Nothing Certain Except Death and Illegal Taxes: How the Tax Anti-Injunction Act Violates Due Process

by Andy Gorordo[*]

The Tax Anti-Injunction Act ("TAIA") bars federal courts from hearing suits "for the purpose of restraining the assessment or collection of any tax." In place of pre-enforcement equitable remedies, Congress has supplied an exclusively post-deprivation regime of administrative and judicial remedies designed to afford the Internal Revenue Service protection from burdensome litigation. But these avenues provide no meaningful opportunity for taxpayers to avert irreparable harm suffered from illegally collected taxes, a consequence seriously at odds with the Fifth Amendment's Due Process Clause. The very heart of due process is the opportunity to be heard at a meaningful time, which for irreparable injuries can only be prior to government enforcement. The Supreme Court's long history of interpreting the TAIA has been defined by attempts to harmonize the statute with the Due Process Clause, but with little success. This Contribution argues that the Supreme Court's no-alternative-remedy exception announced in South Carolina v. Regan *should be extended to allow plaintiffs to bring suits for equitable injunctive relief, notwithstanding the TAIA, whenever they can demonstrate a substantial likelihood of irreparable injury. The Court's recurring need to carve out exceptions to the TAIA signals that the current doctrine is fundamentally unworkable, and an expanded* Regan *exception, grounded in the Court's historical equitable approach to the TAIA's statutory predecessor, offers a sensible off-ramp.*

The Tax Anti-Injunction Act ("TAIA") prevents federal courts from hearing any "suit for the purpose of restraining the assessment or collection of any tax."[1] In essence, the TAIA stands

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[1] 26 U.S.C. § 7421(a). While the TAIA itself only applies to cases about federal taxes, a companion statute—confusingly named the Tax Injunction Act—

as a warped tribute to the "tenacity of the American taxpayer," whose famous litigiousness would otherwise threaten to obstruct the routine and necessary collection of taxes by the federal government.[2] Congress enacted the current TAIA in 1954 and has since amended it numerous times, but the statute's immediate predecessor—the now-defunct Anti-Injunction Act—dates back as far as the 1860s.[3] In other words, it has been over a century and a half since taxpayers in the United States have been allowed to sue the federal government to prevent the illegal collection of tax monies.

This brings the TAIA squarely into conflict with the demands of the Fifth Amendment's Due Process Clause, which guarantees that no one shall be "deprived of . . . property, without due process of law."[4] Tax collection has long been recognized to implicate taxpayers' property interests, and, by extension, their due process rights under the Fifth Amendment.[5] It is constitutional bedrock that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."[6] Injunctive suits, in accordance with traditional equitable relief standards, require plaintiffs to demonstrate "a likelihood of substantial and immediate *irreparable injury*."[7] Since irreparable injuries are by definition incompensable, the

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serves a nearly identical role in blocking federal courts from hearing cases involving state taxes. *See* 28 U.S.C. § 1341.

[2] South Carolina v. Regan, 465 U.S. 367, 386 (1984) (O'Connor, J., concurring) (quoting Israel Herman Gorovitz, *Federal Tax Injunctions and the Standard Nut Cases*, 10 TAXES 446, 446 (1932)).

[3] *See id.* at 373 (discussing the Anti-Injunction Act).

[4] U.S. CONST. amend. V.

[5] *See, e.g.*, Londoner v. City and County of Denver, 210 U.S. 373, 385 (1908) ("[W]here the legislature . . . commits to some subordinate body the duty of determining whether, in what amount, and upon whom [a tax] shall be levied . . . due process of law requires that . . . before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard . . . .").

[6] Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (internal citation omitted).

[7] City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) (emphasis added) (quoting O'Shea v. Littleton, 414 U.S. 488, 502 (1974)). The impending or "substantially likely" requirement stems from Article III limitations on the power of the federal judiciary and is a key requirement to establish standing in any pre-enforcement challenge. *See* Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158–60 (2014) (setting out the Supreme Court's most recent formulation of the pre-enforcement test).

only "meaningful time" to be heard for due process purposes is *before* the harm occurs, as at no other time is there serious opportunity for remedy or redress. It is this fundamental precept of due process—that only prospective injunctive relief is an adequate remedy for an otherwise irreparable harm—that conflicts with, as it has come to be known, the TAIA's "pay-now-sue-later procedure."[8]

Instead of allowing traditional pre-enforcement equitable suits, the TAIA limits taxpayers who want to challenge the legality of their taxes to exclusively post-deprivation administrative and judicial remedies, including refund suits and alternative dispute resolution.[9] While these remedies suffice in many cases, they do not account for parties who cannot afford to wait months or years before receiving a refund from the Internal Revenue Service ("IRS"). Some parties will suffer irreparable harm from the collection of illegal taxes—imagine, for example, a nonprofit organization that will go bankrupt in the intervening time between the IRS's illegal collection and the nonprofit's eventual victory in a refund suit. For parties harmed by such "irreparable mischief,"[10] there is effectively *no* avenue for relief because the TAIA bars the only adequate remedy: a pre-enforcement injunctive suit.

This Contribution argues that the TAIA should be construed to allow parties capable of demonstrating irreparable harm to bring pre-enforcement suits for equitable relief. This can be accomplished by extending the no-alternative-remedy exception already announced by the Supreme Court in *South Carolina v. Regan*.[11] The Supreme Court's current approach to the TAIA has proven itself largely unworkable, as simmering due process concerns have forced the Court to reverse itself multiple times and created an ever-expanding list of ad hoc exceptions to the

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[8] CIC Servs., LLC v. Internal Revenue Service, 593 U.S. 209, 222 (2021).
[9] *See* I.R.S. Publ'n 5 (Rev. 4-2021) (describing the availability of dispute resolution through the IRS's Appeals Office); 26 U.S.C. § 7422.
[10] Erin Morrow Hawley, *The Equitable Anti-Injunction Act*, 90 NOTRE DAME L. REV. 81, 128–31 (2014) (discussing the categories of injuries that sufficed to show irreparable harm in the context of taxation in classical equity jurisprudence).
[11] *Regan*, 465 U.S. at 373, 378.

TAIA. Allowing suits for equitable relief for those facing irreparable injury better accords with historical understanding and enforcement of the TAIA while also leaving much of the statute in effect and affording taxpayers their constitutional right to due process.

The TAIA and its predecessor, the Anti-Injunction Act, have been the subject of due process litigation since at least the early twentieth century. As this Contribution will argue, the Supreme Court has frequently upheld the TAIA as a permissible exercise of congressional authority, but almost always with some caveat or exception that tacitly recognizes the statute's inherent tension with the Due Process Clause. These frequent carveouts reveal a fundamental error in the Court's reasoning going back decades that leaves the doctrine around the TAIA practically unworkable.

Beginning as far back as 1916, the Supreme Court expressed serious concern that a statute foreclosing injunctive suits in tax disputes, if lacking an equitable exception, would run afoul of due process. *Dodge v. Osborn* dealt with a suit to enjoin a set of income taxes on imports that the plaintiffs argued were unconstitutional, with the Supreme Court eventually upholding dismissal for want of jurisdiction because of the statutory bar of the Anti-Injunction Act, the TAIA's direct predecessor.[12] In rejecting the petitioners' contention that due process demanded their case be heard, the Court reasoned that allowing "the mere complaint that the tax is illegal and unconstitutional" to sustain the suit "would take every case where a tax was assailed because of its unconstitutionality out of the provisions of the statute," effectively rendering the whole of the Anti-Injunction Act inoperable.[13] But the *Dodge* Court also assumed without deciding that irreparable harm, or in its words, "[independent and] additional equities sufficient to sustain jurisdiction," would be enough to defeat the Anti-Injunction Act; the only issue was that the plaintiff in that case had alleged no grounds for equitable relief beyond the simple illegality and unconstitutionality of the tax then at issue.[14] In other words, the *Dodge* plaintiffs never argued that their injury

[12] Dodge v. Osborn, 240 U.S. 118, 122 (1916).
[13] *Id.* at 122.
[14] *Id.* at 121–22.

would be irreparable, and consequently the Court straightforwardly applied the Anti-Injunction Act. The *Dodge* court's suggestion that "extraordinary and entirely exceptional circumstance[s]," which may well have included cases involving irreparable injury, could justify allowing a suit to proceed was eventually taken up and given life in a series of cases over the next decade or so.[15] In one of its earliest forays into the issue, then, the Supreme Court held open the idea that due process (or at least traditional equity principles) could justify an exception to the Anti-Injunction Act.

Sixteen years later, in 1932, the Supreme Court decided *Miller v. Standard Nut Margarine Co.*, which unequivocally set down the rule gestured at in *Dodge*: in cases where a party demonstrates "special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained" notwithstanding the Anti-Injunction Act.[16] *Miller* also provided the Court with the opportunity to clarify in greater detail what kinds of circumstances were "special and extraordinary" for purposes of the Anti-Injunction Act. *Miller* was an injunctive suit challenging the levying of an oleomargarine tax,[17] and the *Miller* Court identified two features of the respondent's case that brought it within the ambit of an equitable exception: first, the application of the tax itself was plainly illegal, as it was being assessed upon a product that was not oleomargarine; and second, the levying of the tax "would destroy [respondent's] business, ruin it financially, and *inflict loss for which it would have no remedy at law*."[18] Consequently, the *Miller* court upheld an equitable injunction against the tax even in the face of the Anti-Injunction Act.[19] Though *Miller* did not explicitly reference the Fifth Amendment or the Due Process Clause, its reasoning stems from a core anxiety that, if enforced strictly, the Anti-Injunction Act would leave taxpayers stranded without any recourse for harms caused by illegal tax collection.

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[15] *Id.* at 122; *see* Hawley, *supra* note 10, at 116 (discussing Anti-Injunction Act cases shortly after *Dodge*).
[16] Miller v. Standard Nut Margarine Co., 284 U.S. 498, 509 (1932).
[17] *Id.* at 502.
[18] *Id.* at 510–11 (emphasis added).
[19] *Id.* at 511 ("It is clear that, by reason of the special and extraordinary facts and circumstances, [the Anti-Injunction Act] does not apply.").

But *Miller* was largely abandoned when the Court decided *Enochs v. Williams Packing & Navigation Co.* thirty years later in 1962.[20] *Williams Packing* reread *Miller* to apply only to cases where the blatant illegality of the tax made application of the now-operable TAIA inapposite.[21] As the *Williams Packing* majority stated: "[A] suit may not be entertained merely because collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise."[22] But even as *Williams Packing* slammed the door shut on *Miller*'s expansive vision of equitable remedies based on irreparable injury, it fully reaffirmed that illegal exactions may be challenged if the government has no plausible basis whatsoever for its asserted authority; that is, if "the exaction is merely in 'the guise of a tax.'"[23] Clearly something bothered the Court about leaving flagrant illegality or unconstitutionality without remedy, and it was unwilling to take the TAIA quite as far as its literal language.

Twelve years after *Williams Packing*, in 1974, the Court provided perhaps its most comprehensive (and stringent) reading of the TAIA in a pair of cases, *Bob Jones University v. Simon*[24] and *Alexander v. 'Americans United' Inc.*[25] But even these seemingly harsh opinions were not without their own equitable exception, driven once again by notions of fundamental fairness. Decided on the same day, *Bob Jones* and *Alexander* followed *Williams Packing* closely, with each rejecting the argument that irreparable injury alone was enough to circumvent the TAIA, since "allowing injunctive relief on the basis of this showing alone would render [the TAIA] quite meaningless."[26] In this way, the Court was attempting to echo the earlier reasoning of *Dodge*, wherein the fact that any alternative reading would "effectively

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[20] *See* Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 5–6 (1962).
[21] *Id.* at 6 ("The courts below seem to have found that [*Miller*] decides that [TAIA] does not bar suit for an injunction against the collection of taxes not due if the legal remedy is inadequate. We cannot agree . . . .").
[22] *Id.*
[23] *Id.* at 7 (quoting *Miller*, 284 U.S. at 509).
[24] Bob Jones University v. Simon, 416 U.S. 725 (1974).
[25] Alexander v. 'Americans United', 416 U.S. 752 (1974).
[26] *Id.* at 762. *Bob Jones*, 416 U.S. at 745–46 ("Acceptance of petitioner's irreparable injury argument would simply revive the evisceration of the [TAIA] inherent in [*Miller*].").

repeal[] the Act" was justification enough for its decision.[27] *Dodge*, however, had been concerned only that allowing suits on the mere basis of illegality, as opposed to a claim of irreparable injury, would void the statute.[28] By applying *Dodge* even to claims alleging irreparable harm, *Bob Jones* and *Alexander* were in fact misreading what the Court had said nearly sixty years prior in support of the much more recently decided *Williams Packing* and its evisceration of *Miller*. Even as they rewrote the history of the doctrine, however, the *Bob Jones* and *Alexander* Courts took notice that the TAIA "imposed an especially harsh regime" that was only tolerable because of "the powerful governmental interests in protecting the administration of the tax system," and they furthermore intimated that the Act would be unlikely to survive due process challenges but for the ample post-deprivation remedies available to taxpayers.[29] Just like *Williams Packing* before them, then, *Bob Jones* and *Alexander* felt the need to qualify their decisions in support of the TAIA because of the looming shadow of the Due Process Clause.

That shadow loomed larger still another decade later in 1984 when the Court decided *South Carolina v. Regan*, which embraced fundamental principles of equity more than any decision since *Miller* and formalized the first new exception to the TAIA since the *Williams Packing* decision twenty-two years prior.[30] *Regan* involved a unique set of facts wherein the state of South Carolina sought to challenge the taxability of state-issued bearer bonds.[31] As it would itself incur no tax liability, South Carolina had no recourse to the usual set of administrative remedies that had been so critical in the *Bob Jones* and *Alexander* decisions.[32] The *Regan* Court found that the TAIA was no bar to a suit going forward if no other remedy, either pre- or post-

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[27] *Bob Jones*, 416 U.S. at 744; *see id.* at 746 n.20 (citing *Dodge*, 240 U.S. at 122); *see also Dodge*, 240 U.S. at 122 (rejecting the petitioners' argument because it "would take every case where a tax was assailed because of its unconstitutionality out of the provisions of the statute, and thus render it nugatory . . . .").
[28] *Dodge*, 240 U.S. at 122.
[29] *Bob Jones*, 416 U.S. at 746–47, 749; *see Alexander*, 416 U.S. at 761–62.
[30] *See Regan*, 465 U.S. at 372–373.
[31] *Id.* at 371–72.
[32] *Id.* at 378–379.

deprivation, would be available to a party. While the *Regan* majority's opinion focused more on the legislative history behind the TAIA to determine that it was not Congress's intention to bar suits where no other remedy was available, it did also reference (if obliquely) that due process concerns might arise if such congressional intent did exist.[33] In a concurring opinion, Justice O'Connor and two other Justices—including Justice Powell, the author of the majority in *Bob Jones*—went further, explaining that "[it is an] established rule that Congress cannot, consistently with due process, deny a taxpayer . . . all opportunity for an ultimate judicial determination of the legality of a tax assessment . . . ."[34] To date, the so-called *Regan* exception embodies the furthest the Court has gone since *Miller* in acknowledging that the TAIA must, and does, yield to the Due Process Clause.

Each time the Supreme Court has ruled on the legality of either the Anti-Injunction Act or TAIA, there has been an undercurrent of discomfiture on due process grounds. *Dodge* left open that "extraordinary and entirely exceptional circumstance[s]"[35] might require courts to ignore the Act, a conclusion that *Miller* solidified into doctrine; *Williams Packing* formalized an exception for when the government acts clearly beyond its authority;[36] *Bob Jones* and *Alexander* qualified their holdings on the basis that they were not cases "in which an aggrieved party has no access at all to judicial review";[37] and *Regan*, like *Williams Packing* before it, was a case no less about creating an off-ramp for due process concerns than it was about upholding the basic scheme of the TAIA.[38]

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[33] *See id.* at 375 (relying on *Bob Jones*'s reasoning, which in turn had raised the specter of the Due Process Clause).

[34] *Regan*, 465 U.S. at 393 (O'Connor, J., concurring in judgment). Justice O'Connor's concurrence actually rejected the idea that the Due Process Clause demanded the outcome in *Regan*, but that was largely because she believed that South Carolina was not a "person" for the purposes of the Fifth Amendment and therefore had no due process rights. *See id.* at 394 (O'Connor, J., concurring in judgment).

[35] *Dodge*, 240 U.S. at 122.

[36] *Williams Packing*, 370 U.S. at 7–8.

[37] *Bob Jones*, 416 U.S. at 746.

[38] *See Regan*, 465 U.S. at 378.

Given the patchwork state of the doctrine, it is apparent that the Supreme Court has taken a wrong turn in its jurisprudence surrounding the TAIA.[39] It took the Court nearly one hundred years, from the passage of the Anti-Injunction Act in 1867 to the handing down of *Williams Packing* in 1962, to decide squarely that neither equity principles nor due process enabled suits for injunctive relief under either the Anti-Injunction Act or the TAIA.[40] Moreover, since the decision in *Williams Packing*, the Court has done little but formulate new exceptions to this principle in order to accommodate the myriad circumstances in which the Due Process Clause demands a different result.[41]

Rather than continuing in this vein of case-by-case due process exceptions, the Court should adopt *Regan*'s no-alternative-remedy exception as a sensible off-ramp in these circumstances. While the *Regan* decision focused more on the complete lack of procedural options available, its internal logic can be easily extended to cover plaintiffs who demonstrate substantial risk of irreparable harm, in accordance with traditional equity requirements. A post-deprivation hearing affords no meaningful opportunity to be heard to an individual whose injury can, at the time of that hearing, no longer be redressed; that individual, then, has no alternative available remedy (at least for their irreparable injury) and is therefore within the literal terms of the *Regan* exception.[42] In other words, a plaintiff who demonstrates an impending and substantially likely irreparable injury is in no different a position whether or not they are offered a hearing after the fact, as either way the harm will result and will be beyond

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[39] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 280–86 (2022) (discussing how doctrinal inconsistency over time signals a lack of judicial workability).

[40] *See Williams Packing*, 370 U.S. at 5.

[41] In addition to the above discussed *Williams Packing* and *Regan* exceptions, the Supreme Court has had to continually narrow and clarify the scope of the TAIA to avoid depriving parties of the ability to seek redress. *See, e.g.*, *CIC Servs., LLC,* 593 U.S. at 219–23 (allowing taxes to be challenged when imposed alongside affirmative reporting obligations); Direct Mktg. Ass'n v. Brohl, 575 U.S. 1, 8–12 (2015) (clarifying that the Tax Injunction Act does not apply to certain pre-assessment stages of tax administration); *see also* Z Street v. Koskinen, 791 F.3d 24, 30–31 (D.C. Cir. 2015) (finding that challenging the legality of IRS administrative remedies is not barred by the TAIA).

[42] *See Regan*, 465 U.S. at 378.

redress. Consequently, a plaintiff capable of demonstrating an irreparable injury is always one "for whom [Congress] has not provided an alternative remedy"[43] and thus within the reasoning of *Regan*. Such a reading of *Regan* would move the Court's doctrine back in line with its earlier decisions in *Dodge* and *Miller*, restoring the historical scope of the Anti-Injunction Act and TAIA, while according with traditional equitable notions regarding both due process and tax administration.[44]

Moreover, this reading would not be, as the *Bob Jones* Court feared, equivalent to "repeal[ing] the Act" in its entirety.[45] The majority of "tenacious" taxpayers who would seek to enjoin IRS assessments and collections would remain barred, as an irreparable injury does not result from every illegal collection of taxes. Indeed, most harms created by illegal taxation are monetary and thus can be fully remunerated through the simple issuance of a refund at a later time. For individuals facing only this kind of financial harm, the preexisting structure of post-deprivation remedies more than suffices to satisfy the Due Process Clause. Furthermore, not every party that would in fact suffer an irreparable harm would be able to meet the burden of showing it to be "substantially likely," as the expanded *Regan* exception would require. Thus, the fears of wide-flung courthouse doors and a paralyzed IRS are unlikely to result; instead, a small subset of individuals and businesses capable of showing some concrete reliance interest in the disputed sum—perhaps those who have already purchased their airline tickets[46]—would be able to meaningfully contest the legality of their taxes before suffering irreparable harm.

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[43] *Id.*

[44] Hawley, *supra* note 10, at 112–13 (describing common law equity principles regarding tax injunctions).

[45] *Bob Jones*, 416 U.S. at 744.

[46] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 564 (1992); *see also id.* at 579 (Kennedy, J., concurring in the judgment).