general authority Treasury regulations carry the force of law, the government has continued to assert that many or even most Treasury regulations are exempt interpretative rules.[182]

Although Treasury has always purported to follow APA requirements anyway in promulgating its regulations—and typically has appeared to do so, in a fashion—legal scholars and commentators have complained for decades about Treasury's weak record of compliance with the APA when it promulgates regulations. Twenty-five years ago, Professor Michael Asimow pointed out that Treasury too often issued temporary regulations without prepromulgation notice and comment and raised concerns about noncompliance with the APA.[183] One of us subsequently documented empirically that Treasury fails to follow APA notice-and-

[180] See, e.g., John F. Coverdale, Court Review of Tax Regulations and Revenue Rulings in the *Chevron* Era, 64 Geo. Wash. L. Rev. 35, 44 (1995); Richard E. Levy & Robert L. Glicksman, Agency-Specific Precedents, 89 Tex. L. Rev. 499, 520–21 (2011); Irving Salem et al., ABA Section of Taxation Report of the Task Force on Judicial Deference, 57 Tax Law. 717, 728 (2004); 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, 249–50 (2003).

[181] See Hickman, supra note 12, at 1729 n.9, 1749 (documenting pre–*Mayo Foundation* Internal Revenue Manual claims regarding characterization of Treasury regulations and routine assertions in regulation projects that APA procedural requirements did not apply).

[182] See, e.g., *Altera*, 145 T.C. at 116 ("[The IRS] agrees that the final rule has the force of law but disagrees with petitioner's contention that it is a legislative rule."); Internal Revenue Manual § 32.1.1.2.6 (Sept. 23, 2011) (explaining, after post–*Mayo Foundation* revision, that "[m]ost IRS/Treasury regulations are considered interpretative because the underlying statute implemented by the regulation contains the necessary legal authority for the action taken and any effect of the regulation flows directly from that statute"); id. § 32.1.2.3(3) (continuing to assert that "most IRS/Treasury regulations are interpretative"); see also, e.g., Method of Accounting for Gains and Losses on Shares in Money Market Funds; Broker Returns With Respect to Sales of Shares in Money Market Funds, T.D. 9774, 81 Fed. Reg. 44,508, 44,513 (July 8, 2016), 2016-30 I.R.B. 151, 155 (claiming in preamble to final Treasury regulations that "section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations").

[183] Michael Asimow, Public Participation in the Adoption of Temporary Tax Regulations, 44 Tax Law. 343, 344 (1991).

comment rulemaking procedures in approximately forty percent of its regulations.[184] Patrick Smith has argued that, contrary to the Supreme Court's interpretation of the APA's arbitrary and capricious standard in *State Farm*,[185] "IRS preambles to regulations ordinarily do not explain why the IRS decided to adopt the particular rules in the regulations."[186] Indeed, for many years, the Internal Revenue Manual specifically instructed Treasury and IRS regulation drafters that, contrary to *State Farm*'s mandate, they did not need to provide such explanations.[187] Treasury's track record in this regard is hardly surprising, given Treasury's longtime belief that its regulations are mostly exempt from APA rulemaking requirements.

IRS guidance documents—specifically, revenue rulings, revenue procedures, and notices—raise different APA compliance questions. Revenue rulings formally are "interpretation[s]" and "conclusion[s] of the [IRS] on how the law is applied to a specific set of facts."[188] Revenue procedures are "statements of practice and procedure issued primarily for internal use,"[189] although both Treasury and the IRS acknowledge that they may "affect[] the rights or duties of taxpayers or other members of the public under the [IRC] and related statutes."[190] Notices are "public pronouncement[s] by the Service that may contain guidance that involves substantive interpretations of" the tax laws, though their original purpose in contrast to revenue rulings was to allow the IRS to

[184] Hickman, supra note 12, at 1748.

[185] *State Farm*, 463 U.S. 29; see also supra note 130 and accompanying text (summarizing the *State Farm* decision).

[186] Smith, supra note 12, at 274–75.

[187] At the time Smith wrote his article, the Internal Revenue Manual instructed, "In the Explanation of Provisions section [of a regulatory preamble], the drafting team should describe the substantive provisions of the regulation in clear, concise, plain language . . . . It is not necessary to justify the rules that are being proposed or adopted or alternatives that were considered." Internal Revenue Manual § 32.1.5.4.7.3(1) (Sept. 30, 2011). The IRS has since revised the Internal Revenue Manual to omit the second sentence of that instruction. Id. § 32.1.5.4.7.3(1) (Oct. 20, 2014). But old habits die hard. Cf. *Altera*, 145 T.C. at 119 (rejecting Treasury regulation on *State Farm* grounds but observing that the IRS "contends that we should not review the final rule under *State Farm* because the Supreme Court has never, and this Court has rarely, reviewed Treasury regulations under *State Farm*").

[188] Rev. Proc. 2012-4, 2012-1 I.R.B. 125, § 3.07.

[189] Rev. Proc. 55-1, 1955-2 C.B. 891, § 3.

[190] Treas. Reg. § 601.601(d)(2)(i)(b) (2012); see also Rev. Proc. 89-14, 1989-1 C.B. 814, § 3.02 (using a similar definition).

provide immediate, informal guidance as needed and appropriate.[191] The IRS rarely seeks public comments in issuing any of these guidance documents; on the rare occasions when the IRS does seek public input, it does not purport to comply with APA procedural requirements.

Treasury and the IRS contend that these guidance documents "do not have the force and effect of Treasury Department Regulations,"[192] and the Supreme Court in 1965 declared that they "have only such force as Congress chooses to give them, and Congress has not given them the force of law."[193] Thus, most tax practitioners generally assume that these IRS guidance documents are exempt from APA notice-and-comment rulemaking requirements as interpretative rules, procedural rules, or policy statements.[194] Yet, the IRS uses guidance documents more often than it once did to make pronouncements that seem to create law rather than merely interpret existing law.[195] Also, failing to follow an applicable revenue ruling, revenue procedure, or notice when filing a tax return now can expose a taxpayer to penalties.[196] The *Cohen* case, discussed above,[197] concerned an IRS notice that a district court on remand declared to be a procedurally invalid legislative rule under the APA.[198]

[191] Mitchell Rogovin & Donald L. Korb, The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View from Within, 87 Taxes, Aug. 2009, at 21, 26.

[192] Treas. Reg. § 601.601(d)(2)(v)(d).

[193] Dixon v. United States, 381 U.S. 68, 73 (1965).

[194] 5 U.S.C. § 553(b)(A) (2012).

[195] See Kristin E. Hickman, Unpacking the Force of Law, 66 Vand. L. Rev. 465, 504–05 (2013) [hereinafter Hickman, Unpacking] (documenting examples); Kristin E. Hickman, IRB Guidance: The No Man's Land of Tax Code Interpretation, 2009 Mich. St. L. Rev. 239, 243–52 [hereinafter Hickman, IRB Guidance] (same).

[196] Treas. Reg. § 1.6662-3(b)(2) (1991) (including revenue rulings and notices among "rules or regulations" giving rise to penalties for noncompliance); Accuracy-related Penalty, T.D. 8381, 56 Fed. Reg. 67,492, 67,494 (Dec. 31, 1991), 1992-1 C.B. 374, 376 (indicating same for some revenue procedures).

[197] See supra notes 80–92 and accompanying text (summarizing *Cohen*, 650 F.3d 717).

[198] In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig., 853 F. Supp. 2d 138, 142–43 (D.D.C. 2012).

2. The Expanded Scope of Tax Administration

The coverage of Treasury regulations and IRS guidance documents has also expanded significantly in recent decades. The guiding purpose of the federal tax system historically has been, and to a great extent still is, to raise revenue to fund government programs. Nina Olson, the National Taxpayer Advocate, has described the IRS as "the federal government's accounts receivable department."[199] Without the tax revenue the IRS collects, the U.S. government would cease to function. As the Supreme Court recognized in *Bull v. United States*, "taxes are the life-blood of government, and their prompt and certain availability an imperious need."[200] Courts and scholars have often cited the IRS's unique mission to justify differences between tax administrative practices and general administrative law norms, including but not limited to applying the AIA to preclude pre-enforcement judicial review of Treasury regulations and IRS guidance documents.[201]

In the past, most Treasury regulations and IRS guidance documents that affected the rights and obligations of taxpayers related directly to the determination of the amount of tax each taxpayer owed in a given taxable year.[202] At least in theory, aggrieved taxpayers could seek judicial review of such provisions in two ways: (1) prepare a tax return in compliance with the regulation or guidance document, pay the associated taxes, and seek a refund, or (2) prepare a noncompliant tax return and disclose noncompliance, which should prompt the IRS to examine the tax return, leading to a deficiency assessment that could

[199] Nina E. Olson, Nat'l Taxpayer Advocate, Internal Revenue Serv., 1 2012 Annual Report to Congress 40, https://www.taxpayeradvocate.irs.gov/2012-Annual-Report/downloads/Volume-1.pdf.

[200] 295 U.S. 247, 259 (1935).

[201] See id. at 259–60; see also Steve R. Johnson, Preserving Fairness in Tax Administration in the *Mayo* Era, 32 Va. Tax Rev. 269, 279–80 (2012) (identifying the "revenue imperative" as the claimed justification for "several features of tax administration that uniquely advantage" the IRS, including the AIA); Nina E. Olson, 2010 Erwin N. Griswold Lecture Before the American College of Tax Counsel: Taking the *Bull* by Its Horns: Some Thoughts on Constitutional Due Process in Tax Collection, 63 Tax Law. 227, 232 (2010) (making a similar connection regarding the AIA).

[202] Hickman, Tax System We Have, supra note 14, at 1729–30 (observing that Treasury expenditures were about $60 billion in the 1960s, which is far less than the annual expenditures today of over a trillion dollars).

then be challenged in the Tax Court.[203] Thus, even if the AIA barred pre-enforcement judicial review of Treasury regulations, a taxpayer had avenues to get to court to raise his challenge.[204]

This traditional understanding of judicial review in tax cases has been complicated by a legislative trend of incorporating into the IRC dozens of social welfare and regulatory programs, some quite extensive, with only a tangential relationship to revenue raising.[205] For example, the IRC contains hundreds of tax expenditure items representing more than $1 trillion of indirect government spending each year.[206] Antipoverty programs aimed at the working poor, such as the Earned Income Tax Credit ("EITC") and the Child Tax Credit, are structured as refundable tax credits rather than direct subsidies.[207] Subsidies for the purchase of health insurance are also structured as tax credits rather than as direct payments.[208]

Treasury and the IRS are key health care and pension regulators through ERISA and the Affordable Care Act, the provisions of which are enforced by denying eligibility for deductions or exclusions or by imposing penalties labeled as excise taxes that few people pay.[209] Treasury and the IRS are also key regulators of the nonprofit sector, as Congress has made eligibility for tax-exempt status contingent upon compliance with a variety of different regulatory requirements contained

[203] See Hickman, A Problem of Remedy, supra note 14, at 1183–90 (explaining how aggrieved taxpayers might seek judicial review through refund or deficiency actions).

[204] But see id. (documenting this understanding but explaining why reality is not quite so simple).

[205] Cf. King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (recognizing that the IRS's role in administering the Affordable Care Act is outside the agency's traditional expertise).

[206] See S. Comm. on the Budget, 112th Cong., Tax Expenditures: Compendium of Background Material on Individual Provisions 1, 11 (Comm. Print 2012).

[207] See generally David A. Weisbach & Jacob Nussim, The Integration of Tax and Spending Programs, 113 Yale L.J. 955, 961, 997–1027 (2004) (discussing Congress's integration of spending programs into the IRC, comparing the EITC and food stamp programs); Lawrence Zelenak, Tax or Welfare? The Administration of the Earned Income Tax Credit, 52 UCLA L. Rev. 1867, 1876–98 (2005) (comparing and contrasting the EITC, Temporary Assistance for Needy Families, and food stamps).

[208] See *NFIB*, 567 U.S. at 538–39 (noting the Affordable Care Act's goals and size).

[209] See Hickman, Tax System We Have, supra note 14, at 1732–33 (documenting the role of Treasury and the IRS in administering ERISA and the Affordable Care Act).

in the IRC.[210] Contemporary Treasury regulations implement policies concerning "the environment, conservation, green energy, manufacturing, innovation, education, saving, retirement, health care, child care, welfare, corporate governance, export promotion, charitable giving, governance of tax exempt organizations, and economic development."[211] In one recent five-year period, at least a plurality of Treasury regulations promulgated concerned such matters, rather than more traditional tax issues.[212]

For this reason, many contemporary Treasury regulations do not directly relate to the computation of a taxpayer's annual tax liability at all but rather are more akin to the regulations adopted by other agencies. Parties subject to these regulations are not in the traditional position of paying more taxes with their tax return and then suing for a refund or filing a return documenting their noncompliance and hoping to generate a deficiency notice.[213] Absent pre-enforcement review, such regulations may be permanently shielded from judicial oversight, no matter how egregiously the IRS disregards APA requirements.

II. THE ANTI-INJUNCTION ACT'S LOST ROOTS

Gleaning Congress's precise intent with the AIA has always been a challenge. The Supreme Court has long observed that Congress sought to protect the government's ability to expeditiously assess and collect the tax revenues it needs to function.[214] As noted above, however, that concern has never stopped the courts from recognizing nonstatutory exceptions from the AIA's limitation on judicial review. Rather, the difficulty for the courts has been consistency in drawing the AIA's

[210] See generally James J. Fishman, The Nonprofit Sector: Myths and Realities, 9 N.Y.C. L. Rev. 303, 303–04 (2006) (noting the tax system's role in the nonprofit sector); Hickman, Tax System We Have, supra note 14, at 1732–34 (same).

[211] Pamela F. Olson, Woodworth Lecture: And Then Cnut Told Reagan . . . Lessons from the Tax Reform Act of 1986, 38 Ohio N.U. L. Rev. 1, 12–13 (2011) (footnotes omitted).

[212] See Hickman, Tax System We Have, supra note 14, at 1746–53 (documenting study results).

[213] See generally Hickman, A Problem of Remedy, supra note 14 (detailing the difficulties that such parties face in seeking judicial review).

[214] See, e.g., Bob Jones Univ. v. Simon, 416 U.S. 725, 731–32 & n.7 (1974); Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962) ("In this manner the United States is assured of prompt collection of its lawful revenue."); Taylor v. Secor, 92 U.S. 575, 613–14 (1875).

precise boundaries. Here, Congress has offered little direct guidance. Justice Lewis Powell in *Bob Jones University v. Simon* observed that "[t]he Anti-Injunction Act apparently has no recorded legislative history."[215] Legal scholars also have largely ignored the AIA for much of its existence, contributing to the lack of historical understanding regarding the details of congressional intent.

Nevertheless, the AIA was not adopted in a vacuum. The AIA dates back to 1867 and several new taxes, including the nation's first income tax, adopted briefly to finance the Civil War.[216] Although most of the Civil War taxes were short lived, they prompted Congress to establish the statutory foundations for administrative practices that can be traced directly to contemporary tax administration.[217] Consequently, understanding Civil War–era revenue legislation and the evolution of tax administration from the Civil War to the present offers key insights into what Congress intended to accomplish when it adopted the AIA. Moreover, as one follows the statutory text and context of the AIA from Civil War revenue legislation into the Revised Statutes and finally into the modern IRC, it becomes apparent that Congress has repeatedly readopted the AIA without revisiting or changing its original core meaning, even as Congress has changed other aspects of tax administration substantially. In short, historical analysis provides a powerful tool for resolving the AIA's meaning and scope.

A. Civil War–Era Origins

In the decades before the Civil War, the federal government supported itself primarily through the tariff.[218] Tax administration was largely a function of customhouses at ports and border crossings.[219] Congress imposed a monetary fine on merchants who submitted

[215] 416 U.S. at 736 (citing Note, Enjoining the Assessment and Collection of Federal Taxes Despite Statutory Prohibition, 49 Harv. L. Rev. 109, 109 n.9 (1935)); see also Erin Morrow Hawley, The Equitable Anti-Injunction Act, 90 Notre Dame L. Rev. 81, 95 (2014) (noting an absence of any congressional record defining the scope of the AIA).

[216] Revenue Act of 1867, ch. 169, § 10, 14 Stat. 471, 475.

[217] See infra Section II.C (tracing the assessment and collection functions from the Civil War to the present).

[218] Steven A. Bank et al., War and Taxes 24 (2008); Nicholas R. Parrillo, Against the Profit Motive: The Salary Revolution in American Government, 1780–1940, at 221 (2013).

[219] Parrillo, supra note 218, at 224–26.

inaccurate paperwork.[220] Intentional tax evasion was punishable by forfeiture of goods.[221] Although smuggling was not uncommon, intentional evasion of the tax laws more often took the form of falsified paperwork.[222] Customs officers who discovered intentional evasion received a bounty equal to a percentage of the value of the goods seized.[223] As one might anticipate, customs officers had an incentive to label paperwork inaccuracies as intentional rather than accidental.[224]

Wars are expensive. To finance the Civil War, Congress adopted a collection of new "internal" taxes.[225] Congress started in 1861 with legislation adopting the nation's first income tax, along with a "direct" tax on land apportioned state by state.[226] Quickly recognizing the 1861 Act was inadequate, less than a year later, in 1862, Congress enacted more comprehensive revenue legislation that included a more sophisticated income tax, as well as an inheritance tax, a gross receipts tax on businesses, and a passel of excise taxes, license fees, and stamp duties.[227]

Lacking an administrative apparatus for these new internal taxes,[228] the government initially collected no revenue from them.[229] Therefore, first in the 1861 Act and then again in the 1862 Act, Congress established new administrative structures and procedures for that purpose. The 1862 Act established a Commissioner of Internal Revenue

[220] Id.

[221] Id.

[222] Id. at 224–25.

[223] Id.

[224] Id. at 226–27.

[225] Cf. Sheldon D. Pollack, The First National Income Tax, 1861–1872, 67 Tax Law. 311, 312 (2014) (using the term).

[226] Revenue Act of 1861, ch. 45, §§ 8, 49, 12 Stat. 292, 294–96, 309; see also Bank et al., supra note 218, at 37–38 (summarizing the taxes adopted in the 1861 Act).

[227] Revenue Act of 1862, ch. 119, 12 Stat. 432; see also Bank et al., supra note 218, at 37–38 (summarizing the taxes adopted in the 1862 Act).

[228] Harry Edwin Smith, The United States Federal Internal Tax History from 1861 to 1871, at 271 (1914) ("When the direct and income taxes were levied by the Act of August 5, 1861, there were no officers whose duty it was to collect such taxes.").

[229] See Bank et al., supra note 218, at 37 (observing that Treasury Secretary Salmon Chase initially "failed to nominate anyone to serve as commissioner of taxes, further frustrating the creation of a collection mechanism for internal taxes"); Pollack, supra note 225, at 320 ("In fact, no revenue was ever collected under the income tax of 1861.").

charged with administering the new internal taxes.[230] Congress also instructed the President to divide the country geographically into collection districts and empowered the President, with the advice and consent of the Senate, to appoint "assessors" and "collectors" for each such district to enforce the new taxes.[231] Congress also authorized the presidentially appointed assessors to divide their respective collection districts further into smaller assessment districts, and the Commissioner would appoint assistant assessors from among the residents of each such district.[232]

The administrative provisions of the 1861 Act focused primarily on the direct tax, rather than the income tax.[233] The 1862 Act, by comparison, created a set of "General Provisions" "for the purpose of assessing, levying, and collecting" all of the "duties or taxes" imposed thereby, which provisions were then modified as appropriate for the different taxes imposed by the Act.[234] For example, the 1862 Act specifically called for taxpayers to file income tax returns with the assistant assessors for their districts by May 1 and pay their income taxes by June 30 of each year.[235] The 1862 Act also provided specifically for withholding income taxes from the wages of government employees and from payments of dividends and interest made by corporations.[236]

Regardless, the 1862 Act detailed at length a process for "assessing" and "collecting" the new taxes, including but not limited to the income tax.[237] Congress tasked assistant assessors with receiving tax returns, with visiting taxpayers in their districts individually to investigate their potential liability for taxes, and, if a taxpayer either failed to file or submitted a fraudulent return, with preparing a return on the taxpayer's

[230] Revenue Act of 1862 § 1; see also Pollack, supra note 225, at 322 (describing the office's establishment).

[231] Revenue Act of 1862 § 2; see also Revenue Act of 1861 § 9 (providing similarly).

[232] Revenue Act of 1862 § 3; see also Revenue Act of 1861 § 11 (providing similarly).

[233] Compare Revenue Act of 1861 §§ 8–48 (concerning the direct tax), with id. §§ 50–51 (concerning the income tax).

[234] Revenue Act of 1862 §§ 2–38.

[235] Id. §§ 91–92.

[236] Id. § 86; see also Sidney Ratner, American Taxation: Its History as a Social Force in Democracy 74–75 (1942) (discussing income tax withholding at the source).

[237] Revenue Act of 1862 §§ 2–36.

behalf "according to the best information" available.[238] Based on the returns filed and investigations performed, assistant assessors had thirty days after the statutory filing deadline to provide the assessors with alphabetized lists of taxpayers and the taxes they allegedly owed.[239] The assessors then made the lists publicly available, advertising in county newspapers and posting in public places the time and location where taxpayers might examine the lists.[240] These lists served as tentative assessments, informing taxpayers of their proposed tax liabilities. Taxpayers could appeal from those proposed assessments, and assessors were responsible for considering such appeals before submitting final lists of "sums payable" to their respective collection districts.[241] Upon receiving said final lists from the assessors, collectors were charged with publishing the lists again, this time designating the listed taxes as due.[242] People who failed to pay the taxes owed within a specified period after such publication—ten days generally, but thirty days for income taxes, for example—were assessed an additional ten percent penalty and given another ten days to comply.[243] After that, a delinquent taxpayer's personal or real property could be levied, "distrained" (i.e., seized), and sold.[244]

Judicial review threatened to derail the assessment and collection process envisioned by the 1862 Act. When collectors brought suit to seize and liquidate the property of delinquent taxpayers, taxpayers fought back by requesting declaratory and injunctive relief on the grounds that the taxes were "erroneously or illegally assessed."[245] Although courts of the era generally were reluctant to interfere with tax

[238] Id. §§ 7, 9, 93; see also Joseph A. Hill, The Civil War Income Tax, 8 Q.J. Econ. 416, 435–36 (1894) (describing the process of assessing income taxes owed).

[239] Revenue Act of 1862 § 14.

[240] Id. § 15; see also Hill, supra note 238, at 436 (noting the "custom [of] publish[ing] the incomes of individual tax-payers [sic] in the local newspapers").

[241] Revenue Act of 1862 §§ 6, 16; see also Hill, supra note 238, at 436 (noting the availability of appeal).

[242] Revenue Act of 1862 § 19.

[243] Id. §§ 19, 92; see also Smith, supra note 228, at 275 (describing the collection process).

[244] Revenue Act of 1862 §§ 19–21, 93.

[245] See, e.g., Roback v. Taylor, 20 F. Cas. 852, 852, 854 (C.C.S.D. Ohio 1866) (No. 11,877); Magee v. Denton, 16 F. Cas. 382, 382–83 (C.C.N.D.N.Y. 1863) (No. 8,943); cf. Snyder v. Marks, 109 U.S. 189, 192 (1883) (dismissing a challenge to an assessment of tax liability on AIA grounds).

collections in this way, exceptions abounded.[246] Subjecting federal collection efforts to judicial supervision threatened to slow tax collections and thereby deprive the government of a constant stream of revenue. Though not addressing the AIA specifically, Justice Noah Haynes Swayne observed in *Springer v. United States*, "The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every tax-payer [sic] is entitled to the delays of litigation is unreason."[247]

To stop judicial review from thwarting the collection of taxes, in the Revenue Act of 1867, Congress amended Section 19 of the 1862 Act to include the language paralleling that of the current AIA, preventing suits from "restraining the assessment or collection of any tax."[248] By this language, the AIA forced aggrieved taxpayers to pay their taxes as assessed and sue the government for a refund, rather than seek declaratory and injunctive relief to keep collectors from seizing their property.[249] Congress did not elaborate on the scope of the amendment, but it had no need to do so.[250] Section 19 was the part of the 1862 Act that provided the procedures for collecting taxes after the assessors supplied the collectors with the lists of taxes assessed.[251] Thus, the amendment fit neatly into Section 19 as a limited remedy for judicial obstruction of those particular procedures.[252] As the original Section 19 described how revenue would be collected once taxes had been assessed, the new AIA language facilitated collections by precluding judicial review from stalling that specific process once it had begun. Congress did not need to be more specific about the AIA's scope because the

[246] 1 James L. High, A Treatise on the Law of Injunctions § 484 (2d ed. 1880).

[247] 102 U.S. 586, 594 (1880).

[248] Revenue Act of 1867, ch. 169, § 10, 14 Stat. 471, 475.

[249] See id. The previous year, Congress had also added language precluding suits "for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue." Act of July 13, 1866, ch. 184, § 19, 14 Stat. 98, 152.

[250] *Bob Jones*, 416 U.S. at 736 (observing that "[t]he Anti-Injunction Act apparently has no recorded legislative history" (citing Note, Enjoining the Assessment and Collection of Federal Taxes Despite Statutory Prohibition, 49 Harv. L. Rev. 109, 109 n. 9 (1935))); see also Hawley, supra note 215, at 95 (noting an absence of any congressional record defining the scope of the AIA).

[251] Revenue Act of 1862, ch. 119, § 19, 12 Stat. 432, 439.

[252] Id.

meaning of the new restriction on judicial review was obvious from its statutory context.[253]

Most of the Civil War internal taxes expired or were repealed by the end of 1872.[254] A few internal taxes were retained, such as excise taxes on alcoholic beverages and tobacco,[255] so much of the tax administrative apparatus established in the 1860s was left in place.[256] In 1872, Congress abolished the assessor and assistant assessor positions but not the assessment function, which Congress transferred to the Commissioner of Internal Revenue.[257] Other than the abolition of the assessor and assistant assessor positions, the assessment and collection provisions adopted in 1862 and thereafter, including the AIA, continued to be part of the federal tax laws.[258]

B. Post–Civil War Textual and Contextual Constancy

The federal tax laws, and the administrative practices utilized to administer them, have changed in many ways since the Civil War era. The customs duties that comprised the bulk of tax revenue collected throughout the 1800s now represent merely one percent of total receipts.[259] As recently as 1940, the federal government collected more

[253] For that matter, Congress might not have felt it necessary to explain the AIA because it codified already existing principles of equity jurisprudence. See Pullan v. Kinsinger, 20 F. Cas. 44, 48 (C.C.S.D. Ohio 1870) (No. 11,463) (describing the AIA as "wholly unnecessary, enacted only as a politic and kindly publication of an old and familiar rule").

[254] The Revenue Act of 1862 called for the Civil War income tax to cease after 1866. See Revenue Act of 1862 § 92. Congress later extended the tax through 1871. See Revenue Act of 1866, ch. 184, 14 Stat. 98; Revenue Act of 1867, ch. 169, 14 Stat. 471; Revenue Act of 1870, ch. 255, 16 Stat. 256; see also W. Elliot Brownlee, Federal Taxation in America: A Short History 29 (1996) (noting that Congress let the income tax expire in 1872); Pollack, supra note 225, at 327 (documenting extensions). Other Civil War taxes, like the inheritance, excise, and stamp taxes, were repealed. See Bank et al., supra note 218, at 46 (documenting this history).

[255] Act of Dec. 24, 1872, ch. 13, §§ 2–3, 17 Stat. 401, 402.

[256] Harold Dubroff & Brant J. Hellwig, The United States Tax Court: An Historical Analysis 14 (2d ed. 2014).

[257] Act of Dec. 24, 1872 §§ 1–3, 17 Stat. at 401–02.

[258] See generally 1 Rev. Stat. §§ 3172–3231 (1875) (containing statutory provisions governing assessment and collection functions, including the AIA in § 3224).

[259] According to historical tables prepared by the Office of Management and Budget ("OMB"), in 2016, receipts from all sources totaled $3.267 trillion, and receipts from customs duties and other fees totaled $34 billion. Office of Mgmt. & Budget, Table 2.1—Receipts by Source: 1934–2022, available at https://www.whitehouse.gov/omb/budget/

revenue from internal alcohol and tobacco excise taxes than it did from either individual or corporate income taxes.[260] Individual income taxes that had only briefly existed and social insurance taxes that no one had yet contemplated at the time of the Civil War now constitute more than eighty percent of government receipts.[261] As the sources of government revenue have changed, tax administrative practices have evolved as well, particularly as regards the timing of assessment and collection.

By comparison, at least textually, the AIA's core language remains remarkably unchanged. Most of the changes to the AIA's text have taken the form of exceptions added by Congress over time, often when the IRS or the courts have interpreted and applied the AIA in ways that strike Congress as unfair. By contrast, the arrangement of some of the IRC's administrative provisions and the placement of the AIA within the IRC have changed significantly. Therein may lie at least some of the confusion regarding the AIA's proper scope and meaning.

1. Changes to the Anti-Injunction Act's Text

The only major change to the primary text of the AIA since the Civil War comes from the Federal Tax Lien Act of 1966. With that legislation, Congress added the phrase "whether or not such person is the person against whom such tax was assessed" to the end of the AIA's core prohibition against judicial review of cases "restraining the assessment or collection of any tax."[262] Although its language seems expansive, the change was not aimed at expanding the AIA's scope to limit judicial review further. Rather, as part of the same legislation, Congress added I.R.C. § 7426, providing a mechanism whereby third parties could seek judicial review when the IRS levied or sold their

Historicals [https://perma.cc/2ZDD-AE3A] [hereinafter OMB Table 2.1]; Office of Mgmt. & Budget, Table 2.5—Composition of "Other Receipts": 1940–2022, available at https://www.whitehouse.gov/omb/budget/Historicals [https://perma.cc/2ZDD-AE3A] [hereinafter OMB Table 2.5].

[260] Again according to OMB historical tables, in 1940, the government collected $1.229 billion in alcohol and tobacco excise taxes, $892 million in individual income taxes, and $1.197 billion in corporate income taxes. OMB Table 2.1; OMB Table 2.5.

[261] OMB Table 2.1 (showing in 2016 roughly $1.55 trillion in individual income taxes and $1.15 trillion in social insurance and retirement receipts as compared to $3.27 trillion in total government receipts).

[262] Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1125, 1144 (codified at I.R.C. § 7421 (2012)).

property to satisfy the tax liability of another—as might occur, for example, where property is jointly owned.[263] Legislative history explaining the change described circumstances in which courts, presumably applying the AIA, had denied third parties judicial relief when the IRS wrongfully levied their property or denied their claims to excess proceeds from property sales.[264] Along with the above-quoted language, the Federal Tax Lien Act also added to the AIA a separate cross-reference to I.R.C. § 7426 as an exception from the AIA's limitation on judicial review.[265] The two additions together ensured that courts would confine the new authorization of third-party suits to the terms of I.R.C. § 7426 without eroding the overall scope of the AIA's core text.

Aside from the language concerning third parties, the only changes to the AIA have come when Congress added specific statutory exceptions from the AIA by cross-reference to other provisions both within and outside the IRC. The first and most sweeping set of exceptions by cross-reference accompanied the creation of the Board of Tax Appeals ("BTA") and later carried over to the BTA's successor, the Tax Court.

Having again relied principally on tariffs and a small number of internal taxes for revenue in the decades after the Civil War,[266] Congress adopted the corporate income tax in 1909 and the modern individual income tax in 1913.[267] These taxes were small initially, but World War I saw the expansion of the individual income tax as well as the addition of an excess profits tax.[268] The number of tax returns filed increased dramatically, and the difficulties of administering the tax system multiplied as well.

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[263] S. Rep. No. 1708 pt. II, at 29 (1966); see also id. pt. I, at 3 ("In general terms, these modifications are intended to represent a reasonable accommodation of the interests of the Government in collecting the taxes of delinquent taxpayers with the rights of the taxpayers and third parties.").

[264] Id. pt. II, at 29.

[265] See id. (linking the change to I.R.C. § 7421(a) to the addition of I.R.C. § 7426).

[266] Congress briefly adopted an income tax with the Wilson-Gorman Tariff Act of 1894. Act of Aug. 27, 1894, ch. 349, § 29, 28 Stat. 509, 554. The Supreme Court invalidated that income tax in *Pollock v. Farmers' Loan & Tr. Co.*, 157 U.S. 429, 586 (1895).

[267] Dubroff & Hellwig, supra note 256, at 14.

[268] See, e.g., Bank et al., supra note 218, at 52–79 (discussing legislative action to fund World War I).

Prior to World War I, the IRS was in the habit of examining every income tax return that was filed.[269] In the aftermath of World War I, with its accompanying expansion of the individual income tax, the IRS had an enormous backlog of unaudited income tax returns, and the government badly needed additional revenue to cover war expenditures. To resolve the administrative difficulty, the IRS decided to summarily disallow every seemingly questionable deduction on a large number of returns, assess the resulting taxes immediately, and rely on subsequent refund and abatement claims to resolve any errors.[270] Unsurprisingly, these summary assessments were controversial and merely led to more problems.

These and other difficulties associated with an expanding federal tax system prompted Congress to introduce additional key administrative reforms. In particular for purposes of the AIA, in 1921, Congress began requiring the IRS to issue deficiency notices and allow taxpayers thirty days to seek an administrative appeal before assessing additional taxes.[271] Subsequently, in 1924, Congress created the BTA as an independent tribunal to which taxpayers could appeal such deficiency notices and expanded the time for making such appeals to sixty days.[272] With such appeals, the IRS generally could pursue assessment and collection only after the BTA determined that a deficiency did in fact exist.[273] In 1926, Congress provided that, notwithstanding the AIA, courts could enjoin IRS assessment and collection of taxes pending the

[269] Dubroff & Hellwig, supra note 256, at 14.

[270] Id. at 21. Abatement claims were administrative appeals submitted after taxes were assessed but before they were paid. Id. at 22. Although filed by enough taxpayers in the World War I era to interfere with IRS collection efforts, abatement claims were subject to several onerous requirements and restrictions, including that the claimant post a bond to ensure payment of the assessed taxes. Id. Consequently, Congress and the IRS quickly established alternative remedies to resolve the problems of summary assessments. Id. at 22–23. The contemporary IRC authorizes abatements under certain limited circumstances, but not for income, estate, or gift taxes. I.R.C. § 6404(a)–(b); see also Michael I. Saltzman, IRS Practice and Procedure ¶ 11.04 (2d ed. 1991) (discussing present-day abatement claims).

[271] Revenue Act of 1921, ch. 136, § 250(d), 42 Stat. 227, 266.

[272] Revenue Act of 1924, ch. 234, §§ 274, 308, 900, 43 Stat. 253, 297, 308, 336; see also Dubroff & Hellwig, supra note 256, at 49–81 (detailing the creation of the BTA).

[273] Revenue Act of 1924 §§ 274, 308.

BTA's resolution of a deficiency appeal.[274] Finally, when Congress codified the tax laws as the Internal Revenue Code of 1939, it amended the AIA itself to incorporate cross-references to the provisions permitting appeals of deficiency notices to the BTA and authorizing courts generally to enjoin assessments and collections until the conclusion of those appeals.[275]

As in the 1939 Code, today's AIA cross-references I.R.C. §§ 6212(a) and (c) and 6213(a), which govern deficiency notices and authorize taxpayers to petition the Tax Court for redetermination of a deficiency.[276] Those provisions in turn include language virtually identical to that adopted by Congress in 1926, authorizing injunctions pending Tax Court review.[277] Although taxpayers still retain the option of paying assessed taxes and suing for a refund, the vast majority of tax cases are deficiency actions heard by the Tax Court.[278]

The other exceptions-by-cross-reference added to the AIA are more narrowly tailored. On several occasions, upon identifying specific circumstances in which applying the AIA too literally would either impose hardship or deny judicial review altogether, Congress has acted to clarify and expand the availability of judicial review and to authorize courts to enjoin assessment or collection pending the same. For example, in 1998, Congress made innocent spouse relief from joint tax liabilities easier to obtain by resolving uncertainty regarding Tax Court jurisdiction over IRS innocent spouse denials, authorizing the Tax Court to enjoin associated IRS collection actions pending review in such cases, and incorporating a cross-reference in the AIA.[279]

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[274] Revenue Act of 1926, ch. 27, §§ 274(b), 308(a), 44 Stat. 9, 55, 75 (cross-referencing the AIA, which at that time was codified at R.S. § 3224); see also Revenue Act of 1928, ch. 852, § 272(a), 45 Stat. 791, 853 (including similar language in provisions governing BTA deficiency redeterminations).

[275] An Act to Consolidate and Codify the Internal Revenue Laws of the United States, ch. 36, § 3653(a), 53 Stat. 1, 446 (1939) (codified at I.R.C. § 3653 (1940)) ("Except as provided in sections 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.").

[276] I.R.C. §§ 6212(a) & (c), 6213(a), 7421(a) (2012).

[277] Id. §§ 6212(a) & (c), 6213(a).

[278] David Laro, The Evolution of the Tax Court as an Independent Tribunal, 1995 U. Ill. L. Rev. 17, 18 (documenting tax case statistics).

[279] Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105–206, § 3201(a), (e), 112 Stat. 685, 734–35, 740 (codified as amended at I.R.C. § 6015); see also

A few exceptions-by-cross-reference were adopted in response to litigation before the Supreme Court. As already noted in Part I, shortly after the Court decided *Bob Jones University v. Simon* and *Alexander v. "Americans United" Inc.*,[280] Congress amended the AIA and the Declaratory Judgment Act to allow judicial review of exempt status determinations and revocations, signaling its view that the Court resolved those cases incorrectly.[281] In the same legislation, reacting in part to *Laing v. United States* and *Commissioner v. Shapiro*, also discussed in Part I, and consistent with the Court's pro-taxpayer decisions in those cases,[282] Congress amended provisions governing jeopardy and termination assessments to expand the availability of judicial review for such IRS actions and, correspondingly, adjusted the AIA's cross-references to reflect those changes.[283]

In summary, since its adoption in the 1860s, the only amendments to the AIA have come when Congress wanted to expand the availability of judicial review and, correspondingly, to make clear Congress's intention to limit the AIA's reach. On more than one occasion, those amendments were a reaction to expansive IRS or judicial interpretations of the AIA that cut off judicial review in contexts apart from ordinary, run-of-the-mill enforcement efforts.

2. Changes to the Anti-Injunction Act's Statutory Context

Although the AIA's text has remained relatively constant since the 1860s, the placement of the AIA within the tax laws has changed significantly. Therein may lie at least some of the confusion regarding the proper scope and meaning of the AIA. Yet historical evidence makes

H.R. Rep. No. 105-599, at 249–55 (1998) (Conf. Rep.) (discussing changes to innocent spouse relief, and reasons therefore, including expansion of Tax Court jurisdiction).

[280] See supra notes 44–49 (describing the *Bob Jones* and *Americans United* cases).

[281] See Tax Reform Act of 1976, Pub. L. No. 94–455, § 1306, 90 Stat. 1520, 1718; H.R. Rep. No. 94-658, at 282–86 (1975), *reprinted in* 1976 U.S.C.C.A.N. 2897, 3179 (relating changes to the *Bob Jones* and *Americans United* cases).

[282] See supra notes 56–62 and accompanying text (describing the *Laing* and *Shapiro* cases).

[283] Tax Reform Act of 1976 § 1204(c)(11), 90 Stat. 1520, 1699; see also Staff of J. Comm. on Taxation, 94th Cong., General Explanation of the Tax Reform Act of 1976, at 356–64 (Comm. Print 1976) (including discussion of the *Laing* and *Shapiro* cases in explaining the legislative changes).

quite clear that Congress did not intend changes in the AIA's location within the codified tax laws to alter its meaning.

As noted above, in adopting the AIA in 1867, Congress embedded it within the principal statutory provision governing the collection process, Section 19 of the Revenue Act of 1862, suggesting that Congress believed that the need for the AIA was associated directly with the undertaking of that process. When Congress allowed the Civil War income tax to expire in 1871 and abolished the assessor and assistant assessor positions in 1872, it left the AIA in place along with the rest of the remaining assessment and collection provisions.[284]

In 1874, Congress revised and codified all then-existing statutes.[285] Title 35 of the Revised Statutes contained all of the tax provisions. Chapter 2 of Title 35, entitled "Of Assessments and Collections," divided the statutory text governing those two functions into a few dozen separate provisions, one of which—Section 3224—was the AIA.[286] Courts and commentators at the time took the view that the codification of the AIA into a separate provision in the Revised Statutes did not alter its meaning or scope. In *Snyder v. Marks*, for example, Justice Samuel Blatchford wrote, "This enactment in Section 3224 has no more restricted the meaning than it had when, after the Act of 1867, it formed a part of Section 19 of the Act of 1866, by being added thereto."[287]

Notwithstanding the emergence of more contemporary mechanisms for the assessment and collection of internal taxes, as well as the creation of the Tax Court in the interim, from 1874 until 1954, the AIA's placement among the collection provisions remained unchanged, suggesting its close, proximate relationship with the actual pursuit of the assessment and collection functions.[288] In 1926, Congress approved the

[284] See 1 Rev. Stat. §§ 3172–3223 (1875).

[285] Id. § 1.

[286] Id. § 3224.

[287] 109 U.S. 189, 192 (1883).

[288] See Comp. Stat. 2088, § 3224 (John A. Mallory) (Vol 2. 1902); Comp. Stat. 934, § 5947 (John A. Mallory) (1918); see also Dodge v. Osborn, 240 U.S. 118, 119 (1916) ("The case is here on appeal from the judgment of the court below affirming the action of the trial court in sustaining a motion to dismiss the complaint for want of jurisdiction because the complainants had an adequate remedy at law and because of the provision of Rev. Stat., § 3224, that 'No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.'").

current U.S. Code as a replacement for the Revised Statutes.[289] That 1926 codification moved the AIA—along with the rest of the tax laws—from Title 35 to Title 26 but continued to group the AIA with the provisions describing the collection functions.[290]

In 1939, Congress recodified the various tax laws as the Internal Revenue Code ("1939 Code").[291] The reason for the recodification was simple: the myriad pieces of tax legislation over the years had created a statutory mess that could be cleaned up most readily by consolidating and codifying the tax laws afresh.

> The great mass of internal-revenue legislation since 1873, scattered through 34 volumes of the Statutes at Large, makes such a recourse an exceedingly difficult undertaking, even for the most experienced lawyer. Statutes are repeated in subsequent acts in almost identical language, with no reference to prior acts or any expressed intention to amend or repeal. Provisions of a permanent character are included in riders and provisos and are hidden in various acts. Amendments are often involved and obscure. Inconsistencies and duplications abound.[292]

As noted above, the only change to the text of the AIA resulting from the 1939 codification was the addition of cross-references to provisions allowing courts to enjoin assessment and collection pending resolution of deficiency appeals to the BTA.[293] Legislative history of the 1939 Code is quite clear that Congress did not intend the new codification to alter the preexisting meaning of any of its provisions.[294] Notably, however, Congress included provisions regarding the BTA in Subtitle A, along with the income, estate, and gift tax provisions. By contrast, although Congress separated the provisions addressing assessment into a

[289] Act of June 30, 1926, ch. 712, 44 Stat. 777.

[290] See generally I.R.C. §§ 91–138, 154 (1926) (providing for the assessment and collection of taxes but also including the Anti-Injunction Act as § 154).

[291] An Act to Consolidate and Codify the Internal Revenue Laws of the United States, 53 Stat. 1 (1939) (codified as Title 26 of the U.S.C.).

[292] H.R. Rep. No. 76-6, at 2 (1939).

[293] See supra notes 271–76 and accompanying text (documenting these changes).

[294] S. Rep. No. 76-20, at 1 (1939) ("The following should be noted in connection with the general character of the code. First. It makes no changes in existing law."); H.R. Rep. No. 76-6, at 3 (stating the same).

separate subchapter from those concerning collection,[295] all of the assessment and collection provisions were grouped with other general administrative provisions in Subtitle D. According to legislative history, the reason for this organizational choice was that BTA review was limited to those taxes governed by Subtitle A, whereas the assessment and collection provisions extended to other taxes as well.[296] Consistent with its placement among the collection provisions since 1867, the AIA remained with the collection provisions in the 1939 Code.[297]

The placement of the AIA within the codified tax laws changed only when Congress reorganized and recodified them again in 1954. This time, Congress sought to revisit the tax laws holistically, incorporating substantive changes as well as "rearrang[ing] the provisions to place them in a more logical sequence."[298] As part of that year's overhaul of the tax code, Congress moved the AIA from the subchapter about collections to a new chapter addressing judicial review.[299] Detaching the AIA from its historic place among the provisions governing collections, and incorporating it among the provisions concerning judicial review, may have contributed to contemporary perceptions that the AIA's scope is broader than historically understood. In the legislative history, however, Congress specified that its movement of the AIA made "no material change in existing law."[300] The AIA's placement has not changed since.[301]

In summary, the text of the AIA has been modified several times to create various statutory exceptions, but its core phrase precluding judicial review from "restraining the assessment and collection of any tax" has not changed since 1867. Various codifications have moved the AIA from among the provisions specifically addressing the collection function to the provisions governing judicial review more generally. Regardless of these changes, the available evidence indicates that

[295] See I.R.C. §§ 3640–3646 (1940) (governing assessment); id. §§ 3650–3663 (providing for the collection of taxes, which includes the Anti-Injunction Act).

[296] H.R. Rep. No. 76-6, at 3–4.

[297] I.R.C. § 3653 (1940).

[298] S. Rep. No. 83-1622, at 1 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4621, 4629.

[299] See I.R.C. § 7421(a) (1958) (falling within subchapter B of Chapter 76 of the 1954 Code, with Chapter 76 entitled "Judicial Proceedings" and subchapter B entitled "Proceedings by taxpayers").

[300] See S. Rep. No. 83-1622, at 610, *reprinted in* 1954 U.S.C.C.A.N. 4621, 5260.

[301] See I.R.C. § 7421(a) (2012).

Congress at no time intended to alter the meaning or scope of that core phrase from the original understanding as of 1867.

C. Post–Civil War Evolution of Assessment and Collection

Since 1867, by comparison, key aspects of the assessment and collection functions have changed quite a bit—particularly as regards the timing of the assessment function with the receipt of most tax revenues. Even as it adopted the corporate income tax in 1909 and the modern individual income tax in 1913, Congress initially retained much of the existing administrative structure that dated back to the Civil War, including provisions governing the assessment and collection functions.[302] Employers other than the government were tasked briefly with withholding income taxes for the first time,[303] but this unpopular measure was repealed four years later.[304] Otherwise, much as before, each taxpayer subject to the income tax needed to file a tax return, just with his home district collector rather than an assessor and by March 1 rather than May 1.[305] Again, the IRS in this era endeavored to examine virtually every tax return filed,[306] and collectors still had the authority to increase a tax liability upon giving notice to the affected person.[307] Taxpayers could appeal such decisions to the Commissioner of Internal Revenue,[308] who made assessments and notified taxpayers of their liability by June 1.[309] Taxes again became due on June 30.[310] Collectors had the same tools (levy and distraint) to bring recalcitrant taxpayers into compliance.[311] Over the succeeding forty years, however, Congress

[302] Revenue Act of 1913, ch. 16, § 2A–D, 38 Stat. 114, 166–69.

[303] See Anuj C. Desai, What a History of Tax Withholding Tells Us About the Relationship Between Statutes and Constitutional Law, 108 Nw. U. L. Rev. 859, 882 (2014) (describing how the Revenue Act of 1913 entrenched withholding at the source into American tax administration).

[304] See id. (documenting this short-lived experiment with wage withholding by employers).

[305] Revenue Act of 1913 § 2D.

[306] Dubroff & Hellwig, supra note 256, at 14.

[307] Revenue Act of 1913 § 2D.

[308] Id.

[309] Id. § 2E.

[310] Id.

[311] See supra note 288 and accompanying text (collecting compiled statutes that list the collection procedures from the Civil War, which were still in effect).

slowly modified these procedures until modern income tax administration took shape and diminished the practical significance of formal assessment and collection functions from the perspective of most taxpayers and most tax receipts.

As already noted, World War I saw an expansion of the individual income tax as well as the addition of excess profits taxes.[312] The number of tax returns filed increased substantially, and the difficulties of administering the tax system using Civil War–era procedures multiplied as well, prompting a series of reforms, including but not limited to the creation of the BTA in 1924. Another key change came in 1918, when Congress made income tax payments due at the same time as the income tax returns themselves, then on March 15 of each year.[313] Taxpayers could choose to pay their liability in a lump sum on that date or to make four payments—one on March 15 and the others every three months thereafter.[314] After receiving the returns, the Commissioner of Internal Review still needed to make final lists assessing the tax liability of each person.[315] Those lists were certified and later sent to the district collectors who would then, if necessary, take steps to bring taxpayers into compliance.[316] But, obviously, the IRS would no longer have the opportunity to evaluate the accuracy of tax returns, propose adjustments, and consider appeals thereof prior to taxes becoming due.

The New Deal and World War II altered the timing of tax payments further, introducing the concept of "pay-as-you-go taxation."[317] The Social Security Act provided for employment taxes equal to a percentage of employees' wages to be withheld and paid to the government by employers along with information returns filed

[312] See, e.g., Bank et al., supra note 218, at 52–79 (discussing legislative action to fund World War I).

[313] Revenue Act of 1918, ch. 18, § 227(a), 40 Stat. 1057, 1075 (1919).

[314] Id. § 250(a).

[315] Id. § 3176 (giving the Commissioner the power to assess the taxes provided by the Act). The assessment provisions from the Revised Statutes of 1872 still applied to describe how the Commissioner would exercise that power. See 1 Rev. Stat. § 3182 (1875) (authorizing the Commissioner to make assessments and "certify a list of such assessments when made to the proper collectors respectively, who shall proceed to collect and account for the taxes and penalties so certified").

[316] Revenue Act of 1918 § 3176.

[317] See Carolyn C. Jones, Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income Tax During World War II, 37 Buff. L. Rev. 685, 703 (1989) (using the pay-as-you-go term to describe the shift to wage withholding).

quarterly.[318] World War II saw the expansion of the individual income tax "[f]rom a 'class tax' to a 'mass tax.'"[319] Because many people struggled to make lump sum income tax payments annually or even quarterly, Congress again turned to wage withholding by employers as the wages were earned.[320] For individuals whose income was not subject to wage withholding, and later for corporations, Congress instituted a system of advance installment payments of estimated income taxes.[321] As a result of these changes, most taxes are paid before tax returns are ever filed.

For many years, Congress continued to use the statutory procedures governing assessments from the 1860s with little change. In 1874, at the same time that the AIA became part of the Revised Statutes, Congress also codified the Civil War–era assessment and collection provisions.[322] Like the AIA, those assessment provisions also became part of the U.S. Code in 1926.[323] By 1954, however, Congress recognized that sending millions of tax returns to Washington, D.C. for inspection and certification was an inefficient system.[324] Accordingly, it reformed this process by transforming assessments into the automatic function we

[318] See Desai, supra note 303, at 889–95 (describing introduction and early administration of Social Security Act tax requirements).

[319] See id. at 896 (quoting Jones, supra note 317, at 685–86) (observing that World War II saw the federal individual income tax base expand from 7 million taxpayers in 1940 to 42 million in 1945).

[320] Revenue Act of 1942, ch. 619, § 172, 56 Stat. 798, 887–92 (adopting wage withholding for new "Victory Tax" on individuals); Current Tax Payment Act of 1943, ch. 120, § 2, 57 Stat. 126, 128 (expanding wage withholding to the individual income tax as well as the Victory Tax); see also Desai, supra note 303, at 896–97 (describing the history of World War II wage withholding provisions in greater depth).

[321] Current Tax Payment Act of 1943, § 5, 57 Stat. 126, 141–45 (adopting estimated income tax payment requirements for individual taxpayers). Congress did not adopt an estimated tax payment requirement for the corporate income tax until 1954. Internal Revenue Code of 1954, ch. 736, § 6655, 68A Stat. 825 (1958) (codified at I.R.C. § 6655 (2012)).

[322] See supra notes 285–87 and accompanying text (discussing the codification of existing laws into the Revised Statutes).

[323] See generally 26 U.S.C. §§ 91–138, 154 (1926) (providing for the assessment and collection of taxes but also including the Anti-Injunction Act).

[324] See S. Rep. No. 83-1622, at 572–73 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4621, 5221 (explaining that the change was to "provide[] that the assessments shall be made by recording the liability of the taxpayer . . . through machine operations or through any other modern procedure"); H.R. Rep. No. 83-1337, at A405 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4017, 4552 (same).

have today.[325] When a taxpayer files a tax return, his tax liability is automatically recorded.[326] If the IRS has reason to believe an assessment is inaccurate, then officials may pursue a supplemental assessment, for example by conducting an audit to verify the taxpayer's liability.[327] This automatic assessment process remains in place today.

Regarding collection procedures, again, most taxes are now paid in advance through pay-as-you-go withholding and estimated tax payments. Employers and other third-party payors who fail to withhold and remit as the IRC requires are subject to penalties for such failure;[328] individuals and corporations who fail to make estimated payments must pay interest to compensate the government for paying belatedly.[329] When taxes have not been paid through withholding, through estimated payments, or with a tax return, the IRS first demands payment by letter.[330] After a statutorily defined time period, IRS officials may levy, distrain, and ultimately sell the property of taxpayers to satisfy their outstanding tax liability.[331] As noted above, however, Congress has frequently added additional procedural protections for taxpayers subject to these collection actions, expanding notice and hearing requirements,

[325] Internal Revenue Code of 1954, § 6203, 68A Stat. 768 (1958) (codified at I.R.C. § 6203 (2012)).

[326] Id.

[327] See I.R.C. § 6204 (1958) (stating that "a supplemental assessment" may be made "whenever it is ascertained that any assessment is imperfect or incomplete in any material respect").

[328] See I.R.C. § 6672(a) (2012).

[329] See id. §§ 6621(a)(2), 6654(a), 6655(a).

[330] Compare 1 Rev. Stat. § 3184 (1875) (stating that, after a collector receives a list from the Commissioner, he shall "give notice to each person liable to pay any taxes stated therein, to be left at his dwelling or usual place of business, or to be sent by mail"), with I.R.C. § 6303 (2012) ("[A]fter the making of an assessment of a tax pursuant to section 6203," the Secretary shall "give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address.").

[331] Compare 1 Rev. Stat. § 3187 (stating that, if a person neglects to pay taxes "within ten days after notice and demand, it shall be lawful for the collector . . . to collect the said tax[]"), and id. § 3188 ("In such case of neglect . . . the collector may levy . . . upon all property and rights to property . . . ."), with I.R.C. § 6321 ("If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.").

authorizing judicial review, and staying collection pending the completion of those processes.[332]

In summary, both at the time of the Civil War and in the early days of the modern income tax, examinations and agency-level appeals could and often did occur in the period between the filing of a return and the acts of assessing taxes and pursuing collections based on that return. Indeed, the system of assessments and collections adopted by Congress in 1862 clearly contemplated precisely that procedural sequence. Moreover, most taxes did not come due and were not paid until after returns were filed and assessments were made. The post-return, pre-assessment period was a critical one in which a taxpayer might seek injunctive relief upon becoming aware that an adjustment had been proposed. But, even more significantly, without the AIA to protect the government's ability to pursue the assessment and collection functions unimpeded by judicial review, the government might have been entirely unable to obtain the funds it needed to operate. Today, by contrast, because of pay-as-you-go taxation mechanisms of third-party withholding and advance estimated tax payments, most taxes are paid before a return is ever filed. Assessments take place automatically upon the filing of a return without an examination of the return's content. Subsequent examinations and appeals may lead to additional assessments. And absent the AIA, taxpayers facing an audit could seek injunctive and declaratory relief rather than waiting for a deficiency notice and petitioning the Tax Court. But those secondary assessments, while significant, do not represent the bulk of tax collections.

D. Taxes and Penalties, Rules and Regulations

The AIA does not define the term "tax." Consequently, at least in theory, IRS assessment and collection of amounts not designated as taxes would not be covered by the AIA. The courts have long construed the term broadly for AIA purposes. Nevertheless, labels have occasionally proved deceptive in this regard.

When the AIA was first adopted in 1867, the word "tax" carried the same ordinary meaning as it does today. For instance, Bouvier's Law Dictionary, which was published in that same year, defines a tax as "a contribution imposed by government on individuals for the service of

[332] See Subsection II.B.1 (describing the addition of various exceptions from the AIA).

the state."[333] The Supreme Court's only major decision concerning the meaning of the word "tax" came in 1883 with the *Snyder* case, wherein the Court considered whether an allegedly erroneous or illegal tax assessment should qualify as a tax for AIA purposes.[334] *Snyder* involved a farmer who sought to enjoin revenue officials from seizing and selling his property to collect an allegedly illegally assessed tax on his farming business.[335] His claims were several, including that the assessment was both untimely and unclear for failing to specify the basis for the tax and that revenue officials should have pursued a bond he posted to ensure stamp tax compliance instead of seizing other property.[336] As to the merits, the Court observed at least that various notations on the assessment made clear that it concerned stamp taxes on the farmer's tobacco crop. Regardless, the Court held that the AIA foreclosed its consideration of all of the farmer's claims.[337] According to the Court, Congress passed the AIA precisely for the purpose of stopping taxpayers from bringing suits challenging taxes "alleged to have been erroneously or illegally assessed or collected."[338] Thus, the Court elaborated, the word "tax" in the AIA means "that which is in a condition to be collected as a tax, and is claimed by the proper public officers to be a tax, although . . . alleged to have been erroneously or illegally assessed."[339] In essence, right from the start, *Snyder* laid down the basic principle that the AIA extends to claims that the IRS has misconstrued and thus exceeded its statutory authority in attempting to collect taxes.

Nevertheless, based on the plain language of the statute, the Court has often held that the AIA applies only to taxes and not to other exactions

[333] 2 John Bouvier, A Law Dictionary 578 (12th ed. 1868); see also William A. Wheeler, A Dictionary of the English Language 737 (Chauncey A. Goodrich & Noah Porter eds., 1872) (defining "tax" as "[a] charge, especially a pecuniary burden imposed by authority; as, (*a*.) A levy made upon property for the support of government. (*b*.) *Especially*, the sum laid upon a specific thing, as upon polls, lands, houses, income, &c").

[334] 109 U.S. at 192. The Court did, however, mention the AIA several times in cases involving state taxes. See, e.g., Andreae v. Redfield, 98 U.S. 225, 232 (1878); Taylor v. Secor, 92 U.S. 575, 613 (1875); Hornthall v. Internal Revenue Collector, 76 U.S. (9 Wall.) 560, 566 (1869); City of Philadelphia v. The Collector, 72 U.S. (5 Wall.) 720, 733 (1866).

[335] 109 U.S. at 189.

[336] Id. at 190.

[337] Id. at 192–93.

[338] Act of July 13, 1866, ch. 184, § 19, 14 Stat. 98, 152, as amended by Act of March 2, 1867, ch. 169, § 10, 14 Stat. 471, 475.

[339] *Snyder*, 109 U.S. at 192.

such as penalties.[340] Distinguishing between taxes and penalties, however, is a notoriously arduous task.[341] Complicating matters, courts have treated at least some penalties as taxes for AIA purposes[342] and vice versa.[343] Treating certain penalties as taxes for assessment and collection purposes has deep textual and historical roots, which perhaps explains, at least in part, some of the more recent AIA jurisprudence surrounding the meaning of the term "tax" as regards IRC penalty provisions.

From the very beginning of the AIA's existence, Congress has used two different main types of penalties to encourage compliance with the tax laws. The first type is criminal penalties, which arise when a taxpayer takes willful action to avoid tax liability.[344] Internal revenue officials enforce these penalties through the criminal justice system.[345] The second type of penalties is civil in nature and is assessed and collected in the same manner as taxes.[346]

The distinction between criminal and civil penalties dates back at least to the Civil War. Many penalties in that era were specified by reference to a certain percentage of the associated taxes. For example, in Section 14 of the Revenue Act of 1864, Congress authorized revenue authorities to add either a fifty or a one hundred percent addition to income taxes whenever a taxpayer either failed to file or filed an inaccurate list or return as required.[347] The Act states: "[A]nd the amount

[340] See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 544–45 (2012); Lipke v. Lederer, 259 U.S. 557, 561–62 (1922); Tovar v. Jarecki, 173 F.2d 449, 451 (7th Cir. 1949).

[341] Cf. Robert D. Cooter & Neil S. Siegel, Not the Power to Destroy: An Effects Theory of the Tax Power, 98 Va. L. Rev. 1195, 1196 (2012) (recognizing the difficulty and describing the Supreme Court's efforts to distinguish between taxes and penalties for Commerce Clause purposes as "inadequate to the task").

[342] See, e.g., Nuttelman v. Vossberg, 753 F.2d 712, 714 (8th Cir. 1985) (per curiam); Prof'l Eng'rs v. United States, 527 F.2d 597, 599 (4th Cir. 1975).

[343] See, e.g., *Tovar*, 173 F.2d at 451.

[344] See, e.g., Revenue Act of 1867 §§ 9, 12, 28–29, 32 (establishing various tax crimes); I.R.C. § 7201 (establishing criminal penalties for willful tax evasion). For a more extended discussion of tax crimes and criminal enforcement of the tax laws, see 4 Laurence F. Casey Federal Tax Practice § 13B (2015).

[345] As the Tax Court explained, traditional penalties punish the "commission of crimes while civil fraud additions to tax constitute remedial penalties." Schachter v. Comm'r, 113 T.C. 192, 196 (1999), aff'd, 255 F.3d 1031 (9th Cir. 2001).

[346] 4 Casey, supra note 344, § 13A:01.

[347] Revenue Act of 1864, ch. 173, § 14, 13 Stat. 223, 226–27.

so added to the duty shall, in all cases, be collected by the collector at the same time and in the same manner with the duties."[348] In other words, government officials simply added a percentage-based increase to a taxpayer's tax liability as a penalty for noncompliance with the tax laws and collected the taxes and penalty at the same time. By contrast, a person who provided an assessor of internal revenue with a false return with the intention "to defeat or evade the valuation, enumeration, or assessment" could be fined or imprisoned "upon conviction" by a "district or circuit court of the United States."[349] These early penalty provisions formed "the seed[s] from which the current penalty structure grew."[350]

Although the present IRC includes many more penalties than the early revenue acts, both the civil/criminal distinction and the approach to assessing and collecting civil penalties in the same manner as taxes remain in place. The penalty provisions for false, inaccurate, or missing tax returns moved from Civil War revenue legislation into the Revised Statutes.[351] In the short-lived Wilson-Gorman Tariff of 1894, Congress clarified that criminal penalties—i.e. those imposed through the courts alone—applied only to intentional conduct.[352] During World War I, Congress specified separate penalties for negligent actions as opposed to those committed willfully.[353] Finally, in 1954, Congress consolidated most civil and criminal penalties into distinct subchapters of the IRC.[354] From the Civil War into the early twentieth century, penalty provisions had been scattered throughout parts of tax legislation addressing

[348] Id.

[349] Id. § 15. For an example of criminal prosecution under a revenue act, see *United States v. Ebner*, 25 F. Cas. 973, 973 (D. Ind. 1867) (No. 15,020).

[350] Donald Arthur Winslow, Tax Penalties—"They Shoot Dogs, Don't They?", 43 Fla. L. Rev. 811, 823 (1991); see also Revenue Act of 1918, ch. 18, § 250(b), 40 Stat. 1057, 1083 (adding explicit negligence-based penalties).

[351] See 1 Rev. Stat. §§ 3176, 3179, 3184 (1875).

[352] Act of Aug. 27, 1894, ch. 349, § 34, 28 Stat. 509, 557. The Act reenacted the Civil War statute but modified it to apply a one hundred percent penalty to "any return of a false or fraudulent list or valuation intentionally." Id. at 559.

[353] Winslow, supra note 350, at 829–30.

[354] Internal Revenue Code of 1954, Pub. L. No. 83-591, ch. 736, 68A Stat. 3 (current version at 26 U.S.C. (2012)).

different types of taxes.[355] In 1954, Congress moved civil penalties into a standalone subchapter entitled "Additions to the Tax and Additional Amounts" and made clear that such penalties should be assessed and collected in the same manner as taxes.[356] It was also at this time that Congress added the sentence of I.R.C. § 6671, referenced by the D.C. Circuit in *Florida Bankers Ass'n v. U.S. Department of the Treasury*, providing that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter," further signaling Congress's understanding and intent that civil penalties would be imposed using the same assessment and collection procedures as taxes.[357] Meanwhile, penalties administered through the courts alone became part of a chapter entitled "Crimes, Other Offenses, and Forfeitures."[358]

The present IRC divides most civil penalties generally into subcategories of "Additions to the Tax and Additional Amounts"[359] and "Assessable Penalties."[360] Civil penalties categorized as "Additions to the Tax" or "Additional Amounts" are consolidated in subchapter A of Chapter 68 of the IRC and typically correspond with a direct obligation to pay taxes—e.g., failing to file a tax return and pay the associated taxes due;[361] paying taxes due with a bad check;[362] or filing an inaccurate return.[363] Most of these penalties are computed on an ad valorem basis, as a percentage of tax liability.[364] Some subchapter A provisions speak of "add[ing]" some amount "to the amount required to be shown as tax," without using the word "penalty" at all.[365] Other subchapter A provisions

[355] The penalty provisions remained scattered throughout the revenue acts, and this persisted even in the Internal Revenue Code of 1939. Cf. I.R.C. §§ 2156, 2308, 2357, 2729, 2806 (Supp. V 1939) (providing examples of various penalty provisions).

[356] See Pub. L. No. 83-591, §§ 6671–6674, 68A Stat. 3, 828 (codified at I.R.C. §§ 6671–6674 (1954)) (consolidating assessable penalty provisions); id. §§ 7201–7214 (consolidating criminal penalty provisions).

[357] I.R.C. § 6671(a) (1954).

[358] Id. §§ 7201–7275.

[359] I.R.C. Chapter 68, Subchapter A, covering §§ 6651–6665 (2012).

[360] Id. at Chapter 68, Subchapter B, covering §§ 6671–6725.

[361] Id. § 6651 (entitled "Failure to file tax return or to pay tax").

[362] Id. § 6657 (entitled "Bad checks").

[363] Id. § 6662 (entitled "Imposition of accuracy-related penalty on underpayments").

[364] 4 Casey, supra note 344, § 13A:01 (making this observation).

[365] I.R.C. § 6651(a)(2); see also id. §§ 6652(b), 6654(a), 6655(a) (using similar language).

also use the word "penalty," even as the amount in question is a percentage of the associated tax.[366]

By comparison, civil penalties categorized as "Assessable Penalties" are consolidated in subchapter B of Chapter 68 and tend to correspond with filing or other requirements that do not reflect taxes owed by the party making the filing—e.g., failing to collect and pay over taxes owed by another taxpayer, as with the employee portion of payroll taxes;[367] failing to file required informational reports;[368] or failing to file returns reporting the activities of pass-through entities like S corporations and partnerships.[369] Yet, several provisions within subchapter B speak of such penalties being paid "in addition to the tax,"[370] "in the same manner as a tax,"[371] or something similar.[372] Irrespective of labels or other terminology, I.R.C. § 6751, which imposes procedural requirements for most of the civil penalties in both subchapters A and B of Chapter 68, refers to them all as "penalt[ies]."[373]

Notwithstanding the consolidation of most civil penalties into a single chapter of the IRC, a few civil penalty provisions lie elsewhere in the IRC and thus might be thought to escape the characterization as a tax imposed by I.R.C. § 6671. For example, the shared responsibility payment at issue in *NFIB v. Sebelius*, which the Court in that case recognized as a penalty rather than a tax for AIA purposes, is in I.R.C. § 5000A, in an entirely different subtitle from most of the IRC's penalty provisions.[374] Nevertheless, as I.R.C. § 5000A makes clear, that penalty

[366] Id. §§ 6653, 6656.

[367] Id. § 6672 (entitled "Failure to collect and pay over tax, or attempt to evade or defeat tax" and imposing a penalty equal to the amount required to be withheld and paid over).

[368] See, e.g., id. § 6692 (entitled "Failure to file actuarial report"); id. § 6693 (entitled "Failure to provide reports on certain tax-favored accounts or annuities"); id. § 6707 (entitled "Failure to furnish information regarding reportable transactions").

[369] See, e.g., id. § 6698 (entitled "Failure to file partnership return"); id. § 6699 (entitled "Failure to file S corporation return").

[370] Id. §§ 6715(a), 6715A(a), 6719(a).

[371] Id. § 6724(b) (using this language in connection with penalties imposed by I.R.C. §§ 6721, 6722, and 6723).

[372] Id. § 6707A(b) (imposing a penalty of "75 percent of the decrease in tax shown on the return as a result of" an unreported reportable transaction).

[373] Id. § 6751(c).

[374] Id. § 5000A; see also Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 543 (2012) (discussing this provision).

too "shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68."[375]

In short, the IRC uses terms like "additions to the tax" and "penalty" more or less interchangeably to describe civil penalties. Regardless of the label, all of the above-described civil penalties are assessed and collected in the same manner as taxes, whether as additions to tax or separately imposed.[376] Hence, virtually all civil penalties have been referred to at one time or another as assessable penalties, as distinguished from criminal ones, and irrespective of whether the IRC's text actually refers to them as such.

Turning once again to judicial interpretations of what constitutes a tax for AIA purposes, courts often have held that civil penalties are taxes for AIA purposes. In *NFIB*, the Court observed that "Congress can, of course, describe something as a penalty but direct that it nonetheless be treated as a tax for purposes of the [AIA]."[377] As an example, the Court pointed to the language in Section 6671 that deems "assessable penalties" to be taxes.[378] This observation from *NFIB*, albeit in dicta, is in accord with longstanding precedent from courts of appeal.[379] Indeed, there are no apparent instances of courts treating civil penalties formally categorized as "assessable penalties" as anything other than taxes.[380]

On the other hand, on a few occasions, the Supreme Court has concluded that exactions labeled as taxes instead are penalties and thus outside the scope of the AIA.[381] The most prominent examples come from a pair of companion cases involving the National Prohibition Act, which authorized the IRS to collect a steep "tax" on those who sold

[375] I.R.C. § 5000A.

[376] See, e.g., id. § 6671 (providing that "assessable penalties" in Subchapter B of Chapter 68 "shall be assessed and collected in the same manner as taxes").

[377] 567 U.S. at 544.

[378] Id.

[379] See, e.g., Nuttelman v. Vossberg, 753 F.2d 712, 714 (8th Cir. 1985); Prof'l Eng'rs v. United States, 527 F.2d 597, 599 (4th Cir. 1975).

[380] Based on Westlaw searches involving the terms "no suit" and "penalty" within a paragraph of each other, and "Anti-Injunction Act" and "penalty."

[381] For examples of courts of appeals decisions undertaking this same functionalist reasoning, see *Korte v. Sebelius*, 735 F.3d 654, 669–71 (7th Cir. 2013) (defining the employer contraceptive coverage mandate tax under the Affordable Care Act as a penalty), and *Tovar v. Jarecki*, 173 F.2d 449, 451–52 (7th Cir. 1949) (treating a steep marijuana tax as a penalty for AIA purposes).

liquor without a license.[382] In *Lipke v. Lederer*, the Court noted that "[t]he mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid."[383] Looking to how the "tax functioned," the Court determined that it "clearly involve[d] the idea of punishment for infraction of the law—the quintessential function of a penalty."[384] Although the Supreme Court in *NFIB* indicated that labels matter,[385] as *Lipke* showed, Congress's choice to call an exaction a tax or a penalty has not always been outcome determinative.[386]

The meaning of the word "tax" as used in the AIA has not been litigated frequently. The mine run of AIA cases has involved sums that fall comfortably under any definition of a tax. On rare occasions, however, thorny issues have arisen when courts have been forced to distinguish between taxes and penalties. As a general principle, when the IRC calls upon IRS officials to assess and collect a penalty through the civil assessment and collection process, the AIA will apply. But sometimes, courts have disregarded statutory labels in evaluating the AIA's scope, suggesting that—recent jurisprudence notwithstanding—those labels ought not be regarded as definitive.

Beyond the tax/penalty distinction, which has been an occasional challenge throughout the AIA's history, one wrinkle to the debate is relatively new and worthy of mention: the extension of penalties to taxpayers who disregard IRS rules and regulations. Like the contemporary IRC,[387] the Civil War revenue acts gave first assessors and then the Commissioner of Internal Revenue authority to adopt "rules and regulations" as needed to accomplish legislative purposes.[388] Unlike

[382] Regal Drug Corp. v. Wardell, 260 U.S. 386, 389 (1922); Lipke v. Lederer, 259 U.S. 557, 561 (1922); see also Allen v. Regents of Univ. Sys. of Ga., 304 U.S. 439, 448–49 (1938) (finding, albeit in dicta, that a tax related to the ticket sales for event admissions is a penalty).

[383] 259 U.S. at 561.

[384] Id. at 562.

[385] 567 U.S. at 543–45.

[386] 259 U.S. at 561–62.

[387] I.R.C. § 7805(a) (2012).

[388] Revenue Act of 1861, ch. 45, § 24, 12 Stat. 292, 300 (calling upon assessors collectively to "make and establish such rules and regulations as to them shall appear necessary for" effectuating the act's provisions); Revenue Act of 1862, ch. 119, § 1, 12 Stat. 432, 432–33 (charging the Commissioner of Internal Revenue with "preparing all the . . . regulations . . . which may be necessary to carry this act into effect").

today, however, no one in the 1860s would have understood that language to confer quasi-legislative discretion on revenue officials.[389] As Justice Thomas Cooley wrote in his renowned 1879 tax treatise, in the Civil War era, executive officials tasked with enforcing the tax laws were expected to "keep strictly within the authority those laws confer, and [not] add to or vary, in the slightest degree, any tax lawfully levied."[390] "So inflexible is this rule," he said, "that even the legislature itself . . . cannot clothe them with its own authority" for the purpose of enforcing the tax laws.[391] Furthermore, courts in that era embraced the principle that ambiguity in the tax laws should be construed to favor taxpayers.[392] Authority to adopt rules and regulations conferred a certain amount of discretion, for instance regarding day-to-day procedural matters or how and when to deploy enforcement resources, not the power to adopt broad, legally binding substantive pronouncements.

Complete examination of the evolution of the relationship between penalties and the discretionary powers of revenue officials is beyond the scope of this Article. One of us has addressed that topic at length elsewhere.[393] When contemplating the tax/penalty distinction as it relates to the AIA's scope, however, it is worth at least noting that none of Congress, revenue officials, or the courts would have contemplated either that authority to adopt rules and regulations would confer the broad policymaking discretion Treasury and the IRS enjoy today or that declining to follow Treasury regulations and IRS guidance documents implementing and interpreting the IRC's substantive terms might itself be punishable through penalties that would be assessed and collected like taxes.

[389] See Thomas W. Merrill & Kathryn Tongue Watts, Agency Rules with the Force of Law: The Original Convention, 116 Harv. L. Rev. 467, 488–91 (2002) (discussing late 1800s understandings of rulemaking authority generally); cf. Kristin E. Hickman, The Need for *Mead*: Rejecting Tax Exceptionalism in Judicial Deference, 90 Minn. L. Rev. 1537, 1564–68 (2006) (documenting similar understandings in the early 1900s).

[390] Thomas M. Cooley, A Treatise on the Law of Taxation 33 (1879).

[391] Id.

[392] Id. at 199–208.

[393] E.g., Hickman, Unpacking, supra note 195, at 524–29; Hickman, IRB Guidance, supra note 195, at 265–69; Hickman, supra note 389, at 1592–96.

III. RESTORING THE ORIGINAL MEANING AND FUNCTION OF THE ANTI-INJUNCTION ACT

Over the past half-century in particular, judicial interpretations of the AIA have overgeneralized and lost sight of the AIA's original scope and purpose of protecting the IRS's enforcement authority via the functions of assessment and collection of tax revenues.[394] Courts reflexively and uncritically invoke the AIA as an efficient means of resolving the convoluted claims of obvious tax scofflaws, most of whom were already engaged directly with IRS collection processes anyway. In other instances, the AIA undoubtedly seems like the narrowest ground for resolving otherwise messy cases. In a truly unusual case with a sympathetic party or other good reason for considering the merits, courts can always make an exception. And when the IRS or the courts decline to make an exception notwithstanding great potential hardship, Congress can step in.

When it comes to pre-enforcement review of Treasury regulations and IRS guidance documents, the problem with this approach should be obvious: it removes the courts as a critical check against sweeping IRS policymaking discretion, serving the convenience of the IRS and the courts, but disserving taxpayers and the credibility of the tax system as a whole. Often acceding to the IRS's vision of "a world in which no challenge to its actions is ever outside the closed loop of its taxing authority," courts have turned the AIA into an unjustified vestige of tax exceptionalism and have allowed Treasury and the IRS to act without the transparency and public accountability demanded by Congress through the APA.[395] This problem can be solved through restoring the original purpose and design of the AIA.

The Supreme Court's most recent TIA decision, *Direct Marketing Ass'n v. Brohl*, most closely approximates the original understanding of the AIA by recognizing that only a subset of tax cases fall within the TIA's, and thus the AIA's, proper scope. As discussed earlier, despite minor textual differences, the Court has always interpreted the AIA and TIA in lockstep.[396] But the Court in *Direct Marketing* left open just how proximate a legal challenge must be before it "stops," and thus

[394] See supra Subsection I.A.1 (surveying contemporary AIA case law).

[395] Cohen v. United States, 650 F.3d 717, 726 (D.C. Cir. 2011).

[396] See supra Subsection I.A.3 (discussing the Supreme Court's long history of interpreting the TIA and AIA similarly).

"restrains," the assessment or collection of a tax.[397] In other words, the Court provided no test for determining precisely where to draw the line operationally between stopping and inhibiting the assessment and collection functions.

To fill this void, we draw from the historical analysis above, looking not just to the AIA's text and context but also its interaction with Civil War tax administrative practices and their present-day analogues. Based on that analysis, we propose an "engagement test" that focuses on evidence of IRS engagement with taxpayers in enforcement contexts. We believe that a test based on IRS engagement with taxpayers restores the tighter temporal connection between the AIA and the assessment and collection functions that Congress anticipated when it enacted the AIA. Further, the engagement test brings the AIA into harmony with the APA and the Supreme Court's interpretation of the TIA by clearing the way for pre-enforcement challenges to Treasury regulations, restoring transparency and public accountability to tax administration.

Whether the AIA applies to limit pre-enforcement judicial review of Treasury regulations and IRS guidance documents is an issue of first impression for the Supreme Court and most circuit courts, and the Supreme Court's past interpretations of the AIA are sufficiently varied in their analysis that the courts should perceive their capacity to adopt the engagement test and consider such cases as consistent with the text, history, and purposes of the AIA and the IRC, as well as to bring the AIA in line with the APA and the TIA. Recognizing, however, that the courts' past struggles to interpret the AIA may complicate their ability to accomplish the desired coherence, we also offer a potential legislative solution to the problem. Irrespective of whether the courts or Congress provide the vehicle for clarifying the AIA's scope, we address potential counterarguments, including the frequently raised and always misguided view that pre-enforcement review of Treasury regulations and IRS guidance documents will hamper revenue collection excessively.

[397] Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1133 (2015) ("The question—at least for negative injunctions—is whether the relief to some degree stops 'assessment, levy or collection,' not whether it merely inhibits them.").

A. Using History to Explain the Anti-Injunction Act's Scope

By its plain language, the AIA blocks only those lawsuits that "restrain[] the assessment or collection of [a] tax."[398] As the Supreme Court has often observed, and has been outlined above, the terms "assessment" and "collection" for this purpose refer to particular, discrete, and well-defined procedures in tax administration. Assume, for the sake of argument, two things: first, that the amount eventually to be assessed and collected actually is a tax, rather than a penalty or some other exaction—which, as noted above, can be its own murky question; and second, as the courts always have, that the AIA does not bar judicial review of every case that merely implicates the tax system but is at least constrained by its own terms.[399] With those assumptions, again, the question becomes whether restraining the assessment and collection of taxes means to stop them outright only when they are temporally imminent, or merely to make those functions more challenging to accomplish at some future time.[400]

In 1867, when the AIA was adopted, the only circumstances in which a taxpayer might have sought injunctive relief from assessment or collection would have occurred when revenue officials acted to enforce the tax laws against particular taxpayers. Thus, a taxpayer's request for injunctive relief would have been temporally proximate to the actual execution of the assessment and collection functions. Before Congress passed the AIA in 1867, taxpayers might have challenged income tax administration in court according to one of three conceivable scenarios. Each has analogues in contemporary tax administration, all associated with the initiation of IRS enforcement efforts.

The first centers on the filing and examination of tax returns. Specifically, taxpayers might have sought to enjoin assessment during the period after a tax return came due but before the assessors posted proposed assessments. Recall, for example, that in the Civil War era, taxpayers filed their income tax returns on May 1, but taxes were not

[398] I.R.C. § 7421(a) (2012) ("[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court . . . .").

[399] See, e.g., *Cohen*, 650 F.3d at 726 (citing *Hibbs v. Winn*, 542 U.S. 88, 102, 104 (2004), in rejecting the IRS's arguments that "no challenge to its actions is ever outside the closed loop of its taxing authority" and that "assessment and collection are part of a 'single mechanism' that ultimately determines the amount of revenue the Treasury retains").

[400] See supra note 30 and accompanying text (raising this question).

immediately assessed and would not come due until June 30.[401] During the two-month interim, assessors of internal revenue maintained authority to investigate any tax returns that they believed to be inaccurate. The assessments that the assessors eventually proposed could incorporate the results of those investigations as well as the tax returns as filed. Also, if a taxpayer failed to file a return, assessors could prepare a return on the taxpayer's behalf and propose assessments on that basis. At least in theory, finding themselves under investigation by their local assessors, taxpayers might have sued to stop such inquiries from leading to higher-than-anticipated proposed assessments. Functionally, such pre-assessment investigations are most analogous to the commencement of an examination or audit today, which usually occurs after a tax return is filed,[402] although in some cases when a taxpayer has failed to file.[403]

Second, and perhaps at least somewhat more likely, taxpayers who believed their proposed assessments as posted on the public lists to be inaccurate might have sought to enjoin assessors from finalizing those assessments.[404] Recall that in the Civil War era, assessors posted lists of proposed assessments and entertained taxpayer appeals prior to submitting final lists of tax assessments to the collectors. Today, taxes are due and automatically assessed upon the filing of a tax return, and most taxes are paid in advance through third-party withholding and estimated tax payments.[405] Consequently, the closest contemporary analogues to this former practice would be the issuance of a notice of deficiency,[406] or perhaps the issuance of a letter notifying the subject of

[401] See supra Section II.A (describing Civil War–era administrative procedures).

[402] 1 Casey, supra note 344, § 3:36 (discussing the examination process).

[403] See, e.g., I.R.C. § 6020 (authorizing the IRS to prepare and file a tax return on behalf of a taxpayer who has failed to file); Internal Revenue Manual § 4.12.1 (Oct. 5, 2010) (outlining the examination process for "nonfiled returns," including but not limited to preparing a return on the taxpayer's behalf).

[404] See Revenue Act of 1862, ch. 119, § 15, 12 Stat. 432, 439–40 (stating that assessors must make the lists of tax liability public and that such lists should remain in public for fifteen days); see also supra Section II.A (describing Civil War–era administrative procedures).

[405] See supra Section II.C (making this observation).

[406] See, e.g., I.R.C. § 6213(a) (precluding the IRS from assessing a deficiency generally until ninety days after sending a statutory notice of deficiency to the taxpayer in question); Internal Revenue Manual § 4.8.5.1.2 (Oct. 5, 2017) ("By law, the Service has the authority to make the appropriate assessments once the examination is completed and the taxpayer has

the results of an audit and the opportunity for an administrative appeal thereof, typically made thirty days prior to the issuance of a deficiency notice.[407]

Finally, in the Civil War era, taxpayers could and did bring suits to stop revenue collection procedures after assessment occurred.[408] Indeed, this was the most common scenario at the time. The contemporary analogue is the same—filing suit to stop IRS post-assessment collection efforts.[409]

Further historical context supports the proposition that these three examples, and their contemporary analogues, represent the AIA's proper range. Before 1875, Congress had yet to vest courts with federal question jurisdiction.[410] As the IRS at that time assessed and collected taxes entirely through local officials, diversity jurisdiction was also unavailable.[411] Injunctive relief was only available when injury to established legal or equitable rights was judged to be particularized, as well as imminent and irreparable.[412] Thus, the typical suit to which the AIA would have applied at the time of its enactment was a suit to enjoin individual revenue officials, specifically collectors, in state court.[413]

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been appropriately notified of the audit results."); 1 Casey, supra note 344, § 2.07 (summarizing the relationship between deficiency notices and the assessment function).

[407] Treas. Reg. § 601.105(d) (1967) (providing for notice of examination results and opportunity for administrative appeal thirty days prior to the issuance of a statutory notice of deficiency); 1 Casey, supra note 344, § 3.63 (describing the thirty-day letter).

[408] Revenue Act of 1862 § 19 (providing that collectors would receive a final list of tax liabilities from the assessors, then requiring collectors to give taxpayers ten days' notice before pursuing additional collection procedures); supra Section II.A (discussing same).

[409] I.R.C. § 6303 (calling for the initiation of collection proceedings "as soon as practicable, and within 60 days, after the making of an assessment of a tax"); see also 1 Casey, supra note 344, § 2.02 (observing that "[a]n assessment is required . . . before the [IRS] can take administrative action to collect an unpaid liability").

[410] Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (1875) (codified at 28 U.S.C. § 1331 (2012)); Merrell Dow Pharm. v. Thompson, 478 U.S. 804, 810 (1986).

[411] See supra Section II.A (explaining early assessment and collection practices).

[412] See, e.g., 1 High, supra note 246, § 1 ("Nor will a court of equity lend its aid by injunction for the enforcement of right or the prevention of wrong in the abstract, and unconnected with any injury or damage to the person seeking the relief."); id. § 7 ("And it is incumbent upon the party seeking relief by interlocutory injunction to show some clear legal or equitable rights, and a well-grounded apprehension of immediate injury to those rights.").

[413] Whether state courts actually possessed the authority to enjoin federal officers like assessors and collectors was in some doubt, see generally Richard S. Arnold, The Power of State Courts to Enjoin Federal Officers, 73 Yale L.J. 1385 (1964), but state courts did

Also, even at the time of the Civil War, courts generally considered the availability of an administrative appeal to preclude equitable relief.[414] At the time Congress adopted the AIA, the revenue laws afforded taxpayers an administrative appeal of proposed assessments before they became final.[415] In other words, once engaged with revenue officials to a sufficient degree to be able to state a claim upon which injunctive relief could be based, even without the AIA, taxpayers arguably would not have been able to seek injunctive relief until they first exhausted their opportunity for appeal with their local assessor or, later, the Commissioner of Internal Revenue. Thus, at the time Congress adopted the AIA, the courts were unlikely to entertain a suit for injunctive relief before the taxpayer engaged with revenue officials acting in an enforcement capacity.

In summary, all of the scenarios in which a taxpayer might have sought injunctive relief in 1867, and for a substantial period of time thereafter, involved direct and particular engagement between revenue officials—specifically, local assessors and collectors—and taxpayers, with timing proximate to the active pursuit of the assessment and collection functions by those officials. Once a taxpayer filed a return and

sometimes grant such injunctions. See, e.g., Kissinger v. Bean, 14 F. Cas. 689, 690 (C.C.E.D. Wis. 1875) (No. 7,853) (considering whether an injunction granted by a state court to restrain the sale of property by tax collector could be sustained in light of the AIA). The Revenue Act of 1866 specifically authorized (but did not require) defendant revenue officials to petition for removal of such cases to federal court prior to trial, which often occurred. See Act of July 13, 1866, ch. 184, § 67, 14 Stat. 98, 171–72; see also, e.g., Delaware R.R. Co. v. Prettyman, 7 F. Cas. 408, 408 (C.C.D. Del. 1872) (No. 3,767) (noting that action seeking injunction to restrain collection of assessed taxes had been removed from state court to federal court as per congressional authorization); Howland v. Soule, 12 F. Cas. 743, 744 (C.C.D. Cal. 1868) (No. 6,800) (describing the case as brought initially in state court to enjoin collection).

[414] See, e.g., 1 High, supra note 246, § 493 ("Where, therefore, a particular manner is provided by law, or a particular tribunal designated, for the settlement and decision of all errors or inequalities on behalf of persons dissatisfied with a tax, they must avail themselves of the legal remedy thus prescribed, and will not be allowed to waive such relief and seek in equity to enjoin the collection of the tax."); cf. Rio Grande R.R. Co. v. Scanlan, 44 Tex. 649, 651 (1876) ("A party asking for this extraordinary relief must have used all proper means to obviate the necessity of appealing to the court."); 84 C.J.S. Taxation § 943 (2017) (stating that "the taxpayer seeking relief from an alleged illegal and unjust assessment must first exhaust all of his or her legal remedies, including the remedies before administrative boards").

[415] See Revenue Act of 1862, ch. 119, § 15, 12 Stat. 432, 437 (providing for an appeal of the initial assessment to the district assessor).

revenue officials began investigating its veracity or made a proposed or final assessment, judicial review necessarily would stop the assessment or collection functions.[416] And once that initial engagement occurred, the AIA operated to allow revenue officials to administer the tax laws and pursue the assessment and collection functions to completion unimpeded by judicial intervention.

Based on this understanding of tax administrative practices in 1867 and their contemporary analogues, we can formulate and hereby propose an engagement test that would limit the AIA's scope to those cases in which the IRS has initiated enforcement proceedings of one manner or another against a particular taxpayer. As a procedural matter, the government would bear the burden of proving the AIA's applicability by demonstrating the engagement of its enforcement apparatus with the taxpayer in question. But the government need only show evidence of engagement with a taxpayer about a potential issue or liability to successfully invoke the APA.

Helpfully, the contemporary analogues to all of the above-described three historical scenarios involve a paper trail—e.g., the taxpayer files a tax return; the IRS initiates correspondence with the taxpayer, for example, to notify the taxpayer of its intent to examine a return as filed or to inquire about the taxpayer's failure to file;[417] the IRS sends a thirty-day letter or a statutory notice of deficiency;[418] or the IRS sends a letter demanding payment of an assessed tax liability.[419] Thus, for example, once a taxpayer files a tax return and the IRS assesses the associated taxes, any lawsuit disputing such taxes or seeking to prevent their collection could be countered by producing the return as filed and any IRS correspondence related thereto. If the IRS selects a tax return for examination or inquires regarding the failure to file a tax return, then any lawsuit seeking to stop the assessment or collection functions incident to that audit could be countered, and the AIA invoked, by producing the associated correspondence with the taxpayer.[420]

[416] For a discussion of early assessment procedures, see Section II.A.

[417] See, e.g., Internal Revenue Manual § 4.4.7.3 (Sept. 22, 2014) (detailing the types of letters sent by IRS officials to taxpayers during the examination process).

[418] See I.R.C. § 6213(a) (2012) (providing for a statutory notice of deficiency prior to assessment); Treas. Reg. § 601.105(d) (1967) (providing for thirty-day letter).

[419] See I.R.C. § 6303(a) (providing for notice demanding payment).

[420] See supra note 407 and accompanying text (observing, for example, that an audit is typically preceded by a letter from the IRS to the taxpayer).

In a few situations, application of the engagement test may be more challenging. One such example might be a third-party summons, where the IRS is acting in an enforcement capacity with a paper trail, but the taxpayer in question may not be aware.[421] Applying the engagement test may also be more challenging in cases of large corporations participating in the Compliance Assurance Program, whereby they work with the IRS to resolve potential issues before a tax return is filed, or otherwise engaged with the IRS on a more routine basis.[422]

Under the engagement test, however, the AIA generally would no longer bar pre-enforcement review of Treasury regulations or IRS guidance documents. Pre-enforcement review, by its very definition, refers to challenges to rules and regulations raised prior to agency enforcement efforts.[423] Taxpayers who file APA-based claims before the IRS begins exploring whether a particular rule or regulation applies to a particular taxpayer's facts and circumstances would be afforded judicial review of those claims.

B. Justifying a Narrower Anti-Injunction Act

The engagement test both restores the AIA to its original scope and respects its purpose. As courts have recognized repeatedly, Congress's broad purpose with the AIA was to provide the government with a constant stream of revenue. Today, the pay-as-you-go taxation system of third-party withholding and advance estimated tax payments largely satisfies that goal. Meanwhile, by focusing on those lawsuits that arise after the IRS has already engaged a taxpayer about its own particular tax liability, the engagement test allows the AIA to function in the enforcement context to require administrative exhaustion and protect IRS efforts to pursue additional revenue from recalcitrant taxpayers. Lawsuits that would directly and immediately stop the IRS from pursuing the assessment and collection functions against those taxpayers would be blocked, requiring them to utilize the agency appeals and avenues to judicial review provided by the IRC.

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[421] See Kafka & Cavanagh, supra note 19, ¶ 20.05.

[422] 1 Casey, supra note 344, § 3:48.50 (describing the Compliance Assurance Process).

[423] For an extended discussion of pre-enforcement review of agency actions under various statutory schemes, see Frederick Davis, Judicial Review of Rulemaking: New Patterns and New Problems, 1981 Duke L.J. 279.

In the meantime, however, the engagement test harmonizes the AIA with the APA. Recall that the APA embodies a presumption in favor of judicial review as a mechanism of ensuring that the APA's goals of agency transparency and accountability are satisfied.[424] It is a well-settled principle of statutory construction that courts should construe conflicting statutory provisions in a way that gives maximum effect to both.[425] That principle applies even more to conflicts with the APA. Congress, in Section 559 of the APA, expressly instructed courts to read the APA and specific statutes like the AIA so as to give maximum effect to both.[426] Along those lines, the Court has recognized that Congress adopted the APA "to bring uniformity to a field full of variation and diversity," that of judicial review of final administrative action.[427]

By limiting the scope of the AIA to allow pre-enforcement review of Treasury regulations and IRS guidance documents, the engagement test strikes a balance between protecting tax enforcement efforts and giving effect to the APA's presumption in favor of judicial review. The engagement test would easily exclude from the AIA's scope, and thus would allow courts to consider, those challenges that are only indirectly or tangentially related to day-to-day enforcement. Thus, a court could consider the claims of taxpayers seeking to challenge on a pre-enforcement basis the facial validity of Treasury regulations or IRS guidance documents enforceable by penalties, so long as the case does not arise as a consequence of IRS enforcement against noncompliance. But the engagement test also would allow the AIA to function fully in cases with actual tax dollars at stake. Where revenue collections are not proximately threatened by judicial review, and thus the central purpose of the AIA is not implicated, then the engagement test gives full effect to the APA by permitting claims to go forward.

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[424] See Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967) (observing that "the Administrative Procedure Act . . . embodies the basic presumption of judicial review").

[425] See, e.g., Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 533 (1995); Radzanower v. Touche Ross & Co., 426 U.S. 148, 154–55 (1976).

[426] See 5 U.S.C. § 559 (2012) (stating that a "[s]ubsequent statute may not be held to supersede or modify this subchapter . . . except to the extent that it does so expressly"); see also Intermountain Ins. Serv. of Vail, L.L.C. v. Comm'r, 134 T.C. 211, 246 (2010) (Halpern, J., concurring in the result); Brief of Amicus Curiae Prof. Kristin E. Hickman in Support of Respondents at 15, United States v. Home Concrete & Supply, LLC, 566 U.S. 478 (2012) (No. 11-139), 2011 WL 6813230, at *15.

[427] Dickinson v. Zurko, 527 U.S. 150, 155 (1999).

Finally, the engagement test brings the AIA in alignment with the TIA as interpreted in *Direct Marketing*[428] and also positions the AIA as a clear jurisdictional rule. The Supreme Court, in *Direct Marketing*, restated the bedrock principle of statutory interpretation that jurisdictional rules must be clear.[429] Although the Court has not conclusively determined whether the AIA is in fact jurisdictional, clarity is, in any event, generally considered to be a positive feature of legal rules.[430] As described above, in the vast majority of cases, the engagement test would be very easy to apply. The IRS would bear the burden of proof in establishing engagement but, in most cases, would be easily able to present evidence of correspondence with the taxpayer regarding the disputed sums.

C. A Legislative Alternative

Although the above historical account of the AIA provides substantial support for construing the AIA narrowly to permit pre-enforcement review of Treasury regulations and IRS guidance documents, courts may nevertheless feel constrained by the existing jurisprudence, problematic as it may be. Another way to address the proper construction of the AIA is through legislation. Congress has amended the AIA in the past to permit judicial review where the IRS or the courts applied it too expansively.[431] Congress has the power to do so again.

To that end, we propose that Section 7421 be amended or a new provision added to the IRC to adopt language resembling the following:

> Notwithstanding section 7421(a), not later than 60 days after the promulgation of a rule or regulation under authority granted by this title, any person adversely affected or aggrieved by such rule or regulation may file a petition for judicial review of such regulation with the United States Court of Appeals for the District of Columbia

[428] *Direct Mktg.*, 135 S. Ct. at 1132–33 (constraining the TIA's scope to circumstances more directly proximate to the assessment and collection functions, aligned with traditional equitable principles).

[429] Id. at 1131 (stating that the Supreme Court has a "rule favoring clear boundaries in the interpretation of jurisdictional statutes").

[430] Hawley, supra note 215, at 124 ("Jurisdictional boundaries are well served by clarity, and the government and litigants alike would benefit from consistency in the pre-enforcement review of tax challenges.").

[431] See supra Subsection II.B.1 (discussing exceptions to the AIA adopted by Congress).

> or for the circuit in which such person resides or has their principal place of business.

Beyond the need to clarify the meaning of the AIA to coordinate better with the APA and the Supreme Court's interpretation of the TIA, a few additional considerations shape this language.

First, the reference to rules or regulations, rather than merely regulations, is a deliberate choice. Although some provisions authorizing Treasury and the IRS to adopt legally binding pronouncements regarding the scope and content of the IRC reference regulations only,[432] many such provisions are more expansive in authorizing "rules or regulations" or "rules and regulations."[433] In particular, I.R.C. § 7805(a) sweepingly authorizes "all needful rules and regulations for the enforcement of this title."[434] Additionally, many of the IRC's penalty provisions speak in terms of failure to comply with "rules and regulations."[435] Treasury regulations have interpreted that phrase for penalty purposes as including not only temporary and final Treasury regulations but also "revenue rulings or notices (other than notices of proposed rulemaking) issued by the [IRS] and published in the Internal Revenue Bulletin."[436] The IRS has suggested that some revenue procedures may be included as well.[437] If a Treasury or IRS pronouncement can serve as a basis for asserting penalties, then assuming other justiciability limitations have been satisfied, the AIA ought not provide a basis for cutting off pre-enforcement review.

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[432] See, e.g., I.R.C. §§ 1252(b), 1552(a) (2012) (authorizing "regulations").

[433] See, e.g., id. § 401(n) (authorizing "such rules or regulations as may be necessary to coordinate" that provision with others specified); id. § 1502 (authorizing "regulations" in one sentence but "rules" in the next, seemingly interchangeably).

[434] Id. § 7805(a).

[435] See, e.g., id. § 6662(b)(1) (imposing penalties on taxpayers who underreport and underpay their taxes due to "negligence or disregard of rules or regulations"); id. § 6694(b)(2)(B) (sanctioning tax return preparers for "a reckless or intentional disregard of rules or regulations").

[436] See, e.g., Treas. Reg. § 1.6662-3(b)(2) (1991); see also Accuracy-Related Penalty, T.D. 8381, 56 Fed. Reg. 67,492, 67,494 (Dec. 31, 1991), 1992-1 C.B. 374, 376 (adopting the regulatory definition).

[437] Accuracy-Related Penalty, 56 Fed. Reg. at 67,494 (stating that revenue procedures "may or may not be treated as 'rules or regulations' depending on all facts and circumstances").

Some IRC provisions are phrased even more broadly, authorizing "guidance, rules, or regulations."[438] Including guidance within an exception from the AIA would be a mistake, however. The tax community sometimes uses the term "guidance" to refer not only to Treasury regulations and authoritative IRS documents that arguably carry legal force but also to a whole host of informal IRS pronouncements that expressly carry no legal weight whatsoever.[439] Administrative law doctrine often rejects judicial review of informal, nonbinding agency pronouncements for fear of chilling all agency communications with the general public, which in turn are thought to be desirable as a matter of transparency and good government.[440] For this reason, extending a pre-enforcement review exception from the AIA to encompass everything that might be termed guidance seems a step too far. By restricting a legislative amendment to the AIA to rules and regulations, Congress should capture IRS guidance formats that carry legal weight while excluding those that do not.

Second, although the proposed sixty-day limitation for raising an APA challenge is arbitrary, limiting the time period for raising a pre-enforcement challenge to tax rules and regulations accomplishes important goals as well. 28 U.S.C. § 2401 provides a six-year general statute of limitations on APA-based challenges to the validity of agency regulations.[441] An extensive jurisprudence exists elaborating the contours of that provision.[442] Declining to specify a time limit in

[438] See, e.g., I.R.C. §§ 162(m)(5)(H), 280G(e)(2)(C)(ii).

[439] See, e.g., Understanding IRS Guidance - A Brief Primer, Internal Revenue Serv., https://www.irs.gov/uac/understanding-irs-guidance-a-brief-primer [https://perma.cc/6CN5-88NZ] (last updated July 6, 2016) (offering a partial list of IRS guidance documents, only some of which have the capacity to lead to the imposition of penalties on taxpayers); see generally Rogovin & Korb, supra note 191 (recognizing and describing at least twenty-eight Treasury and IRS guidance formats ranging from regulations to news releases and oral communications).

[440] See, e.g., Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993).

[441] 28 U.S.C. § 2401(a) (2012). This six-year limitations period presumably would not apply in the tax context at all if Treasury regulations and IRS guidance documents are not eligible for pre-enforcement review because of the AIA. See Kristin E. Hickman, *Altera* Meets *Chamber of Commerce*, TaxProf Blog (Oct. 17, 2017) http://taxprof.typepad.com/taxprof_blog/2017/10/hickman-altera-meets-chamber-of-commerce.html [https://perma.cc/HD7L-TG8K] (discussing the potential applicability of 28 U.S.C. § 2401(a) in the tax context).

[442] 1 Richard J. Pierce, Jr., Administrative Law Treatise § 7.15 (5th ed. 2009); 2 id. § 11.7.

amending the AIA would allow legislators and courts to rely by default on that jurisprudence to determine which claims are cut off by the expiration of the limitations period. But many statutes contain more restrictive limitations of the time for raising pre-enforcement challenges to agency regulations.[443] These provisions prompt judicial review, which leads to certainty in the law.[444] Taxpayers value legal certainty so that they may organize their affairs and file their tax returns. Imposing a stricter time limit thus balances providing an avenue to judicial review for parties directly and immediately affected by Treasury regulations or IRS guidance with accommodating taxpayers' desire for certainty.

One question imposing a time limit in this fashion might raise, however, is whether such language would in turn preclude taxpayers engaged in refund or deficiency actions from challenging the validity of Treasury regulations and IRS guidance documents at that later time.[445] Specifying a sixty-day limitation on the time for seeking judicial review arguably suggests that later actions are precluded. The six-year limitations period of 28 U.S.C. § 2401 forecloses many, though not all, subsequent claims that a regulation is invalid.[446] As one court observed, "[d]ifferent legal wrongs give rise to different rights of action," and "[a] federal regulation that makes it six years without being contested does not enter a promised land free from legal challenge."[447] On the other hand, using the word "may" rather than "shall" suggests optionality. Section 703 of the APA provides that, "[e]xcept to the extent that prior, adequate, *and exclusive* opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."[448] Putting the permissive language of the above-proposed AIA amendment together with this language from the APA would signal that Congress means to allow different parties to challenge the validity of final agency actions in both

[443] See, e.g., 15 U.S.C. §§ 1193(e)(1), 1262(e)(3)(A), 1474(b)(1); 21 U.S.C. § 360kk(d)(1); 28 U.S.C. § 2344; 30 U.S.C. § 1276(a)(1).

[444] See Gary Lawson, Federal Administrative Law 1141 (7th ed. 2016) (making this point).

[445] See id. (recognizing this issue with interpretation of the Hobbs Act).

[446] See, e.g., Alaska v. U.S. Dep't of Agric., 772 F.3d 899, 900 (D.C. Cir. 2014) (recognizing "'reopener' doctrine" as an exception from 28 U.S.C. § 2401, "giving rise to a 'new right of action' even though the regulation challenged is no different," citing circuit precedent).

[447] Herr v. U.S. Forest Serv., 803 F.3d 809, 820–21 (6th Cir. 2015).

[448] 5 U.S.C. § 703 (emphasis added).

pre-enforcement and enforcement-based litigation. Nevertheless, specifying as much expressly in amending the AIA could avoid this issue.

Finally, in amending the AIA to permit pre-enforcement review of Treasury regulations and IRS guidance documents, Congress may want to consider incorporating a cross-reference to the new provision in the Declaratory Judgment Act ("DJA"), with which the AIA is often linked. The DJA contains a tax exception preventing courts from providing declaratory relief for controversies "with respect to Federal Taxes," also with a few specific exceptions.[449] The courts generally have declared the AIA and the DJA to be coextensive and have focused their analysis of the combined limitation on judicial review principally on the former.[450] Nevertheless, the IRS has taken the position that the DJA is even more limiting of judicial review than the AIA.[451] If Congress amends the AIA as suggested by this Article, incorporating a cross-reference would resolve conclusively any corresponding dispute over the DJA's meaning.

D. Countervailing Concerns

The principal objection to any narrowing of the AIA is that the IRS's ability to collect revenue will be impaired. In lower-court cases considering the AIA after *Direct Marketing*, the government has consistently made this claim.[452] Nevertheless, when one appreciates first,

[449] 28 U.S.C. § 2201(a).

[450] See, e.g., Ambort v. United States, 392 F.3d 1138, 1140 (10th Cir. 2004) ("In practical effect, these two statutes are coextensive . . . ."); Sigmon Coal Co. v. Apfel, 226 F.3d 291, 299–300 (4th Cir. 2000) ("[T]he two statutory texts are, in underlying intent and practical effect, coextensive." (quoting UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co., 99 F.3d 573, 583 (4th Cir. 1996))); Nat'l Taxpayers Union v. United States, 68 F.3d 1428, 1435 (D.C. Cir. 1995) ("Because the AIA and DJA operate coterminously, the following analysis of the impact of the AIA upon NTU's complaint also determines the effect of the DJA."); cf. Alexander v. "Americans United" Inc., 416 U.S. 752, 759 n.10 (1974) (recognizing the lower courts' treatment of the two provisions).

[451] Internal Revenue Serv., Litigation Guideline Memorandum GL-52, 1991 WL 1167968, (June 28, 1991); see also, e.g., En Banc Brief for the Appellee at 41–43, Cohen v. United States, 650 F.3d 717 (D.C. Cir. 2010) (en banc) (No. 08-5093), 2010 WL 3514351, at *52–54 (arguing in favor of such interpretation).

[452] E.g., Final Brief for the Appellees at 27–31, Maze v. IRS, No. 16-5265 (D.C. Cir. Apr. 12, 2017), 2017 WL 1353543, at *27–31; Defendants' Motion to Dismiss for Lack of

that most tax revenues now are received by the government prior to formal assessment and collection procedures as a result of pay-as-you-go taxation methods like wage withholding and advance estimated tax payments,[453] and second, that not all Treasury regulations or IRS guidance documents relate directly to revenue raising,[454] it becomes easy to see that this argument proves too much.

Many social welfare programs take the form of tax deductions or credits that offset income earned or taxes owed.[455] Treasury regulations and IRS guidance documents defining eligibility for those social welfare programs thus relate directly to the ultimate calculation of an individual's tax liability. Yet the goal of those pronouncements is not to raise revenue for the government. Many Treasury regulations and IRS guidance documents serve regulatory functions that are only part of the tax laws to the extent they are enforceable by civil penalties collected by the IRS.[456] Again, the goal of those pronouncements is not to raise revenue for the government but to define and prompt compliance with the associated regulatory requirements. Consequently, judicial review of pre-enforcement challenges to the validity of such Treasury regulations and IRS guidance documents do not really threaten revenue collection in any meaningful way.

Concededly, the engagement test is inconsistent with some of the broader rhetoric in the Supreme Court's decisions in *Bob Jones University v. Simon*[457] and *Alexander v. "Americans United" Inc.*[458] In those cases, the disputed taxes at stake were those of potential contributors who would be denied deductions after the IRS made a 501(c)(3) status determination with respect to donee organizations. Although the engagement test we propose arguably would be triggered

Subject-Matter Jurisdiction at 25, Chamber of Commerce v. IRS, No. 1:16-cv-944-LY (W.D. Tex. Oct. 11, 2016).

[453] See supra Section II.C (explaining changes in the timing of the assessment and collection functions vis a vis most tax payments).

[454] See supra Subsection I.B.2 (providing background on the current function of Treasury regulations).

[455] See supra notes 205–09 and accompanying text (detailing the social welfare aspects of the contemporary Internal Revenue Code).

[456] See supra notes 209–11 and accompanying text (describing the conduct-regulating nature of Treasury regulations).

[457] 416 U.S. 725 (1974).

[458] 416 U.S. 752 (1974).

by virtue of the communications between the IRS and the donee organizations regarding the latter's exempt status, such was not the basis for the Court's decisions in those cases. As discussed earlier, it is difficult to reconcile the Court's holding in *Direct Marketing* with some of the reasoning of these two cases.[459]

For example, *Direct Marketing* conflicts with dicta from *Americans United* about interfering with the potential for collecting taxes from third parties. In *Americans United*, the Court stated the AIA blocks suits that would interfere with the assessment of taxes against third parties not party to the suit and pointed to language in the AIA regarding its application "whether or not [the person bringing suit] is the person against whom such tax was assessed."[460] The Court did not rely on this claim in reaching its decision; the issuance of an injunction in *Americans United* would have stopped the IRS from assessing employment taxes against the nonprofit bringing suit as well.[461] The nonprofit offered to pay those taxes voluntarily in order to have its constitutional claim heard, prompting the Supreme Court to add a line in the opinion about third-party taxation.

Moreover, in addition to being dicta, the Court's point in *Americans United* about the AIA's language regarding third parties misinterprets its meaning. As documented in Part II above, this reference was added to the AIA in 1966 to correspond with I.R.C. § 7426, which in turn addresses situations in which the IRS seeks to levy and sell property owned by one person to satisfy an assessed tax liability owed by another, for example, as in the case of jointly owned property.[462] By adding the "whether or not such person" language in addition to this new exception, Congress ensured that only third parties who may challenge such collection actions are those described in I.R.C. § 7426. Contrary to the Court's dicta in *Americans United*, the amendment was not intended to extend the AIA's scope to cases that might hypothetically affect eventual assessments against unrelated parties.

Ultimately, however, the Supreme Court may need to choose between constraining either *Bob Jones* and *Americans United* or *Direct*

[459] See supra notes 44–48 (discussing *Bob Jones* and *Americans United* in greater detail) and notes 166–68 (explaining how those cases conflict with *Direct Marketing*).

[460] 416 U.S. at 760; see also I.R.C. § 7421(a) (2012).

[461] 416 U.S. at 760.

[462] See supra notes 262–65 and accompanying text (describing the enactment of the third-party exception from the AIA).

Marketing to their particular facts. For its part, Congress already provided guidance on which precedent it prefers: in the aftermath of *Bob Jones* and *Americans United*, Congress created an exception to the AIA to allow judicial review of 501(c)(3) status determination letters and effectively reverse the Court's decisions in those two cases.[463]

Finally, the engagement test could, to some extent, encourage plaintiff shopping as taxpayers seek to challenge Treasury regulations or IRS guidance documents in a coordinated fashion. Additionally, interpreting the AIA to allow pre-enforcement judicial review of such pronouncements does not automatically cut off APA-based challenges in the context of refund or deficiency actions. Consider two otherwise identical taxpayers seeking to enjoin a new Treasury regulation based on APA claims. The first brings suit immediately after the regulation becomes final and before IRS starts enforcement. Under the engagement test, the suit would go forward notwithstanding the AIA. The second taxpayer waits until the IRS examines its tax return and issues a deficiency notice, then files the exact same legal challenge against the relevant IRS pronouncement. The IRC contains no statute of limitations for pre-enforcement challenges to rules and regulations promulgated thereunder, although the default six-year limit on claims against the government would apply in many cases to prevent post-enforcement challenges too many years past promulgation.[464]

Despite at least some potential for both pre- and post-enforcement challenges, there are nevertheless benefits to opening up Treasury regulations and IRS guidance documents to pre-enforcement challenges. By interpreting the AIA to allow APA-based challenges to be brought pre-enforcement, the courts would increase certainty in the tax laws by promoting earlier judicial review of Treasury regulations and IRS guidance documents. The plaintiffs would receive guidance on the

[463] See supra notes 50, 280–81 and accompanying text (providing that Congress amended the AIA to create a new exception for status determination letters in the wake of *Bob Jones* and *Americans United*).

[464] 28 U.S.C. § 2401(a) (2012) (stating that, unless other provided, "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"); P & V Enters. v. U.S. Army Corps of Eng'rs, 516 F.3d 1021, 1023 (D.C. Cir. 2008) (applying the time limitation of 28 U.S.C. § 2401(a) to a claim brought under the APA); see also 1 Pierce, supra note 442, § 7.15 (discussing the operation and implications of 28 U.S.C. § 2401(a)); 2 id. § 11.7 (same).

implications of their future conduct, as the IRS presumably would usually receive prompt validation of its regulations.

CONCLUSION

In the Civil War era, when the system of internal taxation was small and the discretionary powers of executive officials were much more constrained, Congress enacted the AIA to prevent taxpayers from using the courts to stop the mechanics of the assessment and collection functions once those functions had commenced. Congress passed the AIA to ensure a steady stream of needed revenue into federal coffers during the Civil War by requiring tax grievances that arose during those administrative processes to be heard through administrative appeals, or later through refund suits. Because of the timing of the assessment and collection functions with respect to most tax payments, Congress needed the AIA to protect that revenue stream. And, because of that same timing, the AIA could only come into play after the commencement of those functions.

In the succeeding 150 years, changes in tax administrative practices, as well as the expansion of the tax system's coverage and, along with it, the discretionary authority exercised by tax administrators have opened the door to construing the AIA much more broadly than Congress in 1867, or perhaps even decades later, ever would have contemplated. Particularly in recent decades, the courts have sometimes interpreted the AIA to suggest that virtually any litigation concerning taxes falls under its purview. Meanwhile the federal tax system increasingly serves social welfare and regulatory functions beyond the IRS's traditional mission of collecting revenue to support the federal government. As the goals of the tax system and tax administration have changed, courts (and Congress) have failed to consider whether reflexively applying the AIA to virtually all litigation implicating the IRC remains sensible or whether the AIA has become another vestige of unjustified tax exceptionalism.

Generalist judges typically are not fond of tax cases. Many tax cases are frivolous. The AIA offers overburdened generalist judges an easy and efficient basis for disposing of a group of cases that do not capture their interest. But interpreting the AIA overbroadly misapprehends the text, history, and purpose of the AIA as it fits within the IRC and tax administration as a whole.

It is time for the courts to rediscover lost limitations on the AIA's reach. The Supreme Court's decisions in the *Mayo Foundation* and

Direct Marketing cases, and the new wave of post–*Mayo Foundation*, APA-based challenges to Treasury regulations and IRS guidance documents, offer the courts an opportunity to reconsider the AIA's proper meaning and scope. By adopting an engagement test for evaluating whether litigation actually stops tax assessment and collection efforts in progress, the courts can restore the AIA to its original scope and purpose of facilitating IRS enforcement efforts while also serving the APA's intended function of checking government overreach.

If the courts do not act to clarify the AIA's meaning and scope, however, then Congress should do so through legislation. Treasury and IRS rules and regulations, like those of other agencies, should be subject to judicial review to ensure compliance with the requirements of the APA, which foster good government objectives such as public participation, transparency, and accountability. Tax administration will be better for it.