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# STANDING IN THE SHADOW OF TAX EXCEPTIONALISM: EXPANDING ACCESS TO JUDICIAL REVIEW OF FEDERAL AGENCY RULES

LYNN D. LU\*

*As the Supreme Court recently confirmed, regulation of behavior through the tax code is “nothing new.” Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2596 (2012). From the individual mandate’s “shared responsibility payment” to the income-tax deduction for charitable donations, tax provisions raise or lower the cost of particular conduct. In doing so, tax rules, like all administrative rules, reflect normative values and protect important public interests. Yet the need for swift and certain collection of revenue has historically excused tax regulation from general administrative law principles that promote government accountability in the implementation of federal mandates.*

*This Article explores one critical instance in which tax exceptionalism swallowed the rule of government accountability to insulate much federal agency rulemaking from judicial oversight in all administrative arenas: constitutional standing doctrine. Under current standing doctrine, a wide range of regulatory stakeholders lacks access to federal court review of agency rules that adversely affect their concrete interests. Where such stakeholders are members of historically or politically marginalized populations, the lack*

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of access to judicial review exacerbates process defects that limit their participation in rulemaking decisions. The result is an imbalance in regulatory influence between entities subject to the burdens of regulation and those who stand to benefit from the enforcement of regulatory mandates.

This Article reexamines two central cases that restricted standing in the context of tax exemption for public charities under section 501(c)(3) of the Internal Revenue Code: *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), a poor people's challenge to an Internal Revenue Service (IRS) rule eliminating the requirement that tax-exempt hospitals provide charity care; and *Allen v. Wright*, 468 U.S. 737 (1984), a challenge by black families to an IRS rule facilitating white flight from desegregated public schools to segregated, tax-exempt private schools. In both cases, the Supreme Court failed to treat tax administration as a full-fledged regulatory scheme that governs the behavior of regulated entities with consequences for a wide range of regulatory stakeholders. The Court's implicit embrace of tax exceptionalism in both cases facilitated its explicit invocation of the separation of powers to restrict standing in *Allen v. Wright*—a rationale that now applies broadly to limit constitutional standing in all administrative contexts.

Today, federal courts increasingly reject tax exceptionalism and recognize the need for judicial review in all administrative contexts to check arbitrary agency decisionmaking—albeit under deferential standards that respect agency expertise. See *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704 (2011). This Article concludes that the erosion of tax exceptionalism exposes additional cracks in standing doctrine's already flawed foundation and lends further support for the expansion of federal court access to a wider range of regulatory stakeholders to challenge agency rules.

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## INTRODUCTION

In a pair of federal class-action lawsuits filed in the 1970s, private individuals sought to compel the Internal Revenue Service (IRS)<sup>1</sup> to impose greater obligations on hospitals and schools as conditions of federal tax exemption for public charities under section 501(c)(3) of the Internal Revenue Code (IRC). In *Eastern Kentucky Welfare Rights Organization v. Simon*,<sup>2</sup> people unable to pay the costs of health care challenged an IRS decision to stop requiring tax-exempt hospitals to provide free medical treatment.<sup>3</sup> In *Allen v. Wright*,<sup>4</sup> black families seeking fully desegregated public schools

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1. IRC § 7801(a) (2012) authorizes the Secretary of the Treasury to administer the Internal Revenue Code (IRC). The Secretary appoints the Commissioner of the Internal Revenue Service (IRS) pursuant to IRC § 7803 to supervise the IRS as a bureau of the Treasury Department. The Treasury Secretary is authorized under IRC § 7805(a) to promulgate “all needful rules and regulations for the enforcement” of the IRC. However, because IRS attorneys play a role in drafting Treasury regulations as well as informal internal revenue guidance documents governing tax exemption for public charities, for convenience this Article refers solely to IRS decisionmaking.

2. *E. Ky. Welfare Rights Org. v. Shultz*, 370 F. Supp. 325 (D.D.C. 1973) (raising an Administrative Procedure Act (APA) challenge to revenue ruling as contrary to IRC § 501(c)(3) and invalidly promulgated without notice-and-comment procedures), *rev'd sub nom.* *E. Ky. Welfare Rights Org. v. Simon*, 506 F.2d 1278 (D.C. Cir. 1974), *vacated*, 426 U.S. 26 (1976).

3. *See* Rev. Rul. 69-545, 1969-2 C.B. 117 (superseding Rev. Rul. 56-185, 1956-1 C.B. 202).

4. *Wright v. Miller*, 480 F. Supp. 790 (D.D.C. 1979) (challenging IRS regulation as violation of the Fifth and Fourteenth Amendments, Title VII of the Civil Rights Act of 1964, and IRC § 501(c)(3)), *rev'd sub nom.* *Wright v. Regan*, 656 F.2d 820 (D.C. Cir. 1981), *rev'd sub nom.* *Allen v. Wright*, 468 U.S. 737 (1984).

contested IRS policies facilitating white flight to segregated, tax-exempt private schools.<sup>5</sup> In each case, plaintiffs highlighted the IRS's crucial role in regulating social institutions serving the public interest by setting the terms of eligibility for favorable federal tax status as mandated by federal law.

By demanding changes to federal revenue rules that assertedly furthered economic and racial inequality, both sets of plaintiffs recognized IRS regulation of public charities to be a powerful tool for social justice reform. On the one hand, the plaintiffs faced an uphill battle simply by litigating a tax matter. Justice Stewart wrote separately in *Eastern Kentucky* only to observe: "I cannot now imagine a case . . . where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else."<sup>6</sup> On the other hand, Justice Stewart's characterization of the case as a third-party attempt to initiate an individual tax enforcement action misconstrued plaintiffs' challenges to broadly applicable IRS rules governing important social institutions and implicating persistent social injustices. The IRS, like other federal agencies, does more than make enforcement decisions in individual cases of noncompliance. As the federal agency tasked with implementing the statutory tax-exemption scheme through its revenue-defining and border-drawing authority, the IRS also sets the rules that govern exempt public charities' behavior and determines the minimum standards for compliance in the first place.<sup>7</sup> Viewed in this light, the plaintiffs in *Eastern Kentucky* and *Wright* legitimately sought to hold federal revenue officials accountable for ongoing violations of duties and "norms imposed by federal law"<sup>8</sup>—including the IRC.

When the Supreme Court ultimately ruled that both plaintiff classes lacked federal court standing to sue the IRS for redress of concrete, particularized injuries,<sup>9</sup> the courthouse doors swung closed to a wide range of would-be litigants seeking judicial oversight of federal agency action.<sup>10</sup>

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5. See Rev. Proc. 72-54, 1972-2 C.B. 834; see also Rev. Proc. 75-50, 1975-2 C.B. 587 (superseding Rev. Proc. 72-54, 1972-2 C.B. 834).

6. *E. Ky.*, 426 U.S. at 46 (Stewart, J., concurring) (allowing exception for "the First Amendment area").

7. See Leslie Book, *Increasing Participation in the Rulemaking Process*, 135 TAX NOTES 765, 767 (2012) (referring to the IRS's "quasi-legislative role").

8. Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233, 250, 258 (1991).

9. *Wright*, 468 U.S. at 766; *E. Ky.*, 426 U.S. at 44–45.

10. See, e.g., Karl S. Coplan, *Ideological Plaintiffs, Administrative Lawmaking, Standing, and the Petition Clause*, 61 ME. L. REV. 377, 379–81 (2009); Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 29 (2003); Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1183–95 (2009).

While regulated entities—including taxpayers challenging their “own tax liability”<sup>11</sup>—remain entitled to judicial review of federal agency decisions imposing regulatory burdens, other stakeholders who may stand to benefit the most from regulatory safeguards—often members of historically subordinated or politically marginalized populations<sup>12</sup>—lack judicial recourse to hold federal agencies accountable for violations of constitutional or congressional mandates in effectuating a regulatory scheme’s intended protections.<sup>13</sup>

The Supreme Court explicitly based its decisions on prudential concerns regarding plaintiffs’ status as outsiders to the agency’s regulatory relationship with tax-exempt public charities,<sup>14</sup> which it later recast as constitutional concerns about court authority to intrude into executive affairs under the separation of powers.<sup>15</sup> Yet the Court’s stated rationale obscures a deeper—and potentially more vulnerable—basis for restricting judicial review of agency action: tax exceptionalism,<sup>16</sup> or the view that the enforcement of revenue collection excuses tax administration from general administrative law principles promoting accountability in agency decisionmaking. First, the Court’s reasoning ignored the regulatory impact of tax rules on a wide range of regulatory stakeholders—impact that should justify access to judicial review of such rules. The rejection of tax-exemption administration as an effective regulatory scheme then freed the Court to resort to broad prudential and constitutional grounds to restrict standing in ways applicable to all administrative contexts.

Constitutional standing doctrine thus rests in part on tax-exceptionalist foundations that are both hidden from view and unstable. Federal courts increasingly recognize tax administration as regulation of behavior subject

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11. *E. Ky.*, 426 U.S. at 46 (Stewart, J., concurring).

12. See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 742 (1985) (describing the need for protection of “groups that are discrete and diffuse (like women), or anonymous and somewhat insular (like homosexuals), or both diffuse and anonymous (like the victims of poverty)”).

13. Additional barriers may also foreclose federal court review of action by state government officials under 42 U.S.C. § 1983, see Monaghan, *supra* note 8, at 256–57, or federal agency inaction, see Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1675 (2004).

14. *E. Ky.*, 426 U.S. at 42–43.

15. *Allen v. Wright*, 468 U.S. 737, 761 (1984).

16. See, e.g., Paul L. Caron, *Tax Myopia, or Mamas Don’t Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517 (1994) (identifying tax administration departures from general administrative law principles); Kristin E. Hickman, *Agency-Specific Precedents: Rational Ignorance or Deliberate Strategy?*, 89 TEX. L. REV. SEE ALSO 89, 92–93, 111 (2010) (exploring reasons for lack of cross-pollination in administrative law through example of tax administration).

to general administrative law principles that promote both accountability and autonomy in federal agency action without offending the separation of powers. While the current Court is unlikely to overrule *Eastern Kentucky* and *Wright* to permit broader standing for suits against agency officials by regulatory stakeholders alleging concrete, particularized injuries,<sup>17</sup> it is nonetheless possible to reopen a vital discussion about how to expand access to judicial review of agency rules, as well as restore greater influence in administrative decisionmaking, to a wider range of regulatory stakeholders in public charities and other administrative contexts.

This Article is divided into four parts. Part I describes tax administration as a form of social regulation that deters and promotes particular behavior through the IRC. Regulation of tax-exempt public charities offers one rich example of the importance of federal agency rules in promoting a diverse range of societal benefits, such as access to education and health care, to complement market-driven and governmental services. Part I concludes by showing why poor people and people of color with a stake in the regulation of private hospitals and schools turned to the federal courts as a means of overseeing government agency decisionmaking affecting their interests.

Part II describes the gatekeeping function of standing doctrine in limiting access to federal court to enjoin government agency action. In particular, standing doctrine as developed in the tax-exemption context imposes obstacles to federal court access by regulatory stakeholders alleging constitutionally sufficient injuries. Part II shows how the Court's decisions in *Eastern Kentucky* and *Wright* implicitly reflect a tax-exceptionalist view of tax exemption for public charities that ignores the palpable coercive and incentive effects of broad, prospective revenue rules on the behavior and choices of tax-exempt public charities. By characterizing tax administration as exclusively concerned with individual actions to enforce the collection of revenue, the Court could reject general administrative law principles supporting judicial review of agency action and instead resort to unduly broad prudential and constitutional rationales to deny standing. As a result, standing doctrine illegitimately insulates the IRS—and, by extension, other federal agencies—from accountability for the harmful consequences of their rulemaking decisions.

Part III argues that the Supreme Court's decisions in *Eastern Kentucky* and *Wright* cannot be distinguished or limited in application as exceptional tax

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17. See Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 167 (2011) (“[O]ur only resort [for expanding standing] is in the Court: the hope of persuading a majority to expand the existing doctrine slightly at the margins and the possibility that future changes in personnel might make deeper revisions of the doctrine feasible.”).

cases. While specific procedural rules promote administrative flexibility and efficiency in the collection and redistribution of revenue, tax administration also reflects public values and norms that, as in other administrative contexts, require protection of the interests of politically disempowered or historically marginalized stakeholders. Federal courts increasingly recognize IRS regulation of taxpayer behavior as subject to general administrative law principles that maintain the separation of powers by ensuring agency accountability through judicial review while also according due respect to agency expertise on the merits—albeit in cases in which taxpayers challenging their own tax liability have clear standing.<sup>18</sup> Part III argues that the demise of tax exceptionalism eliminates the only remaining explanation for the dubious reasoning of *Eastern Kentucky* and *Wright*. Accordingly, there is room to relax standing for stakeholders alleging harm to concrete interests protected by federal regulatory schemes to seek judicial review of agency action in federal court in the tax context as in other administrative law contexts.

This Article concludes by arguing that the changing landscape of tax administration warrants new consideration of the role of regulatory stakeholders in challenging federal agency action in federal court as one additional tool of government oversight, particularly in the context of public charities regulation. Renewed attention to this issue may, at a minimum, enrich future discussions of broad stakeholder influence in tax administration and generate a fuller debate about whose interests matter in the regulation of tax-exempt public charities and beyond. Such an outcome alone would amount to a partial vindication of the principles first advanced in *Eastern Kentucky* and *Wright* nearly forty years ago.

## I. TAX EXEMPTION FOR PUBLIC CHARITIES AS REGULATION

### A. *Tax Administration as Regulation*

As the Supreme Court recently confirmed, regulation of behavior through the tax code is “nothing new.”<sup>19</sup> By raising the cost of certain

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18. See *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704 (2011) (rejecting tax exception to application of *Chevron* deference); *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011) (upholding the reviewability of the procedure for refunding tax proceeds despite tax-specific barriers).

19. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2595–96 (2012) (upholding, as a permissible exercise of the congressional power to tax, an imposition of a “shared responsibility payment” on qualifying individuals who fail to purchase minimal health insurance coverage); see also JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 962 (Cambridge, Metcalf & Co. 1833) (“[T]he taxing power is

activities through a tax—or, conversely, by lowering the cost through a tax exclusion—tax rules provide economic deterrents or incentives for behavior in much the same way as direct prohibitions or subsidies. Stanley Surrey famously characterized tax exemptions, deductions, credits, and other “tax expenditures” that are “deliberate departures from accepted concepts of net income” as the functional equivalents of direct spending to promote particular behavior.<sup>20</sup> More fundamentally, scholars have long recognized that all revenue rules reflect normative decisions and promote public values according to legislative design. Even to define basic terms such as “income”<sup>21</sup> subject to taxation—or “charitable” purposes that are not—requires a determination of social values. Indeed, “the basis on which we choose to raise revenue and the people from whom we choose to raise it reflects some conception of fairness and justice.”<sup>22</sup>

Professor Sugin argues that it is appropriate that “[t]he tax law [generally] should be a tool for achieving substantive equality because it is powerful, its effects are widespread, and its medium is money, the root of so much social inequality.”<sup>23</sup> Because tax administration allocates revenue among entities—for example, by encouraging transfers among taxpayers or, conversely, conservation of funds otherwise payable as tax—it operates like direct government spending and plays a key role in redistributing societal resources for the provision of public goods.<sup>24</sup>

Social justice advocates historically have targeted a broad range of public finance mechanisms to ensure government accountability in the allocation of resources on behalf of the least politically and financially influential sectors of the public. For example, in cases challenging government

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often, very often, applied for other purposes, than revenue.”); Linda Sugin, *Tax Expenditure Analysis and Constitutional Decisions*, 50 HASTINGS L.J. 407, 472 (1999) (“[T]he tax law is not simply a revenue raising tool.”).

20. See STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES 3 (1973); see also Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 706, 711 (1970).

21. See Boris I. Bittker, *Accounting for Federal “Tax Subsidies” in the National Budget*, 22 NAT’L TAX J. 244, 250 (1969) (noting that the scope of a normative tax base from which the definition of “expenditures” derives depends on “debatable lines”); see also Sugin, *supra* note 19, at 474 (arguing against “limiting the legal consequences of different tax provisions depending on their categorization as income-defining or not”).

22. Sugin, *supra* note 19, at 472.

23. *Id.* at 474.

24. See Linda Sugin, *Tax Expenditures, Reform, and Distributive Justice*, 3 COLUM. J. TAX L. 1, 42 (2011) (“The most distinctive role for tax policy is in distributive justice, and tax expenditures are a crucial mechanism for achieving fairness in the allocation of government benefits and burdens among individuals.”).

funding for private religious activity, public interest litigants have enforced the Establishment Clause's prohibition on the diversion of state aid to religion.<sup>25</sup> In cases challenging state provision of resources to private actors who discriminated on the basis of race, litigants have similarly enforced the Equal Protection Clause's command to government officials to "steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination."<sup>26</sup> Broad conditions in federal spending legislation prohibit certain uses of federal funds by recipients in a range of contexts, from Title VI, which prohibits racial discrimination by any recipient of "federal financial assistance,"<sup>27</sup> to the Rehabilitation Act<sup>28</sup> and Title IX,<sup>29</sup> which prohibit discrimination by recipients on the basis of disability and sex, respectively. Accordingly, to the extent that tax exemption or deductions effectively amount to the provision of federal financial assistance to,<sup>30</sup> if not state encouragement of, the policies and practices of private entities that violate federal norms, the IRS should likewise be accountable to the public.

While tax exemptions or tax deductions share similarities with direct government spending programs, however, they differ in significant respects, particularly in the nature and degree of "joint public and private decisionmaking" involved and the level of autonomy granted to private actors in determining the activities in which to engage or invest.<sup>31</sup> Nonetheless, Professor Sugin points out, "[t]he creation of the legal regime itself—the statutes, regulations, and administrative practice[s]" governing taxpayer behavior—"is undeniably state action" subject to constitutional mandates, although "whether that action violates the substantive

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25. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 609 (1971) (quoting district court opinions) (affirming injunctions prohibiting state school programs that "fostered 'excessive entanglement' between government and religion" and "had the impermissible effect of giving 'significant aid to a religious enterprise'"). But see *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664 (1970) (holding that state property tax exemption for churches does not violate the Establishment Clause).

26. *Norwood v. Harrison*, 413 U.S. 455, 467 (1973) (enjoining a state provision of free textbooks to segregated private schools).

27. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (2006).

28. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 (2012).

29. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* (2012).

30. See, e.g., *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972) (recognition of tax exemption amounted to "federal financial assistance" subject to the antidiscrimination provisions as a condition of receipt). But see EVELYN BRODY & JOHN TYLER, *HOW PUBLIC IS PRIVATE PHILANTHROPY? SEPARATING REALITY FROM MYTH* (2d ed. 2012) (rejecting characterization of tax exemptions and tax-deductible donations as government subsidies).

31. Sugin, *supra* note 19, at 433.

protections of the Constitution is a separate question.”<sup>32</sup> Agency implementation of a legal regulatory regime, too, is undeniably government agency action subject to the requirements of the Administrative Procedure Act (APA) and other governing federal laws that promote transparency and fairness in federal regulation. Such statutory mandates to protect the public interest in the regulation of private entities may well require more of federal agency officials than the Constitution.<sup>33</sup> Indeed, by enacting broad statutory rights to seek judicial review of agency actions under the APA and other citizen-suit provisions, Congress has contemplated that “‘public interest’ litigants . . . would prod [an] agency to go further in implementing its statutory mandate.”<sup>34</sup>

Federal regulation of tax-exempt public charities provides a particularly rich example of a regulatory scheme that invites such agency “prodding” because it requires determinations of what collective goods and services are of sufficient public value to merit favorable tax treatment. As the site of contested value judgments with substantial social ramifications, public charities regulation also raises concerns about judicial authority to intervene in a sensitive regulatory arena. IRS regulation of public charities thus implicates important questions regarding which public values should matter for purposes of tax exemption and, ultimately, for federal court intervention.

### B. *Regulating Public Charities and Defining Public Benefit*

IRC § 501(c)(3) exempts from federal income and other taxes entities “organized and operated exclusively for religious, charitable, . . . educational,” or other enumerated purposes.<sup>35</sup> So-called “public charities”<sup>36</sup> play a vital role in the provision of public goods and

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32. *Id.* at 434. *But see* Linda Sugin, *The Great and Mighty Tax Law: How the Roberts Court Has Reduced Constitutional Scrutiny of Taxes and Tax Expenditures*, 78 BROOK. L. REV. 777, 795 (2013) (showing how “tax expenditures . . . [have] become essentially unreviewable as a constitutional matter because the Court’s characterization denies the presence of any reviewable state action”).

33. *See* Sugin, *supra* note 19, at 474.

34. *See* Magill, *supra* note 10, at 1189–90 (discussing the rapid growth from 1965 to 1970 of federal agencies and regulation that led to the rapid development of organizations devoted to impact litigation in the public interest).

35. *See* IRC § 501(c)(3) (2012); *see also* IRC § 170(c) (listing similar entities eligible for tax-deductible charitable contributions). Public charities may qualify for additional exemptions under federal, state, or local law—such as low postage rates, state income or property tax exemption, or eligibility for private or government grants—either independent of or by virtue of their status as federally tax-exempt entities.

36. *See* IRC § 509(a) (distinguishing private foundations from other IRC § 501(c)(3)

encompass some of the most highly visible and influential institutions in society, including churches, universities, hospitals, social-service providers, and educational advocacy organizations of all stripes. Federal tax-exempt status for public charities has been described as a federal “stamp of approval”<sup>37</sup> bestowed on qualifying organizations, which hold coveted status as entities not only exempt from federal income taxation but also generally eligible to receive donations deductible from the taxable income of donors who itemize.<sup>38</sup>

In 2009, the IRS recorded nearly one million exempt public charities collectively reporting over \$1 trillion in revenue and expenses, as well as \$2.5 trillion in assets.<sup>39</sup> While the public benefits provided by such entities are difficult to quantify,<sup>40</sup> observers generally credit the “independent” sector with providing particular public goods and services that market-driven and governmental entities cannot or will not offer.<sup>41</sup> Prohibited by

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entities colloquially called “public charities” based on diversity of funding sources); *see also* IRC § 507(b); Treas. Reg. § 1.509(a)-1 (2012) (“Organizations which fall into the categories excluded from the definition of *private foundation* are generally those which either have broad public support or actively function in a supporting relationship to such organizations.”). Public charities are also distinguishable from social welfare organizations exempt under IRC § 501(c)(4), which are not eligible to receive deductible donations (and are permitted to engage in insubstantial political-campaign activity as well as unlimited lobbying and voluntary disclosure of donors). *See* Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (2012) (“An organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting . . . the common good and general welfare of the people of the community” and “civic betterments and social improvements.”). Other entities are both exempt and eligible for deductible donations on very different grounds. *See* IRC § 501.

37. *See, e.g.,* Elizabeth MacDonald, *Former White House Counsel to IRS: Pull Media Matters’ Tax-Exempt Status*, FOX BUS. (Aug. 4, 2011), <http://www.foxbusiness.com/markets/2011/08/04/former-white-house-counsel-to-irs-yank-media-matters-tax-exempt-status/> (quoting complaint filed with the IRS by C. Boyden Gray, former White House counsel to President George H.W. Bush) (last visited Jan. 31, 2014); *see also* Sugin, *supra* note 19, at 452 (referring to placement of exempt organizations eligible for deductible donations “on the official and public list of approved organizations” in Publication 78, now superseded by an online database at Exempt Organizations Select Check, <http://www.irs.gov/Charities-&-Non-Profits/Search-for-Charities>).

38. *See* IRC § 170(c). Stanley Surrey recognized the deduction as an “upside-down” subsidy that gives a greater tax break to taxpayers in higher income brackets. Surrey, *PATHWAYS TO TAX REFORM*, *supra* note 20, at 70.

39. STAFF OF J. COMM. ON TAXATION, PRESENT LAW AND BACKGROUND RELATING TO THE FEDERAL TAX TREATMENT OF CHARITABLE CONTRIBUTIONS, JCX-55-111, 2 (2011), *available at* <http://www.jct.gov/publications.html?func=startdown&id=4371>.

40. While economists have estimated the magnitude of the deduction scheme’s “subsidy” for charitable donations, projections of individual behavior are notoriously imprecise. *See* Sugin, *supra* note 24, at 11.

41. “The exemption from taxation of money or property devoted to charitable and

statute from distributing net profits to “any private shareholder or individual,”<sup>42</sup> public charities may devote their resources to missions that government or investors of for-profit entities do not find to be politically or financially feasible to support, such as providing assistance to poor people ineligible for government benefits, supporting the arts, or engaging in advocacy of unpopular or even fringe viewpoints. While public charities are restricted from engaging in “substantial” amounts of lobbying or “propaganda” and any level of political campaign activity,<sup>43</sup> courts have recognized “the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints.”<sup>44</sup>

Some consider the resulting variety of exempt public charities to be enriching to U.S. society;<sup>45</sup> others view the range of exempt public charities as an embarrassment of “wildly diverse and indeed eccentric associations.”<sup>46</sup> More significantly, critics charge that a combination of

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other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare.” ROBERT L. DOUGHTON, THE REVENUE BILL OF 1938, H.R. REP. NO. 75-1860, 19 (1938), *reprinted in* 1939-1 C.B. 728, 742. *See* Evelyn Brody & John Tyler, *Respecting Foundation and Charity Autonomy: How Public is Private Philanthropy?*, 85 CHI.-KENT L. REV. 571, 571-72 (2010) (discussing justifications for government regulation of charities); Brian Galle, *The Role of Charity in a Federal System*, 53 WM. & MARY L. REV. 777, 781-82 (2012) (discussing limits of market and government failure theories); *see also* Rob Atkinson, *Keeping Republics Republican*, 88 TEX. L. REV. SEE ALSO 235, 235-36 (2011) (questioning whether nonprofits are always better qualified than government (or markets) to perform certain tasks for the public good).

42. IRC § 501(c)(3) (exemption permitted only to entity “no part of the net earnings of which inures to the benefit of any private shareholder or individual”). *See* Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 897 (1980) (discussing “nondistribution constraint”). Professors Reiser and Rodrigues suggest that the nondistribution constraint alone operates as an internal governance mechanism that can focus priorities on the provision of public over private benefits. *See* Dana Brakman Reiser, *Charity Law’s Essentials*, 86 NOTRE DAME L. REV. 1, 63 (2011); Usha Rodrigues, *Entity and Identity*, 60 EMORY L.J. 1257, 1322 (2011).

43. IRC § 501(c)(3).

44. *Bob Jones Univ. v. United States*, 461 U.S. 574, 609 (1983).

45. The independent sector may uniquely “facilitate[] democracy by providing a forum for free discussions and a proving ground for social innovation.” Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, 58 VAND. L. REV. 1093, 1118 (2005).

46. ROB REICH ET AL., STANFORD UNIVERSITY CENTER ON PHILANTHROPY AND CIVIL SOCIETY, ANYTHING GOES: APPROVAL OF NONPROFIT STATUS BY THE IRS 2, 4 (draft report Oct. 25, 2009) *available at* <http://www.stanford.edu/group/reichresearch/cgi-bin/site/wp-content/uploads/2009/11/Anything-Goes-PACS-11-09.pdf> (“Obtaining recognition by the IRS as a public charity is an embarrassingly easy thing to do.”).

loose standards and lax enforcement results in the IRS foregoing millions of dollars in uncollected revenue from possibly undeserving entities inappropriately recognized as tax-exempt public charities and their donors.<sup>47</sup>

But collection of revenue is only one of the many purposes of tax administration; tax exemption for public charities may also promote democratic principles by permitting qualifying entities to play an important “mediating role between the individual and the state.”<sup>48</sup> Crucially, to qualify for tax exemption, public charities must provide a benefit to a sufficiently broad class to serve a “public rather than a private interest.”<sup>49</sup> Professor Goodwin explains that public charities facilitate civil society by fostering the “pursuit of common ground and consensus” whereby “private interests stretch to encompass the interests of others.”<sup>50</sup> It is therefore appropriate for public charities regulation to ensure that the use of charitable resources achieves collective rather than unshared gains.

Historically, in the U.S., as under English law, certain categories of entities have enjoyed exemption from taxation based on their presumed provision of public benefits. Lord Macnaghten’s 1891 decision in *Pemsel’s Case* famously designated four primary purposes of charitable trusts: “trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community not falling under any of the preceding heads.”<sup>51</sup> The federal tax-exemption statute for public charities—not limited to trusts—lists similar categories that have undergone little change in over a century.<sup>52</sup>

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47. *Id.* at 3.

48. Goodwin, *supra* note 45, at 1118.

49. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (“An organization is not organized or operated exclusively for one or more of the purposes specified . . . unless it serves a public rather than a private interest.”). *See* *Am. Campaign Acad. v. Comm’r*, 92 T.C. 1053, 1065–67 (1989) (showing that organizations do not operate exclusively for exempt purposes within the meaning of § 501(c)(3) when more than an insubstantial part of its activities further non-exempt purposes and, in turn, confer non-incidental private benefits).

50. Goodwin, *supra* note 45, at 1102–03, 1159 (observing “activity through extra-political [voluntary, nongovernmental] associations” that “encourages activity that is purely political”) (citing ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 517 (Penguin Books 1956)).

51. *Comm’rs v. Pemsel*, [1891] UKHL 1, [1891] A.C. 531 (H.L.) 583 (appeal taken from Eng.); *see also* Statute of Charitable Uses Act, 1601, 43 Eliz., c. 4 (also known as the Charitable Uses Act or Statute of Elizabeth I).

52. Initially codified in the Tariff Act of 1894, the list of qualifying purposes has undergone little change. Since 1913, the statutory-exemption language has taken substantially the form of the current exemption. *See* Leslie Carol Bender, Note, *Has the Supreme Court Laid Fertile Ground for Invalidating the Regulatory Interpretation of Internal Revenue Code*

Congress has left to the Treasury and IRS the task of further fleshing out the substantive meaning and scope of “religious, charitable, . . . or educational” purposes eligible for the public charities exemption.<sup>53</sup> Although “relief of poverty” is not explicitly included among the enumerated categories in IRC § 501(c)(3),<sup>54</sup> its implementing regulation lists “relief of the poor and distressed” as one possible purpose eligible for exemption, along with advancement of “human and civil rights secured by law,” “lessen[ing of] neighborhood tensions,” and other purposes.<sup>55</sup> Beyond these general and categorical pronouncements, the IRS has done little to announce minimum requirements that *all* public charities *must* exhibit.<sup>56</sup>

Indeed, the role of the federal agency tasked with administering tax exemption for public charities is characterized by minimal oversight of a highly autonomous and influential social sphere.<sup>57</sup> The public charities exemption scheme thus accommodates a wide range of interests, including the agency’s own needs for flexibility and ease of administration, as well as the needs of public charities and their donors for autonomy and predictability in structuring their conduct to comply with agency rules. In particular, sensitivity to First Amendment principles supporting equitable treatment of all viewpoints may counsel particular caution in implementing restrictions on advocacy by public charities.

What may not be fully accounted for in the existing scheme, however, are the interests of a broad spectrum of other stakeholders affected by the

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*Section 501(c)(3)?*, 58 NOTRE DAME L. REV. 564, 569 n.29 (1983) (collecting statutes).

53. IRC § 501(c)(3). Professor Colinvaux argues that Congress has consistently relied on the existing tax-exemption standard to continue “passively accommodat[ing] significant growth of the charitable sector without demanding any rigor of the sector in the form of positive requirements or quantitative measures.” Roger Colinvaux, *Charity in the 21st Century: Trending Toward Decay*, 11 FLA. TAX REV. 1, 7–8 (2011).

54. In 1969, a House Report relying on charitable trust law explained that exempt public charities are statutorily permitted to carry out a broad range of purposes not limited to “the ordinary and popular sense” of the word “charity.” See Paul Valentine, *A Lay Word for a Legal Term: How the Popular Definition of Charity Has Muddled the Perception of the Charitable Deduction*, 89 NEB. L. REV. 997, 1005 (2011). Today, “[t]he term *charitable* is used . . . in its generally accepted legal sense” to permit purposes “as developed by judicial decisions.” Treas. Reg. § 1.501(c)(3)-1(d)(2).

55. Treas. Reg. § 1.501(c)(3)-1(d)(2).

56. Specific rules may apply to particular kinds of public charities. See, e.g., Rev. Rul. 75-198, 1975-1 C.B. 157 (senior citizen center); Rev. Rul. 79-17, 1979-1 C.B. 193 (hospice); Rev. Rul. 75-472, 1975-2 C.B. 208 (substance abuse halfway house).

57. See Colinvaux, *supra* note 53, at 14. At the very least, Professor Colinvaux notes that the public charities regulatory regime is marked primarily by negative rather than positive regulation.

public charities regulatory scheme. Such stakeholders may harbor diverse motives for overseeing revenue rules, ranging from the self-interested to the civic-minded: some members of the general public may wish to micromanage the public fisc by eliminating “tax leniency” towards public charities engaged in particular activities, potential donors may wish to ensure the appropriate use of their charitable gifts, and other public charities may seek to level the playing field of competition for deductible donations or other forms of support.<sup>58</sup> The intended beneficiaries of public charities also have concrete interests that warrant central consideration in the implementation of tax-exemption rules. As clarified by Treasury regulation, such beneficiaries include, among others, “the poor and distressed or . . . the underprivileged,” residents in need of “lessen[ing of] neighborhood tensions,” and those in need of vindication of “human and civil rights secured by law.”<sup>59</sup> As populations whose needs may not be fully met by the majority-controlled governmental or market-driven private sectors, those residents are particularly likely to comprise members of historically underrepresented or marginalized groups lacking the expertise, financial resources, and political power to influence agency decisionmaking.

Sound reasons, however, may exist to curb private individuals’ efforts to steer IRS enforcement action against particular public charities; such limitations may preserve the prosecutorial discretion of the IRS while reducing vindictive scapegoating of unpopular organizations.<sup>60</sup> Where regulatory stakeholders instead challenge the substance of broadly applicable rules, they seek to ensure that the agency is in fact exercising its enforcement discretion rather than misinterpreting its federal obligations.<sup>61</sup> Rather than usurping the IRS’s role as rule-enforcer,<sup>62</sup> they seek to hold the IRS accountable in its independent role as rulemaker tasked with fully implementing protections mandated by federal law.

When the IRS brings its own individual enforcement actions against

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58. See, e.g., *In re U.S. Catholic Conference*, 885 F.2d 1020, 1021, 1031 (2d Cir. 1989) (denying “competitive advocate” standing to an organization alleging discriminatory enforcement of tax-exemption rules prohibiting political campaign activity).

59. Treas. Reg. § 1.501(c)(3)-1(d)(2) (2012).

60. See Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 783–84, 807–08, 814–19 (2009); Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 201, 234 (2000) (identifying concern that citizen enforcement will result in “zealousness error” and raising concern that reliance on citizen-informants may increase civic participation at the cost of violating anti-snitching norms).

61. See Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 636 (1999).

62. Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698 (2011).

particular public charities, it effectively establishes standards applicable in future cases, but only indirectly and on a piecemeal basis. In setting such enforcement standards, the agency still may not fully represent the interests of regulatory stakeholders who challenge the agency's own interpretation of its federal obligations. In the only Supreme Court decision to explore the boundaries of permissible exempt purposes under IRC § 501(c)(3), *Bob Jones University v. United States*, the Court upheld the IRS's revocation of tax-exempt status from private religious schools with racially discriminatory admissions policies against a constitutional challenge under the Free Exercise Clause.<sup>63</sup> In doing so, the Court interpreted § 501(c)(3) as incorporating charitable trust law doctrine to preclude exemption for any purpose—whether religious, educational, or otherwise charitable—that contravenes “fundamental public policy” as expressed by the Legislative, Judicial, and Executive Branches; in the case of *Bob Jones*, the public policy against discrimination on the basis of race.<sup>64</sup> Ironically, the public policy ground upheld by the Supreme Court in *Bob Jones* itself originated in *Green v. Connally*, the precursor to *Wright*, which arose not as an IRS enforcement action but a class action lawsuit by black families of Mississippi public schoolchildren who challenged IRS rules permitting tax exemption for private schools with racially discriminatory policies.<sup>65</sup> When the nationwide class of plaintiffs in *Wright* later sought to expand the prohibition on tax exemption to private schools that remained racially segregated despite their adoption of nondiscrimination policies, they failed for lack of standing.<sup>66</sup> In practice, then, even the Agency's own view of fundamental public policy may fail to fully protect important stakeholder interests under either federal statutes or the Constitution.

The recognition of racial nondiscrimination as a fundamental public policy in *Bob Jones* establishes a minimum standard for public benefits and values that merit tax exemption for public charities. Yet the Court's strict test for demonstrating fundamental national public policy ensures that only those policies receiving sufficient popular support for adoption by each branch of the federal government may qualify. Such a high bar is well out of reach for most policies not supported by powerful political

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63. *Bob Jones Univ. v. United States*, 461 U. S. 574, 603–05 (1983).

64. *Bob Jones Univ.*, 461 U.S. at 594; see Olati C. Johnson, *The Story of Bob Jones University v. United States: Race, Religion, and Congress' Extraordinary Acquiescence* (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 10-229).

65. *Green v. Connally*, 330 F. Supp. 1150, 1155 (D.D.C. 1971), *summarily aff'd sub nom.*, *Coit v. Green*, 404 U.S. 997 (1971) (mem.) (standing argument raised on appeal but not decided).

66. *Allen v. Wright*, 468 U.S. 737, 755–56, 766 (1984).

constituencies. Most importantly, without standing to seek judicial review of agency action, regulatory stakeholders cannot advance public policy arguments before one of the federal branches of government. Ultimately, in the absence of standing for regulatory beneficiaries and other affected stakeholders to challenge agency decisionmaking, judicial-branch determinations of national public policy questions bearing on public charities exemption—for example, whether all exempt public charities must provide “relief of the poor” or any other minimum benefit—are unlikely to develop outside the rare IRS enforcement action.

Judicial review of agency rulemaking provides a much-needed check on agency discretion and arbitrary decisionmaking.<sup>67</sup> Under current standing doctrine, however, only certain regulatory stakeholders may seek judicial scrutiny of agency decisions that affect their concrete interests. The lack of standing for all regulatory stakeholders to challenge agency action exacerbates existing risks of agency capture by regulated entities that alone wield the threat of judicial review.<sup>68</sup> For sectors of the public who lack the political power to influence the rulemaking process,<sup>69</sup> access to judicial review may provide the only means for effective and meaningful oversight of agency regulation on important matters in which they have a direct stake.<sup>70</sup> Yet many regulatory stakeholders—particularly members of

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67. See generally Kristin E. Hickman, *IRB Guidance: The No Man’s Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239, 269–70 (2009) (identifying the potential need to rein in IRS discretion in the issuance of informal guidance documents).

68. Agencies threatened with judicial review of regulatory decisions may more readily capitulate to the interests of regulated entities than to other stakeholders who cannot activate the court’s oversight authority. See Heather Elliott, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L. J. 551, 561–62 (2012) (discussing risks of agency capture “by regulated industry” where “standing doctrine makes it harder for regulatory beneficiaries to get into court,” leading “agencies [to] try to please those who can sue: the regulated industry”); see also Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 17 (2010) (describing process of agency capture through which “well-financed and politically influential special interests” outweigh “the diffuse interest of the general public” in agency decisionmaking).

69. See Thomas F. Field, *Who Needs the Public Interest Movement?*, 27 MAJOR TAX PLAN. 415, 436 (1975) (describing challenges faced by members of the general public in exerting the necessary power to influence the tax rulemaking process); see also Book, *supra* note 7, at 771 (“Some taxpayers may not have the resources or expertise to participate in the process, and even if they did, the IRS may not be attuned to weigh those interests properly.”).

70. See Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1842 (2001) (supporting broader access to judicial review to “encourag[e] self-governance and public participation” and “filter[] faction-dominated policymaking,” among other reasons); see also Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1173–74 (1999) (supporting judicial review by state courts to allow marginalized groups, such as the poor,

historically or politically marginalized social groups—face substantial limits in their ability to play a role of consequence in IRS decisionmaking that affects their interests.<sup>71</sup> These concerns are amply illustrated by IRS regulation of private hospitals and schools as tax-exempt public charities that led to the legal challenges in *Eastern Kentucky* and *Wright*.

C. *The Examples of Health Care and Education in Public Charities Regulation*

Soon after the codification of the current version of § 501(c)(3) in the IRC in 1954, the IRS issued Revenue Ruling 56-185 clarifying that, to qualify for exemption, health facilities must operate “to the extent of [their] financial ability for those not able to pay for the services rendered and not exclusively for those who are able and expected to pay.”<sup>72</sup> The ruling reflected the status quo, as the IRS and reviewing courts had for decades directed hospitals to provide relief to the poor as a condition of tax exemption.

In the early 1960s, while Congress considered legislation that would become the Medicare and Medicaid Act, hospital lobbyists anticipating a future in which everyone had the means to pay for health care reportedly pressed the IRS for new rules eliminating the “charity care” requirement for tax exemption.<sup>73</sup> By 1965, Congress had passed the Medicare and Medicaid Act to provide financial coverage for qualifying elderly, disabled, and low-income individuals to pay health costs. Although financial

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“to leverage legal activity into political power,” “change political discourse,” and otherwise “facilitate[] productive political activity”); see generally Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN. ST. L. REV. 923, 937 (2011) (criticizing lack of court access to enforce socioeconomic rights where “those whose interests are most at stake . . . (typically people of limited means) lack equal or meaningful access to democratic processes”).

71. See Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 530 (1977) (criticizing federal agencies’ “exclu[sion of] the interested and affected public from participation in the formulation of interpretations and policy,” including informal IRS guidance documents); Field, *supra* note 69, at 428 (“The general public, although invited to testify, simply has no one to represent them . . . [making it] difficult for fair-minded administrators to balance the needs of the public and of the affected special interests.”); see also Ira L. Tannenbaum, *Public Interest Tax Litigation Challenging Substantive IRS Decisions*, 27 NAT’L TAX J. 373, 379–80 (1974) (describing the importance of public interest tax litigation).

72. Rev. Rul. 56-185, 1956-1 C.B. 202–03.

73. They also sought categorical exemption for entities engaged in the promotion of health. See Mark A. Hall & John D. Colombo, *The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of Tax Exemption*, 66 WASH. L. REV. 307, 320 (1991) (describing “the hospital industry’s complaint that . . . public programs had greatly reduced the demand for charity care and rendered the existing standard for exemption an anachronism”).

coverage was far from universal, in 1969, the IRS promulgated Revenue Ruling 69-545, explicitly modifying Revenue Ruling 56-185 “to remove therefrom the requirements relating to caring for patients without charge or at rates below cost.”<sup>74</sup> Instead of providing a minimum level of charity care for the poor, hospitals could now demonstrate “charitable” purposes by meeting a broader “community benefit” standard. For example, hospitals could provide only emergency assistance to the poor and still provide a community benefit solely by “maintain[ing] an open medical staff” and resting “control of the hospital . . . with [a] board of trustees . . . composed of independent civic leaders.”<sup>75</sup>

Soon after the issuance of Revenue Ruling 69-545, poor people denied health care by tax-exempt hospitals for inability to pay turned to poverty lawyers who had already been litigating similar health care access issues under the Hill-Burton Act, which conditioned the receipt of federal funds for new hospital construction on the provision of a “reasonable volume” of uncompensated care.<sup>76</sup> Filed in 1971, *Eastern Kentucky* presented an APA-based challenge to the new policy set forth by Revenue Ruling 69-545, both as substantively invalid under § 501(c)(3)’s “charitable” standard for failing to require relief for the poor and as procedurally invalid because the policy was promulgated without notice-and-comment rulemaking.<sup>77</sup>

Meanwhile, civil rights activists had already begun to challenge tax-exemption rules permitting racially segregated private schools as part of the battle to desegregate public school districts.<sup>78</sup> As historians have extensively

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74. Rev. Rul. 69-545, 1969-2 C.B. 117, 119.

75. *Id.* at 118. Since 1986, the Emergency Medical Treatment & Labor Act (EMTALA) has required all hospitals participating in Medicare to provide emergency assistance to anyone regardless of ability to pay. *See generally* SARA ROSENBAUM ET AL., LAW AND THE AMERICAN HEALTH CARE SYSTEM 1020–1107 (2012) (describing protections under EMTALA).

76. *See generally* Marilyn G. Rose, *The Internal Revenue Service’s “Contribution” to the Health Problems of the Poor*, 21 CATH. U. L. REV. 35, 37 (1971) (describing harmful consequences of IRS tax-exemption policies on provision of health care to the indigent); Marilyn G. Rose, *The Implications of the Charitable Deduction and Exemption Provisions of the Internal Revenue Code Upon the Service Required of a Voluntary Hospital to Treat the Poor*, 4 CLEARINGHOUSE REV. 183, 183 (1970) (same).

77. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 33–34 (1976).

78. *See Simkins v. Moses H. Cone Mem’l Hosp.*, 323 F.2d 959, 961, 970–71 (4th Cir. 1963) (invalidating the Hill-Burton Act’s separate-but-equal-facility provision because federally funded recipient hospitals are state actors subject to the Equal Protection Clause), *cert. denied*, 376 U.S. 938 (1964); *see also* Public Health Service Act of 1964, Pub. L. No. 88-443 § 603(e), 78 Stat. 447, 451 (codified as amended at 42 U.S.C. § 291c(e) (2006)) (enacting prohibitions on separate-but-equal hospital facilities as conditions of federal funding). *But see* *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982) (“That programs undertaken by the State

documented, after the Supreme Court's 1954 decision in *Brown v. Board of Education*,<sup>79</sup> school districts in the South engaged in "massive resistance" to avoid desegregating their school systems.<sup>80</sup> As white families seeking segregated educational environments across the country increasingly turned to schools funded through private, tax-deductible donations and exempt from taxation, these schools necessarily diluted the power of court desegregation orders to integrate public schools.<sup>81</sup>

In 1970, in *Green v. Connally*,<sup>82</sup> a class of black parents in Mississippi, which fell under a federal court desegregation order, successfully enjoined the IRS "from approving tax-exempt status for any school in Mississippi that did not publicly maintain a policy of nondiscrimination."<sup>83</sup> In issuing a preliminary injunction, the three-judge district court in *Green* relied heavily on evidence introduced in an earlier school-desegregation case that demonstrated the detrimental effect of segregated private schools on public school desegregation.<sup>84</sup> In particular, the court noted the stigmatizing effect of ongoing private school segregation as well as the role of tax-exempt status as a form of federal encouragement of racial segregation.<sup>85</sup> The IRS complied with the preliminary injunction by issuing new revenue rulings requiring all tax-exempt schools nationwide to adopt, certify, and publish a nondiscrimination policy.<sup>86</sup>

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result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business.").

79. See *Brown v. Bd. of Educ. of Topeka, Kan.*, 347 U.S. 483 (1954).

80. *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218, 221-26 (1964) (observing that Prince Edward County in Virginia responded by closing its public schools to all students and instead funneling public funds to private schools reserved for white students).

81. See Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 637-38 n.16 (1985) (describing the adverse impact of segregated private schools on the effort to desegregate public schools and noting that at one time Prince Edward County had sixty-four white students in public school, while 1,311 were enrolled in private schools).

82. *Green v. Connally*, 330 F. Supp. 1150, 1179 (D.D.C. 1971), *summarily aff'd sub nom.*, *Coit v. Green*, 404 U.S. 997 (1971).

83. *Bob Jones Univ. v. United States*, 461 U.S. 574, 578-79 (1983) (discussing *Green*). The court further ordered the IRS to require all schools to adopt and certify a nondiscrimination policy for admissions and school-related programs as a condition of exemption. See *Green*, 330 F. Supp. at 1179.

84. *Green*, 330 F. Supp. at 1178.

85. See *id.* at 1162, 1178-79.

86. See Rev. Proc. 72-54 § 1, 1972-2 C.B. 834 (setting forth "guidelines for determining whether . . . [tax-exempt] private schools . . . have adequately publicized their racially nondiscriminatory policies as to students"); Rev. Proc. 75-50, 1975-2 C.B. 587 (superseding

The plaintiffs in *Wright*, this time a nationwide class of black parents of public schoolchildren, followed *Green* and filed suit challenging the existing IRS policies as insufficient to satisfy the Equal Protection Clause, Title VI, and § 501(c)(3), although they raised no APA claim. In particular, the *Wright* plaintiffs requested that the IRS prohibit tax exemption for schools that “‘have insubstantial or nonexistent minority enrollments, which are located in or serve desegregating public school districts, and which . . . cannot demonstrate that they do not provide racially segregated educational opportunities for white children avoiding attendance in desegregating public school systems’”—regardless of whether they had adopted policies of nondiscrimination.<sup>87</sup> Whether § 501(c)(3) may be interpreted to require such a condition of tax exemption for public charities—or any other conditions—remains unsettled, however. In its 1984 Term, the Supreme Court dismissed *Wright* for lack of standing, foreclosing judicial review of agency action by regulatory stakeholders not themselves subject to the rules they challenge.<sup>88</sup>

Today, Professor Johnson concludes, “as the era of formal explicit, [school] segregation recedes, the IRS’s exemption policy is likely of little contemporary relevance.”<sup>89</sup> Yet the battle to end racial segregation in education continues. Civil rights advocates confirm that public schools continue to be racially segregated at levels matching those of the desegregation era,<sup>90</sup> while affirmative action plans that seek to redress such disparities remain open to attack in the federal courts.<sup>91</sup>

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Rev. Proc. 72-54 and setting forth “guidelines and recordkeeping requirements for determining whether [tax-exempt] private schools . . . have racially nondiscriminatory policies as to students”).

87. *Allen v. Wright*, 468 U.S. 737, 747 (1984) (quoting plaintiffs’ complaint); *see also Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 441 (1968) (invalidating purportedly non-discriminatory school board plan that “remains a dual system” and fails to actually “effectuate conversion . . . to a unitary, nonracial system”).

88. The district court granted further relief to the Mississippi class in *Green*, *Green v. Miller*, No. 1355-69 (D.D.C. May 5, 1980) (amended June 2, 1980), but dismissed the *Wright* complaint in 1979 for lack of standing and because it held that Congress had evinced its intent to preclude the relief plaintiffs sought, *Wright v. Miller*, 480 F. Supp. 790 (D.D.C. 1979). In 1981, the D.C. Circuit reversed *Wright* and remanded. *Wright v. Regan*, 656 F.2d 820 (D.C. Cir. 1981).

89. *See Johnson, supra* note 64, at 158.

90. *See Robert A. Garda, Jr., The White Interest in School Integration*, 63 FLA. L. REV. 599, 614–15 (2011) (listing statistics indicating increasing racial segregation in recent decades); *see also Mildred Wigfall Robinson, Fulfilling Brown’s Legacy: Bearing the Costs of Realizing Equality*, 44 WASHBURN L. J. 1, 6–7 (2004) (calling “resegregation in public education . . . an accelerating national tragedy”).

91. *See Christian B. Sundquist, The First Principles of Standing: Privilege, System Justification*,

In the health care context, the range of people unable to afford medical services will remain broad even under the Patient Protection and Affordable Care Act's (PPACA's) expansion of individual and Medicaid coverage,<sup>92</sup> while dollars spent by tax-exempt hospitals on charity care remain minimal.<sup>93</sup> Under PPACA, Congress has imposed new obligations as conditions of tax exemption for hospitals.<sup>94</sup> Just as tax-exempt private schools must adopt and report details of their nonracially discriminatory admissions policies and programs,<sup>95</sup> tax-exempt private hospitals must now adopt and report details of their financial assistance policies and procedures for periodically assessing and meeting community health needs.<sup>96</sup> However, just as the IRS does not require tax-exempt private schools to actually demonstrate that they are racially desegregated, the agency has not proposed any minimum requirement for the level of financial assistance or community health services that hospitals must provide in order to qualify for tax-exempt status.<sup>97</sup> As one anti-poverty advocacy organization

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*and the Predictable Incoherence of Article III*, 1 COLUM. J. RACE & L. 119, 160 (2011) (observing that the Supreme Court “denies standing routinely in cases advancing the rights of non-white plaintiffs” while “strain[ing] to locate ‘injuries’ in cases involving the racialized claims of white plaintiffs, even when such claims would seem to be insufficient for Article III review under prior case law”).

92. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2704, 124 Stat. 119, 154–55 (2010).

93. See Colinvaux, *supra* note 53, at 34–35 (discussing the ongoing indigent health care crisis); see also Bobby A. Courtney, *Hospital Tax-Exemption and the Community Benefit Standard: Considerations for Future Policymaking*, 8 IND. HEALTH L. REV. 365, 366–67 (2011) (noting that more than 50 million uninsured U.S. citizens depend on charity care provided by hospitals that are usually nonprofit, private, and tax-exempt, while payments from insured or direct-pay patients increasingly cannot subsidize charity care).

94. IRC § 501(r) (added by Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 9007(a), 124 Stat. 119, 855 (2010), amended by Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010)).

95. IRS Form 990, OMB No. 1545-0047.

96. See Colinvaux, *supra* note 53, at 51.

97. See Community Health Needs Assessments for Charitable Hospitals, 78 Fed. Reg. 20,523 (Apr. 5, 2013) (inviting public comment on proposed regulations regarding community health needs assessments and responding to informal comments previously invited by IRS Notice 2011-52, I.R.B. 2011-30 “Notice and Request for Comments Regarding the Community Health Needs Assessment Requirements for Tax-Exempt Hospitals”); *id.* at 20,525 (preserving “hospital facilities’ flexibility to determine the best way to identify and meet the particular health needs of the specific communities they serve”); Additional Requirements for Charitable Hospitals, 77 Fed. Reg. 38,148, 38,149 (June 26, 2012) (inviting public comment on proposed regulations regarding financial assistance policies and responding to informal comments previously invited by IRS Notice 2010-39, I.R.B. 2010-24 “Request for Comments Regarding Additional Requirements for Tax-Exempt Hospitals”), amended by 77 Fed. Reg. 47787 (Aug. 10, 2012); *id.* at 38149 (“Neither

observed in informal comments to the IRS, “neither the Act nor the proposed regulations supply the Secretary with much guidance as to what hospital actions will satisfy the law.”<sup>98</sup> Accordingly, “the proposed regulations leave too much room for hospitals to follow their own prerogatives rather than those of the community.”<sup>99</sup>

Lack of access to hospital care for the poor and racial segregation in education are only two examples of how public charities’ regulation may affect a broad range of stakeholders effectively excluded from the rulemaking process. The lack of standing for such regulatory stakeholders to challenge IRS rules in federal court compounds their limited influence in agency decisionmaking, particularly where they may already lack financial, political, informational, or other resources to adequately air their interests.<sup>100</sup> Judicial review thus remains a crucial mechanism for adjudicating agency obligations to implement the public policies and values protected under federal regulatory schemes.

## II. REGULATION OF TAX-EXEMPT PUBLIC CHARITIES AND THE TRANSFORMATION OF STANDING TO CHALLENGE FEDERAL AGENCY ACTION

### A. *Standing Doctrine and the Limits of Federal Court Authority*

Standing doctrine has played a crucial role in restricting parties’ access to federal court to seek judicial review of government agency action and to enjoin violations of federal law. Early modern cases identified the purpose of assigning “the judicial Power” to enumerated federal “Cases” and

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the statute nor these proposed regulations establish specific eligibility criteria that a [financial assistance policy] must contain.”)

98. Letter from Gary A. Benjamin, Anti-Poverty Advocates, Mich. Legal Serv., to Internal Revenue Service (June 30, 2010), available at <http://www.sitemason.com/files/kWrQjc/Michigan%20Legal%20Services%20Gary%20Benjamin.pdf> (last visited Jan. 31, 2014).

99. *Id.*; see also Mary Crossley, *Tax-Exempt Hospitals, Community Health Needs and Addressing Disparities*, 55 HOW. L.J. 687, 701–02 (2012) (“[W]ithout meaningful prodding by the IRS, most hospitals may be unlikely to do more than the bare minimum identified as needed to satisfy the new requirement,” and “[a] real risk exists . . . that many hospitals . . . will . . . view the [community health needs assessment] requirement simply as a new hoop to jump through with the least possible effort expended.”).

100. Regulated entities may have greater financial, informational, and political resources than other stakeholders. See Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1357–58 (2011); Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321 (2010) (discussing interest-group communications with agency decisionmakers prior to notice-and-comment rulemaking).

“Controversies” under Article III of the Constitution<sup>101</sup> as “assur[ing] that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.”<sup>102</sup> So long as a party seeking to invoke the power of the federal courts alleged a sufficient “personal stake in the outcome of the controversy” to effectuate that purpose,<sup>103</sup> Article III posed no obstacle to standing.

Over time, the Supreme Court has imposed more constitutional requirements for standing on plaintiffs seeking injunctive relief in federal court. In *Wright*, the Supreme Court described the now-familiar “core component” of Article III standing as requiring plaintiffs to allege “personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”<sup>104</sup> Although the contours of standing’s constitutional core are “concededly not susceptible of precise definition,” a court assessing a complaint’s bare allegations must ask: “Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?”<sup>105</sup>

Under this test, plaintiffs alleging judicially cognizable injuries may still fail to qualify for judicial resolution of their claims where relief might not follow directly and with certainty from a federal court order. In particular, where plaintiffs are not themselves subject to the agency rules they challenge, the *Wright* Court foreclosed standing because full redress would require federal courts not merely to curb government agency action against regulated entities but also to “restructur[e]” Executive Branch operations and act “as virtually continuing monitors of the wisdom and soundness of Executive action.”<sup>106</sup> For the first time, the Court announced that the three-part standing requirement “derive[s] directly from the Constitution,” specifically “a single basic idea—the idea of separation of powers.”<sup>107</sup> The

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101. U.S. CONST. art. III, § 2.

102. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

103. *Id.*

104. *Allen v. Wright*, 468 U.S. 737, 751 (1984). The injury requirement has subsequently been interpreted to require “actual or imminent” threat of suffering “concrete and particularized” injury in fact. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).

105. *Wright*, 468 U.S. at 751–52.

106. *Id.* at 760 (quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972)); see also Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 896 (1983) (arguing that the role of federal courts is to protect individuals from the majority, not to decide what is best for the people).

107. *Wright*, 468 U.S. at 751–52.

*Wright* Court thus transformed Article III's requirement of "concrete adverseness" as a practical necessity for quality decisionmaking into a "concern about the proper—and properly limited—role of the courts in a democratic society" and, consequently, their authority to engage such decisionmaking in the first place.<sup>108</sup>

Far from maintaining the separation of powers, restrictive standing doctrine absolves federal courts of their unique duty to interpret constitutional mandates and congressional enactments to be carried out by the Executive Branch.<sup>109</sup> As a result, the doctrine insulates government action against even congressionally authorized federal court oversight under a range of citizen-suit provisions, including the APA, which entitle any aggrieved party to seek judicial review of federal agency action in order to protect the interests of a broad range of regulatory stakeholders.<sup>110</sup>

Under current constitutional standing doctrine, parties challenging the economic burdens of regulation routinely have access to federal courts,<sup>111</sup> while other regulatory stakeholders face substantial barriers to protecting their rights under regulatory schemes according to legislative design. The Court has repeatedly emphasized that the fact that no plaintiff may exist with standing to litigate a claim is no reason to grant standing to unqualified parties.<sup>112</sup> However, a stark asymmetry favoring court access only for certain kinds of federal litigants—for example, private entities challenging increased costs of business instead of other stakeholders who

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108. *Id.* at 750 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)) (internal quotation marks omitted); see Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 18 (2011) (tracing the move from justification based on concern for "adverseness necessary to make out a constitutional case or controversy" to concern for "separation of powers, namely with keeping courts within their proper role in government").

109. See Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 670 (1985) (arguing that judicial review promotes the separation of powers by ensuring the effectuation of congressional will); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 601–02 (1992) (Blackmun, J., dissenting) (criticizing the plurality opinion as an attempt "to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates," and as "based . . . on [an] invitation of executive lawlessness").

110. 5 U.S.C. § 702 (2012).

111. Regulated entities, however, are not guaranteed judicial review. Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 491–92 (2008); see Elliott, *supra* note 17, at 173 n.70 (noting lack of standing for a regulated entity seeking further clarification of Department of Transportation policy in *Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 815–22 (D.C. Cir. 2006)).

112. See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) ("The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.").

lack the financial and political power to influence the regulatory process—is more troubling.<sup>113</sup> As Professor Bandes observes, “The usual answer is that the government has the sole interest in enforcing the law, and that it will be assumed to be representing even interest groups who claim their interests are being ignored or misrepresented.”<sup>114</sup> Instead, “those defending pocketbook interests will continue to have ready access to the courts, but those seeking to vindicate the public interest will not.”<sup>115</sup>

### B. Prudential Limits on Federal Court Standing

Plaintiffs’ standing to seek judicial review of federal agency action was never questioned in the earliest cases challenging IRS rules governing tax-exempt public charities. Hence, in *Green v. Connally*, a 1969 federal class action filed by black families of public schoolchildren in Mississippi, the three-judge district court could simply announce that plaintiffs “have standing to attack the constitutionality of statutory provisions which they claim provide[] an unconstitutional system of benefits and matching grants that fosters and supports a system of segregated private schools as an alternative available to white students seeking to avoid desegregated public schools.”<sup>116</sup> Likewise, in *Eastern Kentucky*, the district court easily granted standing on the basis of existing precedent<sup>117</sup>—a conclusion that the D.C. Circuit upheld in a footnote.<sup>118</sup>

Yet the plaintiffs’ claims in *Eastern Kentucky* and *Wright* did raise particular concerns for federal courts, which have created self-imposed prudential limits on standing in order to promote pragmatic goals such as judicial

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113. See, e.g., Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 680 (1985) (“Depriving public interest advocates of their newly-won legal rights while allowing industry to challenge regulations through extensive formal procedures and ‘hard look’ review would clearly have a lopsided impact.”).

114. Susan Bandes, *Victim Standing*, 1999 UTAH L. REV. 331, 335 (1999).

115. Field, *supra* note 69, at 430–31 (protesting agency decisions as “‘Robin Hood in reverse’—i.e., decisions which give to the few and powerful at the expense of the many and the weak”); see also Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 304 (2002) (noting that the injury standard “systematically favors the powerful over the powerless”).

116. *Green v. Kennedy*, 309 F. Supp. 1127, 1132. (D.D.C. 1970), *summarily aff’d sub nom. Coit v. Green*, 404 U.S. 997 (1971) (leaving the standing issue raised in certiorari petition unaddressed).

117. *E. Ky. Welfare Rights Org. v. Simon*, 506 F.2d 1278, 1282 (D.C. Cir. 1974) (citing *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973)).

118. *Id.* at 1282 n.6.

efficiency and fairness to nonparties.<sup>119</sup> First, in cases arising under the APA, plaintiffs must establish that the “interest sought to be protected . . . [is] arguably within the zone of interests to be protected or regulated” by the challenged federal law.<sup>120</sup> The precise limits of a statute’s “zone of interests” are difficult to discern, but are to be defined with great leniency.<sup>121</sup> In *Eastern Kentucky’s* APA challenge, the D.C. Circuit rejected “the government’s conclusion that [the Internal Revenue] Code provisions” governing exemption and deductibility of donations to charitable hospitals “are in no way intended to aid” plaintiffs who would be hospital patients were it not for their inability to pay.<sup>122</sup> Had the *Wright* plaintiffs proceeded under the APA in addition to the Equal Protection Clause, they might have presented a closer call as families of children prevented from attending fully desegregated public schools due to white flight to tax-exempt private schools.<sup>123</sup> Still, the legislative history and purpose of the tax-exemption scheme indicates that it is designed to complement rather than frustrate the provision of existing government services; accordingly, the interests of public schoolchildren in fully desegregated public schools “arguably fall[]” within the zone of interests protected by the tax-exemption scheme for private schools.<sup>124</sup>

Relatedly, because plaintiffs sought to expand obligations imposed by a federal agency on others, they could be characterized as “third parties not themselves subject to coercive government regulation but affected by regulation of others.”<sup>125</sup> As such, they could be viewed as seeking to

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119. See Bradford C. Mank, *Reading the Standing Tea Leaves in American Electric Power Co. v. Connecticut*, 46 U. RICH. L. REV. 543, 548 (2012) (“[F]ederal courts may impose prudential standing requirements to limit unreasonable demands on limited judicial resources or for other judicial policy reasons.”).

120. *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 489 (1998). The zone-of-interests inquiry is generally limited to cases under the APA.

121. *Id.* at 492; see generally Jonathan R. Siegel, *Zone of Interests*, 92 GEO. L.J. 317, 319, 368 (2004) (recommending finding plaintiffs’ interests to be within the zone “unless Congress, in a statute other than the [APA], prescribes a more restrictive rule” to “focus [the Court’s] attention on implementing the congressional will”).

122. *E. Ky. Welfare Rights Org. v. Schultz*, 370 F. Supp. 325, 332–33 (D.D.C. 1973).

123. See, e.g., Monaghan, *supra* note 8, at 254, 256 (observing “symmetries” in standing analysis in APA cases and analysis of the private right of action for merely incidental beneficiaries under 42 U.S.C. § 1983—despite the fact that the APA is theoretically “more liberal”).

124. *Nat’l Credit Union Admin.*, 522 U.S. at 517 (O’Connor, J., dissenting); see *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (“[W]e have always conspicuously included the word ‘arguably’ in the test to indicate that the benefit of any doubt goes to the plaintiff.”).

125. Richard B. Stewart, *Standing for Solidarity*, 88 YALE L.J. 1559, 1560 (1979) (book

vindicate rights only “collateral” to those of absent “primary” rights holders who choose not to press their own claims.<sup>126</sup> As stakeholders of, yet outsiders to, the regulatory relationship between the IRS and tax-exempt public charities, plaintiffs’ allegations of harm from agency rulemaking could be perceived as subordinate to the interests of the private, regulated entities actually subject to those rules. Indeed, Professor, now Circuit Court Judge, Fletcher observed that the “difficult standing cases are almost always third party standing cases in the sense that the direct interests of the plaintiff are viewed as less important than the interests of non-parties” who may lack motivation to challenge the status quo.<sup>127</sup> Nonetheless, plaintiffs seeking to vindicate their own “direct interests” warrant their own avenue to federal court review without regard to the existence or non-existence of other, higher-priority rights holders. Professor Pfander has described cases like *Eastern Kentucky* and *Wright* as “derivative” and as involving a kind of triangulation through the method of an agency-forcing lawsuit, which “seek[s] to change the behavior of the regulated [entity] by acting through the regulatory agency.”<sup>128</sup> By disrupting the traditional, bilateral, private rights model of federal court review,<sup>129</sup> the cases raised the prospect of a wider range of litigants empowered to use the courts for reform based on more attenuated chains of causation linking government actions to plaintiffs’ injuries. Not only did the cases raise thorny Palsgrafian questions about legal causation and the “orbit of duty” owed by government actors to foreseeably harmed parties,<sup>130</sup> but they also invoked what has been called the “spooky” doctrine of horizontality, which recognizes government responsibility for a broad range of seemingly private orderings.<sup>131</sup> To be

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review).

126. See Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 282 (1984) (observing that many third-party interests can be recharacterized as first-party interests); see also Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 316 (1990). See generally Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000).

127. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 246 (1988); see, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975).

128. James E. Pfander, *Triangulating Standing*, 53 ST. LOUIS U. L.J. 829, 833 (2009) (“Here, the citizens seek to compel the agency to apply a more rigorous standard to the industry, or to enforce the law against a particular firm . . . . Such suits have sometimes been called ‘agency-forcing litigation.’”).

129. See generally Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982).

130. See Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1379 (1988).

131. See Helen Hershkoff, *Horizontality and the “Spooky” Doctrines of American Law*, 59 BUFF. L. REV. 455, 456–62 (2011) (citation omitted).

sure, by seeking to influence the behavior and decisions of regulated entities through the mechanism of federal agency oversight rather than through “case-by-case litigation against each allegedly offending school” or hospital,<sup>132</sup> the plaintiffs in *Wright* and *Eastern Kentucky* sought to transform whole sectors of society—but only to the extent allegedly mandated by federal law.

Finally, as parties not themselves subject to regulation who nonetheless sought government accountability in the implementation of regulatory schemes affecting their interests, plaintiffs implicated not only disfavored third-party interests but also generalized grievances, or injuries to “interest[s] . . . held in common by all members of the public” and therefore insufficiently particularized for judicial cognizance.<sup>133</sup> Where an asserted injury boils down to a complaint potentially shared by all members of the public about unfair administration of the laws, courts routinely dismiss such generalized grievances to prevent overuse of the federal courts as “no more than a vehicle for the vindication of the value interests of concerned bystanders.”<sup>134</sup>

To avoid the risk of engaging in “gratuitous adjudications” of such public rights,<sup>135</sup> the Court imposed impossibly strict standards for directness of harm and likelihood of relief at the traceability and redressability stages—first as a prudential matter in *Eastern Kentucky*<sup>136</sup> and later, in *Wright*,<sup>137</sup> based on the same grounds recharacterized as constitutionally required to maintain the separation of powers. As a result, even where regulatory stakeholders establish concrete, particularized injury above and beyond generalized grievances shared by all members of the public, they face significant limits to obtaining government accountability in agency

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132. *Wright v. Regan*, 656 F.2d 820, 836 (D.C. Cir. 1981); *see also* *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976) (“[N]o hospital is a defendant.”).

133. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220–21 (1974) (“[S]tanding to sue may not be predicated upon an interest . . . which is held in common by all members of the public . . .”); *see* Mank, *supra* note 119, at 548 (observing that the “Supreme Court has been unclear” whether a bar on generalized grievances “is a prudential limitation or a constitutional one”). Even the concrete economic injury suffered by an individual taxpayer through the alleged misallocation of federal revenue rarely, if ever, qualifies as cognizable injury due to the minute and diluted nature of the harm relative to that suffered by other taxpayers. *See* *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 593 (2007) (limiting taxpayer standing to challenge alleged violations of the Establishment Clause).

134. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687 (1973).

135. *See* *Nichol*, *supra* note 81, at 657.

136. *E. Ky.*, 426 U.S. at 44–45.

137. *Allen v. Wright*, 468 U.S. 737, 766 (1984).

decisionmaking in their own right. The Court's transformation of standing doctrine in *Eastern Kentucky* and *Wright* thus elevates prudential concerns to constitutional levels—at the risk of “leav[ing] governmentally caused injuries unredressed.”<sup>138</sup>

### C. *Tax Exemption for Public Charities as Regulation in Standing Doctrine*

The Court's explicit concerns about excessive intrusion into executive affairs in *Wright* masked a more subtle undercurrent in its reasoning. Crucially, the Court's analysis in each case rested on a mischaracterization of the effects of IRS rulemaking on the behavior and decisions of tax-exempt public charities as regulated entities. At each stage of the analysis, the Court confronted the need for government accountability in tax administration but failed to credit the real influence of IRS decisions on a wide range of regulatory stakeholders. The Court thus downplayed the IRS's exclusive role in setting legally binding rules implementing the statutory tax-exemption scheme and instead treated the agency as merely an enforcer of federal mandates it played no role in interpreting. By invoking broad prudential reasons and separation of powers grounds, the Court effectively insulated IRS rulemaking from judicial scrutiny and accountability in all but the most traditional challenges by regulated entities vindicating their own private interests.

#### 1. *Injury-in-Fact*

On the surface, the plaintiffs in *Eastern Kentucky* and *Wright* evoked a broad, generalized form of injury simply by challenging IRS rules recognizing federal tax-exempt status for public charities under circumstances allegedly in violation of federal statutes and the U.S. Constitution.<sup>139</sup> By implementing tax exemption for public charities in contravention of federal mandates, the IRS theoretically offended any and all members of U.S. society with “an interest . . . in the effective administration of the tax laws.”<sup>140</sup> More specifically, however, in *Wright*,

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138. Nichol, *supra* note 81, at 657; see *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 355 (2006) (Ginsburg, J., concurring in part and concurring in the judgment) (“One can accept, as I do, the nonjusticiability of . . . federal and state taxpayer suits in federal court without endorsing as well the limitations on standing later declared in [cases including *Eastern Kentucky* and *Wright*].”).

139. U.S. CONST. amend. XIV, § 1; 5 U.S.C. § 701(a)(2) (2012); IRC § 501(c)(3) (2012); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006).

140. *Wright v. Regan*, 656 F.2d 820, 844 (D.C. Cir. 1981) (Tamm, J., dissenting) (alleging stigmatic injury amounts to a generalized grievance: “What the plaintiffs actually

the plaintiffs alleged that they bore an especial brunt of the injury because they suffered the stigma of being assigned second-class status based on race through the availability of a “federal stamp of approval”—tax-exempt status—to segregated private schools.<sup>141</sup> Yet the *Wright* plaintiffs denied any personal interest in actually attending any currently segregated private school.<sup>142</sup> Because they were not “personally subject” to the nationwide discriminatory policies they challenged, the Court held their stigmatic injury to be too abstract to meet Article III’s minimum requirements.<sup>143</sup>

By contrast, the plaintiffs in *Eastern Kentucky* did allege—and the Court recognized for purposes of Article III standing—the quintessentially personal injury of the inability to “receiv[e] . . . hospital treatment.”<sup>144</sup> Like the *Wright* plaintiffs, however, they did not seek medical care from any particular tax-exempt hospital; rather, their broader grievance remained their decreased chance of obtaining medical care at any hospital in the absence of the charity-care requirement as a condition of tax exemption. As Justice Brennan clarified, concurring in the judgment only in *Eastern Kentucky*, plaintiffs were *not* alleging “that they have been and will be illegally denied the provision of indigent medical services by the hospitals,”<sup>145</sup> but alleged a different, constitutionally sufficient “injury to their ‘opportunity and ability’ to receive medical services” because “the Internal Revenue Code requires the Government to offer economic inducements to the relevant hospitals only under conditions which are likely to benefit” them.<sup>146</sup>

Following Justice Brennan’s lead, the *Wright* plaintiffs specifically disavowed any desire to actually receive educational services from tax-exempt private schools<sup>147</sup> and explicitly alleged an additional injury in the form of “their children’s diminished ability to receive an education in a racially integrated school.”<sup>148</sup> In contrast to the *Wright* plaintiffs’ general allegation of stigmatic injury, the Court declared this narrower

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challenge here is the *adequacy of agency enforcement procedures*, arguing that the IRS has failed to weave its net of enforcement fine enough to catch all of the private schools that may discriminate on the basis of race”).

141. Joint Appendix at 19, *Allen v. Wright*, 468 U.S. 737 (1984) (No. 81-757) (citing paragraph 21 of Plaintiffs’ Complaint).

142. *Wright*, 468 U.S. at 746.

143. *Id.* at 755–56 (finding “abstract stigmatic injur[ies]” insufficient for Article III standing).

144. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 46 (1976).

145. *Id.* at 56.

146. *Id.*; see *Winter*, *supra* note 130, at 1470–73.

147. Brief for Respondents at 39, *Allen v. Wright*, 468 U.S. 737 (1984) (No. 81-757).

148. *Wright*, 468 U.S. at 756.

characterization of plaintiffs' harm to be, "beyond any doubt, not only judicially cognizable but . . . one of the most serious injuries recognized in our legal system."<sup>149</sup>

Ultimately, the plaintiffs in *Eastern Kentucky* and *Wright* succeeded in demonstrating concrete, particularized harm to themselves that distinguished them from the general population of individuals aggrieved by racial and class disparities in health care and education or, at an even more basic level, by unfair administration of the tax-exemption scheme. In each case, plaintiffs cleared the threshold for particularized injury by alleging straightforward personal harm resulting from the tax-exemption scheme for public charities. Yet the precise characterization of their alleged injuries only served to raise the Court's standards for the traceability and redressability prongs of the standing inquiry based on concerns about judicial authority to intervene in government operations.

## 2. Traceability

If, as Professor Chayes argued, what plaintiffs ultimately sought was access to benefits—whether or not provided by tax-exempt entities—in an economic setting that “accurately reflect[ed]” the cost-savings of federal tax exemptions and tax-deductible donations as intended by Congress, then the IRS's exclusive role in determining the precise parameters of tax exemption should have sufficed to meet the traceability requirement.<sup>150</sup> The plaintiffs in both *Eastern Kentucky* and *Wright* sought to compel the IRS to adopt rules requiring exempt public charities to change their practices—to plaintiffs' benefit—in order to retain tax-exempt status and eligibility for tax-deductible donations. The *Eastern Kentucky* plaintiffs produced evidence that most tax-exempt hospitals could ill afford to lose deductible donations

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149. *Id.* (citing cases ranging from *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), to the previous term's decision in *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983)).

150. Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 80 (1984); see Chayes, *supra* note 129, at 19 (recharacterizing the injury at issue as “not the interest in obtaining free medical services at a particular hospital, but in having hospitals' decisions whether to provide free services reflect accurately the incentive structure that Congress established—presumably based on a judgment that the incentive is sufficient to call forth the desired overall amount of services for indigents” and concluding that “Congress must believe that these measures have some efficacy in inducing desired conduct on the part of taxpayers”); see also *Dellums v. U.S. Nuclear Regulatory Comm'n*, 863 F.2d 968, 987 (D.C. Cir. 1988) (Ginsburg, J., dissenting) (“The proper threshold inquiry . . . is whether Congress reasonably predicted that enforcement of the Act as a whole would effect changes sufficient to alleviate petitioners' injuries.”).

based on that status.<sup>151</sup> If at least some hospitals reallocated their resources and increased their levels of charity care to prevent that outcome, plaintiffs would necessarily have more options for free medical treatment. Similarly, if racially segregated private schools could no longer depend on the same level of deductible donations based on their status as exempt public charities, the cost of drawing white children away from public schools would increase, raising the likelihood that at least some would end their discriminatory policies or cease to exist.<sup>152</sup>

Because the *Eastern Kentucky* majority instead described the injury to poor plaintiffs as the actual denial of medical treatment by tax-exempt hospitals, it could then conclude that, “it is purely speculative whether the denials of service . . . fairly can be traced to [IRS] ‘encouragement’ or instead result[ed] from decisions made by the hospitals without regard to the tax implications.”<sup>153</sup> In short, the Court found that plaintiffs failed to demonstrate traceability because they could not establish that the IRS’s change in policy was the but-for cause of their individual service denials.<sup>154</sup> When their injury is reframed as a decreased likelihood of obtaining health care in the economic climate Congress intended, however, the IRS’s role becomes indispensable, for the IRS alone establishes the tax consequences of all exempt hospitals’ charity-care decisions, regardless of whether individual charities ultimately are willing to absorb them.

In *Wright*, the plaintiffs described their injury more accurately as the “diminished ability to receive an education in a racially integrated school.”<sup>155</sup> Yet the Court again failed to find such an injury fairly traceable to IRS decisionmaking without evidence that “there were enough racially discriminatory private schools receiving tax exemptions in respondents’ communities for withdrawal of those exemptions to make an appreciable difference in public school integration.”<sup>156</sup> A marginal increase in the

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151. *E. Ky.*, 426 U.S. at 43.

152. *Wright*, 468 U.S. at 788 (Stevens, J., dissenting).

153. *E. Ky.*, 426 U.S. at 42–43.

154. See Winter, *supra* note 130, at 1470–71.

155. *Wright*, 468 U.S. at 756.

156. The Court continued:

It is just as speculative whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any changes in educational or financial policy made by the private school once it was threatened with loss of tax-exempt status. It is also pure speculation whether, in a particular community, a large enough number of the numerous relevant school officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools.

*Id.* at 758. But see *id.* at 775 (Brennan, J., dissenting) (arguing that plaintiffs met the standard

likelihood of a desegregated public school district would not suffice. Equally speculative, as under *Eastern Kentucky*, was the question “whether withdrawal of a tax exemption from any particular school would lead the school to change its policies.”<sup>157</sup> The Court thus found that the *Wright* plaintiffs failed to establish even the possibility of a marginal increase in their chances at a desegregated education. In fact, all of the “speculative” decisions identified by the Court share one certainty in common: each depends on a decision of the IRS to assign tax costs and consequences as part of the calculus.

Instead of recognizing the agency role in setting minimum requirements for tax-exempt public charities’ behavior, the Court in *Eastern Kentucky* and *Wright* treated plaintiffs’ claims as attempts to usurp the IRS’s individual enforcement decisions despite the fact that their “own tax liability was not affected.”<sup>158</sup> In *Linda R.S. v. Richard D.*,<sup>159</sup> decided several years earlier, the Court denied standing to a custodial parent to challenge a criminal prosecutor’s child-support enforcement policy of declining to prosecute parents who had never married the custodial parent, in part because criminal prosecution might result only in the noncustodial parent’s incarceration rather than the actual payment of child support.<sup>160</sup> The Court thus implied that the sole duty of a criminal prosecutor is to make individual decisions to punish noncompliance rather than to set broadly applicable rules and policies that may prospectively influence—and deter—the behavior and decisionmaking of those subject to their mandates.

In the tax-exemption context, the Court likewise failed to recognize the IRS’s role in not only penalizing noncompliance but also determining the tax costs and benefits that influence public charities’ choices. Professor Nichol observes that in both cases the Court “effectively presume[d],” contrary to congressional judgment, “that private actors are not substantially likely to alter their behavior in order to obtain tax-exempt status.”<sup>161</sup> Certainly some might decide that exemption and deductible

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by referring by name to 20 schools in two jurisdictions falling under desegregation orders “that discriminate on the basis of race and yet continue to benefit illegally from tax-exempt status”).

157. *Id.* at 758.

158. *E. Ky.*, 426 U.S. at 46 (Stewart, J., concurring).

159. 410 U.S. 614 (1973).

160. *Id.* at 614–18. *But see* *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (per curiam) (striking down the same policies under the Equal Protection Clause in a case brought by a married parent).

161. Nichol, *supra* note 81, at 656; *see* *Women’s Equity Action League v. Cavazos*, 879 F.2d 880, 885 (D.C. Cir. 1989) (“[F]ederal funding of facilities that engage in proscribed discrimination is in part causative of the perpetuation of such discrimination,

contributions are no longer worth the additional constraints.<sup>162</sup> However, the decision would be made in a regulatory regime that, if plaintiffs prevailed on the merits, would be corrected to comport with congressional intent and constitutional mandates. Private schools that failed to “demonstrate that they do not provide racially segregated educational opportunities for white children avoiding attendance in desegregating public school systems” would be compelled either to make such a demonstration or to accept the risk of being forced to begin paying taxes and receiving only nondeductible donations.<sup>163</sup> Hospitals that failed to provide charity care would likewise do so in a reformed regulatory environment posing the risk of revocation and ineligibility for deductible donations for noncompliance, a cost they did not previously have to take into account.

Whether changes in the IRS tax-exemption rules impose quantifiable economic costs exceeding the benefits of exempt status, public charities derive intangible benefits from the “halo effect” that surrounds entities exempt from taxation and eligible for deductible donations based on their provision of a public benefit.<sup>164</sup> As Professors Hill and Hickman argue, private entities subject to federal regulation in all areas respond both to agency rules that deter or encourage particular behavior as well as to agency efforts at “persuasion, education, and assistance.”<sup>165</sup> Public charities, likewise, base their behavior “on their assessments of costs and benefits broadly construed, including not only monetary savings and the possibility of legal sanctions, but also extra-legal rewards and sanctions relating to reputation, . . . feelings of virtue and law-abidingness, and other factors.”<sup>166</sup> Accordingly, the intangible benefit of charitable tax-exempt status’s “halo effect” or “stamp of approval” may be a determining factor—if not *the* determining factor—for many public charities’ decisionmaking.

The *Eastern Kentucky* Court warned that “indirectness of injury, while not

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and . . . ‘initiating federal fund termination proceedings [is] highly effective in gaining compliance with federal antidiscrimination laws.’”) (citation omitted).

162. In fact, some might be willing to pay for the privilege of discriminating. See Galle, *supra* note 41, at 850 (asserting that the lack of government support can “strengthen[] . . . [members’] own resolve to contribute” to make up the difference).

163. *Allen v. Wright*, 468 U.S. 737, 769 (1984) (Brennan, J., dissenting).

164. See Kristin E. Hickman, *How Did We Get Here Anyway?: Considering the Standing Question in DaimlerChrysler v. Cuno*, 4 GEO. J.L. & PUB. POL’Y 47, 70 (2006) (“[E]mpirical research suggest[s] that tax incentives are more politically symbolic than economically influential.”).

165. Kristin E. Hickman & Claire A. Hill, *Concepts, Categories, and Compliance in the Regulatory State*, 94 MINN. L. REV. 1151, 1160–66 (2010).

166. See *id.* at 1160, 1174 (stating that administrative law generally features “susceptibility to planning by minimal compliers”).

necessarily fatal to standing, ‘may make it substantially more difficult’” for third parties to the regulatory relationship to meet Article III’s minimum requirements.<sup>167</sup> In *Wright*, the Court transformed the high bar for standing in such contexts into a constitutional limit. In the Court’s view, not only did indirectness of injury limit federal agencies’ ability to provide the requisite relief to satisfy traceability, but it also precluded redressability by requiring federal courts to overstep their authority by saddling agencies with affirmative obligations.

### 3. Redressability

The Court in *Wright* stressed that redressability analysis is distinct from that of traceability, although where the relief requested is “simply the cessation of the allegedly illegal conduct,” the analysis “is identical.”<sup>168</sup> Consequently, the *Eastern Kentucky* majority’s redressability analysis concluded, “the complaint suggests no substantial likelihood that victory in this suit would result in [plaintiffs’] receiving the hospital treatment they desire”<sup>169</sup> because, under the Court’s traceability analysis, invalidating the IRS’s new rule in favor of the IRS’s former charity-care requirement might have no effect on exempt hospitals’ decisions.<sup>170</sup> However, the Court cited additional concerns regarding affirmative court intervention in government agency action that defeated the *Wright* plaintiffs’ claims at the redressability stage. First, because the plaintiffs sought to increase the likelihood of desegregation in public schools by restricting tax exemption for racially segregated private schools, the Court determined that the relief sought could not go far enough and might be futile in the absence of those private schools as parties to the lawsuit.<sup>171</sup> What the plaintiffs sought, however, was not enforcement against specific nonparties not before the court, but a recalibration of the conditions under which any and all private schools could seek tax-exempt status; this could only be effectuated by the IRS through its rule-setting function.

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167. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44–45 (1976) (quoting *Warth v. Seldin*, 422 U.S. 490, 505 (1975)).

168. *Wright*, 468 U.S. at 759 n.24.

169. *E. Ky.*, 426 U.S. at 45–46.

170. The “denials of service” they experienced might “result from decisions made by the hospitals without regard to the tax implications.” *Id.* at 42–43. However, the question, as Justice Brennan clarified it, was how much factual or probabilistic evidence should be required to determine justiciability. *Id.* at 54–55 (Brennan, J., dissenting).

171. *See Wright*, 468 U.S. at 759; *see also* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006) (describing “practically unacceptable” or incomplete relief).

At the same time, the *Wright* majority determined that plaintiffs' request for relief sought too much,<sup>172</sup> because the *Wright* plaintiffs requested not only declaratory relief ending the IRS's policy extending tax exemption to racially segregated private schools but also injunctive relief mandating that the IRS amend its tax-exemption rules accordingly.<sup>173</sup> The balance of the Court's redressability analysis focused on the limits of judicial power to oversee government agency operations. Justice O'Connor's majority opinion explicitly disavowed the federal courts' role "as virtually continuing monitors of the wisdom and soundness of Executive action."<sup>174</sup> While some egregious circumstances might warrant review, where plaintiffs bring suit "not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties," the federal courts are powerless to provide that relief.<sup>175</sup>

Furthermore, according to Justice O'Connor, in *Wright*, "the relief requested goes well beyond the violation of law alleged"<sup>176</sup> by compelling adoption of measures to eliminate constitutionally permissible de facto segregation from tax-exempt private schools, regardless of whether those schools intentionally discriminated on the basis of race.<sup>177</sup> While the Court strongly rejected the argument that the Equal Protection Clause imposed such "specific legal obligations" on the IRS,<sup>178</sup> the question remains

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172. The Court characterized plaintiffs' requested relief as "substantially similar to the enforcement guidelines promulgated by the IRS itself in 1978 and 1979, before congressional action temporarily stayed, and the agency withdrew, the amended procedures." *Wright*, 468 U.S. at 769; see 44 Fed. Reg. 9451, 9454 (Feb. 13, 1979) (revising proposed procedure to require schools to engage in "actions and programs reasonably designed to attract minority students," which may vary from school to school); 43 Fed. Reg. 37,296, 37,298 (Aug. 22, 1978) (proposing revenue procedure requiring "operation in good faith on a racially nondiscriminatory basis" based on several factors). For more details on Congress's action preventing the amended procedures from taking effect, see Archie Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360, 1374-75, 1380-86 (1980) (discussing the inappropriate use of appropriations bills to impliedly amend the substantive IRC, thereby freezing the administration of tax law).

173. Brief for Respondents at 48, *Allen v. Wright*, 468 U.S. 737 (1984) (No. 81-757); see *Wright*, 468 U.S. at 746-47.

174. *Wright*, 468 U.S. at 760 (quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972)).

175. *Id.* at 761.

176. *Id.* at 753 n.19 (noting that cases in which plaintiffs seek relief broader than a mere correction of the alleged unlawful conduct demonstrate the need to keep the traceability and redressability prongs of the standing test distinct from each other).

177. See *id.* In *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, however, Justice Douglas noted that the Equal Protection Clause does not distinguish de facto from de jure segregation. See 413 U.S. 189, 214-15 (1973) (Douglas, J. concurring).

178. See also Sugin, *supra* note 19, at 448 (stating that if the *Bob Jones* Court "had adopted

whether the requested relief could redress the IRS's alleged independent violations of § 501(c)(3), and whether that statute requires more from exempt public charities under the public policy prohibition announced one term before in *Bob Jones*.<sup>179</sup> Only full recognition of how tax-exemption administration operates as a form of federal regulation—and as government agency action subject to congressionally authorized judicial review under the APA—could determine what, precisely, was required to accomplish the statutory goals of the tax-exemption scheme. Yet the Court's restrictive view of the cases as essentially individual enforcement efforts prevented it from treating the tax-exemption scheme as regulation of behavior subject to public accountability. In the absence of that routine administrative framework for analysis, the Court was free to rely on a broad separation of powers rationale not limited to any particular administrative context.

For the Supreme Court, judicial review is precluded by the separation of powers principle in the unique situation where stakeholders of federal regulation challenge agency rules because the necessary relief requires too much scrutiny “of the wisdom and soundness of Executive action.”<sup>180</sup> Yet judicial review remains available where regulated entities seek to reform agency rules to their advantage. As the district court recognized in *Eastern Kentucky*, the need for a judicial check to ensure the legitimacy of federal agency action is not limited to those bearing the burdens of regulation; the fact that an IRS rule does “not produce protesting [tax-exempt entities] eager to challenge its policy and application should not immunize [it] from such a testing where . . . the Code policy it purports to serve has a fundamental purpose of aiding and benefiting . . . [people] other than those whose tax returns are immediately affected.”<sup>181</sup> The Court's separation of powers concerns are thus exaggerated where regulatory stakeholders seek to enforce federal agency obligations. To the contrary, where such a judicial check is only available to regulated entities, the risk of agency capture arises. Therefore, in tax, as in other administrative contexts, broader standing in federal court remains essential to correct an imbalance in regulatory stakeholder power and enforce congressional mandates in the implementation of regulatory schemes.

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the strong version of tax expenditure analysis,” it would have followed *Norwood v. Harrison*, 413 U.S. 455 (1973), to strike down funding to segregated schools).

179. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 595–96 (1983).

180. *Wright*, 468 U.S. at 760 (quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972)) (internal quotation marks omitted).

181. *E. Ky. Welfare Rights Org. v. Shultz*, 370 F. Supp. 325, 333 (D.D.C. 1973).

### III. THE EROSION OF TAX EXCEPTIONALISM IN JUDICIAL REVIEW OF TAX ADMINISTRATION

Critics have assailed the constitutionalization of the traceability and redressability requirements of standing in *Wright* to foreclose federal court challenges of agency rules by regulatory stakeholders alleging particularized, concrete injuries.<sup>182</sup> Subsequent cases may have preserved the availability of standing to challenge agency action to holders of informational or procedural rights whose violation affects unrelated concrete interests.<sup>183</sup> Where such procedural injuries are alleged, the redressability bar may be set lower so that plaintiffs need not demonstrate that a favorable court decision would necessarily result in a different outcome the second time around, but only that the decisionmaking process would comport with statutory requirements designed to promote transparency and fairness.<sup>184</sup> The bar has, however, remained high for regulatory stakeholders challenging substantive agency rules.<sup>185</sup>

Professor Sunstein has criticized the majority decisions in *Eastern Kentucky* and *Wright* as “incorrectly decided if they are taken as pure redressability cases” and dubious to the extent that they “focus[] on the exercise of discretion by a private [third] party” to preclude traceability.<sup>186</sup> Instead, in keeping with Justice Stewart’s short *Eastern Kentucky* concurrence,<sup>187</sup> Sunstein distinguishes the decisions “as a matter of construction of the Internal Revenue Code,”<sup>188</sup> because Congress is “generally not understood

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182. See, e.g., Nichol, *supra* note 81, at 655–56; see also Sunstein, *supra* note 61, at 615–17.

183. See *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 23–26 (1998) (asserting courts can address informational injuries resulting from Federal Election Commission’s (FEC’s) decisions); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992) (plurality opinion) (finding no injury but allowing theoretical possibility of procedural injury under a lower standard); Kimberly N. Brown, *What’s Left Standing? FECA Citizen Suits and the Battle for Judicial Review*, 55 KAN. L. REV. 677, 722 (2007) (suggesting that *Akins* be read as “expressly disavowing the causation and redressability prongs of the traditional test for administrative cases, where they have little content, and look primarily to whether Congress created a nonabstract ‘injury’—by, for example, conferring a right to information”); see also *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007); see generally Sunstein, *supra* note 61.

184. See Richard J. Pierce, Jr., *Making Sense of Procedural Injury*, 62 ADMIN. L. REV. 1, 2 n.4 (2010).

185. The bar may also be lower where the regulatory stakeholder is a state. See *Massachusetts v. EPA*, 549 U.S. at 520 n.17.

186. Sunstein, *supra* note 61, at 648 n.173, 652 n.183.

187. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 46 (1976) (Stewart, J., concurring); see also *Women’s Equity Action League v. Cavazos*, 879 F.2d 880, 885 n.3 (D.C. Cir. 1989) (characterizing J. Stewart’s “well-established position” as an additional reason to distinguish lack of standing in *Wright* and *Eastern Kentucky*).

188. Sunstein, *supra* note 61, at 649 n.177.

to allow one taxpayer to litigate the tax liability of another.”<sup>189</sup> Similarly, Professor Stewart has described the opinions as hinging on special “considerations, admittedly inarticulate, as to the appropriate role of courts in the evolution of tax policy.”<sup>190</sup> But it is far from clear why the IRC, in particular, should be interpreted to foreclose such standing. To the contrary, the decision to regulate behavior through taxation rather than direct spending should not insulate such regulation from judicial oversight.

Indeed, even when considered as explicitly exceptional cases, the decisions are unfounded, for federal courts increasingly reject the view that tax matters are exempt from the application of general administrative law principles, supporting judicial review of agency action to promote government accountability.<sup>191</sup> To the extent that restrictions on standing for regulatory stakeholders rest on court decisions even partially or implicitly influenced by tax exceptionalism, then, those decisions are suspect. Administrative law principles that support broad access to judicial review of agency action while guarding against judicial overreaching remain vital and increasingly applicable to the tax context. As in other administrative contexts, other limits on judicial authority—most notably, the requirement of final agency action and deference accorded to agency expertise on the merits—assuage concerns about excessive court intervention in government agency affairs under federal separation of powers. Accordingly, there is little to fear and much to gain from extending standing to regulatory stakeholders alleging particularized, concrete injuries through federal regulation to seek judicial review of substantive agency rules—whether in the tax context or in other administrative contexts. Relaxing standing in this way would correct an imbalance of power that limits the influence of important stakeholders in government agency decisionmaking that affects their concrete interests.

#### A. *Tax Exceptionalism in Administrative Law*

In *Eastern Kentucky*, the IRS sought absolute immunity from judicial review of “determination[s] of general revenue policy” on the theory “that the entire history of this country’s revenue system . . . manifests a consistent congressional intent to vest exclusive authority for the administration of the tax laws in the Secretary and his duly authorized delegates, subject to

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189. *Id.* at 652 n.183.

190. Stewart, *supra* note 125, at 1568.

191. See *infra* Part III.A; see also *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 714 (2011).

oversight by the appropriate committees of Congress itself.”<sup>192</sup> While the Court rejected this broad-sweeping argument for immunity, it represents a pervasive theory that tax administration is fundamentally different from other administrative contexts because of its revenue-collecting purpose.<sup>193</sup>

To be sure, the need for speedy collection of revenue has resulted in distinct legislative procedures that facilitate revenue assessment and collection, but at the expense of transparency and accountability. Tax legislation generally proceeds through a nonpartisan joint tax committee rather than through both a separate subject-matter subcommittee and the appropriations committee.<sup>194</sup> Tax provisions are not subject to annual review; rather, once enacted, they often remain embedded in the IRC.<sup>195</sup> Finally, tax provisions do not require annual appropriations and are not considered in the creation of the formal federal budget,<sup>196</sup> although a separate budget accounts for “tax expenditures” that are the functional equivalent of direct spending.<sup>197</sup> As a result of this unique legislative process for revenue enactments, commentators describe the revenue code as lacking overall coherence or clear purpose.<sup>198</sup>

Certain tax administration procedures explicitly depart from generally applicable procedures for judicial review by congressional command. The (Tax) Anti-Injunction Act (AIA) prohibits “any person” from “maintain[ing] in any court” a “suit for the purpose of restraining the

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192. *E. Ky.*, 426 U.S. at 36; *see, e.g., Louisiana v. McAdoo*, 234 U.S. 627, 632 (1914) (demonstrating judicial review “would operate to disturb the whole revenue system of the Government”).

193. *See, e.g., Caron, supra* note 16, at 518–19.

194. *See* Susannah Camic Tahk, *Everything is Tax: Evaluating the Structural Transformation of U.S. Policymaking*, 50 HARV. J. ON LEGIS. 67, 69, 106 (2013) (noting close relationship of the IRS and Congress in drafting tax legislation); *see generally* Edward A. Zelinsky, *Efficiency and Income Taxes: The Rehabilitation of Tax Incentives*, 64 TEX. L. REV. 973 (1986) (stating that the tax agency remains insulated from interest-group influence because so many interest groups compete for its attention).

195. *See* Tahk, *supra* note 194, at 88–89 (noting difficulty of eliminating isolated provisions without affecting other parts of the IRC).

196. *See* Sheldon D. Pollack, *Arenas of Federal Tax Policy*, 135 TAX NOTES 1499, 1503 (2012) (explaining that the tax code offers “an efficient and attractive tool for distributing particularized economic benefits to constituents” without drawing the scrutiny of a direct appropriation).

197. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344 § 3(a)(3), 88 Stat. 297, 299 (codified as amended at 2 U.S.C. § 622(3) (2012)) (requiring reporting of “revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability”).

198. Hickman & Hill, *supra* note 165, at 1177 (stating that tax laws lack coherence and that the IRC’s purposes “are merely implied”).

assessment or collection of any tax.”<sup>199</sup> Similarly, the Declaratory Judgment Act (DJA) precludes suit for declaratory relief “with respect to Federal taxes.”<sup>200</sup> Both Acts may “protect[] . . . the Government’s need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference.”<sup>201</sup> Accordingly, taxpayers seeking relief against the burdens of revenue rules must generally wait to raise their claims in a post-enforcement deficiency action or refund suit. Nonetheless, where Congress seeks to promote particular regulatory goals over efficient revenue collection, it has acted to render the AIA and DJA inapplicable.<sup>202</sup>

Aside from specific congressional enactments, the IRS’s role in the swift and efficient collection of revenue should not detract from its equally important role in protecting stakeholder interests in the implementation of revenue rules that affect them. As Professor Sugin argues, “The increasing importance of the tax law as one of the few vessels that can still be legitimately filled with federal policy places pressure on the traditionally insular perspective of tax policy.”<sup>203</sup> While tax administrators may be somewhat insulated from interest group influence, they may not be sufficiently attuned to the interests of a broad range of regulatory stakeholders. Tax regulation forms part of a “larger political and social structure” in need of transparency and accountability to the public.<sup>204</sup> Professor Hickman argues that “Contemporary U.S. tax administrative practices [instead] have shifted [the] balance more toward efficiency and flexibility” by weakening procedural protections for regulatory stakeholders in agency decisionmaking “in developing the laws that govern taxpayer

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199. IRC § 7421(a) (2012).

200. 28 U.S.C. § 2201(a) (2012). In *Cohen v. United States*, 650 F.3d 717, 728 (D.C. Cir. 2011) (en banc), the D.C. Circuit reconfirmed the holding of *Eastern Kentucky* (never reviewed by the Supreme Court) that the Anti-Injunction Act’s and Declaratory Judgment Act’s limits on equitable relief are “coterminous” and “narrow[].” Furthermore, both Acts are inapplicable where plaintiffs, “rather than attempting to negate the levy of a tax, . . . seek[] to force the Government to impose a tax,” because in such cases “the Government is [not] faced with any threat to the actual assessment or collection of the taxes to which it deems itself entitled.” *E. Ky. Welfare Rights Org. v. Simon*, 506 F.2d 1278, 1284 (D.C. Cir. 1974), *rev’d on other grounds*, 426 U.S. 26 (1976).

201. *E. Ky.*, 506 F.2d at 1284 (quoting *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974)).

202. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (holding that the individual mandate to purchase health insurance subject to penalty enforced through the IRC is not a “tax” for purposes of the Anti-Injunction Act); see also *Cohen v. United States*, 578 F.3d 1 (D.C. Cir. 2009) (permitting pre-enforcement suit for Byzantine procedure where liability not at issue).

203. Sugin, *supra* note 19, at 474.

204. *Id.* at 474 n.302 (discussing John Stuart Mill).

behavior,” thereby insulating revenue rules from political or judicial oversight.<sup>205</sup>

The IRS is particularly notorious for issuing numerous rules and guidance documents that govern taxpayer behavior while bypassing the procedural protections of the APA that require agency consideration of public input by invoking the statutory exception to notice-and-comment rulemaking for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”<sup>206</sup> While full stakeholder participation in IRS rulemaking may not always be required or advisable,<sup>207</sup> overreliance on such rules on the theory that they are “nonlegislative”—even where they operate to legally bind regulated entities—may exacerbate power and informational imbalances among stakeholders.<sup>208</sup> While the IRS sometimes voluntarily invites public comments on proposed rules prior to adoption,<sup>209</sup> without the promise of public notice or a considered response to any feedback received,<sup>210</sup> the interests or viewpoints of non-expert stakeholders may be crowded out by those of better-represented and better-informed regulated entities who have experience with tax administration.<sup>211</sup> Even where the agency does initiate notice-and-comment rulemaking, many regulatory stakeholders may be difficult to identify and mobilize in advance of any harmful impact.<sup>212</sup>

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205. Kristin E. Hickman, *The Promise and the Reality of U.S. Tax Administration*, in *THE DELICATE BALANCE: TAX, DISCRETION AND THE RULE OF LAW* 39, 62 (Chris Evans et al. eds., 2011); see also Book, *supra* note 7, at 766 (“As the tax system has evolved into a complex dynamic with functions that extend far beyond revenue collection, the need for heightened expedience that often accompanies agencies wishing to bypass procedural checks is less compelling.”).

206. 5 U.S.C. § 553(b)(3)(A) (2012); see Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury’s (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1728–31 (2007).

207. For example, “when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(3)(B); see Beermann, *supra* note 108, at 27 (“[J]udicial activism in administrative law has been criticized . . . for contributing to the ‘ossification’ of rulemaking . . .”).

208. Hickman, *supra* note 205, at 53 (“[T]he IRS routinely issues a collection of guidance documents that are only marginally less legally binding [than notice-and-comment regulations] but that the agency nevertheless rarely submits for public comment.”).

209. See, e.g., IRS Notice 2011-52, 2011-30 I.R.B.

210. 5 U.S.C. § 553(b).

211. This result also crowds out less sophisticated taxpayers. See Book, *supra* note 7, at 767–68.

212. Even the notice-and-comment process can undervalue the voices of the public. See Mendelson, *supra* note 100, at 1380 (stating that agencies should “engage comments on the value-laden questions more seriously, including the comments of lay persons submitted in

Agency failure to adhere to the APA's notice-and-comment requirements raises risks that important stakeholder voices will be undervalued in agency decisionmaking and unable to seek judicial review of either the rulemaking process or the substantive outcome of resulting rules.

Like most federal agencies, the IRS is also statutorily required to receive petitions for rulemaking and to respond with reasons if it declines to initiate notice-and-comment proceedings.<sup>213</sup> However, it is not clear whether the statutory mandate requires the agency to explain a decision not to issue any other form of guidance, such as revenue rulings or notices, as well.<sup>214</sup> Nor does the statute impose any particular timeframe within which the IRS must respond to petitions.<sup>215</sup> Accordingly, like other agencies, the IRS may engage in “foot-dragging” in carrying out its statutory obligation to implement federal mandates, including under the public-charities exemption scheme.<sup>216</sup> Procedural protections—including judicial review of agency action—are thus required as much in tax administration as in other contexts to protect the interests of stakeholders who lack the political, financial, informational, or other resources to influence agency or legislative decisionmaking.

Related to the tax exceptionalist view of tax administration as being solely about unimpeded revenue collection is the view that revenue collection involves only the *post hoc* enforcement of pre-existing tax rules against individual taxpayers. Justice Stevens expressed some sympathy for the view that the IRS was entitled to prosecutorial discretion in enforcement decisions even as he dissented in the rulemaking challenge in *Wright*: “The Executive requires latitude to decide how best to enforce the law, and in general the Court may well be correct that the exercise of that

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large numbers”); Wagner, *supra* note 100, at 1325 (describing how “the excessive use of information and related information costs” by “well-financed interest groups” may result in “information capture” as a way “of gaining control over regulatory decisionmaking in informal rulemakings”).

213. See 5 U.S.C. § 553(e) (requiring agencies to accept petitions for rulemaking); *id.* § 555(e) (requiring agencies to respond to petitions made “in connection with any agency proceeding”). The IRS must give such petitions “careful consideration.” Treas. Reg. § 601.601(c) (subject to exceptions not relevant here); see also Sean Croston, *The Petition Is Mightier than the Sword: Rediscovering an Old Weapon in the Battles over “Regulation Through Guidance”*, 63 ADMIN. L. REV. 381, 399 (2011) (predicting more petitions and attempts at judicial review).

214. See *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 50–51 (1976) (Brennan, J., concurring) (suggesting that plaintiffs should have submitted such a petition for rulemaking).

215. See Michael D. Sant’Ambrogio, *Agency Delays: How a Principle-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381 (2011) (exploring the causes and consequences of agency delays and inaction).

216. See *id.* at 1383–85.

discretion, *especially in the tax context*, is unchallengeable.”<sup>217</sup>

Although the majorities in *Eastern Kentucky* and *Wright* did not explicitly rely on the tax-specific context of each plaintiffs’ claims as a reason to deny standing,<sup>218</sup> tax exceptionalism nevertheless colored the Court’s analyses of each prong of the standing inquiry as it ignored the vital role of the IRS in going beyond its prosecutorial role to regulate prospectively the behavior and decisions of public charities and their donors. In effect, the Court declined to treat public-charities regulation as a working administrative scheme with substantial economic incentives and practical impact on exempt entities’ organization and operations.

Yet in policing the outer bounds of proper revenue collection, the IRS necessarily establishes prospective rules and standards for compliance that give content to statutory mandates reflecting important public values<sup>219</sup>—with important consequences for other stakeholders. In 2011, in *Mayo Foundation for Medical Education and Research v. United States*, the Supreme Court clearly rejected an exception to general administrative law principles for tax matters and recognized the agency’s vital role not only in collecting revenue from individual taxpayers but also in promulgating broadly applicable regulations implementing legislative mandates: “Filling gaps in the Internal Revenue Code plainly requires the Treasury Department to make interpretive choices for statutory implementation at least as complex as the ones other agencies must make in administering their statutes.”<sup>220</sup> Plaintiffs in *Eastern Kentucky* and *Wright* challenged agency action in statutory implementation rather than individual enforcement decisions. Accordingly, as in other administrative contexts, as the *Mayo* Court recognized, no special rules should apply in tax cases to alter the existing balance among the federal branches in subjecting executive action to oversight while respecting agency needs for autonomy and flexibility.

The rejection of “tax exceptionalism” signals federal courts’ recognition of the need, as in other administrative contexts, to safeguard stakeholder interests in the formation of broadly applicable revenue rules through crucial administrative procedural protections—including judicial review of agency action.<sup>221</sup> Today, general administrative law principles increasingly

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217. *Allen v. Wright*, 468 U.S. 737, 793 (1984) (Stevens, J., dissenting) (emphasis added).

218. *See supra* Part II.C.

219. *See Lemos, supra* note 62, at 701–04 (distinguishing between individual enforcement authority and rulemaking).

220. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011).

221. *See, e.g., id.* (rejecting tax exceptionalism and instead applying *Chevron* deference); *Cohen v. United States*, 650 F.3d 717, 733–34 (D.C. Cir. 2011) (en banc) (authorizing a

apply in the tax context to expand access to federal court review while balancing separation of powers concerns—albeit in cases in which plaintiffs with clear standing as taxpayers subject to liability seek to challenge IRS revenue rules.<sup>222</sup> This balance of federal powers appropriately recognizes a limited role for federal courts in ensuring government accountability through oversight of agency rulemaking, as well as the need for agency flexibility and discretion in carrying out statutorily delegated duties.<sup>223</sup> By contrast, restrictive standing doctrine rests on dubious and increasingly rejected tax exceptions to the general rule supporting limited judicial review of federal agency action. Expanding judicial review for regulatory stakeholders challenging federal government agency action would promote, rather than disrupt, separation of powers by recognizing substantial agency discretion in the implementation of legislative mandates while preventing federal agencies from insulating themselves entirely from judicial oversight.<sup>224</sup>

### B. *Balancing Judicial Review and Deference to Agency Decisionmaking*

#### 1. *Finality of Agency Action and Non-Action*

Agency action is presumptively subject to judicial review.<sup>225</sup> Nevertheless, the APA restricts judicial review to “final” agency action and precludes review entirely where “statutes preclude judicial review” or “agency action is committed to agency discretion by law.”<sup>226</sup> Agency “non-

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procedural challenge to final agency action).

222. *Mayo*, 131 S. Ct. at 713; *Cohen*, 650 F.3d at 726 (rejecting the IRS view of “a world in which no challenge to its actions is ever outside the closed loop of its taxing authority”).

223. See 5 U.S.C. § 701(a)(2) (2012).

224. *Brown*, *supra* note 183, at 729 (noting “highly deferential standards of review” on the merits address separation of powers concerns animating restrictive standing doctrine); Mark Seidenfeld, *Chevron’s Foundation*, 86 NOTRE DAME L. REV. 273, 311 (2011) (describing *Chevron* as “a doctrine of judicial self-restraint under the courts’ Article III responsibilities”); see also Richard Murphy, *Abandoning Standing: Trading a Rule of Access for a Rule of Deference*, 60 ADMIN. L. REV. 943, 949 (2008) (“[A] rule of judicial deference . . . could provide a better means for ensuring proper separation of judicial and political powers than constitutional standing’s contentious, injury-based limits on judicial access.”).

225. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (presumption may be rebutted); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (“[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.”).

226. 5 U.S.C. §§ 701(a), 704; see *Abbott Labs.*, 387 U.S. at 148 (stating that the judicial doctrine of ripeness also limits premature review of challenges to agency actions); see also IRC § 7421(a) (2012); 28 U.S.C. § 2201(a) (2012).

action” is, in theory, also reviewable;<sup>227</sup> under principles supporting unfettered prosecutorial discretion, agency declinations of enforcement action are ordinarily not reviewable,<sup>228</sup> but agency decisions to forego issuance of rules in implementing a regulatory scheme remain subject to judicial oversight.<sup>229</sup> Nonetheless, federal courts have declined to exercise their authority to “compel agency action [unless it has been] unlawfully withheld or unreasonably delayed.”<sup>230</sup> Courts thus defer to agency decisions regarding the allocation of their own resources based on different rulemaking priorities.<sup>231</sup>

Such restrictions on reviewability reflect concerns that litigants will usurp federal courts to engage in “a kind of private conscription of public resources . . . that undermines a fully democratic effort . . . to allocate . . . limited [agency] resources to the most serious problems.”<sup>232</sup> Such concerns regarding private citizens’ ability to steer agency enforcement priorities are familiar. Still, agency decisions to forego issuance of rules or guidance of any kind may amount to an abdication of statutory obligations warranting judicial review.<sup>233</sup>

Even where an agency has affirmatively issued rules implementing statutory mandates, it may employ rulemaking procedures that involve little public participation or oversight. The IRS establishes numerous rules governing tax-exempt public charities, but much of its guidance exists in the form of revenue rulings and revenue procedures issued without public notice-and-comment procedures under the APA’s statutory exception for

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227. See 5 U.S.C. § 704.

228. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (concluding that “an agency’s decision not to take enforcement action should be presumed immune from judicial review” as “committed to agency discretion” under § 701(a)(2)).

229. See *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007) (recognizing that while agencies have broad discretion in deciding how to allocate resources, “[r]efusals to promulgate rules are . . . susceptible to judicial review”); cf. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64–65 (2004) (limiting judicial review to “agency fail[ure] to take a *discrete* agency action that it is *required to take*”). But see Bressman, *supra* note 13, at 1709 (noting that “specific failures to enforce” require more scrutiny than rulemaking to guard against arbitrariness than failures to “comply . . . with broad congressional directives” or attempts to “compel agencies to reduce general statutory standards to specific prohibitions or requirements”).

230. 5 U.S.C. § 706(1).

231. See *Norton*, 542 U.S. at 62–66 (deferring to agency resource allocation decision where agency had no clear statutory mandate).

232. Sunstein, *supra* note 61, at 631 (footnote omitted).

233. See Monte A. Jackel, *Is There Anything Wrong with the Guidance Process?*, 132 TAX NOTES 935, 936 (2011) (documenting the problem of retroactive, unsupportable, and politically motivated tax guidance).

“interpretive” rules.<sup>234</sup> The plaintiffs in *Eastern Kentucky* conceded before the D.C. Circuit that the revenue ruling they challenged “ha[d] no independent binding effect,” which rendered it unreviewable as a final agency action or, as Justice Brennan argued in his concurrence in the judgment, unripe.<sup>235</sup> Without judicial scrutiny, the IRS’s designation of rules as “interpretive”—and therefore exempt from public notice-and-comment requirements—could insulate entire regulatory schemes from judicial review.<sup>236</sup>

Recently, however, in *Cohen v. United States*, the D.C. Circuit held an IRS “notice” issued without public notice-and-comment procedures to be a “final agency action” reviewable under the APA after determining that the notice altered legal rights and was intended to be binding.<sup>237</sup> The court found that a notice outlining allegedly inadequate procedures for taxpayers seeking a refund of excise taxes (which the agency conceded were unlawfully collected) represented “the consummation” of agency decisionmaking and had binding legal consequences.<sup>238</sup> Notably, public charities may also be subject to legal consequences—including denial or revocation of agency recognition of tax-exempt status—for noncompliance with revenue rules issued without public notice-and-comment procedures, such as the revenue ruling and revenue procedures at issue in *Eastern Kentucky* and *Wright*.<sup>239</sup> By confirming in *Cohen* the finality and therefore the reviewability of a potentially broad range of informal agency guidances not rising to the level of a notice-and-comment regulation, the D.C. Circuit refused to permit the IRS to insulate itself against judicial scrutiny through its characterization of such rules as “interpretive” and exempt from the APA’s notice-and-comment procedures.<sup>240</sup> In doing so, the court

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234. See 5 U.S.C. § 553(b)(3)(A).

235. *E. Ky. Welfare Rights Org. v. Simon*, 506 F.2d 1278, 1290 (D.C. Cir. 1974); see *Dixon v. United States*, 381 U.S. 68, 73 (1965) (informal guidance lacks the “force of law”).

236. See, e.g., M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1412, 1446 (2004) (identifying concern “that the agency will be allowed to act ‘strategically’ in choosing its policymaking form”).

237. *Cohen v. United States*, 578 F.3d 1, 6–12 (D.C. Cir. 2009), *reh’g en banc granted in part, opinion vacated in part*, 599 F.3d 652 (D.C. Cir. 2010), *on reh’g en banc rev’d in part*, 650 F.3d 717 (D.C. Cir. 2011) (en banc), *and remanded to In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 853 F. Supp. 2d 138, 142–43 (D.D.C. 2012) (holding on remand that a legally binding IRS Notice required notice-and-comment rulemaking).

238. *Cohen*, 578 F.3d at 6.

239. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (upholding revocation of tax-exempt status pursuant to revenue ruling); *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980) (reversing rejection of tax-exempt status pursuant to unconstitutionally vague revenue procedure).

240. *Cohen*, 578 F.3d at 8, 12.

confirmed the applicability of the general presumption of judicial review for a broad range of tax administration rules.<sup>241</sup> Reviewability doctrine thus assuages separation of powers concerns by subjecting legally binding agency implementation of statutory mandates to judicial scrutiny except in circumstances in which Congress has left discrete resource allocation and rulemaking priorities to agency discretion. A similar accommodation occurs in judicial review of agency decisionmaking on the merits.

## 2. *Delegation and Deference to Agency Interpretations of Statutory Mandates*

Courts exercising judicial review of agency action play a crucial role in “ensuring that agencies have engaged in reasoned decisionmaking” by determining “whether [a] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”<sup>242</sup> Judicial oversight of government action is particularly important where it is carried out not by politically accountable elected representatives but by unelected appointees of the executive.<sup>243</sup> Accordingly, under *Chevron* and related doctrines,<sup>244</sup> courts reviewing the validity of agency rules must take into account the intent of Congress to cede power through the enactment of ambiguous statutes, thereby delegating regulatory authority—and discretion—to agencies to fill in the gaps by promulgating rules that have “the force of law.”<sup>245</sup> Where Congress so acts, courts must accord deference to agency rules so long as those rules reasonably interpret statutory mandates; such deference recognizes an agency’s comparatively expert judgment in the regulatory matters entrusted to it by Congress.<sup>246</sup>

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241. See Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 394 (2011) (advocating “mak[ing] guidance documents substantively reviewable when they are issued” to “encourage agencies to solicit input even from stakeholders outside the issue networks affected”).

242. *Judulang v. Holder*, 132 S. Ct. 476, 484 (2011) (quoting *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (internal quotations omitted).

243. See Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2032 (2011) (discussing constitutional claims against agency actors).

244. See generally *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000); Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727 (2010) (characterizing *Chevron* as a canon of statutory interpretation).

245. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); see *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 864 (1984).

246. See Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 517 (2011) (observing that deference

As Professor Biber observes, limits on justiciability—including restrictions on when agency action or inaction becomes reviewable and on which regulatory stakeholders have standing to seek review—effectively operate as a form of absolute deference to agency decisionmaking.<sup>247</sup> Judicial review of agency rules on the merits, then, even under highly deferential standards, better promotes the separation of powers by permitting judicial oversight, however limited, of rulemaking by agency officials otherwise not directly accountable to the public.

In *Mayo*, a unanimous Supreme Court stated: “We see no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations.”<sup>248</sup> Accordingly, courts reviewing revenue rules must engage in the same inquiry—no less complicated for being familiar—into the degree to which Congress intended an IRS rule implementing a statutory mandate itself to “carry the force of law,”<sup>249</sup> and consequently, the degree of deference to which the agency’s interpretation is entitled.<sup>250</sup>

To the extent Congress duly delegates the implementation of tax-code mandates fully to the IRS, agency rules exercising that authority with “the force of law” are entitled to strong deference by the courts.<sup>251</sup> By contrast,

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may be warranted in light of the “expertise-based comparative institutional advantage” of agencies, and “the goal of maximizing national uniformity in implementing national statutes”).

247. See Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461 (2008).

248. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011).

249. See *Mead Corp.*, 533 U.S. at 221; Hickman, *supra* note 67, at 255, 264–65; see also Marie Sapirie, *DOJ Won’t Push Chevron Deference for Revenue Rulings*, 131 TAX NOTES 674 (2011) (reporting that the Department of Justice will not seek *Chevron* deference unless tax rules have undergone notice-and-comment rulemaking).

250. *Mayo Found.*, 131 S. Ct. at 711 (“[W]e may not disturb an agency rule unless it is arbitrary or capricious in substance, or manifestly contrary to statute.” (quoting *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232, 242 (2004)) (internal quotation marks omitted)); *Mead Corp.*, 533 U.S. at 226–27.

251. The question whether such informal guidance documents may have the “force of law” for purposes of *Chevron* deference without also being “legally binding” for purposes of triggering notice-and-comment rulemaking remains unsettled. Professor Hickman points out that taxpayers may be subject to penalty for noncompliance with informal guidance as much as with notice-and-comment regulations, strongly suggesting that informal guidance must undergo such rulemaking procedures. See Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 529 (2013) (concluding that informal IRS guidance documents “carry the force and effect of law, are legislative rules necessitating APA notice and comment (and are invalid to the extent that they lack those procedures),” and warrant *Chevron* deference).

where—as in the public charities context—the IRS chooses to regulate largely through guidances, including revenue rulings, revenue procedures, Notices, private letter rulings, and technical-advice memoranda that may not carry “the force of law,”<sup>252</sup> such rules may be entitled to deference only to the extent that they demonstrate the “power to persuade” based on factors announced in *Skidmore v. Swift & Co.*<sup>253</sup> Among these factors are “the thoroughness evident in [the agency’s] consideration, the validity of its

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252. Since many revenue policies applicable to public charities interpret one of the agency’s own regulations, Treas. Reg. § 1.501(c)(3)-1, they may arguably be entitled to nearly absolute deference under *Auer v. Robbins*, 519 U.S. 452 (1997). However, to the extent the regulation merely parrots the statutory language in IRC § 501(c)(3), such absolute deference may be unwarranted. See *Gonzales v. Oregon*, 546 U.S. 243 (2006); Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 363 (2012) (advocating a “purposive approach” that determines “whether the interpretation is (1) permitted by the regulation’s text and (2) consistent with the regulation’s purposes, as set forth in the statement of basis and purpose and the regulation’s text”).

253. 323 U.S. 134, 140 (1944); see also *United States v. Mead Corp.*, 533 U.S. 218, 228, 235 (2001) (evaluating “the degree of the agency’s care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency’s position”; “thoroughness, logic, and expertness, and] its fit with prior interpretations”). In *National Muffler Dealers Association v. United States*, the Court

determin[ed] whether a particular regulation carri[ed] out the congressional mandate in a proper manner . . . [by assessing] whether [a] regulation harmonizes with the plain language of the statute, its origin, and its purpose[;] . . . [whether] it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent[;] . . . the manner in which [the regulation] evolved[;] . . . the length of time the regulation has been in effect[;] the reliance placed on it[;] the consistency of the Commissioner’s interpretation[;] and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.

440 U.S. 472, 477 (1979) (citations omitted).

It is unclear the extent to which *Skidmore* differs from the alternate standard of *National Muffler* (and, indeed, how much *Skidmore* varies from *Chevron*). See Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1241–42 (2007) (arguing that despite some differences, courts will likely look to legislative purpose and harmony under any standard); Andrew Pruitt, *Judicial Deference to Retroactive Interpretative Treasury Regulations*, 79 GEO. WASH. L. REV. 1558, 1562 (2011) (favoring *National Muffler* for retroactive tax regulations that have undergone notice-and-comment rulemaking). But see David Zaring, *Rule by Reasonableness*, 63 ADMIN. L. REV. 525, 527, 560 (2011) (finding that courts rule in favor of agency interpretation in approximately 70% of cases and will “ultimately embrace a reasonableness standard of review and reject the complexity of the current set of standards”). Professor Hickman and Matthew D. Krueger argue that courts reviewing agency rules should apply varying degrees of strong, weak, or intermediate “deference that [are] tailored in accordance to contextual factors,” with “agency expertise and the avoidance of arbitrariness” operating as the “guiding principles” for the inquiry. Hickman & Krueger, *supra*, at 1309–10.

reasoning, [and] its consistency with earlier and later pronouncements.”<sup>254</sup>

Under *Skidmore*, courts may weigh a variety of factors; in practice, courts may differ in the relative weight they assign to each factor. For example, courts may “credit” agency interpretations “that are likely to be politically neutral, that may have lasted through a number of political changes.”<sup>255</sup> This level of judicial inquiry, Professor Strauss contends, “respects the complex relationship amongst the legislature, executive, and judiciary.”<sup>256</sup> At the same time, respect for agency expertise often requires recognition that even longstanding policies are subject to change for valid reasons.<sup>257</sup> Ultimately, in determining the range of permissible interpretations, “Among the matters indispensable for [a court] to consider . . . are the meanings attributed to [the statute] by prior (administrative) interpreters, their stability, and the possibly superior body of information” available to agency experts tasked with implementing a regulatory scheme.<sup>258</sup>

By raising such factors in the context of tax administration—even as they predated the modern *Chevron* framework—*Eastern Kentucky* and *Wright* presented familiar rulemaking challenges fully within the federal courts’ competence and scope of authority. Before the Supreme Court denied standing in *Eastern Kentucky*, the lower courts considering the merits disagreed on the validity of the IRS policy rescinding the hospital charity-care requirement; each, however, gave heavy weight to legislative hints regarding the agency’s change in tax-exemption policy.<sup>259</sup> After the district

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254. *Skidmore*, 323 U.S. at 140; see also *Mead Corp.*, 533 U.S. 218.

255. Peter L. Strauss, “Deference” Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight”, 112 COLUM. L. REV. 1143, 1147 (2012). But see *Judulang v. Holder*, 132 S. Ct. 476, 488 (2011) (“Arbitrary agency action becomes no less so by simple dint of repetition. . . . And longstanding capriciousness receives no special exemption from the APA.”).

256. Strauss, *supra* note 255, at 1147.

257. Some federal circuits require changes in agency interpretations to be made through notice-and-comment rulemaking. See, e.g., *Ala. Prof’l Hunters Ass’n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (“When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.”).

258. Strauss, *supra* note 255, at 1156; see also Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1017 (2005) (recognizing “the force of law”—and justification for deference—where agency interpretation is longstanding or was reached after a rulemaking process evincing agency investment in and commitment to the resulting interpretation).

259. *E. Ky. Welfare Rights Org. v. Shultz*, 370 F. Supp. 325, 336 (D.D.C. 1973). The Court cited *Fribourg Navigation Co. v. Comm’r*, 383 U.S. 272 (1966), decided a few years before *National Muffler*, where, “[i]n reaching its determination, cognizance was taken and great weight was given to the fact that for many years the IRS had followed a fundamentally

court in *Eastern Kentucky* “focus[ed] upon and [gave] careful consideration to the relevant judicial, legislative and administrative history” of Revenue Ruling 69-545, it found the IRS’s reversal of policy to be illegitimate given the consistent practice of courts and the agency in requiring tax-exempt hospitals to provide charity care.<sup>260</sup> In addition, the district court gave significant weight to the fact that Congress had indicated in conference reports that relief to the poor was a minimum requirement for exempt hospitals.<sup>261</sup> However, the D.C. Circuit reversed on the basis that the congressional materials were equivocal; at least one House Report stated that the legal definition of “charitable” should control instead of the popular connotation requiring relief to the poor.<sup>262</sup> In addition, in light of “the changed health care situation in the country as a result of Medicare, Medicaid and other government programs, of which the [IRS] was cognizant,” the Court of Appeals found no abuse of discretion in the elimination of the charity-care requirement.<sup>263</sup>

In *Wright*, the D.C. Circuit remanded for consideration on the merits after reversing the district court’s dismissal for lack of standing.<sup>264</sup> When the suit was again dismissed by the Supreme Court, the federal courts lost the opportunity to decide whether the Constitution or the IRC required more than mere adoption and certification of a nonracially discriminatory policy by private, tax-exempt schools—or whether *Chevron*, decided in the same term, required any particular level of deference to the IRS’s current rule. Still, the Court had just decided *Bob Jones* in the previous term;<sup>265</sup> there, the Court read a public policy limitation developed in the common law of charitable trusts into § 501(c)(3), to find racial discrimination in private schools to violate “fundamental national public policy” as announced by each of the three federal branches.<sup>266</sup> The Court further noted that the agency, for its part, was authorized to identify such policy based on its expertise: “In an area as complex as the tax system, the agency Congress vests with administrative responsibility must be able to exercise its

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different policy which had been solidified by court as well as congressional approval.” *E. Ky.*, 370 F. Supp. at 336.

260. *Id.* at 325, 336 (footnote omitted).

261. *Id.* at 332.

262. See Valentine, *supra* note 54, at 1005–06.

263. *E. Ky. Welfare Rights Org. v. Simon*, 506 F.2d 1278, 1291 (D.C. Cir. 1974).

264. *Wright v. Regan*, 656 F.2d 820, 837–38 (D.C. Cir. 1981). The court also rejected the district court’s conclusion that Congress had effectively precluded review by prospectively defunding future agency enforcement of the policies plaintiffs sought.

265. *Bob Jones Univ. v. United States*, 461 U.S. 574, 596 (1983).

266. *Id.* at 593.

authority to meet changing conditions and new problems.”<sup>267</sup> The Court later cited this language to support its application of *Chevron* deference to tax regulations in *Mayo*.<sup>268</sup> Without explicitly deferring to either agency delegation or discretion, then, the *Bob Jones* decision rested in part on factors indicating both the exercise of agency expertise in implementing evolving norms and legislative intent or, more particularly, legislative acquiescence validating the IRS’s nondiscrimination policy.<sup>269</sup>

Agency interpretations of statutes arising in the tax—or tax-exempt public charities—context are just as likely as in other administrative contexts to trigger what Professor Eskridge and Lauren E. Baer describe as judicial “deploy[ment of] ongoing legislative history to support statutory interpretations.”<sup>270</sup> Such efforts have arisen “in cases where the Court was assimilating agency understandings of statutes that had generated ongoing exchanges between the agency and Congress.”<sup>271</sup> While federal courts may seek to avoid wading into such exchanges—and the Supreme Court vigorously resisted doing so in *Wright*—their oversight role may be most warranted in such situations, where both agency and legislature decline to employ more publicly accountable means for fixing the meaning of revenue rules, such as legislative amendment or notice-and-comment rulemaking.<sup>272</sup> Whether justified as a matter of statutory construction or through scrutiny of factors demonstrating the persuasiveness or reasonableness of the

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267. *Id.* at 596.

268. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 714 (2011).

269. See Sugin, *supra* note 19, at 444 (“Commentators have argued that because of its special nature, the tax law lends itself to a different method of interpretation than other statutes; the Code’s internal logic and coherence may be more important than the original intent of Congress in the day-to-day interpretation of tax statutes.”) (footnote omitted). This view “treats tax policy as dependent only upon the internal structure and coherence of the tax law.” *Id.* at 474.

270. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1197 (2008).

271. *Id.* Prior to *Mayo*, Professor Eskridge described *Bob Jones* as “following” the IRS’s interpretation of the IRC “based upon congressional acquiescence in [a] controversial agency interpretation.” *Id.* at 1197 n.368.

272. See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989) (discussing statutory interpretation as construing legislation to protect historically marginalized groups); Andre L. Smith, *Race, Law, and the Free Market: A Critical Law and Economics Conception of Racism as Asymmetrical Market Failure*, 4 GEO J.L. & MOD. CRITICAL RACE PERSP. 39, 41, 50 (2012) (arguing that under *Bob Jones*, “Congress expects judges to consider the effect statutes have on racial equality” and “did not intend for tax exemption to support or worsen racial subordination”).

agency's own decisionmaking process and rationale, such judicial determinations adequately accommodate federal courts' obligation to enforce congressional mandates and delegations to agencies without wholly insulating agency action from judicial review.

Importantly, such analysis does not require an exception from general administrative law principles governing judicial review of agency action on the merits. To the contrary, federal courts are particularly well-equipped to balance the risks of arbitrary decisionmaking against agency expertise deserving of deference in tax as in other contexts.<sup>273</sup> After *Mayo*, courts have no reason to exempt tax administration from general administrative law principles. With *Chevron* deference fully available in the tax administration context, revenue rules with the force of law merit judicial deference except where wholly unreasonable or contrary to a clear statutory command. Even rules that are subject to a more searching inquiry permitting courts to assess factors evincing legislative intent, the thoroughness of agency deliberations, and the interactions between the two may pass muster where agency decisionmaking processes and outcomes comport generally with legislative design. While more searching review of the substantive legitimacy of agency rules may not necessarily result in a different outcome,<sup>274</sup> at a minimum, the process of judicial review of IRS rules on the merits within the *Chevron/Skidmore* framework extends general principles applicable in other regulatory contexts—due respect for agency expertise balanced against the need to guard against the risk of arbitrary agency action<sup>275</sup>—to the context of tax administration.

Because tax rules, like other forms of regulation, may affect the individualized, concrete interests of stakeholders who are not themselves regulated entities, the same principles support expanded standing for such regulatory stakeholders to challenge substantive federal agency rules. While *Eastern Kentucky* and *Wright* limited standing for such plaintiffs, both cases rest on flawed analysis of the regulatory tax-exemption scheme that reflects an eroding tax-exceptionalist perspective. Recent developments

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273. See Hickman & Krueger, *supra* note 253, at 1309–10 (advocating for balance between policing arbitrariness and deferring to agency expertise).

274. More searching review may not even result in appreciably higher rates of litigation. See Rob Atkinson, *Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries?*, 23 J. CORP. L. 655, 693 (1998) (finding that collective-action problems will prevent a flood of litigation, as most will prefer to be free riders on others' litigation efforts); Brown, *supra* note 183, at 729 (rejecting concerns about flood of litigation).

275. See Brown, *supra* note 183 (advocating context-sensitive inquiry); see also Pruitt, *supra* note 253 (suggesting regulations promulgated under notice-and-comment rulemaking may even warrant more scrutiny where such rules have retroactive effect).

confirming the application of general administrative law principles in the tax context further destabilize the already shaky foundation for such a restrictive standing doctrine. As in other administrative contexts, the presumption of reviewability of federal agency action and deference to agency discretion on the merits respects rather than offends the separation of powers. In the revenue context, as elsewhere, broader standing for regulatory stakeholders to seek judicial review of harmful agency action would promote rather than frustrate the appropriate balance of federal powers and reasoned agency rulemaking.

### CONCLUSION

The IRS wields tremendous power and potential to oversee the provision of diverse public benefits by vital social institutions through regulation of tax-exempt public charities under the IRC. Like other administrative agencies that must take into account the interests of a variety of stakeholders, the IRS faces the challenge of balancing sector autonomy and pluralism against a clear obligation to limit tax exemption for public charities to statutorily authorized entities. In carrying out its statutory mandate, the IRS—again, like other agencies tasked with regulating social and economic behavior—necessarily gives effect to public values protected by the exemption scheme according to legislative design and constitutional commands.

As one of the most visible contexts in which tax rules regulate behavior with consequences for a broad range of other stakeholders, tax exemption for public charities naturally invited attempts at judicial oversight in *Eastern Kentucky* and *Wright*. Yet the Court's tax-exceptionalist focus on revenue collection and, relatedly, on individual agency actions to enforce taxpayer compliance, effectively insulated the agency from general administrative law principles supporting judicial review. Instead of crediting the influence of agency rules on a wide range of stakeholders and acknowledging the agency's role in setting such broadly applicable rules, the Court resorted to general prudential and constitutional grounds to limit standing by regulatory outsiders to challenge and influence agency decisionmaking.

In contrast to the Court's tax-exceptionalist view, IRS administration of revenue rules operates as a form of regulation that raises or lowers the costs—both economic and intangible—of public charities' activities to ensure a benefit to the public. Accordingly, neither prudential concerns about regulatory stakeholders as outsiders to the tax regulatory relationship nor broad separation of powers concerns regarding judicial oversight of government agency action justify limitations on standing for regulatory stakeholders in tax or other administrative arenas. Rather, as increasingly

recognized by federal courts, general administrative law principles apply in the revenue context, as in other contexts, to cabin court intervention in executive affairs by respecting agency expertise and flexibility while also ensuring government accountability by guarding against arbitrary agency decisionmaking.

Contemporary commentators give short shrift to judicial review instigated by regulatory stakeholders as a viable—or even desirable—option for overseeing IRS implementation of tax exemption for public charities.<sup>276</sup> Some conclude that the discretion of expert agency decisionmakers or voluntary self-regulation by public charities suffices to protect the interests of those affected by regulation of exempt entities.<sup>277</sup> To the contrary, under well-established principles that apply as much in the tax context as in other regulatory frameworks, both regulated entities and other regulatory stakeholders warrant access to federal court to challenge agency decisions that adversely impact their interests—whether by imposing regulatory burdens or by frustrating the intended protections and benefits of regulatory schemes. In particular, where the stakeholders seeking to enforce regulatory mandates are historically marginalized, economically disadvantaged, or otherwise politically disempowered, access to federal court may be an essential form of leverage through which to influence agency decisionmaking. By denying standing to such stakeholders despite their constitutionally sufficient injuries in *Eastern Kentucky* and *Wright*, the Supreme Court weakened a crucial check on agency discretion as well as agency capture by regulated entities routinely entitled to seek judicial review of regulatory burdens.

As in other administrative contexts, judicial review by a broad range of stakeholders of public charities exemptions remains an essential but missing component of private citizen oversight of IRS administration.<sup>278</sup> Such

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276. See Kevin A. Coyle, Comment, *Standing of Third Parties to Challenge Administrative Agency Actions*, 76 CALIF. L. REV. 1061 (1988); see generally Atkinson, *supra* note 274, at 684–85 n.146.

277. See, e.g., Evelyn Brody & John Tyler, *How Public is Private Philanthropy? Separating Reality from Myth* (2d ed. 2012), available at [http://www.philanthropyroundtable.org/guidebook/how\\_public\\_is\\_private\\_philanthropy\\_2nd\\_edition/philanthropic\\_freedom/](http://www.philanthropyroundtable.org/guidebook/how_public_is_private_philanthropy_2nd_edition/philanthropic_freedom/); Galle, *supra* note 41; Lloyd Hitoshi Mayer & Brendan M. Wilson, *Regulating Charities in the Twenty-First Century: An Institutional Choice Analysis*, 85 CHI.-KENT L. REV. 479 (2010); Rodrigues, *supra* note 42, at 1264–65 (observing that nonprofit form constrains public charities through formation of a social identity that enables them to execute their mission in a way that for-profit entities cannot); Marcus S. Owens, *Charity Oversight: An Alternative Approach* (Hauser Ctr. for Nonprofit Orgs., Harvard Univ., Working Paper No. 33.4, 2006) (positing self-regulatory framework for nonprofit entities akin to a securities exchange).

278. See, e.g., Coplan, *supra* note 10 (exploring the Petition Clause as basis for organizational standing in the environmental context).

stakeholders warrant their own route to federal court oversight of government agency action that operates to their detriment. By exposing standing doctrine as implicitly based on an eroding tax-exceptionalist foundation, this Article seeks to reinvigorate the discussion of how to correct the imbalance in judicial access and agency influence for stakeholders of federal public charities regulation, as well as other regulatory arenas. At a minimum, such a debate remains especially vital if historically subordinated and politically marginalized populations are to count as part of the “public” for whose benefit tax-exempt public charities exist.