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The Jurisdictional Question in *Hobby Lobby*

Erin Morrow Hawley

Burwell v. Hobby Lobby Stores, Inc. may well be the biggest case of the past Term.¹ But by its own rules, the Supreme Court lacked jurisdiction to decide the case. An obscure statute, the Anti-Injunction Act of 1867 (AIA), imposes a pay-first requirement on federal tax challenges. The deeply held conventional wisdom is that the AIA is a jurisdictional statute,² and there is a good argument that the AIA applies to the contraception mandate at issue in *Hobby Lobby*. In *National Federation of Independent Business v. Sebelius*, the Court held that Congress's decision to label something a tax provides the best evidence as to whether Congress intended the AIA to apply.³ The contraception mandate, 26 U.S.C. § 4980D (2012), expressly refers to its employer assessment as a tax—twenty-four times. As a result, the Court's failure to address the AIA in *Hobby Lobby* was a serious mistake.

In *National Federation of Independent Business v. Sebelius*, Chief Justice Roberts famously—or perhaps infamously, depending on your point of view—concluded that the enforcement provision for the individual healthcare mandate, 26 U.S.C. § 5000A (2012), was a penalty for *statutory* purposes and yet a tax for *constitutional* purposes.⁴ This creative reasoning was occasioned by the AIA, which prevents a taxpayer from bringing a preemptive challenge to a federal tax. Because the government depends upon the prompt collection of tax revenues, the 1st Congress, and every Congress since, has enforced taxes “by summary and stringent means.”⁵ The AIA thus requires a taxpayer to pay the disputed tax and exhaust an administrative appeal before raising a constitutional or other challenge through a refund action.⁶

1. No. 13-354 (U.S. June 30, 2014).

2. See Erin Morrow Hawley, *The Equitable Anti-Injunction Act*, 90 NOTRE DAME L. REV. (forthcoming 2014) (collecting cases and scholarly commentary).

3. 132 S. Ct. 2566, 2583 (2012).

4. *Id.*

5. State Railroad Tax Cases, 92 U.S. 575, 614 (1875); see also *Kelly v. Pittsburgh*, 104 U.S. 78, 80 (1881) (holding 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.).

6. 26 U.S.C. § 7421(a) (2012) (“[N]o 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.”)

The AIA received a lot of attention in *NFIB*. Four months before oral argument, the Supreme Court appointed an *amicus curiae* to argue “in support of the position that the [AIA] bars the . . . challenge [to] the minimum coverage provision of the Patient Protection and Affordable Care Act.”⁷ As the Court explained, there was a “reasonable argument that the Anti-Injunction Act deprived [the Court] of jurisdiction” to hear the case.⁸ The Court also directed the parties to brief the issue, and it reserved a full day of oral argument for the AIA question. Three different views of the AIA were presented. The Federal Government argued that the AIA was jurisdictional but did not apply because § 5000A was a penalty rather than a tax.⁹ The States and *NFIB* argued that the AIA was not jurisdictional, and since the Government had forfeited any such defense, the Court did not need to address the AIA at all.¹⁰ The court-appointed *amicus*, Robert Long, argued that the AIA required the Court to dismiss the case because the AIA was jurisdictional and § 5000A was a tax, not a penalty.¹¹

The Court seriously considered Robert Long’s assessment. “Before turning to the merits,” the Court wrote, “we need to be sure we have the *authority* to do so.”¹² The AIA, the Court explained, “protects the Government’s ability to collect a consistent stream of revenue, by barring litigation to enjoin or otherwise obstruct the collection of taxes.”¹³ As a result, “taxes can ordinarily be challenged only after they are paid, by suing for a refund.”¹⁴ Characterizing § 5000A as a tax would have created significant problems for the individual mandate challenges: because the mandate did not become enforceable until 2014, no plaintiff had yet paid Treasury.¹⁵ Consequently, the challenges were not the sort of refund suit typically allowed under the AIA, but rather suits to restrain collection under § 5000A – and thus potentially barred by the AIA.

The Court avoided this conclusion, but only by holding that § 5000A imposes a *penalty* and not a *tax* – at least for statutory purposes. The “best evidence” as to whether Congress intended the AIA to apply to the individual

7. Order, *NFIB*, 132 S. Ct. 2566 (No. 11-398) <http://www.supremecourt.gov/orders/courtorders/111811zr.pdf>.

8. *NFIB*, 132 S. Ct. at 2582.

9. Reply Brief for Petitioners (Anti-Injunction Act) at 2-4, *NFIB*, 132 S. Ct. 2566 (No. 11-398); Transcript of Oral Argument at 46-54, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-398).

10. Reply Brief for Private Respondents on the Anti-Injunction Act at 3-10, *NFIB*, 132 S. Ct. 2566 (No. 11-398); Reply Brief for State Respondents on the Anti-Injunction Act at 3-9, *NFIB*, 132 S. Ct. 2566 (No. 11-398).

11. *NFIB*, 132 S. Ct. at 2583-84.

12. *Id.* (emphasis added).

13. *Id.* at 2582.

14. *Id.* (citing *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7-8 (1962)).

15. *Id.*

mandate, concluded the Court, is the “statutory text.”¹⁶ Because the AIA and the Affordable Care Act “are creatures of Congress’s own creation,” the Court wrote, the issue of how they relate is for Congress to determine.¹⁷ 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.¹⁸ Therefore, according to the Court, the AIA did not apply to the suit.¹⁹

This brings us to the present conundrum: the Court’s text-based reasoning in *NFIB* raises a significant question as to whether the AIA applies to the contraception mandate at issue in *Hobby Lobby*. Under *NFIB*, there is a “reasonable argument” that the AIA should have deprived the Court “of jurisdiction to hear challenges to the [contraception] mandate.”²⁰ That mandate requires employers of a certain size who offer health insurance to provide coverage for all FDA-approved contraceptives.²¹ Employers who fail to provide such coverage must pay \$100 per employee per day.²² The statute provides: “There is hereby imposed a *tax* on any failure of a group health plan to meet the requirements of chapter 100 (relating to group health plan requirements).”²³ It continues, “The amount of the *tax* imposed . . . on any failure shall be \$100 for each day in the noncompliance period with respect to each individual to whom such failure relates.”²⁴

If the *NFIB* Court really meant what it said, then this statutory text should have engendered some serious jurisdictional qualms for the *Hobby Lobby* Court. The language of the mandate could not be clearer: the statute refers to the contraception assessment as a “tax” no less than twenty-four times.²⁵

16. *Id.* at 2583.

17. *Id.*

18. *Id.* (quoting 26 U.S.C. §§ 5000A(b), (g)(2)).

19. *Id.*; 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.”).

20. *Id.* at 2583.

21. See Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8727 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590 & 45 C.F.R. pt. 147).

22. 26 U.S.C. §§ 4980D(a)-(b)(1) (2012); 42 U.S.C. § 300gg-13 (2012).

23. 26 U.S.C. § 4980D(a) (2012) (emphasis added).

24. *Id.* § 4980D(b) (emphasis added). The other penalty provision that may apply when employers choose not to offer qualifying health insurance at all also refers to the payment as an “assessable penalty” and as a “tax.” *Id.* § 4980H(a). See *Halbig v. Sebelius*, No. 13-0623, 2014 WL 129023, at *9-11 (D.D.C. Jan. 15, 2014) (finding that the penalty imposed by § 4980H is a tax subject to the AIA).

25. The Court has even applied the AIA to “statutorily described ‘taxes’” where it thought the label inaccurate. *NFIB*, 132 S. Ct. at 2583 (citing *Bailey v. George*, 259 U.S. 16 (1922) (noting

Moreover, in holding that the individual mandate penalty in the ACA was not a tax for the purposes of the AIA, the *NFIB* Court found it “significant” that the “Affordable Care Act describes many other exactions it creates as ‘taxes.’”²⁶ “Where Congress uses certain language in one part of a statute and different language in another,” the Court wrote, “it is generally presumed that Congress acts intentionally.”²⁷ But surely the twenty-four instances of contrasting language in § 4980D suggest that Congress, here, too, should be presumed to have acted intentionally. Finally, like any other tax, § 4980D is located in the Internal Revenue Code, enforced by the Internal Revenue Service, and performs a revenue-raising function.²⁸

Indeed, at oral argument, the Justices repeatedly characterized § 4980D as a tax. As Justice Kagan put it, “[Section 4980D]’s not even a penalty . . . in the language of the statute. It’s a payment or a tax.”²⁹ Justice Sotomayor similarly observed, “It’s not called a penalty. It’s called a tax.”³⁰ Invoking memories of the *NFIB* decision (and audience laughter), the Chief Justice agreed: “She’s right about that.”³¹ In its decision, moreover, the Court casually referred to the “taxes” imposed by the contraception mandate.³² Given the prevalence of such sentiments among the Justices, one would expect a follow-up discussion about the AIA — perhaps a question along the lines of, “So, counsel, if this payment is a tax, then doesn’t the AIA bar this lawsuit unless and until your clients have paid the tax?” Yet not a single Justice raised the possibility of an AIA bar at oral argument or in any opinion.

that the Anti-Injunction Act applied to the “Child Labor Tax” even though that “tax” had been struck down as exceeding Congress’s taxing power in *Drexel Furniture*)).

26. *Id.*

27. *Id.* (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)).

28. See 26 U.S.C. §§ 4980D(a)-(b)(1) (2012); *id.* § 6201 (Secretary may make “assessments of all taxes” imposed by Title 26); *id.* § 6301 (collection authority). In addition, the Department of Health and Human Services may enforce regulations regarding health insurance coverage when a state does not itself substantially enforce such provisions, 42 U.S.C. § 300gg 22 (2012), and the Secretary of Labor is authorized to enforce health-care requirements with respect to ERISA employers. 29 U.S.C. § 1132(a)(5) (2012).

29. Transcript of Oral Argument at 22, *Burwell v. Hobby Lobby Stores, Inc.* (U.S. June 30, 2014) (No. 13-354).

30. *Id.* at 24; see also *id.* at 22 (“[I]sn’t there another choice nobody talks about, which is paying the tax[?]”); *id.* (“[E]mployers could choose not to give health insurance and pay . . . that high of a tax”); *id.* at 26 (“So it’s a tax.”).

31. *Id.* at 24.

32. *Hobby Lobby*, slip op. at 32 (noting that businesses could be “taxed \$100 per day for each affected employee”).

The Court's silence is puzzling given that Court precedent and academic commentators have cast the AIA as jurisdictional.³³ Granted, the AIA may not satisfy the Court's recently created clear statement requirement for jurisdictional provision—more about this later. Such a possibility, however, does not explain the Supreme Court's failure to address the Act given that the Court's most recent precedents on the AIA—and every court of appeals to address the issue—label it jurisdictional. Where a requirement is jurisdictional, waiver and forfeiture do not apply.³⁴ Because a jurisdictional limitation goes to the very power of the court to hear a case, a jurisdictional question must be raised and decided *sua sponte*, even where all parties desire a decision on the merits.³⁵ That's why the Court appointed an *amicus* to argue the jurisdictional issue in *NFIB*. And that's why the *Hobby Lobby* Court's failure to address the AIA question was a serious mistake.

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33. See *Bob Jones Univ. v. Simon*, 416 U.S. 725, 749 (1974) (“[T]he Court of Appeals did not err in holding that [the AIA] deprived the District Court of jurisdiction to issue the injunctive relief petitioner sought.”); *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 5 (1962) (“The object of [the AIA] is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes.”); see also Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 46 n.275 (2012) (“Had the [§ 5000A] payment been construed as a tax for purposes of the Anti-Injunction Act, 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.”) citing *Williams Packing*, 370 U.S. at 7); 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”); Michael C. Dorf & Neil S. Siegel, “*Early-Bird Special*” 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 the AIA is jurisdictional); 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[.]”); 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”). For their part, the federal courts are unanimous in the view that the AIA is jurisdictional. See, e.g., *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 401 (4th Cir. 2011), *vacated*, 133 S. Ct. 679 (2012); *RYO Mach., LLC v. U.S. Dep’t of Treasury*, 696 F.3d 467, 470 (6th Cir. 2012); *Wade v. Reg’l Dir.*, 504 F. App’x 748, 752 (10th Cir. 2012); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 539 (6th Cir. 2011), *abrogated by Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); *Pagonis v. United States*, 575 F.3d 809, 813 (8th Cir. 2009); *Enax v. United States*, 243 F. App’x 449, 451 (11th Cir. 2007); *Hansen v. Dep’t of Treasury*, 528 F.3d 597, 601 (9th Cir. 2007); *Gardner v. U.S.*, 211 F.3d 1305, 1311 (D.C. Cir. 2000); *Shrock v. United States*, 92 F.3d 1187 (7th Cir. 1996); *Int’l Lotto Fund v. Va. State Lottery Dep’t*, 20 F.3d 589, 591 (4th Cir. 1994); *Flynn v. United States by and through Eggers*, 786 F.2d 586, 588 (3d Cir. 1986); *Lane v. United States*, 727 F.2d 18, 21 (1st Cir. 1984); *Laino v. United States*, 633 F.2d 626, 633 (2d Cir. 1980); *Lange v. Phinney*, 507 F.2d 1000, 1003 (5th Cir. 1975); *Williams v. Wiseman*, 333 F.2d 810, 811 (10th Cir. 1964).
34. *Dolan v. United States*, 560 U.S. 605, 611 (2010).
35. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 & n.11 (2006).

In short, there is a good argument to be made that the AIA applies to the challenges brought by Hobby Lobby. Hobby Lobby was seeking to enjoin the collection of the contraception mandate payment. Section 4980D expressly (and repeatedly) imposes a “tax” on an employer’s failure to provide contraceptive coverage, and Congress’s choice to call the assessment a “tax” is a strong indication that the AIA applies.³⁶ In contrast to *NFIB*, where there may have been “no immediate reason to think that a statute applying to ‘any tax’ would apply to a penalty,”³⁷ in *Hobby Lobby* there was every reason to think that a statute applying to “any tax” would apply to a “tax.”

Why was the *Hobby Lobby* Court unconcerned about the AIA? Did the same Court that directed briefing on, and reserved an entire day of oral argument for, the AIA question in *NFIB* simply overlook the jurisdictional issue lurking in *Hobby Lobby*? Given that *NFIB* was decided merely two years ago (and was hardly a minor case), this seems unlikely. The possibility also seems remote given that, in his concurrence to the Tenth Circuit’s *Hobby Lobby* opinion, Judge Gorsuch concluded that there was “a non-trivial argument” that the AIA applied to the contraception mandate.³⁸

Perhaps the Supreme Court said nothing about the AIA because it agreed with the Tenth Circuit’s conclusion that the AIA does not apply to regulatory taxes.³⁹ While the Court once contemplated a revenue-raising/regulatory distinction,⁴⁰ however, that line of argument has not been viable since the 1930s.⁴¹ As the Court stated in *NFIB*, “taxes that seek to influence conduct are nothing new.”⁴² Congress has long enforced its regulatory purposes through the tax code—indeed, one scholar estimates that over half of the IRS’s

36. *NFIB*, 132 S. Ct. at 2582.

37. *Id.* at 2583.

38. See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1157 (10th Cir. 2013) (Gorsuch, J., concurring); see also *id.* at 1126-28 (majority opinion; noting the possibility that the AIA applied).

39. See *id.*

40. *Hill v. Wallace*, 259 U.S. 44, 62 (1922); *Lipke v. Lederer*, 259 U.S. 557 (1922); *Regal Drug Corp. v. Wardell*, 260 U.S. 386 (1922).

41. See *Bob Jones Univ. v. Simon*, 416 U.S. 725, 743 (1974) (citing *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932) and *Allen v. Regents of the Univ. Sys. of Ga.*, 304 U.S. 439 (1938)). In *Korte v. Sebelius*, the Seventh Circuit concluded that the AIA did not bar a challenge to the contraception mandate because plaintiffs were seeking to void the mandate, not the resulting taxes. 735 F.3d 654, 669-70 (7th Cir. 2013). But as the Seventh Circuit acknowledged, the effect of a successful suit would be to restrain the collection of what Congress had labeled a tax, and even the Seventh Circuit went on to analyze whether Congress meant the AIA to apply to the mandate. *Id.*

42. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

resources are devoted to *non*-revenue raising measures.⁴³ Furthermore, the individual mandate provision at issue in *NFIB* was no less “regulatory” than the contraception mandate, and yet the Court suggested that Congress’s decision to label that assessment a “tax” was dispositive for AIA purposes.⁴⁴ If the Court wanted to revive a regulatory-purposes exception to the AIA, it is difficult to imagine unanimous agreement on the issue; at the very least, the Court likely would request briefing on the question.

The Court’s silence on the jurisdictional question is especially puzzling in light of a different case argued the same day as *Hobby Lobby*—and just a few blocks away. In *Halbig v. Burwell*, the government argued that the AIA divested the district court of jurisdiction over plaintiffs’ claims that the Affordable Care Act does not offer tax credits to individuals who purchase insurance through federal exchanges.⁴⁵ According to the government, § 4980H, which fines large employers that fail to provide adequate coverage, was a “tax” within the meaning of the AIA.⁴⁶ The government’s briefing maintained that the reasoning in *NFIB* was controlling⁴⁷: “[T]he express characterization of Section 4980H as a ‘tax’ leaves no doubt that the Anti-Injunction Act precludes the employer plaintiffs’ claims here.”⁴⁸ The District Court for the District of Columbia agreed. Judge Freidman concluded that “for purposes of the Anti-Injunction Act the assessable payment described in 26 U.S.C. § 4980H must be considered a tax.”⁴⁹ His conclusion was compelled by *NFIB*, which “held that the label that Congress gives an assessment collected by the IRS matters for purposes of the AIA.”⁵⁰

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43. Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717, 1749 (2014). Because “[e]very tax is in some measure regulatory,” the Court has “upheld such obviously regulatory measures as taxes on selling marijuana and sawed-off shotguns” under the taxing power. *NFIB*, 132 S.Ct. at 2596 (internal quotation marks and citations omitted).
44. *NFIB*, 132 S.Ct. at 2594 (“It is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress’s choice of label on that question.”).
45. Defendants’ Memorandum in Support of Their Motion to Dismiss the Complaint at 35, *Halbig v. Sebelius*, 2014 WL 129023 (D.D.C. Jan. 15, 2014) (No. 13-0623).
46. *Id.*
47. *Id.* at 35-36.
48. *Id.* at 36-37.
49. *Halbig v. Sebelius*, No. 13-0623, 2014 WL 129023, at *11 (D.D.C. Jan. 15, 2014).
50. *Id.* at 9; see also *id.* at 10 (“The Section 4980H assessment *acts* like a tax and *looks* like a tax . . . [therefore] it is a [tax].”). On appeal, the Government continued to press its argument that the AIA required the employer-plaintiffs to violate Section 4980H, pay the tax, and then sue for a refund. Brief for the Appellees at 55-56, *Halbig v. Burwell*, 2014 WL 3569745, at *11. The D.C. Circuit avoided the question by holding that, because at least one individual plaintiff possessed standing, there was no need to consider standing as to the employer-plaintiffs. *Halbig v. Burwell*, 2014 WL 3579745 (D.C. Cir. July 22, 2014). The AIA did not apply to individual plaintiffs because they were challenging the individual mandate, which

There is no reason why the same analysis should not have applied to the contraception mandate in *Hobby Lobby*. In a footnote in its *Halbig* briefing, the Government sought to distinguish § 4980H from § 4980D (the provision at issue in *Hobby Lobby*) on the grounds that the latter provision triggers non-tax consequences. In contrast to § 4980H, the Government argued, the tax imposed by § 4980D “is just one of the many collateral consequences that can result from a failure to comply with the contraceptive-coverage requirement.”⁵¹ But there is no “collateral consequences” exception to the AIA—at least not one previously endorsed by the Supreme Court.⁵² The Government’s contemporaneous claim that the AIA is jurisdictional highlights the Court’s failure to consider whether the AIA applied in *Hobby Lobby*.

One explanation for the Court’s reticence may be the harsh consequences of applying a jurisdictional AIA. In fact, *Hobby Lobby* exemplifies several problems with the conventional view of the AIA as jurisdictional. If the contraception assessment is a tax, then *Hobby Lobby*’s case may not go forward. In order to raise their religious liberty claims, the company must wait for the regulation to go into effect, pay the tax (\$1.3 million a day), and file a refund action. This is in stark contrast to the rule that, subject to justiciability concerns, pre-enforcement review of substantial monetary *penalties* is ordinarily available.⁵³ For some plaintiffs, the difficult choice between paying a large tax and exercising conscience rights may not be economically viable. More importantly, even if *Hobby Lobby* were ultimately to prevail in their refund suit, a refund remedy is generally considered insufficient to compensate a plaintiff for the loss of a civil or political right.⁵⁴ As the D.C. Circuit put it in *Halbig*, a tax refund suit offers only “doubtful and limited relief”—it is an often an inadequate remedy compared to ordinary judicial review with the possibility of prospective relief.⁵⁵

Another possible explanation is that the Supreme Court’s jurisdictional *faux pas* was not really an error. There is a good argument that the

the Supreme Court had concluded was not subject to the AIA in *NFIB*. *Halbig*, 2014 WL 129023, at *8 n.8.

51. Defendants’ Memorandum in Support of Their Cross-Motion for Summary Judgment and in Opposition to Plaintiffs’ Summary Judgment Motion at 23 n.10, *Halbig v. Sebelius*, No. 13-0623 (D.D.C. Jan. 15, 2014) (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1127 (10th Cir. 2013)).
52. *Hawley*, *supra* note 2 (describing exceptions to the AIA).
53. DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 41 (1991).
54. *Id.*
55. *Halbig*, 2014 WL 3569745, at *6 (quoting *Garcia v. Vilsack*, 563 F.3d 519 (D.C. Cir. 2009)) (under APA). *Cf. Bowen*, 487 U.S. at 904–05 (rejecting as “unprecedented” the government’s argument that a suit for monetary damages is an adequate alternative to prospective relief under the APA).

conventional view of the AIA as jurisdictional is wrong.⁵⁶ As I have argued elsewhere, the view that the AIA is jurisdictional is based upon an overbroad understanding of what counts as jurisdictional⁵⁷—one from which the Court has recently backed away,⁵⁸ indicating that jurisdictional holdings must be reevaluated.⁵⁹ The Court has directed courts to return to text, structure, and context to determine whether a provision is in fact jurisdictional,⁶⁰ and to use a demanding test: a provision may only be considered jurisdictional if Congress “clearly” says so.⁶¹ A reexamination of the text, structure, and context of the AIA reveals that the statute is not jurisdictional.⁶² On this reading, the Government’s failure to press the AIA defense would have permitted Hobby Lobby’s suit to go forward. Even so, the Court’s most recent precedents label the AIA jurisdictional,⁶³ and the Government continues to argue that the AIA is a jurisdictional statute.⁶⁴ These factors and the Supreme Court’s decision in *NFIB* should have required an analysis into whether Hobby Lobby’s lawsuit was barred by the AIA.

We may never be certain why the Court expressed so much concern over the AIA in *NFIB* and none in *Hobby Lobby*. Could it be that issues of religious conscience have a special salience? Are passive virtues more important in cases involving congressional power than those involving individual rights? Did the Court’s view of *Hobby Lobby* as presenting two conflicting statutes (RFRA and the ACA) push the AIA—yet a third statute—into the background? If so, did RFRA not only trump the substantive provisions of the ACA but also the procedural ones of the AIA? All of these are promising avenues for future research, but the Court’s treatment of *Hobby Lobby* itself yields few clues. Given the contentious nature of the case, one would expect a dissenting Justice at least to raise the AIA issue. Under current precedent, after all, there is a good

56. See Hawley, *supra* note 2.

57. See *id.*

58. See, e.g., *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510–11 (2006).

59. *Id.* at 515; see also *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998) (“[D]rive-by jurisdictional rulings . . . have no precedential effect.”).

60. See, e.g., *Sebelius v. Auburn Reg’l Med. Ctr.*, 133 S. Ct. 817, 824 (2013); *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012).

61. *Arbaugh*, 546 U.S. at 515.

62. Hawley, *supra* note 2. Indeed, a reexamination of the text, structure, and context (which includes precedent and history) of the AIA reveals not only that the AIA is not jurisdictional in the usual sense, but also that it was meant to govern the equity jurisdiction of the federal courts. *Id.* Equity jurisdiction functions much differently than traditional jurisdiction—lawsuits may go forward where the Government waives or forfeits a defense and in certain extraordinary circumstances. *Id.*

63. See *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974); *Enoch v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962).

64. See *supra* notes 45–50 and accompanying text.

argument that the Court reached out to decide a highly politicized case in which it had no jurisdiction. Then again, maybe the dissenting Justices—all usually chary of provisions that strip jurisdiction from the federal courts—were playing the long game and thus were unwilling to suggest that the AIA is in fact jurisdictional. Only time will tell.

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