

ESSAYS

RIGHTS, REMEDIES, AND JUSTICE: THE PARADOX OF TAXPAYER RIGHTS

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ABSTRACT

This Essay examines the 2018 federal district court ruling in Facebook, Inc. v. Internal Revenue Service to make three arguments regarding the Taxpayer Bill of Rights (TBOR), codified as Section 7803(a)(3) of the Internal Revenue Code. The first is that the TBOR is enforceable, despite the lack of explicit statutory remedies, via an implied private right of action. The second is that this implied right of action requires a pragmatic, case-by-case, facts-and-circumstances fashioning of remedies. The third is in the nature of a paradox: although the enumerated TBOR rights are grounded in demands of justice, the pragmatic fashioning of remedies required for enforcement precludes any guarantee that justice will be fully afforded to a taxpayer whose TBOR rights have been violated.

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INTRODUCTION

This Essay about the Taxpayer Bill of Rights (TBOR)¹ seeks to develop two claims. The first, which is the focus of Section I, is that the rights enumerated in the TBOR are enforceable via an implied private right of action. The second, taken up in Section II, is that the TBOR's implied right of action requires a pragmatic, case-by-case, facts-and-circumstances fashioning of remedies. In

* Professor of Law, Temple University Beasley School of Law. I owe an enormous debt to Alice Abreu, my coauthor on multiple articles on taxpayer rights. Some of the ideas reflected in this piece emerged from that collaboration, and more generally much of what I know about tax law and taxpayer rights I have learned from my work with her. I also want to thank her for her careful, critical reading of an earlier draft of this Essay. However, any and all errors are my responsibility.

1. I.R.C. § 7803(a)(3) (2018).

Section III I explore a paradox of justice that emerges from the pragmatic dimension of the TBOR.

The vehicle for developing my two claims will be the recent federal district court decision in *Facebook, Inc. v. Internal Revenue Service*.² *Facebook* involved a transfer pricing dispute,³ which Facebook wanted referred to the IRS Office of Appeals (Appeals).⁴ Invoking Revenue Procedure 2016-22,⁵ the IRS refused to transfer the case to Appeals on the ground that the transfer “is not in the interest of sound tax administration.”⁶ In response, Facebook pursued a two-prong strategy: it filed a petition in the United States Tax Court (Tax Court) challenging the deficiency and also filed a complaint in the United States District Court for the Northern District of California challenging the IRS’s refusal to refer the case to Appeals.⁷

As described by United States Magistrate Judge Laurel Beeler in her decision in the district court litigation, Facebook’s “main argument [was] that the [TBOR] . . . ‘right to appeal a decision of the Internal Revenue Service in an independent forum’ . . . gives it an enforceable right to take its tax case to IRS Appeals in lieu of litigation before the Tax Court.”⁸ Judge Beeler ruled that the TBOR affords no such enforceable right.⁹ In Section I of this Essay, I summarize Judge Beeler’s rejection of various potential statutory sources of remedies for enforcing the TBOR and then argue that in the absence of explicit statutory remedies, the TBOR supports an implied private right of action.

As I mentioned above, the second claim in this Essay is that the TBOR’s implied right of action requires a pragmatic, case-by-case, facts-and-circumstances fashioning of remedies. And I argue that for this very reason Judge Beeler was correct in concluding that the TBOR does not afford Facebook a right to have its case referred to Appeals *in addition to* its right to petition the Tax Court.

This pragmatic approach to remedies implied by the TBOR reveals a paradoxical tension, which I address in Section III. On the one hand, the rights enumerated in the TBOR are familiar demands of justice. On the other hand, the pragmatic fashioning of narrowly tailored remedies for violations of these justice-based rights—illustrated by Judge Beeler’s ruling—means that there can

2. No. 17-cv-06490-LB, 2018 WL 2215743 (N.D. Cal. May 14, 2018).

3. As a result of an audit the IRS determined that Facebook had undervalued certain intangible property that it transferred to its Irish subsidiary to the tune of \$7 billion. *Facebook*, 2018 WL 2215743, at *1. The audit had gone on for several years, during which Facebook had agreed to five extensions of the statute of limitations. *Id.* at *10. The IRS requested a sixth extension, and Facebook said it would consent only if the IRS agreed to issue a “30-Day letter,” which would have given Facebook the right to have the matter referred to the IRS Office of Appeals. *Id.* Negotiations broke down, and the IRS issued a Statutory Notice of Deficiency before the fifth extension of the statute of limitations expired. *Id.*

4. *Id.* at *1.

5. Rev. Proc. 2016-22, 2016-15 I.R.B. 577.

6. *Facebook*, 2018 WL 2215743, at *10.

7. *Id.* at *1.

8. *Id.* (citations omitted).

9. *Id.* at *12–13.

be no guarantee that justice will be fully afforded to a taxpayer who demonstrates that the IRS has violated a listed right. This tension can be seen to be embedded in the TBOR itself. A just tax system (itself a right conferred by the TBOR¹⁰) must be one that is administrable. But an administrable tax system is incapable of conferring on taxpayers the full rights set out in the TBOR and demanded by justice. Properly understood, however, the tension I speak of is neither a special feature of the TBOR, specifically, nor of the tax law, generally. As I argue in Section III, this paradox of justice is a pervasive feature of the real world.

I. LANGUAGE AND THE ENFORCEMENT OF TAXPAYER RIGHTS

In 2015 Congress amended the Internal Revenue Code (the Code) by inserting the TBOR as Section 7803(a)(3).¹¹ It provides as follows:

Execution of duties in accord with taxpayer rights

In discharging his duties, the Commissioner shall ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title, including—

- (A) the right to be informed,
- (B) the right to quality service,
- (C) the right to pay no more than the correct amount of tax,
- (D) the right to challenge the position of the Internal Revenue Service and be heard,
- (E) the right to appeal a decision of the Internal Revenue Service in an independent forum,
- (F) the right to finality,
- (G) the right to privacy,
- (H) the right to confidentiality,
- (I) the right to retain representation, and
- (J) the right to a fair and just tax system.¹²

A noteworthy feature of the TBOR is that it lacks explicit statutory remedies specifically aimed at redressing violations of taxpayer rights.¹³ This, of course, raises a fundamental question: What does the TBOR add to the Code?¹⁴

10. I.R.C. § 7803(a)(3)(J) (2018).

11. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 401, 129 Stat. 2242, 3117 (2015) (codified as amended at I.R.C. § 7803(a)(3)).

12. I.R.C. § 7803(a)(3).

13. Alice G. Abreu & Richard K. Greenstein, *The U.S. Taxpayer Bill of Rights: Window Dressing or Expression of Justice?*, J. TAX ADMIN., Nov. 2018, at 25, 28 [hereinafter Abreu & Greenstein, *The U.S. Taxpayer Bill of Rights*].

14. For a fuller discussion of this question, see generally Alice G. Abreu & Richard K. Greenstein, *Embracing the TBOR*, 157 TAX NOTES 1281 (2017) [hereinafter Abreu & Greenstein, *Embracing the TBOR*], which argues that codification of the TBOR has the potential to significantly change tax practice and the relationship between taxpayers and the IRS, and Abreu & Greenstein, *The U.S. Taxpayer Bill of Rights*, *supra* note 13, which includes a debate about the significance of the codified TBOR's lack of explicit remedies.

One answer, given by Judge Beeler in her *Facebook* decision, is that the TBOR “imposes duties on the IRS Commissioner to manage and train IRS employees regarding taxpayer rights.”¹⁵ In reaching this conclusion, Judge Beeler drew on the prefatory language of Section 7803(a)(3): “In discharging his duties, the Commissioner shall ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title”¹⁶ The remainder of Section 7803(a)(3)—the actual enumeration of ten taxpayer rights—adds nothing to the Code, according to Judge Beeler.¹⁷ Rather, by its very terms, it simply restates “taxpayer rights as afforded by other provisions of” the Code.¹⁸

But Judge Beeler’s reading of Section 7803(a)(3)—that what it adds to the Code is limited to instructing the Commissioner to “manage and train IRS employees regarding taxpayer rights”¹⁹—is puzzling for two reasons. First, if that is the only new thing the TBOR brings to the Code, then the provision amounts to nothing more than reminding the Commissioner to do his job—hardly a significant or even meaningful addition to the Code. But more importantly, if a reminder was all that Congress intended to add to the Code with this amendment, we would expect the text to end after the preamble language in that subsection. But that is not what Congress did. Congress went on to set out a list of ten taxpayer rights, for the first time collecting and enumerating them in one place,²⁰ thereby treating them as analogous to the Constitution’s Bill of Rights.

And importantly, Congress used new language to describe those rights. As I explain below, Congress reformulated what had been various duties scattered throughout the Code in the language of rights, justice, and standards. So the question is: What did Congress do when it enacted this new formulation of taxpayer rights? That of course is an issue of statutory interpretation.

So to figure out what Section 7803(a)(3) adds to the Code, I want to focus on the following specific question: Does the TBOR, properly interpreted, provide an implied private right of action? That is, does the TBOR supply a remedy for violations of taxpayer rights that is not explicitly given in the statute? To explore this question, I return to the *Facebook* litigation.

The case was filed in the Northern District of California and centered on the TBOR right “to appeal a decision of the Internal Revenue Service in an independent forum.”²¹ Facebook argued that this included a right to have its dispute with the IRS reviewed by Appeals and that the IRS’s refusal to refer the matter to Appeals was, therefore, a violation of the TBOR.²²

15. *Facebook, Inc. v. IRS*, No. 17-cv-06490-LB, 2018 WL 2215743, at *14 (N.D. Cal. May 14, 2018).

16. *Id.* at *8 (quoting I.R.C. § 7803(a)(3)).

17. *Id.* at *13.

18. *Id.*

19. *Id.* at *14.

20. *See* I.R.C. § 7803(a)(3).

21. *Facebook*, 2018 WL 2215743, at *14.

22. *Id.* at *14–15.

A significant part of Judge Beeler's opinion was devoted to the question of the remedy for TBOR violations.²³ Again, the TBOR includes no express remedies.²⁴ Facebook argued that two remedies were available under the Administrative Procedure Act (APA) and a third by means of a writ of mandamus.²⁵ Judge Beeler considered and rejected all of these proffered remedies.²⁶

Regarding the APA, which authorizes judicial review to persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,"²⁷ Facebook argued (1) that the IRS's decision not to refer the dispute to Appeals violated its taxpayer right to review in an independent forum and (2) that the issuance of Revenue Procedure 2016-22 interfered with Facebook's right to review of its case by Appeals.²⁸ Regarding the mandamus claim, pursuant to Section 1361 of the Judicial Code,²⁹ Facebook argued that the IRS had failed "to perform a duty owed to the plaintiff" by not referring the dispute to Appeals.³⁰

The predicate for Judge Beeler's rejection of these claims was her conclusion that no specific right to have a matter referred to Appeals predated enactment of the TBOR and that the TBOR itself created no new right of that nature.³¹ Again, her view was that the TBOR adds no new rights but simply restates taxpayer "rights 'afforded by other provisions of [the Code].'"³² In light of that conclusion, Judge Beeler ruled with respect to the APA claims that neither the issuance of Revenue Procedure 2016-22 nor the IRS's specific decision not to refer the dispute to Appeals satisfied the requirements for judicial review of the agency action.³³ In Judge Beeler's view, neither constituted a "final agency action for which there is no other adequate remedy in a court"³⁴ since neither interfered with Facebook's nonexistent right to a referral to Appeals.³⁵ Similarly, Judge Beeler ruled that to be entitled to mandamus, Facebook must have a "clear and certain" claim,³⁶ but "[i]f a plaintiff has no

23. *Id.* at *16–18.

24. *See* I.R.C. § 7803(a)(3).

25. *Facebook*, 2018 WL 2215743, at *16–18. Facebook's complaint literally asked for "mandamus-like relief," *id.* at *11, but Judge Beeler analyzed this claim as a straightforward request for mandamus, *id.* at *18.

26. *Id.* at *16–18.

27. 5 U.S.C. § 702 (2018).

28. *See Facebook*, 2018 WL 2215743, at *17–18.

29. 28 U.S.C. § 1361 (2018).

30. *Facebook*, 2018 WL 2215743, at *16 (quoting 28 U.S.C. § 1361).

31. *Id.* at *13–16.

32. *Id.* at *14 (quoting I.R.C. § 7803(a)(3)).

33. *Id.* at *17–18.

34. *Id.* at *17 (quoting 5 U.S.C. § 704 (2018)).

35. *Id.* at *17–18.

36. *Id.* at *18 (quoting *Lowry v. Barnhart*, 329 F.3d 1019, 1021 (9th Cir. 2003)).

legal entitlement to the relief sought, a ‘clear and certain’ claim cannot exist, and the writ will not lie.”³⁷

Having found no remedy under the APA or the United States Code’s mandamus provision, Judge Beeler dismissed Facebook’s complaint.³⁸ But in so doing, she overlooked the possibility that Facebook’s TBOR “right to appeal a decision of the Internal Revenue Service in an independent forum”³⁹ is enforceable through an implied private right of action. In the remainder of this Section I argue that the Supreme Court’s 1975 decision in *Cort v. Ash*⁴⁰ supports an implied right of action for all of the enumerated TBOR rights. However, as I further argue in Section II, when this implied right of action is applied to the *Facebook* litigation, it turns out that Judge Beeler arrived at the correct result on the merits: Facebook does indeed have an enforceable “right to appeal a decision of the Internal Revenue Code in an independent forum,”⁴¹ but that enforceable right does not entail the right to have its case referred to Appeals.

But first to *Cort v. Ash*. The Supreme Court framed the “principal issue” in *Cort* as follows: “whether a private cause of action for damages . . . is to be implied” when the statute in question does not expressly provide a remedy.⁴² In making this determination, the Court identified four relevant factors:

First, is the plaintiff “one of the class for whose *especial* benefit the statute was enacted,”—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?⁴³

The question at hand is whether the application of these four factors shows that a private right of action exists to enforce the TBOR, notwithstanding the absence of explicit statutory remedies. The first of these factors is clearly satisfied. While Judge Beeler’s explication of the TBOR focuses on its identification of duties owed by the Commissioner,⁴⁴ nevertheless the explicit

37. *Id.* (quoting *Lowry*, 329 F.3d at 1021).

38. Judge Beeler dismissed the case on the ground that Facebook had failed to “show that [it] suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Id.* at *12 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016)). Accordingly, Facebook could not show an injury in fact, as required by Article III of the Constitution, and therefore lacked standing. *See id.* at *11–12. This, coupled with the lack of reviewability of Facebook’s claims under the APA, deprived the court of subject matter jurisdiction. *Id.* at *16–18.

39. I.R.C. § 7803(a)(3)(E) (2018).

40. 422 U.S. 66 (1975).

41. I.R.C. § 7803(a)(3)(E).

42. *Cort*, 422 U.S. at 68.

43. *Id.* at 78 (citations omitted) (quoting *Tex. & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916)).

44. *Facebook, Inc. v. IRS*, No. 17-cv-06490-LB, 2018 WL 2215743, at *14 (N.D. Cal. May 14, 2018).

language of Section 7803(a)(3) makes clear that those duties are about ensuring that IRS employees “act in accord with taxpayer rights,” including the ten specific enumerated rights.⁴⁵ Hence, it seems fairly uncontroversial to conclude that taxpayers are “the class for whose especial benefit the statute was enacted.”⁴⁶

The fourth *Cort* factor is also satisfied. A cause of action to protect federal taxpayer rights is self-evidently not “one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law.”⁴⁷

But what about the second and third factors? These two factors work together and direct our attention to the question of legislative intent. The second factor implicates the text of the statute while the third factor is concerned with the legislative purposes revealed in the provision.⁴⁸ Indeed, as Professor Leandra Lederman has argued,⁴⁹ the Supreme Court in post-*Cort* case law has indicated that the four *Cort* factors are not necessarily “entitled to equal weight” and has made clear that “[t]he central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action.”⁵⁰

45. See I.R.C. § 7803(a)(3).

46. *Cort*, 422 U.S. at 78 (emphasis omitted) (quoting *Rigsby*, 241 U.S. at 39). However, Professor Leandra Lederman has argued that the first of the *Cort* factors does not clearly support an implied private right of action:

With respect to the first factor, it may seem as if by referencing taxpayer rights, the TBOR, in the language of *Cort*, “create[d] a federal right in favor of the plaintiff.” . . . However, that is not consistent with Supreme Court case law, which has distinguished between statutes that focus on the people to be protected and those that focus on the entity that is the subject of the statute.

For example, in *Univs. Research Ass’n, Inc. v. Coutu*, the Supreme Court said, “there ‘would be far less reason to infer a private remedy in favor of individual persons’ where Congress, rather than drafting the legislation ‘with an unmistakable focus on the benefited class,’ instead has framed the statute simply as a general prohibition or a command to a federal agency.” . . .

. . . TBOR’s requirement that “[i]n discharging his duties, the Commissioner shall ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title” . . . is an instruction focused on the head of an agency, with respect to the actions of agency employees.

Leandra Lederman, *Is the Taxpayer Bill of Rights Enforceable?* 10–11 (Ind. Univ. Maurer Sch. of Law, Research Paper No. 404, 2019), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3365777 [<http://perma.cc/C9B8-DWWK>] (alterations in original) (footnotes omitted) (first quoting *Cort*, 422 U.S. at 78; then quoting *Univs. Research Ass’n, Inc. v. Coutu*, 450 U.S. 754, 772 (1981); and then quoting I.R.C. § 7803(a)(3)). In short, Professor Lederman believes that my application of *Cort* “is not consistent with Supreme Court case law.” *Id.* at 10. A complete response to Professor Lederman’s argument is beyond the scope of this Essay. In brief, the explicit reference in Section 7803(a)(3) to the duty of federal tax officials to act in accordance with “taxpayer rights” suggests “an unmistakable focus on the benefited class”—that is, a command “in favor of the [taxpayer]”—rather than “a general . . . command to a federal agency.” See *id.* at 10–11.

47. *Cort*, 422 U.S. at 78.

48. *Id.*

49. Lederman, *supra* note 46, at 10–11.

50. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979).

In determining legislative intent, it is of course important to attend carefully to the language that Congress used in the TBOR. And here I want to make three observations about that language: namely, that in formulating the TBOR, Congress employed (1) the language of rights, (2) the language of justice, and (3) the language of standards. I examine the significance of each of these in turn.

First, although the TBOR's language claims that its enumerated rights were already "afforded by other provisions" of the Code,⁵¹ the TBOR is the first expression of these rights to explicitly use the *language of rights*. Before enactment of the TBOR, the Code imposed various duties on tax officials but did not explicitly identify corresponding taxpayer rights.⁵² In our article *Embracing the TBOR* Professor Alice Abreu and I argued that as a general matter legal duties do not necessarily imply corresponding rights.⁵³ So by expressly using the new language of rights, Congress put taxpayers in a stronger position to demand that the government provide legal remedies for violations of the enumerated rights and thereby follow through on the TBOR's status as a codification of *legal* rights. This is so because, as the Supreme Court noted way back in *Marbury v. Madison*,⁵⁴ it would be an embarrassment to the law to have legal rights without legal remedies.⁵⁵ Accordingly, enacting taxpayer rights as an explicit part of the Code significantly enhances taxpayers' normative basis for demanding that the rights be enforced, despite the absence of specific statutory remedies.⁵⁶

Second, the TBOR does not just use the language of *rights*: the specific rights are formulated in language that is familiarly expressive of fundamental rights concerned with procedural and substantive *justice*. The first and fourth TBOR rights are the well-established procedural due process rights to receive notice and to be heard, and the ninth right is the procedural right to representation.⁵⁷ On the substantive justice side are the TBOR rights to privacy and confidentiality⁵⁸—again, familiar demands of constitutional justice. Congress's use of the customary language of justice highlights the connection between the enumerated rights and the demands of justice—that is, demands regarding how members of the polity should be treated by the government as a matter of justice. And that further adds to taxpayers' normative basis for

51. See I.R.C. § 7803(a)(3).

52. For example, Section 6751(a) of the Code provides that "the Secretary shall include with each notice of penalty under this title information with respect to the name of the penalty, the section of this title under which the penalty is imposed, and a computation of the penalty." I.R.C. § 6751(a). Similarly, Section 7524 provides: "Not less often than annually, the Secretary shall send a written notice to each taxpayer who has a tax delinquent account of the amount of the tax delinquency as of the date of the notice." *Id.* § 7524.

53. Abreu & Greenstein, *Embracing the TBOR*, *supra* note 14, at 1299–301.

54. 5 U.S. 137 (1803).

55. See *Marbury*, 5 U.S. at 163 ("The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.").

56. See Abreu & Greenstein, *Embracing the TBOR*, *supra* note 14, at 1284.

57. I.R.C. § 7803(a)(3)(A), (D), (I).

58. *Id.* § 7803(a)(3)(G), (H).

demanding that the rights be enforced, despite the absence of express statutory remedies.

Third, in addition to using the language of *rights* and *justice*, the TBOR uses the language of *standards* rather than rules. This distinction between rules and standards has been the subject of voluminous scholarly literature.⁵⁹ A particularly famous account was given by Louis Kaplow:

Arguments about and definitions of rules and standards commonly emphasize the distinction between whether the law is given content *ex ante* or *ex post*. For example, a rule may entail an advance determination of what conduct is permissible, leaving only factual issues for the adjudicator. (A rule might prohibit “driving in excess of 55 miles per hour on expressways.”) A standard may entail leaving both specification of what conduct is permissible and factual issues for the adjudicator. (A standard might prohibit “driving at an excessive speed on expressways.”)⁶⁰

Viewed through this lens, not one of the ten enumerated TBOR rights is formulated as a rule. The first right—the “right to be informed”⁶¹—illustrates this. The text fails to specify what it means to “be informed.”⁶² Rather, it is left up to the adjudicator to fill in that content and to identify the relevant facts needed to determine whether the right has been satisfied. Even more so, the second right—the “right to quality service”⁶³—leaves huge discretion to the adjudicator to determine just what constitutes quality service. And of course the tenth right—the “right to a fair and just tax system”⁶⁴—is hopeless as a rule.

By using the language of standards, Congress signaled that the question of remedies would need to be determined on a case-by-case basis. That is, the question of the scope of the enumerated TBOR rights and whether, how, and to what extent those rights would be enforced must be addressed case by case, which is how standards in the law function. Put another way, the failure of Congress to enact specific statutory remedies for violations of the TBOR was not a signal that no remedies were to be deemed implied by the TBOR text. On the contrary, the failure to enact statutory remedies was consistent with congressional intent—as indicated by its use of the language of standards—that the courts would fashion appropriate remedies in light of the relevant facts and circumstances of the specific case. And if that inference is correct, then the second and third *Cort* factors are satisfied, and the availability of an implied private right of action to remedy violations of the TBOR is supported.

But not so fast. Professor Lederman raises an important argument that seems to support the conclusion that in the context of the *Facebook* litigation

59. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–60 (1992).

60. *Id.* (footnote omitted).

61. I.R.C. § 7803(a)(3)(A).

62. See *id.*

63. *Id.* § 7803(a)(3)(B).

64. *Id.* § 7803(a)(3)(J).

Congress did *not* intend to imply a private right of action.⁶⁵ She reminds us that the TBOR imposes a duty on the Commissioner to “ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights *as afforded by other provisions of this title*.”⁶⁶ This can be read to suggest “that any available private enforcement mechanisms are provided elsewhere in the Code”⁶⁷—that is, a listed TBOR right is enforceable only insofar as a remedy can be found in another provision of the Code. Professor Lederman offers as an example Section 6103(a),⁶⁸ which imposes on federal officers and employees a duty to maintain the confidentiality of tax returns and return information.⁶⁹ The express remedy for violating this provision (a civil action for damages) is found in Section 7431(a)(1).⁷⁰ By contrast, no provision of the Code provides an express remedy for enforcing Facebook’s TBOR “right to appeal a decision of the Internal Revenue Service in an independent forum.”⁷¹ On this reading of the TBOR’s language, then, Congress did not intend to provide an implied private right of action to enforce the TBOR right asserted by Facebook; the absence of an express remedy elsewhere in the Code thus renders that right unenforceable.

However, this reading overlooks the significance of the changes in language catalogued above. The example of Section 6103(a) nicely illustrates how the pre-TBOR restrictions on federal tax officials were formulated as duties, rather than as rights.⁷² Not only does the text of this provision lack any mention of taxpayer rights⁷³ but subsequent subsections of Section 6103 explicitly situate the requirement of confidentiality within the “official duties” of federal tax officials.⁷⁴ So I come back to the question whether the enactment of Section 7803(a)(3), which for the first time recasts duties imposed by the Code in the language of rights, has changed things—that is, whether it has signaled a change of directions regarding remedies for violation of taxpayer rights. I argue that words matter—that both the text and purposes of the TBOR indicate that this new use of the language of rights did change things. Professor Lederman is, of course, correct that prior to enactment of the TBOR the duty of confidentiality codified in Section 6103(a) was enforceable by means of the statutory right of action for monetary damages in Section 7431(a)(1). But with the advent of the TBOR, taxpayers are no longer dependent on preexisting statutory remedies. The TBOR enhances the normative basis for demanding that its enumerated

65. Lederman, *supra* note 46, at 7.

66. I.R.C. § 7803(a)(3) (emphasis added).

67. Lederman, *supra* note 46, at 7.

68. *Id.* at 7 & n.38.

69. I.R.C. § 6103(a).

70. *Id.* § 7431(a)(1).

71. *Id.* § 7803(a)(3)(E).

72. *See id.* § 6103(a).

73. *See id.* (“Returns and return information shall be confidential, and except as authorized by this title—(1) no officer or employee of the United States . . . shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section.”).

74. *Id.* § 6103(h)(1), (i)(8)(A), (j)(3), (j)(5), (j)(6), (l)(16)(A), (l)(17), (o)(1)(A).

rights be enforced even in the absence of a statutory remedy—a demand that is met by means of an implied private right of action.⁷⁵

II. STANDARDS AND THE PRAGMATISM OF TAXPAYER RIGHTS

Words matter.

As I have noted, Congress formulated the TBOR using language that significantly altered the landscape within which taxpayer rights are situated. By using the language of rights and justice, the TBOR changed the normative basis for taxpayer demands to enforce the duties imposed on federal tax officials by the Code. And by using the language of standards, Congress signaled that the courts should take a case-by-case, facts-and-circumstances approach to remedies for violations of the TBOR.

This latter point can be expressed differently: The TBOR reflects a pragmatic approach to the question of remedies. If all TBOR rights were uniformly and fully enforced, the tax system would grind to a halt. To avoid this, the TBOR balances the need to have meaningful taxpayer rights with the need to protect the integrity of the tax system. It does this by, on the one hand, using the language of rights and the language of justice, thereby improving the normative basis for taxpayer demands that these rights be enforced. But on the other hand, it formulates TBOR rights as standards so that the existence and scope of the TBOR rights must be determined case by case in light of all the facts and circumstances. And the availability and scope of remedies for violation of TBOR rights must similarly be determined case by case in light of all the facts and circumstances. Again, all of this signals judicial responsibility to craft remedies that are pragmatic—remedies that vindicate taxpayer rights but do not thereby unduly burden the tax system.

This pragmatism is nicely illustrated by the conclusion on the merits reached by Judge Beeler in *Facebook*. As you will recall, while Facebook's case was being heard by the Tax Court, Facebook filed a complaint in United States District Court for the Northern District of California challenging the IRS's refusal to refer their dispute to Appeals.⁷⁶ In rejecting the referral, the agency invoked Revenue Procedure 2016-22, which provides in part that the Office of Chief Counsel may decline to refer a case to Appeals if it determines that "referral is not in the interest of sound tax administration."⁷⁷

75. I mentioned earlier that the codification of the TBOR in Section 7803(a)(3) treated taxpayer rights in a manner analogous to the Constitution's Bill of Rights. In that regard, I want to note that although the Constitution's text also lacks explicit remedies to enforce the rights it contains, the Supreme Court has found those rights enforceable through implied private rights of action. *E.g.*, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971) (recognizing an implied right of action to enforce the Fourth Amendment); *Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278, 295 (1913) (recognizing an implied right of action to enforce the Fourteenth Amendment).

76. *Facebook, Inc. v. IRS*, No. 17-cv-06490-LB, 2018 WL 2215743, at *1 (N.D. Cal. May 14, 2018).

77. Rev. Proc. 2016-22 § 3.03, 2016-15 I.R.B. 577, 578.

According to Judge Beeler, Facebook’s “main argument [was] that the [TBOR] . . . ‘right to appeal a decision of the Internal Revenue Service in an independent forum,’ . . . gives it an enforceable right to take its tax case to IRS Appeals in lieu of litigation before the Tax Court.”⁷⁸ But the judge ruled that the TBOR affords no new enforceable rights: it only restates rights already “afforded by other provisions of [the Code].”⁷⁹ She went on to conclude that even if the TBOR did create a new right to appeal to an independent forum, that right “encompassed the right to appeal in a judicial forum like the Tax Court, in addition to any rights a taxpayer might have to access IRS Appeals.”⁸⁰ Hence, she concluded, the TBOR right is satisfied by Facebook’s access to the Tax Court.⁸¹

This ruling seems to be just the sort of pragmatic approach demanded by the TBOR’s use of the language of standards. On the one hand, it guarantees a satisfactory level of enforcement of the TBOR right. If multiple independent appellate forums exist, then the right to appeal in an independent forum is sufficiently satisfied by access to any one of them, and Judge Beeler is surely correct that the Tax Court is one of them. At the same time, under this ruling, the IRS retains discretion to designate cases for litigation and to make referral decisions in a manner consistent with “sound tax administration.”⁸² In other words, the core tax value of administrability is one of the values that should inform the pragmatic crafting of remedies,⁸³ and Judge Beeler’s ruling appears to give Facebook access to an independent forum without thereby sacrificing the administrability of the tax system.⁸⁴

Now, I want to be very clear about my assessment of Judge Beeler’s ruling. Her procedural ruling that Facebook had no remedy available for enforcement of the TBOR “right to appeal a decision of the Internal Revenue Service in an independent forum”⁸⁵ was incorrect. Initially Judge Beeler focused on the wrong question. The question she asked was whether a right specifically to access Appeals either predated enactment of the TBOR or was created by the TBOR’s enactment.⁸⁶ The question that she should have asked was whether enactment of the TBOR implied a remedy for enforcement of the rights as literally set out in the TBOR’s text. And as I have argued, the answer to that question is yes; application of the *Cort* factors strongly indicates that the TBOR implies a private right of action to enforce its provisions. But because the implied enforcement remedies are pragmatic, requiring consideration of the facts and circumstances of

78. *Facebook*, 2018 WL 2215743, at *1 (citation omitted) (quoting I.R.C. § 7803(a)(3)(E)).

79. *Id.* at *14 (quoting I.R.C. § 7803(a)(3)).

80. *Id.* at *15.

81. *See id.* at *16.

82. *See id.* at *11–12 (quoting Rev. Proc. 2016-22 § 3.03, 2016-15 I.R.B. at 578).

83. *See, e.g.,* Reuven S. Avi-Yonah, *The Three Goals of Taxation*, 60 TAX L. REV. 1, 1 (2006) (identifying efficiency, equity, and administrability as “the traditional grounds for evaluating tax policy”).

84. *See Facebook*, 2018 WL 2215743, at *16.

85. *Id.* at *12–16 (quoting I.R.C. § 7803(a)(3)(E) (2018)).

86. *See id.* at *12.

the specific case, the answer to the question whether enforcement of the “right to appeal a decision of the Internal Revenue Service in an independent forum” entailed the right to a referral to Appeals *in this case* required a facts-and-circumstances analysis.⁸⁷ And I conclude that such an analysis supports the conclusion that appeal to the Tax Court is sufficient to vindicate the TBOR right in question.

In short, Judge Beeler was incorrect in her conclusion that the “statutory TBOR did not grant Facebook any new enforceable rights.”⁸⁸ It did. But Judge Beeler was correct in concluding that “even if [it] had, [it] did not grant Facebook a new enforceable right to take its tax case to IRS Appeals specifically, as opposed to other independent forums such as the Tax Court.”⁸⁹

III. JUSTICE AND THE PARADOX OF TAXPAYER RIGHTS

But now we can see a puzzle emerging from the changes brought about by the TBOR’s language of rights, justice, and standards. On the one hand, the use of the language of justice makes clear that the rights enumerated in the TBOR reflect the demands of procedural and substantive justice. On the other hand, the use of the language of standards—with its case-by-case, facts-and-circumstances approach to remedies—seems to preclude any guarantee that the remedies for violating TBOR rights will bring about just results.

Again, *Facebook* is the exemplar. Facebook asserted its TBOR right to appeal to an independent forum⁹⁰—a right expressive of procedural justice. In determining that Facebook could not freely choose among available forums, that Facebook’s access to Appeals could be properly cut off by the IRS’s invocation of “sound tax administration,”⁹¹ Judge Beeler’s ruling compromised the moral demands of justice to accommodate the practical demands of maintaining an administrable tax system. Put directly: In the context of the tax law, we care about justice, but we also care about other things (like a viable tax system).⁹² And when those things we care about compete, something has to be sacrificed. Sometimes we sacrifice practical goals in the name of justice. But sometimes we compromise justice: we give the bearer of a right less than perfect enforcement of that right in order to safeguard some other important goal—like a viable tax system.⁹³ That is the lesson of *Facebook*.

Of course, suggesting that Judge Beeler’s ruling treated Facebook unjustly might seem a bit of an exaggeration. After all, Facebook did have access to an

87. *See id.* at *14–16 (quoting I.R.C. § 7803(a)(3)(E)).

88. *Id.* at *16.

89. *Id.*

90. *Id.* at *1.

91. *See id.* at *11–12 (quoting Rev. Proc. 2016-22 § 3.03, 2016-15 I.R.B. 577, 578).

92. *See supra* note 83 and accompanying text.

93. For a discussion of how a field of law is constituted by multiple social values, how those values can compete in the analysis of legal issues, and how choosing among competing values can lead to the sacrifice of justice, see generally Richard K. Greenstein, *Toward a Jurisprudence of Social Values*, 8 WASH. U. JURIS. REV. 1 (2015).

independent forum to review the IRS's determination of a deficiency.⁹⁴ It just was not the particular forum Facebook desired.⁹⁵

But it is not difficult to imagine a situation where the crafting of the kind of pragmatic remedy implied by the TBOR's language of standards does severely compromise achieving justice.⁹⁶ Consider the first TBOR right: the "right to be informed."⁹⁷ An important question is how this right might be applied to the longstanding position of the IRS that its instructions for the completion of tax forms and other guidance contained in IRS publications do not constitute legal authority on which taxpayers may rely in litigation against the IRS. For example, in *Wilkes v. United States*,⁹⁸ the taxpayer argued that the instructions for filling out an estate tax return contradicted the Commissioner's litigating position.⁹⁹ As described by the court, the Commissioner's response was that "instructions such as those proffered by Plaintiff have no legal effect."¹⁰⁰

Other courts have routinely agreed with this position. In *Adler v. Commissioner*,¹⁰¹ for example, the taxpayer argued that he relied on language used in IRS Publication 17, *Your Federal Income Tax for Individuals*, in taking the position that dancing lessons purchased as a form of exercise constituted a deductible "medical care" expense.¹⁰² In ruling against the taxpayer on this issue, the United States Court of Appeals for the Ninth Circuit concluded: "Nor can any interpretation by taxpayers of the language used in government pamphlets act as an estoppel against the government, nor change the meaning of taxing statutes; any more than a dance studio manager[']s tax advice] can bind the government in its effort to collect taxes."¹⁰³ More recently, in *Bobrow v. Commissioner*,¹⁰⁴ the taxpayer invoked IRS guidance in Publication 590, *Individual Retirement Arrangements (IRAs)*, to support the position he took on his tax return with respect to IRA rollovers.¹⁰⁵ Citing a string of cases, the Tax

94. See *Facebook*, 2018 WL 2215743, at *18.

95. See *id.*

96. The example that follows is a sketch of an argument that the TBOR provides a new tool for asserting equitable estoppel against the IRS when a taxpayer has relied on characterizations of the tax law contained in IRS publications. Alice Abreu and I presented an expanded version of this argument at the 4th International Conference on Taxpayer Rights, on May 23–24, 2019, in Minneapolis, Minnesota.

97. I.R.C. § 7803(a)(3)(A) (2018).

98. 50 F. Supp. 2d 1281 (M.D. Fla. 1999), *aff'd*, 210 F.3d 394 (11th Cir. 2000).

99. *Wilkes*, 50 F. Supp. 2d at 1287.

100. *Id.*

101. 330 F.2d 91 (9th Cir. 1964).

102. *Adler*, 330 F.2d at 93.

103. *Id.*

104. 107 T.C.M. (CCH) 1110 (2014).

105. Order Denying Motion for Reconsideration at 2, *Bobrow v. Comm'r*, 107 T.C.M. (CCH) 1110 (2014) (No. 7022-11), <http://www.ustaxcourt.gov/InternetOrders/DocumentViewer.aspx?IndexSearchableOrdersID=131933> [<http://perma.cc/YN89-BKAL>]. The taxpayer did not raise the issue of Publication 590 until he filed a motion for reconsideration after the Tax Court ruled against him. *Id.* Nor does the court's opinion make clear whether the taxpayers actually relied on Publication 590. See *id.* The court acknowledged, however, that it "was aware of the position taken in Publication 590 prior to the issuance of the opinion in this case." *Id.*

Court stated that the IRS's "published guidance is not binding precedent" and that "taxpayers rely on IRS guidance at their own peril."¹⁰⁶

A taxpayer who is denied a claimed deductible expense based on reliance on an IRS publication might raise the TBOR "right to be informed"¹⁰⁷ as a basis for asserting equitable estoppel against the Commissioner. As discussed above, a court considering this matter would have to decide whether the asserted estoppel remedy is appropriate, all facts and circumstances considered. The traditional rule is that the government is immune from equitable estoppel¹⁰⁸—a rule supported by powerful policies, including separation of powers and protection of the public fisc.¹⁰⁹ Consequently, it is easy to imagine a court taking all considerations into account and deciding that the taxpayer's reliance on an IRS publication does not support estopping the government from denying the deduction.

But such a ruling, while consistent with the pragmatic approach demanded by the articulation of the TBOR rights as standards, would be manifestly unfair. The injustice of permitting the IRS to publish materials intended to guide taxpayers and then contradict that very guidance in litigation against a taxpayer who relied on the guidance was captured in an amicus curiae brief filed by the American College of Tax Counsel in *Bobrow*: "Retroactively overruling years of consistent guidance in Publication 590, proposed regulations, and letter rulings . . . by simply taking a contrary position in litigation—without any form of general notice that Respondent now considers Publication 590 inaccurate—is arbitrary and capricious, as well as patently unfair."¹¹⁰

So here is where things stand: It is tempting to think that standards present the ideal tool for achieving justice in the individual case. For when faced with a difficult legal issue, standards press us to take all relevant things into consideration—all relevant facts, policies, social values, and so forth. And the more relevant things we take into consideration, the more likely it is that we will

106. *Id.*

107. I.R.C. § 7803(a)(3)(A) (2018).

108. *See, e.g.,* *Auto. Club of Mich. v. Comm'r*, 353 U.S. 180, 183 (1957) ("The doctrine of equitable estoppel is not a bar to the correction by the Commissioner [of Internal Revenue] of a mistake of law."); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408–09 (1917) ("[T]he United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit."); *Spencer v. R.R. Ret. Bd.*, 166 F.2d 342, 343 (3d Cir. 1948) ("It is settled that estoppel may not be asserted against an agency of the United States Government such as the Railroad Retirement Board."); *Schafer v. Helvering*, 83 F.2d 317, 320 (D.C. Cir. 1936) ("Whoever deals with the government does so with notice that no agent can, by neglect or acquiescence, commit it to an erroneous interpretation of the law."); *aff'd*, 299 U.S. 171 (1936); John F. Conway, Note, *Equitable Estoppel of the Federal Government: An Application of the Proprietary Function Exception to the Traditional Rule*, 55 *FORDHAM L. REV.* 707, 707 (1987) ("It is well settled that the federal government may not be equitably estopped from asserting a claim or defense on the same terms as other litigants." (footnote omitted)).

109. *See* Conway, *supra* note 108, at 710–11.

110. Brief Amicus Curiae American College of Tax Counsel at 14–15, *Bobrow v. Comm'r*, 107 T.C.M (CCH) 1110 (2014) (No. 7022-11). As previously noted, *supra* note 105, the opinion in *Bobrow* does not make clear whether the taxpayer petitioners in that case actually relied on Publication 590.

get to the right answer, the just answer.¹¹¹ Hence, when coupled with Congress's use of the language of procedural and substantive justice, the formulation of the TBOR as a compendium of standards seems to promise justice for taxpayers.

Among the relevant values that present themselves for consideration when applying the rights listed in the TBOR is administrability. And this makes sense. The tenth of the TBOR rights is the "right to a fair and just tax system,"¹¹² and a predicate for such a tax system is that it be functional. If the tax system is not administrable, there can be no tax justice.

In short, consideration of the equitable estoppel issue discussed above reveals an apparent paradox. Administrability is a predicate for taxpayer justice, but it also creates powerful incentives for compromising taxpayer rights and thereby compromising justice as expressed in the language of those rights.¹¹³

It is important to see that this paradox at the heart of justice is not specific to the context of taxpayer rights or of tax law more broadly. Tax is not exceptional in this sense. Administrability is not merely a core tax value; it is a value intrinsic to all organized communities. That is because every community, whether it is an institution of the government like the IRS or civil society writ large, operates under conditions of scarce resources and uncertain knowledge of the future. And what is required pragmatically to maintain a functioning community under such conditions, although necessary in order to produce justice, virtually ensures that justice will be compromised in certain circumstances.

111. *But see* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177, 1179 (1989) (maintaining that rules are more conducive to achieving justice than standards).

112. I.R.C. § 7803(a)(3)(J).

113. Sonya C. Bishop has argued that the tax value of vertical equity is also in tension with a full realization of the TBOR rights. Email from Sonya C. Bishop (Oct. 29, 2018) (on file with author).