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Constitutional Law -- The Anti-Injunction Act -- Due Process Considerations Where IRS Actions Threaten First Amendment Liberties -- Bob Jones University v. Simon; Alexander v. "Americans United" Inc.

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Jacquelin may be likely to protect the defendant in Rule 23(b)(3) class actions from being forced to settle for financial reasons, this desirable result may well be at the cost of foreclosing the use of the class action as a means by which the small claimant can seek redress. If the Court had construed the notice provision in Rule 23(c)(2) as stating that the form of notice should be a discretionary consideration rather than that individual notice to each identifiable member is always required, the desirable result with respect to the defendant might have been achieved in a manner that was less damaging to the small claimant's position.

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Constitutional Law—The Anti-Injunction Act—Due Process Considerations Where IRS Actions Threaten First Amendment Liberties: *Bob Jones University v. Simon;*[1] *Alexander v. "Americans United" Inc.*[2]—Petitioner Bob Jones University, a religious institution, sought to enjoin the Internal Revenue Service (IRS) from revoking petitioner's status as a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code of 1954[3] (the Code) because of its segregationist admissions policy.[4] Respondent in *Alexander v. "Americans United" Inc.*[5] sought declaratory and injunctive relief to restore its section 501(c)(3) tax-exempt status, which the IRS had revoked because of the organization's substantial lobbying activities.[6] Restoration not only would shield respondent from federal taxation but also would insure that future contributors be permitted to deduct contributions under section 170 of the Code.[7]

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[1] 416 U.S. 725 (1974).

[2] 416 U.S. 752 (1974). The full name of the organization is "Protestants and Other Americans United for Separation of Church and State," Id. at 754.

[3] Int. Rev. Code of 1954, § 501(c)(3). This section of the Code exempts from federal income taxation, *inter alia*, corporations and organizations "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals . . . ." Id. However, the tax exemption is provided only where profits do not inure to private gain and "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . ." Id.

[4] Bob Jones Univ. v. Simon, 416 U.S. 725, 735 (1974).

[5] 416 U.S. 752 (1974).

[6] Id. at 754-55. The organization's lobbying activities were evidently consonant with its purpose, described by the Court as the defense and maintenance of "religious liberty in the United States by the dissemination of knowledge concerning the constitutional principle of the separation of church and State." Id. at 754. See note 25 infra.

[7] Int. Rev. Code of 1954, § 170. Section 170 of the Code provides for the deductibility of charitable contributions. Generally, an organization qualifying under § 501(c)(3) will qualify as a charitable organization under § 170(c)(2). Loss of § 501(c)(3) status, therefore, almost automatically removes contributions which had been deductible under § 170 from qualification for deduction on contributors' federal income tax returns. Thus, "[t]he differences be-

Both Bob Jones University and Americans United argued that irreparable injury would result from the IRS action. Furthermore, the two organizations contended that the IRS conduct would result in violations of due process, equal protection and First Amendment rights. The United States Supreme Court HELD in both cases: actions to restrain revocation of section 501(c)(3) tax-exempt status or to obtain restoration of such status are suits to restrain the collection of taxes.[8] Consequently, the suits brought by Bob Jones University and Americans United were barred by the Anti-Injunction Act of 1867.[9] The Court reasoned that both organizations had failed to show that the government would not ultimately prevail on the merits, and thus could not place their cases within the recognized exception to the Anti-Injunction Act (the Act).[10] Therefore, the Court decided that their allegations of irreparable injury and of the unconstitutionality of the IRS actions were insufficient to invoke the federal equity jurisdiction.[11]

Initially, this note will discuss the lower court decisions which held that actions to enjoin the revocation of section 501(c)(3) status were not suits to enjoin the collection of taxes within the meaning of the Anti-Injunction Act and therefore were maintainable.[12] The Supreme Court's conclusion that any suit with a potentially negative impact on the revenues falls within the Act's prohibition will then be examined in detail. Subsequently, the Court's interpretation of the anti-injunction statute will be discussed in light of Supreme Court interpretations of the Act's legislative history and the Court's previous constructions of the statutory provisions. Finally, the Court's application of the Anti-Injunction Act in *Bob Jones University* and *Americans United* will be analyzed in light of principles of due process established in cases where First Amendment liberties are infringed by administrative actions.

I. Decisions Below

Bob Jones University is an eleemosynary corporation, founded to promulgate fundamentalist religious beliefs. A basic tenet of the faith sponsored by the University is that segregation of the races is

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tween the requirements of §§ 501(c)(3) and 170(c)(2) are minor and are not involved in this litigation." *Americans United*, 416 U.S. at 754 n.2.

[8] *Bob Jones Univ.*, 416 U.S. at 739; *Americans United*, 416 U.S. at 760-61.

[9] *Bob Jones Univ.*, 416 U.S. at 749; *Americans United*, 416 U.S. at 763. The Anti-Injunction Act, Int. Rev. Code of 1954, § 7421(a) (originally enacted as Act of Mar. 2, 1867, ch. 169 § 10, 14 Stat. 475), provides that ". . . 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."

[10] *Bob Jones Univ.*, 416 U.S. at 748-49; *Americans United*, 416 U.S. at 763.

[11] *Bob Jones Univ.*, 416 U.S. at 748-49; *Americans United*, 416 U.S. at 763.

[12] Bob Jones Univ. v. Connally, 341 F. Supp. 277, 283-84 (D.S.C. 1971); "Americans United" Inc. v. Walters, 477 F.2d 1169, 1179-80 (D.C. Cir. 1973).

divinely ordained, a precept conscientiously reflected in the school's admissions policy.[13]

The University's tax-exempt status under section 501(c)(3) was secure until 1970. At that time, the Internal Revenue Service announced that tax exemptions would no longer be available to educational institutions discriminating on the basis of race.[14] In 1970 and 1971 the IRS, seeking modification of the school's admissions policy, conducted unsuccessful negotiations with the University.[15]

In September 1971, prior to IRS initiation of administrative action to deprive the school of its section 501(c)(3) tax-exempt status and its donors of advance assurance of the deductibility of their contributions under section 170, Bob Jones University sought an injunction in federal district court to restrain the IRS action. The government moved to dismiss on the basis of the Anti-Injunction Act, which prohibits (with explicit exceptions[16] not relevant to the case) the maintenance of any "suit for the purpose of restraining the assessment or collection of any tax."[17] Finding that the University sought relief from "what it contends to be illegal and unconstitutional actions or threatened actions"[18] by federal officials rather than the restraint of taxation, the district court in *Bob Jones University* held that jurisdiction for the action was not withdrawn by the Act, and granted a temporary injunction.[19]

On appeal, the Fourth Circuit reversed and held that since the necessary result of an injunction preserving the University's section 501(c)(3) status was a restraint upon taxation of its income or of its donors' income, the Anti-Injunction Act barred injunctive relief.[20] Furthermore, the court of appeals held that since the University could not show that "under no circumstances could the Government

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[13] Since its founding in 1927, the University has excluded black persons from the student body. "On pain of expulsion students are prohibited from interracial dating, and petitioner believes it would be impossible to enforce this prohibition absent the exclusion of Negroes." *Bob Jones Univ.*, 416 U.S. at 735. For a further discussion of the University and its policies see Bob Jones Univ. v. Connally, 341 F. Supp. 277, 278-79 (D.S.C. 1971).

[14] Rev. Rul. 71-447, 1971-2 Cum. Bull. 230. The IRS change of policy was prompted in part by a successful suit brought by black students and parents against grants of tax exemptions to segregated "private academies." Green v. Connally, 330 F. Supp. 1150 (B.D.C.), aff'd mem. sub nom. Coit v. Green, 404 U.S. 997 (1971). The Supreme Court's affirmance is of questionable value as precedent due to the change of position of the IRS pending review. *Bob Jones Univ.*, 416 U.S. at 740 n.11.

[15] See Bob Jones Univ. v. Connally, 341 F. Supp. 277, 279-80 (D.S.C. 1971).

[16] Int. Rev. Code of 1954, § 7421(a) acknowledges the authorization by Int. Rev. Code of 1954, § 7426(b) of injunctive relief for a third party where the United States levies against property in which the third party has superior rights and where the levy threatens irreparable injury to those rights. Section 7421(a) also carves out an exception for Int. Rev. Code of 1954, § 6213(a), which authorizes restraints on assessments of deficiences or levies where the taxpayer has filed a timely petition with the Tax Court for a redetermination of tax deficiency.

[17] Int. Rev. Code of 1954, § 7421(a).

[18] 341 F. Supp. at 283.

[19] Id. at 285.

[20] Bob Jones Univ. v. Connally, 472 F.2d 903, 905-06 (4th Cir. 1973).

ultimately prevail" in the litigation,[21] the case was not within the recognized exception to the Act.[22]

In the *Americans United* case, the respondent organization also had qualified for tax-exempt status under section 501(c)(3) and for deductibility of charitable contributions under section 170.[23] In 1969, the organization's substantial lobbying activities caused the IRS to revoke the exemption and deductibility privileges.[24] Subsequently, the IRS issued a ruling letter[25] certifying that the respondent qualified for exemption from income taxation as a "social welfare" organization under section 501(c)(4).[26] By 1970 the actions of the IRS allegedly had "dried up its well of contributory resources to such an extent that [Americans United] operated at a deficit for the first time in its history . . . ."[27] In July 1970, Americans United and several persons expressing an intention to donate if deductibility were guaranteed filed suit in federal district court. The plaintiffs sought both a declaratory judgment holding the lobbying proscription of section 501(c)(3) unconstitutional, and injunctive relief aimed at restoration of exemption and deductibility status.[28] The IRS obtained dismissal of the case in an unpublished order[29] relying on the Anti-Injunction Act and the exception to jurisdiction under the Declaratory Judgment Act for cases "with respect to Federal taxes . . . ."[30]

The District of Columbia Circuit affirmed dismissal with respect to the prospective contributors and held that they were seeking restraints on tax liability, relief proscribed by the Anti-Injunction and Declaratory Judgment Acts.[31] The court, however, interpreted

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[21] Id. at 906, quoting Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962).

[22] 472 F.2d at 906-07.

[23] 416 U.S. at 754.

[24] "Americans United" Inc. v. Walters, 477 F.2d 1169, 1172 (D.C. Cir. 1973).

[25] *Americans United,* 416 U.S. at 755. The IRS maintained that "[t]he majority of the corporation's activities were . . . in furtherance of the following goals: 'the mobilization of public opinion; resisting every attempt by law or the administration of law which widens the breach in the wall of separation of church and state; working for the repeal of any existing state law which sanctions the granting of public aid to church schools; and uniting all "patriotic" citizens in a concerted effort to prevent the passage of any federal law allotting, directly or indirectly, federal education funds to church schools.' " "Americans United" Inc. v. Walters, 477 F.2d at 1172.

[26] Int. Rev. Code of 1954, § 501(c)(4), which exemption includes "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare . . . ." Contributions to a § 501(c)(4) organization ordinarily are ineligible for deductibility under § 170. See *Americans United,* 416 U.S. at 755.

[27] "Americans United" Inc. v. Walters, 477 F.2d at 1172-73.

[28] Id. at 1173-74

[29] Id. at 1174.

[30] 28 U S.C. § 2201 (1970). "In a case of actual controversy within its jurisdiction except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Id.

[31] 477 F.2d at 1176-77. The court also stated that the prohibition with respect to taxes

these statutes as precluding relief only where the plaintiff's "primary design" was to restrain taxation.[32] Since the primary design of Americans United, in contrast to that of the individual contributors, was not to restrain taxation but "to avoid the disposition of contributed funds away from the corporation,"[33] the court of appeals reversed and remanded with respect of the plaintiff organization.[34]

II. Judicial Application of the Anti-Injunction Act

The threshold question to be answered by the Supreme Court was whether jurisdiction for the actions brought by Bob Jones University and Americans United was prohibited by the Anti-Injunction Act because the suits were "for the purpose of restraining the assessment or collection of any tax."[35] The District of Columbia Circuit's interpretation of "purpose" equated that term with the motive of the plaintiff.[36] Under this interpretation, if the organization had brought the action in order to restain directly the assessment of taxes against it, the Act would be applicable and would withdraw equitable jurisdiction.[37] Furthermore, if a person sued in the stead of another to restrain the assessment of a tax indirectly burdensome to the plaintiff (e.g., a shareholder suit on behalf of a reluctant corporation; a consumer seeking to restrain a tax imposed at the manufacturing level), the Act would bar the action.[38] Where, however, there is evidence that the plaintiff's "primary design," such as the preservation of Americans United's organizational vitality, is not to restrain tax collection, but necessarily includes such restraint, the suit would not be termed for the "purpose" of restraint.[39] The federal district court in *Bob Jones University* adopted a similar rationale.[40] In as much as the school's motive was "to enjoin the defendants from exercising alleged illegal and *ultra vires* power and authority . . . the levy, assessment, and collection of a tax is not the main issue."[41]

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contained in the Declaratory Judgment Act, 28 U.S.C. § 2201, though literally broader than the Anti-Injunction Act, was coterminous in scope. Id. at 1175-76. See McGlotten v. Connally, 338 F. Supp. 448, 452-53 (D.D.C. 1972).

[32] 477 F.2d at 1177-79.

[33] Id. at 1178-79.

[34] Id. at 1179-81.

[35] Int. Rev. Code of 1954, § 7421(a). Assuming that the Declaratory Judgment Act's prohibition, 28 U.S.C. § 2201, was at least as restrictive as that of the Anti-Injunction Act, the Court based its decision on § 7421(a), not reaching the issue of the Declaratory Judgment Act's arguably more stringent provisions. 416 U.S. at 759 n.10.

[36] *Americans United,* 477 F.2d at 1169.

[37] Id. at 1179.

[38] See id. at 1179-80.

[39] Id. at 1178-80.

[40] 341 F. Supp. at 283.

[41] Id. Judge Boreman, dissenting in Bob Jones Univ. v. Connally, 472 F.2d 903 (4th Cir. 1973), would examine the motives of the IRS in removing the University's tax privileges. Id. at 908. Because the government was not primarily concerned with the collection of revenue

The equation of the statutory term "purpose" with the motive of the plaintiffs did not survive Supreme Court review. While the motive of Americans United may have been self-preservation, the Supreme Court concluded that its "objective" in bringing suit was to "restore advance assurance that donations to it would qualify as charitable deductions," thereby preventing the IRS from collecting taxes on that portion of contributors' incomes exempted from federal income tax by the deduction.[42] The organization's argument that it sought merely to preserve its viability by avoidance of the diversion of tax-deductible gifts was found to be merely an indirect statement of its desire to remove the burden of taxation from contributors.[43] Since the relief sought was the restraint of taxation, the Court concluded that the "purpose" of the suit was the restraint of taxation.[44]

In *Bob Jones University* the school would have been exposed to liability for over one million dollars in income taxes for the period during which the IRS was enjoined from removing its section 501(c)(3) shield.[45] The Court therefore dismissed the University's claim that the Anti-Injunction Act was inapplicable, noting that this major tax liability and its allegedly disastrous impact on the school left "little doubt that a primary purpose of this lawsuit is to prevent the Service from assessing and collecting income taxes from petitioner."[46]

Although in some contexts "motive," "intent" or "primary design" may be synonymous with "purpose," it is suggested that the

but with using the tax power to force adherence to "political or social guidelines," an action to restrain the IRS would not interfere with "prompt collection of its lawful revenue" and therefore would not be prohibited by the Anti-Injunction Act. Id.

This argument echoes the reasoning of the line of cases in the 1920's holding that collection of a tax which was a "penalty" might be enjoined despite the Anti-Injunction Act. E.g., Regal Drug Co. v. Wardell, 260 U.S. 386, 392 (1922); Lipke v. Lederer, 259 U.S. 557, 562 (1922). Finding that the taxes assessed in each case were penalties imposed to punish illegal acts, the Court held that Congress may not authorize summary tax proceedings to evade the requirements of procedural due process in criminal cases. 260 U.S. at 392; 259 U.S. at 562. One may speculate that the Court was concerned more with substantive than procedural due process, and that it was as vigilant to thwart the indirect exercise of unconstitutional regulatory power as it was committed to strike down the direct exercise of such power. See Child Labor Tax Case, 259 U.S. 20 (1922); Hill v. Wallace, 259 U.S. 44 (1922). The concept that a tax is not actually a tax where it is a penalty or used for regulatory purposes is of doubtful validity today. See Sonzinsky v. United States, 300 U.S. 506, 513 (1937). See also United States v. Kahriger, 345 U.S. 22, 27-28 (1953); United States v. DiPrimio, 209 F. Supp. 137, 138 (W.D. Pa. 1962).

[42] 416 U.S. at 760-61.

[43] Id. at 761.

[44] Id. at 760-61. The Injunction sought by Americans United would also shield the organization from its new unemployment insurance tax liability under Int. Rev. Code of 1954, § 3301. Id. at 755. Deciding that the Anti-Injunction Act was applicable despite the motives of Americans United with respect to restraint of third parties' tax liability, the Court did not comment at length on the question of the Act's applicability where the effect of the injunction was to shield the plaintiff from direct, albeit miniscule, tax liability. Id. at 760.

[45] Id. at 738.

[46] Id.

Court's equation of "purpose of restraining" with the negative impact of the relief sought on revenue collection in the context of tax injunctions, is preferable. The lower courts' attempts to isolate a limited class of cases where the plaintiff's goal—for example, the vindication of a legal or constitutional right—is distinguishable from his means of achieving the goal—the restraint of tax liability—is grounded on a meaningless distinction, which would enable plaintiffs who plead a "purpose" other than the restraint of taxation to evade the Act's proscription.[47] A plaintiff whose goal is merely the restraint of taxation, and who seeks injunctive relief to achieve that goal, would suffer dismissal of his suit even in the absence of the Anti-Injunction Act. No court of equity could entertain a prayer to restrain taxation absent the plaintiff's allegations that the tax was illegal.[48] Therefore, in any non-frivolous suit, the plaintiff's desire to remedy the violation of a legal right would be a requirement for injunctive relief. Thus, it appears that the lower courts had created a distinction without a difference and that the Supreme Court was correct in finding both actions, prima facie, within the language of the Act barring suits to restrain taxation.

The soundness of Supreme Court's test of impact upon revenue collection is more evident upon further examination of the lower courts' attempts to isolate those cases where the "primary design" of a suit is other than to restrain taxation. It is submitted that the motives of taxpayers cannot be usefully categorized as "primary" or otherwise. Rather, they range along a continuum, with a desire to restrain based on greed or impure motive at one end, and a desire to restrain based on, perhaps, a concern for the integrity of the constitution at the other. Purity of motive, then, would seem to be the operative test where the objective is a determination primary design. If a pure motive would bring the action out of the scope of the Anti-Injunction Act, then any action, based as it must be on allegations of illegality or unconstitutionality, could be maintained through artful pleading of motives. An impossible task would thereby be created for judges and an irresistible loophole for inventive litigants. Who is to say, for example, that Bob Jones University's concern is less with its tax bill and more with its abhorrence of unconstitutional administrative actions?

The facts of *Americans United* and the opinion of the court of appeals[49] present a further illustration of the propriety of the Supreme Court's test which measures "purpose" by the potential impact of the suit on the revenues. The District of Columbia Circuit's decision created a paradoxical situation where a third party would

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[47] See Bob Jones Univ. v. Connally, 341 F. Supp. 277, 282-84 (D.S.C. 1971); "Americans United" Inc. v. Walters, 477 F.2d 1169, 1177-80 (D.C. Cir. 1973).

[48] See Miller v. Standard Nut Margarine, 284 U.S. 498, 509 (1932); 4 J. Pomeroy, Equity Jurisprudence §§ 1779-80, at 4144 (4th ed. 1919).

[49] "Americans United" Inc. v. Walters, 477 F.2d 1169 (D.C. Cir. 1973).

have standing to contest the tax liability of a taxpayer while the taxpayer was barred by the Anti-Injunction Act.[50] The lower court had no difficulty concluding that the Anti-Injunction Act would bar such indirect actions as a shareholder suing to shield a corporation from liability if "the tax itself directly operates to place a financial burden upon the non-taxpayer . . . ."[51] A shareholder sues to restrain taxation of the corporation because, if it is not restrained, the operation of predictable economic forces will depress the value of stock and reduce dividends. In the light of this analysis, the District of Columbia Circuit's conclusion that the suit brought by Americans United was not such an indirect action appeared erroneous. Americans United sued because predictable economic forces had caused donors to cease contributing once deductibility of their gifts was revoked. Like the hypothetical shareholder, Americans United was a third party suffering indirect economic injuries attributable to the burden of a tax imposed upon another. The only distinguishing characteristics between the grievances of the donor and the shareholder are the tax assessment's larger quantitative impact on the donee and the donee's motive. The shareholder may be motivated primarily by concern for his pocketbook, while Americans United may have been motivated more by the serious threat to its organizational existence. As noted,[52] however, under these recent Supreme Court decisions, the motive of the plaintiff cannot place an action outside the scope of the Act's prohibition of suits for the "purpose" of restraining taxation.[53]

It is also suggested that the Supreme Court's equation of "purpose" with effect on the revenues is consistent with previous constructions of the statute by the Court. It has been unequivocally stated that the intent of Congress in enacting the Anti-Injunction Act was to isolate the federal tax collection process from judicial interference, and thereby to protect the integrity of the treasury.[54] Accordingly, a construction of the Act which brings within its scope any action, the necessary result of which is to impair the collection of taxes or reduce the revenues, is in conformity with the legislative intent as interpreted by the Supreme Court. Moreover, because there is no evidence[55] that the draftsmen of the Anti-Injunction Act intended to permit exceptions based on plaintiffs' motivation, a construction of the Act which, on that basis, excludes suits from its coverage is not in conformity with the intent of Congress as uni-

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[50] Id. at 1176-80.

[51] Id. at 1180.

[52] See text at notes 42-44 supra.

[53] Irrespective of motive, it is submitted that due process requires an exception to the Act where IRS actions threaten irreparable harm and infringe on fundamental rights. See text at notes 113-49 infra.

[54] E.g., Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962); State Railroad Tax Cases, 92 U.S. 575, 613-14 (1876).

[55] See note 79, infra.

formly interpreted by the Court. Thus, the Supreme Court interpretation, that Bob Jones University's and Americans United's suits are "for the purpose of restraining" within the meaning of the Anti-Injunction Act,[56] is consistent with prior decisions interpreting the intent of Congress.[57]

Finally, policy considerations support the Court's construction of the term "purpose." An interpretation of the Act permitting a donee to obtain pre-collection injunctive relief and to litigate the deductibility of donors' gifts would pose a greater threat to the revenues than the more ordinary case where the taxpayer sues to shield himself from taxation. In the latter case, the plaintiff, after an adverse judgment, would ordinarily be required (and solvent) to pay his taxes, liability for which had been suspended during the litigation. However, where a donee such as Americans United or Bob Jones University obtains a preliminary injunction to preserve advance assurance by the IRS of deductibility of contributions, a donor, relying on that assurance, cannot, after judgment for the government, be held liable retroactively for disallowed deductions. Otherwise the preliminary injunction would be a nullity providing no assurance to prospective donors.

[56] *Bob Jones Univ.*, 416 U.S. at 738-41; *Americans United*, 416 U.S. at 759-61. The Court thus adopted an effect on the revenues test to delineate the scope of the Anti-Injunction Act. See *Bob Jones Univ.*, 416 U.S. at 738-39; *Americans United*, 416 U.S. at 760. Therefore, lawsuits which seek judicial interference with IRS administrative procedures, but which have no negative effect on tax collection apparently may be maintained. Thus, actions such as Green v. Connally, 330 F. Supp. 1150 (D.D.C.), aff'd mem. sub nom. Coit v. Green, 404 U.S. 997 (1971), where black students and their parents successfully sought to enjoin the grant of § 501(c)(3) status to a segregationist private school, would not be prohibited because their impact on the revenues would be positive rather than negative. For the same reason, Eastern Ky. Welfare Rights Org. v. Shultz, 370 F. Supp. 325 (D.D.C. 1973), where plaintiffs successfully challenged an IRS ruling, allowing non-profit hospitals to qualify as charitable organizations without requiring the hospitals to offer special financial consideration to indigents, was outside the scope of the Anti-Injunction Act.

The net effect on the revenues test thus gives rise to the paradoxical situation where an organization denied § 501(c)(3) status has no prepayment remedy in the courts, while a third party's suit to restrain a grant of an exemption could be entertained. The paradox arises, however, not from an infirmity in interpretation, but from the statute itself.

Perhaps recognizing the inevitability of a net effect on the revenues test, the University and Americans United argued that removal of their § 501(c)(3) status would not result in increased revenues, since donors would divert their largesse to organizations retaining deductible status. The Supreme Court found such an argument "too speculative" because of its assumption that all contributors would desert the formerly § 501(c)(3) organization. 416 U.S. at 739 n.10. To the extent that donors failed to desert the organization, the injunction would serve to restrain taxation. Id. The Court's reasoning on this point is compatible with an analogous rule for assigning the burden of proof in tax injunction cases. In an action where a taxpayer seeks to restrain the collection of a tax within the scope of the Anti-Injunction Act, the burden is on the plaintiff to show that the case falls within the recognized exception to the statute. Lucia v. United States, 474 F.2d 565, 576 (5th Cir. 1973). Logically, one seeking to show that the action is, in the first instance, outside the scope of the statute, should have the burden of proof.

[57] For an analysis of the meaning of "purpose" within the context of the Act which agrees with the District of Columbia Circuit's interpretation, see *Americans United*, 416 U.S. at 763 (Blackmun, J., dissenting).

III. EXCEPTIONS TO THE ANTI-INJUNCTION ACT

The Court's determination that both *Bob Jones University* and *Americans United* were suits "for the purpose of restraining" taxation, raised the issue whether either organization qualified for the recognized exception to the Anti-Injunction Act. In the most recent case in which the Court interpreted the Act and that exception, *Enochs v. Williams Packing & Navigation Co.*,[58] no troublesome constitutional issues were presented. A corporation, which claimed that bankruptcy would result from collection of social security and unemployment taxes alleged to be incorrectly assessed against it,[59] sought to enjoin the IRS from collecting the taxes.[60] The prayer for injunctive relief was based on claims of irreparable injury, resulting from lack of an adequate legal remedy,[61] and on allegations that the IRS erred in assessing the taxes.[62] The legality of the IRS actions turned[63] on whether certain fishermen were employees within the meaning of the social security and unemployment tax provisions of the Code.[64] Without deciding the merits, the Court held that a plaintiff seeking a pre-payment injunction against tax collection must meet a two part test: (1) that traditional equity jurisdiction exists because there is no adequate legal remedy, and (2) that "it is clear that under no circumstances could the Government ultimately prevail."[65]

Both Americans United and Bob Jones University had made out a case for traditional equity jurisdiction on grounds of threatened irreparable injury due to the lack of an adequate legal remedy.[66] The statutorily provided remedies of a suit for a refund of taxes paid or for a deficiency assessment action in the Tax Court[67]

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[58] 370 U.S. 1 (1962).

[59] Id. at 5.

[60] Id. at 2.

[61] Id. at 5.

[62] Id. at 2.

[63] Id. at 3.

[64] Int. Rev. Code of 1954, §§ 3111, 3301-11.

[65] *Enochs*, 370 U.S. at 7.

[66] "Americans United" Inc. v. Walters, 477 F.2d at 1172-73; Bob Jones Univ. v. Connally, 472 F.2d 903, 906 (4th Cir. 1973).

[67] See Int. Rev. Code of 1954, §§ 7422 (civil actions for refunds), 6212-13 (authorization of Tax Court deficiency actions); 28 U.S.C. §§ 1346(a)(1) (1970) (district court and Court of Claims jurisdiction over tax refund actions), 1491 (1970) (Court of Claims jurisdiction).

For a discussion of the statutorily authorized actions in federal district court, the Court of Claims and the Tax Court, see 1 S. Surrey, W. Warren, P. McDaniel, & H. Ault, Federal Income Taxation 70-85 (1972); Mills, Remedy Problems in Federal Civil Tax Litigation, 5 Ariz. L. Rev. 32 (1963). A donor could also utilize these procedures to challenge denial of deductibility of a contribution to an organization. However, whether a donor has standing to litigate an alleged violation of the donee's constitutional rights remains an open question. See *Americans United*, 416 U.S. at 781 (Blackmun, J., dissenting). In *Bob Jones Univ.*, the Court did not reach the question whether in a refund suit successfully litigated by an organization denied § 501(c)(3) status, the district court might provide equitable relief to assure both the future deductibility of contributions and the immunity of the organization from taxation. *Bob Jones Univ.*, 416 U S. at 748 n.22. The Court did note, however, that

would not result in a favorable judgment until one or two years after revocation of section 501(c)(3) status.[68] During that period the diversion of donors' resources to organizations retaining recognition under section 170 would threaten ruin to an aggrieved organization heavily dependent on such contributions. In light of the irreparable injury attending the actions of the IRS, and the lack of adequate legal remedies of the University and Americans United, the cases presented controversies traditionally cognizable in equity and thus satisfied the first part of the *Enochs* test.[69]

The Supreme Court held that both organizations, however, failed to meet the requirement of the second part of the *Enochs* test:[70] the showing that under no circumstances could the government prevail in the litigation. Citing *Green v. Connally*,[71] in which black students successfully challenged the prior IRS policy of extending section 501(c)(3) status to private segregationist schools, the Court concluded that the University's "First Amendment, due process, and equal protection contentions are sufficiently debatable to foreclose any notion that 'under no circumstances could the Government ultimately prevail . . . .' "[72] The Court reversed in *Americans United* without commenting on the substance of the constitutional issues raised by that organization.[73] Evidently, it regarded the challenges by Americans United to be at least as debatable as the University's.

In reaffirming its adherence to the *Enochs* test, the Court

> there would be serious question about the reasonableness of a system that forced a § 501(c)(3) organization to bring a series of backward looking refund suits in order to establish repeatedly the legality of its claim to tax-exempt status and that precluded such an organization from obtaining prospective relief even though it utilized an avenue of review mandated by Congress.

Id. Such relief would, of course, be necessitated only by evidence of bad faith or arbitrariness on the part of the IRS. An exhibition of bad faith by the IRS preceding and during trial has prompted a district court in at least one case to provide injunctive relief. Center on Corp. Responsibility, Inc. v. Shultz, 368 F. Supp. 863 (D.D.C. 1973). In that case the court reasoned that because its judgment stood as a bar to further relitigation of the organization's qualification for § 501(c)(3) status, id. at 879, "there is no possibility that the government will ultimately prevail on the exemption question as long as the Plaintiff's operations continue as outlined in the amended application, [and] injunctive relief is essential to prevent irreparable harm to the Plaintiff." Id. at 880. Once the question of § 501(c)(3) status is res judicata, and the plaintiff has made the requisite showing of eligibility for injunctive relief, the *Enochs* test, see text at note 65 supra, has been satisfied. The court's reasoning also is compatible with the Anti-Injunction Act's central purpose, viz., the avoidance of pre-collection judicial interference by requiring litigants to follow the post-collection avenues of relief provided by statute. See *Bob Jones Univ.*, 416 U.S. at 748 n.22.

[68] *Americans United*, 416 U.S. at 778 (dissenting opinion).

[69] See text at note 65 supra.

[70] *Bob Jones Univ.*, 416 U.S. at 748-49; *Americans United*, 416 U.S. at 763. See text at note 65 supra.

[71] 330 F. Supp. 1150 (D.D.C.), aff'd mem. sub nom. Coit v. Green, 404 U.S. 997 (1971).

[72] *Bob Jones Univ.*, 416 U.S. at 749, quoting Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962).

[73] *Americans United*, 416 U.S. at 763.

assumed that *Enochs* represented a return to the Court's original interpretation of the Anti-Injunction Act.[74] The Court also appeared to accept the assumption in *Enochs* that the plain language of the Act mandated virtually absolute withdrawal of jurisdiction to entertain tax injunction actions.[75] These assumptions merit examination in light of the Anti-Injunction Act's origins and of the Court's interpretations of that statute.

When the Anti-Injunction Act was originally enacted in 1867, two distinct rules governing equity's interference with tax collection existed in the United States.[76] In a minority of the states, courts of equity would entertain a prayer for injunctive relief where the complainant alleged the illegality of the tax assessed, although the illegality was required to be of a substantial nature.[77] However, in a majority of the states and in the federal courts, a different rule existed: equity would intervene prior to collection only where an allegation of an illegal or unconstitutional assessment was coupled with an allegation, such as fraud, apprehension of a multiplicity of suits, or other grounds, sufficient to bring the case "within a recognized head of equity jurisprudence."[78]

Against this background the Anti-Injunction Act was enacted, but without any discernible legislative history.[79] However, the logical effect of the Act was either: (1) to affirm the traditional equity rule of the federal courts in derogation of the minority rule; or (2) to establish a rule more stringent than that existing in the federal courts. The Court has approved both constructions at varying times.[80] It is doubtful, however, that the mere existence of a federal rule, more stringent than the minority rule, without more,[81] is sufficient to warrant the conclusion that Congress, in enacting the Anti-Injunction statute, merely intended to reaffirm the settled federal rule. Moreover, it should be noted that the Judiciary Act of 1789[82] had supplied a legislative basis for the federal equity rule, which provided equitable jurisdiction only in cases where the legal remedy was inadequate. Moreover, the plain language of the Anti-Injunction Act, which appears to establish an absolute bar to pre-

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

[75] Id. at 736-37. See *Enochs*, 370 U.S. at 5.

[76] 4 J. Pomeroy, Equity Jurisprudence §§ 1779-81, at 4144-47 (4th ed. 1919).

[77] E.g., Sweet v. Boyd, 6 Okla. 699, 713, 52 P. 939, 944 (1898).

[78] E.g., Hannewinkle v. Georgetown, 82 U.S. (15 Wall.) 547, 549 (1873); Dows v. Chicago, 78 U.S. (11 Wall.) 108, 109-10 (1871).

[79] *Bob Jones Univ.*, 416 U S. at 736. For a description of a fruitless search for the Act's origins, see Note, 49 Harv. L. Rev. 109 & n.9 (1935).

[80] Compare Miller v. Standard Nut Margarine, 284 U.S. 498, 509 (1932), with Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 6-7 (1962).

[81] There appears to be no evidence that the federal courts in the 1860's had departed from the majority rule. For example, Pomeroy, in an exhaustive listing of the nineteenth century cases in point, cites no federal cases adhering to the minority rule. 4 J. Pomeroy, supra note 48, § 1781 at 4147 n.3.

[82] Act of Sept. 24, 1789. ch. 20, § 16, 1 Stat. 82.

collection suits to enjoin the assessment or collection of federal taxes,[83] militates against a theory of reaffirmation of the existing practice. However, perhaps because of the unknown origins of the Act and the difficulty of identifying the precise evil which Congress sought to remedy in 1867, the Court, even in adopting the stringent *Enochs* test, has never held that a literal reading of the statute is required. Therefore, it appears that the Court in *Bob Jones University* and *Americans United* could have construed the Act in a manner more responsive to cases where IRS administrative actions threaten basic liberties.[84]

The nineteenth century cases commenting on the Act provide some support for a literal interpretation of the anti-injunction statute. In the 1876 *State Railroad Tax Cases,*[85] the Supreme Court in dicta commenting on the Anti-Injunction Act, gave an apparently literal construction to the statute.[86] Read together with the Court's enthusiastic endorsement of the equity rule permitting jurisdiction only in exceptional circumstances,[87] however, the language of the opinion supporting a literal construction of the Act seems somewhat ambiguous.

In the 1883 case of *Snyder v. Marks,*[88] the first case in which the Act served as a basis of the decision, the Supreme Court strictly construed the language of the Act.[89] However, the relevance of the Court's reading of the statute in that case is unclear for the plaintiff apparently did not allege[90] the traditional basis of equitable relief —irreparable injury due to the lack of an adequate legal remedy.

The authority of the Court's literal construction of the Act in *Snyder* was seriously eroded by dicta in cases decided in 1916 and 1922. In *Dodge v. Osborn*[91] and *Bailey v. George,*[92] the Supreme Court commented that an "extraordinary and . . . exceptional circumstance" would create an exception to the Act's prohibition.[93]

A showing of the required exceptional circumstance was made in the next case decided under the Act, *Hill v. Wallace.*[94] There, traders in grain futures were threatened with heavy criminal penal-

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[83] See Int. Rev. Code of 1954, § 7421(a). "[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court . . . ." Id.

[84] The Court thereby would avoid the thorny question of whether where Congress has purported to withdraw jurisdiction, the federal courts may exercise jurisdiction when the Constitution appears to require the exercise of jurisdiction. See generally, H. Hart & H. Wechsler, The Federal Courts and the Federal System 330-75 (2d ed. 1973).

[85] 92 U.S. 575 (1876).

[86] Id. at 613.

[87] Id. at 614.

[88] 109 U.S. 189 (1883).

[89] Id. at 193.

[90] Id. at 190.

[91] 240 U.S. 118 (1916).

[92] 259 U.S. 16 (1922).

[93] *Dodge,* 240 U.S. at 122; *Bailey,* 259 U.S. at 20.

[94] 259 U.S. 44 (1922).

ties for failure to pay a federal tax alleged to be unconstitutional. Furthermore, if each paid the tax, a multiplicity of suits would be required to recover the tax payments.[95] Since the equities were of sufficient weight, the Court found that the exceptional circumstances, alluded to in *Dodge*,[96] authorized equitable jurisdiction and held the tax unconstitutional.[97]

The "extraordinary and exceptional circumstances" exception reached full flower in 1932 in *Miller v. Standard Nut Margarine Co.*[98] In that case, the IRS sought to tax respondent's "Southern Nut Product" under the Oleomargarine Act.[99] Relying on decision in cases involving other manufacturers[100] and holding that the ingredients found in "Southern Nut Product" were not taxable as oleomargarine,[101] the district court had imposed an injunction against the collector.[102] The Supreme Court sustained the injunction, concluding that

> the enforcement of the [Oleomargarine] 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. It is clear that, by reason of the special and extraordinary facts and circumstances, [the Anti-Injunction Act] does not apply.[103]

The Court noted that the Anti-Injunction Act merely constituted an affirmation of the equity rule applied by the federal courts in 1867.[104] Justices Stone and Brandeis dissented, on the basis of their belief that the Anti-Injunction Act required and absolute bar to equitable jurisdiction.[105]

Standard Nut remained the authoritative interpretation of the Act for thirty years. In 1962, however, the plaintiff in *Enochs v. Williams Packing & Navigation Co.*[106] claimed that collection of taxes allegedly not owed would bankrupt it.[107] The Court narrowed

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[95] Id. at 62.

[96] 259 U.S. at 20.

[97] *Hill*, 259 U.S. at 62, 68-72.

[98] 284 U.S. 498 (1932).

[99] Act of May 9, 1902, ch. 784, 32 Stat. 193, amending Act of Aug. 2, 1886, ch. 840, 24 Stat. 209, as amended, 26 U.S.C. §§ 4591 et seq. (1970).

[100] E.g., Higgins Mfg. Co. v. Page, 297 F. 644 (D.R.I. 1924).

[101] See Miller v. Standard Nut Margarine Co., 49 F.2d 79, 80-83 (5th Cir. 1931). The opinion and order of the district court are unpublished.

[102] Id. at 80.

[103] 284 U.S. at 510-11.

[104] Id. at 509.

[105] Id. at 511 (dissenting opinion).

[106] 370 U.S. 1 (1962).

[107] The Court seemed to doubt the corporation's claim of impending bankruptcy: Attempting to establish a basis for equitable jurisdiction, the corporation maintains that it will be thrown into bankruptcy if required to pay the entire assessment of $41,568.57. It is undisputed that Williams itself is without available funds in this amount, but the Government suggests that respondent has denuded itself of assets in

the extraordinary circumstances test by adding a requirement that the government's claim to the taxes be so baseless as to be an "exaction" in "the guise of tax."[108] The existing requirement was merely that traditional grounds for equity jurisdiction be shown.

However, the application of the stricter test requiring a showing that under no circumstances can the government prevail was left unclear. The Court in *Enochs* stated that

> the question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained.[109]

However, the Court assumed that the *Enochs* test was not inconsistent with the holding of *Standard Nut.*[110] Yet *Standard Nut* required, *inter alia,* rather technical factual determinations concerning the product's ingredients and a studied interpretation of the Oleomargarine Act's provisions.[111] These issues were resolved in favor of the plaintiff corporation only after issuance of a temporary injunction and a trial on the merits.[112]

Realistically, application of the *Enochs* test will require dismissal of any suit for injunctive relief where a factual dispute exists, or where the law is at all unclear. Thus, without regard to the actual merits in any case, it affords taxpayers equitable relief only in instances of the most egregious abuses of power by the IRS. In light of the obscure origins of the Act and the Court's varying interpretations of it over the past century, it is submitted that the insensitive stringency of the *Enochs* test is not, in all cases, required by history or logic.

IV. Infringement of First Amendment Rights: The Possibility of Expansion of the Exception to the Anti-Injunction Act

The rigidity of the *Enochs* test raises serious constitutional questions. The denial of a judicial forum for the resolution of disputes where IRS administrative actions operate to stifle funda-

anticipation of its tax liability, that DeJean's assets should be considered as belonging to respondent, and that, in any event, the respondent corporation may pay the assessment for a single quarter and then sue for a refund.

370 U.S. at 5. Instead of remanding for a clearer factual determination of the irreparable injury alleged by the respondent, the Court reversed under its new interpretation of the Anti-Injunction Act. Id. at 8.

[108] Id. at 7.

[109] Id.

[110] Id.

[111] *Standard Nut,* 284 U.S. at 506-08.

[112] Id. at 502-03.

mental rights presents an apparent conflict with settled principles of due process. Applying the *Enochs* test, the Supreme Court, however, dismissed Bob Jones University's contention that the requirement that it seek redress only through administrative or judical refund actions violated due process.[113] It reasoned that these procedures offered "petitioner a full, albeit delayed, opportunity to litigate the legality of the Service's [actions]."[114] The irreparable injuries visited on the University by the withdrawal of equitable jurisdiction did "not rise to the level of constitutional infirmities, in light of the powerful governmental interests in protecting the administration of the tax system from premature judicial interference . . . and of the opportunities for review that are available."[115] The Court did not consider whether fulfillment of due process requirements should require creation of exceptions where there existed the possibility of IRS encroachment on the First Amendment rights of the University.

Established principles of procedural due process appear to support a conclusion that the arguably unconstitutional IRS infringements on First Amendment liberties in *Bob Jones University* and *Americans United* merited creation of a test more flexible than *Enochs* to permit equitable relief pending judicial resolution of the constitutional issues. Where only economic ruin is threatened by an IRS withdrawal of exemption and deductibility privileges, a scheme affording relief only through a refund suit would not seem to violate taxpayer's constitutional rights. However, where an allegation of impending economic ruin resulting from the absence of a legal remedy is joined by a substantial showing that the IRS actions violate a recognized fundamental right, it is submitted that due process appears to demand an interpretation of the Anti-Injunction Act which would shield such a case from its scope.

The scope of the Due Process Clauses of the Fifth[116] and Fourteenth Amendments[117] is necessarily fluid due to the broad range of governmental actions subject to the clauses and the diverse interests subject to governmental infringement. In addition to personal or real property threatened by governmental taking,[118] the constitutional guarantees of due process extend to such 'entitlements"[119] as unemployment[120] and welfare benefits,[121] au-

[113] Bob Jones Univ. v. Simon, 416 U.S. at 725, 746-48 (1974).

[114] Id. at 746.

[115] Id. at 747.

[116] U.S. Const. amend. V.

[117] U.S. Const. amend. XIV, § 1.

[118] For a discussion of the requirements of due process where property rights are threatened see Fuentes v. Shevin, 407 U.S. 67, 80-82 (1972).

[119] Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970). Justice Brennan, writing for the Court, implied that any statutory "entitlement" of an economic nature was "property" within the meaning of the Due Process Clause. Id.

[120] See Sherbert v. Verner, 374 U.S. 398 (1963).

[121] Goldberg v. Kelly, 397 U.S. 254 (1970).

tomobile drivers licenses,[122] public employment,[123] social security benefits,[124] and tax exemptions.[125] Rights of liberty protected by due process include those interests recognized as "fundamental," ranging from the right to marry[126] to the right of free speech.[127]

"The right to a prior hearing,"[128] before governmental deprivation of life, liberty or property is recognized as the "fundamental requisite"[129] of due process. The nature of the hearing may vary, "depending upon the importance of the interests involved. . . ."[130] The hearing must, however, be "at a meaningful time and in a meaningful manner,"[131] focusing, at least, upon the proposed deprivation's furtherance of a legitimate state interest.[132] The specific requirements of the hearing, *e.g.,* formality and the opportunity for judicial review, evolve from a classic balancing test: the gravity of the individual's threatened loss is weighed against "the government interest in summary adjudication."[133] As the balance shifts in favor of the individual, the procedural safeguards must necessarily increase.[134]

In a case where the governent interest is sufficiently compelling, the hearing requirement may be suspended "until after the event."[135] For example, the state's interest in public health outweighs property rights. Thus, seizure without a hearing of mislabeled vitamin products[136] or food unfit for human consumption[137] is permitted. In the area of federal taxation, as the Court has stated, the "paramount" right of the IRS "to exact immediate payment and to relegate the taxpayer to a suit for recovery"[138] ordinarily eclipses

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[122] Bell v. Burson, 402 U.S. 535 (1971).
[123] Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).
[124] Flemming v. Nestor, 363 U.S. 603, 611 (1960).
[125] See Speiser v. Randall, 357 U.S. 513 (1958).
[126] Loving v. Virginia, 388 U.S. 1, 12 (1967).
[127] E.g., Cantwell v. Connecticut, 310 U.S. 296 (1940).
[128] Fuentes v. Shevin, 407 U.S. 67, 84 (1972).
[129] Grannis v. Ordean, 234 U.S. 385, 394 (1914).
[130] Boddie v. Connecticut, 401 U.S. 371, 378 (1971).
[131] Armstrong v. Manzo, 380 U.S. 545, 552 (1965).
[132] See *Burson,* 402 U.S. at 541.
[133] *Goldberg,* 397 U.S. at 262-63.
[134] *Speiser,* 357 U.S. at 520-21.
[135] *Boddie,* 401 U.S. at 379.
[136] Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 599-600 (1950).
[137] North American Cold Storage Co. v. Chicago, 211 U.S. 306, 320 (1908).
[138] Phillips v. Commissioner, 283 U.S. 589, 599 (1931). It should be noted, however, that present IRS practices preceding revocation of § 501(c)(3) status or advance assurance of deductibility under § 170 provide considerably more procedural safeguards than the draconian tax collection system contemplated by the *Phillips* Court. Prior to loss of § 501(c)(3) privileges, an aggrieved organization will be notified and allowed to protest in writing to the District Director. Rev. Proc. 72-4, § 11.02, 1972-1. Cum. Bull. 706, 708. If the District Director's ruling is adverse, the proposed action is removed to the National Office and treated as a request for technical advice. Rev. Proc. 72-4, § 11.04, 1972-1 Cum. Bull. 709. At the National Office, the organization may file a written statement and have at least one conference. Rev. Proc. 72-2, §§ 4.05-4.06, 1972-1 Cum. Bull. 695, 696. Where the District Director discovers

the traditional requirement of a prior hearing: "Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate."[139]

Where, however, the governmental interest in summary proceedings is insufficient, due process requires a hearing before the individual interest is foreclosed or infringed. For example, a state's financial interest in economy must yield to a welfare recipient's right to a hearing before termination of benefits, even if unrecoverable sums are consequently paid for a short period to ineligible persons.[140] Similarly, the governmental interest in removing negligent drivers from the road unless they post security for damages claimed by aggrieved parties does not excuse the denial of a presuspension hearing, focused on negligence, to the accused licensee.[141] Where mere property interests are affected by taxation, the due process requirement of an administrative hearing appears to be satisfied by the internal hearing procedures afforded by the IRS.[142] However, judicial review of the final decision is not required by the Constitution.[143]

It is suggested that due process does require provision of a judicial forum to resolve those cases in which administrative actions constitute a restraint on the exercise of the fundamental rights of free expression or free exercise of religion. These more rigid requirements have been imposed in cases dealing with the censorship or seizure of allegedly obscene materials and with restraints on their dissemination through the mail.[144] In such cases, any "final restraint," *e.g.*, where a film is "enjoined from exhibition or threatened with destruction,"[145] may be effected only after an adversary judicial proceeding.[146] Any temporary restraint "imposed in advance of a final judicial determination on the merits similarly must be limited to preservation of the status quo for the shortest

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"serious doubt concerning the continued qualification of the organization to receive deductible contributions" and intends to revoke advance assurance of deductibility to contributors, the affected organization is guaranteed immediate notice. Rev. Proc. 72-39, § 4.05, 1972-2 Cum. Bull. 818, 819. Unless "time is critical," allowing only an oral protest, the Director is required to allow up to ten days for written protest and a conference. Rev. Proc. 72-39, § 4.06, 1972-2 Cum. Bull. 818, 819. Thereafter, the organization has a right to a conference at the National Office. Rev. Proc. 72-39, § 4.08, 1972-2 Cum. Bull. 818, 819.

[139] Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931).

[140] Goldberg v. Kelly, 397 U.S. 254, 264-66 (1970).

[141] Bell v. Burson, 402 U.S. 535, 541-42 (1971).

[142] See note 138 supra.

[143] See Ortwein v. Schwab, 410 U.S. 656 (1973).

[144] E.g., Freedman v. Maryland, 380 U.S. 51 (1965); Blount v. Rizzi, 400 U.S. 410 (1971).

[145] Heller v. New York, 413 U.S. 483, 490 (1973).

[146] Freedman v. Maryland, 380 U.S. 51, 58 (1965). In *Freedman*, the Court ruled that a state censorship board's powers to prohibit the exhibition of allegedly obscene motion pictures offended the Constitution. Id.

fixed period compatible with sound judicial resolution."[147] Furthermore, no temporary restraint may be imposed where a less restrictive alternative course is available to the state.[148] Thus it is established that judicial participation is an essential element of any attempted restraint of free expression: "We have tolerated such a system [of prior restraint] only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint."[149] Applying this principle to administrative tax proceedings, it is submitted that agency decisions which threaten a substantial infringement of First Amendment or other fundamental rights should similarly be exposed to prompt judicial review. Where the delay attending relief through a refund suit will extinguish or seriously hamper the exercise of the rights in question, such delayed judicial proceedings would not appear constitutionally adequate according to the principles of due process developed by the Supreme Court. It would appear that due process requires that the Court's strict interpretation of the Anti-Injunction Act yield to permit equitable relief.

In determining whether judicial review should have been available in *Bob Jones University* or *Americans United* the first question is whether the IRS revocation of section 501(c)(3) status infringed on First Amendment rights. It does not appear that because a tax exemption may be termed a matter of legislative grace,[150] its removal, however arbitrary, is insulated from the demands of due process or cannot operate to infringe constitutional rights.[151] "[T]he

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[147] Id. at 59.

[148] Heller v. New York, 413 U.S. 483, 492-93 (1973) (copies of a seized film must be made available to an exhibitor if none are otherwise available to him).

Similar procedural safeguards have been erected where the Postal Service sought to deny use of the mails for distribution of allegedly obscene literature. Blount v. Rizzi, 400 U.S. 410 (1971). Only procedures containing "built-in safeguards against curtailment of constitutionally protected expression," id. at 416, would satisfy the requirements of the Constitution. Moreover, the prior restraint administratively imposed must be minimal, id. at 417, with the Postal Service obligated to initiate prompt judicial review of its action. Id.

The safeguards surrounding police or postal actions against allegedly obscene materials reflect the preferred position of First Amendment rights in the hierarchy of constitutional values. They are paralleled in other proceedings where state action threatens First Amendment rights. In Dombrowski v. Pfister, 380 U.S. 479 (1965), the Supreme Court held that the doctrine requiring federal courts to abstain from enjoining the initiation of state criminal proceedings was inapplicable where "statutes are justifiably attacked on their face as abridging free expression or as applied for the purpose of discouraging protected activities." Id. at 489-90. (The grounds for federal intervention were narrowed in Younger v. Harris, 401 U.S. 37 (1971).) In Carroll v. President & Commissioners of Princess Anne, 393 U.S. 175 (1968), the Court ruled that ex parte temporary restraining orders curtailing the right of assembly may not issue except where "it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." Id. at 180.

[149] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

[150] See Cammarano v. United States, 358 U.S. 498, 515 (1959) (concurring opinion).

[151] Such an argument failed to insulate procedures for determining eligibility for welfare benefits from the requirements of due process: "Such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that

fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes."[152]

If the IRS denies a tax exemption because an organization has exercised a First Amendment right, such denial appears to constitute an infringement of that right. However, where the deprivation is imposed because of conduct unrelated to free expression, but has an incidental effect of curtailing free expression, First Amendment rights are not violated.[153] In light of this distinction, the IRS actions in *Bob Jones University* and *Americans United* may be recognized, prima facie, as curtailments of First Amendment liberties:[154] in *Bob Jones University* because the school's tax-exempt status was threatened with revocation, a penalty prompted by the institution's exercise of a sincere religious belief; in *Americans United* because the IRS actions penalized the organization's constitutionally protected right to lobby.

The impact of the IRS actions' on First Amendment rights is not limited to the chilling effect associated with loss of each plaintiff's shield against its own tax liability. To the extent that revocation of section 501(c)(3) tax-exempt status diverts contributions, it operates as a direct financial restraint on the exercise of the First Amendment liberties by the organization. Therefore, it is a form of prior restraint comparable to the restraint accomplished by denial of access to the mails[155] or denial of a license to show an allegedly obscene film.[156] Prior restraint of First Amendment rights ordinarily requires prompt judicial resolution of the dispute,[157] such

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adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are 'a "privilege" and not a "right." ' " Goldberg v. Kelly, 397 U.S. 254, 262 (1970).

[152] American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950).

[153] E.g., Branzburg v. Hayes, 408 U.S. 665, 682-83 (1972).

> [T]he First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. . . . [O]therwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed.

Id. at 682-83. "It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon." Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943). See also Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) (taxes levied generally on enterprises, including the press, raise no constitutional problems).

[154] See Speiser v. Randall, 357 U.S. 513, 518 (1958). "It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. . . . To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech." Id.

[155] Blount v. Rizzi, 400 U.S. 410 (1971).

[156] Freedman v. Maryland, 380 U.S. 51 (1965).

[157] See text at notes 144-49 supra.

as would be provided by an exception to the Anti-Injunction Act to create jurisdiction for injunctive relief.

Assuming that *Bob Jones University* and *Americans United* had established, prima facie, IRS infringement of their First Amendment rights, only a "sufficient countervailing justification"[158] would "justify a short-cut procedure which must inevitably result in suppressing protected speech."[159] Although the weight assigned to the governmental objective to be achieved at the expense of the fundamental right in question is necessarily subjectively measured, strict scrutiny is aided by a "less restrictive alternative" analysis:

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of . . . abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.[160]

The Constitution then, requires an examination of how compelling the asserted state interest is in light of alternatives available for achieving the same end.

The interest asserted by the IRS in seeking to shield its administrative determinations from pre-collection judicial interference is the need to assure the United States "of prompt collection of its lawful revenue,"[161] and to protect "the collector from litigation pending a suit for refund."[162] Except to the extent that the latter reason is a restatement of the former, it is difficult to conceive why the collector should stand on a footing different from any other federal official subject to judicial scrutiny. Concededly, there is a strong governmental interest in freedom from judicial interference with the tax collection process. The Court in 1876 flatly stated that "[i]f there existed in the courts, State or National, any general power of impeding or controlling the collection of taxes, . . . the very existence of the government might be placed in the power of a hostile judiciary."[163] Scarely retreating from this nineteenth century assertion, the Court in 1931 noted that "the right of the United States to exact immediate payment and to relegate the taxpayer to a suit for recovery, is paramount."[164] The Court in both *Enochs*[165]

[158] Boddie v. Connecticut, 401 U.S. 371, 380-81 (1971). In *Boddie*, the Court held that Connecticut violated due process in denying indigents, who could not pay a filing fee, access to its courts to exercise their right of divorce. Id.

[159] Speiser v. Randall, 357 U.S. 513, 529 (1958).

[160] Shelton v. Tucker, 364 U.S. 479, 488 (1960); accord, Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964); Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293, 296-97 (1961).

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

[162] Id. at 8.

[163] Cheatham v. United States, 92 U.S. 85, 89 (1876).

[164] Phillips v. Commissioner, 283 U.S. 589, 599 (1931).

[165] See *Enochs*, 370 U.S. at 7.

and in *Bob Jones University*[166] recognized the government interest in freedom from judicial interference in pre-tax collection procedures as superior to an organization's interest in escaping from "a precarious financial position."[167]

It is submitted that the Court's unquestioning assumption that the government's interest in precollection immunity from all judicial interference is paramount, ignores the question of whether a less restrictive alternative, permitting pre-collection equitable relief only in exceptional cases, would not protect the treasury equally well. The Court's apparently unquestioning acceptance of the government's asserted interest appears to compromise its commitment "searchingly [to] examine the interests that the State seeks to promote" where in conflict with fundamental rights.[168]

A serious threat to the revenues would exist where a broadly drawn exception to the Anti-Injunction Act would invite a multitude of suits hampering the tax collection machinery. However, a narrow exception, permitting injunctive relief only where a substantial constitutional question involving an encroachment on First Amendment rights is combined with a showing of irreparable harm, would not result in a severe disruptive effect upon the tax collection system. Where the plaintiff's own tax liability is at issue, the government's interest in the fiscal integrity of the treasury is not seriously jeopardized by requiring it to postpone collection until after the litigation. Indeed, certain delays are authorized by statute to preserve the status quo while the Tax Court tries a deficiency assessment action.[169] It is difficult to discern how the effect of a Tax Court injunction on the government's "paramount interest" differs in any significant respect from the impact of a federal district court injunction.[170]

Moreover, where a third-party donor's taxes would be irretrievably lost during the period of injunctive relief, or where the plaintiff's solvency is in question, an alternative to denial of the availability of injunctive relief could be a requirement that the plaintiff post a bond to assure the government's eventual collection of taxes owed.[171] While a bonding requirement may prove burden-

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[166] 416 U.S. at 747.

[167] Id.

[168] Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

[169] Int. Rev. Code of 1954, § 6213(a).

[170] Furthermore, it is difficult to understand how a state's interest in the integrity of its treasury is substantially less compelling than Federal Government's interest in the integrity of its revenues; yet New York's interest in denying funds to ineligible persons was held inferior to a welfare recipient's right to a hearing before removal from the rolls. Goldberg v. Kelly, 397 U.S. 254, 266 (1970).

[171] Fed. R. Civ. P. 65(c) provides that "[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."

For an earlier case in which the Court required a bond as a condition of temporary

some to some plaintiffs, it is certainly less so than the present scheme resulting in certain loss of contributions. Moreover, where the legal questions are novel a bond seems a fair accommodation of the interests of the two parties in light of the uncertain outcome of the litigation.

Assuming that an exception to the Anti-Injunction Act should be permitted where the probability of irreparable injury and a substantial question involving fundamental rights are presented in the same case, it is submitted that *Bob Jones University* and *Americans United* are cases appropriate for application of such an exception. In *Bob Jones University* the threatened economic deprivation penalized the University's exercise of an evidently sincere, if eccentric, religious belief that racial segregation was divinely ordained. In *Americans United* the revocation penalized the organization's First Amendment right to petition for redress of grievances. If the University sought to challenge the IRS threatened revocation of tax-exempt status on grounds independent of the free exercise of religion, it is doubtful that a substantial constitutional claim would be present. While the associational interest in private education is protected against state encroachment,[172] it seems clear that the federal government's interest in avoiding support for institutions established to promote segregated education would be sufficiently important to justify a tax classification discriminating against segregationist private schools.[173]

Where the protected associational interest is coupled with an interest in the free exercise of religion, a difficult question is presented. Perhaps, as the court in *Green v. Connally*[174] stated,

> [t]here is a compelling as well as a reasonable government interest in the interdiction of racial discrimination which stands on the highest constitutional ground, taking into account the provisions and penumbra of the Amendments passed in the wake of the Civil War. That government interest is dominant over other constitutional interests to

injunctive relief against tax collection, see Hill v. Wallace, 257 U.S. 615, 616 (1921). For a discussion of bonding requirements under Fed. R. Civ. P. 65(c), see 7 Moore's Fed'l Practice ¶ 65.09 (2d ed. 1974).

[172] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[173] For a discussion of the constitutional issues presented by such a case, see Green v. Connally, 330 F. Supp. 1150, 1165-69 (D.D.C.), aff'd mem. sub nom. Coit v. Green, 404 U.S. 997 (1971). See also Railway Mail Ass'n v. Corsi, 326 U.S. 88, 93-94 (1945) (associational liberties protected by the Fourteenth Amendment may be infringed by state anti-discrimination legislation because of the Amendment's overiding concern with the elimination of racial discrimination). Cf. Norwood v. Harrison, 413 U.S. 455 (1973) (state's supplying of free textbooks to private schools practicing racial discrimination violates the Fourteenth Amendment).

[174] 330 F. Supp. 1150 (D.D.C.), aff'd mem. sub. nom. Coit v. Green, 404 U.S. 997 (1971).

> the extent that there is complete and unavoidable conflict.[175]

It is not to be denied that the interest in eliminating racial discrimination is of the highest national concern. But the Court has never held that the wall between church and state may be breached to permit government regulation of a church's racial policies. Nor has the Court decided whether denial of a tax exemption to a church composed of members of one racial group would be the constitutional equivalent of such regulation. And where a religious organization's racial beliefs manifest themselves in the exercise of a function as intimately associated with religion as religious education, it is uncertain whether a tax classification necessarily burdening that type of religious exercise is justifiable.[176]

The great deference accorded by the Court to religious practices in conflict with important state interests was vividly reflected in *Wisconsin v. Yoder.*[177] In that case, the State's interest in insuring that all children receive an adequate education was not of sufficient constitutional weight to justify requiring Amish children, in violation of their religious beliefs, to attend public school after the eighth grade.[178] In *Bob Jones University,* however, the governmental interference with the religious exercise was perhaps less invidious and direct than in *Yoder.* Moreover, because the interference, the withholding of indirect support, goes no further than necessary to promote the important goal of disassociating the United States from all forms of racial discrimination, it is likely that the proposed revocation of section 501(c)(3) status was not unconstitutional. However, it is submitted that the question was sufficiently novel and uncertain to have justified the district court's assumption of equitable jurisdiction under an exception to the Anti-Injunction Act.

In *Americans United* the constitutional question presented was whether an otherwise qualifying organization may be denied tax-exempt status when a significant portion of its activities enters the constitutionally protected area of lobbying.[179] The Court has never

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[175] 330 F. Supp. at 1167.

[176] Cf. People v. Woody, 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964) (state's interests in prohibiting the use of hallucinogens were insufficient to permit the prosecution of Indians using peyote in a bona fide religious ritual). But cf. Reynolds v. United States, 98 U.S. 145 (1878) (government's interest in protecting democratic institutions, morals and social well-being overrode Mormons' religious interest in practicing polygamy).

[177] 406 U.S. 205 (1972).

[178] Id. at 228-29.

[179] The claim by Americans United that the lobbying proscription of § 501(c)(3) violates equal protection because large organizations are thereby permitted to engage in more lobbying than small organizations seems insubstantial. The Supreme Court appears to have rejected contentions that discriminations based solely on wealth are invidious. See San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 24 (1973); Ortwein v. Schwab, 410 U.S. 656, 660 (1973).

confronted this question directly.[180] It appears logical, however, that the IRS revocation of Americans United's tax-exempt status should be regarded as an infringement on First and Fifth Amendment liberties. Threatened loss of section 501(c)(3) status for engaging in certain types of constitutionally protected activities has a strong deterrent effect on the exercise of the protected right.[181] Moreover, deprivation of a governmental benefit which penalizes the exercise of a fundamental right may violate equal protection.[182]

In determining whether the IRS action against Americans United was constitutional, an examination of the government's rationale in denying exemptions to organizations substantially involved in lobbying is required. The government's policy, as enunciated by the Tenth Circuit, is based on the conviction "that the United States Treasury should be neutral in political affairs and that substantial activities directed to attempts to influence legislation or

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[180] In Cammarano v. United States, 358 U.S. 498 (1959), taxpayers claimed that denial of a business expense deduction for lobbying costs violated their First Amendment rights. Id. at 512-13. The Court refused to find a First Amendment issue:

> Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets . . . . Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not " 'aimed at the suppression of dangerous ideas.' "

Id. at 513. *Cammarano* is distinguishable from *Americans United* on several grounds. At issue in *Cammarano* was the question of whether lobbying costs were "ordinary and necessary" business expenses within the meaning of Int. Rev. Code of 1939, § 23(a)(1)(A). Id. at 499. Despite the Court's evident belief that First Amendment rights were unaffected, the IRS interpretation of the Code which excluded lobbying expenses from that classification penalized the exercise of free expression in behalf of the enterprise. However, unlike the penalty in *Americans United* where no commercial interests underlay the organization's lobbying activity, the IRS actions in *Cammarano* penalized only expression in behalf of a business, an interest evidently unprotected by the First Amendment. See Valentine v. Chrestensen, 316 U.S. 52, 54 (1942). Moreover, the denial of a tax exemption for organizations engaged in lobbying, as in *Americans United*, goes well beyond the denial of a deduction, a penalty co-extensive with the government's interest in avoiding support for lobbying activities. Where tax-exempt status is revoked, all tax benefits are lost although the lobbying efforts constituted only a portion of the organization's overall activities. Finally, the penalty in *Cammarano* was of only minor impact on the petitioners' business enterprises. See 358 U.S. at 501-02. Americans United, which was organized for non-commercial purposes, was placed in grave financial condition by the IRS actions. "Americans United" Inc. v. Walters, 477 F.2d 1169, 1172-73 (D.C. Cir. 1973).

Given the larger quantitative impact of the IRS actions in *Americans United* and the clearer penalization of protected activities, a test more stringent than the rational justification analysis adopted in *Cammarano*, see 358 U.S. at 513, should be applied. See also Speiser v. Randall, 357 U.S. 513 (1958). "[D]enial of a tax exemption for engaging in speech is a limitation on free speech." Id. at 518.

[181] See *Speiser*, 357 U.S. at 518.

[182] Shapiro v. Thompson, 394 U.S. 618, 634 (1969). "[A]ny classification which serves to penalize the exercise of [a fundamental] right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." Id. (emphasis in original). In *Shapiro*, the Court held that one year residency requirements for welfare eligibility unconstitutionally infringed on the appellees' fundamental rights of interstate travel. Id. at 638.

affect a political campaign should not be subsidized."[183] The Supreme Court has yet to attach constitutional weight to this interest. And it has yet to determine what level of invidiousness is reached by tax classifications which infringe on fundamental rights. Until it does so, the First Amendment claims raised in *Americans United* remain novel and troubling, and it would seem that sufficiently substantial constitutional question exists to justify an exception to the Anti-Injunction Act.

Nonetheless, the Supreme Court's unwillingness to depart from the rigid and clumsy test enunciated in *Enochs* leaves tax-exempt organizations virtually without a remedy in the face of potentially arbitrary infringements of their First Amendment rights. Given *Enochs'* virtual foreclosure of access to a precollection remedy even where basic liberties are threatened with destruction, it is submitted that the Anti-Injunction Act should have been interpreted as permitting injunctive relief where a substantial constitutional question involving fundamental rights is coupled with a showing of irreparable injury.

RICHARD J. SHEA

Trade Secrets—Federal Patent Law Preemption of State Trade Secret Law—*Kewanee Oil Co. v. Bicron Corp.*[1]—Harshaw Chemical, a subsidiary of plaintiff, Kewanee Oil Co., completed a sixteen year research program which produced the first seventeen-inch sodium iodide thallium crystal ever manufactured in the United States.[2] The crystal is used for the detection of ionizing radiation. The manufacture of the seventeen-inch crystal represented a significant advancement in the field.[3] Three years after the production of the first seventeen-inch crystal, Bicron Corporation, the defendant, was formed by three former Harshaw employees, all of whom had been involved in the research program. Within nine months, Bicron had produced its first seventeen-inch crystal.[4] The

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[183] Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 854 (10th Cir. 1972) (emphasis deleted).

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[1] 416 U.S. 470 (1974) (5-3 majority).

[2] Id. at 473. While Harshaw was not alone in its interest in growing sodium iodide thalium crystals, no other research team had been able to grow a 17-inch crystal. See Brief for Petitioner at 5-6, Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974), reprinted in 7 Trade Reg. Law Reprints (no. 3a) 43 (1974) [hereinafter cited as Law Reprints]; Brief for Respondent at 5-6, Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974), reprinted in Law Reprints, supra, at 121.

[3] Kewanee Oil Co. v. Bicron Corp., 478 F.2d 1074, 1076 (6th Cir. 1973).

[4] 416 U.S. at 473.