THE EQUITABLE ANTI-INJUNCTION ACT

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Abstract

The Anti-Injunction Act of 1867 (AIA or the Act) has never been more important. Originally enacted to expedite the collection of revenue-raising taxes, courts and scholars have for years assumed that the statute imposes a jurisdictional bar on any pre-enforcement challenge to a tax. On this interpretation, taxpayers subject to an invalid tax have two choices only: comply or pay the tax and pursue a refund. Read this way, the Act is a marked departure from the general rule that pre-enforcement challenges are permissible so long as justiciability requirements are met. And it imposes a marked burden on aggrieved taxpayers that grows all the more significant as the federal government regulates more and more activity through the tax code.

This Article argues that the conventional wisdom is wrong. Scholars—and courts—have too readily relied on the Supreme Court's past permissive use of the term jurisdiction. But the Supreme Court has recently backed away from this jurisprudence, and more to the point, the traditional tools of statutory interpretation indicate that the AIA is not jurisdictional after all—at least, not in the traditional way.

This Article examines the text, structure, history, and early interpretation of the AIA and comes to a novel conclusion: the Act is not jurisdictional in the usual sense, but rather governs the equity jurisdiction of the federal courts. While "equity jurisdiction" is now a term unfamiliar to us, it governed the exercise of extraordinary remedies like injunctions for over a century. And it functioned much differently than jurisdiction does today. That the AIA refers to equity jurisdiction will change the landscape of tax litigation: contrary to the conventional wisdom, pre-enforcement tax challenges may go forward where the government waives or forfeits reliance on the AIA and in certain extraordinary circumstances.

Introduction

Whatever the Supreme Court says, there is a law for tax law alone—at least in the enforcement context.[1] The puzzle is this: pre-enforcement chal-

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1 *See* Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 713 (2011) ("[W]e are not inclined to carve out an approach to administrative review good for tax law only.").

lenges to statutes and regulations are generally allowed in the law.[2] But not for taxes. In contrast to measures enacted under Congress's other powers, there is generally no such thing as the pre-enforcement review of a tax. This is all because of the Anti-Injunction Act of 1867 (AIA or the Act),[3] a statute that bars a taxpayer who believes a tax to be unconstitutional or otherwise invalid from bringing a preemptive suit.[4] In order to have her day in court, a taxpayer must pay the disputed tax—only then may she raise a constitutional (or other) challenge in federal court, and only by way of a refund action.

The deeply embedded conventional wisdom is that the AIA is jurisdictional. If that is true, then the AIA's limitation on pre-enforcement tax challenges is absolute. The government may not waive the prohibition, a meritorious excuse is irrelevant, and the federal courts have no authority to craft equitable exceptions.

Consider the implications. In *National Federation of Independent Business v. Sebelius* (*NFIB*), the recent litigation over the Affordable Care Act, the AIA nearly prevented the Supreme Court from deciding whether the individual mandate was constitutional—an outcome avoided only when the Court concluded the fines in question were "penalties" for purposes of the statute rather than "taxes."[5] There is an even stronger argument that the AIA should have barred the Supreme Court from hearing *Burrell v. Hobby Lobby Stores, Inc.*,[6] the case finding unconstitutional regulations requiring employers to provide contraceptive insurance coverage, precisely because Congress labeled the penalties for non-compliance "taxes."[7] If the AIA applies, then under the conventional view, the Supreme Court must dismiss.

Questions like these will only become more frequent as Congress increasingly turns to the tax code to enforce various mandates of federal law.[8] Indeed, the Chief Justice's opinion in *NFIB*[9] practically invites Con-

2 *See* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 41 (1991) (explaining that injunctions, rather than damages, are the standard remedy in a wide range of actions against the government). The ability to sue is subject to justiciability considerations like ripeness. *See, e.g.*, MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128 n.8 (2007) (discussing the "justiciability problem that arises[ ] when the party seeking declaratory relief is himself preventing the complained-of injury from occurring").

3 H.R. 1161, 39th Cong. (1867) (enacted).

4 26 U.S.C. § 7421(a) (2012) ("[Except as otherwise provided] no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.").

5 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2582–84 (2012).

6 134 S. Ct. 2751 (2014).

7 Erin Morrow Hawley, *The Jurisdictional Question in* Hobby Lobby, 124 YALE L.J. F. 63 (2014), http://www.yalelawjournal.org/forum/the-jurisdictional-question-in-hobby-lobby; *see also* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1157 (10th Cir. 2013) (Gorsuch, J., concurring) (noting that "[c]ongress's decision to label something a tax usually is enough for it to trigger the AIA, 'even where that label [is] inaccurate'" (citing *NFIB*, 132 S. Ct. at 2583)).

8 *See e.g.*, Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717 (2014) (arguing that the IRS is no longer focused primarily on revenue raising).

gress to use the taxing power for purposes of regulation rather than for its other enumerated powers.[10] And here is the point: if the conventional wisdom about the AIA is correct, the growing myriad regulatory tax penalties are all but immune from pre-enforcement challenge. Taxpayers subject to an unconstitutional tax regulation have two choices only: comply with the (invalid) regulation or pay the tax penalty and institute a refund action.

But what if the AIA is not jurisdictional? This Article argues that the conventional wisdom is wrong. It depends upon a highly permissive view of what counts as a jurisdictional requirement. The Supreme Court, however, recently has backed away from this overbroad conception of jurisdiction. This new revisionist jurisprudence destabilizes the consensus view and directs courts to return to text, structure, and context to determine whether a provision is in fact jurisdictional.

This Article does just that. It examines the text, structure, and context of the Anti-Injunction Act of 1867 and its early interpretation. This investigation reveals that the conventional wisdom is wrong: the AIA is not jurisdictional in the traditional sense. Moreover, because scholars and jurists uniformly have disregarded or misread early caselaw interpreting the AIA, they have missed discovering what it is that the statute actually does: it governs the *equitable* jurisdiction of the federal courts.

This category of "equitable jurisdiction" is one largely forgotten in our law, but it governed the exercise of extraordinary remedies like injunctions for over a century. And it functioned much differently than jurisdiction does today. That the AIA refers to equity jurisdiction will change the landscape of tax litigation—contrary to the conventional wisdom, pre-enforcement tax challenges may go forward where the government waives or forfeits reliance on the AIA and in certain extraordinary circumstances.

Recovering the concept of equitable jurisdiction also sheds new light on the longstanding debate over the reach of various bars on the authority of federal courts to grant equitable relief. A series of "Anti-Injunction Acts": the Anti-Injunction Act of 1793, which governs federal-state injunctions; the Anti-Injunction Act of 1867, which governs federal-federal tax injunctions; the Johnson Act of 1934, which governs federal-state agency rate-making injunctions; and the Tax Anti-Injunction Act of 1937, which governs federal-state tax injunctions—have bedeviled courts and commentators. Do these statutes bar any and every exercise of jurisdiction? Or do they instead allow for jurisdiction in the extraordinary case? The Supreme Court's answer has varied over time and with the circumstances of each case. This Article helps bring clarity to this debate by recovering an understanding of equity practice that may bear on the proper interpretation of all these "jurisdictional" bars.

Part I examines the judicial and scholarly consensus that the AIA is jurisdictional. Part II analyzes the Supreme Court's recent and destabilizing jurisdictional decisions—decisions that cut back on an overly permissive use of

9 132 S. Ct. at 2566.

10 *Id.* at 2598–99 (explaining why Congress has the authority to impose the individual mandate under its taxing power).

the term "jurisdiction" and mandate a return to text, structure, and history. Part III takes a fresh look at the text, structure, and history of the AIA and concludes that the conventional wisdom is wrong: the AIA is *not* jurisdictional, at least in the traditional sense. Part IV examines early interpretations of the AIA. Often seen as incoherent, these early cases reveal a surprisingly consistent line of precedent once one accounts for the equitable rules that governed tax injunction suits prior to the AIA's enactment. This leads to a novel interpretation: the Anti-Injunction Act of 1867 governs the *equitable* jurisdiction of the federal courts. Part V briefly develops the scope of an equitable AIA, sketching out categories of cases in which pre-enforcement review might be available.

I. THE CONVENTIONAL WISDOM

The overwhelming academic consensus is that the AIA is a jurisdictional statute.[11] As Kevin Walsh put it, the AIA "easily satisfies the test for a jurisdic-

11 *See* Danshera Cords, *How Much Process Is Due? I.R.C. Sections 6320 and 6330 Collection Due Process Hearings*, 29 VT. L. REV. 51, 58 (2004) (noting that "[p]ost-assessment, pre-collection review is generally prohibited by the Anti-Injunction Act"); John K. DiMugno, *The Affordable Care Act After the Supreme Court's Ruling*, 22 EXPERIENCE 10, 13 (2013) (noting that "the Anti-Injunction Act would appear to deprive the Court of jurisdiction"); George A. Hani, *Supreme Court Preview:* Department of Health and Human Services v. State of Florida, 2012 WTR INSIDE BASIS 8, 8 ("The AIA has long been held to be a jurisdictional statute. Therefore where the AIA applies, it deprives the Court of jurisdiction over the case." (citing Bob Jones Univ. v. Simon, 416 U.S. 725, 749 (1974))); Stewart Jay, *On Slippery Constitutional Slopes and the Affordable Care Act*, 44 CONN. L. REV. 1133, 1184 (2012) (referring to the AIA as a "jurisdictional statute[ ]"); Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 46 n.275 (2012) (stating that the AIA deprives courts of jurisdiction); Abigail R. Moncrieff, *Safeguarding the Safeguards: The ACA Litigation and the Extension of Indirect Protection to Nonfundamental Liberties*, 64 FLA. L. REV. 639, 653 n.62 (2012) (describing the "Anti-Injunction Act's jurisdictional bar"); Robert J. Muise & David Yerushalmi, *Wearing the Crown of Solomon? Chief Justice Roberts and the Affordable Care Act "Tax,"* 38 J. HEALTH POL., POL'Y & L. 291, 292 (2013) (arguing that the AIA, if applicable, "would have likely deprived the Court of jurisdiction" over pre-enforcement review of mandate); Cono R. Namorato & Gerald A. Feffer, *Financial and Criminal Sanctions for Noncompliance with the Internal Revenue Code: Representing a Taxpayer in a Grand Jury Investigation*, C419 ALI-ABA COURSE OF STUDY 143, 160 (1989) ("[T]he Anti-Injunction Act . . . withdraws the jurisdiction of all courts to hear suits seeking injunctions prohibiting the collection of taxes."); Kevin C. Walsh, *The Anti-Injunction Act, Congressional Inactivity, and Pre-enforcement Challenges to § 5000A of the Tax Code*, 46 U. RICH. L. REV. 823, 828 (2012) ("[T]he AIA is jurisdictional."); *id.* at n.18 ("[T]he text of the [AIA] easily satisfies the test for a jurisdictional bar."); Steven Weiss, *Undoing the IRS Wrongful Levy*, 106 BANKING L.J. 336, 338 (1989) ("[T]he Anti-Injunction Act . . . provides that, except in limited circumstances, courts are without jurisdiction to enjoin the IRS on the lawful collection of taxes."); Jack F. Williams, *National Bankruptcy Review Commission Tax Recommendations: Notice, Jurisdiction, and Corporate Debtors*, 14 BANKR. DEV. J. 261, 289 (1998) ("The Anti-Injunction Act . . . generally den[ies] a court the jurisdiction to determine the prospective tax consequences of an event or transaction."); Bryan T. Camp, *Jesus and the Anti-Injunction Act*, TAX NOTES, Sept. 2012, at 1335 (arguing that the AIA is jurisdictional); Michael C. Dorf & Neil S. Siegel, *"Early-Bird Special"*

tional bar."[12] The statute, according to Walsh, "clearly governs a court's 'adjudicatory capacity.'"[13] Writing about the Affordable Care Act litigation in her *Supreme Court Foreword*, Pam Karlan agreed that the AIA is jurisdictional.[14] "Had the [§ 5000A] payment been construed as a tax for purposes of the Anti-Injunction Act," Karlan wrote, "the Court would have been deprived of jurisdiction, and determination of the constitutionality of the minimum coverage provision would have had to await a suit after 2014 by an individual who made the payment and then sued for a refund."[15] And while Michael Dorf and Neil Siegel do not address the question themselves, they wrote of "directly" on-point Supreme Court precedent for the proposition that the AIA is "a limit on federal court jurisdiction."[16]

Further, in anticipation of the Supreme Court's decision in *NFIB* scholars devised novel ways of reading either the AIA or the Affordable Care Act's § 5000A penalty to avoid their intersection—analyses predicated on avoiding a jurisdictional AIA. Dorf and Siegel, for example, wrote that the AIA did not apply to the Affordable Care Act since the challenges at issue in *NFIB* did not have the "purpose" of *immediately* restraining tax assessment or collection.[17] Others have argued that the Affordable Care Act's penalty does not qualify as a tax for purposes of the AIA.[18] Despite the barrage of articles presenting various grounds upon which the Supreme Court could avoid application of the AIA to the Affordable Care Act, scholars did not contend that the AIA was not jurisdictional.[19]

For their part, the federal courts are unanimous in their conclusion that the AIA is jurisdictional.[20] Indeed, the Affordable Care Act litigation pro-

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Indeed!: Why the Tax Anti-Injunction Act Permits the Present Challenges to the Minimum Coverage Provision, 121 YALE L.J. ONLINE 389, 394 (2012) (assuming that the AIA is jurisdictional).

12 Walsh, *supra* note 11, at 828 n.18.

13 *Id.* (quoting Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1202 (2011)).

14 *See* Karlan, *supra* note 11, at 46 n.275 (citing Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962)).

15 *Id.*

16 Dorf & Siegel, *supra* note 11, at 400 n.50.

17 *Id.* at 400.

18 *See, e.g.*, Walsh, *supra* note 11, at 834–38.

19 My research has revealed only one article, written in *Tax Notes* by practitioner Patrick J. Smith, which suggests that the AIA may not be jurisdictional because the Supreme Court's recent AIA cases were not well-considered. *See* Patrick J. Smith, *Is the Anti-Injunction Act Jurisdictional?*, TAX NOTES, Nov. 2011, at 1104.

20 *See, e.g.*, RYO Mach., LLC v. U.S. Dep't of Treasury, 696 F.3d 467, 470 (6th Cir. 2012); Pagonis v. United States, 575 F.3d 809, 813 (8th Cir. 2009); Hansen v. Dep't of Treasury, 528 F.3d 597, 601 (9th Cir. 2007) ("[T]he Anti–Injunction Act precludes federal jurisdiction over Hansen's claims unless he is able to satisfy the judicially created exception to the Act by demonstrating (1) irreparable injury if his case is not heard, and (2) certainty of success on the merits."); Gardner v. United States, 211 F.3d 1305, 1311 (D.C. Cir. 2000); Int'l Lotto Fund v. Va. State Lottery Dep't, 20 F.3d 589, 591 (4th Cir. 1994) (holding that the AIA withdraws federal court jurisdiction); Flynn v. United States, 786 F.2d 586, 588 (3d Cir. 1986) (holding the same); Lange v. Phinney, 507 F.2d 1000, 1003 (5th Cir. 1975) (holding the same); *see also* Hawley, *supra* note 7, 67 n.33.

vided recent and focused attention on the jurisdictional status of the AIA; every federal court to confront the issue determined that the AIA is jurisdictional. In early 2011, the Fourth Circuit squarely held that "the AIA divests federal courts of subject-matter jurisdiction."[21] Writing for the Sixth Circuit, Judge Sutton agreed: the AIA "goes to the subject matter jurisdiction of the federal courts."[22] In his dissent from the D.C. Circuit's decision upholding the Affordable Care Act, Judge Kavanaugh argued that the court should dismiss the case because the Anti-Injunction Act is jurisdictional.[23] Moreover, all of the federal courts and judges (including the Supreme Court) to conclude that the AIA does not bar review of challenges to the individual mandate have done so on the ground that Congress intended § 5000A to operate as a penalty, not a tax.[24]

The litigation over the employer contraception requirement created a small chink in the unanimity of the federal judiciary.[25] Judge Gorsuch, joined by two colleagues, concluded that the AIA likely applied to the contraception mandate but did not satisfy the Supreme Court's recent clear statement test for jurisdictional statutes.[26] This separate opinion, to put it mildly, is an outlier. It did not command a majority of the appellate court, and the Supreme Court glossed over the issue entirely, failing to address the AIA at all.

NFIB provides the latest from the Supreme Court.[27] Three different views of the AIA were presented during briefing and again at oral argument. The government argued that the AIA was jurisdictional but did not apply to the Affordable Care Act because 26 U.S.C. § 5000A was a penalty rather than a tax.[28] The States and NFIB argued that the AIA was not jurisdictional, and since the federal government had forfeited its defense under that statute, the

21 Liberty Univ., Inc. v. Geithner, 671 F.3d 391, 401 (4th Cir. 2011) ("The Supreme Court has explicitly so held."), *vacated*, 133 S. Ct. 679 (2012).

22 Thomas More Law Ctr. v. Obama, 651 F.3d 529, 539 (6th Cir. 2011), *abrogated by NFIB*, 132 S. Ct. 2566 (2012).

23 Seven-Sky v. Holder, 661 F.3d 1, 26–28 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), *abrogated by NFIB*, 132 S. Ct. at 2566.

24 *See* Florida *ex rel.* McCollum v. U.S. Dep't of Health & Human Servs., 716 F. Supp. 2d 1120, 1130–42 (N.D. Fla. 2010) (concluding that the individual mandate imposes a penalty and not a tax); *see also Thomas More Law Ctr.*, 651 F.3d at 539 ("The relevant terminology suggests that we may hear this action. While the Anti-Injunction Act applies only to 'tax[es],' . . . Congress called the shared-responsibility payment a 'penalty.'" (quoting 26 U.S.C. §§ 7421(a), 5000A (2012))).

25 *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013).

26 *See id.* at 1157–59 ("[T]he AIA shows none of the hallmarks of a jurisdictional restriction, and has many features that collectively indicate otherwise.").

27 *See NFIB*, 132 S. Ct. at 2582–84 (holding that, for purposes of the statute, § 5000A imposes penalties, not taxes).

28 *See* Reply Brief for Petitioners at 2–4, *NFIB*, 132 S. Ct. 2566 (No. 11-398) ("[T]he fact that the minimum coverage provision is a constitutional exercise of Congress's taxing power does not compel the conclusion that the Anti-Injunction Act . . . bars this suit."); *see also* Transcript of Oral Argument at 46–54, *NFIB*, 132 S. Ct. 2566 (No. 11-398).

Supreme Court had no need to address whether the Act might apply.[29] Court-appointed amicus Robert Long, claimed that the Act was jurisdictional and the penalty imposed by § 5000A was a tax.[30]

The Supreme Court sided with the government and held that § 5000A imposed a penalty and not a tax—at least for statutory purposes. Congress's choice "to describe the '[s]hared responsibility payment' imposed on those who forgo health insurance not as a 'tax,' but as a 'penalty'" was dispositive.[31] This nomenclature indicated that Congress had not intended the payment to be subject to the AIA.[32] Because the AIA did not apply, the Supreme Court had no occasion to consider whether the Act is jurisdictional. The tenor of its opinion nevertheless suggests that, were the question presented, it would view the Act through a jurisdictional lens.[33] "Before turning to the merits," the Court wrote in assessing the AIA, "we need to be sure we have the *authority* to do so."[34]

In modern times, scholars and courts have confidently assumed that the AIA is jurisdictional. They should not be so certain. On closer inspection, the conventional wisdom turns out to be premised almost entirely on what we will call the Supreme Court's modern doctrine of jurisdiction, which is founded on a highly permissive use of the word "jurisdiction." The Supreme Court recently has launched a major revision of that jurisprudence, however, acknowledging that its previous use of the jurisdictional label has been, at best, imprecise. The time has come, the Court has said, to be more careful: to look to the text, structure, and context of a given statute to decide if its provisions really count as jurisdictional limits. This revisionist turn is fatal for the conventional wisdom because, as we shall see, the text, structure, context, and early interpretations all indicate that the AIA is not a jurisdictional statute, at least not in the traditional sense. The AIA governs instead the *equity* jurisdiction of the federal courts. I begin with a brief look at the role of the Court's revisionist turn, before turning to the text, structure, and context of the AIA.

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29 *See* Reply Brief for Private Respondents at 3–10, *NFIB*, 132 S. Ct. 2566 (No. 11-398) (referring to "[t]he AIA's fundamentally non-jurisdictional character"); Reply Brief for State Respondents at 3–9, *NFIB*, 132 S. Ct. 2566 (No. 11-398) ("[T]he federal government maintains that this Court must address [the AIA] anyway because it is jurisdictional. The federal government is mistaken.").

30 *See NFIB*, 132 S. Ct. at 2583–84 ("According to *amicus*, by directing that the penalty be 'assessed and collected in the same manner as taxes,' § 5000A(g)(1) made the Anti-Injunction Act applicable to this penalty.").

31 *Id.* at 2582–83 (quoting 26 U.S.C. §§ 5000A(b), (g)(2) (2012)).

32 *See id.* at 2582; *see also id.* at 2656 (Scalia, J., dissenting) ("What qualifies as a tax for purposes of the Anti-Injunction Act, unlike what qualifies as a tax for purposes of the Constitution, is entirely within the control of Congress.").

33 *See id.* at 2582 (majority opinion).

34 *Id.* (emphasis added).

II. The Supreme Court's Revisionist Turn

Over the past two decades, the Supreme Court has undergone a fundamental shift in the way it regards procedural requirements, like filing deadlines or exhaustion requirements, imposed by Congress. Historically the Court strictly interpreted such requirements, adopting, in effect, a presumption in favor of jurisdictional treatment.[35] The modern court expanded upon this tradition, resorting to a highly permissive use of the term jurisdiction.[36] Beginning in 1998, in *Steel Co. v. Citizens for Better Environment*, however, the Supreme Court reversed course, noting that the term "jurisdiction" had become "a word of many, too many, meanings."[37] Because the Supreme Court had been overinclusive in its use of the term, referring to *non*-jurisdictional provisions as jurisdictional,[38] it would reevaluate whether jurisdictional holdings were really jurisdictional.[39] This revisionist turn has sparked a revolution of sorts. Indeed, the Court's reexamination of past precedent has been so searching that it led Justice Scalia, the author of *Steel Co.*, to remark that "[w]hat began as an effort to bring some discipline to the use of the term jurisdictional shows signs of becoming a libertine, liberating romp through our established jurisprudence."[40]

In reexamining its past precedent, the Supreme Court has sought to distinguish between "claims-processing" rules and truly jurisdictional provisions. Jurisdictional statutes speak to the very power of the federal court to hear a case; they govern the court's "adjudicatory authority."[41] In contrast, claims-processing rules simply "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."[42]

To distinguish between claims-processing rules and jurisdictional limitations, the Supreme Court has begun to look to text, structure, and context.

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35 *See, e.g.*, Mussina v. Cavazos, 73 U.S. 355, 358 (1867) ("We have repeatedly held that the writ of error in cases at law is essential to the exercise of the appellate jurisdiction of this court."); *see also* Erin Morrow Hawley, *The Supreme Court's Quiet Revolution: Redefining the Meaning of Jurisdiction*, 56 WM. & MARY L. REV. (forthcoming 2015) (manuscript at 19) (on file with author).

36 *See* Arbaugh v. Y&H Corp., 546 U.S. 500, 510–11 (2006) (noting that the Court "has sometimes been profligate in its use of the term" jurisdiction).

37 Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998) (citing United States v. Vanness, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)).

38 *See Arbaugh*, 546 U.S. at 510–11 (explaining, for example, that the Court had referred to a non-extendable time limit as jurisdictional, even though the Court's recent jurisprudence indicates that such limits are not jurisdictional).

39 *See Steel Co.*, 532 U.S. at 91 (holding that "drive-by jurisdictional rulings" would "have no precedential effect").

40 Gonzalez v. Thaler, 132 S. Ct. 641, 663 (2012) (Scalia, J., dissenting) (citation omitted) (internal quotation marks omitted).

41 Kontrick v. Ryan, 540 U.S. 443, 455 (2004); *see also Steel Co.*, 523 U.S. at 89 (noting that "subject-matter jurisdiction" refers to "the courts' statutory or constitutional *power* to adjudicate the case").

42 Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1203 (2011).

First, the Court employs "a clear-statement principle"[43] to determine whether the text "clearly states" that the precondition is jurisdictional.[44] The Court then considers whether the structure of the statute compels a jurisdictional conclusion.[45] In particular, the Court considers whether the precondition to suit is located in the jurisdiction-granting provision, a finding that would support jurisdictional scope,[46] and whether there are any other structural statutory factors, such as congressional exceptions to the precondition, that would suggest that the text does not speak in jurisdictional terms.[47]

The Supreme Court's revisionist turn is not without its ambiguities. The Court also looks to context, which sometimes includes past precedent.[48] This is in some tension with its general clear statement approach. In two cases in particular, *Bowles v. Russell*,[49] and *John R. Sand & Gravel Co. v. United States*,[50] the Supreme Court found past precedent, not a clear statement from Congress, to be dispositive.[51] Noting the tension between the precedent-based rationale in these cases and the requirement that Congress "*clearly state*[ ] that a threshold limitation on a statute's scope shall count as jurisdictional,"[52] the Court has sought to moor the cases in some form of congressional intent by relying on congressional acquiescence.[53] Putting to one side

43 *See id.* ("[W]e look to see if there is any 'clear' indication that Congress wanted the rule to be 'jurisdictional.'" (citing *Arbaugh*, 546 U.S. at 515–16)).

44 Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 163 (2010).

45 *Id.* at 163–65.

46 *Id.* at 164–65.

47 *Id.* at 165 ("It would be at least unusual to ascribe jurisdictional significance to a condition subject to these sorts of exceptions."); *see also* Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393–94, 397 (1982) (holding that a statutory exemption from an EEOC filing requirement supports a nonjurisdictional reading of that requirement).

48 *See Reed Elsevier*, 559 U.S. at 168.

49 551 U.S. 205 (2007) (holding the appellate filing deadlines contained within § 2107(a) jurisdictional).

50 552 U.S. 130 (2008) (holding the general six-year federal statute of limitation contained in § 2501 jurisdictional).

51 *See John R. Sand & Gravel Co.*, 552 U.S. at 139 (relying exclusively on "[b]asic principles of *stare decisis*"); *Bowles*, 551 U.S. at 209 (finding dispositive that the Court "has long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional'" (quoting Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 61 (1982) (per curiam))).

52 *Reed Elsevier*, 559 U.S. at 160 (emphasis added) (quoting Arbaugh v. Y&H Corp., 546 U.S. 500, 515 (2006)); *see also id.* at 171 (Ginsburg, J., concurring in part and concurring in the judgment) (recognizing "undeniable tension" between *Bowles* and *Arbaugh*).

53 In *Henderson*, the Court explained *John R.*'s stare decisis holding as one based on context and congressional acquiescence: "When a long line of this Court's decisions left undisturbed by Congress, has treated a similar requirement as jurisdictional, we will presume that Congress intended to follow that course." Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1203 (2011) (citation omitted) (internal quotation marks omitted). Similarly, the Court has recast *Bowles* as "relying on a long line of this Court's decisions left undisturbed by Congress." Union Pac. R.R. v. Bhd. of Locomotive Eng'rs, 558 U.S. 67, 82 (2009); *see also Reed Elsevier*, 559 U.S. at 171–74 (Ginsburg, J., concurring in part and concurring in the judgment) (reconciling decisions based on congressional acquiescence).

the Court's problematic endorsement of congressional acquiescence in situations where Congress has not addressed the issue,[54] *Bowles* and *John R. Sand & Gravel Co.* make clear that a "long line" of past precedent may tip the jurisdictional scales.[55]

In sum, the Court's revisionist turn teaches that a procedural requirement is not automatically "a *jurisdictional* prerequisite."[56] Instead, the Court looks to text, structure, and context.[57] But what does the text, structure, and context of the AIA reveal? That the statute is not jurisdictional.

III. THE ANTI-INJUNCTION ACT

A. Text

The first question under the Supreme Court's revisionist jurisprudence is one of text.[58] The legislature must "clearly state[ ] that a threshold limitation on a statute's scope shall count as jurisdictional."[59] The text of the AIA, 26 U.S.C. § 7421(a), provides:

> Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), and 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.[60]

Although the text of the AIA is an unqualified prohibition of suit except for certain provided circumstances, the Supreme Court has long recognized that a provision may be mandatory and binding on litigants, yet stop short of requiring jurisdictional treatment.[61] Several features of the AIA's language

54 *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 69 (1988) ("Generally, when the Court finds meaning in Congress' inaction, it points to specific legislative consideration of the issue and, either implicitly or explicitly, indicates that Congress' failure to act bespeaks a probable intent to reject the alternative(s).").

55 *See Henderson*, 131 S. Ct. at 1203 ("When a long line of this Court's decisions left undisturbed by Congress has treated a similar requirement as 'jurisdictional,' we will presume that Congress intended to follow that course." (citation omitted) (internal quotation marks omitted)).

56 *Reed Elsevier*, 559 U.S. at 166 (quoting Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982)).

57 *See id.* ("[T]he jurisdictional analysis must focus on the 'legal character' of the requirement . . . which we discerned by looking to the condition's text, context, and relevant historical treatment." (quoting *Zipes*, 455 U.S. at 393–95)); *see also* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 109 (2002) (stating that "our most salient source for guidance is the statutory text").

58 *See* Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006) (noting that "[n]othing in the text of Title VII indicates that Congress intended courts, on their own motion, to assure that the employee-numerosity requirement is met").

59 *Id.* at 515.

60 26 U.S.C. § 7421(a) (2012).

61 *See* Gonzalez v. Thaler, 132 S. Ct. 641, 651 (2012) (rejecting "the notion that 'all mandatory prescriptions, however emphatic, are . . . properly typed jurisdictional'" (quoting Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1205 (2011))); Dolan v.

suggest that, while the statute may be mandatory, it is a nonjurisdictional claims-processing rule, rather than a jurisdictional limitation imposed on federal courts.

To begin, the text of the AIA does not mention jurisdiction in so many words. That fact is not alone dispositive.[62] But it is apiece with the claims-channeling nature of the AIA. The AIA establishes the method and timing of judicial review; it requires litigants to pay a tax before disputing it in a refund action.[63] The Act is, in other words, part of an exhaustion regime that focuses on conditions *litigants* must fulfill to have their day in court, not the adjudicatory authority of the federal courts.[64]

Exhaustion requirements are "quintessential claims-processing rules."[65] Because they "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times,"[66] the Supreme Court often has held threshold exhaustion requirements nonjurisdictional.[67] In *Jones v. Bock*, for example, the Supreme Court held that the Prison Litigation Reform Act's (PLRA) administrative exhaustion requirement—"[n]o action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted"[68]—was not jurisdictional. The precondition to suit did not implicate the adjudicatory authority of the court.[69]

The Court's new precedent, moreover, makes clear that exhaustion regimes may be applied to specific claims by specific litigants (e.g., prisoners raising prison condition claims and copyright holders raising validity claims) without transforming a nonjurisdictional condition into a jurisdictional one. That the PLRA was addressed to a particular type of claim, i.e., ones challenging prison conditions, did not make the condition jurisdictional.[70] So too for

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United States, 560 U.S. 605, 611 (2010) (holding that "shall" does not render a precondition jurisdictional).

62 *See Henderson*, 131 S. Ct. at 1203 (holding that "magic words" are unnecessary).

63 *See* South Carolina v. Regan, 465 U.S. 367, 374 (1984) (holding that the AIA "was merely intended to require taxpayers to litigate their claims in a designated proceeding"). The "by any person" language added in 1966 clarifies that the AIA speaks to the parties, not the courts. 26 U.S.C. § 7421(a) (incorporating the 1966 amendment language). Indeed, the AIA was enacted as an addendum to the tax code's administrative-exhaustion requirement and thus intended to bar suit "only in situations in which Congress had provided the aggrieved party with an alternative legal avenue by which to contest the legality of a particular tax." 465 U.S. at 373.

64 *See* Landgraf v. USI Film Prods., 511 U.S. 244, 274 (1994) ("[J]urisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." (internal quotation marks omitted)).

65 *Henderson*, 131 S. Ct. at 1203.

66 *Id.*

67 *See* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 166 n.6 (2010) (citing Jones v. Bock, 549 U.S. 199, 211 (2007)).

68 *Jones*, 549 U.S. at 204 (quoting 42 U.S.C. § 1997e(a) (2012)) (internal quotation marks omitted).

69 *See id.* at 221.

70 *See id.* at 221–22.

the registration requirement imposed as a precondition to suit on a certain subset of copyright infringement claims by § 411(a) of the Copyright Act.[71]

Because the AIA is concerned with the manner and timing of review, it does not appear to implicate the adjudicatory authority of the federal courts. And like other exhaustion regimes, the AIA does not forever bar federal court review of a class of cases (as does the Tax Injunction Act), but instead assumes that suits blocked by the AIA eventually will end up in federal court.

Reed Elsevier, Inc. v. Muchnick is instructive.[72] In that case, the Court considered whether § 411(a) of the Copyright Act—"no civil action for infringement of the copyright in any United States work shall be instituted" until the copyright is registered—is jurisdictional.[73] Like the AIA, § 411(a) is addressed to particular litigants (owners of unregistered copyrights), couched in mandatory terms, and is part of a remedial scheme. Because the statute placed conditions on plaintiffs (and not the federal courts), the Court found that § 411(a) did not "clearly state[ ]" that its registration requirement was jurisdictional.[74]

In sum, the text of the AIA does not *clearly* indicate jurisdictional status. The statute does not employ jurisdictional language, it is addressed to private litigants, and it is part of an exhaustion regime that eventually provides for federal court review.

B. Structure

The structure of the AIA similarly indicates that the provision is a "claims-processing" rule that directs litigants to a refund action rather than a jurisdictional bar on federal court review.[75]

To begin, the AIA is not located in a jurisdiction-granting provision; it resides in a miscellaneous tax code section that governs procedure and administration. That the AIA "is located in a provision 'separate' from those granting federal courts subject-matter jurisdiction over [the] respective claims" supports a nonjurisdictional reading of the AIA.[76] More specifically, federal district courts have subject matter jurisdiction over federal tax disputes based on the general federal question grant contained in 28 U.S.C. § 1331. And of course § 1331 does not "condition[ ] its jurisdictional grant" on whether taxes have been paid.[77]

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71 *See Reed Elsevier*, 559 U.S. at 157–58 (finding that a condition imposed on a particular type of infringement claim was not jurisdictional).

72 *See id.*

73 *Id.* (quoting 17 U.S.C. § 411(a)).

74 *Id.* at 163.

75 *See id.* at 163–65; Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1205 (2011); Arbaugh v. Y&H Corp., 546 U.S. 500, 514–15 (2006).

76 *Reed Elsevier*, 559 U.S. at 164.

77 *Id.* at 165 (noting that 28 U.S.C. § 1331 and § 1338(a) do not "condition[ ]" jurisdiction on whether "copyright holders have registered their works before suing for infringement"); *see also Arbaugh*, 546 U.S. at 515 ("Title VII's jurisdictional provision" does not "specif[y] any threshold ingredient akin to 28 U.S.C. § 1332's monetary floor.").

Moreover, it is important that the AIA allows federal courts to provide pre-enforcement review of tax challenges in some situations. The *Reed Elsevier* Court found it "significant[ ]" that § 411(a) permitted the adjudication of unregistered claims in three circumstances.[78] The AIA is littered with no less than fourteen statutory exceptions.[79] For example, a taxpayer who receives a deficiency notice may file suit notwithstanding the AIA.[80] So too for taxpayers who are innocent joint filers,[81] who have a third-party interest in property[82] and whose property have been levied.[83] The existence of so many exceptions suggests that Congress did not intend to limit the power of federal courts to hear all pre-enforcement challenges but only to require taxpayers to follow the proper procedures.[84]

The purpose of the AIA also suggests that it is not a jurisdictional statute.[85] Efficient administration of the tax code lies at the heart of the Act.[86] Congress enacted the AIA to prevent federal courts from interfering "with the process of collecting the taxes on which the government depends for its continued existence,"[87] and "to require that the legal right to the disputed

78 *Reed Elsevier*, 559 U.S. at 165 (finding it "significant[ ]" that the AIA "expressly allows courts to adjudicate [unexhausted] claims").

79 26 U.S.C. § 7421(a) (2012).

80 26 U.S.C. § 6212(a), (c).

81 26 U.S.C. § 6015(e).

82 26 U.S.C. § 7426(a)(1), (b).

83 26 U.S.C. § 6330(e)(1) ("Notwithstanding the provisions of section 7421(a), the beginning of a levy or proceeding during the time the suspension under this paragraph is in force may be enjoined by a proceeding in the proper court, including the Tax Court."); 26 U.S.C. § 6672(c)(1) ("Notwithstanding the provisions of section 7421(a), the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court."); 26 U.S.C. § 6694(c)(1) ("Notwithstanding the provisions of section 7421(a), the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court."); 26 U.S.C. § 7426(b) ("The district court shall have jurisdiction to grant" an injunction to prohibit the enforcement of such levy or to prohibit such sale as "appropriate"); 26 U.S.C. § 7429(b) (authorizing review of jeopardy levy or assessment).

84 Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 165 (2010) ("It would be at least unusual to ascribe jurisdictional significance to a condition subject to these sorts of exceptions."); *see also* Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393–94, 397 (1982) (stating that Congress's approval of Title VII relief to claimants who had not complied with the EEOC filing requirement supports a nonjurisdictional reading of that requirement).

85 Legislative purpose is in some tension with the clear statement requirement, but the Court has resorted to it in jurisdictional cases. *See* Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1206 (2011) (finding that Congress could not have intended for the deadline for filing a notice of appeal with the Veterans Court "to carry the harsh consequences that accompany the jurisdiction tag").

86 *See* Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962) ("The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue.").

87 State R.R. Tax Cases, 92 U.S. 575, 613 (1875).

sums be determined in a suit for refund."[88] As the government has explained, these purposes may be best served by pre-enforcement review.

In *Helvering v. Davis*,[89] for example, a shareholder brought suit to restrain the Edison Corporation from deducting payroll taxes as required by the Social Security Act.[90] The Commissioner of Internal Revenue intervened.[91] In light of the serious budgetary and administrative problems that would result from a delay in determining the validity of the Social Security tax, the government sought pre-enforcement review.[92] And when the Supreme Court granted certiorari, the government argued that the Court should proceed to the merits of the case notwithstanding the AIA: the core purposes of the statute were best served by prompt resolution.[93] The AIA, the government explained, "was enacted to promote, not to discourage, the orderly administration and collection of Government revenues."[94] In *Helvering*, "the litigation of an injunction suit [was] more important for the protection of the revenues than insistence upon adherence to the ordinary procedure of payment followed by a suit for refund."[95]

Helvering was not a one-off decision. The government also sought pre-enforcement review of the Bituminous Coal Act of 1937 in *Sunshine Anthracite Coal Co. v. Adkins*,[96] "expressly waiv[ing]" its "'defense'" under the AIA.[97] Similarly, the government urged the Court to review the constitutionality of a tax prior to its enforcement in *Pollock v. Farmers' Loan & Trust Co.*,[98] and "explicitly waived" any question as to jurisdiction.[99] Most recently, the government sought pre-enforcement review of the constitutionality of § 5000A, the individual mandate, arguing that the Supreme Court should decide whether the penalty was constitutional *before* any person had paid it.[100]

In short, situations exist where the "primary purpose" of the AIA—"enabling the prompt and efficient assessment and collection of taxes on which

88 Bob Jones Univ. v. Simon, 416 U.S. 725, 736 (1974) (quoting *Williams Packing*, 370 U.S. at 7) (internal quotation marks omitted). The Court has also identified "a collateral objective of the Act—protection of the collector from litigation pending a suit for refund." *Williams Packing*, 370 U.S. at 7–8.

89 301 U.S. 619 (1937).

90 *Id.* at 619.

91 *Id.*

92 Brief for Petitioners at 22–23, *Helvering*, 301 U.S. 619 (No. 36-910).

93 *Id.*

94 *Id.* at 31.

95 *Id.*

96 310 U.S. 381 (1940).

97 Brief for the Appellee at 9, *Sunshine*, 310 U.S. at 381 (No. 804).

98 157 U.S. 429 (1895), *reh'g granted and opinion vacated*, 158 U.S. 601 (1895).

99 *Id.* at 554 ("[S]o far as it was within the power of the government to do so, the question of jurisdiction, for the purposes of the case, was explicitly waived on the argument.").

100 Supplemental Brief for Appellees at 2, Liberty Univ., Inc. v. Geithner, 671 F.3d 391 (4th Cir. 2011) (No. 10-2347), *rev'd*, 133 S. Ct. 679 (2012) (explaining that the government had reconsidered its position on the AIA and "concluded that the [Act] does not foreclose the exercise of jurisdiction in these cases").

the government's operations depend"[101]—is best served by pre-enforcement review. To accord the AIA jurisdictional status would in every case preclude the prompt review of a tax statute. As the government argued in *Helvering*, this would "discourage" rather than encourage "the orderly administration and collection of Government revenues."[102] The core purpose of the AIA, and its structure more generally, thus suggest that the Act is not jurisdictional.

C. Context

The Supreme Court's revisionist jurisdictional doctrine looks to context, which includes an assortment of statutory interpretation tools like history, the interpretation of similar statutes, and—the factor that has received the most attention in *NFIB* and other cases—past precedent. The context inquiry demonstrates that the AIA is not jurisdictional.

History. The clear statement approach may preclude resort to legislative history,[103] but in all events, the AIA's legislative history does not clearly indicate that Congress intended the provision to carry jurisdictional water. Indeed, the statute, the Court has remarked, "apparently has no recorded legislative history."[104]

Still, some indicators of congressional motive can be gleaned from context. In 1867, Senator Fessenden, Chairman of the Senate Finance Committee,[105] offered the AIA as an amendment to section 19 of the Internal Revenue Act of July 13th, 1866, which requires the exhaustion of administrative tax remedies.[106] The amendment was part of a much larger reconstruction bill, House Bill 1161, aimed at maintaining revenues sufficient to pay down Civil War debt, lowering Civil War income tax rates, and setting specific tax rates on a whole host of items, like whiskey and tobacco.[107] The House of Representatives agreed to the amendment only after conference, but no

101 Brief for Petitioners at 5–6, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-398).

102 Brief for Petitioners at 31, Helvering v. Davis, 301 U.S. 619 (1937) (No. 36-910).

103 *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY 989 (4th ed. 2007) ("Even if there were a coherent legislative 'intent' (a matter Scalia disputes), it would have no authority as law under the Constitution.").

104 Bob Jones Univ. v. Simon, 416 U.S. 725, 736 (1974); *see also* Note, *Enjoining the Assessment and Collection of Federal Taxes Despite Statutory Prohibition*, 49 HARV. L. REV. 109, 109 n.9 (1935) ("[T]he amendment's progress was devoid of reported comment.").

105 *See* CONG. GLOBE, 39th Cong., 2d Sess. 1933, 1949, 1950, 1968, 1979, 1997 (1867) (wherein other senators address Senator Fessenden as "the chairman of the Committee on Finance").

106 Internal Revenue Act of July 13th, 1866, ch. 184 § 19, 14 Stat. 98, 152 ("[N]o suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue . . . .").

107 *See* CONG. GLOBE, 39th Cong., 2d Sess. 1939 (1867) (repeatedly referring to H.R. 1161 as a bill "to amend existing laws relating to internal revenue").

record of any negotiations exist.[108] And despite statements indicating that the Senate Finance Committee and the Conference Committee each prepared a report, neither report nor any other legislative history appears to exist.[109]

As originally proposed by Senator Fessenden, the amendment precluded any "suit *in equity or otherwise* for the purpose of restraining the assessment or collection of tax [from being] maintained in any court."[110] We have no record of when or why the "in equity or otherwise" language was dropped from the amendment, but the bill as reported out of conference no longer referred to suits in equity.[111] The deletion of the phrase may represent a compromise between two competing purposes of House Bill 1161: to provide the IRS with more enforcement authority vis-à-vis tax cheats and to rein in well-documented abuses of authority by undertrained and corrupt IRS agents.

Given the latter concern, it is unlikely that a *jurisdictional* AIA would have passed without debate. Indeed, just minutes before Senator Fessenden proposed the AIA, Senator Davis, a Democrat from Kentucky, offered an amendment that would have taken the power to remit or mitigate fines away from the Treasury Department and given it to the courts.[112] The Senate rejected the amendment, but only after Senator Fessenden spoke in favor of the status quo[113]:

> The universal system has been in all our revenue laws to leave these matters to be relieved by the proper authorities, if they are satisfied, on the whole, that the relief ought to be given; *and I hope that the system which has always been in operation will not be changed now.* It is difficult enough to procure a conviction for a breach of the revenue law, and this will make it more so. *I hope the Senate will not interfere with a system so well established.*[114]

Senator Fessenden, then, regarded the well-established system as appropriate. This system provided for equitable review of taxes in limited circum-

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108 *See id.* at 1949 (describing a message from the House of Representatives requesting a conference on the disagreement between the House and the Senate concerning the Senate's amendments to House Bill 1161); *id.* at 1968 (reporting the agreements reached during the conference).

109 *See* South Carolina v. Regan, 465 U.S. 367, 387 n.4 (1984) (O'Connor, J., concurring) ("No other recorded legislative history has been uncovered."); Israel Herman Gorovitz, *Federal Tax Injunctions and the Standard Nut Cases*, TAX MAG., Dec. 1932, at 446 n.6 ("[N]either the House nor Senate committee reports are on file at the Library of Congress or the Government Printing Office. It is probable, therefore, that they were not printed."); Note, *supra* note 104, at 109 n.9 ("[T]he amendment's progress was devoid of reported comment.").

110 CONG. GLOBE, 39th Cong., 2d Sess. 1933 (1867) (emphasis added).

111 *Id.*; *see also* H.R. 1161, 39th Cong. (1867) (enacted).

112 CONG. GLOBE, 39th Cong., 2d Sess. 1932 (1867) (emphasis added).

113 *See id.* at 1933.

114 *Id.* (emphasis added).

stances.[115] Moreover, while many senators expressed concerns over rampant tax evasion, none expressed any concerns over *judicial* meddling.

In short, the sparse legislative record does not clearly indicate that Congress intended the Anti-Injunction Act of 1867 to be jurisdictional. If Congress had intended the AIA to strip the federal courts of all jurisdiction over tax cases (at least prior to exhausting an administrative appeal and paying the disputed tax), one would think the issue would have been discussed on the floor of either the House or Senate—especially given concerns about abusive and corrupt agency officials. One would also expect the government to advance the no-jurisdiction position on the heels of the AIA's enactment. And one would expect leading equity and taxation experts of the day to devote substantial paragraphs, if not pages, to explaining the effects of the Act. But no mention of the AIA exists in the House or Senate debates, the government asserted the power to waive the AIA defense in early cases (a position inconsistent with a jurisdictional measure), and the leading equity and tax treatises of the day (published in 1881) do not so much as mention the AIA.[116]

Moreover, there was no pressing need to foreclose federal jurisdiction because such jurisdiction over tax challenges rarely existed. General federal question jurisdiction had yet to be conferred on the federal courts, and in 1867, the only way a taxpayer could challenge a tax in federal court was by suing a non-diverse defendant.[117] Since the agent responsible for collection

115 *See infra* notes 235–36 and accompanying text.

116 *See* THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION (Chicago, Callahan & Co. 2d ed. 1881); 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 129, at 111–13 (San Francisco, A.L. Bancroft & Co. 1st ed. 1881).

117 In 1833, with states threatening to annul customs laws, Congress conferred on the circuit courts jurisdiction of "all cases, in law or equity, arising under the revenue laws of the United States, for which other provisions are not already made." Force Act of 1833, ch. 57, § 2, 4 Stat. 632, 632. Under the Force Act, as it was known, a taxpayer could file suit against a collector, though a citizen of the same state. *Id.* at 632–33. The Force Act also gave collectors the right to remove an action arising under the revenue laws to federal court. *Id.* at 633–34. It was initially unclear whether the Force Act's grant of jurisdiction applied to suits challenging the Civil War income taxes. Congress said yes in section 50 of the Internal Revenue Act of 1864. Act of June 30, 1864, ch. 173, § 50, 13 Stat. 223, 241. In 1866, however, Congress changed its mind, repealing section 50 of the 1864 Act and specifying that the Force Act would not apply to cases arising under internal revenue (as opposed to customs) laws. Internal Revenue Act of July 13th, 1866, ch. 184, §§ 67–68, 14 Stat. 98, 171–72. The 1866 Internal Revenue Law kept in place a provision for removal to federal court by the collecting agent. *Id.* After 1866, then, the federal courts had limited jurisdiction over federal tax controversies: the parties must either be diverse or the collecting agent must remove the action to federal court. *Id.*; Assessors v. Osbornes, 76 U.S. (9 Wall.) 567, 572 (1869); City of Philadelphia v. Collector, 72 U.S. (5 Wall.) 720, 729–30 (1866). Bryan Camp argues that the AIA was intended to plug the statutory hole that sometimes allowed courts to exercise their equity jurisdiction before a tax had been paid. Camp, *supra* note 11, at 1336. Professor Camp does not marshal any contemporaneous evidence for this point—aside from noting that the equity hole existed—and it is difficult to see why Congress would have deleted the phrase "in equity or otherwise" from the text of the Amendment if it had this purpose in view. Camp also fails to recognize that Con-

almost always resided in the same state as the taxpayer, tax challenges normally were litigated in the state courts—with the possibility of Supreme Court review under section 25 of the Judiciary Act.

Subsequent statutory history does not support a jurisdictional AIA either. The caselaw has never supported a jurisdictional reading of the AIA, thus Congress could not have affirmed such a reading.[118] Moreover, in amending the statute to clarify various exceptions, Congress never focused on the jurisdictional question.[119] Thus, even if the Court's decisions could be read for a jurisdictional AIA, the Supreme Court is unlikely to give weight to subsequent legislative history where, as here, Congress did not specifically consider the issue.[120]

Similar Statutes. There are no similar statutes that suggest the AIA is jurisdictional. During the healthcare litigation, the government argued that the jurisdictional nature of the Tax Injunction Act (TIA) meant that the AIA was jurisdictional.[121] But the TIA, while modeled on the AIA,[122] is different in critical ways. Most importantly, the text of the TIA is plainly directed to the *power* of the federal district courts, providing: "The *district courts shall not*

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gress had removed most federal jurisdiction over tax cases in 1866. § 68, 14 Stat. at 172. The later treatise cited by Professor Camp does not establish that the AIA was intended to circumscribe equitable jurisdiction, but instead admits that injunctions might be granted "when sufficient ground for equitable relief was shown." *See* ROGER FOSTER & EVERETT V. ABBOT, A TREATISE ON THE FEDERAL INCOME TAX UNDER THE ACT OF 18 94, § 72, at 233 (1895). Professor Camp fails to recognize the nature of equity jurisdiction—which allowed the Court to adjudicate tax lawsuits in certain circumstances. In this vein, even if the history is ambiguous, the federal courts quickly and decisively interpreted the AIA to permit federal lawsuits in cases where equity would permit. As Camp notes, Congress was not shy about reversing court decisions interpreting the federal tax laws, but remained silent with respect to the AIA. Camp, *supra* note 11, at 1337.

118 *See infra* subsection III.C.1.

119 Congress amended the statutes at various times to provide for various exceptions to the statutes. *See* 26 U.S.C. § 7421(a) (2012) (noting the added language and inserted references to various code sections in subsection (a)). And, in 1966, when Congress amended the AIA, inserting the phrase "by any person, whether or not such person is the person against whom such tax was assessed," *id.*, this merely clarified that the third-party cause of action granted by the newly enacted Federal Tax Lien Act was exclusive: third-party filers were subject to the AIA. South Carolina v. Regan, 465 U.S. 367, 377 (1984) (citing Bob Jones Univ. v. Simon, 416 U.S. 725, 731 n.6 (1974)). In doing so, Congress said nothing one way or the other about whether the AIA was jurisdictional, and indeed, the wording of the amendment suggests that Congress viewed the AIA as a condition on litigants, not courts.

120 *See* Eskridge, *supra* note 54, at 69. When the Court finds meaning in congressional inaction, as it would have to do in inferring that Congress meant to codify the Court's AIA decisions, it usually "points to specific legislative consideration of the issue and, either implicitly or explicitly, indicates that Congress' failure to act bespeaks a probable intent to reject the alternative(s)." *Id.*

121 Brief for Petitioners at 13–15, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-398).

122 Hibbs v. Winn, 542 U.S. 88, 102 (2004) ("In composing the [Tax Injunction Act's] text, Congress drew particularly on . . . the Anti-Injunction Act."); Jefferson Cnty. v. Acker, 527 U.S. 423, 434 (1999) ("The federal statute Congress had in plain view was" the AIA).

enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."[123] Further, federalism concerns animate the TIA, which according to its legislative history, was designed expressly to restrict "the jurisdiction of the district courts of the United States over suits relating to the collection of State taxes."[124] The TIA, unlike the AIA, is located in 28 U.S.C. § 1341—the section of the United States Code that provides for the jurisdiction of the district courts. And as the Supreme Court explained with respect to these very statutes, when Congress clearly addresses a subject in the TIA, but not in the AIA, that "indicates" that if Congress had desired the AIA to have the same effect "it would have said so explicitly."[125] Congress's "failure to do so" means the two statutes operate differently.[126]

During the Affordable Care Act litigation, the government also relied upon 26 U.S.C. § 7422(a)—the statute the AIA originally amended in 1867.[127] The government argued that, because the AIA "works in tandem" with § 7422(a), and "uses materially identical language,"[128] the Court's conclusion that the preconditions to suit contained in § 7422(a) are jurisdictional means that the AIA is too.[129]

The government's reliance on § 7422(a) is a stretch, however. As the state litigants pointed out, § 7422(a) was not the deciding factor in any of the cases cited by the government.[130] In each case, the taxpayer had complied with § 7422(a)'s refund requirement but failed to timely file under a different statute, 26 U.S.C. § 6511(a).[131] Thus any loose characterization of § 7422(a) as jurisdictional would not be entitled to precedential weight.[132] Further, the exhaustion requirement contained in § 7422(a), like the AIA,

123 28 U.S.C. § 1341 (2012) (emphasis added). Indeed, the original wording of the Act provided "no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy or collection of any [state] tax." Tax Injunction Act, Pub. L. No. 75-332, § 1, 50 Stat. 738, 738 (1937). The statute was reworded in 1948, without affecting its substance. *See* Levin v. Commerce Energy, Inc., 130 S. Ct. 2323, 2335 n.10 (2010) (stating that the courts have continued to regard the statute as jurisdictional after the rewording).

124 S. Rep. No. 75-1035, at 1 (1937).

125 Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 6 (1962).

126 *Id.*; *see also* Gonzalez v. Thaler, 132 S. Ct. 641, 649 (2012) (noting that "unambiguous jurisdictional terms" in a related statute are evidence that Congress "would have spoken in clearer terms if it intended [the statute] to have similar jurisdictional force").

127 Brief for Petitioners at 13–15, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-398).

128 26 U.S.C. § 7422(a) ("No suit . . . shall be maintained in any court for the recovery of any . . . tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary . . . .").

129 *See* Brief for Petitioners at 13–15, *NFIB*, 132 S. Ct. 2566 (No. 11-398).

130 Reply Brief for State Respondents at 5, *NFIB*, 132 S. Ct. 2566 (No. 11-398).

131 *Id.* (citing United States v. Brockamp, 519 U.S. 347, 349 (1997); Comm'r v. Lundy, 516 U.S. 235, 243 (1996); United States v. Dalm, 494 U.S. 596, 600 (1990)).

132 *See id.* ("This Court's references to the status of section 6511(a)'s filing deadline shed absolutely no light on the AIA.").

appears to operate as a quintessential claims-processing rule: it "seek[s] to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."[133] In short, there is no similar statute that indicates that the 39th Congress intended for the AIA to be jurisdictional.

Precedent. Under the conventional view, scholars, jurists, and litigators assert that—even if the text and structure of the AIA do not clearly indicate that Congress intended the AIA to operate jurisdictionally—the AIA is jurisdictional because a long line of Supreme Court cases support a jurisdictional reading.[134] This view, however, is based on a cursory and incomplete assessment of the caselaw. Indeed, as most everyone admits, the Supreme Court has at times viewed the AIA as something less than a jurisdictional bar.[135]

The Supreme Court's meandering caselaw is inconsistent with a jurisdictional reading of the AIA in three ways. First, the Supreme Court's early interpretation of the AIA as an equitable statute, culminating in its decision in *Miller v. Standard Nut Margarine Co. of Florida*,[136] cannot be reconciled with a traditionally jurisdictional reading. Second, two judicially created exceptions to the AIA are well-established: the Supreme Court has long held that the AIA does not apply in "extraordinary circumstances" nor does it when the party challenging a tax statute has no alternative remedy at law. Finally, the Supreme Court has repeatedly accepted the government's waiver of the AIA defense, and proceeded to the merits—actions illegitimate under a jurisdictional reading of the AIA.

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133 Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1203 (2011); *see also* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 166 (2010) (treating "threshold requirements" as nonjurisdictional). As for the Court's references to § 6511(a)'s filing deadline as being jurisdictional, there are no substantive or textual similarities between that statute and the AIA, and the Court has made clear that filing deadlines are of a different stripe altogether. *See* Bowles v. Russell, 551 U.S. 205, 210 (2007) ("Although several of our recent decisions have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules, none of them calls into question our longstanding treatment of statutory time limits for taking an appeal as jurisdictional."). As for the point that § 7422(a) and the AIA operate "in tandem," it is not unusual for different aspects of a remedial scheme to carry different jurisdictional consequences. *See* Gonzalez v. Thaler, 132 S. Ct. 641, 664–65 (2012) (Scalia, J., dissenting) (considering some, but not all, certificate of appealability requirements jurisdictional).

134 Brief for Court-Appointed Amicus Curiae Supporting Vacatur at 10, *NFIB*, 132 S. Ct. 2566 (No. 11-398) (citing Bob Jones Univ. v. Simon, 416 U.S. 725, 749 (1974); Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 5 (1962)); *see also* Brief for Petitioners at 3–5, *NFIB*, 132 S. Ct. 2566 (No. 11-398) ("This Court has repeatedly described the AIA as jurisdictional in nature and it has held that other, related provisions also rank as jurisdictional."); Seven-Sky v. Holder, 661 F.3d 1, 26–28 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("Since the Anti–Injunction Act's enactment in 1867, the Supreme Court has consistently ruled that the Act is jurisdictional."), *abrogated by NFIB*, 132 S.Ct. 2566.

135 Brief for Court-Appointed Amicus Curiae Supporting Vacatur at 7, *NFIB*, 132 S. Ct. 2566 (No. 11-398) (describing "a cyclical pattern" of allegiances to and departures from the "plain meaning" of the act (quoting *Bob Jones*, 416 U.S. at 745)).

136 284 U.S. 498 (1932).

1. *Standard Nut*

Standard Nut is problematic to a jurisdictional reading. In that case, the IRS assessed a ten-cent per pound back tax on Southern Nut Product, a vegetable-based spread, under the Oleomargarine Act of 1886.[137] Prior to the assessment, three federal courts had held similar products nontaxable, and, by letter ruling, the IRS had informed Standard Nut that Southern Nut Product was not subject to the tax.[138] Standard Nut then marketed its product at a three-cent per pound profit.[139] After the IRS reversed course, Standard Nut filed suit to enjoin the ten-cent back tax alleging that it "would destroy [Standard Nut's] business, ruin it financially and inflict loss for which it would have no remedy at law."[140]

The Supreme Court upheld a pre-enforcement injunction restraining collection of the ten-cent tax. The AIA did not apply because of "special and extraordinary facts and circumstances."[141] The AIA, the Supreme Court reasoned, was merely "declaratory of the principle" that equity usually, but not always, disallows tax injunction suits.[142] As a result, "extraordinary and exceptional circumstances"—though not mentioned in the text of the AIA—"render[ed] its provisions inapplicable."[143] And while the Court previously had given effect to the AIA, it had "never held the rule to be absolute, but ha[d] repeatedly indicated that extraordinary and exceptional circumstances render its provisions inapplicable."[144]

The standard trope is to view *Standard Nut* as an aberration. Courts and recent commentators first point to an early period of "literal" interpretation of the AIA, a period of time in which courts purportedly construed the AIA to be jurisdictional.[145] The 1937 decision in *Standard Nut* is then viewed as a "judicial departure" from the "plain meaning" of the AIA, followed by a return to the "plain meaning" in *Williams Packing*.[146]

But *Standard Nut* is not an erratic departure from prior caselaw. Many of the very first federal courts to address the AIA, and the Supreme Court's first cases involving that statute, endorsed equitable exceptions.[147] Indeed, early federal courts read the AIA in light of the equitable rules that governed tax injunctions suits before the AIA and construed the AIA in harmony with pre-

137 *Id.* at 502.
138 *Id.* at 510.
139 *Id.* at 505.
140 *Id.* at 510–11.
141 *Id.* at 511.
142 *Id.* at 509.
143 *Id.* at 510.
144 *Id.* at 510–11 (citing Graham v. Du Pont, 262 U.S. 234, 257 (1923); Hill v. Wallace, 259 U.S. 44, 62 (1922); Dodge v. Brady, 240 U.S. 122, 126 (1916); Dodge v. Osborn, 240 U.S. 118, 121 (1916); Brushaber v. Union Pac. R.R., 240 U.S. 1, 9–10 (1916)).
145 Bob Jones Univ. v. Simon, 416 U.S. 725, 742 (1974).
146 *Id.* ("[*Williams Packing*] spells an end to a cyclical pattern of allegiance to the plain meaning of the Act, followed by periods of uncertainty caused by a judicial departure from that meaning, and followed in turn by the Court's rediscovery of the Act's purpose.").
147 *See* cases cited *infra* notes 246–47.

existing equitable exceptions.[148] These cases pre-date the *Standard Nut* decision and put to rest the argument that the early Supreme Court interpreted the AIA as a jurisdictional statute. Indeed, one commentator summed up his recitation of the first sixty years of (pre-*Standard Nut*) caselaw with the conclusion that "it would appear that [the AIA] may not be read literally."[149] Another commentator summarizing the early caselaw similarly concluded that the AIA "prohibits the granting of an injunction restraining the collection of federal taxes unless its provisions are rendered inapplicable to a particular case because of extraordinary and exceptional circumstances."[150] In short, as the Supreme Court explained in *Standard Nut*, while the early Supreme Court gave effect to the AIA in a number of cases, "[i]t ha[d] never held the rule to be absolute"[151]—as would be true of a jurisdictional statute.

2. Equitable Exceptions

Early caselaw permitting federal courts to entertain suits to restrain the assessment or collection of taxes in some circumstances has culminated in two well-established judicial exceptions to the AIA. The Supreme Court has long taken the view that the Act does not always apply to cases seemingly within its terms. It has consistently held that the AIA does not apply in certain "extraordinary circumstances" and is also inapplicable when the taxpayer has no alternative remedy at law. These equitable exceptions are irreconcilable with the view of the AIA as a jurisdictional statute.

The "Extraordinary Circumstances" Exception. In a series of cases, the Court held that the AIA "does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable."[152]

While the Supreme Court's most recent AIA decisions take a cramped view of what constitutes an extraordinary circumstance, they continue this

148 *See* cases cited *infra* notes 246–47.

149 Joseph L. Lewinson, *Restraining the Assessment or Collection of a Federal Tax*, 14 CALIF. L. REV. 461, 462 (1926).

150 Clarence A. Miller, *Restraining the Collection of Federal Taxes and Penalties by Injunction*, 71 U. PA. L. REV. 318, 339 (1923); *see also* John C. Gall, *Enjoining the United States*, 10 VA. L. REV. 194, 194 (1923) (noting that despite the fact that the text of the AIA does not "make any provision whatever for unusual cases which may arise . . . upon an examination of the decided cases we find that a great number of suits of this character have been entertained in the federal courts"); Comment, *Taxation—Right of Federal Taxpayer to Question Validity of a Federal Tax—Effect of Section 3224 of the United States Revised Statutes*, 34 MICH. L. REV. 716, 718 (1936) ("Since the machinery of government cannot operate unless taxes are promptly available, the Supreme Court decided quite early that under ordinary circumstances the federal courts will not interfere with the collection of taxes by injunction.").

151 Miller v. Standard Nut Margarine Co., 284 U.S. 498, 509–10 (1932).

152 Hill v. Wallace, 259 U.S. 44, 62 (1922); *see also* Bailey v. George, 259 U.S. 16, 20 (1922) ("There must be some extraordinary and exceptional circumstance . . . to make the provisions of the section inapplicable."); Dodge v. Osborn, 240 U.S. 118, 122 (1916) ("[I]t is obvious that the statute plainly forbids the enjoining of a tax unless by some extraordinary and entirely exceptional circumstance its provisions are not applicable.").

tradition. In 1962, *Williams Packing* reaffirmed an equitable exception to the AIA. In that case, the district court relied on prior Supreme Court precedent to enjoin a tax on the extraordinary-circumstances ground that "collection would destroy [the taxpayer's] business."[153] The Supreme Court reversed, holding that the AIA could not be avoided "merely because collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise."[154] The Court did not, however, question the legitimacy of equitable exceptions writ large, as one would expect for a truly jurisdictional statute. Instead, in an odd twist, the Court switched the focus from irreparable harm to likelihood of success on the merits.[155] "[I]f it is clear that under no circumstances could the government ultimately prevail," the Court wrote, "the attempted collection may be enjoined if equity jurisdiction otherwise exists."[156] The Court then examined the *merits* of the taxpayer's claim (hardly a jurisdictional sort of inquiry) and concluded that the case must be dismissed because "[t]he record before us clearly reveals that the Government's claim of liability was not without foundation."[157]

The Supreme Court's most recent pronouncement on the issue in *Bob Jones University v. Simon* is also inconsistent with a jurisdictional reading of the AIA because it endorses the *Williams Packing* exception.[158] *Bob Jones* involved a challenge to the IRS's revocation of Bob Jones's tax-exempt status.[159] The Supreme Court first held that the action was a suit "for the purpose of restraining the assessment or collection of any tax" within the terms of the AIA.[160] But that was not the end of the matter. The Court went on to describe a two-factor exception to the "literal terms of § 7421 (a): first, irreparable injury . . . and second, certainty of success on the merits."[161] Because the merits of Bob Jones University's claims were "debatable," the equitable exception to the AIA did not apply.[162]

The No Alternative Remedy at Law Exception. From its earliest days, the AIA has also been interpreted to permit a taxpayer without an adequate remedy at law to enjoin a tax. The Supreme Court, for example, routinely permitted shareholders to challenge corporate taxes notwithstanding the AIA on grounds the shareholders had no adequate remedy at law once the tax was

153 Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 2 (1962) (citing Williams Packing & Navigation Co. v. Enochs, 176 F. Supp. 168 (S.D. Miss. 1959)).

154 *Id.* at 6.

155 Bob Jones Univ. v. Simon, 416 U.S. 725, 745 (1974) (describing the switch "from a showing of the degree of harm to the plaintiff . . . to the requirement that it be established that the Service's action is plainly without a legal basis").

156 *Williams Packing*, 370 U.S. at 7. In such a situation the exaction is merely in "the guise of a tax." *Id.* (quoting *Standard Nut*, 284 U.S. at 509) (internal quotation marks omitted).

157 *Id.* at 8.

158 *Bob Jones*, 416 U.S. at 737.

159 *Id.* at 725.

160 *Id.* at 738.

161 *Id.* at 737 (citing *Williams Packing*, 370 U.S. at 6–7).

162 *Id.* at 749 (citing *Williams Packing*, 370 U.S. at 7).

paid.[163] And in a 1938 case, *Allen v. Regents of University System of Georgia*, the Supreme Court held the AIA "inapplicable" to a third-party tax challenge.[164] In that case, the IRS levied a penalty on the University of Georgia for failure to collect a tax on athletic events.[165] Since the University did not bear the incidence of the tax, it had no way to challenge the tax penalty, and the Supreme Court found that the AIA did not bar the suit.[166]

The more recent decision in *South Carolina v. Regan* reaffirmed a narrow remedy at law exception, and is inconsistent with a jurisdictional interpretation of the AIA.[167] In *Regan*, South Carolina challenged the constitutionality of "a tax on the interest earned on state obligations issued in bearer form."[168] The government argued that "a plaintiff may only sue to restrain the collection of taxes if it satisfies the narrow exception to the Act enunciated in *Williams Packing*."[169] The Court disagreed, concluding that, since the AIA was an amendment to a remedial statute providing for administrative review, the "circumstances of [the AIA's] enactment strongly suggest that Congress intended the Act to bar a suit only in situations in which Congress had provided the aggrieved party with an alternative legal avenue by which to contest the legality of a particular tax."[170] Since South Carolina was "unable to utilize any statutory procedure" to challenge the bond tax, the AIA did not prevent the issuance of an injunction.[171]

The Court's recent and repeated affirmation of some stripe of the "extraordinary and exceptional circumstances" test, and its conclusion that the AIA does not apply where Congress has not provided an alternate legal avenue, are difficult to reconcile with a jurisdictional bar. As the Supreme Court explained long ago, a jurisdictional limit admits of no court-created equitable exception, even if a meritorious litigant is left wholly without remedy.[172] Because the Court's "power to hear and determine a case" is conferred by Congress, Congress alone may determine "the manner in which the

163 Graham v. Du Pont, 262 U.S. 234, 257–58 (1923); Brushaber v. Union Pac. R.R., 240 U.S. 1, 26 (1916); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 554 (1895), *reh'g granted and opinion vacated*, 158 U.S. 601 (1895).

164 Allen v. Regents of Univ. Sys., 304 U.S. 439, 449 (1938).

165 *Id.* at 441–44.

166 *Id.* at 449.

167 South Carolina v. Regan, 465 U.S. 367, 373–74 (1984).

168 *Id.* at 372.

169 *Id.* at 374.

170 *Id.* at 373.

171 *Id.* at 380.

172 United States v. Curry, 47 U.S. (6 How.) 106, 113 (1848); *see also* Dolan v. United States, 560 U.S. 605, 609 (2010) (stating that, if a statute imposes a jurisdiction limit, then that limit is absolute); Bowles v. Russell, 551 U.S. 205, 214 (2007) (stating that, if a statute imposes a jurisdiction limit, then that limit is absolute); Arbaugh v. Y&H Corp., 546 U.S. 500, 514–16 (2006) (stating that, if a statute imposes a jurisdiction limit, then that limit is absolute); Kontrick v. Ryan, 540 U.S. 443, 452 (2004) (stating that the statute at issue was nonjurisdictional and the Court could, therefore, make an exception to it).

case shall be brought," and the Court "ha[s] no power to dispense with any of these provisions, nor to change or modify them."[173]

During the Affordable Care Act litigation, the government argued that the *Williams Packing* and *Regan* exceptions were "a product of statutory interpretation, rooted in the AIA's text and purpose."[174] Judge Kavanaugh agrees, writing that *Williams Packing* and *Regan* stand for the unremarkable proposition that "the status of a statute as jurisdictional does not disable the courts from interpreting the statute and Congress's intent by means of the usual tools of statutory construction."[175] Yet the usual tools of statutory construction do not yield a conditional AIA. Neither the text nor its structure says anything about extraordinary circumstances in which the government puts on a bad case, or where the aggrieved party has no alternate remedy at law. Indeed, the Supreme Court has itself referred to the former exception as a "judicially created" exclusion.[176]

3. Waiver

In several cases, the government has taken the position that it may waive an AIA defense, and the Court has proceeded on the merits—facts inconsistent with a jurisdictional AIA. Most notably, in *Helvering v. Davis*, the government explained its view that the AIA "may be waived by an appropriate officer of the United States."[177] In that case, a shareholder challenged the withholding provisions of the Social Security Act.[178] The First Circuit declared that payroll taxes violated the Tenth Amendment, and the government sought review by the Supreme Court.[179] Before the Court, the government argued that the Supreme Court "should render a decision on the merits" because "waiver [of the AIA] is certainly within the power of the appropriate officers of the Government."[180] Since parties may not waive a

173 *Curry*, 47 U.S. (6 How.) at 113.

174 Brief for Petitioners at 16, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-398); *see also* Seven-Sky v. Holder, 661 F.3d 1, 29–34 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (going through the usual tools of statutory interpretation in order to see if the AIA applies), *abrogated by NFIB*, 132 S. Ct. 2566.

175 *Seven-Sky*, 661 F.3d at 29 n.8 (Kavanaugh, J., dissenting).

176 *Regan*, 465 U.S. at 372. The government also defended the equitable exception by arguing that in cases in which it is clear that the government cannot ultimately prevail, "the central purpose of the Act is inapplicable" and "the exaction is merely in the guise of a tax." Brief for Petitioners at 3–5, *NFIB*, 132 S. Ct. 2566 (No. 11-398) (quoting Miller v. Standard Nut Margarine Co., 284 U.S. 498, 509 (1932)) (internal quotation marks omitted). But a broad resort to purpose does not allow the Court to create equitable exceptions to jurisdictional requirements. Further, the Court has long held that allegations of illegality are insufficient to sustain jurisdiction under the AIA. *See, e.g.*, Snyder v. Marks, 109 U.S. 189, 192 (1883).

177 Brief for Petitioners at 31, Helvering v. Davis, 301 U.S. 619 (1937) (No. 36-910).

178 *Helvering*, 301 U.S. at 637.

179 *Id.* at 638.

180 Brief for Petitioners at 28–31, *Helvering*, 301 U.S. 619 (No. 36-910).

jurisdictional impediment,[181] the government's argument, and the Court's decision on the merits, is evidence that the AIA is not jurisdictional.

Even the opinion in dissent suggests that the AIA is not jurisdictional. The four dissenting justices were concerned with their power to issue an *equitable* remedy, not with jurisdiction as such.[182] The Court previously had allowed shareholders to challenge the assessment of a corporate tax because, once a tax voluntarily was paid, no refund could be issued, and the shareholders were without remedy.[183] Congress subsequently granted shareholders statutory authority to compel a corporation to seek a refund for taxes, even though voluntarily paid.[184] In light of this new remedy, Justice Cardozo argued on behalf of the four dissenting justices that the Court should not hear the case because the shareholders did not meet the criteria for *equity* jurisdiction.[185] A majority of the Court, however, disagreed finding "in this case extraordinary features making it fitting . . . to determine whether the benefits and the taxes are valid or invalid."[186]

In *Seven-Sky v. Holder*, Judge Kavanaugh distinguished *Helvering* as a case between shareholders and a corporation, not the government.[187] But that fact should make no difference. The AIA does not refer to suits against the government. As the government put it in *Helvering*: "We agree that [the AIA] is intended to prevent equitable interference with the collection of Federal taxes by all devices, including the medium of a stockholder's suit in equity against a corporation to enjoin payment."[188] And as Justice Cardozo noted, shareholders were no longer unique; like other taxpayers, they too could avail themselves of a remedy at law.[189]

The Supreme Court, moreover, has accepted the government's waiver in other pre-enforcement challenges to federal taxes. In *Sunshine Anthracite*, the plaintiff brought suit "praying for a temporary injunction suspending and restraining the assessing and collecting or attempting to assess and collect"

181 Bowles v. Russell, 551 U.S. 205, 216 (2007). Federal courts "must raise and decide jurisdictional questions" on their own, even where the parties agree that there is no jurisdictional impediment to review. Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1202 (2011).

182 *Helvering*, 301 U.S. at 639–40.

183 *See* Brushaber v. Union Pac. R.R., 240 U.S. 1, 9–10 (1916); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 554 (1895), *reh'g granted and opinion vacated*, 158 U.S. 601 (1895).

184 With the passage of section 1014 of the Revenue Act of 1924, shareholders could bring actions to recover unlawful taxes whether or not the corporation had paid voluntarily. *See* Norman v. Consol. Edison Co. of N.Y., 89 F.2d 619, 621 (2d Cir. 1937). As a result, shareholders could no longer allege irreparable harm when a corporation voluntarily paid an allegedly illegal tax. *See id.*

185 *Helvering*, 301 U.S. at 639–40.

186 *Id.* at 640.

187 Seven-Sky v. Holder, 661 F.3d 1, 28 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), *abrogated by NFIB*, 132 S. Ct. 2566 (2012).

188 Brief for Petitioners at 31, *Helvering*, 301 U.S. 619 (No. 36-910).

189 *Helvering*, 301 U.S. at 639.

two taxes imposed by the Bituminous Coal Act of 1937.[190] Even though the prayer for relief sought a remedy barred by the very terms of the AIA, the government "expressly waived" reliance on the AIA, and the Court decided the case on the merits.[191] In yet a third case, *Pollock*, the government again "explicitly waived" any question as to the AIA during oral argument and the Court rendered a decision on the merits.[192]

Jurisdictional statutes are strict limits on a court's adjudicatory power. The Court's equity-based decision in *Standard Nut*, its longstanding endorsement of two equitable exceptions, and its three-time acceptance of the government's waiver of the AIA collectively extinguish the conventional wisdom of a jurisdictional AIA.

4. Oft-Relied Upon Precedent

Precedent is irreconcilable with the notion that the Supreme Court has long considered the AIA to be a jurisdictional statute. What then of the supposed "long line" of uniform precedent holding the AIA jurisdictional?[193] It turns out to be difficult to pinpoint even a single case which clearly holds that the AIA is jurisdictional.

Three early cases—*Snyder v. Marks*,[194] *Brushaber v. Union Pacific Railroad Co.*,[195] and *Hornthall v. Collector*[196]—are often cited as proof that the early Supreme Court viewed the AIA as jurisdictional.[197]

Snyder comes the closest. In that case, the taxpayer argued that the AIA did not apply to an allegedly "illegal tax."[198] The government asserted that the AIA barred the suit and that the Supreme Court lacked equitable jurisdiction.[199] The Court held that the AIA applied "to all assessments of taxes, made under color of their offices, by internal revenue officers charged with

190 Statement as to Jurisdiction at 11, Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) (No. 804).

191 Brief for the Appellee at 9, *Sunshine*, 310 U.S. 381 (No. 804).

192 Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 554 (1895), *reh'g granted and opinion vacated*, 158 U.S. 601 (1895).

193 *See* Brief for Court-Appointed Amicus Curiae Supporting Vacatur at 10, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-398); *see also* Brief for Petitioners at 5–6, *NFIB*, 132 S. Ct. 2566 (No. 11-398) ("This court has repeatedly described the AIA as jurisdictional in nature . . . ."); Seven-Sky v. Holder, 661 F.3d 1, 26–28 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (arguing that the Court has consistently treated the AIA as a jurisdictional requirement), *abrogated by NFIB*, 132 S. Ct. 2566.

194 109 U.S. 189 (1883).

195 240 U.S. 1 (1916).

196 76 U.S. (9 Wall.) 560 (1869).

197 *See* Brief for Court-Appointed Amicus Curiae Supporting Vacatur at 16, *NFIB*, 132 S. Ct. 2566 (No. 11-398) (citing all three cases in support of belief that AIA is jurisdictional); *see also* Brief for Petitioners at 10, *NFIB*, 132 S. Ct. 2566 (No. 11-398) (citing only *Snyder* in support).

198 *Snyder*, 109 U.S. at 192.

199 *Id.* at 191.

general jurisdiction."[200] And since Congress had provided an alternative and exclusive refund remedy, a suit to restrain collection of the tax was forbidden under the AIA.[201]

The *Snyder* Court's reliance on the AIA as grounds for its dismissal is inconclusive. The case did not use the jurisdictional label and is consistent with the view that the AIA imposes a mandatory (but not jurisdictional) requirement and also with the view that the AIA simply codified traditional equitable rules. Since the government raised and pressed the AIA defense, the *Snyder* Court was not confronted with the question whether the AIA was truly jurisdictional, i.e., whether it *always* barred suit, or rather whether it was a mandatory condition that might be waived or forfeited. Further, equity jurisdiction plainly was absent because Congress had provided an adequate alternative remedy. In view of other cases decided near the same time, early commentators and litigants argued that the *Snyder* dismissal was best explained on equitable grounds.[202]

Brushaber also falls short.[203] In *Brushaber*, the Supreme Court "put out of the way a question of jurisdiction" and held that shareholders could challenge the voluntary payment of a corporate tax notwithstanding the AIA where they alleged the "absence of all means of redress."[204] To permit such a suit "did not violate the prohibitions of [the AIA], against enjoining the enforcement of taxes."[205] Indeed, any jurisdictional argument to the contrary was "without merit."[206]

As for *Hornthall*, the case is, by definition, a drive-by jurisdictional ruling.[207] In *Hornthall*, the government argued that the Court should dismiss for two reasons: "(1) Because the parties to the suit are citizens of the same State," and "(2) [b]ecause the Circuit Court has no power to afford a remedy by injunction for such a grievance."[208] The government's latter argument could just as easily have referred to the general equitable rule that a federal court will not enjoin a tax as to the AIA. But even if the second point refers to the AIA, the Court did not spend much time on that issue: "[I]t will not be necessary to examine the second proposition with much particularity, as the first is clearly correct and must prevail."[209] While *Hornthall* noted the existence of the AIA, any application of the statute was unnecessary as diversity jurisdiction did not exist.[210]

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200 *Id.* at 193.

201 *Id.* at 193–94.

202 *See* Brief on Behalf of Appellees at 21, Bailey v. George, 259 U.S. 16 (1922) (No. 590).

203 240 U.S. 1 (1916).

204 *Id.* at 10.

205 *Id.*

206 *Id.*

207 76 U.S. (9 Wall.) 560 (1869).

208 *Id.* at 564.

209 *Id.*

210 *Id.*

On occasion, other early cases are offered as evidence of a long line of Supreme Court precedent holding the AIA to be jurisdictional. In *Bob Jones University v. Simon*, for example, the Supreme Court offered up a handful of cases from the first half century of the AIA's existence as evidence that the Court previously had given the AIA "literal force."[211] Yet when one considers those five cases, no conclusion of jurisdictional import may be drawn. The first two cases, the *State Railroad Tax Cases*[212] and *Pacific Steam Whaling Co. v. United States*,[213] are state tax cases to which the AIA does not apply; they are, at most, "drive-by jurisdictional rulings."[214] More importantly, both of those cases advance a view of the AIA as governing the *equity* jurisdiction of the federal courts, not jurisdiction per se.[215] As discussed above, *Snyder* is fully consistent with either a mandatory or an equitable reading of the AIA.[216] The last two cases, *Dodge v. Osborn* and *Bailey v. George*, are inconsistent with the conclusion that the AIA is a jurisdictional statute because they bless equitable exceptions.[217] With the possible exception of *Snyder*, then, no early case supports a long line of Supreme Court precedent and practice holding the AIA to be jurisdictional.

More recent cases said to support a jurisdictional reading of the AIA fare no better. Two cases in particular, *Enochs v. Williams Packing & Navigation Co.*[218] and *Bob Jones University v. Simon*,[219] are often cited for the proposition that the Supreme Court has held the AIA to be jurisdictional. In contrast to the older decisions discussed above, those cases *do* refer to the AIA as jurisdictional. In *Williams Packing*, the Supreme Court wrote, "[t]he object of § 7421 (a) is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes."[220] And in *Bob Jones University*, the Court concluded that "the Court of Appeals did not err in holding that § 7421 (a) deprived the District Court of jurisdiction to issue the injunctive relief petitioner sought."[221] But these two cases were decided during the height of the Supreme Court's overinclusive use of the term jurisdiction. As the Court's recent jurisdictional cases teach,

211 416 U.S. 725, 742 (1974) ("During the first half century of the Act's existence, the Court gave it literal force, without regard to the character of the tax, the nature of the pre-enforcement challenge to it, or the status of the plaintiff."); *see also* Seven-Sky v. Holder, 661 F.3d 1, 26–27 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (listing a line of cases that treat the AIA as jurisdictional), *abrogated by NFIB*, 132 S. Ct. 2566 (2012).

212 92 U.S. 575 (1875).

213 187 U.S. 447 (1903).

214 Arbaugh v. Y&H Corp., 546 U.S. 500, 511 (2006) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998)) (internal quotation marks omitted).

215 *See Pac. Steam Whaling*, 187 U.S. at 452; *State R.R. Tax Cases*, 92 U.S. 575, 613–14.

216 *See supra* note 176.

217 Bailey v. George, 259 U.S. 16, 20 (1922); Dodge v. Osborn, 240 U.S. 118, 121–22 (1916).

218 370 U.S. 1 (1962).

219 416 U.S. 725 (1974).

220 *Williams Packing*, 370 U.S. at 5.

221 *Bob Jones*, 416 U.S. at 749.

loose use of the term jurisdiction is not precedential.[222] The substance of the two cases—specifically, their recognition of an equitable exception—makes clear that *Williams Packing* and *Bob Jones University* do not support a jurisdictional AIA.[223]

In sum, neither the text nor the structure nor the history of the AIA indicates that the statute is jurisdictional. As for the oft-relied upon "long line" of precedent, that precedent points in the opposite direction—allowing waiver and equitable exceptions—demonstrating that the AIA cannot possibly be jurisdictional.

If the AIA is not a jurisdictional statute, what is it? This question is of critical importance to the exercise of Congress's taxing power and to the ability of taxpayers to challenge such exercises. The next Part will argue that the AIA governs the *equitable* jurisdiction of the federal courts.

IV. The Equitable Anti-Injunction Act

Contrary to conventional wisdom, the Anti-Injunction Act of 1867 is not a jurisdictional statute: it is an equitable one. A close analysis of the Supreme Court's AIA jurisprudence reveals a surprisingly consistent line of cases interpreting the AIA in harmony with the equitable jurisdiction of the federal courts. The AIA was enacted during the height of the canon that statutes in derogation of the common law must be construed narrowly, and the courts first tasked with interpreting the AIA applied a similar canon to equity: they read the statute in light of the rule that equity ordinarily will not enjoin a tax. This equitable rule explains the Supreme Court's seemingly meandering

222 *See, e.g.*, Gonzalez v. Thaler, 132 S. Ct. 641, 649 (2012) (finding the indication requirement of a certificate of appeal nonjurisidctional because Congress had not been clear); Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 161 (2010) (stating that the Court has previously mischaracterized claim-processing rules for jurisdictional limitations); Arbaugh v. Y&H Corp., 546 U.S. 500, 511 (2006) (describing past cases as being "less than meticulous" in using the term, jurisdiction, and that those cases do not hold precedential value).

223 Because Congress is the ultimate arbiter of federal jurisdiction, federal courts have no authority to craft equitable exceptions to jurisdictional requirements. Kontrick v. Ryan, 540 U.S. 443, 452–53 (2004); Bowles v. Russel, 551 U.S. 205, 214 (2007); *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). The government also cited *Alexander v. Americans United Inc.*, 416 U.S. 752, 757–58 (1974), as a recent case holding the AIA jurisdictional, in the Affordable Care Act litigation, Brief for Petitioners, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-398), but that case reaffirms the Court's adherence to the equitable test announced in *Williams Packing*. Amicus Robert Long cited *Jefferson County v. Acker*, 527 U.S. 423, 434 (1999), which expressly refers to the AIA as "jurisdictional." Brief for Court–Appointed Amicus Curiae Supporting Vacatur at 11, 39, 48, *NFIB*, 132 S. Ct. 2566 (No. 11-398). But that case is inapposite because it involved the 1937 Tax Injunction Act, not the AIA. *Jefferson County*, 527 U.S. at 433. Notably, the Court referred to the AIA to find that certain suits were *permissible* despite the TIA. *Id.* at 434–35. The Court held that, like the AIA, the TIA should be construed so as not to bar collection actions undertaken by the government and must not prevent taxpayers from asserting a defense that the tax was invalid in such suits. *Id.*

jurisprudence—the repeated acceptance of the government's waiver of the AIA, its endorsement of general equitable exceptions, and *Standard Nut*'s conclusion that the AIA is merely declaratory of general equitable principles.

That the AIA governs equity jurisdiction is of considerable practical importance. The consequences that attach to jurisdictional statutes are dramatically different from those that attach to statutes that govern equity jurisdiction. Because the AIA addresses equity, the jurisdictional bar is not absolute. Because equity jurisdiction does not govern the very authority of the court to hear the case, it may be waived or forfeited. And because equity jurisdiction exists when the remedy at law is inadequate, federal courts may hear tax injunction suits in extraordinary circumstances notwithstanding the AIA.[224]

The equitable rules that governed tax suits prior to the AIA and the caselaw that applied those same rules to suits after the AIA's enactment reveal a consistent set of circumstances in which strict compliance with the AIA is not required. This Part will identify those circumstances and sketch out how they might apply to present-day tax litigation.

A. Equity and Taxes

Equity never has had much to do with taxes. Because the government depends upon the prompt collection of tax revenues, and because the public has every reason to delay and dispute taxation, the First Congress, and every Congress since, has enforced taxes "by summary and stringent means."[225] Instead of ordinary judicial review,[226] taxpayers are provided an administra-

224 When a tax regulation is at issue, the Administrative Procedure Act (APA) provides for judicial review of agency action. But that review is available only so long as Congress has not provided other judicial review procedures. 5 U.S.C. § 704 (2012) (providing review for final agency action when "there is no other adequate remedy in a court"); *see* Bowen v. Massachusetts, 487 U.S. 879, 903 (1988) (noting that the APA "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures" (quoting 1 U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 101 (1947)) (internal quotation marks omitted)). Sections 7421(a) and 7422(a) of the Internal Revenue Code permit lawsuits for the recovery of wrongfully collected taxes to go forward, but only after the tax has been paid and an administrative refund claim has been filed. 26 U.S.C. § 7422(a). If this procedure is an adequate remedy at law, then taxpayers must comply before filing suit under the APA. Cohen v. United States, 650 F.3d 717, 732 (D.C. Cir. 2011). Although the compass of APA review of agency action is beyond the scope of this Article, the test for whether a tax challenge may go forward—the adequacy of the legal remedy—is the same under the AIA and the APA.

225 State R.R. Tax Cases, 92 U.S. 575, 614 (1875); *see also* Kelly v. Pittsburgh, 104 U.S. 78, 80 (1881) (noting that "[t]he necessities of government, the nature of the duty to be performed, and the customary usages of the people," mean that a "different procedure" is necessary for enforcing taxes).

226 *Kelly*, 104 U.S. at 80.

tive appeal. In addition, they may file a refund claim in federal court, but only after paying the disputed tax.[227]

This legal remedy meant that tax cases generally were outside the equitable jurisdiction of the federal courts.[228] In the routine tax case, the Supreme Court explained, "the party of whom an illegal tax is collected has ordinarily ample remedy"[229]—the plaintiff protesting against its enforcement might pay the tax and sue to recover back the money, making it difficult "to suggest any ground of equitable jurisdiction."[230] Because Congress had provided an alternate remedy, equity jurisdiction did not obtain in the garden-variety tax dispute.[231]

Yet there was no absolute limitation on the powers of a court sitting in equity to enjoin the collection of an illegal tax.[232] Equitable relief was available in "special circumstances": where the remedy at law was inadequate and where the case fell "under some recognized head of equity jurisdiction."[233]

B. Equity and the AIA

The federal courts' familiarity with equity rules and expansion of the derogation canon to equity explains early interpretations of the AIA. At the time of the AIA's enactment in 1867, courts were well aware of "the federal rule that a suit in equity will not lie to restrain collection on the sole ground that the tax is illegal."[234] They were also familiar with the exception to that rule: a suit could be maintained where, in addition to illegality, the plaintiff alleged "special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence."[235] In short, the AIA "was written against the background of general equitable principles disfavoring the issuance of federal injunctions against taxes, absent clear proof that available remedies at law were inadequate."[236]

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227 28 U.S.C. § 1346(a)(1).

228 *State R.R. Tax Cases*, 92 U.S. at 613.

229 Shelton v. Platt, 139 U.S. 591, 594 (1891).

230 *Id.* at 595 (citation omitted) (internal quotation marks omitted).

231 *See* COOLEY, *supra* note 116, at 536; *see also* Hannewinkle v. Georgetown, 82 U.S. (15 Wall.) 547, 548 (1872) ("It has been the settled law of the country for a great many years, that an injunction bill to restrain the collection of a tax, on the sole ground of the illegality of the tax, cannot be maintained.").

232 *Shelton*, 139 U.S. at 594–95.

233 *Id.* (quoting COOLEY, *supra* note 116, at 536; Dows v. City of Chicago, 78 U.S. (11 Wall.) 108, 109–10 (1870)).

234 California v. Latimer, 305 U.S. 255, 262 (1938) (footnote omitted).

235 Miller v. Standard Nut Margarine Co., 284 U.S. 498, 499 (1932) (citing State R.R. Tax Cases, 92 U.S. 575 (1875); *Hannewinkle*, 82 U.S. (15 Wall.) at 547; *Dows*, 78 U.S. (11 Wall.) at 108).

236 Bob Jones Univ. v. Simon, 416 U.S. 725, 742 n.16 (1974) (citing Pittsburgh Ry. v. Bd. of Pub. Works, 172 U.S. 32 (1898); *Shelton*, 139 U.S. at 591; *Dows*, 78 U.S. (11 Wall.) at 109–10); *see also State R.R. Tax Cases*, 92 U.S. at 613–14 (citing *Hannewinkle*, 82 U.S. (15 Wall.) 547; *Dows*, 78 U.S. (11 Wall.) 108; Dodd v. City of Hartford, 25 Conn. 232 (1856);

Much maligned in recent times, the canon that statutes in derogation of the common law be narrowly construed came of age in the mid-1800s.[237] Substantively, the derogation canon required courts to construe statutes in harmony with previously existing common law, absent a plainly contrary statutory purpose. As the Supreme Court explained as early as 1797, an act "being in derogation of the common law, is to be taken strictly."[238] By the mid-1800s, the federal courts assumed that Congress legislated with an expectation that the common law principle would apply.[239] Thus the Supreme Court of the late 1800s taught that "[n]o statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."[240] Practically speaking, Harvard Dean Roscoe Pound explained (as a criticism), the canon meant that statutes were construed so as "to interfere with the status quo as little as possible."[241]

Though the derogation canon has since suffered much abuse, it was not only the federal courts, but also the most influential nineteenth-century scholars, who took a favorable view of the canon. Justice Story explained the rule as follows: "In all cases of a doubtful nature, the common law will prevail, and the statute not be construed to repeal it."[242] In addition to Justice Story's account, Chancellor James Kent wrote that statutes were "construed in reference to the principles of the common law, for it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required."[243] Sutherland's treatise on statu-

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Mooers v. Smedley, 6 Johns. Ch. 28 (N.Y. Ch. 1822); Messeck v. Columbia Cnty. Supervisors, 50 Barb. 190 (N.Y. Gen. Term 1867)).

237 *See* ESKRIDGE, *supra* note 103, at 956 (explaining the traditional rule "that statutes in derogation of the common law should be narrowly construed" and noting the erosion of this rule during the twentieth century).

238 Brown v. Barry, 3 U.S. (3 Dall.) 365, 367 (1797).

239 ESKRIDGE, *supra* note 103, at 956.

240 Shaw v. R.R. Co., 101 U.S. 557, 565 (1879).

241 Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 387 (1908) [hereinafter Pound, *Common Law*] (emphasis omitted); *see also* Warren R. Maichel, *Legislation—The Role of the Common Law in Interpretation of Statutes in Missouri*, 1952 WASH. U.L.Q. 101, 101 ("One of the fundamental principles of statutory construction is that all legislation is to be considered in the light of the common law."); Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907).

242 Joseph Story, *Law, Legislation, Codes, in* 7 ENCYCLOPEDIA AMERICANA 576, 584 (Francis Lieber ed. & trans., 1831), *reprinted in* JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION app. III, at 362 (1971); *see also* THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 267–71 (John Norton Pomeroy ed., New York, Baker, Voorhis & Co., 2d ed. 1874) (1756) ("[W]riters like Coke . . . spoke of [the derogation canon] as the perfection of human wisdom . . . .").

243 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 464 (New York, O. Halsted, 2d ed. 1832); *see also* 1 JOHN BOUVIER, INSTITUTES OF AMERICAN LAW § 88, at 21 (Daniel A. Gleason ed., Philadelphia, George W. Childs 1870) ("[S]tatutes in derogation of the common law are to be strictly construed.").

tory interpretation was also enthusiastic about the canon, explaining its rationale: "The common law, which has been moulded into a logical classification of subject matter provides one of the most reliable backgrounds upon which an analysis of the purpose and objectives of the statute can be determined."[244]

The federal courts first tasked with interpreting the AIA extended the derogation canon to equity and construed that statute as subject to the traditional equitable exceptions. In the 1870 case of *Pullan v. Kinsinger*, for example, the District of Ohio held that the AIA "was wholly unnecessary, enacted only as a politic and kindly publication of an old and familiar rule" that an injunction will not generally lie to prevent the collection of an illegal tax.[245] Early courts went on to note that traditional equitable exceptions survived the AIA,[246] and others to enjoin the assessment or collection of a tax, finding that the AIA "does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable."[247]

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244 3 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 5301, at 3 (Frank E. Horack Jr. ed., 3d ed. 1943).

245 20 F. Cas. 44, 48 (C.C.S.D. Ohio 1870) (No. 11,463).

246 *See, e.g.*, Huston v. Iowa Soap Co., 85 F.2d 649, 652 (8th Cir. 1936) (stating that the AIA "is not an absolute bar in every case to injunctive relief"); Cohen v. Durning, 11 F. Supp. 824, 829 (S.D.N.Y. 1935) (noting the adequate remedy at law exception); Grosvenor-Dale Co. v. Bitgood, 12 F. Supp. 416, 417 (D. Conn. 1935) (same); Larabee Flour Mills Co. v. Nee, 12 F. Supp. 395, 399 (W.D. Mo. 1935) (noting that the AIA "does not prohibit a suit in equity to restrain the collection of a tax where the tax is illegally exacted and where the taxpayer has no adequate remedy at law for its recovery if it is paid by him; [and such] remedy at law must not only be adequate . . . [but also] clear and unquestioned."); Rieder v. Rogan, 12 F. Supp. 307, 320 (S.D. Cal. 1935) (noting the adequate remedy at law exception); John A. Gebelein, Inc. v. Milbourne, 12 F. Supp. 105, 121 (D. Md. 1935) (enjoining a tax and finding that the AIA does not apply to novel cases resulting in "exceptional and unusual hardship" and "irreparable damage"); French Mortg. & Bond Co. v. Woodworth, 38 F.2d 841, 842 (E.D. Mich. 1930) (noting the exceptional circumstances exception); Lafayette Worsted Co. v. Page, 6 F.2d 399, 400 (D.R.I. 1925) (noting the exceptional circumstances exception); Acklin v. People's Sav. Ass'n, 293 F. 392, 394 (N.D. Ohio 1923) (recognizing the "existence of exceptional cases" which permit review notwithstanding the AIA); Burgdorf v. District of Columbia, 7 App. D.C. 405, 414 (1896) (noting an exception for "additional special circumstances, bringing the case under some recognized head of equity jurisdiction, such as irreparable injury, multiplicity of suits, or cloud on the title of the complainant"); Frayser v. Russell, 9 F. Cas. 728, 729 (C.C.E.D. Va. 1878) (No. 5067) (noting that the challenge does not fall "within the letter, or spirit, or intention" of the AIA and that the multiplicity of suit exception applies).

247 Trinacia Real Estate Co. v. Clarke, 34 F.2d 325, 328 (N.D.N.Y. 1929) (issuing injunction); *see also* Regents of Univ. Sys. of Ga. v. Page, 81 F.2d 577, 583 (5th Cir. 1936) (issuing injunction); Kingan & Co. v. Smith, 16 F. Supp. 549, 552 (S.D. Ind. 1936) (granting injunction because of inadequate remedy at law); Baltic Mills Co. v. Bitgood, 12 F. Supp. 132, 135 (D. Conn. 1935) (granting injunction because of inadequate remedy at law and multiplicity of suit); Danahy Packing Co. v. McGowan, 11 F. Supp. 920, 924 (W.D.N.Y. 1935) (issuing injunction); Inland Milling Co. v. Huston, 11 F. Supp. 813, 817 (S.D. Iowa 1935) (issuing injunction); Neild Mfg. Corp. v. Hassett, 11 F. Supp. 642, 642 (D. Mass. 1935) (issuing

The Supreme Court also narrowly construed the AIA so as to recognize the same equitable principles that governed tax injunction suits before its passage. Just a few years after the AIA was enacted, the *State Railroad Tax Cases* Court viewed the AIA as apiece with the traditional equitable rules that governed suits to restrain taxes.[248] After discussing the caselaw, which demonstrated that equity would not enjoin a tax unless there was no adequate remedy at law, the Court said:

> We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say, that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax.[249]

Making clear that the Supreme Court was concerned about its equitable jurisdiction, the Court summarized: "No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law."[250] Although the railroads sued to enjoin a *state* tax, the Supreme Court went on to remark how the AIA was passed so "there might be no misunderstanding of the universality of" the principles described above—i.e., that equity disfavors but does not prohibit tax injunction suits.[251]

The Court subsequently and repeatedly construed the AIA to recognize the same equitable exceptions that applied before its enactment. In discussing the AIA in 1903, the *Pacific Steam Whaling* Court equated the AIA with traditional rules of equity and described the rule as follows: "Something more than mere illegality is necessary to justify the interference of a court of equity."[252] The Court went on to consider whether the case fell within any

injunction); Gold Medal Foods, Inc. v. Landy, 11 F. Supp. 65, 65 (D. Minn. 1935) (issuing injunction); Higgins Mfg. Co. v. Page, 20 F.2d 948, 949 (D.R.I. 1927) (granting injunction and noting that "where there is no adequate remedy at law, the court should have power to grant relief"). Other early cases exist in which the federal courts dismissed under the AIA, but those cases do not indicate that the AIA is jurisdictional. In those cases, the taxpayers argued that the AIA did not apply to invalid taxes and the federal courts disagreed. There was never any finding that the remedy at law was inadequate. *See, e.g.*, Kensett v. Stivers, 10 F. 517, 522–29 (S.D.N.Y. 1880) (describing cases); United States v. Pac. R.R., 27 F. Cas. 397, 397 (E.D. Mo. 1877) (No. 15,983); Alkan v. Bean, 1 F. Cas. 418, 420 (E.D. Wisc. 1877) (No. 202).

248 92 U.S. 575, 613 (1875).

249 *Id.* at 614.

250 *Id.*

251 *Id*. at 613.

252 Pac. Steam Whaling Co. v. United States, 187 U.S. 447, 452 (1903).

traditional equitable head of jurisdiction: irreparable injury, multiplicity of suits, and cloud upon real estate title.[253]

In 1916, *Dodge v. Osborn* held that the AIA forbid "the enjoining of a tax *unless* by some extraordinary and entirely exceptional circumstance [the AIA's] provisions are not applicable."[254] The 1922 case of *Bailey v. George* similarly contemplated equitable exceptions: "There must be some extraordinary and exceptional circumstance not here averred or shown to make the provisions of the section inapplicable."[255]

The Court's early interpretation of the AIA to permit "extraordinary and exceptional circumstances" was not merely dictum. In a second case brought by the *Dodge* plaintiffs, hereinafter *Dodge II*, the Court relied upon the exception to find the AIA inapplicable. Plaintiffs paid the contested tax and exhausted their administrative remedies, but failed to allege exhaustion in their second lawsuit. Even though jurisdictional prerequisites must be pleaded and proved by the plaintiff,[256] the Court rebuffed the government's argument that the case should be dismissed for failure to exhaust: "[W]e think that this [tax] case is so exceptional in character as not to justify us in holding that reversible error was committed by the court below in passing upon the case upon its merits."[257] The Supreme Court subsequently understood *Dodge II* to stand for the proposition that "[the AIA] does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable."[258]

Furthermore, in a series of three cases in 1922, the Court held the AIA inapplicable to tax penalties imposed by the Grain Futures Trading Act, finding that "exceptional and extraordinary circumstances"—criminal penalties and a multiplicity of suits—made the AIA inapplicable.[259] In *Hill v. Wallace*, for example, the Court relied upon an equitable exception to permit preenforcement challenges to processing taxes imposed by the Grain Futures Trading Act.[260] Because countless individual suits must be filed, the Court found the refund remedy to be impractical: "We think these exceptional and extraordinary circumstances with respect to the operation of [the Grain Futures Trading Act] make [the AIA] inapplicable."[261] And while the Court has subsequently narrowed the scope of the tax penalty cases, holding that

253 *Id.*

254 240 U.S. 118, 122 (1916) (emphasis added).

255 Bailey v. George, 259 U.S. 16, 20 (1922).

256 Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987).

257 Dodge v. Brady, 240 U.S. 122, 126 (1916).

258 Hill v. Wallace, 259 U.S. 44, 62 (1922) (citing *Brady*, 240 U.S. at 126).

259 *Id.* at 62; *see also* Regal Drug Corp. v. Wardell, 260 U.S. 386 (1922) (enjoining the revenue collector from enforcing collection of unlawful taxes and penalties); Lipke v. Lederer, 259 U.S. 557 (1922) (stating that penalties and taxes for alleged violations of the National Prohibition Act cannot be enforced by distraint of property without notice and an opportunity to be heard and that the AIA does not preclude injunctive relief).

260 *Hill*, 259 U.S. at 62.

261 *Id.*

the AIA applies to "truly revenue-raising tax statutes," it has not renounced the underlying equitable exception.[262]

The three waiver cases mentioned above also support an equitable reading of the AIA.[263] In *Helvering v. Davis*, for instance, the government argued that the Supreme Court "should render a decision on the merits" of the Social Security Act's payroll taxes because "waiver [of the AIA] is certainly within the power of the appropriate officers of the Government."[264] This articulates what amounts to an equitable view of the AIA; because equity jurisdiction does not govern the federal court's authority to hear a case, the defense may be waived or forfeited. The Supreme Court's decision on the merits indicates that it too saw the AIA as nonjurisdictional.

Standard Nut is the culmination of the Supreme Court's AIA qua equity jurisprudence. The case upheld a pre-enforcement injunction on grounds that the AIA did not apply because of "special and extraordinary facts and circumstances."[265] Speaking in terms of the derogation canon, the Court held that the AIA was merely "declaratory of the principle" that equity usually, but not always, disallows tax injunction suits.[266] The AIA was to be construed "in harmony with [this rule] and the reasons upon which it rests."[267] Accordingly, the inadequate remedy at law exception was valid—even though it was not specifically mentioned in the text: "The general words employed are not sufficient, and it would require specific language undoubtedly disclosing that purpose, to warrant the inference that Congress intended to abrogate that salutary and well established rule."[268] And while the Court previously had given effect to the AIA, "[i]t ha[d] never held the rule to be absolute, but ha[d] repeatedly indicated that extraordinary and exceptional circumstances render its provisions inapplicable."[269]

In announcing its rule that the AIA should be interpreted in harmony with background equitable rules and rationales, the Supreme Court relied upon cases that endorse the derogation canon. The Court first looked to *Cumberland Telephone & Telegraph Co. v. Kelly*, a 1908 derogation canon case

262 Bob Jones Univ. v. Simon, 416 U.S. 725, 743 (1974) (citing Graham v. Du Pont, 262 U.S. 234 (1923)).

263 *See* Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); Helvering v. Davis, 301 U.S. 619 (1937); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 554 (1895), *reh'g granted and opinion vacated*, 158 U.S. 601 (1895).

264 Brief for Petitioners at 28, 31, *Helvering*, 301 U.S. 619 (No. 910). The AIA "may be waived by an appropriate officer of the United States." *Id.* at 31; *see also Pollock*, 157 U.S. at 554 (waiving the question of jurisdiction because an objection of adequate remedy at law was never raised).

265 Miller v. Standard Nut Margarine Co., 284 U.S. 498, 511 (1932).

266 *Id.* at 509.

267 *Id.*

268 *Id.*

269 *Id.* at 509–10 (citing Hill v. Wallace, 259 U.S. 44, 62 (1922); Dodge v. Brady, 240 U.S. 122, 126 (1916); Dodge v. Osborn, 240 U.S. 118, 121 (1916)); *cf.* Graham v. Du Pont, 262 U.S. 234, 257 (1923); Brushaber v. Union Pac. R.R. Co., 240 U.S. 1 (1916).

from the Sixth Circuit.[270] In *Kelly*, the Sixth Circuit found that a Tennessee statute was merely "declaratory of the common-law duty not to discriminate."[271] The appellate court held that the statute must be read in light of the common law and quoted Sutherland's admonition that "the best construction of a statute is to construe i[t] as near to the rule and reason of the common law as may be, and by the course which that observes in other cases."[272]

Baker v. Baker, the second case cited by the Supreme Court in *Standard Nut*, looks backward to English common law for the canon that statutes in affirmance of the common law are to be construed by that law.[273] In *Miles v. Williams*, for example, the English court said: "The best rule of construing Acts of Parliament is by the common law, and by the course which that observed in like cases of its own before the Act."[274] And, in *Arthur v. Bokenham*, the Common Pleas said:

> The general rule in exposition of all Acts of Parliament is this—that, in all doubtful matters, and where the expression is in general terms, they are to receive such a construction as may be agreeable to the rules of the common law, in cases of that nature; for statutes are not presumed to make any alteration in the common law, further or otherwise than the Act does expressly declare; therefore, in all general matters, the law presumes the Act did not intend to make any alteration; for, if the Parliament had had that design, they would have expressed it in the Act.[275]

Bradley v. People, a case about cattle rustling in Colorado, also provided authority for the Court's use of the derogation canon.[276] *Bradley* cited English law for the proposition that "'[a] statute general in its terms is construed as subject to any exceptions which the common law requires.'"[277]

The *Standard Nut* Court made clear its reliance on, and expansion to equity of, the derogation canon by citing section 454 of Sutherland's *Rules of Statutory Construction*. That section of the widely influential treatise states: "It is not presumed that the legislature intended to make any innovation upon the common law further than the necessity of the case required."[278] Statutes in derogation of the common law, the treatise continues, "are strictly con-

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270 160 F. 316, 320–21 (6th Cir. 1908).

271 *Id.* at 320.

272 *Id.* at 321 (quoting SUTHERLAND, *supra* note 244, § 290, at 374) (internal quotation marks omitted).

273 13 Cal. 87, 95 (1859).

274 *Id.* (citing Miles v. Williams, 88 Eng. Rep. 711 (Q.B. 1714)).

275 *Id.* at 95–96 (quoting Arthur v. Bokenham, 88 Eng. Rep. 957, 958 (C.P. 1709)) (internal quotation marks omitted).

276 9 P. 783, 786–87 (Colo. 1886).

277 *Id.* at 786 (quoting JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES § 131 (3d ed. 1901)).

278 2 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 454, at 862 (John Lewis ed., 2d ed. 1904).

strued and will not be extended by construction beyond their natural meaning."[279]

The AIA was enacted during the "heyday" of the derogation canon,[280] and neither the Supreme Court nor the lower federal courts hesitated in extending that canon to equity. Indeed, no one appears to have noticed the distinction. Reinforcing the view that nineteenth-century courts—to the extent they thought about it—viewed equity and the common law as apiece when it came to giving them deference for purposes of statutory interpretation, Judge Cooley endorsed an equity derogation canon of sorts. In *Remedies for Illegal Taxation*, he wrote that Congress, in enacting remedy-limiting statutes, "must recognise the same equitable principles which governed before."[281]

Nor was this resort to equitable principles good for one day and one statute only. More recently, Samuel Bray has identified a trend in the Supreme Court to return to the old, historical distinctions between law and equity.[282] Bray has also identified an equity clear statement rule, showing that the Court has insulated its new equity jurisprudence from congressional revision by employing a clear statement canon: absent a clear statement to the contrary, the Court will not read a statute as derogating from traditional equity.[283]

Following *Standard Nut*, the federal courts continued to cite equity as grounds to construe the AIA narrowly. The 1933 Agricultural Adjustment Act, for example, imposed processing taxes on farm products as a means of providing revenue for farm support payments.[284] Farm processors sought injunctive relief en masse, and the vast majority of federal district courts found equitable grounds, such as multiplicity of suits, sufficient to avoid application of the AIA.[285] In doing so, one federal court remarked, "It should be observed that [the AIA] is simply declaratory of a long-established principle of equity invoked by the courts in many cases antedating the enactment of this statute."[286]

When the processing cases arrived at the federal courts of appeals, the derogation canon as applied to equity led the appellate courts to hold that the AIA did not bar review. After canvassing the caselaw, the Eighth Circuit concluded that the AIA "is not as inclusive as it appears"; the statute "is not

279 *Id.*

280 ESKRIDGE, *supra* note 103, at 956.

281 T.M. Cooley, *Remedies of Illegal Taxation*, 29 AM. L. REG. 1, 16 (1881).

282 *See* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. (forthcoming 2015).

283 *Cf.* Samuel L. Bray, *A Little Bit of Laches Goes a Long Way: Notes on* Petrella v. Metro-Goldwyn-Mayer, Inc., 67 VAND. L. REV. EN BANC 1 (2014).

284 Agricultural Adjustment Act of 1933, 7 U.S.C. § 601 (2012).

285 Note, *supra* note 104, at 109–11.

286 Gold Medal Foods, Inc. v. Landy, 11 F. Supp. 65, 67 (D. Minn. 1935).

an absolute bar in every case to injunctive relief."[287] The Fifth Circuit took a similar view:

> The enactment . . . was merely declaratory of the prior rule that courts of equity will not restrain the collection of a tax upon the sole ground of its illegality. The rule is not absolute, and is inapplicable in extraordinary and exceptional circumstances. The absence of a plain, adequate, and complete remedy at law to pay the illegal tax and sue to recover it raises an independent ground to support injunctive relief in equity. Such ancient equitable relief was not abrogated by the above statute which is construed in harmony with the former equitable doctrine.[288]

When a farm-processing case reached the Supreme Court, the Court took the highly unusual action of granting petitioners' "motions for injunction restraining the collection of the assailed tax" pending certiorari.[289] The Court gave no rationale for its injunction, but as the Eighth Circuit noted, it presumably "was granted because a majority of the Supreme Court were of opinion that the remedy provided for recovery of the tax in the Agricultural Adjustment Act . . . was inadequate."[290] The very existence of the inadequacy exception turns, of course, on an equitable reading of the AIA.

This caselaw did not go unnoticed. Shortly after the AIA was enacted in 1867, and both before and after *Standard Nut*, scholars wrote that the AIA codified common law principles. Writing in 1923, one commentator argued that the AIA "made no changes whatever in the common law," and "[t]he statute took from the courts no power which they before its passage were wont to exercise. The rule today is the same as it was then. The general principles of equity apply."[291] As for two of the most influential treatises at the time, Pomeroy's on equity and Cooley's on taxation, both published in 1881, neither so much as mentions the Anti-Injunction Act of 1867.[292] The failure of either treatise to discuss the AIA signals that the authors did not view the AIA as working a major change in the law—rules of equity would

287 Huston v. Iowa Soap Co., 85 F.2d 649, 652 (8th Cir. 1936) (citations omitted) (internal quotation marks omitted).

288 Regents of Univ. Sys. of Ga. v. Page, 81 F.2d 577, 581 (5th Cir. 1936) (citation omitted) (citing Miller v. Standard Nut Margarine Co., 284 U.S. 498, 498 (1932)); *see also* Kingan & Co. v. Smith, 16 F. Supp. 549 (S.D. Ind. 1936); Larabee Flour Mills Co. v. Nee, 12 F. Supp. 395, 399 (W.D. Mo. 1935) ("[The AIA] does not prohibit a suit in equity to restrain the collection of a tax where the tax is illegally exacted and where the taxpayer has no adequate remedy at law for its recovery if it is paid by him; and [such remedy] must be not only adequate; it must be clear and unquestioned").

289 Rickert Rice Mills v. Fontenot, 296 U.S. 569 (1935).

290 *Huston*, 85 F.2d at 656.

291 Gall, *supra* note 150, at 203–04; *see also* Miller, *supra* note 150, at 339 (granting an injunction to restrain the collection of federal taxes but limiting such relief to special situations—such as when "the taxpayer has no adequate remedy at law to recover back the taxes paid").

292 Judge Cooley does write that statutes may prohibit tax injunction suits and cites to *Pullan v. Kinsinger*, 20 F. Cas. 44 (C.C.S.D. Ohio 1870) (No. 11,463), but does not discuss the AIA, and assumes that tax challenges may go forward in some circumstances. *See supra* note 116 and accompanying text.

continue to govern tax injunction suits. Judge Cooley said as much, arguing that while Congress might condition tax injunction suits, it "cannot take away all remedy without providing a new one, and whatever is provided it is conceived must recognize the same equitable principles which governed before."[293]

An equitable view of the AIA dominated the federal courts until the 1960s.[294] It was not until *Williams Packing* that the Supreme Court held that the AIA did something more than codify the rules that govern equity jurisdiction. In that case, the Court appeared to limit the various equitable grounds upon which a taxpayer could bring suit notwithstanding the AIA.[295] But that limitation was a break with, not a return to, prior precedent. Moreover, as argued above, the limited exception itself indicates that the AIA is not jurisdictional, because the federal courts are not authorized to carve out *any* exception to a jurisdictional statute.

In summary, early interpretations of the AIA can be explained by reference to background equitable rules. Equity makes sense out of the Supreme Court's AIA caselaw and its repeated invocation of equitable exceptions. And since objections to equitable jurisdiction may be waived and forfeited, it also explains the Supreme Court's interpretation of the AIA to permit waiver.[296]

V. Litigating Under an Equitable AIA

What does all of this mean for today? What are the consequences of a nonjurisdictional AIA? Does it matter that, for the first 100 years or so of its history, the Supreme Court interpreted the AIA to articulate a bar on equitable jurisdiction?

I submit that a careful review of the caselaw establishes, at the least, that the AIA is not jurisdictional. The Supreme Court's revisionist turn to text, structure, and context destabilizes the current consensus. These factors and early interpretations of the AIA all reject a jurisdictional reading. This is an important conclusion in its own right because of the dramatic consequences

293 Cooley, *supra* note 281, at 16.

294 As late as 1948, equity scholars noted that extraordinary circumstances exceptions to the AIA "have made possible a wide range of injunctions to restrain the collection of federal taxes." Henry L. McClintock, Handbook of the Principles of Equity 476 (2d ed. 1948).

295 Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 6 (1962) ("[I]f Congress had desired to make the availability of the injunctive remedy against the collection of federal taxes not lawfully due upon the adequacy of the legal remedy, it would have said so explicitly.").

296 *See, e.g.*, Atlas Life Ins. Co. v. W.I. S., Inc., 306 U.S. 563, 568 n.1 (1939) ("Unlike the objection that the court is without jurisdiction as a federal court, the parties may waive their objections to the equity jurisdiction by consent . . . ." (citations omitted)); Duignan v. United States, 274 U.S. 195, 199 (1927) (stating that failing to timely object to equity jurisdiction will constitute waiver); Am. Mills Co. v Am. Surety Co. of N.Y., 260 U.S. 360, 363 (1922) (stating that defendant's failure to renew the motion to dismiss or insist on the sufficiency of the first defense of its answer constituted a waiver); McGowan v. Parish, 237 U.S. 285, 295 (1915) (noting that a consent degree amounted to an express waiver).

that attach to a jurisdictional statute. Since the AIA does not speak to the authority of the federal courts, waiver, forfeiture, and exceptions apply.

A return to text, structure, and context, moreover, makes it possible to state a positive case for interpreting the AIA: the statute reinforces the rules that govern equity jurisdiction. But what does that mean? This Part undertakes a close analysis of the cases in which equity acted before and after the AIA; from history's vantage point, we get a picture of what it means to litigate under an equitable AIA.[297]

To be clear, the term "equitable jurisdiction" is a bit of a misnomer. Although it has often been said that a court of equity has "jurisdiction" only if the remedy at law is inadequate,[298] and cases are routinely dismissed "for want of equity jurisdiction,"[299] equity jurisdiction does not mean jurisdiction in the fundamental sense of a court's power to decide a case.[300] Equity jurisdiction helps federal courts to determine whether a case in which they already possess jurisdiction is an appropriate one for the exercise of the extraordinary powers and remedies that exist in equity.[301] Because equity jurisdiction only determines when a court should act, rather than whether it has power to act, actions taken without jurisdiction are not null and void or ultra vires.[302]

To be sure, the Supreme Court's early interpretation of the AIA as codifying equitable principles may not be the most obvious—at least to today's readers. The AIA's terms do not admit of any exceptions, yet the Court interpreted the statute to have several. A question at the outset is thus whether the early Supreme Court got it right. Was it legitimate to look to the equity derogation canon then? And why should we return to an equitable AIA,

297 An equitable AIA, while sharing some commonalities with partial or hybrid jurisdiction, is a different species of jurisdiction altogether. Advocates of partial or hybrid jurisdiction envision jurisdictional requirements that have features of nonjurisdictional rules, too. *See, e.g.*, Paul D. Carrington, *Toward a Federal Civil Interlocutory Appeals Act*, 47 LAW & CONTEMP. PROBS. 165, 170 (1984) (arguing that defects in appellate jurisdiction should be waivable and appellate jurisdiction conferred upon consent of the parties); Edward H. Cooper, *Timing as Jurisdiction: Federal Civil Appeals in Context*, 47 LAW & CONTEMP. PROBS. 157, 157–63 (1984) (arguing for discretion in timing of appeals); Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439 (2011) (proposing hybrid treatment for jurisdictional rules). Thus, a rule might be jurisdictional, but waivable. Dodson, *supra*, at 1442. The AIA, in contrast, governs equity jurisdiction.

298 MCCLINTOCK, *supra* note 294, at 99.

299 *See, e.g.*, Randolph v. Willis, 220 F. Supp. 355, 360–61 (S.D. Cal. 1963).

300 1 POMEROY, *supra* note 116, at § 129; *see also* Z. CHAFEE, SOME PROBLEMS OF EQUITY 296–380 (1950); 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES 180 (2d ed. 1993); MCCLINTOCK, *supra* note 294, at 98–99. The possibility that equity jurisdiction might refer to the power of a court in a criminal case is a narrow circumstance not implicated in the tax context. *See* 1 DOBBS, *supra*, at 180; 1 POMEROY, *supra* note 116, at § 129.

301 Equitable jurisdiction speaks to cases "which form proper subjects for the exercise of the powers of a chancery court." MCCLINTOCK, *supra* note 294, at 98 (quoting BLACK'S LAW DICTIONARY 1038 (3d ed. 1933)); *see also* 1 DOBBS, *supra* note 300, at 126 (equity jurisdiction refers to the "body of equity precedent and practice").

302 MCCLINTOCK, *supra* note 294, at 98.

especially when that meaning was influenced by the (now discredited) derogation canon? Although other scholars likely will debate the merits of the equity derogation canon in general, this Article offers a few reasons in favor of an equitable AIA.

First, an interpretation of the AIA in harmony with equity is consistent with what we know of the statute. We do not have much data concerning the 39th Congress's enactment of the AIA in 1867, but what we do know suggests that Congress did not mean radically to change the rules that governed tax disputes. That the provision garnered no attention in floor debates suggests that Congress did not see the AIA as stripping the federal courts of pre-enforcement jurisdiction—more important were the precise levels of reconstruction taxes imposed on various goods like cotton.[303] And it is telling that the most influential tax and equity treatises of the time do not mention the AIA.[304] One would expect Professor Pomeroy and Judge Cooley to discuss at length legislation designed to work a sea change in the way tax and equity interacted, but neither of their 1881 treatises mention the AIA.[305] Similarly, the government's arguments in early cases suggest that the administration did not view the AIA as a strict jurisdictional bar, but rather one that could (at a minimum) be waived by the government.[306] And although the nineteenth-century Congress was active in reversing the Supreme Court's interpretation of federal tax law, the Court did not amend the AIA when the federal courts interpreted it to permit equitable exceptions.

The Supreme Court's recent jurisdictional jurisprudence also supports a return to an equitable AIA. The Court's turn to text, structure, and context makes clear that the AIA is not jurisdictional. But more than that, it suggests that a long line of precedent and practice regarding jurisdictional issues matter. In direct opposition to the conventional wisdom, a line of surprisingly consistent precedent suggests that the AIA governs the *equitable* jurisdiction of the courts.

Further, while the derogation canon has been widely disparaged (and for good reason[307]), the question is not how we would interpret the AIA were the statute enacted today. The slate is not blank. And while we might expect present-day courts to approach the statute differently in the first instance, it is not at all surprising that early federal courts interpreted the AIA consistent with general equitable principles.

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303 *See supra* Section III.C.

304 Judge Cooley does write that statutes may prohibit tax injunction suits and cites to *Pullan v. Kinsinger*, 20 F. Cas. 44 (C.C.S.D. Ohio 1870) (No. 11,463). However, Cooley does not discuss the AIA and assumes that tax challenges may go forward in some circumstances. *See* COOLEY, *supra* note 116, at 537.

305 COOLEY, *supra* note 116, at 537.

306 *See supra* notes 88–99.

307 *Id.*; *see also* Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 9 (1993) (discussing the rise and fall of the canon); Pound, *Common Law*, *supra* note 241, at 406–07 (discussing the derogation doctrine and suggesting that common law should not be superior to legislation).

Statutes "cannot be understood in a historical vacuum."[308] The interpretive methods of the day are relevant to a statute's meaning. At the time of the AIA's enactment, the federal courts deferred to common law rules in the interpretation of statutes almost as a matter of course.[309] Because Congress legislated against this interpretive backdrop,[310] the Supreme Court has held the "landscape of the common law" relevant to the present-day judicial construction of statutes from this time period.[311] In short, the pervasiveness of the derogation canon during the time period makes the equitable principles that were in place before the AIA's adoption important to that statute's interpretation.

Another justification for an equitable view of the AIA is the one suggested by Bray in a different context: the interplay between legislative process and the theory of remedies.[312] The Act is not jurisdictional in the sense of the term we now use. But it must mean something. Early interpretations of that statute as codifying equitable rules give rise to a relatively defined set of circumstances in which the AIA does not bar a pre-enforcement challenge to a tax.[313] Given the statute's nonjurisdictional status, the only other interpretive option left open to courts would be a hodgepodge of judicial exceptions created on a case-by-case basis. Jurisdictional boundaries are well served by clarity, and the government and litigants alike would benefit from consistency in the pre-enforcement review of tax challenges. And of course Congress may alter this interpretation of the AIA and provide guidance as to the circumstances in which pre-enforcement tax challenges may be brought.[314] Stability in the law counsels for an equitable AIA.

Finally, an equitable view of the AIA is wise policy. Courts sitting in equity were onto something when they gave wide berth to legislative bodies for implementing and enforcing taxes and for raising the revenue necessary for government operations. But they also recognized the extraordinary power of taxation and that circumstances might exist where a refund remedy was inadequate; in these special cases, equity would intervene. Further, the taxing power was in its infancy at the time—the income tax was intermittent and the idea of using the tax code in place of statutory commands was a nonstarter (though today commonplace). And while the pay-now, litigate-later system makes sense when applied to revenue-raising measures, the government's fiscal interests in summary and stringent enforcement do not apply when the measure accomplishes a regulatory purpose. It is important too that a person is not ordinarily required to suffer the penalty from an

308 Briscoe v. LaHue, 460 U.S. 325, 330 (1983).

309 *See* WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 60 (1999).

310 *Briscoe*, 460 U.S. at 330–34.

311 *Id.* at 355.

312 *See supra* notes 282–83 and accompanying text.

313 *See* 1 DOBBS, *supra* note 300, at 127.

314 Given the enormity of the tax code, the AIA is the place to make such reforms, not a "tax statute by tax statute" basis.

unconstitutional statute in order to bring a challenge. A jurisdictional AIA makes that result all but inevitable: a taxpayer must pay the disputed tax to have her day in court. As the following Part demonstrates, however, an equitable AIA would permit tax challenges when the statutory refund remedy is inadequate.

A. The Adequacy Exception

The lynchpin of "equitable jurisdiction" vis-à-vis a tax challenge has always been an inadequate remedy at law. In the seminal case of *Dows v. Chicago*, the Court wrote: "The equitable powers of the court can only be invoked by the presentation of a case of equitable cognizance. There can be no such case, at least in the Federal courts, where there is a plain and adequate remedy at law."[315]

The adequacy rule can be traced to the division between law and equity. Equity courts in England performed two primary functions.[316] Equity sometimes acted to create new substantive rights that did not otherwise exist under legal rules, such as mortgage protections for debtors and the fiduciary duties required of trustees.[317] It was more common, however, for courts sitting in equity to act remedially, pairing an equitable remedy with a legal right already recognized by common law courts.[318] In the latter case, where equity merely supplied a remedy for a preexisting legal right, equity jurisdiction existed only if the legal remedies were deemed inadequate.[319] That is, since a legal right already existed, a party was able to go into a law court and get some remedy; it was only when that remedy was inadequate that the courts of equity had power to award equitable remedies.[320]

Courts of equity took care to justify their intervention in a legal action, basing their authority on the inadequacy of the remedy at law.[321] The adequacy rule thus served a gatekeeping function, allowing courts of equity to entertain legal claims and award equitable remedies where the common law did not supply an adequate remedy.[322] By using adequacy rhetoric, equity courts sought to avoid at least the appearance of intruding into matters delegated to the law courts.[323]

With the merger of law and equity, the importance of the adequacy test has declined.[324] Douglas Laycock and others have forcefully argued that, since law and equity have merged, there is no need to deny equitable relief

315 Dows v. City of Chicago, 78 U.S. 108, 112 (1870).
316 *See* 1 POMEROY, *supra* note 116, § 130.
317 1 DOBBS, *supra* note 300, at 74–75.
318 *Id.*
319 1 POMEROY, *supra* note 116, § 216.
320 *Id.* § 217.
321 *Id.*
322 *Id.*
323 *Id.*
324 *See* 1 DOBBS, *supra* note 300, at 124 (arguing that after the merger of law and equity there is "no basis for continued use of the rule").

based on the historical gatekeeping function of the adequacy rule. Since the same judge sits in law as in equity, equity courts need no longer be wary of intruding into common law matters. Laycock further concludes that the rule is irrelevant today, because the adequacy rule does not bar any plaintiff who can demonstrate a plausible need for equitable relief.[325] These arguments have been widely regarded to be correct,[326] but recently the Supreme Court has placed more emphasis on the adequacy rule, and it has played a major role in the Court's remedial jurisprudence.[327]

Regardless of the adequacy rule's general viability, it remains relevant in the tax context. The AIA was enacted *before* the merger of law and equity and interpreted to allow only plaintiffs who satisfied some established head of equity jurisdiction to proceed with a pre-enforcement challenge to a tax. Since the law already provided a legal remedy, the only way a court of equity would intervene was upon finding that legal remedy inadequate. The AIA, in other words, used the adequacy rule to police equity's review of pre-enforcement tax cases. If an adequate remedy at law existed, then the challenge was dismissed for want of equity jurisdiction. If the remedy at law was inadequate, then a court sitting in equity could proceed to adjudicate the pre-enforcement challenge and grant relief to a meritorious taxpayer. To determine whether the AIA bars pre-enforcement review, then, depends upon whether the remedy at law is adequate.

The circumstances in which traditional equity might act, and thus the circumstances in which the AIA permits pre-enforcement tax challenges, are limited.[328] It has always been clear that neither "the mere illegality of the tax complained of, nor its injustice nor irregularity, of themselves, give the right to an injunction in a court of equity."[329] Under equitable rules, then, the pre-enforcement review of a tax was possible only when "special circumstances" brought the case under the court's equitable jurisdiction. Although courts often recited that any "head of equity jurisdiction"—fraud, mistake, and accident, for example—would suffice to bring the case within equity's purview,[330] the three grounds most often recognized by courts sitting in equity to enjoin taxation were irreparable mischief, multiplicity of suits, and

325 *See* LAYCOCK, *supra* note 2, at 23.

326 *See* 1 DOBBS, *supra* note 300, at 58.

327 *See, e.g.*, eBay, Inc. v. MercExchange, LLC, 547 U.S. 388 (2006) (holding that permanent injunction relief requires a showing that, among other things, "remedies at law are inadequate to compensate"); *see also* Mark P. Gergen et al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 206 (2012) (discussing the *eBay* case and the various factors the Court considers when contemplating injunctive relief).

328 *See* Shelton v. Platt, 139 U.S. 591, 597 (1891) ("[T]he strong arm of the Court of Chancery ought not to be interposed in that direction except where resort to that court is grounded upon the settled principles which govern its jurisdiction.").

329 State R.R. Tax Cases, 92 U.S. 575, 613 (1875).

330 *Shelton*, 139 U.S. at 594–96.

cloud on real estate title.[331] Each is an application of the adequate remedy at law requirement.

1. Multiplicity of Suit

During the nineteenth century, multiplicity of suit was a common ground for equitable jurisdiction over a tax challenge.[332] The "chief object" of multiplicity of suit jurisdiction is to avoid the hardship of prosecuting multiple suits by facilitating "a complete and final remedy by one equitable decree."[333] Pomeroy explains that the multiplicity of suit doctrine originated in bills of peace brought to establish a general right between a party (usually a landlord) and numerous other persons claiming distinct individual interests (usually tenants).[334] Multiplicity of suit jurisdiction also obtained in quiet title actions when a single equitable decree would prevent repeated ejectment actions.[335] These categories gave rise to two different fact patterns where an inadequate remedy at law based on multiplicity of suit could be alleged: (1) where a number of people have similar but individual claims against the same party; and (2) where a single plaintiff might be required to bring more than one lawsuit to protect his legal rights.[336]

To fast forward to the present day, it is hard to envision a case under either category in which the Federal Rules of Civil Procedure—rules modeled largely on procedures borrowed from equity[337]—would not provide an adequate remedy. From Federal Rule of Civil Procedure 14's third-party practice, to Rule 19 and 20's joinder of parties and Rule 18's joinder of claims, to Rule 22's interpleader and Rule 24's intervention, to Rule 23's class and mass action procedures, legal remedies for multiple parties[338] and multiple claims[339] are now commonplace. Because the Federal Rules of Civil Procedure provide a means to decide multiple claims by multiple parties in one

331 Dows v. City of Chicago, 78 U.S. 108, 110 (1870) ("No court of equity will, therefore, allow its injunction to issue to restrain [a tax], except where . . . [the taxpayer] has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, [and would] throw a cloud upon the title . . . ."); *see also* 1 DOBBS, *supra* note 300, at 58–61; 1 POMEROY, *supra* note 116, § 243.

332 *See* 1 POMEROY, *supra* note 116, § 243.

333 *Id.* § 266. In *Hill v. Wallace*, for example, Congress placed a transactional tax on the sale of grain futures contracts that would apply each time one of the 1600 members of the Board of Trade sold grain for future delivery. *See* 259 U.S. 44, 62 (1922). The Supreme Court found that a suit for each transaction would be impracticable and that the AIA was inapplicable. *Id.*; *see also* Cummings v. Nat'l Bank, 101 U.S. 153, 157 (1879); 1 DOBBS, *supra* note 300, at 130.

334 *See* 1 POMEROY, *supra* note 116, § 245.

335 *See id.*

336 *See id.* § 243.

337 *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 912 (1987).

338 FED. R. CIV. P. 19, 20, 24.

339 FED. R. CIV. P. 13, 18.

lawsuit, multiplicity of suit should not often (if ever) be grounds for equitable jurisdiction in a modern tax case.[340]

2. Cloud on Title

During the late-nineteenth century, "cloud on title" was often recited as a basis for equitable jurisdiction over a tax claim. A "cloud" on title occurs when an invalid legal instrument appears to encumber the title.[341] As a result, courts sitting in equity routinely would act to cancel and annul tax certificates issued for a void tax,[342] to enjoin the sale of land for illegal taxes,[343] and to enjoin the execution and delivery of a land deed sold at an invalid tax sale.[344]

Through a plethora of exceptions, the AIA permits parties whose property has been levied to test the validity of the tax prior to a tax sale.[345] Because such a taxpayer has an adequate remedy at law to remove any cloud on title, equity jurisdiction would not exist, and taxpayers are left with the specific remedies identified as exceptions in the text of the AIA.

3. Irreparable Mischief

The head of equitable jurisdiction most likely to permit a pre-enforcement tax challenge today is the irreparable mischief, or irreparable injury, basis of jurisdiction. At the outset, Laycock, as well as other scholars, have made a persuasive case that "irreparable injury" has become meaningless: when the issue is remedial, as in the tax context, the adequacy and irreparability rules mean the same thing.[346] Irreparability is simply evidence of inadequacy: "irreparable injury" or "irreparable mischief" cases, that is, illustrate factual situations, which give rise to an inadequate remedy at law.[347]

340 *See* 1 POMEROY, *supra* note 116, § 266 n.2.

341 *See, e.g.*, Bissell v. Kellogg, 60 Barb. 617, 617 (N.Y. App. Div. 1871), *aff'd*, 65 N.Y. 432 (1875).

342 *See, e.g.*, Milwaukee Iron Co. v. Hubbard, 29 Wis. 51, 57 (1871).

343 *See* State *ex rel.* Bayha v. Kansas City Court of Appeals, 10 S.W. 855, 858 (Mo. 1889); *Milwaukee Iron Co.*, 29 Wis. at 52.

344 *See, e.g.*, Crooke v. Andrews, 40 N.Y. 547, 547 (1869).

345 Before any property is subject to levy under the tax code, the taxpayer is entitled to notice and a hearing. 26 U.S.C. § 6330(a)(1) (2012). The AIA authorizes federal courts to enjoin any levy proceeding until such hearing has been held. 26 U.S.C. § 6330(e)(1); *see also* 26 U.S.C. § 6672(c)(2) (stating that courts may enjoin levy of responsible person payments); § 6694(c)(1) (stating that courts may enjoin a levy imposed on tax preparers). Notwithstanding the AIA, the district courts also may grant an injunction to prohibit the enforcement of any levy of third-party property. 26 U.S.C. § 7426(b)(1); *see also* 26 U.S.C. § 6331(i) (forbidding a levy on property pursuant to an indivisible-tax deficiency). And notwithstanding the AIA, 26 U.S.C. § 7429(b) grants jurisdiction to the federal courts to review any jeopardy or levy assessments. 26 U.S.C. § 7429(b)(2)(A).

346 *See* Douglas Laycock, *Injunctions and the Irreparable Injury Rule*, 57 TEX. L. REV. 1065, 1070–71 (1979) (reviewing OWEN M. FISS, CIVIL RIGHTS INJUNCTION (1978)).

347 *See* Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 688 (1990).

The key to litigating under an equitable AIA, then, is to recognize the factual circumstances that give rise to an inadequate remedy at law and to permit a pre-enforcement tax challenge. As relevant to tax litigation, "irreparable mischief" cases tend to fall within one of three categories: severe economic injury, unique rights or entitlements, and third-party taxpayers.

Severe Economic Injury. In extreme cases, the destruction of a business interest may warrant equitable jurisdiction.[348] *Standard Nut*, for example, presents unique circumstances. In that case, *Standard Nut* sold its butter substitute in reliance on the IRS's determination that the taxes levied by the Oleomargarine Act did not apply.[349] Eighteen months later, the IRS changed its mind and assessed a back tax.[350] The back taxes were far more than the company could pay,[351] and the Supreme Court held that "the enforcement of the act against respondent would be arbitrary and oppressive, would destroy its business, ruin it financially, and inflict loss for which it would have no remedy at law."[352]

Civil and Political Rights. The loss of a civil or political right often means that damages at law are inadequate.[353] This is because these sorts of rights are irreplaceable,[354] and since the harm is nonmonetary, it is difficult to estimate an amount of damages.[355] For both of these reasons, equitable relief is routinely available to prevent the loss of a unique right or entitlement.

The prototypical irreplaceability case is land. Because each parcel is considered unique, its loss is irreplaceable. No other piece of property would be an adequate replacement, and no amount of damages that could be used

348 *See, e.g.*, Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205–06 (2d Cir. 1970) (granting injunction because of irreparable business harm); AIM Int'l Trading, LLC v. Valcucine Spa, 188 F. Supp. 2d 384, 388 (S.D.N.Y. 2002) (holding irreparable harm where plaintiff's business would be "wiped out"); Canterbury Career Sch., Inc. v. Riley, 833 F. Supp. 1097, 1105 (D.N.J. 1993) ("[D]estruction of an ongoing business . . . generally constitutes irreparable injury."); Goldstein v. Miller, 488 F. Supp. 156, 175 (D. Md. 1980) ("[W]hen the potential economic loss is so great as to threaten the existence of the moving party's business, then an injunction may be granted, even though the amount of direct financial harm is readily ascertainable.").

349 Miller v. Standard Nut Margarine Co., 284 U.S. 498, 505 (1932).

350 *See id.* at 505.

351 *Id.* at 505–06. The tax was also imposed in a discriminatory manner, as other companies had not been pursued for back taxes. *Id.* at 510.

352 *Id.* at 510–11. Additionally, the destruction of a business interest might give rise to an inadequate remedy at law if damages are difficult to value. *See* Allen v. Balt. & Ohio R.R., 114 U.S. 311, 311 (1885) (enjoining the sale of critical machinery); Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 739 (1824) (holding an injunction warranted where taxation would result in the denial of a franchise to do business in the state).

353 LAYCOCK, *supra* note 2, at 41.

354 *Id.* at 41–42.

355 *Id.* at 37.

to purchase such property is adequate. As a result, the standard remedy is the equitable one of specific performance.[356]

The same is true for constitutional values.[357] Damages at law are inadequate for the loss of a civil or political right both because the rights are irreplaceable and because they are difficult to value.[358] No matter the sum, a taxpayer cannot use a damages award to replace the loss of her civil rights. She cannot buy back the right to vote,[359] or the right to be free from an unreasonable search and seizure,[360] any more than she can buy back her right to free speech,[361] or religious liberty.[362] Furthermore, these sorts of intangible values are never bought or sold on any market and come with

356 1 DOBBS, *supra* note 300, at 130, 134; *see also* Lance v. Plummer, 353 F.2d 585 (5th Cir. 1965) (holding an officer in contempt for violating an injunction not to interfere with the rights of blacks to use public accommodations).

357 *See* 1 DOBBS, *supra* note 300, at 130, 134; *see also* Paulsen v. Cnty. of Nassau, 925 F.2d 65, 65 (2d Cir. 1991) (holding that even minimal loss of First Amendment rights would be irreparable harm and justifying an injunction against interference with distribution of leaflets).

358 *See* LAYCOCK, *supra* note 2, at 41.

359 *See id.* at 60 (citing Quinn v. Missouri., 839 F.2d 425, 425 (8th Cir. 1988) (enjoining exclusion of nonproperty owners from local governing board)); *see also* Bell v. Southwell, 376 F.2d 659, 659 (5th Cir. 1967) (involving a case of racial segregation in a polling place); Hamer v. Campbell, 358 F.2d 215, 215–16 (5th Cir. 1966) (involving racial discrimination in voter registration); Schrenker v. Clifford, 387 N.E.2d 59, 59 (Ind. 1979) (involving the mailing of absentee ballots to addresses within the county); O'Connors v. Helfgott, 481 A.2d 388, 394 (R.I. 1984) ("No amount of monetary damages can rectify this vote dilution.").

360 *See* LAYCOCK, *supra* note 2, at 62 (citing Lewis v. Kugler, 446 F.2d 1343, 1345 (3d Cir. 1971) (involving police stops of cars driven by long-haired males)); *see also* Lankford v. Gelston, 364 F.2d 197, 202 (4th Cir. 1966) (involving mass searches on anonymous tips).

361 *See* LAYCOCK, *supra* note 2, at 61 (citing Elrod v. Burns, 427 U.S. 347, 373 (1976) ("[The] loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.")); *see also* Allee v. Medrano, 416 U.S. 802, 814–15 (1974) (plurality opinion) (involving the suppression of a union organizing campaign and concluding with the Court granting an injunction); Miss. Women's Med. Clinic v. McMillan, 866 F.2d 788, 795 (5th Cir. 1989) (refusing to enjoin picketing at abortion clinic because an injunction would irreparably injure defendants); Mariani Giron v. Acevedo Ruiz, 834 F.2d 238, 239 (1st Cir. 1987) (involving a politically motivated discharge from public employment); Jacobsen v. U.S. Postal Serv., 812 F.2d 1151, 1154 (9th Cir. 1987) (holding that, with the removal of newspaper racks, the "prevention of access to a public forum is, each day, an irreparable injury").

362 *See* LAYCOCK, *supra* note 2, at 61–62 (citing Deeper Life Christian Fellowship, Inc. v. Bd. of Educ., 852 F.2d 676, 679 (2d Cir. 1988) (involving access to a public forum, where an injunction was granted without discussing irreparable injury)); *see also* Islamic Ctr. of Miss. v. City of Starkville, 840 F.2d 293, 303 (5th Cir. 1988) (involving discriminatory zoning, where an injunction was granted without discussion); ACLU v. City of St. Charles, 794 F.2d 265, 274–75 (7th Cir. 1986) (involving a lighted cross on a city firehouse); Lily of the Valley Spiritual Church v. Sims, 523 N.E.2d 999, 999 (Ill. App. Ct. 1988) (involving disruption of church services, where an injunction was granted without discussion of irreparable injury).

intractable valuation problems.[363] As Wright and Miller explain, because the loss of a constitutional right is unique, "most courts hold that no further showing of irreparable injury is necessary."[364] Since the loss of such rights is irreplaceable and damages at law inadequate, injunctions are the standard remedy in civil rights cases.[365]

Third Party Situations. The legal refund remedy also may be inadequate where the incidence of the tax falls on a third party who is unable to utilize the statutory refund remedy. The earliest AIA decisions involved this category of inadequacy—the federal courts permitted shareholders to sue to enjoin a corporate tax because they had no means to seek a refund once the tax had been voluntarily paid.[366] The Supreme Court's recent cases have cut back on this traditional equitable head of jurisdiction, requiring only an "alternative legal avenue."[367] But the equitable tradition is clear: the remedy at law must not only exist, it must be adequate.[368] A legal remedy is adequate only if it is "complete, practical, and efficient" as the equitable remedy.[369] In brief, where a party is burdened by, but unable fully to challenge a tax, equity jurisdiction obtains, and the AIA does not pose a bar to the taxpayer's pre-enforcement challenge.

4. *Williams Packing* and *Regan*

Reading the AIA consistent with precedent reveals problems with the Supreme Court's decisions in *Williams Packing* and *Regan.* Equity permits pre-enforcement tax challenges in broader circumstances than those cases contemplate.

In 1962, when the Supreme Court redefined the equitable exceptions to which the AIA might be subject, it all but eliminated them. *Williams Packing* reversed centuries of precedent and practice holding that certain irreparable harms might permit a pre-enforcement tax challenge and held that the AIA barred pre-enforcement actions unless there were "no circumstances" under which the government might prevail.[370] The question of whether the government will have a chance to prevail, moreover, is to be decided at the time

363 *See* LAYCOCK, *supra* note 2, at 41.

364 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948 (2d ed. 1973); *see also* Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984) (noting that in the case of the deprivation of a constitutional right "most courts hold that no further showing of irreparable injury is necessary"); Int'l Ass'n of Firefighters v. City of Sylacauga, 436 F. Supp. 482, 492 (N.D. Ala. 1977) ("Deprivations of constitutional rights are usually held to constitute irreparable injury as a matter of law.").

365 *See* LAYCOCK, *supra* note 2, at 41–42.

366 *See, e.g.*, Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 429 (1895) (concerning whether a diversion of corporate funds to an invalid tax may be enjoined), *reh'g granted and opinion vacated*, 158 U.S. 601 (1895).

367 South Carolina v. Regan, 465 U.S. 367, 373 (1984).

368 *See* LAYCOCK, *supra* note 2, at 22–23.

369 *Id.* at 22.

370 Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962).

the government assesses the tax and under "the most liberal view of the law and the facts."[371]

The recent decision in *United States v. Clintwood Elkhorn Mining Company* illustrates the narrowness of the *Williams Packing* exception. Plaintiffs in that case sought a refund of a coal export tax that had been held unconstitutional.[372] The IRS acquiesced.[373] Although no one disputed that the coal tax was unconstitutional, the Supreme Court found that the "under no circumstances" test was not satisfied since the district court decision invalidating the tax had relied in part on Supreme Court cases that postdated the tax assessment.[374] As a result, it was not "obvious" that the government had no chance of prevailing—at least when it had assessed the tax.[375]

For its part, *Regan* is a cramped interpretation of the inadequate remedy at law predicate to equity jurisdiction. *Regan* held that the AIA was not intended to bar a tax challenge where "Congress has not provided the plaintiff with *an alternative legal way* to challenge the validity of a tax."[376] The quintessential *Regan* case involves a challenger who is burdened by, but does not ultimately bear the incidence of, a tax. In such case, the refund remedy is unavailable and the taxpayer has no alternate remedy at law. *Regan* does not contemplate a challenge when a taxpayer is challenging her own tax. As the Supreme Court's early AIA cases show, however, the legal refund remedy may nevertheless be inadequate. In short, *Regan's* "alternative remedy"[377] must be replaced with equity's "adequate remedy."

B. Waiver and Forfeiture

That the AIA governs equity jurisdiction will also allow the government—as it has in times past—to determine whether the purposes of the AIA are best served by prompt resolution. An objection that the court of equity is not the proper forum may be waived, and indeed is deemed waived, if not raised at the earliest proper stage of the proceedings.[378] As a result, the government may decide to waive the AIA and seek a decision on the merits, when such a decision would aid in the overall goal of efficient tax collection.

As Congress enacts more of its policies through the tax code, the availability of waiver will become all the more important. Waiver, for example, would have greatly simplified things in the *NFIB* litigation. The government could have been forthright in its waiver of the AIA, and the Court could have

371 United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1, 13–14 (2008) (quoting *Williams Packing*, 370 U.S. at 7).

372 *Id.* at 5–6.

373 *Id.* at 6.

374 *See id.* at 14.

375 *Id.*

376 South Carolina v. Regan, 465 U.S. 367, 373 (1984) (emphasis added).

377 *Id.* at 374, 377.

378 MCCLINTOCK, *supra* note 294, at 99 (citing Insley v. United States, 150 U.S. 512 (1893); Reynes v. Dumont, 130 U.S. 354 (1889); Maxwell v. Frazier, 96 P. 548 (Or. 1908); Hoff v. Olson, 76 N.W. 1121 (Wis. 1898)).

proceeded to the merits without determining that the § 5000A penalty was a tax for one purpose (constitutional) and not for another (statutory).[379]

C. Equitable Discretion

A key feature of equity is discretion—even as to jurisdiction. The traditional discretion afforded to courts of equity to grant, deny, or craft remedies also extends to an equity court's decision whether to hear a case.[380] Because the system of equity treats access to equitable rights and remedies as a "privilege," even where a plaintiff establishes that the remedy at law is inadequate, a court sitting in equity may in its discretion refuse to hear the case.[381] This one-way discretion[382] will allow federal courts, once they have determined that the remedy at law is inadequate, to consider whether pre-enforcement review of a tax is an appropriate exercise of their equitable jurisdiction. Federal courts may consider both the government's interest in the prompt collection of revenues and the disruption a pre-enforcement lawsuit would occasion.

Conclusion

The Anti-Injunction Act has never been more important. Congress has and will increasingly pursue many of its behavior-shaping goals through the tax code. Whether an individual can seek pre-enforcement review will depend upon the status of the AIA. A spate of federal court decisions and the academic commentary leaves little room for the argument that the AIA is jurisdictional. Yet, contrary to the conventional wisdom, the AIA is not an absolute bar on the pre-enforcement review of taxes. It governs the equitable jurisdiction of the federal courts. This changes the landscape of pre-enforcement tax litigation: a taxpayer may challenge a tax if the government waives or forfeits reliance on the AIA, as well as in circumstances where Congress has not provided an adequate remedy at law and equity jurisdiction otherwise exists.

379 *See NFIB*, 132 S. Ct. 2566, 2594–96 (2012).

380 1 Dobbs, *supra* note 300, at 12.

381 *Id.* at 57.

382 *Id.* at 127 (arguing that the adequacy rule is "fixed and definite"—where a remedy at law is adequate, the claim must be dismissed).