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Susan C. Morse is the Angus G. Wynne Sr. Professor of Civil Jurisprudence and associate dean for academic affairs at the University of Texas School of Law.

In this report, Morse examines the six-year default limitations period for claims against the federal government, which the government can invoke to defend against administrative procedure challenges and other claims in tax cases.

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I. Introduction

Old tax regs are having a moment.[1] This year in *Valley Park Ranch*,[2] the Tax Court invalidated a 1986 Treasury regulation concerning conservation easements and the division of sale proceeds. Meanwhile, corporate taxpayer 3M is appealing a Tax Court decision that narrowly upheld a 1994 regulation on transfer pricing requirements for blocked income.[3] In both cases, the Tax Court considered claims that Treasury made administrative procedure mistakes, like failing to correctly follow notice and comment requirements, when it promulgated those regulations decades ago.[4]

But as other recent cases show, the government can defend against these procedural challenges with the six-year limitations period of 28 U.S.C. section 2401(a). In *Townley*,[5] a federal district court time-barred an administrative procedure challenge to another provision from the same 1986 conservation easement regulations at issue in *Valley Park Ranch*. In *Govig*,[6] another district court time-barred procedural challenges to Notice 2007-83, 2007-45 IRB 960, concerning tax shelter employee benefit arrangements. The recent Supreme Court decision in *Corner Post*[7] — which held that the six-year limitations period

[1] *See generally* Susan C. Morse, "Old Regs: The Default Six-Year Time Bar for Administrative Procedure Claims," 31 *Geo. Mason L. Rev.* 191 (2024) (using tax examples to explain the 28 U.S.C. section 2401(a) six-year limitations period).

[2] *Valley Park Ranch LLC v. Commissioner*, 162 T.C. No. 6 (2024).

[3] *See 3M Co. v. Commissioner*, 160 T.C. 50 (2023).

[4] Notice and comment is the process generally required for the promulgation of regulations by federal agencies. *See* 5 U.S.C. section 553(b) (describing notice and comment requirements and exceptions).

[5] *See Townley v. United States*, No. 3:22-cv-00107 (M.D. Ga. Nov. 17, 2023).

[6] *Govig & Associates v. United States*, No. 2:22-cv-00579 (D. Ariz. Mar. 23, 2023).

[7] *Corner Post v. Board of Governors of the Federal Reserve System*, 144 S. Ct. 2440 (2024).

accrues later, when a plaintiff acquires the right to sue, for substantive *ultra vires* claims — still allows the government to pursue the six-year time bar argument for procedural challenges to old tax regs.

Cases about old regs present a tension between the importance of adequate administrative procedure and the value of certainty in the law. A classic tool — a limitations period — balances these two concerns. The relevant statute, 28 U.S.C. section 2401(a), says that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." It provides the default limitations period for claims against the federal government,[8] including administrative procedure claims and some other claims in tax.[9] It is an exception to sovereign immunity, meaning a condition of the United States' agreement to be sued.[10]

Given this six-year time bar, how could the 2024 *Valley Park Ranch* decision invalidate a 1986 reg on the basis that Treasury failed to respond to a comment made in the notice and comment process? And why would the Tax Court or the Eighth Circuit even consider a challenge based on Treasury's alleged failure to adequately explain the 1994 transfer pricing reg at issue in *3M*?

A short answer is that the limitations period is a nonjurisdictional affirmative defense.[11] That means that the government has to raise it, typically in the answer to a complaint or initial pleading.[12] The government has not raised the limitations period as a defense in *Valley Park Ranch* or *3M*. In general, a defendant can raise such a time bar later in the litigation only if a court concludes that later consideration would not unfairly surprise the opposing party.

The longer answer, developed below, offers three points. First, if the government *had* raised the limitations period as a defense in either *Valley Park Ranch* or *3M*, the Tax Court should have time-barred the claim.

Second, *Corner Post*, the Supreme Court case decided July 1, allows the government to continue to argue that the six years begin to accrue when a regulation is promulgated (or other guidance is issued) for procedural claims (as opposed to substantive *ultra vires* claims).

Third, the government needs a thoughtful time-bar litigation policy for tax cases. It should pursue the time-bar defense regularly. But it also should consider waiving it in appropriate cases, such as when the administrative procedure claim arises from a tax return filed within six years of a promulgated reg.

II. Time-Barring Tax Cases

A. Antitax Exceptionalism

When the Supreme Court wrote in 2011 in *Mayo* that it was "not inclined to carve out an approach to administrative review good for tax law only,"[13] it set in motion the big and challenging project of incorporating administrative law into tax law.[14] This project is a moving target.

As court decisions reshape administrative law and, in general, curtail the power of the administrative state, tax will not only adapt but also contribute to the developing law. For instance, when the Supreme Court decided *Loper Bright*[15] in June, it overruled *Chevron* deference to regulations in tax as in other areas. And when the

[8] *See United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 8-9 (2008) (explaining that 28 U.S.C. section 2401(a) provides an "outside limit" time bar).

[9] For instance, claims for overpayment interest are subject to the default six-year time bar. *See, e.g.*, *Bank of America Corp. v. United States*, 964 F.3d 1099, 1105 (Fed. Cir. 2020) (explaining that the six-year time bar applies to claims of overpayment of interest in tax); and *Hale v. United States*, 143 Fed. Cl. 180, 188 n.5 (2019) (applying six-year time bar to a refund claim that the government failed to respond to).

[10] *See* Morse, *supra* note 1, at 193 (explaining the default time bar of 28 U.S.C. section 2401(a)).

[11] *See, e.g.*, *Jackson v. Modly*, 949 F.3d 763, 765-766 (D.C. Cir. 2020) (recognizing that the court's long-standing interpretation of 28 U.S.C. section 2401(a) as jurisdictional "is no longer correct") (citing *United States v. Wong*, 575 U.S. 402, 412 (2015) (treating 28 U.S.C. section 2401(b) as nonjurisdictional)).

[12] *See, e.g.*, Michael A. Saltzman and Leslie Book, *IRS Practice and Procedure*, at section 5.02 (2023) (explaining that, as an affirmative defense, the statute of limitations can be waived if not asserted in a timely manner).

[13] *Mayo Foundation v. United States*, 562 U.S. 44, 55 (2011).

[14] For example, just four years after *Mayo*, the Tax Court concluded that a Treasury regulation was arbitrary and capricious, in violation of APA section 706(2)(A), because its preamble lacked a "reasoned explanation." *Altera Corp. v. Commissioner*, 145 T.C. 91, 112-115 (2015) (citing and quoting *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983)). The Ninth Circuit later reversed the Tax Court's decision. *Altera*, 926 F.3d 1061, 1087 (9th Cir. 2019).

[15] *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

Court decided *Corner Post* just a few days later, its decision about accrual timing for the six-year limitations period in 28 U.S.C. section 2401(a) made the time bar largely irrelevant for substantive *ultra vires* claims. Yet *Corner Post* also opened the way for tax cases to build some administrative law precedent on earlier accrual for procedural claims.

As discussed more fully later, *Corner Post* squarely holds that substantive *ultra vires* claims accrue later, when a specific plaintiff acquires the right to sue. But footnote 8 of the opinion leaves open the possibility that claims that allege procedural error, like notice and comment failures, accrue earlier, when a regulation is promulgated. These procedural claims are exactly the kind of claims that are typically raised in tax cases. The government can still argue that procedural claims are time-barred in tax cases based on accrual of the six-year limitations period for all eligible plaintiffs when an agency promulgates a regulation or releases other guidance.

The administrative law/tax law incorporation project for this limitations period is challenging not only because of *Corner Post*, but also because of some special characteristics of tax law. For example, the Anti-Injunction Act usually delays taxpayers' ability to raise administrative procedure claims.[16] This complicates the six-year time-bar analysis.

But before getting any further into these complexities, let's review the existing law on when the six-year time bar of 28 U.S.C. section 2401(a) accrues. The case law consensus is that time bars generally accrue at promulgation for procedural lineage claims[17] like those raised in *Valley Park Ranch* and *3M*. Those claims relate, for instance, to the adequacy of notice and comment procedures.[18]

Some nontax cases parallel *Valley Park Ranch* (involving a 1986 conservation easement regulation) and *3M* (involving a 1994 transfer pricing regulation). These involve plaintiffs subject to agency enforcement action who try to object that the agency invalidly (and long ago) issued the regulation or guidance that supports the enforcement action. Cases involve procedural challenges on facts including a Medicaid beneficiary who became subject to a 1980 regulation regarding offset of Social Security benefits in 2006,[19] a hospital that did not face Health and Human Services enforcement of a 1986 manual regarding coverage of certain devices until 1994,[20] and a political organizer who found that a 1973 election law regulation blocked his 2004 visit to a Veterans Affairs hospital.[21]

Each of these claims challenged the procedural lineage of a regulation or other guidance. All were time-barred. These decisions and others make up the case law consensus holding that the six-year time bar accrues at promulgation for claims involving the procedural lineage of regulations, such as challenges that notice and comment requirements were not met.

B. Raise It or Waive It

The six-year time bar of 28 U.S.C. section 2401(a) is not jurisdictional. As a result, for a government defendant, the first step in an effort to time-bar a claim under this section is to raise it as an affirmative defense. If 28 U.S.C. section 2401(a) were jurisdictional, a court would be required to raise it *sua sponte*, and (accordingly)

[16] *See infra* notes 72-75 and accompanying text (discussing the AIA and *CIC Services LLC v. IRS*, 141 S. Ct. 1582, 1590-1592 (2021)).

[17] *JEM Broadcasting Co. v. Federal Communications Commission*, 22 F.3d 320, 325 (D.C. Cir. 1994).

[18] *See, e.g.*, *Preminger v. Secretary of Veterans Affairs*, 517 F.3d 1299, 1307-1308 (Fed. Cir. 2008) (time-barring a notice and comment challenge); *Wong v. Doar*, 571 F.3d 247, 263 (2d Cir. 2009) (same); *Hire Order Ltd. v. Marianos*, 698 F.3d 168, 170 (4th Cir. 2012) (time-barring a facial challenge to a 1969 revenue ruling); *Texas v. Rettig*, 987 F.3d 518, 523-524, 529-530 (5th Cir. 2021) (time-barring a notice and comment challenge); *Sierra Club v. Slater*, 120 F.3d 623, 628-629, 631 (6th Cir. 1997) (time-barring a claim brought under the National Environmental Protection Act via the APA to a 1984 Federal Highway Administration record of decision); *Cedars-Sinai Medical Center v. Shalala*, 177 F.3d 1126, 1128-1129 (9th Cir. 1999) (time-barring a notice and comment challenge); *Alabama v. PCI Gaming Authority*, 801 F.3d 1278, 1292-1293 (11th Cir. 2015) (time-barring an APA challenge).

[19] *See Wong*, 571 F.3d at 263.

[20] *See Cedars-Sinai*, 177 F.3d at 1128-1129.

[21] *See Preminger*, 517 F.3d at 1307-1308.

the government would not be deemed to waive the time bar if it failed to raise it.[22] A jurisdictional limitations period is also not subject to equitable tolling or other equitable exceptions.[23]

Although 28 U.S.C. section 2401(a) used to be considered jurisdictional,[24] the Supreme Court's jurisprudence on limitations periods and jurisdiction has shifted over the past several decades. In a 1990 case, the Court held that a limitations period is jurisdictional only if the statutory language clearly so states.[25] In 2015 the Court developed the rule that a statute must contain a "clear statement of jurisdiction" and held that a limitations period codified in an adjacent statute, 28 U.S.C. section 2401(b), is not jurisdictional.[26] Decisions in 2022 and 2023 further confirm this clear-statement rule.[27]

The language of 28 U.S.C. section 2401(a) — that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues" — lacks a clear statement of jurisdiction and so should not be treated as a jurisdictional limit. Several courts of appeals have so held.[28] The Fifth Circuit had been an outlier in considering 28 U.S.C. section 2401(a) jurisdictional in at least some cases, but it appears to be coming around to the majority view.[29]

Because 28 U.S.C. section 2401(a) is not jurisdictional, it is subject to the usual rule for nonjurisdictional affirmative defenses, which is that the defendant must raise the defense.[30] The applicable rule of civil procedure requires the defendant to raise a statute of limitations defense in the answer, meaning the first filing submitted to a court in response to a plaintiff's complaint.[31] The Tax Court rule follows the same approach.[32] In general, courts allow a defendant to raise a limitations period as an affirmative defense later in the litigation only if it does not surprise the plaintiff (that is, the taxpayer).[33] The six-year time bar of 28 U.S.C. section 2401(a) did not block the taxpayer's administrative procedure challenge in *Valley Park Ranch* or *3M* for the simple reason that the government had not raised it as a defense.[34]

C. Early Accrual: Policy

When a defendant does properly raise the six-year time bar as a defense, courts have justified the result of accruing the limitations period at promulgation (rather than later, such as when a plaintiff acquires the ability to sue) by

[22] *See, e.g.*, *Boechler v. Commissioner*, 596 U.S. 199, 203 (2022) ("Jurisdictional requirements cannot be waived or forfeited, must be raised by courts *sua sponte*, and . . . do not allow for equitable exceptions.").

[23] *See id.*

[24] *See, e.g.*, *Spannaus v. U.S. Department of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987) (treating 28 U.S.C. section 2401(a) as a "jurisdictional condition attached to the government's waiver of sovereign immunity"), *overruled by Jackson*, 949 F.3d at 776.

[25] *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 91, 95-96 (1990) (concluding that a 30-day period to challenge an Equal Employment Opportunity Commission decision was not jurisdictional, and considering and rejecting equitable tolling of that period).

[26] *See Wong*, 575 U.S. at 410-412 (holding 28 U.S.C. section 2401(b) nonjurisdictional).

[27] *Compare Boechler*, 596 U.S. at 199, 203 (holding nonjurisdictional section 6330, which provides a limitations period for collection due process claims) *with Arellano v. McDonough*, 598 U.S. 1, 4, 8-9 (2023) (holding jurisdictional 38 U.S.C. section 5110(a)(1), which provides a limitations period for the filing of veteran disability benefits).

[28] *See, e.g.*, *Jackson*, 949 F.3d at 765-766 (citing *Wong*, 575 U.S. at 412); *Desuze v. Ammon*, 990 F.3d 264, 269-271 (2d Cir. 2021); *Chance v. Zinke*, 898 F.3d 1025, 1033 (10th Cir. 2018); and *Herr v. U.S. Forest Service*, 803 F.3d 809, 822 (6th Cir. 2015).

[29] *Compare Texas*, 987 F.3d at 529 (jurisdictional), and *General Land Office v. Department of the Interior*, 947 F.3d 309, 318 (5th Cir. 2020) (jurisdictional), *with Alliance for Hippocratic Medicine v. Food and Drug Administration*, 78 F.4th 210, 244-245 (5th Cir. 2023) (considering equitable tolling question without considering jurisdictional question), and *Louisiana v. U.S. Army Corps of Engineers*, 834 F.3d 574, 584 (5th Cir. 2016) (nonjurisdictional).

[30] *See, e.g.*, *Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286, 294 (2d Cir. 2006) (allowing a procedural challenge to a 1966 SEC regulation to proceed because the government failed to raise 28 U.S.C. section 2401(a) in its answer).

[31] *See* Fed. R. Civ. P. 8(c) (requiring affirmative defense in answer).

[32] Tax Court R. Prac. & Proc. 39 (requiring that affirmative defenses, including statute of limitations, be set forth in the party's pleading); Tax Court R. Prac. & Proc. 142(a) (the party raising an affirmative defense has the burden of pleading and proving it). *See, e.g.*, *Bruce v. Commissioner*, T.C. Memo. 2014-178 (holding that, because the statute of limitations is an affirmative defense, the taxpayer must raise it in the petition or else the defense is waived).

[33] *Tahoe-Sierra Presidential Counsel Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764, 788 (9th Cir. 2000) (allowing the defendant's vague or defective affirmative defense to be preserved so long as there is no prejudice or unfair surprise for the plaintiff), *overruled on other grounds by Gonzales v. Arizona*, 677 F.3d 383 (9th Cir. 2012); *see also Smith v. Travelers Casualty Insurance Co.*, 932 F.3d 302, 308-310 (5th Cir. 2019) (holding that the defendant did not waive the statute of limitations defense, which was raised in the defendant's second amended complaint, even though litigation had been underway for two years by the time it was raised, because the plaintiff was responsible for the delay).

[34] *See, e.g.*, Amended Answer, *3M*, 160 T.C. 50 (Aug. 15, 2013) (No. 5816-13) (not raising any limitations period defense).

emphasizing the nature of administrative procedure as a public right. That is, the right to challenge the procedural lineage of a regulation proceeds from the general public's interest in adequate administrative procedure. As the Sixth Circuit explained in 2015, a claim about defective notice and comment would be a claim about the "denial of [administrative] process to the public at large," and a classic example of accrual of an Administrative Procedure Act claim when "an agency . . . issues a rule."[35] As the Ninth Circuit similarly explained in 1990 when it time-barred a challenge to a 1964 Bureau of Land Management order, any administrative procedure injury "was that incurred by all persons when, in 1964 . . . the amount of land available for mining claims was decreased."[36]

The policy values of certainty and stability in law also support accruing the limitations period at promulgation. If the limitations period accrued anew for procedural claims whenever a new plaintiff was injured by a regulation, there would be no practical limit on the ability to challenge the procedural validity of decades- or centuries-old regulations, because a new plaintiff (including a new taxpayer) could always arise later and become newly subject to the regulation. The later-accrual approach "would virtually nullify the statute of limitations."[37] With the *Corner Post* decision, the Supreme Court has as a practical matter nullified the statute of limitations for substantive *ultra vires* claims. But, as discussed further below, it has not done so for procedural claims.

After *Corner Post*, the time bar accrues later for claims that involve a substantive *ultra vires* claim. In tax, these claims are almost always "as applied," meaning that they arise from an enforcement action. Tax claims are almost always as-applied because the AIA generally blocks facial pre-enforcement challenges, subject to a limited case-law-based exception.[38] The typical substantive *ultra vires* claim in tax arises after the government assesses a tax deficiency or fails to grant a refund claim based on the content of a regulation or administrative guidance. In the resulting litigation, the taxpayer can raise claims that the regulation (or guidance) relied on by the government exceeds the statutory authority of the Internal Revenue Code, or that a regulation incorrectly interprets a statutory term.

It turns out that the case law even before *Corner Post* held that as-applied *ultra vires* claims accrued later, and not earlier at promulgation.[39] Because tax cases are almost always as-applied, the accrual of an *ultra vires* claim generally happens later anyway in tax cases, since the claim proceeds from an enforcement or collection action. As a result, *Corner Post* does not significantly increase the vulnerability of tax regulations and other guidance to *ultra vires* challenge. Moreover, even after *Corner Post*, the government still can offer the six-year time bar as a defense to a procedural lineage claim — even in an as-applied case.

III. *Corner Post*

A. *Corner Post*'s Holding

In *Corner Post*, the Court held 6-3 that for purposes of the six-year limitations period of 28 U.S.C. section 2401(a), a claim brought under the APA accrues "when the plaintiff has the right to assert it in court."[40] The Court's analysis emphasized the historical and dictionary meanings of "first accrues."[41] It focused on contemporary sources at the time of a 1948 recodification, which expanded 28 U.S.C. section

[35] *Herr*, 803 F.3d at 819-820.

[36] *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1366 (9th Cir. 1990).

[37] *Id.* at 1365.

[38] *See infra* notes 72-75 and accompanying text (discussing the AIA and *CIC Services*).

[39] *See Wind River Mining Corp. v. United States*, 946 F.2d 710, 711 (9th Cir. 1991) (developing and applying this exception and allowing a claim about whether a regulation correctly interpreted the meaning of "roadless" in the authorizing statute); *see also Schiller*, 449 F.3d at 293 ("The D.C. Circuit has explained that while substantive challenges to agency action — for example, claims that agency action is unconstitutional, that it exceeds the scope of the agency's substantive authority, or that it is premised on an erroneous interpretation of a statutory term — have no time bars, 'challenges to the procedural lineage of agency regulations . . . will not be entertained outside the [time] period provided by the statute.") (citing *JEM Broadcasting*, 22 F.3d at 325).

[40] *Corner Post*, 144 S. Ct. at 2448.

[41] *Id.* at 2451-2452.

2401(a) and made it into the main catchall or default limitations period for suits against the federal government.[42]

In dissent, Justice Ketanji Brown Jackson argued that APA claims are not plaintiff-specific, so that the meaning of "accrues" grounded in plaintiff-specific contexts, like contract, should not apply.[43] The Court responded that the grammar of the statute connected the complaint with the cause of action, which, the Court reasoned, must mean the specific plaintiff's cause of action.[44] In response to the dissent's policy concerns about exposing regulations to challenge forever,[45] the Court responded that if Congress wants to change the limitations period statute, it can do so.[46] The Court compared 28 U.S.C. section 2401(a) with statutes of repose[47] like the Hobbs Act, which runs 60 days from the entry of an agency order.[48]

APA claims covered by *Corner Post* as a practical matter have no time limit. Even if one plaintiff faces a time bar that accrues early, at promulgation, another plaintiff who comes into existence later and is later harmed by the regulation can challenge it based on later accrual. In *Corner Post* itself, a later-formed plaintiff revived the lawsuit and saved it from the time bar. First, two trade associations challenged Reg II, the Federal Reserve's 2011 maximum debit card swipe-fee regulation.[49] The trade associations lost when the D.C. Circuit upheld the regulation.[50] Then the plaintiffs added Corner Post, a truck stop that began doing business in 2018, to the suit in "an end run around" the six-year time bar, so they could try again in the Eighth Circuit.[51]

The *Corner Post* complaint contained two claims. One — clearly a substantive *ultra vires* claim — alleged that the swipe fee regulation violated the Durbin Amendment,[52] the authorizing substantive statute under which the Federal Reserve promulgated the reg. The other — perhaps a procedural claim — alleged that the Fed had acted arbitrarily and capriciously when it promulgated the reg. The Court makes clear that its holding applies to substantive claims. But it leaves open whether the holding applies to procedural claims.

The *Corner Post* Court explained that a substantive claim means a claim that the regulation violated the authorizing statute. This kind of claim used to be called a *Chevron* claim, but because *Chevron* has now been overruled by *Loper Bright*, that label doesn't work anymore. We can call it an *ultra vires* claim instead — a claim that a regulation (or guidance) exceeds the authority of the authorizing statute — the IRC, almost always, for a tax reg.

An example of an *ultra vires* challenge to tax regulations is the challenge to the payroll tax regulation defining the term "student" to exclude medical residents, which was upheld by the Court in *Mayo* in 2011. The Mayo Foundation's argument, which failed, was that Treasury's regulation was inconsistent with the statute, section 3121(b)(10). *Corner Post* holds that the limitations period for *ultra vires* challenges like that in *Mayo* accrues "when the plaintiff has the right to assert it in court."[53] For a refund claim, like that in *Mayo*, that right would arise six months after the taxpayer filed its refund claim, assuming the government did not reply within that six-month period.[54]

The reg at issue in *Mayo* was promulgated by Treasury in 2004, and the Mayo Foundation promptly challenged it. But under the *Corner Post* holding, the regulation could have been

[42] *See* Brief of Professors Aditya Bamzai and John Duffy as Amici Curiae in Support of Petitioner at 9-12, *Corner Post*, 144 S. Ct. 2440 (Nov. 20, 2023) (No. 22-1008) (discussing 1948 recodification). *See also* John Kendrick, "(Un)limiting Administrative Review: *Wind River*, Section 2401(a), and the Right to Challenge Federal Agencies," 103 *Va. L. Rev.* 157, 181-189 (2017) (comparing historical accrual of tort and contract claims with earlier accrual of claims against federal agencies under the *Wind River* doctrine).

[43] *Corner Post*, 144 S. Ct. at 2479-2480 (Jackson, J., dissenting).

[44] *Id.* at 2453-2454.

[45] *Id.* at 2480 (Jackson, J., dissenting).

[46] *Id.* at 2460.

[47] *Id.* at 2452.

[48] 28 U.S.C. sections 2342, 2344.

[49] Debit Card Interchange Fees and Routing, 76 F.R. 43394 (July 20, 2011).

[50] *NACS v. Board of Governors of the Federal Reserve*, 746 F.3d 474 (2014).

[51] *Corner Post*, 144 S. Ct. at 2471 (Jackson, J., dissenting).

[52] 15 U.S.C. section 1693o-2(a).

[53] *Corner Post*, 144 S. Ct. at 2448.

[54] *See* section 6532(a)(1).

challenged even if it was an old regulation promulgated in, say, 1984. Regardless of whether the Mayo Foundation could sue,[55] more recently created teaching hospitals where medical residents study and work clearly could have brought later *ultra vires* challenges to an old regulation.[56] There is no practical 28 U.S.C. section 2401(a) time limit to an *ultra vires* claim after *Corner Post*. This is illustrated in the bottom row of the table.

When Does 28 U.S.C. Section 2401(a) Accrue for Challenges to Regulations?

	Facial Challenge	As-Applied Challenge
Procedural challenge	EARLY: When the regulation is promulgated. Arguably, even after *Corner Post*.	EARLY: When the regulation is promulgated. Arguably, even after *Corner Post*. *See, e.g., Townley, Govig*.
Substantive *ultra vires* challenge	LATER: When the specific plaintiff has the right to assert it in court. *Corner Post*.	LATER: When the specific plaintiff has the right to assert it in court. *Wind River; see, e.g., Townley, Govig*.

For as-applied claims, the *Corner Post* holding that *ultra vires* claims accrue later does not materially change the law. An as-applied claim arises out of an agency's enforcement action. The case law has long concluded, in a doctrine named for a case called *Wind River*,[57] that *ultra vires* challenges accrue when the plaintiff acquires the right to sue in as-applied cases. Because of law including the AIA, facial challenges to tax regulations are rare.[58] Most administrative procedure challenges in tax are as-applied claims. *Mayo*, for instance, arose out of a refund claim and was an as-applied claim.

Outside tax, facial claims — that is, pre-enforcement claims — are common. *Corner Post* involved facial claims. The Fed did not directly enforce its maximum swipe fee regulation against the plaintiff convenience store, because the reg applied instead to the banks to which the plaintiff paid the swipe fees. The *Corner Post* plaintiffs challenged the swipe fee regulation on a facial — not as-applied — basis.

But in tax, the only clear holding of *Corner Post* has a limited effect: When a facial *ultra vires* claim is allowed despite the AIA (which is pretty unusual), the six-year time bar accrues not earlier, on promulgation, but rather later, when the plaintiff has the right to assert that claim in court.

B. Footnote 8

The *Corner Post* result — later, plaintiff-focused accrual — is clear for *ultra vires* claims. But this later-accrual result is not clear for procedural claims — those identified in the top row of the chart above. In footnote 8, the *Corner Post* Court indicates that earlier, at-promulgation accrual could still apply for procedural claims:

> It also may be that some injuries can only be suffered by entities that existed at the time of the challenged action. Corner Post suggests that only parties that existed during the rulemaking process can claim to have been injured by a "procedural" shortcoming, like a deficient notice of proposed rulemaking. Reply Brief 18-19. We need not resolve that issue here because there is no dispute that Corner Post proffered an injury that does not depend on its having existed when the Board promulgated Regulation II: the rule's alleged conflict with the Durbin Amendment. The dissent's observation that "the claims in this case *are*

[55] This is an open question because if the Mayo Foundation employed medical residents in 1984, it acquired the right to challenge the regulation in court then regarding (hypothetical) 1984 payroll tax obligations. It is an open question whether the foundation would acquire a fresh right to reassert in court an *ultra vires* challenge to the regulation with every subsequent payroll tax return (or any subsequent payroll tax refund claim) that it files.

[56] For instance, the University of Texas at Austin first launched its medical school in 2016 and opened its primary teaching hospital in 2018. Dell Medical School, "History" (2024).

[57] *See Wind River*, 946 F.2d 710.

[58] *See infra* notes 72-75 and accompanying text (discussing AIA and *CIC Services*).

> procedural," *post*, at 18, is confused. Even if some of Corner Post's claims might be procedural, its central claim — that the regulation violates the statute — is a prototypical substantive challenge.[59]

The *Corner Post* complaint included two claims. One was that the regulation exceeded the authority of the statute. The other claim was that the regulation was promulgated in an arbitrary and capricious fashion. The Court in footnote 8 distinguishes procedural claims — perhaps including the arbitrary and capricious claim in the case — and marks them for possible early accrual.

This suggestion channels a unanimous case law consensus about early accrual for procedural claims.[60] For example, in *Herr*,[61] the Sixth Circuit case that the *Corner Post* plaintiffs emphasized in their briefing, Judge Jeffrey Sutton distinguished between procedural lineage claims and *ultra vires* claims, writing that a classic example of accrual of an APA claim at the time of promulgation is when an agency "issues a rule without following all requirements of notice-and-comment rulemaking."[62] Similarly, in its reply brief at the Court, Corner Post conceded that "procedural attacks mentioned in the government's cases [such as notice-and-comment violations] will likely still be barred six years after a rule becomes final."[63]

The Court appears to ground this opening for earlier accrual for procedural claims in standing and its requirement of injury.[64] When the Court observes that it "may be that some injuries can only be suffered by entities that existed at the time of the challenged action," it refers to the challenged action of faulty administrative procedure, or of bad process followed during promulgation. Certainly the ability to participate in notice and comment is available only to those who exist when notice and comment is happening. The Court suggests that the persons who exist at promulgation not only exclusively hold the right to participate but also exclusively hold standing to object to an inadequate participation opportunity.

This new idea[65] holds promise as a government litigation tactic, including in the tax cases involving claims about notice and comment flaws. The history of tax rulemaking includes a decades-long period when Treasury and the IRS were not fully diligent about following notice and comment procedures; old guidance and old regs are vulnerable to challenge on these grounds.[66] Cases like *Valley Park Ranch*, *3M*, *Townley*, and *Govig* turn on whether notice and comment should have applied or on whether notice and comment was adequate.

Corner Post's footnote 8 increases the importance of these cases about old tax regs. The standard-fare claims about notice and comment in tax are plainly procedural claims,[67] and the opening offered by footnote 8 invites the government to continue to raise the six-year time bar as a challenge to old tax regulations. The results might inform administrative law generally, as well as tax administrative law in particular.

C. District Court Tax Decisions

The district court decisions that have applied the six-year time bar in tax cases provide a nice

[59] *Corner Post*, 144 S. Ct. at 2458 n.8.

[60] *See* Morse, *supra* note 1, at 212 (noting consensus).

[61] *Herr*, 803 F.3d 809 at 819 (allowing claim that a Forest Service order violated state property rights and thus exceeded the authority of the federal statute).

[62] *Id.* at 820.

[63] Reply Brief for Petitioner at 18-19, *Corner Post*, 144 S. Ct. 2440 (Jan. 12, 2024) (No. 22-1008).

[64] *See, e.g., Abbott Labs v. Gardner*, 387 U.S. 136, 139-141 (1967) (stating standing requirements of injury, causation, and redressability).

[65] Before *Corner Post*, the understanding was that plaintiffs who came into existence after the issuance of guidance could bring a procedural challenge if they acquired standing within six years. *See* Morse, *supra* note 1, at 238 (explaining overinclusive right to sue relative to right to participate in notice and comment); *Shiny Rock*, 906 F.2d at 1365 (noting conjunctive requirement of (1) having standing (2) within the six-year period).

[66] *See* Morse, *supra* note 1, at 200-204 (explaining exposure of old tax regulations to notice and comment challenge); *see, e.g.*, Kristin E. Hickman, "Unpacking the Force of Law," 66 *Vand. L. Rev.* 465, 492-502 (2013) (developing this argument in the case of temporary Treasury regulations).

[67] Alleged notice and comment process errors are plainly procedural for purposes of this distinction. Arbitrary and capricious claims also should be procedural claims. For instance, a claim that an agency's action is arbitrary and capricious because the agency failed to carefully consider the statute is procedural, relating to the public right to administrative procedure, to the extent that the alleged error is that the agency failed to provide a sufficient contemporaneous explanation when it promulgated the reg. If this claim is really alleging that the regulation violates the statute, rather than alleging that the agency's analysis or explanation was insufficient, the claim is an *ultra vires* and the arbitrary and capricious label should not apply.

illustration of the application of a rule that requires accrual at promulgation for procedural claims but not substantive claims. *Townley*, for instance, involved claims arising from the IRS's disallowance of a conservation easement deduction. The court correctly time-barred the taxpayers' as-applied procedural lineage claim that notice and comment had been violated when the conservation easement regulations were promulgated in 1986.[68] But the *Townley* court in 2023 recognized the exception for as-applied, *ultra vires* claims and allowed the taxpayers to pursue their argument that the regulation was inconsistent with the authorizing statute.[69] Likewise, the *Govig* court time-barred procedural challenges to Notice 2007-83, concerning tax shelter employee welfare benefit arrangements established more than eight years after the issuance of the notice.[70] But the *Govig* court declined to time-bar a claim that the IRS notice exceeded the authority of the relevant statute.[71]

Both *Townley* and *Govig* are consistent with the existing case law on 28 U.S.C. section 2401(a), which is summarized in the table. *Townley* and *Govig* involved as-applied challenges both to the procedural lineage of a regulation (or notice) and to the question of whether the regulation (or notice) exceeded the authority of the statute. They involved, in other words, the right, as-applied column of the table, including both the procedural row and the substantive row. As described, consistent with available precedent, the six-year time bar accrued at the time of promulgation for procedural lineage claims. But the time bar accrued later — when a plaintiff acquired the ability to sue — for *ultra vires* claims in both *Townley* and *Govig*.

IV. Waiving the Six-Year Time Bar

A. Anti-Injunction Act Complications

Outside tax, facial administrative procedure claims generally are available,[72] so that when the limitations period accrues at promulgation, it is simultaneously true that, at least probably, a plaintiff can bring an administrative procedure complaint and litigate the case. In contrast, within tax, the AIA[73] frames the question of when the government should waive the six-year time bar. The AIA (as well as other statutes such as the Declaratory Judgment Act)[74] generally prevents taxpayers from litigating a tax claim against the government before assessment or collection. In other words, in tax, facial claims are generally not allowed. Instead, most tax cases must be brought on an as-applied basis.

The restriction to as-applied claims in tax is subject to an exception as described in *CIC Services*, a 2021 Supreme Court case.[75] In *CIC Services*, the Court allowed a facial challenge to a tax shelter notice on the theory that the notice imposed an affirmative reporting obligation connected to possible criminal penalties but with only an attenuated connection to a possible civil tax liability. Although the case law is still working out the scope of *CIC Services*, an administrative procedure claim that can be raised on a facial basis in tax remains an exception. The overwhelming majority of tax cases are as-applied deficiency cases that follow from government enforcement.

B. Tax Procedure Delays

When only as-applied, and not facial, claims are available, as is usually the case in tax, delays

[68] *See Townley*, No. 3:22-cv-00107, at *1-*2 (denying plaintiffs' motion to amend complaint to include as-applied administrative procedure challenge to "inconsistent use" conservation easement regulation) (citing *Alabama v. PCI Gaming Authority*, 801 F.3d 1278, 1290-1291 (11th Cir. 2015)).

[69] *See Townley*, No. 3:22-cv-00107, at *4 (considering the so-called inconsistent use regulation as applied to disallow the Townleys' claimed conservation easement deduction because of reserved timber harvesting rights). The taxpayers lost their *ultra vires* claim in *Townley*. *Id.* at *5 (concluding that the regulations' disallowance for a reserved right that could destroy a "significant conservation interest" was consistent with the statute).

[70] *Govig*, No. 2:22-cv-00579, at *14-16 (D. Ariz. Mar. 23, 2023) (time-barring each procedural count of plaintiff's claim and noting that the limitations period could run against the plaintiff before the plaintiff came into existence) (citing *Shiny Rock*, 906 F.2d 1362).

[71] *Id.* at *15-*16.

[72] *See Abbott Labs*, 387 U.S. at 139-141.

[73] *See* section 7421(a) (providing that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person").

[74] Another limitation is that federal tax claims are excluded from the Declaratory Judgment Act. *See* 28 U.S.C. section 2201. *See, e.g.*, Stephanie Hunter McMahon, "Pre-Enforcement Needed for Taxing Procedures," 92 *Wash. L. Rev.* 1317, 1319-1321 (2017) (explaining how the AIA and the Declaratory Judgment Act, together with a lack of general taxpayer standing, block procedural challenges to tax regulations).

[75] *CIC Services*, 141 S. Ct. at 1590-1592 (distinguishing the notice from a typical assessment or collection provision).

that result from tax procedure rules can interfere with taxpayers' ability to bring procedural claims. This problem of delay is especially acute for deficiency actions, in which the government charges a taxpayer with underpayment of tax after auditing the taxpayer's return. In these cases, delay arises because of the lag between promulgation and tax return filing, because of the typical three-year limitations period for the government to challenge a tax return, and because of the practice of extending that limitations period.

For example, say a regulation is promulgated in year 0. A taxpayer would likely first have the opportunity to file a tax return with a position that challenged the regulation in year 1. The tax return filing starts the three-year limitations period running, so that the government can wait until year 4 to assess a deficiency related to the taxpayer's position.[76] Further, it is customary for taxpayers and the government to agree to extend the limitations period to allow additional time for IRS examination and for the internal IRS appeals process to run its course.[77] It is only after this internal tax controversy practice is complete that the IRS issues a notice of deficiency. After that, a taxpayer acquires the right to sue and has 90 days to file a petition for review in the Tax Court.[78]

Even if the government promptly challenges a taxpayer's position after a regulation is promulgated, there is an excellent chance that more than six years will elapse before the taxpayer has the ability to present the controversy to the Tax Court. Moreover, there is also the possibility that the government will not challenge the taxpayer's position at all. The government audits only a tiny percentage of tax returns — even for the highest-income taxpayers.

Yet there is an answer to delay and underenforcement that can get an administrative procedure challenge to court. This answer is classic: the taxpayer-initiated refund suit. The taxpayer's strategy would be to first file a tax return that complies with a regulation, then file an amended return that challenges the regulation, then sue the government for a refund.[79] In a refund suit, the taxpayer largely controls the timing of the litigation. This time-worn strategy[80] can also force review of procedural lineage claims within the six-year limitations period.

C. Allowing Procedural Claims in Tax

The logic of accruing the six-year limitations period at promulgation in tax proceeds from the general administrative law analysis explained above, including the opening left by footnote 8 in *Corner Post*. As *Mayo* explains, there is no special administrative law for tax only. Applying the six-year time bar is part of the big project of bringing administrative law into tax.[81]

Nevertheless, there is a special policy challenge in tax because of the AIA and other laws that often delay taxpayers' ability to bring claims. Facial claims are allowed only in the small proportion of cases described by the *CIC Services* precedent.[82] Meanwhile, except for refund claims, as-applied claims arise at the discretion of the government and are often subject to delay outside the taxpayer's control.

This tension suggests that the law should seek ways to ensure that procedural lineage challenges are available for tax regulations. But this goal does not require changing the timing of accrual for tax. The flexibility in the law arises from three other sources instead.

The first source of flexibility is taxpayers' ability to bring refund suits, as discussed above.[83] A diligent taxpayer can get its administrative procedure claim to court within the six-year time bar through the mechanism of a refund suit. It may be that this approach highlights the taxpayer's return for the government and increases the chance of audit.[84] But similar

[76] *See* section 6501(a).

[77] *See* IRS Form 872, "Consent to Extend the Time to Assess Tax."

[78] *See* section 6213.

[79] *See* section 7422(a) (providing procedure for filing a claim for refund).

[80] *See United States v. Windsor*, 570 U.S. 744, 753 (2013) (reciting the government's denial of the taxpayer's refund action).

[81] *See supra* notes 13-14 and accompanying text (discussing *Mayo*).

[82] *See supra* notes 72-75 and accompanying text (discussing the AIA and *CIC Services*).

[83] *See* section 7422(a).

[84] *See* Hickman, "A Problem of Remedy: Responding to Treasury's (Lack of) Compliance With Administrative Procedure Act Rulemaking Requirements," 76 *Geo. Wash. L. Rev.* 1153, 1181, 1184-1185, 1187-1188 (2008) (describing challenges with enforcement-based judicial review).

concerns likely apply for nontaxpayer plaintiffs that facially challenge regulations issued by other agencies. The refund suit is, in general, an effective workaround.

The second source of flexibility arises from courts' ability to equitably toll the 28 U.S.C. section 2401(a) six-year time bar. The Supreme Court has said that equitable tolling can apply against the government if the claimant has exercised due diligence in preserving his legal rights but "has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass."[85]

Consider two hypotheticals to illustrate when equitable tolling of the six-year time bar would make sense for a tax claim. In the first, assume that the government promulgates regulations with an effective date seven years after promulgation. This would make an administrative procedure challenge impossible, even via a refund suit. In the second situation, assume that a taxpayer diligently pursues a refund claim but must wait six months for the government to respond to the claim before going to court.

Equitable tolling could be an appropriate remedy in both of these cases. Whether or not the government's action should be described as misconduct, the effect is to produce a delay in the taxpayer's ability to raise the claim regardless of how diligently the taxpayer pursues it. Equitable tolling has applied when a claimant's ability to pursue a claim is suspended for reasons beyond the claimant's control.[86]

The third source of flexibility that can ensure access to procedural lineage challenges to tax regulations is government waiver policy. This is discussed in more detail in the next section.

D. Government Waiver Policy

Because 28 U.S.C. section 2401(a) is not jurisdictional, the government can decide when to waive the limitations period defense. Before 2023, as far as I know, it did not raise, and thus waived, the defense in all cases. This choice opened old tax regulations to procedural lineage challenges regardless of how long they had been on the books. In at least one case, *Altera*, the government affirmatively confirmed its decision to waive the defense.[87]

Going forward, the government's waiver policy will help shape the exposure of old tax regs to challenge. As a matter of internal process, the government might choose to raise the limitations period defense every time a taxpayer raises an administrative procedure claim to provide time for the government to consider whether waiver is appropriate. But if the government pressed the six-year time bar as a defense to every procedural lineage claim, some claims might be time-barred simply because of delays that result from working through the administrative tax controversy process at the IRS, rather than because taxpayers are reaching back in time to challenge decades-old procedural foot faults. To allow some relatively recent administrative procedure challenges to move forward, the government could pursue one or both of the following two strategies.

First, the government could revise its standard agreement with taxpayers to extend statutes of limitation to allow their cases to work their way through the internal IRS appeals process. This extension now tolls various limitations periods, most prominently the typical three-year limitations period following the filing of a tax return, but the extension does not toll the six-year time bar of 28 U.S.C. section 2401(a).[88] That six-year time bar should be added to the list of limitations period that the parties agree to extend in that agreement.

More generally, the purpose of the six-year limitations period — to encourage a plaintiff, or taxpayer, to timely raise a claim — might be well enough served if an as-applied procedural claim arises from a tax return filed (rather than a court

[85] *Irwin*, 498 U.S. at 95-96.

[86] *See, e.g.*, *Young v. United States*, 535 U.S. 43, 50-51 (2002) (holding that a chapter 7 three-year lookback period for IRS collections in connection with a bankruptcy case was tolled while a pending chapter 13 petition prevented the IRS from pursuing the collections action).

[87] *Altera* involved a regulation promulgated in 2003 and tax returns filed for tax liability in years 2004 through 2006. *See Altera*, 926 F.3d at 1067, 1072-1073, 1087. In *Altera*, one of the panel judges raised the question of whether 28 U.S.C. section 2401(a) might block the taxpayer's procedural challenge. *See id.* at 1075 n.6. In response, the government confirmed that it had waived the limitations period defense. *See* Letter-Brief in Response to the Court's Order Dated September 28, 2018, at 4, *Altera*, 926 F.3d 1061 (No. 16-70496); *see also* James M. Puckett, "Reasonable Tax Rules: Advancing Process Values With Reasonable Restraint," 24 *Fla. Tax Rev.* 277, 296-297 (2020) (explaining treatment of 28 U.S.C. section 2401(a) in *Altera*).

[88] *See* Form 872.

complaint filed) within six years of the effective date of a regulation and by a taxpayer that existed when the regulation was promulgated. This would help account for the reduced availability of facial claims in tax and provide reasonable opportunity for taxpayers to raise administrative procedure claims. Government waiver policy, in addition to judicial decisions, can help to balance the importance of adequate administrative procedure and the value of certainty in the law.

V. Conclusion

How late is too late to challenge old tax regs? *Corner Post*, a recent Supreme Court case, adopts a plaintiff-specific approach for *ultra vires* substantive challenges. But for procedural challenges, it invites the government to argue that the applicable six-year limitations period of 28 U.S.C. section 2401(a) accrues when a regulation is promulgated. This limitations period would have barred recent challenges to old regulations in cases like *Valley Park Ranch* and *3M* — if the government had raised it. Going forward, the government should regularly raise the six-year time bar as an affirmative defense. It should be prepared for the possibility of equitable tolling counterarguments. It should also waive the time bar in some cases to allow reasonable opportunity for procedural challenges, for instance if a claim concerns a tax return filed before the six-year mark and by a taxpayer in existence when the regulation was promulgated. ■