

NOTE

THE TAX INJUNCTION ACT AND FEDERAL JURISDICTION: REASONING FROM THE UNDERLYING GOALS OF FEDERALISM AND COMITY

*David Fautsch**

States routinely contest federal jurisdiction when a state tax is challenged in federal district court on federal constitutional grounds. States argue that the Tax Injunction Act, 28 U.S.C. § 1341 (2006), bars jurisdiction and, even if the Tax Injunction Act does not apply, the principals of federalism and comity require abstention. The United States Supreme Court has not squarely addressed the scope of federalism and comity in relation to the Tax Injunction Act, and federal courts of appeal are split. In the Fourth and Tenth Circuits, federalism and comity require federal district courts to abstain even where the Tax Injunction Act permits jurisdiction. In the First, Sixth, and Seventh Circuits, however, federalism and comity reach no further than the Tax Injunction Act.

This Note (1) discusses the circuit split, (2) provides a framework for analyzing the federal judiciary's role in constitutional litigation involving state interests, and (3) resolves the circuit split by arguing that federalism concerns do not justify abstention and that comity concerns, in extreme cases, may justify abstention.

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“The history of American freedom is, in no small measure, the history of procedure.”

—Justice Felix Frankfurter¹

INTRODUCTION

The forum in which a case is heard, federal or state court, can significantly affect the outcome of litigation,² and litigants often fight hard to obtain their preferred forum.³ Plaintiffs raising constitutional law claims, in particular, often choose between state and federal court based on their perception of which court will be most receptive to their claims.⁴ The stakes are high in the fight over whether a state or federal court has jurisdiction, because the first court system to hear the case will likely be the last.⁵ Justice Frankfurter’s recognition that freedom and procedure are deeply intertwined is, therefore, especially true for plaintiffs raising constitutional claims—determining whether a state or federal court has jurisdiction is a crucial decision that can have far-reaching ramifications.⁶

1. *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring).

2. Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988) (discussing the debate on whether federal and state courts vindicate federal rights to the same extent).

3. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

4. *See, e.g., id.* at 1108–09 (noting that civil rights litigants have historically sought to expand federal jurisdiction for civil rights claims); William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 606–11 (1999) (noting that state courts are the preferred forum for most gay-rights litigants).

5. Scholars and practitioners routinely note that litigation is expensive and time consuming. *See, e.g.,* Kathleen K. Wright, *Using Retroactive Taxes to Cure Budget Shortfalls*, 61 TAX LAW. 1153, 1179 (2008) (“Litigation is expensive and limiting any recovery discourages taxpayers from challenging unconstitutional assessments.”). Furthermore, the high cost of continuing to litigate may be too much for some plaintiffs to bear. Shira A. Scheindlin & John Elofson, *Judges, Juries, and Sexual Harassment*, 17 YALE L. & POL’Y REV. 813, 844 (1999) (“[A]n appeal is another significant expense, and it is likely that neither the plaintiff nor her attorney can afford to press the appeal.”).

6. *See* Neuborne, *supra* note 3, at 1106 (“During the past century, litigators have consistently advanced ostensibly outcome-neutral federalism arguments, assertedly unrelated to the merits, to channel constitutional adjudication into forums calculated to advance the substantive interests of their clients.”).

Suits involving the constitutionality of state tax schemes exemplify the procedural battle over whether the appropriate court of first instance is state or federal. Assume, for example, that a state decides that families who send their children to private schools should not pay the full price for a public school system that they are not using. This hypothetical state, therefore, enacts legislation to provide a tax credit for parents who send their children to private schools.⁷ The tax credit allows families to deduct a portion of the expense of sending their children to private school, but the absolute most that a single family can avoid paying in taxes is \$2000. Each family's exact tax savings is determined by a formula that takes into account the number of children attending school, the cost of the private school, and the cost of public education in that family's particular community.

The legislative history and public debate around the new tax-credit program does not reveal an invidious purpose to discriminate against any protected class. Nor is there any evidence of intent to create or maintain racial segregation.⁸ The state has done substantial planning to forecast tax revenues, and it claims that the quality of public education will not diminish. According to the state, the decrease in tax revenue will be offset by the decrease in students attending public schools.

Despite the state's claims, a class of plaintiffs seeks to invalidate the tax credit. The plaintiffs argue that public education is suffering—especially in minority communities—and that public education will become even worse if the state is allowed to continue this tax credit. The plaintiffs argue that the state tax credit violates the First Amendment's Establishment Clause (many of the private schools are religious) and the Fourteenth Amendment's Equal Protection Clause. The plaintiffs file a complaint against the state in the local federal district court. The state responds that the federal district court lacks jurisdiction by virtue of the Tax Injunction Act, 28 U.S.C. § 1341,⁹ and, even if § 1341 does not apply, that notions of federalism and comity require the federal court to abstain.¹⁰

Section 1341 reads, "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."¹¹ Thus, if § 1341 applies, federal district courts do not have jurisdiction.¹²

7. This hypothetical draws loosely on the facts of two recent cases: *Hibbs v. Winn*, 542 U.S. 88 (2004) and *Lynch ex rel. Lynch v. Alabama*, 568 F. Supp. 2d 1329 (N.D. Ala. 2008).

8. In the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954), tuition grants and tax credits were one means of circumventing federally mandated desegregation efforts. *Hibbs*, 542 U.S. at 93; see also *Griffin v. County School Bd.*, 377 U.S. 218 (1964) (holding that a federal district court may require a county to levy taxes to combat an unconstitutional closure of public schools resulting from tuition grants and tax credits for contributions to private segregated schools).

9. 28 U.S.C. § 1341 (2006).

10. This is a common defense in cases like the hypothetical. See *infra* Part I.

11. 28 U.S.C. § 1341.

12. By its terms, § 1341 deprives the federal district courts of jurisdiction so that jurisdiction is not discretionary. *Id.* Federalism and comity, on the other hand, are concepts that may require courts to *abstain* from hearing a case. Abstention is "[a] federal court's relinquishment of

Regardless of § 1341, however, federal district courts may invoke federalism and comity to justify abstention when litigation involves sensitive state interests.¹³ Federalism, which describes the balance of power between the states and the federal government, is sometimes simply articulated as “Our Federalism.”¹⁴ Comity, which describes the recognition that federal courts give to official acts of a state government, is often listed as a justification for abstention when a federal court judgment might create hostility between the state and the federal government.¹⁵

Supreme Court jurisprudence does not definitively resolve whether the federal district court should exercise jurisdiction or abstain. In *Fair Assessment in Real Estate Association v. McNary*, the Court held that the principle of comity required federal district courts to abstain from taxpayer suits brought under 42 U.S.C. § 1983 regardless of whether § 1341 applied.¹⁶ Although the Court was asked to consider the effect of § 1341 in *Fair Assessment*, the Court specifically found that because “the principle of comity bars federal courts from granting damages relief in such cases, we do not decide whether [§ 1341], standing alone, would require such a result.”¹⁷ In

jurisdiction when necessary to avoid needless conflict with a state’s administration of its own affairs.” BLACK’S LAW DICTIONARY 9 (9th ed. 2009). Therefore, when deciding whether to abstain based on federalism and comity concerns, the federal district courts have jurisdiction but use their discretion to avoid adjudicating the case.

13. See, e.g., *Mitchum v. Foster*, 407 U.S. 225, 243 (1972) (“[W]e do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding.”); see also *Steffel v. Thompson*, 415 U.S. 452, 462 (1974) (“When no state proceeding is pending and thus considerations of equity, comity, and federalism have little vitality, the propriety of granting federal declaratory relief may properly be considered independently of a request for injunctive relief.”). Federalism and comity, however, are distinct concepts. Lee Kovarsky, *AEDPA’s Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 457 (2007) (“I have been unable to locate a habeas decision that carefully parses comity and federalism interests. The two terms describe different phenomena, but comity is by far the more clearly and frequently articulated interest.”). The key difference between these two concepts appears to be that comity is a doctrine of equity, whereas federalism is an organizing principle unique to the government of the United States. Compare *Fair Assessment in Real Estate Ass’n v. McNary*, 454 U.S. 100, 119 (1981) (Brennan, J., concurring) (describing comity as an equitable doctrine), with *Chemerinsky*, *supra* note 2, at 312–13 (describing federalism as a principle relating to the structure of government).

14. Federalism is “[t]he legal relationship and distribution of power between the national and regional governments within a federal system of government.” BLACK’S LAW DICTIONARY, *supra* note 12, at 687. In the context of federal court abstention, however, federalism is often meant to convey the concept of “Our Federalism.” See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971). “Our Federalism” is defined as “[t]he doctrine holding that a federal court must refrain from hearing a constitutional challenge to state action if federal adjudication would be considered an improper intrusion into the state’s right to enforce its own laws in its own courts.” BLACK’S LAW DICTIONARY, *supra* note 12, at 1211.

15. Comity is “[a] practice among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts.” BLACK’S LAW DICTIONARY, *supra* note 12, at 303.

16. 454 U.S. at 107.

17. *Fair Assessment*, 454 U.S. at 107. Although the *Fair Assessment* Court used the term “bar” (which connotes a sense of permanence) to describe its holding, federal courts are not forever restrained from hearing constitutional challenges to state tax schemes. *Id.* at 116 (recognizing that constitutional plaintiffs “may ultimately seek review of the state decisions in this Court”). Thus,

Hibbs v. Winn, the Court held that § 1341 permits jurisdiction where the relief requested by the plaintiff would result in an increase in the state's tax revenue.¹⁸ The *Hibbs* Court did not address whether federalism or comity could require federal courts to abstain even when § 1341 permits jurisdiction.¹⁹ Moreover, the three dissenters, led by Justice Kennedy, did not specifically argue that comity required abstention.²⁰ Thus, the Supreme Court has not addressed whether federalism or comity can require a federal court to abstain when § 1341 clearly permits federal jurisdiction.

The Supreme Court's failure to address the effect of federalism and comity in the context of § 1341 opened the door for conflict between the federal courts of appeal.²¹ The Fourth and Tenth Circuits hold that federalism and comity reach beyond § 1341. Thus, in these Circuits, courts may abstain even in cases where *Hibbs* clearly indicates that § 1341 does not apply. The First, Sixth, and Seventh Circuits, on the other hand, hold that federalism and comity reach no further than § 1341. Thus, in these Circuits, if § 1341 does not bar jurisdiction, neither federalism nor comity is a justification for abstention.

Resolving this circuit split requires courts to answer the following question: where a plaintiff seeks relief from the federal courts for an allegedly unconstitutional state tax scheme, and § 1341 does not bar the plaintiff's claim, can general principles of federalism or comity still require federal courts to abstain? The resolution of this circuit split is important for at least two reasons. First, litigants and courts involved in suits challenging the constitutionality of state tax schemes need to know where the case properly belongs. If ambiguity persists, similarly situated litigants will be treated differently depending on where their case arises. That is to say, litigants in certain circuits will be required to litigate in state court while litigants in other circuits will be allowed to litigate in federal court. Second, the way this question is resolved has implications for how federal courts define and reason about their relationship to state courts.²² Federal judges, scholars, and practitioners continually note that the limited jurisdiction of the federal judiciary is constantly evolving and not always articulated by bright

federal appellate courts retain the right to adjudicate federal constitutional issues once the state court system has adjudicated the case.

18. *Hibbs v. Winn*, 542 U.S. 88, 108 (2004) (“[Section] 1341 has been read to restrain state taxpayers from instituting federal actions to contest their liability for state taxes, but not to stop third parties from pursuing constitutional challenges to state tax *benefits* in a federal forum.”).

19. The *Hibbs* Court cites, but does not discuss, *Fair Assessment* for the proposition that the Court has refused jurisdiction in cases where the relief requested by the plaintiff would decrease state tax revenue. *Hibbs*, 542 U.S. at 106. The *Fair Assessment* Court, however, rested its decision squarely on the notion of comity. 454 U.S. at 107.

20. *Hibbs*, 542 U.S. at 124 (Kennedy, J., dissenting). Justice Kennedy, rather, focused on the interpretation of § 1341, and only briefly mentioned *Fair Assessment*. *Id.*

21. See *infra* Section I.B.

22. See, e.g., Richard H. Fallon Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1145–46 (1988) (noting the complex debate over the constitutional, statutory, and common law issues implicated by federalism).

line rules.²³ Where case law is not dispositive, as in these kinds of cases, judgments about the appropriate scope of federal judicial power are inevitable.²⁴ The appropriate resolution of this question is all the more important given that the Supreme Court recently granted certiorari to a case from the Sixth Circuit to consider the same issues addressed by this Note: (1) whether *Hibbs* narrowed the doctrine of comity applied in *Fair Assessment*, and (2) whether comity principles bar federal jurisdiction in the instant case.

This Note provides a framework for analyzing the federal judiciary's role in constitutional litigation involving sensitive state interests, and argues that federalism concerns do not justify abstention, and that comity concerns, in extreme cases, may justify abstention.

Part I discusses the history of § 1341 and the Supreme Court's conflicting interpretations in *Fair Assessment* and *Hibbs*, as well as outlines the recent circuit split that is rooted in these two cases. Part II notes the failure of the federal appeals courts to explain how the underlying goals of federalism and comity factor into the decision to exercise jurisdiction or abstain, and argues that § 1341 (as interpreted in *Hibbs*) defines the limits of federal jurisdiction in most cases. That is to say, as long as the relief requested by the plaintiff would increase state tax revenue, federal courts are not limited by § 1341, federalism, or comity. In extreme cases, however, comity (but not federalism) justifies federal-court abstention. An extreme case would be one in which the relief requested by the plaintiff might ultimately increase state tax revenue but would require the state to drastically overhaul its tax system. The federal appeals courts have not yet dealt with such an extreme case.

I. THE HISTORY OF § 1341 AND CONFLICTING JUDICIAL INTERPRETATIONS

The relationship between § 1341, federalism, and comity is complex and long standing. Section I.A provides a brief overview of the legislative history, text, and interpretation of § 1341. This overview demonstrates how § 1341 already addresses comity and federalism concerns. Section I.A also argues that the Supreme Court's decisions in *Fair Assessment* and *Hibbs* led the federal circuits to ask whether federalism and comity can require federal courts to abstain irrespective of § 1341. In other words, the Supreme Court has not squarely resolved the limits of federalism and comity in suits challenging the constitutionality of state taxes. Finally, Section I.B establishes that the federal circuits have differed over the reach of federalism and comity without meaningfully explaining how the decision to exercise jurisdiction or abstain implicates the underlying goals of these concepts.

23. See, e.g., Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 394–95 (1964) (discussing the evolving nature of federal court jurisdiction).

24. See, e.g., Neuborne, *supra* note 3, at 1105–06.

A. *The Tax Injunction Act, Fair Assessment, and Hibbs*

1. *Congress Designed the Tax Injunction Act to Address Federalism and Comity Concerns*

Section 1341, the Tax Injunction Act, reads, “The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.”²⁵ Several observations about the mechanics of § 1341 help provide context. First, § 1341 permits federal jurisdiction if a state fails to provide an adequate process for plaintiffs to contest the validity of a tax.²⁶ In the context of § 1341, no federal court has held that a state’s court system is incapable of supplying a constitutional plaintiff with a plain, speedy, and efficient remedy.²⁷ Second, the term “tax” is defined by federal law, not state law.²⁸ Third, § 1341 applies to all types of challenges to state taxes,²⁹ but, for the purposes of this Note, only federal constitutional challenges are considered.³⁰

The legislative history of § 1341 reveals that Congress intended to resolve tension between state and federal interests. First, Congress sought to

25. 28 U.S.C. § 1341 (2006).

26. See Ann K. Wooster, Annotation, *What Constitutes Plain, Speedy, and Efficient State Remedy Under Tax Injunction Act (28 U.S.C.A. § 1341)*, *Prohibiting Federal District Courts from Interfering with Assessment, Levy, or Collection of State Business Taxes*, 31 A.L.R. FED. 2D 237, 253 (2008).

27. See *id.* (discussing cases where federal courts evaluated whether existing state court procedures provided plain, speedy, and efficient remedies within the meaning of § 1341, none of which considered the possibility that a state’s court system was unable to provide such a remedy). Whether state courts adequately adjudicate federal constitutional rights is the subject of substantial debate. See, e.g., Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Chemerinsky, *supra* note 2; Neuborne, *supra* note 3; Rubenstein, *supra* note 4; Michael E. Solomine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L. Q. 213 (1982).

The parity debate is obviously beyond the scope of this Note, but questions of parity are deeply embedded in the legitimacy of comity and, especially, federalism. See *infra* Section II.A. Indeed, Justice Kennedy identifies parity as an underlying motivator of the Court’s decision in *Hibbs*. In his dissent, Justice Kennedy writes, “The concern, it seems, is that state courts are second rate constitutional arbiters, unequal to their federal counterparts. State courts are due more respect than this.” *Hibbs v. Winn*, 542 U.S. 88, 113 (Kennedy, J., dissenting).

28. *Wright v. McClain*, 835 F.2d 143, 144 (6th Cir. 1987); *Robinson Protective Alarm Co. v. City of Phila.*, 581 F.2d 371, 374–76 (3d Cir. 1978); *Tramel v. Schrader*, 505 F.2d 1310, 1315 & n.7 (5th Cir. 1975).

29. See generally Andrew M. Campbell, Annotation, *What constitutes “tax” under Tax Injunction Act (28 U.S.C.A. § 1341)*, which prohibits federal district courts from interfering with assessment, levy, or collection of state taxes, 151 A.L.R. FED. 387 (1999) (noting that the Tax Injunction Act applies to all challenges to state tax laws, not just constitutional challenges).

30. Section 1341 does not, on its face, distinguish between plaintiffs who are actually subject to the tax that they are challenging, and plaintiffs that are challenging tax benefits given to third parties. *Hibbs* holds, however, that § 1341 does not apply to third parties challenging tax benefits given to other people or entities. 542 U.S. at 108–12. For the purposes of this Note, as outlined in the Introduction’s hypothetical, the paradigm suit is one where a third party is contesting a tax credit or benefit.

limit the impact of *Ex Parte Young*,³¹ which held that a state Attorney General could be held in contempt of court for violating a federal injunction.³² *Ex Parte Young* was a watershed case because it exposed state officers to scrutiny from the federal courts—it brought “within the scope of federal judicial review actions that otherwise might escape review, and [subjected] the states to the restrictions of the United States Constitution that they otherwise might be able safely to ignore.”³³

Second, Congress was concerned that the use of diversity jurisdiction gave out-of-state plaintiffs an unfair business advantage by permitting out-of-state plaintiffs to delay payment of state taxes during the course of litigation in federal court.³⁴ Congress feared a situation in which out-of-state plaintiffs could bring suit in federal court through diversity jurisdiction and withhold taxes during litigation,³⁵ whereas in-state plaintiffs would be required to pay first and then litigate in state court.³⁶

Third, Congress did not want federal courts to disrupt the administration of state tax systems.³⁷ Congress was concerned that litigation can render future revenue difficult to predict, and thus hamper the ability of states to create a budget.³⁸

Courts have differed about the exact contours of the third purpose: the degree to which federal courts may complicate state budget making. In *Hibbs*, for example, Justices Ginsburg and Kennedy differed sharply over how robustly Congress intended to protect state budgets from scrutiny in the federal courts. Justice Ginsburg found that § 1341 does not apply when the proposed relief would increase state tax revenues.³⁹ Quoting Judge Easterbrook, the Court recognized that “[t]here was no articulated concern about

31. Frederick C. Lowinger, Comment, *The Tax Injunction Act and Suits for Monetary Relief*, 46 U. CHI. L. REV. 736, 739–40 (1979).

32. 209 U.S. 123 (1908).

33. CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 48, at 312 (6th ed. 2002).

34. See H.R. REP. NO. 75-1503, at 2 (1937) (incorporating S. REP. NO. 75-1035 (1937)); S. REP. NO. 75-1035, at 1–2; 81 CONG. REC. 1416 (1937).

35. *Garrett v. Bamford*, 538 F.2d 63, 67 (3d Cir. 1976) (“Congress’ apparent concern to limit the ability of *foreign* corporations to use the *diversity* jurisdiction, at least suggests that Congress did not intend the Tax Injunction Act to bar federal courts from entertaining challenges to state taxes when such challenges were based on federal law.”). Prior to the Tax Injunction Act, federal courts permitted out-of-state plaintiffs to sue in diversity and to stay payment on their taxes during the course of the litigation. *Id.* at 66. Recognizing that this created an incentive to litigate in federal court and a business advantage to out-of-state corporations, Congress sought to end this practice through the Tax Injunction Act. *Id.*

36. *Id.* at 66.

37. See H.R. REP. NO. 75-1503, at 2 (noting *inter alia* that through litigating in federal courts, foreign corporations can withhold taxes “in such vast amounts and for such long periods of time as to seriously disrupt State and county finances” (quoting S. REP. NO. 75-1035, at 2)).

38. See *Perez v. Ledesma*, 401 U.S. 82, 127 n.17 (1971) (Brennan, J., concurring in part, dissenting in part) (“If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law.”).

39. *Hibbs v. Winn*, 542 U.S. 88, 108–12 (2004).

federal courts' flogging state and local governments to collect additional taxes."⁴⁰ Justice Kennedy, writing for the dissent, construed the legislative history more broadly: "The Court has made clear that [§ 1341]'s purpose is not only to protect the fisc but also to protect the State's tax system administration and tax policy implementation."⁴¹ Justice Kennedy, therefore, would find that even if the plaintiff's relief would increase state tax revenue, § 1341 should still bar jurisdiction because Congress intended to stop federal courts from interfering with state tax systems.⁴²

The legislative history of § 1341 clearly indicates that Congress sought to protect state interests from federal scrutiny. The Supreme Court, however, complicated the question. By failing to address whether the general principles of federalism or comity can require federal courts to abstain, even where § 1341 permits federal jurisdiction, the Supreme Court opened the door to conflicting interpretations of federal jurisdiction over challenges to state tax schemes.

2. *The Supreme Court Opened the Door for Conflicting Interpretations of the Tax Injunction Act in Fair Assessment and Hibbs*

In *Fair Assessment*, the Supreme Court held that the principle of comity bars federal district court jurisdiction over suits "to redress the allegedly unconstitutional administration of a state tax system."⁴³ A group of plaintiffs complained that Missouri imposed a higher tax on their recently renovated homes than on homes that were not recently improved.⁴⁴ By systematically taxing recently improved homes at a higher rate, the plaintiffs argued, Missouri violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.⁴⁵ The plaintiffs initially filed their case in state trial court.⁴⁶ Although the plaintiffs prevailed in the trial court, the Missouri Supreme Court reversed and held that the State Tax Commission, not the trial court, was the proper venue.⁴⁷ While the case was being heard in front of the State Tax Commission, the plaintiffs filed a § 1983 suit in federal district court to enforce their Fourteenth Amendment rights.⁴⁸

Missouri argued that § 1341 and comity required the plaintiffs to litigate in state court, and both the federal district court and the Eighth Circuit

40. *Id.* at 109 (quoting *Dunn v. Carey*, 808 F.2d 555, 558 (7th Cir. 1986)).

41. *Id.* at 123 (Kennedy, J., dissenting).

42. *See id.* at 122–23.

43. *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 101 (1981).

44. *Id.* at 106.

45. *Id.* at 105–06.

46. *Id.* at 106.

47. *State ex rel. Cassilly v. Riney*, 576 S.W.2d 325, 328 (Mo. 1979) (en banc).

48. *Fair Assessment*, 454 U.S. at 105–06. Although § 1983 on its face does not require exhaustion of administrative remedies, a pending state administrative hearing is a factor that militates in favor of abstention. *Id.* at 136.

agreed.⁴⁹ As stated in the syllabus to *Fair Assessment*, the Supreme Court, however, held that comity alone required the federal court to abstain:

The principle of comity bars taxpayers' damages actions brought in federal courts under 42 U.S.C. § 1983⁵⁰ to redress the allegedly unconstitutional administration of a state tax system. Because the principle of comity bars federal courts from granting damages relief in such cases, it is not necessary to decide whether the Tax Injunction Act, standing alone, would bar such actions.⁵¹

While § 1341 was before the Court, the Court did not address its application or scope. The Court did not give any reason for its decision to apply comity as opposed to § 1341, except to note that any analysis of § 1341 was unnecessary in light of the Court's holding.⁵²

The *Fair Assessment* Court, unlike the *Hibbs* Court discussed below, did not analyze the effect of the proposed relief on the state budget. The *Fair Assessment* Court focused on the traditionally equitable nature of challenges to state taxes, the legislative history of § 1341, and the Court's federalism cases.⁵³ In particular, the Court focused on "Our Federalism" as articulated in *Younger v. Harris*.⁵⁴ The Court's concern was that federal courts would meddle in purely local issues at the expense of the state's right to regulate its own affairs.⁵⁵ Justice Brennan, however, took a more measured view of comity, noting that "the 'principle of comity' refers to the 'proper respect for state functions' that organs of the National Government, most particularly the federal courts, are expected to demonstrate in the exercise of their own legitimate powers."⁵⁶ Justice Brennan argued that comity could be a wise public policy, but not an inexorable constitutional command: "So employed, the 'principle of comity' is nothing more than an encapsulation of policy,

49. *Id.* at 101–02.

50. Section 1983 was the vehicle through which the Court examined the plaintiffs' Fourteenth Amendment claims. *Id.* at 106–07. The Court gave no indication that its analysis would change had the claim been brought under another federal statute or constitutional provision. *See id.* at 106.

51. *Id.* at 100. The *Fair Assessment* Court used the term "bar" throughout its decision. *See id.* at 101–16. Nonetheless, federal courts still retained the right of federal constitutional review of final state court judgments. *Id.* at 116 (recognizing that constitutional plaintiffs "may ultimately seek review of the state decisions in this Court").

52. *See id.* at 107.

53. *Id.* at 116. Justice Rehnquist left the door open for a challenge to state tax laws that were patently discriminatory: "We need not decide in this case whether the comity spoken of would also bar a claim under § 1983 which requires no scrutiny whatever of state tax assessment practices, such as a facial attack on tax laws colorably claimed to be discriminatory as to race." *Id.* at 107 n.4. Thus, Justice Rehnquist set a high bar (i.e., capable of being invalidated with "no scrutiny whatever") for determining when comity would permit federal jurisdiction.

54. *Id.* at 112 (quoting *Younger v. Harris*, 401 U.S. 37, 44–45 (1971)).

55. *Id.* at 111.

56. *Id.* at 119 (Brennan, J., concurring).

albeit policy with roots in the Constitution and our federal system of government.”⁵⁷

After *Fair Assessment*, it is clear that comity functions independently of § 1341, and that it may reach further than § 1341.⁵⁸ *Hibbs*, however, led courts to question the authority of *Fair Assessment*. That is to say, *Hibbs* indicates that comity does not reach any further than § 1341.⁵⁹

In *Hibbs*, the Supreme Court held that § 1341 does not deprive federal district courts of jurisdiction when the proposed relief would increase state tax revenue.⁶⁰ The plaintiffs brought suit in federal district court to enjoin a state tax credit.⁶¹ The tax credit allowed taxpayers to receive a \$500 credit if they gave a donation to an organization that awarded tuition grants to students attending private schools.⁶² The plaintiffs argued that the tax credit violated the Establishment Clause.⁶³ The plaintiffs were unsuccessful before the United States District Court for the District of Arizona, which held that § 1341 barred federal jurisdiction,⁶⁴ but were successful before the Ninth Circuit.⁶⁵

The Supreme Court, affirming the Ninth Circuit, reasoned that § 1341 did not deprive federal district courts of jurisdiction because the state fisc would not be diminished.⁶⁶ The *Hibbs* Court inferred from the legislative history that § 1341 applies only when a taxpayer sought to avoid paying taxes.⁶⁷ In this case, no party sought to avoid paying taxes—the plaintiffs were a third party seeking to end a tax credit given to taxpayers who made certain charitable donations.⁶⁸ The Court further reasoned that if the law were struck down, state tax collections would increase, and thus § 1341 did

57. *Id.*; see also 1 LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3–30, at 589–91 (3d ed. 2000) (arguing that the principle of comity is tied to the concept of federalism and not to language in the Constitution or statutory law).

58. Note that the *Fair Assessment* Court blended its analysis of comity and federalism by holding that comity barred jurisdiction but relying on the federalism language of *Younger*. *Fair Assessment*, 454 U.S. at 107–11. Subsequent courts have relied on both federalism and comity to bar jurisdiction within the context of tax litigation.

59. For further discussion of *Hibbs* and its application, see *infra* Section I.B.

60. *Hibbs v. Winn*, 542 U.S. 88, 93–94 (2004).

61. *Id.* at 92–93.

62. *Id.* at 95. Before the tax credit went into effect, a different group of plaintiffs made a similar facial challenge in the Arizona Supreme Court, which failed on a 3–2 vote. *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) (en banc).

63. *Hibbs*, 542 U.S. at 93.

64. *Id.* at 96.

65. *Id.*

66. *Id.* at 93–94.

67. *Id.* at 100–07.

68. *Id.* at 94–95.

not bar federal jurisdiction.⁶⁹ The *Hibbs* Court, however, did not address whether federalism and comity could reach beyond § 1341.⁷⁰

The *Hibbs* Court sidestepped *Fair Assessment*. The *Hibbs* Court cited *Fair Assessment* only twice. *Fair Assessment* was first cited as an instance where the federal courts lacked jurisdiction because the plaintiffs' proposed relief would decrease state tax revenue.⁷¹ *Fair Assessment* was cited for a second time in a footnote as an instance where plaintiffs seeking to avoid tax liability were barred from federal court.⁷² The dissent criticized the majority's citation of *Fair Assessment*, noting that *Fair Assessment* stood for broader principles.⁷³ But it stopped short of arguing that comity could require abstention.⁷⁴ If *Hibbs* limited the reach of federalism or comity in this context, it did so only by implication, because *Hibbs* did not expressly rebut the holding of *Fair Assessment*. Therefore, it is an open question whether federalism or comity can require federal courts to abstain when § 1341 permits jurisdiction.

Federalism and comity can require federal courts to withhold jurisdiction regardless of statutory restraints,⁷⁵ because federalism and comity are not coextensive with § 1341, and exist to protect state interests. First, the Supreme Court undoubtedly treats federalism and comity as concepts that are not restrained by statutory law.⁷⁶ Federalism, while not articulated in any one clause of the Constitution, enjoys substantial constitutional underpinnings.⁷⁷ Comity, on the other hand, does not enjoy the same sort of

69. *Id.* at 108 (reasoning that the relevant distinction is “between taxpayer claims that would reduce state revenues and third-party claims that would enlarge state receipts”).

70. *Id.* at 107. In a footnote, the *Hibbs* Court mentioned that comity has caused federal courts to abstain in other instances. *Id.* at 107 n.9. The Court, however, did not discuss comity's breadth. *See id.* Rather, the Court noted that these cases were also instances where plaintiffs sought relief that would decrease state revenue. *See id.* at 106.

71. *Id.* at 106 (citing *Fair Assessment* for the claim that federal court relief is not available where the relief requested by the plaintiff would reduce the state's tax revenue).

72. *Id.* at 107 n.9.

73. The dissent argued that *Fair Assessment* bars jurisdiction regardless of whether state tax revenue is increased or decreased. Curiously, but plainly, Justice Kennedy did not argue that comity barred jurisdiction independently of § 1341:

Though the majority says [*Fair Assessment*, among others,] supports its holding because [it] involved plaintiffs who mounted federal litigation to avoid paying state taxes, the language of [*Fair Assessment*] is too clear to be ignored and is contrary to the Court's holding today. In *Fair Assessment*, the Court observed that [§ 1341] has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations. This last consideration was [§ 1341's] principal motivating force.

Id. at 124 (Kennedy, J., dissenting) (internal quotation marks and citations omitted).

74. *See id.*

75. *See, e.g.*, 17B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4252 (3d ed. 2007) (discussing the *Younger* rule that provides for federal court abstention under reasons of federalism and comity even in light of statutory law conferring federal court jurisdiction).

76. *See, e.g.*, *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298–99 (1943) (holding, after the enactment of § 1341 and other anti-injunction statutes, that suits in equity may be barred on the basis of comity).

77. *See, e.g.*, *Younger v. Harris*, 401 U.S. 37, 44 (1971) (“Our Federalism”).

constitutional status; courts generally describe comity as a doctrine that guides courts sitting in equity.⁷⁸

Second, even if federalism and comity could be defined by the legislature, it is not clear that Congress intended § 1341, federalism, and comity to be one and the same. The Congressional Record does not mention federalism or comity.⁷⁹ Congress simply made a legislative judgment, pursuant to its Article III power, to define the subject matter jurisdiction of the federal courts.⁸⁰ Instead, the legislative history focuses on avoiding unfairness between in-state and out-of-state litigants, and avoiding interference with the administration of the state tax system.⁸¹ Thus, while Congress intended to restrain federal courts through § 1341, the federal courts could still restrain themselves beyond § 1341.

Therefore, federalism and comity are concepts that exist independently of § 1341, and courts may apply them to justify abstention even where § 1341 would not bar jurisdiction. This is precisely what has happened in the Fourth and Tenth Circuits.

B. *Disagreement Between the Circuits*

The federal appeals courts have differed markedly over the reach of federalism and comity. The Fourth and Tenth Circuit cases hold that the principles of federalism and comity reach beyond § 1341.⁸² These courts contend that the breadth of federalism and comity were “simply not before the Supreme Court in *Hibbs*.”⁸³ The First, Sixth, and Seventh Circuit cases, on the other hand, hold that *Hibbs* defines the limits of § 1341, comity, and federalism.⁸⁴

The Fourth Circuit, in *DIRECTV, Inc. v. Tolson*, abstained from a case where the plaintiffs alleged that North Carolina maintained a subsidy for their business competitors.⁸⁵ This subsidy imposed a significant cost on the

78. Fair Assessment in Real Estate Ass’n v. McNary, 454 U.S. 100, 119–20 (1981) (Brennan, J., concurring) (“Only where a federal court [employs] its historic powers as a court of equity . . . does ‘comity’ have an established and substantial role in informing the exercise of the court’s discretion.”).

79. See H.R. REP. NO. 75-1503 (1937); S. REP. NO. 75-1035 (1937); 81 CONG. REC. 1415–17 (1937).

80. See Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 38, 42 (2001) (discussing Congress’s Article III power to limit federal court jurisdiction).

81. See generally H.R. REP. NO. 75-1503, at 2; S. REP. NO. 75-1035, at 1–2; 81 CONG. REC. 1416.

82. *DIRECTV, Inc. v. Tolson*, 513 F.3d 119, 127 (4th Cir. 2008); see *Hill v. Kemp*, 478 F.3d 1236, 1247 (10th Cir. 2007).

83. *DIRECTV*, 513 F.3d at 127; see also *Hill*, 478 F.3d at 1249.

84. *Coors Brewing Co. v. Méndez-Torres*, 562 F.3d 3, 18 (1st Cir. 2009); *Commerce Energy, Inc. v. Levin*, 554 F.3d 1094, 1097 (6th Cir.), cert. granted, 130 S. Ct. 496 (Nov. 2, 2009) (No. 09-223); *Levy v. Pappas*, 510 F.3d 755, 760–61 (7th Cir. 2007).

85. 513 F.3d at 128.

plaintiffs.⁸⁶ The plaintiffs claimed that because they were an out-of-state company, the subsidy discriminated against them in violation of the Dormant Commerce Clause.⁸⁷

The *DIRECTV* court dismissed the plaintiff's § 1983 claim, and rejected the idea that *Hibbs* did anything to limit an expansive reading of *Fair Assessment*, because the comity principle is "broader than [§ 1341] itself, and its scope is not restricted by § 1341."⁸⁸ The Fourth Circuit relied heavily on the Supreme Court's decision in *Fair Assessment* to justify abstention,⁸⁹ and noted that comity "was simply not before the Supreme Court in *Hibbs*."⁹⁰

The Tenth Circuit, in *Hill v. Kemp*, abstained from a case where the plaintiff argued that Oklahoma's tax scheme for license plates was unconstitutional under the First and Fourteenth Amendments.⁹¹ The plaintiffs contended that Oklahoma unlawfully discriminated against supporters of abortion rights by permitting drivers to obtain license plates with the phrases "Adoption Creates Families" and "Choose Life" for less than license plates with pro-choice phrases.⁹²

The *Hill* court attempted to limit *Hibbs*:

In any event, there is simply nothing in [§ 1341] or *Hibbs* suggesting that federal courts can entertain challenges to state taxes on the basis of predictive judgments that doing so will not harm state coffers; rather our jurisdiction is precluded by the plain language of [§ 1341] in *all* cases seeking to enjoin the levy or collection of taxes under State law.⁹³

The *Hill* court then went on to sound traditional arguments in favor of a limited judiciary by writing that courts are "not authorized by Congress to be in the business of forecasting the likely fiscal effects of variations on state tax policy; nor . . . well equipped to do so."⁹⁴ Even if courts were allowed to engage in rudimentary economic analysis, the *Hill* court argues, judges should avoid "becom[ing] second rate, supply-side economists, hazarding guesses that enjoining this or that revenue raising measure would help rather than hurt overall tax collections."⁹⁵

The Seventh Circuit, in *Levy v. Pappas*, created the circuit split by abstaining from a claim where the plaintiffs sought to avoid taxes by invalidating a state tax scheme.⁹⁶ Pursuant to *Hibbs*, the Seventh Circuit

86. *Id.* at 122–23.

87. *Id.* at 123.

88. *Id.* at 127.

89. *See id.* at 123–24.

90. *Id.* at 128.

91. 478 F.3d 1236, 1239 (10th Cir. 2007).

92. *Id.*

93. *Id.* at 1250.

94. *Id.*

95. *Id.*

96. 510 F.3d 755, 757 (7th Cir. 2007).

dismissed the plaintiffs' claim because the relief sought would decrease state tax revenue.⁹⁷

Although this case was a straightforward application of *Hibbs*, the Seventh Circuit described its task as determining whether the case before it was more like *Hibbs* or *Fair Assessment*.⁹⁸ The court stated, "If the relief sought [would operate] to reduce the flow of state tax revenue or would tie up rightful tax revenue, then [§ 1341] bars federal jurisdiction over the claims."⁹⁹ Thus, the Seventh Circuit held, when a plaintiff alleges that the state tax is unfair as applied to the plaintiff, then § 1341 and comity bar federal jurisdiction, as in *Fair Assessment*.¹⁰⁰ Where "a plaintiff alleges that the state tax . . . is giving unfair benefits to someone else, then according to *Hibbs* [§ 1341] and comity are not in play."¹⁰¹

The Seventh Circuit, therefore, defined comity, federalism, and § 1341 as having essentially the same reach. *Levy* does not appear to leave room for a situation where § 1341 would permit federal jurisdiction, but comity would bar federal jurisdiction.¹⁰² Therefore, although the Seventh Circuit did not take jurisdiction, this case belongs on this side of the circuit split because it finds that federalism and comity do not reach beyond § 1341.

The Sixth Circuit, in *Commerce Energy v. Levin*, took jurisdiction over a claim by an out-of-state corporation doing business in Ohio.¹⁰³ The plaintiff alleged that Ohio's tax scheme was discriminatory and thus unconstitutional under the Commerce and Equal Protection Clauses because the plaintiff's in-state competitors benefited from tax exemptions.¹⁰⁴

The district court dismissed on the grounds that federalism and comity required abstention, even if § 1341 did not bar jurisdiction.¹⁰⁵ When addressing the question of federalism and comity, the district court relied on *Fair Assessment* and *DIRECTV*.¹⁰⁶ The Sixth Circuit reversed and

97. *Id.* at 761–62.

98. *Id.*

99. *Id.* at 762 (internal quotation marks omitted).

100. *Id.*

101. *Id.*

102. *See id.*

103. 554 F.3d 1094, 1096 (6th Cir. 2009), *cert. granted*, 130 S. Ct. 496 (Nov. 2, 2009) (No. 09-223). The Supreme Court granted certiorari to consider essentially the same issues addressed by this Note: (1) whether *Hibbs* narrowed the doctrine of comity applied in *Fair Assessment*, and (2) whether comity principles bar federal jurisdiction in the instant case. *Id.* The parties' briefs indicate that the case will likely turn on the reach of federalism and comity. *See, e.g.*, Petition for Writ of Certiorari, *Commerce Energy*, 78 130 S. Ct. 496 (No. 09-223), 2009 WL 259938 (arguing that comity's vitality ought to extend beyond *Hibbs*); Amicus Brief for 29 States, *Commerce Energy*, 130 S. Ct. 496 (No. 09-223) 2009 WL 3052654 (arguing that *Hibbs* threatens the independence of state tax administration and in favor of a broad comity principal).

104. *Id.*

105. *Id.*

106. *Id.* at 1098. The Sixth Circuit wrote that the Ninth Circuit shared its view on the issue, referencing *Wilbur v. Locke*, 423 F.3d 1101 (9th Cir. 2005). *Commerce Energy*, 554 F.3d at 1099. *Wilbur*, however, is not direct support for this proposition. *Wilbur* involved a suit by a third party seeking to enjoin Washington from entering into a contract with a Native American Tribe. *Wilbur*,

remanded.¹⁰⁷ Reasoning from *Hibbs*, the Sixth Circuit held that neither federalism nor comity apply where the plaintiff is a third party who seeks relief that would increase state tax revenue.¹⁰⁸

The Sixth Circuit distinguished *Hibbs* from *Fair Assessment*. First, the Sixth Circuit found that “a sweeping reading of *Fair Assessment*” cuts against the *Hibbs* Court’s focus on closing the doors of federal court to “plaintiffs [who] try to thwart tax collection.”¹⁰⁹ Second, a broad conception of comity would render § 1341 redundant and unnecessary.¹¹⁰ Thus, the Sixth Circuit was uncomfortable with the nonconstitutional comity principle effectively trumping a statute.¹¹¹

The First Circuit examined federalism and comity in light of *Hibbs* in *Coors Brewing Co. v. Méndez-Torres*.¹¹² Coors challenged a provision in Puerto Rico’s beer taxation scheme that created a lower tax rate for small brewers.¹¹³ Coors brought a suit for declaratory judgment to invalidate Puerto Rico’s taxation scheme on the grounds that it was unconstitutional under the Commerce Clause and illegal under the Federal Relations Act.¹¹⁴ The district court found for Puerto Rico.¹¹⁵ The First Circuit reversed and remanded.¹¹⁶

The First Circuit directly rebutted the Fourth Circuit’s position.¹¹⁷ In *Hibbs*, the First Circuit noted, “Arizona similarly advanced arguments based on principles of comity.”¹¹⁸ The First Circuit, however, did not explain how the Supreme Court specifically dealt with Arizona’s comity arguments.¹¹⁹ The First Circuit simply read *Hibbs* as equating the reach of comity and § 1341: “[P]rinciples of comity . . . preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection.”¹²⁰ The First Circuit reasoned that “*Hibbs*

423 F.3d at 1105. The Ninth Circuit held that the lower court erroneously dismissed the case under § 1341, finding that § 1341 does not apply to a prospective contract, even if the result of the contract would have been for the State of Washington to subsequently amend its tax laws. *Id.* at 1110. *Wilbur* discussed *Hibbs*, but did not take a firm position on the circuit split, and its discussion of *Hibbs* was detached from its holding. *See id.*

107. *Commerce Energy*, 554 F.3d at 1096.

108. *Id.* at 1098.

109. *Id.* at 1099.

110. *Id.*

111. *See id.*

112. 562 F.3d 3, 13–18 (1st Cir. 2009).

113. *Id.* at 5.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 17 (“The Fourth Circuit’s position is not convincing.”).

118. *Id.*

119. *See id.*

120. *Id.* at 17 (quoting *Hibbs v. Winn*, 542 U.S. 88, 107 n.9 (2004)) (internal quotation marks omitted).

confined principles of comity to cases seeking to arrest or countermand state tax collection.”¹²¹

This disagreement between the circuits is the result of the Supreme Court’s failure to directly address the reach of federalism and comity in *Hibbs*. Because *Hibbs* and *Fair Assessment* are not clearly reconcilable, and federalism and comity are inherently ambiguous concepts, the federal circuits have struggled to clearly delineate their jurisdiction. To move beyond the impasse, Part II argues that courts should begin to reason from the underlying goals of federalism and comity. Part II also resolves the impasse by identifying federalism’s and comity’s underlying goals and asking how those goals are implicated in the context of suits challenging the constitutionality of a state tax.

II. COURTS MUST EXAMINE THE UNDERLYING GOALS OF FEDERALISM AND COMITY

This Part demonstrates that the federal courts on both sides of this circuit split need to address the underlying goals of federalism and comity. Section II.A explains that failing to examine the underlying goals of federalism and comity leads to an incoherent, contradictory jurisprudence. Section II.B then examines the underlying goals of federalism and comity in this context to conclude that federal court abstention is not justified under a federalism rationale, but that federal court abstention may be appropriate under a comity rationale in extreme cases.

A. An Unsatisfactory Resolution:

Courts on Both Sides of the Circuit Split Should Examine the Underlying Goals of Federalism and Comity

Scholars have long argued that courts rely on federalism and comity to justify a particular outcome, but fail to explain how the underlying goals of those concepts are actually advanced through their application.¹²² *Fair Assessment*, *Hibbs*, and their progeny in the appeals courts suffer from that very flaw. Courts are naturally concerned with faithfully applying precedent,

121. *Id.* at 18.

122. *See, e.g.*, Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1766 (2006) (“Constructing a meaningful theory of federalism must be based on these values and not on unsupported assumptions.”); Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 9 (1998) (arguing that federalism should be “a flexible principle that allows decentralized experimentation, rather than as a doctrine focused primarily on the ‘dignity’ of states”); Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1118 (1977) (“But Justice Black, no less than Justice Brennan, did not analyze, rigorously or otherwise, the underlying tenets of federalism. He merely gave us a new shibboleth, ‘Our Federalism,’ to express the anti-nationalist sentiment . . .”); Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, 14 YALE L. & POL’Y REV. 187, 195 (1996) (arguing that courts should “evaluat[e] the extent to which the underlying goals of federalism may be furthered”); Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1047 (1985) (arguing that “federalism is a code word for routine and undifferentiated deference to the states and the state courts in virtually any context”).

and thus underlying policy concerns tend to go unspoken in the face of seemingly on-point precedent.¹²³ The result is a set of opinions that speaks in terms of conclusions rather than reasons.

Examining the underlying goals of federalism and comity forces courts to move beyond asserting federalism and comity as shibboleths, and should help courts craft a more coherent jurisprudence.¹²⁴ If courts fall into the trap of invoking federalism and comity as if these concepts are a “brooding omnipresence in the sky,”¹²⁵ the result will be a patchwork of laws that are not rooted in any readily identifiable purpose.¹²⁶ Courts must begin asking policy-related questions if federalism and comity are going to function in a way that allows concrete benefits to flow from our system of government.¹²⁷ The natural place to start is to ask whether the underlying goals of federalism and comity are advanced by a decision to abstain.

B. Reasoning From the Underlying Goals of Federalism and Comity

The following discussion operates under a simple assumption: if abstaining does not meaningfully further the underlying goals of federalism or comity, then federal courts should not abstain based on federalism or comity concerns. In effect, this is a balancing test in which courts weigh the costs and benefits of abstention.¹²⁸

Federalism’s primary goal is to advance liberty and avoid tyranny by channeling power away from the federal government and to the states.¹²⁹ Courts and commentators have also identified several benefits of the federal

123. See Wilson Huhn, *The Use and Limits of Syllogistic Reasoning in Briefing Cases*, 42 SANTA CLARA L. REV. 813, 846 (2002) (“[Courts sometimes invoke] premises that are not proven or explained. These are the base premises, the often unspoken assumptions of the Court’s opinion.”).

124. See Chemerinsky, *supra* note 122.

125. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (“The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . .”).

126. See Rakesh K. Anand, *Toward an Interpretive Theory of Legal Ethics*, 58 RUTGERS L. REV. 653, 673 (2006) (“The recognized truth is that the application of legal norms requires an examination of the formal rules’ underlying purpose . . .”).

127. Some courts and commentators might disagree with the contention that the use of federalism and comity should rest on an analysis of whether the underlying purposes of the concepts are furthered. See, e.g., *New York v. United States*, 505 U.S. 144, 178 (1992) (O’Connor, J.) (finding that even a compelling federal interest will not justify a significant intrusion into a state’s interest). But see Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 928 (1994) (“[E]ven federalism’s most enthusiastic proponents, such as Justice O’Connor, cast their arguments for federalism in functional, or policy terms.”).

128. David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 585 (1985) (“I am concerned, however, to establish one basic proposition: that the controversy should center on the appropriate weight to be accorded federalism considerations in the exercise of jurisdiction, not on whether there is discretion to accord any weight at all.”).

129. See J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 320 (2009) (discussing “federalism’s inherent capacity to protect liberty”); see also MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 9–12 (1988); Rubin & Feeley, *supra* note 127, at 927. See generally THE FEDERALIST NO. 45 (James Madison).

system of government, which include increasing public participation, broadening citizen choice, fostering competition between states, and facilitating “laboratories”¹³⁰ of democracy.¹³¹ The underlying goals and benefits of federalism, as explained in this Section, do not provide support for depriving the federal courts of jurisdiction over third-party suits challenging the constitutionality of state tax laws.

The primary goal of comity is avoiding hostility and unnecessary friction between the federal government and state governments.¹³² Avoiding friction, as discussed below, may provide support for depriving the federal courts of jurisdiction, at least in extreme cases. Section 1341 and *Hibbs* will minimize federal-state friction in most instances because states are unlikely to complain when their tax revenues increase. However, a situation could arise where the relief requested by the plaintiff would increase state tax revenues, but ultimately cause the state to expend a great deal of time and energy overhauling its tax system. In such a case, substantial federal-state friction would occur, and comity might require a federal court to abstain despite the fact that § 1341 and *Hibbs* would permit jurisdiction.

1. *Federalism Does Not Justify Abstention*

Courts continually cite the desire to protect liberty and combat tyranny as a primary goal of federalism.¹³³ Such a goal is virtually unassailable. The unspoken, and often unsupported, assumption is that more state control and

130. The use of the term “laboratories” to describe states in the federal system is generally attributed to Justice Brandeis. *E.g.*, G. Alan Tarr, *Laboratories of Democracy? Brandeis, Federalism, and Scientific Management*, 31 *PUBLIUS* 37, 38 (2001).

131. Rubin & Feeley, *supra* note 127, at 906–07.

132. See James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 *STAN. L. REV.* 1049, 1051 (1994). Courts regularly discuss comity in terms of avoiding friction or undue interference. See, e.g., *Younger v. Harris*, 401 U.S. 37, 44 (1971) (referring to comity as “the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways”); *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 35 (1959) (Brennan, J., dissenting) (“Clearly decision of this case, in which the City itself is the party seeking an interpretation of its authority under state law, will not entail the friction in federal-state relations that would result from decision of a suit brought by another party to enjoin the City from acting.”); *Burford v. Sun Oil Co.*, 319 U.S. 315, 335 (1943) (Douglas, J., concurring) (“Divided authority breeds friction . . .”); *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941) (discussing “the friction of a premature constitutional adjudication”).

133. *E.g.*, *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 702–03 (1999) (Breyer, J., dissenting) (“Federalism helps to protect liberty not simply in our modern sense of helping the individual remain free of restraints imposed by a distant government, but more directly by promoting the sharing among citizens of governmental decisionmaking authority.”); *Clinton v. City of N.Y.*, 524 U.S. 417, 450 (1998) (“[The Framers] used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts.”); *New York v. United States*, 505 U.S. 144, 181 (1992) (“[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: ‘Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.’” (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting))).

less federal control is the best way to achieve that objective.¹³⁴ That assumption is not warranted, especially in this context.

Under the view of *Hibbs* espoused by the First, Sixth, and Seventh Circuits, liberty is promoted and tyranny is avoided by allowing federal jurisdiction. The typical suit is one where the plaintiff argues that the state is infringing basic constitutional rights (i.e., the plaintiff argues that the Due Process, Equal Protection, or Dormant Commerce Clause is being violated).¹³⁵ If a federal court exercises jurisdiction and finds for the plaintiff, the court necessarily makes a determination that the state tax scheme was violating some indispensable constitutional principle.¹³⁶ Therefore, unless the federal courts are somehow biased against states, or incapable of adjudicating such constitutional rights,¹³⁷ the exercise of federal jurisdiction will not impede individual liberty.

One potential counterargument is that it is an affront to liberty for a federal court to effectively deprive the defendant state of access to a state forum. Assuming a plaintiff chooses to litigate in federal court,¹³⁸ the defendant state is unable to have its own courts take the first bite of the apple, so to speak.

This counterargument is not persuasive because it rests on several unsupported assumptions. First, this counterargument assumes that it is an advantage for the state to litigate in state court.¹³⁹ While that might be the case, is there any reason to bend jurisdictional norms out of concern for where the defendant prefers to litigate? To the contrary, the general rule is to let the plaintiff have her choice of forum.¹⁴⁰ Second, this argument frames the debate in terms of the state's interest to litigate in its own forum versus the individual plaintiff's interest in having a federal forum. Favoring the state's interest over the plaintiff's interest does not appear to advance liberty because federalism's ultimate goal is advancing individual liberty. Third,

134. Cf. Chemerinsky, *supra* note 122, at 1765 (discussing seven unsupported assumptions of the Rehnquist Court's federalism decisions). This particular assumption is not enumerated by Professor Chemerinsky, but several closely related assumptions are listed. *See id.*

135. *See supra* Section I.B.

136. *But see New York*, 505 U.S. at 178 (arguing, in a distinguishable context, that even a compelling federal interest will not justify a significant intrusion into a state's interest).

137. Indeed, the argument usually runs in the opposite direction. *See supra* note 27.

138. The plaintiff could bring the case in state court because state courts share concurrent power to adjudicate constitutional claims. Anne M. Payne, *Exclusive and Concurrent Jurisdiction*, 20 AM. JUR. 2d Courts § 93 (2009). If the plaintiff brings the case in state court then, of course, the defendant state has nothing to complain about.

139. This implicates the parity debate. *See supra* note 27. There might be support for an argument that state governments really are better off litigating in state court. *See* Herbert Kritzer, *The Government Gorilla: Why Does Government Come Out Ahead in Appellate Courts?*, in IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD? 342, 343 tbl.11.1 (Herbert M. Kritzer & Susan S. Silbey eds., 2003) (gathering and analyzing data from U.S. federal and state appellate courts, and finding that state governments have a larger net advantage over other parties in state court (+32.3) than in federal court (+11.2)).

140. 32A AM. JUR. 2D *Federal Courts* § 1274 (2007) ("The plaintiff's choice of forum is to be great given [sic] weight and should not be lightly set aside.").

this counterargument assumes that the commonly listed benefits of federalism can be obtained through abstention. As discussed below, the benefits of federalism are not achieved by abstaining in this kind of case.

Another potential counterargument is that taxes are themselves a restriction on liberty.¹⁴¹ If a federal court takes jurisdiction and grants the relief requested by the plaintiff, tax rates will increase. Thus, the exercise of federal jurisdiction in this class of cases restricts liberty because it implicitly authorizes the federal courts to raise taxes.

This counterargument is not persuasive for several reasons. First, the federal government has no financial interest in the suit. The federal government's only interest is adjudicating a federal right—there is no scenario where the federal government would benefit from increasing state taxes. Second, these kinds of suits do not lend themselves to creating an oppressive state tax regime,¹⁴² because challenges to tax credits or rebates are likely to be minuscule in the context of the state tax system.¹⁴³ Third, if state citizens are concerned about an oppressive tax regime, they can exercise their political power to lobby for a low tax rate that does not offend a federal constitutional right.

Aside from furthering liberty, proponents of a highly decentralized federal system often point to several benefits of placing the bulk of decisionmaking in the hands of state institutions. These benefits are usually listed as increasing public participation, broadening citizen choice, fostering competition between states, and facilitating “laboratories” of democracy.¹⁴⁴ From the discussion below, it is clear that these benefits should not bear heavily on the decision to abstain.

First, these benefits come into play only when courts are faced with the substantive (as opposed to jurisdictional) decision to strike down a state tax law. In other words, whether these benefits are obtained depends on the outcome of the case—these benefits are not threatened by the simple act of a federal court hearing a constitutional challenge to a state tax. For example,

141. See *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819) (“That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.”). Arguments that taxes are antithetical to liberty persist today, but instead of making a nuanced point about the structure of government, these arguments often demonstrate a more general angst. See *Thousands of Anti-Tax ‘Tea Party’ Protesters Turn Out in U.S. Cities*, FOXNEWS.COM, Apr. 15, 2009, <http://www.foxnews.com/politics/2009/04/15/anti-tax-tea-party-protests-expected/> (quoting protesters who carried signs saying “Give me liberty, not debt”). In fairness, not all opposition to increased taxes is merely angst; many proponents of low taxes frame their arguments in moral and ethical terms. E.g., Daniel J. Mitchell, *The Moral Case for Tax Havens*, CATO @ LIBERTY, Oct. 22, 2008, <http://www.cato-at-liberty.org/2008/10/22/the-moral-case-for-tax-havens/>.

142. See *supra* Section I.B (discussing cases that arise out of due process and equal protection challenges).

143. Of course, a situation could arise where the challenged tax was substantial. That does not appear to be the situation given the cases previously considered by the federal circuit courts. See *supra* Section I.B.

144. Rubin & Feeley, *supra* note 127, at 914.

consider the scenario presented in the Introduction. If the federal court decides to hear the plaintiff's challenge to the constitutionality of the state tax credit, the state's ability to serve as a laboratory of democracy is not harmed, because the federal court has not yet passed on the merits. Only once the state tax credit is invalidated can it be claimed that the federal court has hampered the state's ability to experiment. Conversely, if the federal court hears the case but decides that the state tax credit is constitutionally permissible, then the state's ability to experiment is not stifled.¹⁴⁵

Even if a federal court merely exercising jurisdiction implicates federalism's underlying goals, it is unlikely that those underlying goals would actually be furthered by abstention. Federal court abstention in this context does not advance federalism's goals of public participation, citizen choice, competition, and experimentation.

Courts sometimes note that federalism improves the democratic process by increasing the opportunity for local political involvement.¹⁴⁶ Federalism can increase the opportunity for citizens to affect the democratic process because states are closer to the people.¹⁴⁷ The assumption is that people find it easier and more convenient to influence their local government.¹⁴⁸

Public participation, however, is not a persuasive argument for abstention. First, public participation in the judicial process is not necessarily desirable.¹⁴⁹ For example, as Justice O'Connor recently noted, the justice system can be marred by judicial elections that permit expensive campaign contributions and encourage majoritarian decisions at the expense of minority rights.¹⁵⁰ Second, this goal is more suited to a legislative or regulatory context where public participation is generally encouraged.¹⁵¹ Thus public

145. Advocates of expansive federal court jurisdiction might argue that one reason to prefer federal court over a state court is that the federal court is more sensitive or more protective of federal constitutional rights. *See, e.g.*, Neuborne, *supra* note 3, at 1105–06 (discussing the parity debate). This Note, however, argues that federal court jurisdiction is justified regardless of whether federal and state courts are in parity.

146. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

147. Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 541–43 (2002) (discussing the assumptions of the public-participation argument); Rubin & Feeley, *supra* note 127, at 915–16 (evaluating the public-participation justification for federalism).

148. Massey, *supra* note 147.

149. *See* Shirley S. Abrahamson, Chief Justice, Wisconsin Supreme Court, The Ballot and the Bench, Address at the Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice (Mar. 15, 2000), in 76 N.Y.U. L. REV. 973, 978 (2001) (“Scholars, lawyers, and bar associations have been nearly unanimous in condemning judicial elections.”).

150. Jennifer Sullivan, *Ex-Justice O'Connor: Electing judges puts courts at risk*, SEATTLE TIMES, Sept. 15, 2009, available at http://seattletimes.nwsource.com/html/politics/2009866692_justice15m.html.

151. Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L. J. 359, 371–72 (1972) (arguing that the value of public participation is likely to be higher in legislative or quasi-legislative government functions than in judicial or quasi-judicial government functions). Furthermore, the Supreme Court's most recent, and sweeping, federalism decisions came in the context of curtailing federal legislative power. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 555 (1995) (invalidating the Gun-Free School Zones Act of 1990 based, in part, on federalism concerns); *New York v. United States*, 505 U.S. 144, 178 (1992) (invalidating the “take title” provision of the Low-Level Radioactive Waste Policy Amendments Act based, in part, on federalism concerns).

participation is not meaningfully advanced by federal court abstention in this context.

Commentators often argue that federalism increases the overall utility function of the citizenry.¹⁵² States offer different bundles of tax systems and government services.¹⁵³ People can “vote with their feet” to find the state with the tax–services ratio that best suits their preferences.¹⁵⁴

Citizen choice, however, is not a compelling justification for abstention. First, federal restrictions on state tax schemes do not create a uniform national tax code. Federal restrictions would set only the outer limit of acceptable state behavior. States are still free to create a unique bundle of taxes and services. Second, scholars have long recognized that the ability to vote with one’s feet should not vitiate fundamental constitutional rights.¹⁵⁵ Third, the federal courts have a role in restraining a potential tyranny of the majority.¹⁵⁶ The more homogenous a state becomes, the more likely that state is to favor policies that benefit the majority at the expense of the ever-dwindling minority. In the context of suits challenging the constitutionality of a state tax credit, federal courts—by virtue of having appointed judges—might be more likely to push back against an overwhelming majority.¹⁵⁷

Commentators argue that competition between states forces states to create the best economic climate to attract businesses.¹⁵⁸ This is closely related to the “citizen choice” argument, but this argument emphasizes states competing to have businesses locate within their borders.¹⁵⁹ This argument has a bit more punch than the citizen-choice argument because businesses are more likely to respond to the legal–economic climate in a state.¹⁶⁰ In other words, if a business recognizes that Nebraska has lower taxes than Iowa, that business might move to Nebraska.¹⁶¹

152. Rubin & Feeley, *supra* note 127, at 918.

153. *Id.*

154. See Richard A. Epstein, *Exit Rights under Federalism*, 55 LAW & CONTEMP. PROBS. 147, 150 (1992) (“Federalism works best where it is possible to vote with your feet.”). The efficacy of voting with one’s feet is subject to harsh scholarly critique. Rubin & Feeley, *supra* note 127, at 918 (“Climate, size, location, employment opportunities, and a variety of other factors are likely to loom larger in the utility function of our wandering citizen, even apart from considerations that discourage mobility, like family ties, nostalgia, and local loyalty.”).

155. Douglas Laycock, *Voting with Your Feet Is No Substitute for Constitutional Rights*, 32 HARV. J.L. & PUB. POL’Y 29, 30 (2009).

156. THE FEDERALIST NO. 10 (James Madison).

157. Whether federal courts really are more likely to stand up for minority rights is a central area of disagreement in the parity debate. See *supra* note 4.

158. Rubin & Feeley, *supra* note 127, at 920–21.

159. *Id.*

160. *Id.*

161. See *id.* Some scholars have argued that this phenomenon creates a harmful “race to the bottom.” William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 665–66 (1974) (arguing that Delaware’s corporate law resulted from an injurious “race for the bottom”).

The state-competition argument should still receive very little weight in the decision to abstain. First, states are free to compete in a wide variety of ways, states just are not allowed to compete by playing fast and loose with constitutional rights.¹⁶² Second, clear federal rules will create fairer competition between the states. If each state is playing within the same boundaries, no state will be able to benefit from a particularly controversial tax scheme.

This is the laboratories-of-democracy argument. When states have a wide degree of latitude to enact different policies, the nation can observe which policies are most effective.¹⁶³ Justice Brandeis described this process as “one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹⁶⁴ Thus, it might be argued that federal jurisdiction over challenges to state tax credits will hamper the ability of states to conduct beneficial experiments from which the rest of the country might learn something useful.

Striking down a state tax credit on federal constitutional grounds, however, will not meaningfully diminish experimentation. Placing constitutional limits on state tax laws is analogous to placing ethical limits on scientific research. Even if a scientist can yield interesting and useful results from an experiment, ethics may limit her options; yet the scientist may still perform other versions of the experiment. In the same way, the Constitution places limits on the ability of states to experiment, but does not ban experimentation.

Therefore, federalism is not a justification for federal court abstention from third-party constitutional challenges to state tax credits. First, federalism’s primary goal, advancing liberty, is not achieved by abstention. Second, the benefits of federalism, as discussed above, are not realized by abstention.

2. In Extreme Cases, Comity May Justify Abstention

Comity, in the context of third-party suits challenging state tax schemes, should operate to bar federal jurisdiction only in rare cases in which exercising jurisdiction would create unbearable tension between the state and federal governments. Comity seeks to minimize harmful friction between sovereigns.¹⁶⁵ Given comity’s rather vague goal, a very case-specific inquiry is a necessity.¹⁶⁶ The rule in *Hibbs*¹⁶⁷ will prevent tension in most cases.¹⁶⁸ A

162. See Laycock, *supra* note 155, at 30–31 (“[V]oting with your feet is often a last resort in response to illegitimate treatment. . . . [T]he debate over the appropriate scope of [constitutional] rights cannot be resolved by references to voting with your feet.”).

163. Rubin & Feeley, *supra* note 127, at 923.

164. *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Rubin and Feeley, in refuting Justice Brandeis’s argument, note that experimentation is more the result of managerial decentralization than of federalism. Rubin & Feeley, *supra* note 127, at 924.

165. See Rehnquist, *supra* note 132, at 1052.

166. Shapiro, *supra* note 128, at 583 (arguing that the complexity of the federal system makes it impossible to craft a hard-and-fast rule regarding comity).

167. See *supra* note 18 and accompanying text.

168. *Hibbs v. Winn*, 542 U.S. 88, 108–09 (2004).

case may arise, however, that requires a federal court to deeply intrude into the realm of state sovereignty. In such cases, federal courts should abstain.

The *Hibbs* rule will satisfy the goals of comity in most cases because damaging friction between the state and federal governments is unlikely to occur when a federal court improves the state's bottom line. At least two prominent judges appear to agree with this conclusion. Judge Easterbrook of the Seventh Circuit observed, "The legislative history is filled with concern that federal judgments were emptying state coffers and that corporations with access to the diversity jurisdiction could obtain remedies unavailable to resident taxpayers. There was no articulated concern about federal courts' flogging state and local governments to collect additional taxes."¹⁶⁹ Judge Friendly concurs: "Congress was thinking of cases where taxpayers were repeatedly using the federal courts to raise questions of state or federal law going to the validity of the particular taxes imposed upon them"¹⁷⁰

Both Judge Easterbrook and Judge Friendly were describing the legislative history of § 1341, but their reasoning is equally persuasive in the context of comity. Judge Easterbrook alludes to the understanding that state and local governments will not need to be coerced into collecting additional taxes. Even if the state government begrudges having a federal court tell it what to do, the state government will certainly be comforted by additional tax revenue. Thus, in the typical case, where the rule in *Hibbs* is satisfied, the goal of comity is also met because friction between the state and federal governments will be minimized.

The rule in *Hibbs* will apply in the vast majority of cases. Challenges to the constitutionality of a state tax credit tend to focus on specific, narrow tax schemes.¹⁷¹ In other words, federal courts are not likely to see claims where the plaintiff alleges that the entirety of the state's tax code is systemically biased against a particular group. Typical suits involve a credit to an in-state corporation¹⁷² or a credit for donations to certain charitable groups.¹⁷³ In these kinds of cases, the offending tax credit is easily identifiable, and the effect of invalidating it will clearly increase state tax revenue. Thus, in the typical suit, federal courts will not be required to rewrite the state's tax code or engage in any other highly fractious remedy.

Federal courts could, in extreme cases, be asked to grant a revenue-increasing remedy that is likely to create a great deal of friction between the federal and state governments. For example, assume that a plaintiff claims that the state's entire tax code is systemically biased against her socio-economic group, but that the tax code should be rewritten in such a way as to ultimately increase state tax revenue. If a federal court was presented with this kind of case, the rule in *Hibbs* would likely permit jurisdiction because

169. *Dunn v. Carey*, 808 F.2d 555, 558 (7th Cir. 1986).

170. *Wells v. Malloy*, 510 F.2d 74, 77 (2d Cir. 1975).

171. *See supra* Section I.B.

172. *E.g.*, *Commerce Energy, Inc. v. Levin*, 554 F.3d 1094, 1095–96 (6th Cir.), *cert. granted*, 130 S. Ct. 496 (Nov. 2, 2009) (No. 09-223).

173. *E.g.*, *Hibbs*, 542 U.S. at 92–93.

the plaintiff's requested relief would increase state tax revenue. Nonetheless, this example would be an appropriate place to invoke comity. If the federal court were to grant jurisdiction and approve the plaintiff's relief, the federal court would in effect be requiring the state legislature to go back to the drawing board. Even if the federal court did not invalidate the entire tax code, the federal court would likely need to carefully excise or add provisions to the state's tax code. In either case, federal intrusion is far more significant than in the typical case described above. Thus comity may justify abstention in such an extreme case.

The Supreme Court's precedent supports using comity to bar jurisdiction in extreme cases. Justice Brennan explained as follows:

While the "principle of comity" may be a source of judicial policy, it is emphatically no source of judicial *power* to renounce jurisdiction. The application of the comity principle has thus been limited to a relatively narrow class of cases: Only where a federal court is asked to employ its historic powers as a court of equity, and is called upon to decide whether to exercise *the broadest and potentially most intrusive form of judicial authority*, does "comity" have an established and substantial role in informing the exercise of the court's discretion.¹⁷⁴

Having established that comity may reach beyond § 1341 to bar federal jurisdiction in extreme cases, a question remains as to how to draw the line between the typical case and the extreme case. As noted above, such a question is necessarily a highly fact-specific inquiry that does not lend itself to a bright line rule.¹⁷⁵ Courts should consider at least two factors, including (1) the degree of certainty as to whether tax revenue will actually increase, and (2) the administrative burden that the proposed relief would impose on the state.¹⁷⁶

This is a middle-of-the-road solution. The Fourth and Tenth Circuits defined comity as a broad, powerful concept that could be readily invoked in many cases.¹⁷⁷ The First, Sixth, and Seventh Circuits essentially held that comity goes no further than § 1341,¹⁷⁸ which essentially guts the notion of comity as an independent, equitable concept.¹⁷⁹ To give effect to the underlying goal of comity, it is sufficient to follow the Court's holding in *Hibbs* in

174. Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 119–20 (1981) (Brennan, J., concurring) (second emphasis added) (footnote call number omitted). Commentators have also argued that comity can bar jurisdiction in extreme cases. See Rehnquist, *supra* note 132 at 1066–68 (discussing when and why comity should cause courts to abstain); Shapiro, *supra* note 128 at 585 (arguing that federalism and comity are justifications for abstention).

175. Shapiro, *supra* note 128 at 583.

176. See *id.* for several other factors to consider when abstaining on comity grounds, including disruption of ongoing state court proceedings, degree to which federal constitutional rights are implicated, the prospect of managing—taking over state institutions, and the ability of state courts to recognize and enforce constitutional rights.

177. See *supra* Section I.B.

178. See *supra* Section I.B.

179. See generally Shapiro, *supra* note 128, at 570–74 (discussing the long common law history of comity dating back to Great Britain).

nearly every case. Cases may arise, however, where it is necessary to abstain even when state tax revenues might increase. In such cases, the relief requested by the plaintiff would cause the federal court to radically alter or interfere with the state's tax system. Forcing the state to revamp its tax scheme is likely to create substantial friction and thus violate the underlying goal of comity.

CONCLUSION

To answer the question presented in the beginning of this Note, federal courts may abstain from actions permitted by § 1341 and *Hibbs* only in extreme cases. Extreme cases are instances where comity concerns significantly outweigh any benefit to be gained from exercising jurisdiction, because the proposed relief would result in an extraordinary intrusion into the state's tax system.

Returning briefly to the hypothetical presented in the Introduction, the federal court should not abstain from the plaintiff's challenge to the state's tax credit program. First, the plaintiff is seeking to invalidate a tax credit, and thus § 1341 and *Hibbs* permit jurisdiction, because the state's tax revenue will likely increase if the plaintiff wins. The state could argue, however, that the state budget would actually be harmed because students and families would lose the incentive to attend private schools. The actual effect on the state budget could lend itself to complex litigation, but given the relative simplicity of the tax credit, courts would likely be able to determine the actual effect of the tax-credit program. Second, the Introduction's hypothetical does not qualify as an extreme case. The tax credit is a single provision in the tax code, and thus it does not appear to be intertwined with other tax provisions. Therefore, the federal court could invalidate the tax credit without causing the state to drastically alter its system of tax administration. Of course, if the facts were tweaked to make the tax-credit program more integral to the overall tax system, the case for abstention based on comity concerns would improve.

As even this brief analysis indicates, the task of determining federal jurisdiction over constitutional challenges to state tax schemes can be highly fact specific. Nonetheless, by examining the facts, and the underlying reasons for why a federal court might abstain, courts will begin to craft a more thoroughly reasoned federalism and comity jurisprudence that will create more fairness and consistency.

