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I. INTRODUCTION

No COVID-19 stimulus provision captured public attention quite like the multiple rounds of no-strings-attached cash payments. The first round of checks, authorized by Congress in March 2020, was such a political winner that President Trump insisted on including a personal letter in the mailing;[1] the second, passed in December 2020, may have swung control of the Senate;[2] and the third was the centerpiece of President Biden's legislative agenda in early 2021.[3] Each round of checks passed in a flurry of omnibus lawmaking, an increasingly common occurrence in the highly polarized national environment.[4] Under immense time and logistical constraints to pass legislation and distribute stimulus, Congress relied on the tax code and the Internal Revenue Service (IRS) to rush payments to millions of Americans during the pandemic.[5]

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1 Lisa Rein & Michelle Singletary, *His Name on Stimulus Checks, Trump Sends a Gushing Letter to 90 Million People*, WASH. POST (Apr. 29, 2020), https://www.washingtonpost.com/politics/his-name-on-stimulus-checks-trump-sends-a-gushing-letter-to-90-million-people/2020/04/28/04143a62-8999-11ea-ac8a-fe9b8088e101_story.html [https://perma.cc/AZ6Y-LRCW].

2 Stephanie Saul, *Relief Package Grows as Campaign Issue in Georgia Senate Races*, N.Y. TIMES (Dec. 28, 2020), https://www.nytimes.com/2020/12/28/us/politics/stimulus-georgia-senate-runoffs.html [https://perma.cc/GL6V-H5AV].

3 Grace Segers, *Biden Signs $1.9 Trillion American Rescue Plan into Law*, CBS NEWS (Mar. 12, 2021), https://www.cbsnews.com/news/biden-signs-covid-relief-bill-american-rescue-plan-into-law/ [https://perma.cc/SQ6V-CLFD].

4 *See* Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1803–05 (2015).

5 *See* Susannah Camic Tahk, *Everything Is Tax: Evaluating the Structural Transformation of U.S. Policymaking*, 50 HARV. J. ON LEGIS. 67, 69–73 (2013) (arguing that the tax code has complexified in an attempt to address many more social and economic policy goals than simply raising

Congress passed the first round of checks as part of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)[6] in late March 2020 to infuse more than $2 trillion into the national economy and address the overlapping medical and economic emergencies stemming from the COVID-19 pandemic.[7] Among its many relief programs, the CARES Act provided loan guarantees for businesses to cover payroll costs, a temporary expansion of unemployment insurance, additional health care funding, and assistance for state and local governments.[8] Immediate stimulus payments, known as Economic Impact Payments (EIPs), resulted in instant and fully-refundable tax credits of $1,200 per adult and $500 per child, subject to certain income thresholds.[9] The Internal Revenue Service quickly distributed EIPs to eligible taxpayers to stimulate the shuttered economy and aid Americans in economic distress.[10] In December 2020, Congress passed a second round of EIPs, $600 per adult and $600 per dependent child, as part of the Consolidated Appropriations Act, 2021.[11] Then, in March 2021, the American Rescue Plan Act of 2021[12] delivered another round of EIPs, this time for $1,400 per adult and as well as for each dependent regardless of age.[13]

Despite broad language in the CARES Act requiring the distribution of EIPs to "any individual,"[14] the IRS announced that incarcerated individuals were not eligible for the payment.[15] As a result, the agency moved to "claw back" EIPs already sent to incarcerated people by requesting the return of the stimulus checks and intercepting checks sent to prison facilities.[16] This action triggered criticism across the ideological spectrum as libertarians criticized the administrative overreach,

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revenue).

[6] Pub. L. No. 116-136, 134 Stat. 281 (codified at 15 U.S.C. §§ 9001–9080) (2020).

[7] Letter from Phillip L. Swagel, Dir., Cong. Budget Off., to Hon. Mike Enzi, Chairman, Comm. on the Budget (Apr. 27, 2020) (on file with journal).

[8] *Id.*

[9] 26 U.S.C. § 6428(a),(c) (2020).

[10] *A Message from the Commissioner—Economic Impact Payments: IRS Helping 150 Million Americans One Payment at a Time*, INTERNAL REVENUE SERV. (Apr. 14, 2020), https://www.irs.gov/newsroom/a-message-from-the-commissioner-economic-impact-payments-irs-helping-150-million-americans-one-payment-at-a-time [https://perma.cc/47P7-9CNM].

[11] Pub. L. No. 116-260 (2020); 26 U.S.C. § 6428A(a).

[12] Pub. L. No. 117-2 (2021); 26 U.S.C. § 6428B.

[13] 26 U.S.C. § 6428B(b).

[14] 26 U.S.C. § 6428(d).

[15] *Economic Impact Payment Information Center: EIP Eligibility and General Information*, INTERNAL REVENUE SERV. (May 6, 2020), https://www.irs.gov/newsroom/economic-impact-payment-information-center-eip-eligibility-and-general-information [https://perma.cc/4GD7-2E4B] (choose the "+" sign next to "Q A14. Does someone who is incarcerated qualify for the Payment? (added May 6, 2020)").

[16] Rebecca Boone, *US Inmates Got Virus Relief Checks, and IRS Wants Them Back*, ASSOCIATED PRESS (June 24, 2020), https://apnews.com/article/0810bb67199c9cef34d4d39ada645a92 [https://perma.cc/85MJ-5ATG].

while progressives argued that the policy continued a years-long trend of shifting the costs of incarceration onto incarcerated people and their families.[17]

Then, incarcerated individuals filed class action suits challenging the Treasury's decision to exclude them from receiving EIPs.[18] One such case, *Scholl v. Mnuchin*,[19] resulted in a successful class action certification and injunction requiring the IRS to distribute payments to incarcerated individuals.[20] By the time the court resolved the dispute in favor of the class action plaintiffs in October 2020, the acute economic and health crisis of COVID-19 had not abated.

This Comment will argue that the delay in delivering immediate cash assistance to incarcerated individuals exposes the inadequacy of the tax administrative doctrine in resolving emergency relief disputes. Exclusionary measures embedded in the tax system and other economic policies inhibit the rehabilitation prospects of incarcerated people. Millions of Americans, including incarcerated individuals, made personal and financial sacrifices in 2020 to aid the public health efforts. In return, those who were denied economic relief on an arbitrary basis should not have to wait until the following tax year—as is required by current law—to seek a legal remedy. In other words, the legal framework for challenging tax decisions is too unsympathetic toward many taxpayers that rely on policies embedded in the tax code for immediate economic relief. Further, by providing nearly universal economic stimulus, Congress recognized the plight of incarcerated individuals during a pandemic and moved away from the exclusionary stimulus measures enacted in prior economic crises.[21] Providing economic stimulus to those in incarceration is sound economic stimulus policy so long as punitive measures for individuals in and exiting incarceration are embedded in tax and economic policy.

Part II of this Comment describes the CARES Act provision at the core of the controversy as well as prior economic stimulus legislation

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17 *See* Alan D. Viard, *IRS Has No Authority to Deny Rebates to the Incarcerated and the Recently Deceased*, AM. ENTER. INST. (May 11, 2020), https://www.aei.org/economics/irs-has-no-authority-to-deny-rebates-to-the-incarcerated-and-the-recently-deceased/ [https://perma.cc/63WP-EZ2X]; Stephen Raher, *Since You Asked: Should Incarcerated People Be Receiving Stimulus Payments?*, PRISON POL'Y INST. (May 18, 2020), https://www.prisonpolicy.org/blog/2020/05/18/checks/ [https://perma.cc/233Y-3B8P].

18 *See, e.g.*, Scholl v. Mnuchin, 489 F. Supp. 3d 1008 (N.D. Cal. 2020) (order granting preliminary injunction and class certification).

19 489 F. Supp. 3d 1008 (N.D. Cal. 2020) (order granting preliminary injunction and class certification).

20 *Id.* at 1047.

21 *Compare* 26 U.S.C. § 6428 (2020) (CARES Act section enacting EIPs without an earned income requirement), *with* 26 U.S.C. § 6428 (2008) (economic stimulus passed during Great Recession with an earned income requirement).

and the relevant tax and administrative law doctrines. Part III covers the progression of cases resulting in injunctive relief for incarcerated individuals and considers arguments for and against the injunction. Part IV argues that the tax administration doctrine results in a mismatch between tax expenditure programs that confer immediate benefits and the laws governing when a suit to recover from the IRS can be brought, which results in ordinary taxpayers stranded waiting for urgently needed economic relief. The benefits of speedy legal remedies for taxpayers outweigh added administrative burdens and other potential consequences. Part V argues that directing economic stimulus to incarcerated individuals is sound policy—especially during a pandemic—and that the tax code is too punitive toward those individuals during and after incarceration. The long-term trend toward universal economic stimulus programs offers significant benefits in reducing administrative costs and improving economic outcomes.

II. ECONOMIC RELIEF PROGRAMS, TAX INJUNCTIONS, AND THE CARES ACT

The controversy over the eligibility of incarcerated individuals to receive EIPs implicates a number of important issues in tax and administrative law. Section A will review the evolution of economic stimulus statutes leading to the CARES Act, the provisions of the CARES Act governing eligibility and distribution of EIPs, and subsequent administration of the EIPs by the IRS. Then, Section B will outline the relevant administrative law and tax law doctrines in dispute.

A. Statutory and Administrative History Leading to the CARES Act

1. Prior stimulus legislation

Many pieces of prior economic stimulus legislation have excluded incarcerated individuals. The CARES Act builds upon legislative frameworks from the Social Security Act of 1935 (SSA) [22] and its subsequent amendments, and the Economic Stimulus Act of 2008 (ESA).[23] Congress passed the SSA during the Great Depression to provide, among other things, social insurance to elderly and disabled people facing severe financial distress.[24] The SSA contains a number of exclusions to its social assistance program. For example, the SSA sets monthly income limits

[22] Pub. L. No. 74-271, 49 Stat. 620 (codified as amended in scattered sections of 42 U.S.C.) (1935).

[23] Pub. L. No. 110-185, 122 Stat. 613 (2008).

[24] *See* Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 GEO. J. POVERTY L. & POL'Y 127, 134–35 (2011); Patricia E. Dilley, *Taking Public Rights Private: The Rhetoric and Reality of Social Security Privatization*, 41 B.C. L. REV. 975, 981 (2000).

to eligibility, with separate thresholds for individual and married households,[25] and also sets benefit limits for individuals in medical treatment facilities receiving Medicare assistance.[26]

Many scholars argue that certain SSA exclusions are part and parcel of a deliberate strategy to prevent Black people from receiving benefits of New Deal legislation.[27] To accomplish this, Congress excluded domestic and farm workers from most programs and decentralized benefits administration to empower racist local government authorities.[28] Although some dispute whether racism drove these exclusions in the SSA, it is nevertheless clear that the exclusions disproportionately impacted Black Americans.[29]

Later, in 1980, as a political reaction to sensational news stories of incarcerated individuals receiving social security payments, Congress amended the SSA to exclude them from receiving benefits.[30] Sensationalized news stories drew attention to incarcerated individuals such as the "Son of Sam" serial killer, who committed violent crimes and then received Social Security income and other government benefits while incarcerated.[31] Members of Congress sensed that excluding incarcerated individuals to shore up the fiscal strength of the program was a politically winning issue.[32]

The 1980 SSA amendments made individuals ineligible for social security if they are "inmate[s] of a public institution"[33] or fleeing to avoid prosecution or imprisonment.[34] In order to facilitate data collection and efficient administration, the statute was amended to incentivize prison facilities to provide lists of inmates to the Social Security Administration, paying penal institutions $400 for each timely submission

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[25] 42 U.S.C. § 1382(a).

[26] 42 U.S.C. § 1382(e)(1)(B).

[27] *See* Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 109 (2011); Robert C. Lieberman, *Race, Institutions, and the Administration of Social Policy*, 19 SOC. SCI. HIST. 511, 512 (1995) ("[T]he [SSA] created a diverse and fragmented set of policies that appeared to reinforce racial divisions in the American political economy.").

[28] Perea, *supra* note 27.

[29] *See* Larry DeWitt, *The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act*, 70 SOC. SEC. BULL. 49, 53 (2010) (arguing that administrative efficiency motivated the policy exclusions but acknowledging that the farm and domestic exclusions effectively excluded 65 percent of African American workers but only 27 percent of white workers).

[30] *See* Jennifer D. Oliva, *Son of Sam, Service-Connected Entitlements, and Disabled Veteran Prisoners*, 25 GEO. MASON L. REV. 301, 325–28 (2018).

[31] *Id.*

[32] *Id.* (summarizing the floor debates over the 1980 amendments); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO/HRD-82-43, PRISONERS RECEIVING SOCIAL SECURITY AND OTHER FEDERAL RETIREMENT, DISABILITY, AND EDUCATION BENEFITS 1–4 (1982).

[33] 42 U.S.C. § 1382(e)(1)(A).

[34] 42 U.S.C. § 1382(e)(4)(A)(i).

of information to the registry.[35] In sum, the 1980 amendments codify a strong preference to exclude incarcerated individuals from receiving social security income.

The 2008 stimulus, passed at the height of the Great Recession, sought to provide immediate economic stimulus to revive the national economy.[36] Like the CARES Act, the ESA resulted in the issuance of immediate refundable tax credits to eligible individuals: $600 per taxpayer, or $1,200 to a married couple.[37] Like the payments under the CARES Act, the ESA payments were subject to gross income limitations. In identical statutory language to the CARES Act, the ESA excluded nonresident aliens, dependents, and trusts and estates from receiving payments.[38]

Yet the ESA differs in construction from the CARES Act in one critical way: it includes an earned income minimum to target only working individuals or retirees for financial assistance, excluding, among others, incarcerated people. Congressional statements evinced a clear intent to use the ESA to deliver targeted assistance to low- and middle-income families.[39] The ESA required individuals to earn at least $3,000 annually in earned income, social security benefits, or compensation from pensions to qualify for the program.[40] Because incarcerated individuals can neither generate earned income nor qualify for social security, this had the effect of excluding incarcerated individuals from the ESA.[41]

2. The CARES Act

Of the many economic stimulus provisions of the CARES Act, the EIPs generated perhaps the greatest amount of public attention due to the broad eligibility requirements and the executive branch's enthusiasm for the initiative.[42] In effect, the stimulus payments adjusted the tax owed for eligible individuals and refunded the credit due immediately. Taxpayers were "treated as having made a payment against the

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[35] 42 U.S.C. § 1382(e)(1)(I)(i)(I)–(II).

[36] *See* Remarks on Signing the Economic Stimulus Act of 2008, 44 WEEKLY COMP. PRES. DOC. 185–86 (Feb. 13, 2008).

[37] 26 U.S.C. § 6428(a) (2008).

[38] 26 U.S.C. § 6428(e)(3) (2008); *see also* 26 U.S.C. § 6428(d) (2020) (identical language).

[39] *E.g.*, 154 CONG. REC. S19,720 (daily ed. Feb. 6, 2008) (statement of Sen. Kennedy) ("Our actions today are vital for the entire economy, but they are most critical for these struggling families. Our decisions will help determine whether they keep their homes, whether their teenagers stay in college, and whether their children go to bed hungry.").

[40] 26 U.S.C. §§ 6428(b)(2)(a), (e)(1) (2008).

[41] *See* 26 U.S.C. § 32(c)(2)(B)(iv) (excluding any "amount received for services provided . . . while the individual is an inmate at a penal institution" from the definition of "earned income"); 42 U.S.C. § 1382(e)(1)(A).

[42] *See* Rein & Singletary, *supra* note 1.

tax" in tax year 2019 for which an advance refund was due equal to $1,200.[43] Then, the Act authorized a one-time, fully refundable tax credit of $1,200 per individual and $500 per dependent child, to be issued immediately.[44]

The CARES Act required the issuance of EIPs to "any individual," subject to only a few limitations.[45] The amount of the tax credit began phasing out at certain adjusted gross income thresholds, starting at $75,000 for individuals and $150,000 for joint returns, and phasing out entirely for individuals earning at least $99,000 and joint filers earning at least $198,000.[46] The Act then specifically excluded nonresident alien individuals,[47] dependent children and relatives,[48] as well as trusts and estates from receiving the tax credit.[49] The Act did not place any other eligibility restrictions on EIPs.

Further, the CARES Act directed the IRS to act swiftly in distributing EIPs to eligible individuals and imposed a deadline for the distribution of payments. The Act required the Department of Treasury to issue refunds "as rapidly as possible" through electronic funds transfers and paper checks using taxpayer information from 2018 and 2019.[50] While the Treasury's authority to issue CARES Act refunds through the EIP program expired on December 31, 2020, subsequent rounds of relief carried no such expiration date.[51]

The IRS, through the Treasury Secretary, was charged with administering EIPs and developing reasonable regulations to effectuate the Act. The Internal Revenue Code broadly grants authority to the Treasury Secretary to prescribe "all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue."[52] Further, the CARES Act authorizes the Treasury Secretary to prescribe regulations as needed, including measures "deemed appropriate to

[43] 26 U.S.C. § 6428(f)(1) (2020).

[44] 26 U.S.C. § 6428(a).

[45] 26 U.S.C. § 6428(d).

[46] 26 U.S.C. § 6428(c) (phasing out the credits according to income and household status); *see also Calculating the Economic Income Payment*, INTERNAL REVENUE SERV. (May 2020), https://www.irs.gov/newsroom/calculating-the-economic-impact-payment [https://perma.cc/X5R4-BCK6].

[47] 26 U.S.C. § 6428(d)(1).

[48] 26 U.S.C. § 6428(d)(2). This provision notably prohibits any dependents "with respect to whom a deduction under [26 U.S.C. § 151] is allowable" from receiving EIPs. Yet, the § 151 deductions for dependent children and relatives were eliminated—or rather, cut to zero—starting with tax year 2018. *See* 24 U.S.C. § 151(d)(5). Whether this eligibility provision of the CARES Act accomplishes its intended purpose of excluding dependent children and relatives is beyond the scope of this Comment.

[49] 26 U.S.C. § 6428(d)(3).

[50] 26 U.S.C. § 6428(f)(3)(a)–(b).

[51] *Id.*; *see also* 26 U.S.C. § 6428B(f) (2021) (containing no such expiration of authority).

[52] 26 U.S.C. § 7805(a).

avoid allowing multiple credits or rebates to a taxpayer."[53] Unlike other sections of the CARES Act, the section pertaining to EIPs does not exempt Treasury from Administrative Procedure Act (APA) notice-and-comment rulemaking requirements.[54]

3. IRS implementation of the CARES Act

Given the extraordinary economic and health emergency of the COVID-19 pandemic, the IRS moved swiftly to administer EIPs and other provisions of the CARES Act. Yet the IRS also dedicated administrative resources to withhold EIPs from incarcerated individuals, despite dubious legal grounds for the policy. Just two weeks after the Act's passage, the IRS began distributing EIPs to eligible individuals via direct deposit.[55] Within two months, more than 157 million individuals received EIPs, totaling more than $264 billion.[56] The IRS maintained a dedicated webpage to address common issues arising in the distribution of EIPs.[57] Common causes of delay in receiving EIPs included not enrolling in direct deposit with the IRS for the 2018 and 2019 tax years, slow rollout of mailed checks, and difficulties reaching those who did not file tax returns or otherwise receive Social Security income for the 2018 and 2019 tax years.[58]

Initially, incarcerated individuals received EIPs in the same manner as any other taxpayer. Because many incarcerated people likely did not file tax returns for the prior two years, rollout of EIPs to them was initially slow. In the first two months of the program, only an estimated 84,861 incarcerated people received EIPs.[59] With approximately 1.4 million people in incarceration at year-end 2019, this means only 5 percent of incarcerated individuals received an EIP.[60] Yet, on May 6, 2020,

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53 26 U.S.C. § 6428(h) (2020).

54 *Compare id.*, *with* CARES Act, Pub. L. No. 116-136 § 12003(c)(2), 134 Stat. 281, 516 (specifically exempting the Bureau of Prisons from "notice-and-comment rulemaking requirements" under § 553 of the APA).

55 TREASURY INSPECTOR GEN. FOR TAX ADMIN., INTERIM RESULTS OF THE 2020 FILING SEASON: EFFECT OF COVID-19 SHUTDOWN ON TAX PROCESSING AND CUSTOMER SERVICE OPERATIONS AND ASSESSMENT OF EFFORTS TO IMPLEMENT LEGISLATIVE PROVISIONS 3 (June 30, 2020), https://www.treasury.gov/tigta/auditreports/2021reports/202146023fr.pdf [https://perma.cc/X9M4-V38H] [hereinafter TIGTA].

56 *Id.* at 4.

57 *Economic Impact Payment Information Center: EIP Eligibility and General Information*, *supra* note 15.

58 Janet Holtzblatt & Michael Karpman, *Who Did Not Get the Economic Impact Payments by Mid-to-Late May, and Why? Findings from the May 14–27 Coronavirus Tracking Survey*, URB. INST. (July 2020), https://www.urban.org/sites/default/files/publication/102565/who-did-not-get-the-economic-impact-payments-by-mid-to-late-may-and-why_0.pdf [https://perma.cc/KZZ3-278J].

59 TIGTA, *supra* note 55, at 6.

60 E. ANN CARSON, BUREAU OF JUST. STATS., U.S. DEP'T. OF JUST., PRISONERS IN 2019 1 (2020).

the IRS updated the webpage to declare that incarcerated individuals were ineligible for payment and include information on how to remit the EIPs.[61] The IRS began excluding incarcerated people from receiving EIPs and even sought to intercept payments en route to individuals at state prisons.[62]

B. Administrative Law, Tax Injunctions, and the IRS

The controversy over whether incarcerated individuals were eligible for stimulus payments raises sensitive questions of tax and administrative law. IRS tax regulations once occupied a unique role in administrative jurisprudence outside of the APA framework, but the modern trend is to align IRS rulemaking jurisprudence under the same framework as other agencies.[63] To that end, incarcerated individuals have successfully relied on the APA as a vehicle to enjoin the IRS from withholding payments. In addition, the litigation raised an issue concerning the Anti-Injunction Act (AIA),[64] which requires taxpayers to submit a tax return prior to filing suit to recover an excessive assessment or denied refund.[65] This Section will discuss each in turn.

1. APA challenges to agency action

The APA governs the process by which executive branch agencies exercise their rulemaking and regulatory powers and is thus a favored route to challenging the validity of executive branch action. Most administrative rulemaking occurs through the informal notice-and-comment procedure—where the agency promulgates a rule, solicits public comment, and issues a final rule—but there are two notable exceptions to the process.[66] First, non-legislative rules—including "interpretative rules, general statements of policy, or rules of agency organization"—are exempt.[67] Second, the "good cause" exception permits the agency to eschew the notice-and-comment procedure where it would be "impracticable, impossible, or contrary to public interest."[68] The Treasury has historically invoked both exceptions in order to avoid public comment

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[61] *Economic Impact Payment Information Center: EIP Eligibility and General Information*, *supra* note 15.

[62] *See* Boone, *supra* note 16.

[63] *See* Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 242–43 (2014).

[64] Pub. L. No. 39–169, 14 Stat. 475 (1867) (codified at 24 U.S.C. § 7421).

[65] 24 U.S.C. § 7421(a) (restraining pre-assessment litigation over tax owed).

[66] *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1390 (2004).

[67] 5 U.S.C. § 553(b)(3)(A).

[68] 5 U.S.C. § 553(b)(3)(B).

on IRS rulemaking.[69] The IRS also issues informal guidance including revenue rulings, announcements, and revenue procedure, among others, that operate outside of the APA notice-and-comment framework.[70]

The APA authorizes a right of action for parties to challenge agency action, but the agency ruling must be final, and the party must lack any other adequate remedy.[71] Courts look for confirmation that the rulemaking process has concluded, and that the disputed decision has actual effects on the party seeking relief.[72] Where Congress intended to delegate legislative authority to agencies, courts may defer to an agency's interpretation of the statute.[73]

The Supreme Court's decision in *Mayo Foundation for Medical Education and Research v. United States*[74] confirmed that IRS rulemaking, like the rulemaking of any other agency, is subject to the two-step *Chevron v. NRDC*[75] deference test, which asks whether an ambiguity existed in the statute and defers to the agency interpretation unless it lacked a rational basis.[76] *Mayo* repudiated an earlier line of thinking that IRS rulemaking was "exceptional" and existed outside of the APA framework.[77] After *Mayo*, the notion of "tax exceptionalism" was no longer persuasive.[78] Now, the level of deference accorded to IRS rulemaking largely turns on the "care, . . . consistency, formality, and relative expertness" of the agency rulemaking, with more deference generally afforded to more comprehensive rulemaking.[79] In certain instances, agency rulemaking may be subject to no deference at all.[80]

Even if a court defers to the agency interpretation of a statute, certain procedural defects in the decision-making process may still result

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[69] *See* Leslie Book, *A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation*, 12 FLA. TAX REV. 517, 547–49 (2012).

[70] *Id.* at 550.

[71] *See* 5 U.S.C. § 704.

[72] Bennett v. Spear, 520 U.S. 154, 177–78 (1997).

[73] United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

[74] 562 U.S. 44 (2011).

[75] 467 U.S. 837 (1984).

[76] *Mayo Found.*, 562 U.S. at 55–56 (citing *Chevron*, 467 U.S. at 843).

[77] *See* Stephanie Hunter McMahon, *The Perfect Process Is the Enemy of the Good Tax: Tax's Exceptional Regulatory Process*, 35 VA. TAX REV. 553, 586 (2016) (arguing that tax exceptionalism looks no different than attempts by other agencies to work around certain APA requirements).

[78] *Id.*

[79] United States v. Mead Corp., 533 U.S. 218, 228 (2001) (citing Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944)).

[80] *See* King v. Burwell, 576 U.S. 473, 485–86 (2015) (holding that no deference should be afforded to the IRS's interpretation of Affordable Care Act tax credits).

in an injunction.[81] Notably, an agency action cannot proceed if the action is "arbitrary" or "capricious."[82] The court may not substitute its own judgment for that of the agency in reaching such a finding.[83] In short, courts must identify a "clear error of judgment."[84] Courts have set side agency actions as arbitrary or capricious where agencies failed to address important policy considerations in their decision-making process.[85]

2. Bars to tax injunctions and their exceptions

Challenges to tax assessment decisions are subject to two closely related provisions of the tax code. First, § 7421 of the AIA restrains taxpayers from filing suit against the IRS until a tax has been assessed or collected.[86] Because the tax collector is an "attractive target for all kinds of litigation," the AIA seeks to ensure smooth, uninterrupted collection of federal revenue so that the federal government can continue operations.[87] This has the effect of minimizing tax litigation prior to tax assessment to protect the agency's collection efforts from interference.[88]

Second, § 7422 governs the process for refund suits, requiring a taxpayer to pay the tax incurred and exhaust administrative remedies before filing a claim for refund with the IRS.[89] For individuals, Treasury regulations further elaborate that submitting a Form 1040 tax return qualifies as a claim for refund.[90] For a typical filer, that means filing an annual tax return, awaiting a determination from the IRS on the validity of a credit, and then suing for recovery. Because § 7421 and § 7422 are closely related, courts will sometimes consider these statutes alongside one another.[91]

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[81] *See* 5 U.S.C. § 706(2).

[82] 5 U.S.C. § 706(2)(A).

[83] Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1905 (2020) (quoting FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009)).

[84] *Id.* (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)).

[85] *See id.* at 1912 (enjoining DHS rescission of DACA where agency neglected to consider impacts of rescission on nonresident alien children subject to prosecutorial forbearance); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 51 (1983) (enjoining the National Highway Traffic Safety Association from abandoning a mandatory seatbelt rule for manufacturers where the agency did not consider safety effects of the rule).

[86] 26 U.S.C. § 7421(a).

[87] *See* South Carolina v. Regan, 465 U.S. 367, 387 (1984) (O'Connor, J., concurring).

[88] *See* Stephanie Hunter McMahon, *Pre-Enforcement Litigation Needed for Taxing Procedures*, 92 WASH. L. REV. 1317, 1343–44 (2017); *see also* Fla. Bankers Ass'n v. U.S. Dep't of the Treasury, 799 F.3d 1065, 1072 (2015) ("If plaintiffs' challenge were successful, the IRS would be unable to assess or collect that tax.").

[89] 26 U.S.C. § 7422(a).

[90] 26 C.F.R. § 301.6402-3(a)(2) (2020).

[91] *See* United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1, 9–10 (2018) ("These principles [barring a suit for refund under § 7422] are fully applicable to claims of unconstitutional

Courts have recognized two relevant exceptions to the AIA: the irreparable injury and no alternative remedy exceptions. First, in *Enochs v. Williams Packing & Navigation Co.*,[92] the taxpayer, a corporation, sought to enjoin the IRS from collecting unpaid payroll taxes.[93] The Supreme Court reversed the lower court's injunction because the AIA requires taxpayers to pay a tax assessment prior to filing suit. The Court held that the issuance of a pre-collection injunction would be appropriate only if the plaintiff could prove "irreparable injury" to the taxpayer and that there were "no circumstances" under which the government could prevail.[94] As elaborated on in *Investment Annuity, Inc. v. Blumenthal*,[95] the taxpayer must prove that the IRS "flouted the express terms of the code, or lacked any factual basis for the assessment of taxes against an individual taxpayer."[96] As a result of this high standard, plaintiffs rarely prevail on this exception.[97]

Second, a suit for a tax injunction can proceed under the exception established in *South Carolina v. Regan*,[98] in which the Supreme Court permitted a suit to enjoin tax collection where no alternative remedy existed.[99] In *South Carolina v. Regan*, the state sought to challenge the imposition of a tax on a bond offering it had issued.[100] The state had no legal recourse to challenge a tax levied on an issuance of state bonds because the tax was ultimately paid by the bond purchasers.[101] Thus, the Court permitted the state to challenge the IRS ruling.[102]

III. CARES ACT CLASS ACTION LITIGATION

Once it became clear that the IRS intended to withhold EIPs from them, incarcerated individuals began filing lawsuits challenging the IRS interpretation of the CARES Act. This Section surveys cases in which incarcerated individuals challenged the Treasury's decision to

taxation, a point highlighted by what we have said in other cases about the Anti-Injunction Act."); *Regan*, 465 U.S. at 385–87 ("In depriving courts of jurisdiction to resolve abstract tax controversies [under the AIA and § 7422], Congress has determined that the United States must be able to assess and collect taxes alleged to be due without judicial intervention." (O'Connor, J., concurring) (internal quotation marks and citation omitted)).

92 370 U.S. 1 (1962).

93 *Id.* at 2.

94 *Id.* at 7–8.

95 609 F.2d 1 (D.C. Cir. 1979).

96 *Id.* at 5–6.

97 McMahon, *supra* note 88, at 1347.

98 465 U.S. 367 (1984).

99 *Id.* at 378.

100 *Id.* at 370.

101 *Id.* at 378.

102 *Id.*

deny EIPs, beginning with *Scholl v. Mnuchin*,[103] where incarcerated individuals successfully enjoined the IRS from withholding payments on APA grounds.[104]

After the IRS issued its CARES Act guidance in May, incarcerated individuals successfully won injunctions requiring the IRS to distribute EIPs.[105] These cases challenged the validity of the statute and subsequent interpretation, arguing that Treasury's interpretation was arbitrary and capricious under the APA and also violated the Fourteenth Amendment's Equal Protection Clause. In addition, the suits tested the AIA doctrine for barring pre-assessment litigation.

Incarcerated individuals prevailed in *Scholl*.[106] Judge Hamilton of the Northern District of California certified the proposed class in late September 2020 and issued a preliminary injunction requiring the IRS to begin distributing credits to incarcerated individuals.[107] Less than one month later, the court granted the class summary judgment in part and denied defendant's summary judgment motion.[108] The government declined to pursue an appeal, and the IRS began complying with the injunction.[109]

The *Scholl* court held that the suit was not barred by either the AIA, which concerns pre-assessment litigation, or a § 7422 suit for refund.[110] Judge Hamilton concluded that it would be inequitable to require plaintiffs to exhaust administrative claims before seeking a remedy in court.[111] With regard to the plaintiffs' standing to bring a § 7422 refund suit, the district court rejected the government's argument that

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[103] 489 F. Supp. 3d 1008 (N.D. Cal. 2020) (order granting preliminary injunction and class certification).

[104] *Id.* at 1047

[105] *See id.*; Galvan v. Mnuchin, No. 20-CV-4511, 2020 WL 5296974 (N.D. Ill. Sept. 4, 2020) (motion denying intervention and stay by *Scholl* plaintiffs); Warfield v. Mnuchin, No. 20-CV-04121, 2020 WL 5849716 (D.S.D. Oct. 1, 2020) (order denying motion for class certification). Spouses of nonresident aliens have also challenged the validity of § 6428(d) on equal protection grounds. *E.g.*, Doe v. Trump, No. 20-cv-00858, 2020 WL 5076999 (C.D. Cal. July 8, 2020) (order denying motion for temporary restraining order).

[106] *Scholl*, 489 F. Supp. 3d at 1047.

[107] *Id.*

[108] Scholl v. Mnuchin, 494 F. Supp. 3d 661 (N.D. Cal. 2020) (order granting summary judgment in part and denying motion for stay).

[109] *See* Scholl v. Mnuchin, No. 20-16915, 2020 WL 9073361 (9th Cir. Nov. 20, 2020) (order granting unopposed motion to dismiss). It is quite rare for the Justice Department to lose on the merits in a civil tax litigation case and then decline to pursue an appeal. The Tax Division of the DOJ, which represented the government in *Scholl*, claimed a 98 percent win rate in civil tax litigation for fiscal years 2016 through 2019. *See* TAX DIV., U.S. DEPT. OF JUST., *FY 2021 Congressional Budget Proposal* at 19, https://www.justice.gov/doj/page/file/1246761/download [https://perma.cc/T7AX-L9RW].

[110] *See Scholl*, 489 F. Supp. 3d at 1031.

[111] *Id.* at 1031–32.

the court could not hear the case until the plaintiffs filed 2020 tax returns.[112] Instead, the plaintiffs' argument that incarcerated individuals suffered a cognizable injury when the IRS deemed them ineligible proved persuasive.[113] Thus, the court sidestepped difficult questions about how the suit fits within the framework for restraining pre-assessment tax suits.[114]

Having determined that the plaintiffs had standing to sue, the court turned to an analysis of the IRS decision under the APA, finding that the interpretation excluding incarcerated individuals lacked a statutory basis and was arbitrary and capricious under the APA.[115] The CARES Act plainly deems "any individual" eligible for EIP payments, subject to only a few clearly defined exclusions in the statute for nonresident aliens and dependents.[116]

In this case, the IRS failed to put forth any rationale for the policy.[117] Unlike the ESA, which bootstrapped eligibility definitions from the SSA and Internal Revenue Code that excluded incarcerated individuals, the CARES Act lacks an income requirement.[118] Absent a public explanation for the decision, or even evidence of internal deliberations, the IRS had no defense for the manner in which the agency decided to exclude incarcerated individuals from receiving EIPs.[119] This finding that the agency violated § 706 of the APA was sufficient to enjoin the IRS from continuing to withhold EIPs from incarcerated people.[120] The government declined to pursue an appeal, strongly suggesting that officials recognized the weaknesses in the legal position that "any individual" could allow the government to exclude those in incarceration.[121]

Courts thus far have yet to weigh in on whether the pandemic should be considered a good cause exception under the APA, which would excuse the IRS from undergoing a notice-and-comment rulemaking process.[122] With such little time between passage and implementation of EIPs—in the middle of a pandemic, no less—the IRS has grounds

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[112] *See id.* at 1025 (citing Coon v. Wood, 160 F. Supp. 3d 246, 251 (D.D.C. 2016)).

[113] *Id.* at 1026.

[114] *See infra* Part IV.

[115] *Id.* at 1035–37.

[116] 26 U.S.C. § 6428(d) (2020).

[117] *See Scholl*, 489 F. Supp. 3d at 1036–37 ("[T]he IRS has put forward virtually no public explanation concerning its decision to withhold payments to incarcerated persons.").

[118] *Compare* 26 U.S.C. § 6428(d), *with* 26 U.S.C. § 6428(e)(1) (2008).

[119] *Id.* ("Defendants have not directed the court to any other evidence indicating that the Treasury Department or IRS gave *any reason* for its decision, much less an adequate one.").

[120] *Id.* at 1037.

[121] *See* 26 U.S.C. § 6428(d) (2020).

[122] *See* 5 U.S.C. § 553(b)(3)(B).

to argue that notice-and-comment rulemaking is impracticable under the circumstances.[123]

Incarcerated people also brought at least two other cases seeking an injunction requiring the distribution of EIPs. In *Galvan v. Mnuchin*,[124] the court denied a motion from the *Scholl* parties to intervene and stay the proceedings pending the outcome of the *Scholl* case.[125] The court reasoned that the Scholl plaintiffs' motion to intervene—and accompanying motion to stay—was a clear attempt to delay the *Galvan* proceedings.[126] However, as the *Scholl* case progressed more quickly, the *Galvan* court never reached the merits and a stay was issued.[127] The other case, *Warfield v. Mnuchin*,[128] was brought by a pro se litigant.[129] Consequently, the court denied class certification on adequacy of counsel grounds.[130]

The plaintiffs' victory in *Scholl* is quite remarkable, for it is rare for taxpayers to successfully bring a class action suit to recover unlawfully withheld tax credits. For a long time, the conventional wisdom held that successfully bringing class action tax refund litigation was a near-impossibility.[131] Plaintiffs rarely have sufficient commonality of fact and law such that each member of the class can precisely identify the amount of the refund, and there are often other tax claims during the period that can complicate certification of the class.[132] It seems that

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[123] *Id.* This builds on a line of thinking that limited judicial review of executive action is "unavoidable" during emergencies such as national security crises. *See* Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1097, 1106–07 (2009) (arguing that the good cause exception to APA rulemaking creates inevitable gaps in administrative law, resulting in "law-free zones and sham review"). *But see* Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515, 545–46 (2018) (cautioning that administrative law jurisprudence undermines democratic legitimacy and should be replaced through legislative action).

[124] No. 20-CV-4511, 2020 WL 5296974 (N.D. Ill. Sept. 4, 2020) (order denying intervention and stay by *Scholl* plaintiffs).

[125] *Id.* at *3 (denying intervention and stay by *Scholl* plaintiffs). A reciprocal motion filed by the *Galvan* plaintiff in the *Scholl* case was also unsuccessful. *See* Scholl v. Mnuchin, 483 F. Supp. 3d 822, 828 (N.D. Cal. 2020) (granting motion to intervene and denying motion to stay).

[126] *Galvan*, 2020 WL 5296974, at *3.

[127] *See* Galvan v. Mnuchin, No. 20-CV-4511, 2020 U.S. Dist LEXIS 248711 (N.D. Ill. Oct. 15, 2020) (order denying class certification); *see also id.* at *3–4 (recognizing *Scholl*'s progression).

[128] No. 20-CV-04121, 2020 WL 5849716 (D.S.D. Oct. 1, 2020) (order denying motion for class certification).

[129] *Id.* at *2.

[130] *Id.*

[131] *See* GERALD A. KAFKA & RITA A. CAVANAGH, LITIGATION OF FEDERAL CIVIL TAX CONTROVERSIES ¶ 15.02[4] (2d ed. 2016) ("[N]o court has allowed a federal tax refund action to be maintained as a class action. Instead, tax refund actions have been found to be particularly ill-suited for certification as class actions.").

[132] *Id.*; *see also* Sorenson v. Sec'y of the Treasury, 475 U.S. 851, 863–65 (1986) (certifying a class of low-income parents whose earned income tax credits were intercepted but denying the

only one successful class action suit to recover tax credits unlawfully withheld by the federal government has succeeded.[133]

IV. Tax Injunction Bars to Economic Relief During Economic Emergencies

This controversy raises important questions about the AIA and related statutes that govern the process for seeking relief from the IRS. The immediate nature of EIPs confounds the typical analysis over the AIA and perhaps justifies a clear exception to the AIA's bar on pre-assessment injunctions. Introducing additional exceptions to the AIA, however, might be too favorable to certain taxpayers and weaken annual accounting principles. This section will argue that the current AIA doctrine is no longer sufficient for a tax system where significant economic and social policy programs are embedded in the tax code. Where Congress passes legislation funneling immediate economic benefits through the tax code, it should exempt claims for relief under those provisions from the AIA.

A. Toward a New AIA Exception for Emergency Stimulus

Tax law should recognize that the AIA creates a significant timing mismatch for recipients of economic stimulus based in the tax code. Taxpayers eligible for relief but denied benefits are stranded under the AIA until the tax is collected, defeating the emergency policy's entire purpose.[134] The dispute over the eligibility of incarcerated individuals for payments under the CARES Act illustrates the need for doctrinal flexibility. Otherwise, AIA procedural requirements could delay future attempts at economic relief through the tax code, leaving vulnerable populations stranded in a time of need.

There are two possible remedies to address situations where (1) relief is urgently needed, (2) the IRS dubiously withholds the intended stimulus measure, and yet (3) litigation is constrained by the AIA. First, Congress could exempt future economic relief programs for low-income

class a refund); Appoloni v. United States, 450 F.3d 185, 187–88 (6th Cir. 2006) (affirming certification of retired teachers seeking tax refund, but holding that tax was lawfully withheld as employment tax).

[133] *See* Simpao v. Guam, No. 04-CV-49, 2005 WL 6777659 (D. Guam 2005) (order granting partial summary judgment). In *Simpao*, the district court certified a class of plaintiffs living in Guam that were eligible to receive earned-income credits but were denied payment of the credit due after years of intra-governmental confusion over whether certain residents of Guam were eligible for the credit. Having certified the class, the court ruled that the class was eligible for a refund because the filing of an income tax return satisfied administrative requirements for bringing a refund suit under § 7422(a).

[134] *See* 26 U.S.C. § 7421.

taxpayers from the AIA's ban on pre-assessment litigation.[135] Alternatively, courts could enlarge the *Williams Packing* irreparable injury exception to include circumstances such as those facing incarcerated individuals in *Scholl*.[136]

The CARES Act did not go far enough to exempt the EIPs from the AIA ban on pre-assessment litigation, but the statute offers a roadmap in how to do so in the future. Going forward, acts providing economic relief through the tax code could exempt the provisions from the AIA and allow for an administrative or legal right of action to challenge IRS eligibility determinations.

The statutory construction of the EIPs under the CARES Act presents a plausible route to avoiding the pre-assessment ban on tax litigation. The statute credits each taxpayer as having made an overpayment equal to the amount of the refund for tax year 2019.[137] It reads: "[E]ach [eligible] individual . . . for such individual's first taxable year beginning in 2019 shall be treated as having made a payment against the tax . . . in an amount equal to the advance refund amount . . . ."[138] One could read this provision as the IRS levying an assessment retroactively against the 2019 tax year. This seems to present an appealing legal fiction in which the Act amounted to an overpayment on every individual's return, leaving the IRS to calculate and distribute refunds.[139] Then, taxpayers could bring § 7422 refund claims alleging that EIPs were wrongfully withheld because the tax had already been assessed through legislative fiat.[140]

Others might argue this outcome defies common logic. The Act plainly applies the credit toward a taxpayer's 2020 return, and the 2020 tax year had not closed at the time the *Scholl* plaintiffs brought the suit.[141] It then follows that the *Scholl* case operates as an attempt to bar the assessment or collection of a tax, which is barred by the AIA, because it seeks to deliver a tax credit for a year that has yet to close. The *Scholl* court never reached the merits of this question, instead holding that the claim was sufficiently ripe for judicial review because the plaintiffs suffered an economic injury by not receiving an EIP.[142] By

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[135] There already are a limited number of exceptions permitting pre-assessment litigation under the AIA. *See* 26 U.S.C. § 7421(a).

[136] *See* Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 2 (1962).

[137] 26 U.S.C. § 6428(f)(1) (2020).

[138] *Id.*

[139] *Id.*

[140] *See* 26 U.S.C. § 7422.

[141] 26 U.S.C. § 6428(a) (2020) ("[T]here shall be allowed as a credit . . . for the first taxable year beginning in 2020 . . . .").

[142] *See* Scholl v. Mnuchin, 494 F. Supp. 3d 661, 677–78 (N.D. Cal. 2020).

avoiding this difficult question about bars to tax injunctions, this outcome does little to clarify the appropriate timing to bring a tax suit where a refund has been denied. A ruling on this question would have improved tax doctrine for low-income taxpayers seeking review of an eligibility determination.

In addition, because the AIA passed long before the creation of the modern tax system—it predates the federal income tax, for example—some argue it cannot adequately address the complexity of contemporary taxation.[143] In particular, the AIA arrived long before Congress inserted large, substantive programs into the Internal Revenue Code that operate outside of the tax code's more typical annual accounting structure.[144] Making matters worse, little is known about Congress's intentions regarding the AIA at time of passage is known.[145] "The [AIA] apparently has no recorded legislative history."[146]

The increasing complexity of the tax code—and the use of the IRS as a delivery vehicle for economic assistance—makes the AIA increasingly untenable. Professors Kristin Hickman and Gerald Kerska propose a narrow exception to the AIA for challenges to regulations and other policy guidance from the IRS, apart from individual filers challenging an assessment.[147] At the time of the AIA's passage, suits against tax collection agencies would only arise out of the particular circumstances of the taxpayer, who typically sought to contest or avoid payment of a tax.[148] The *Scholl* suit and other suits brought by low-income taxpayers challenging policy or administrative determinations by the IRS could proceed under this framework because they challenge IRS policy. It would be critical to keep exceptions to the AIA narrow to balance between the IRS's tax collection needs and the ability of taxpayers to challenge unlawful regulation.[149]

Alternatively, courts could enlarge the "irreparable injury" exception to the AIA to include situations where low-income taxpayers are

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[143] *See* Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 VA. L. REV. 1683, 1687 (2017) ("[C]ontemporary debates regarding the AIA's meaning fail to recognize that the AIA is not a modern congressional enactment but rather dates back to the Civil War era—long before the adoption of the modern income tax or the APA, and even before the emergence of the modern regulatory state.").

[144] *See* Daniel J. Hemel, *The Living Anti-Injunction Act*, 104 VA. L. REV. ONLINE 74, 82–83 (2018).

[145] *See* Bob Jones Univ. v. Simon, 416 U.S. 725, 736 (1974).

[146] *Id.*

[147] *See* Hickman & Kerska, *supra* note 143, at 1754–56.

[148] *Id.* at 1754.

[149] *See* Hemel, *supra* note 144, at 86 ("To whittle down the AIA without simultaneously bolstering the IRS's defenses would be to expose the tax authority to an onslaught that could overwhelm it.").

withheld a tax benefit. As announced in *Williams Packing*, the exception would be a sufficient foothold for incarcerated individuals to reclaim EIPs.[150] The argument goes that incarcerated individuals are irreparably injured by a failure to distribute checks as rapidly as possible—a pandemic can only last so long—and so the only remedy is litigation.

But by the time incarcerated people file 2020 tax returns and the IRS refuses to issue the EIP, it may be far too late to recover under the AIA such that incarcerated individuals might use the funds to cope with the COVID-19 emergency. The irreparable injury exception could be expanded to cover not only incarcerated individuals, but also any taxpayer denied tax benefits intended to offer financial relief, such as the Earned Income Credit. This may result in an effective scheme that achieves justice for individuals and does not overburden the IRS's tax collection efforts.

B. Conserving Budgetary and Administrative Resources

Critics might argue that creating additional exceptions where the AIA would otherwise apply might strain IRS resources and clog already congested court dockets. The IRS is already underfunded, and adding additional administrative remedies might result in further tax evasion.[151] This criticism is misplaced, however, because the exception is narrow, and the exception may result in a positive-sum outcome for the taxpayers, the IRS, and the courts.

This dispute over EIPs inverts the typical arguments for and against granting an AIA exception to a taxpayer seeking an injunction. In a typical AIA case, the taxpayer argues for an exception to the AIA permitting a pre-assessment injunction because the entity seeks to avoid payment of a tax.[152] These typical cases thus pit a relatively unsympathetic taxpayer—typically a corporate entity pushing the boundaries of accepted tax practice—against the IRS defending its mission to raise revenue and ensure the continued operation of the federal government. The typical taxpayer agitates for an exception, and the IRS points

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[150] *See* Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962).

[151] *See* Chye-Ching Huang, *Depletion of IRS Enforcement Is Undermining the Tax Code*, CTR. ON BUDGET & POL'Y PRIORITIES (Feb. 11, 2020), https://www.cbpp.org/research/federal-tax/depletion-of-irs-enforcement-is-undermining-the-tax-code [https://perma.cc/98EC-WZKT] (stating that IRS funding has been reduced by 21 percent since 2010); Paul Kiel & Jesse Eisinger, *How the IRS Was Gutted*, PROPUBLICA (Dec. 11, 2018), https://www.propublica.org/article/how-the-irs-was-gutted [https://perma.cc/9YEF-QM6J] (reporting a 42 percent decrease in the annual audit rate between 2010 and 2017).

[152] *E.g.*, CIC Servs., LLC v. IRS, 925 F.3d 247, 258 (6th Cir. 2019), *rev'd and remanded*, 141 S. Ct. 1582 (2021).

out that the taxpayer can comply with the disputed assessment, pay its taxes, and then sue for a refund.

Here, the immediate nature of the EIPs scrambles these typical AIA battle lines. Instead of well-off individuals or corporate entities seeking to avoid tax payment, this controversy concerns incarcerated individuals at society's margins seeking a tax benefit. In addition, there is a mismatch between the timing of the distribution and when those individuals wrongfully denied payments could seek relief. As the plaintiffs argued in *Scholl*, waiting for the end of the tax year to bring a refund suit is an inadequate remedy.[153] By the time plaintiffs exhaust all administrative remedies, the purpose of delivering immediate payments will be defeated.[154] If a future crisis tidily resolves itself in less than a year—unlike the COVID-19 pandemic—federal relief from the tax code may be too slow to arrive.

This mismatch between the immediacy of the intended relief and the delay in challenging IRS eligibility determinations in court creates a significant bottleneck for taxpayers under the AIA. Were the *Scholl* plaintiffs to pursue a § 7422 refund claim, they each would have had to file individual returns before April 2021 for the 2020 tax year claiming a refund for the EIP owed. If the IRS denied the refund, only *then* could the taxpayer file a refund claim. This process is incredibly time-consuming for the typical low-income taxpayer and would result in significant delays in receiving the intended economic relief.[155]

On the other hand, procedural changes to tax law have practical consequences for agency budgets and taxpayers. Faster claims add to the administrative caseload and might result in payouts exceeding agency budgets.[156] Changes to the AIA might increase the number of refund claims filed against the IRS, which trades off against the agency's ability to successfully detect and pursue revenue-generating enforcement claims.[157] Over time, this may have the effect of stretching the agency budget, and creating a positive feedback loop: lax enforcement begets increased evasion, further lowering revenue and thus lowering resources available for enforcement.

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[153] *See* Scholl v. Mnuchin, 494 F. Supp. 3d 661, 677 (2020).

[154] *Id.*

[155] *See* NAT'L TAXPAYER ADVOC., 2020 ANN. REP. TO CONG.: EXEC. SUMMARY–PREFACE & HIGHLIGHTS 41, https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_ExecSummary.pdf [https://perma.cc/RZ6M-RDXH].

[156] *See* Shannon M. Grammel & Joshua C. Macey, *The Costs of Aggregating Administrative Claims*, 70 STAN. L. REV. ONLINE 123, 127 (2018) (demonstrating that the Departments of Labor, Housing and Urban Development, and Veterans Affairs cannot honor all meritorious claims under current budget constraints).

[157] *See generally* Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 895 (2014).

Beyond agency budget considerations, these changes to the AIA might also overburden the federal judiciary. Lowering the barrier to filing claims might increase their number, overburdening already high caseloads.[158] Administrative claims already occupy a large and growing part of the federal caseload; increasing tax claims would trade off with the speedy resolution of criminal cases, civil disputes, and the like.[159] Instead of reducing the lag time in receiving benefits through the tax code, low-income taxpayers might wait even longer if courts take longer to resolve disputes and the IRS is stretched to its limits.

Yet counterintuitively, relaxing requirements for taxpayers seeking economic relief could *reduce* administrative delays through case aggregation and clear implementation of deadlines. In the environmental law context, Professor Luis Inaraja Vera argues persuasively that delayed review of administrative actions often leads to no review, and immediate review does not impede the agency's enforcement obligations.[160] In a sense, the *Scholl* class action is a model for quickly resolving eligibility disputes because the class action was more effective than a series of cases brought by litigants around the country. Aggregating cases would require less time from administrative and Article III judges, conserve agency budgets by requiring fewer cases to litigate, and bring about the speedier resolution of issues like eligibility for tax benefits.[161] While some might chafe at bringing additional administrative disputes into courts, aggressive timelines for resolving administration of benefits would empower the IRS and other agencies by returning key decisions over implementation into the hands of the agency, not the courts.[162] In sum, a looser AIA regime combined with sensible techniques to reduce administrative caseload congestion would result in positive-sum outcomes for low-income taxpayers, agencies, and the courts.

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[158] *See* Diarmuid F. O'Scannlain, *Striking a Devil's Bargain: The Federal Courts and Expanding Caseloads in the Twenty-First Century*, 13 LEWIS & CLARK L. REV. 473, 477–78 (2009) (reporting a sharp increase in caseloads in the Ninth Circuit); Cara Bayles, *Crisis to Catastrophe: As Judicial Ranks Stagnate, "Desperation" Hits the Bench*, LAW360 (Mar. 19, 2019), https://www.law360.com/articles/1140100/as-judicial-ranks-stagnate-desperation-hits-the-bench [https://perma.cc/F528-TX99] (reporting a 38 percent increase in federal cases between 1990 and 2019, yet only a 4 percent increase in federal judges nationwide).

[159] *See, e.g.*, O'Scannlain, *supra* note 158, at 477.

[160] Luis Inaraja Vera, *Delayed Judicial Review of Agency Action*, 56 HARV. J. ON LEGIS. 199, 206–07 (2019).

[161] *See* Grammel & Macey, *supra* note 156, at 125.

[162] *See* James D. Ridgway, *Equitable Power in the Time of Budget Austerity: The Problem of Judicial Remedies for Unconstitutional Delays in Claims Processing by Federal Agencies*, 64 ADMIN. L. REV. 57, 62 (2012).

V. PAY INCARCERATED INDIVIDUALS DURING A PANDEMIC

Resolving bars to pre-assessment suits for low-income taxpayers seeking economic relief is a necessary but not sufficient corrective. One should interrogate whether the tax code arbitrarily punishes low-income and minority taxpayers in general, and incarcerated individuals in particular.[163] This Part will examine the impact of the CARES Act as a near-universal economic program. First, the severe economic and health hazards of pandemics outweigh policy arguments for excluding incarcerated people from receiving EIPs. Second, the CARES Act litigation sheds light on the difficulties individuals face navigating the tax system during and after incarceration. The tax code should not serve a punitive purpose for former incarcerated individuals upon reentry, given the other punitive elements of the criminal justice system.

A. Incarcerated Individuals Should Be Eligible For EIPs

The dispute over the EIP eligibility of incarcerated individuals highlights the unfavorable treatment of incarcerated individuals by the IRS. At no point did the government argue any legal justification for withholding EIPs from incarcerated individuals. Few, if any, initial analyses of the IRS decision to exclude incarcerated individuals from receiving EIPs raised arguments in favor of the policy.[164] Even a right-of-center policy analysis acknowledged the lack of legal authority for the position that incarcerated individuals were excluded from the payments.[165]

Just as compensating incarcerated individuals a fair wage for their labor has a positive economic effect and little to no negative impact, so too might universal stimulus.[166] For example, one economics study shows that "even a return of prison labor to the free market would have little employment impact on free laborers."[167] Just as the national econ-

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[163] *See generally* DOROTHY A. BROWN, THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT (2021).

[164] *See* Viard, *supra* note 17.

[165] Alan D. Viard, *The IRS Abandons Its Lawless Effort to Deny Rebate Payments to Prisoners*, AM. ENTER. INST. (Jan. 7, 2021), https://www.aei.org/economics/the-irs-abandons-its-lawless-effort-to-deny-rebate-payments-to-prisoners/ [https://perma.cc/KCH2-BK9L] ("Although Americans may disagree about whether prisoners should receive rebate payments, we should all agree that the IRS must follow the laws passed by our elected representatives in Congress.").

[166] Indeed, one initial economic study of the COVID-19 EIPs suggests that the checks successfully provided economic relief to families in need and provided much-needed stimulus to the flagging economy. *See* CLAUDIA SAHM, JAIN FAMILY INST., THEY WORKED: THE EFFECTS OF $1,400 STIMULUS CHECKS ON FAMILIES AND ON THE ECONOMY 3 (Jul. 2021), https://www.jainfamilyinstitute.org/assets/1400stimuluscheckssahm_july2021.pdf [https://perma.cc/Z2NZ-FKYQ].

[167] Frederick W. Derrick et al., *Prison Labor Effects on the Unskilled Labor Market*, 48 AM.

omy can absorb increases in immigration without crowding out the domestic labor force, so, too, could the economy accommodate incarcerated people paid at fair wages.[168] The negative economic effects of incarceration, however, last well beyond an inmate's time in a correctional facility. Another study estimates that the loss of economic output associated with ex-offenders amounts to approximately $60 billion annually as a result of post-incarceration barriers to employment.[169]

Still, critics may argue that there is a significant difference between compensating incarcerated individuals fairly for their labor and sending checks during a pandemic. Prison labor programs such as apprenticeships, for example, reduce recidivism and lower barriers to employment post-conviction.[170] By contrast, some could argue that a no-strings-attached tax credit comes with no other positive externalities to society such as reduced recidivism or incentivizing work. It follows, then, that sending EIPs to incarcerated individuals undermines the deterrent and punitive purposes of incarceration. Instead of directing payments to individuals in incarceration, the nation's fiscal resources might be better used to support other economic relief programs in the CARES Act like small business loans, unemployment insurance, and supplies for medical workers.

This line of thinking, however, discounts the economic strain faced by incarcerated individuals and their family. Incarceration imposes enormous costs on incarcerated people and their families, particularly during a pandemic. During a family member's incarceration, families often pay fees such as communications costs—often the only way to contact incarcerated individuals during the pandemic[171]—and replenishing incarcerated individuals' commissary accounts.[172] Over time, lost wages from incarceration and reentry have a demonstrated impact on asset ownership for incarcerated individuals and their families.[173] One study

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ECONOMIST 74, 79 (2004).

[168] *See id.*

[169] *See* JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. & POL'Y RSCH., EX-OFFENDERS AND THE LABOR MARKET 1 (2010), https://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf [https://perma.cc/4R68-KNZS].

[170] *See* LOIS M. DAVIS ET AL., RAND CORP., EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION: A META-ANALYSIS OF PROGRAMS THAT PROVIDE EDUCATION TO INCARCERATED ADULTS, at xvi (2013), https://www.rand.org/pubs/research_reports/RR266.html [https://perma.cc/YV7W-EDPK].

[171] Avi Asher-Schapiro, *Locked Up During COVID-19: Costly Phone Calls Strain Families*, REUTERS (Sept. 23, 2020), https://www.reuters.com/article/us-usa-prisons-tech/locked-up-during-covid-19-costly-phone-calls-strain-families-idUSKCN26E3DQ [https://perma.cc/Y4KT-6WE4].

[172] *See* Nicole Lewis & Beatrix Lockwood, *How Families Cope with the Hidden Costs of Incarceration for the Holidays*, N.Y. TIMES (Dec. 20, 2019), https://www.nytimes.com/2019/12/17/us/incarceration-holidays-family-costs.html [https://perma.cc/VL8P-FJ9Y] (reporting that families spend an estimated $2.9 billion annually on commissary accounts and phone calls to inmates).

[173] *See* Kristin Turney & Daniel Schneider, *Incarceration and Household Asset Ownership*, 53

even found a decrease in social service participation during and after a family member's incarceration as families lost eligibility or children exited the household.[174] Taken together, the economic impact of incarceration justifies sending EIPs to people in incarceration.

Moreover, the COVID-19 pandemic creates particular health risks for incarcerated individuals, who reside in relatively unsanitary and close conditions. Prisons have been COVID-19 hotspots due to the close proximity of inmates, with some states reporting infection rates as high as 40 percent among incarcerated individuals—far higher than the rate of infection among the general population.[175] Due to the lack of adequate testing supplies and record-keeping, some think that official statistics may undercount the actual number of infections among those in incarceration.[176] While sending EIPs cannot fix unsanitary conditions or reduce the prevalence of COVID-19 in carceral settings, the payments can materially alleviate the financial conditions of incarcerated individuals and their families, and serve as compensation for the higher risk of contracting COVID-19.

B. Toward a Less Punitive Tax Code for Incarcerated Individuals

This controversy also sheds light on the IRS's unfavorable treatment of incarcerated people. The tax code imposes an additional, often hidden, layer of punishment. So long as a substantial overhaul of the criminal justice system remains a pipe dream, a tax code that takes a less punitive approach to individuals in and exiting incarceration would serve rehabilitative goals.

Here are only a few hurdles embedded in the tax code facing individuals before or after incarceration. Incarcerated people often face difficulties accessing tax preparation materials, and then are denied leniency in filing deadlines.[177] Incarcerated individuals do not qualify for

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DEMOGRAPHY 2075, 2094–95 (2016) (finding negative associative impacts of incarceration and asset ownership for both incarcerated individuals and their families).

[174] Dana DeHart et al, *The Impact of Incarceration on Families: A Single-Jurisdiction Pilot Study Using Triangulated Administrative Data & Qualitative Interviews*, OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST. 9 (Feb. 2017), https://www.ojp.gov/pdffiles1/nij/grants/250657.pdf [https://perma.cc/PU8R-LACK].

[175] *See, e.g.*, *A State-by-State Look at Coronavirus in Prisons*, MARSHALL PROJECT (Dec. 11, 2020), https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons [https://perma.cc/2Y9W-JMMM] (reporting nearly 6,000 COVID-19 cases per 10,000 prisoners in Kansas).

[176] *See* Beth Schwartzapfel et al, *1 in 5 Prisoners in the U.S. Has Had COVID-19*, MARSHALL PROJECT (Dec. 18, 2020), https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19 [https://perma.cc/THG5-7JQM].

[177] *See* Labato v. Comm'r, 82 T.C.M. (CCH) 579, 580 (2001) ("The mere fact that petitioner was incarcerated at the time his return was due is not reasonable cause . . . for his failure to timely file."); *Stimulus Check: Economic Impact Payment (EIP)*, MO. DEP'T CORR., https://doc.mo.gov/programs/family-friends/stimulus-check [https://perma.cc/89LE-B8CY] (last visited July 20, 2021)

the Earned Income Credit, even if they earn wages from businesses during a period of incarceration.[178] Family members of incarcerated individuals may not claim them as dependents, even though incarcerated individuals rely on familial financial support during incarceration.[179] Additionally, states have upheld surcharges levied on commissary purchases, finding that such levies are constitutionally-permissible taxes.[180] Even after individuals exit incarceration, the tax code places sustained financial pressure on them as they seek rehabilitation and a new life.[181]

After incarceration, significant barriers to financial stability remain, and existing tax programs do little to assist the rehabilitation effort. While an employer-side incentive exists to encourage post-incarceration employment, this targeted provision has had minimal impact. The Work Opportunity Tax Credit (WOTC) offers employers a credit equal to 40 percent of first-year wages for certain qualified employees, including those exiting incarceration.[182] However, the WOTC is plagued by low participation rates; one study suggests that fewer than 10 percent of eligible employers take advantage of the credit.[183] As a result, there is little long-term economic benefit for participants in the program.[184] This finding is consistent with research that tax incentives are insufficient in raising employment rates among individuals after incarceration.[185]

This pattern of treating incarcerated individuals unfavorably stands in contrast to other instances where the IRS interprets statutory language in the taxpayer's favor. It is altogether unusual for the IRS to construe a statute *unfavorably* to a set of taxpayers. Some scholars have argued that the IRS tends to depart from the plain language of a statute

(counseling that "[f]amily members or non-IRS agencies" should not send blank tax forms to incarcerated individuals).

178 *See* Wilson v. Comm'r, 81 T.C.M. (CCH) 1745, 1748–49 (2001).

179 *See* Haywood v. Comm'r, 84 T.C.M. (CCH) 442 (2002). In *Haywood*, the petitioner was disallowed from claiming her twenty-one-year-old son as a dependent after he was incarcerated. The court held that petitioner's biweekly transfer of funds to her son while in prison did not qualify as support sufficient to establish dependency.

180 *See* Starr v. Governor, 802 A.2d 1227, 1228–29 (N.H. 2002); Myrie v. Comm'r, N.J. Dep't of Corr., 267 F.3d 251, 259–61 (3rd Cir. 2001).

181 *See* Mona Lewandoski, *Barred from Bankruptcy: Recently Incarcerated Debtors In and Outside Bankruptcy*, 34 N.Y.U. REV. L. & SOC. CHANGE 191, 197–200 (2010) (cataloguing taxes, fines, and fees that are typically nondischargeable upon prisoner reentry).

182 26 U.S.C. § 51(a); 26 U.S.C. § 51(d)(1)(C).

183 Sarah Hamersma, *The Effects of an Employer Subsidy on Employment Outcomes: A Study of the Work Opportunity and Welfare-to-Work Tax Credits*, 27 J. POL'Y ANALYSIS & MGMT. 498, 509 (2008).

184 *Id.* at 510.

185 ADAM LOONEY & NICHOLAS TURNER, BROOKINGS INST., WORK AND OPPORTUNITY BEFORE AND AFTER INCARCERATION 19 (2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf [https://perma.cc/52RV-6WAW].

even where there is clear legislative intent.[186] By extension, one might assume withholding EIPs from incarcerated individuals follows in that tradition. However, because the exclusion of incarcerated individuals from receiving EIPs does not favor the taxpayers in question, this incident departs from the more typical cases of IRS leniency.

Professor Lawrence Zelenak has identified instances where the IRS has declined to strictly enforce sections of the Internal Revenue Code when enforcement would be impracticable, unpopular, or costly.[187] In particular, he cites the treatment of fringe benefits—frequent flyer miles, business meals, and the like—and the deductibility of operating losses as "customary deviations" from the Code, where the IRS sought to mollify key constituencies and avoid popular backlash.[188] Yet unlike the tax-favorable treatment of frequent flyer miles,[189] denying incarcerated individuals from receiving EIPs is expressly *anti*-taxpayer, in the sense that it denies a tax benefit to incarcerated people.

This history of IRS pro-taxpayer leniency cuts against the history of economic relief programs that tend to exclude incarcerated individuals as a matter of political expediency. Time and again, major economic policies like Social Security and the 2008 stimulus exclude incarcerated individuals from receiving benefits.[190] Whether as a matter of political expediency or concern over the final price tag of a program, Congress's exclusion of incarcerated individuals from economic programs is punitive and exacerbates an already tenuous economic situation for most people reentering society.

The since-rejected determination from the IRS that incarcerated individuals were ineligible for EIPs thus marks a significant departure from longstanding custom. Previously, the IRS might construe a provision contrary to the plain text but at least construe the provision in the taxpayer's favor.[191] One could imagine the dangers of future rulings where the IRS flouts the rule of law and makes adverse regulatory determinations on political as opposed to legal bases.[192] If the IRS continues enforcing the tax code with a consistent pro-taxpayer bent, then the risk of using the code as a punitive tool diminishes.

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[186] *See generally* Lawrence Zelenak, *Custom and the Rule of Law in the Administration of the Income Tax*, 62 DUKE L.J. 829, 833–34 (2012); *see also* Alice G. Abreu & Richard K. Greenstein, *Defining Income*, 11 FLA. TAX REV. 295, 299–300 (2011) (arguing that contradictory rulings on the meaning of gross income stem from "widespread uncertainty and disagreement" about the language of the Internal Revenue Code, which provides the IRS "flexibility to navigate the shoals of social opinion").

[187] Zelenak, *supra* note 186, at 841.

[188] *See id.*

[189] *See id.* at 830–831.

[190] *See supra* Part II.A.

[191] Zelenak, *supra* note 186, at 833.

[192] *See id.* at 851 ("To anyone who takes the rule of law seriously, it is troubling to contemplate

So long as the United States incarcerates more than any other nation in the world, these policy choices significantly impact millions of Americans.[193] Absent significant criminal justice reform, universal programs might require higher outlays at first, but they are easier to administer and may be more politically durable over time.[194] The CARES Act rightly represents a recognition that the tax code should not layer additional punishment atop lengthy prison sentences.

VI. CONCLUSION

For the foreseeable future, political exigencies will likely result in enacting economic relief policy through the tax code. Inevitably, legal debates over eligibility of certain populations will ensue. With the AIA barring injunctive relief in many instances, individuals like those in incarceration may not have a litigation remedy to adverse rulemaking by the IRS, frustrating congressional intent to provide immediate economic relief. While incarcerated individuals successfully litigated their eligibility for EIPs, one legal victory cannot overcome the many barriers to getting checks in the hands of incarcerated individuals in a timely manner. For example, two attorneys who reach incarcerated individuals through criminal law newsletters were allegedly temporarily banned from communicating with federal inmates after they reported on the legal victory in *Scholl*.[195] From adhering to state-by-state rules on sending tax forms to inmates to reaching those in solitary confinement without access to mail or the internet, significant challenges remain in ensuring timely filing with the IRS.[196]

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that the Treasury and the IRS are almost unconstrained in their ability to make de facto revisions to the Internal Revenue Code enacted by Congress, as long as those revisions are in a taxpayer-favorable direction.").

[193] *See* PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 6 (2010).

[194] *See* Leonard E. Burman, *A Universal EITC: Sharing the Gains From Economic Growth, Encouraging Work, and Supporting Families*, TAX POL'Y CTR. 10–11 (May 20, 2019), (arguing that the benefits of a universal EITC outweigh the added costs of the program); *see also* Miranda Perry Fleischer & Daniel Hemel, *The Architecture of a Basic Income*, 87 U. CHI. L. REV. 625, 671 (2020) (assessing political economy considerations of universal programs).

[195] *See* Keri Blakinger & Joseph Neff, *Prisoners Won the Right to Stimulus Checks. Some Prisons Are Standing in the Way*, MARSHALL PROJECT (Oct. 21, 2020), https://www.themarshallproject.org/2020/10/21/prisoners-won-the-right-to-stimulus-checks-some-prisons-are-standing-in-the-way [https://perma.cc/6UVT-2FR9].

[196] *Id.*