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*Sean M. Stegmaier**

I. INTRODUCTION

In our federalist society, constitutional jurisprudence and respect for the federalist principles on which our Constitution is based demand that state governments be granted deference to administer their own tax systems without unwarranted and unprovoked federal intrusion.[1] Therefore, if a State has a legitimate interest in increasing attendance at its private and secondary schools, and chooses to offer to its taxpayers a tax credit in order to achieve this legitimate interest, the federal government should stay its hand and allow the State to arrange its fiscal affairs in whatever manner it deems necessary and appropriate. Congress recognized the imperative need for the states to arrange their tax systems without unnecessary federal court interference when it enacted the Tax Injunction Act in 1937 (TIA), which provides in its entirety as follows: "[t]he 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."[2]

The statutory language of the TIA clearly indicates the

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1 *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 710 (3d ed. 1999).

2 28 U.S.C. § 1341 (2003).

intent of Congress: as long as the respective State is able to provide an adequate State court remedy for any challenge to an aspect of the State's tax system, federal district courts lack subject matter jurisdiction over so delicate an area as a State's tax administration. Furthermore, because the TIA "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," federal courts, through congressional decree and longstanding principles of comity, are obligated to defer to and respect a State's administration of its tax system.[3] By allowing federal district courts to adjudicate challenges to state tax credits, despite the clear statutory bar imposed by the TIA, the Supreme Court in *Hibbs v. Winn* has effectively shown complete disregard for Congress' intent in enacting the federalism-based statute, and has furthermore abandoned venerable principles of comity, which require federal courts to defer to the states in administering their respective tax systems.[4]

Part II of this Note discusses the Arizona State tax credit offered in Arizona Revised Statute § 1089,[5] and how the Arizona statute was first challenged in the Arizona Supreme Court by a group of Arizona taxpayers. Part II goes on to discuss *Hibbs v. Winn* and the opinions of both the majority and the dissent. Part III of this Note begins by addressing the inherent difficulties in accepting the Supreme Court's holding and heavily relies on the arguments and reasoning set forth by the dissent. Part III goes on to discuss the potentially hazardous consequences to state sovereignty stemming from the Supreme Court's holding in *Hibbs v. Winn*, and how the *Winn* Court ignored the broad federalism underpinnings of the TIA.

II. *HIBBS V. WINN*—A STATEMENT OF THE CASE

A. The Arizona Tax Credit Goes to the Arizona Supreme Court

In 1997, the Arizona Legislature enacted Arizona Revised Statute § 43-1089 (A.R.S. § 1089), which permits State tax credits for contributions made to "[s]chool tuition organization[s]"[6] (STO) by Arizona taxpayers.[7] The A.R.S. § 1089

3 Tully v. Griffin, Inc., 429 U.S. 68, 73 (1976).

4 Hibbs v. Winn, 124 S. Ct. 2276 (2004).

5 ARIZ. REV. STAT. ANN. § 43-1089 (2004).

6 ARIZ. REV. STAT. ANN. § 43-1089(F)(3) provides the following: "'[s]chool tuition organization' means a charitable organization in this state that is exempt from federal taxation under § 501(c)(3) of the Internal Revenue Code and that allocates at least ninety per cent of its annual revenue for educational scholarships or tuition grants to children to allow them to attend any qualified school of their parents' choice. In addition, to qualify as a school tuition organization the charitable organization shall provide educational

tax credit allows an Arizona taxpayer a dollar-for-dollar tax credit for up to $500 per year for contributions made to STOs during the taxable year; married couples who file a joint return are permitted a tax credit of up to $625.[8] The tax credit offered under A.R.S. § 1089 differs from tax deductions for contributions to nonprofit schools in that A.R.S. § 1089 offers a credit against *total* taxes owed, and does not merely reduce a taxpayer's income that is subject to taxation.[9] Furthermore, the tax credit can only be used to reduce a taxpayer's total amount of taxes owed by the allowable amount (i.e., $500 maximum credit for a single individual or $625 for a married couple filing a joint return), and the taxpayer is not entitled to any type of tax refund based on the taxpayer's contribution.[10]

A.R.S. § 1089 imposes certain limitations and requirements on the manner in which STOs are to facilitate taxpayer contributions. First, the tax credit is not allowed if the taxpayer designates the donation to the STO for the direct benefit of any dependent of the taxpayer.[11] Second, the STOs are required to spend at least ninety percent of the contributions on educational scholarships and grants for children so that those children can attend private or secondary schools.[12] Third, beneficiaries of the STO's funds must be from at least two different schools.[13] Finally, an STO cannot distribute funds to students who attend schools that discriminate on the basis of race, color, handicap, familial status or national origin.[14]

Approximately two years after the Arizona Legislature enacted A.R.S. § 1089, several Arizona taxpayers challenged the statute in the Arizona Supreme Court, arguing that the Arizona statute violates the Establishment Clause of the United States Constitution,[15] as well as three provisions of the Arizona Constitution, since the statute authorizes the use of funds raised through the State tax system to directly support religious

scholarships or tuition grants to students without limiting availability to only students of one school."

7 Winn v. Killian, 307 F.3d 1011, 1013 (9th Cir. 2002).

8 ARIZ. REV. STAT. ANN. § 43-1089(A)(1)-(2).

9 *Id*. § 43-1089(A).

10 *Id*. § 43-1089(B).

11 *Id*. § 43-1089(D).

12 *Id*. § 43-1089(F)(3).

13 *Id*.

14 *Id*. § 43-1089(F)(2).

15 U.S. CONST. amend. I (the Establishment Clause, made applicable to the states by the Fourteenth Amendment, provides in relevant part that, "Congress shall make no law respecting an establishment of religion . . . ."). *See also* Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947) (Justices unanimously agreed that the Establishment Clause applies to the States through the Fourteenth Amendment).

education.[16] Ultimately, the Arizona Supreme Court held that A.R.S. § 1089 did not violate either the United States or the Arizona Constitution, and that the STO tax credit was therefore a valid exercise of the Arizona Legislature's prerogative.[17]

B. The Arizona Tax Credit Finds its Way into Federal Court

In February 2000, another group of Arizona taxpayers (Taxpayers) brought suit in the United States District Court for the District of Arizona (federal district court) against Mark W. Killian (Director of Revenue),[18] in his official capacity as the Director of the Arizona Department of Revenue, alleging that the A.R.S. § 1089 STO tax credit program violates both the United States and Arizona Constitutions.[19] The Taxpayers sought to enjoin any future operation of the STO program and an injunction requiring the return of funds already distributed to but not yet spent by the STOs to the State's general fund.[20]

The Director of Revenue moved to dismiss the suit on two theories: (1) immunity from suit pursuant to the Eleventh Amendment;[21] and (2) the federal district court lacked subject matter jurisdiction due to the TIA[22] and principles of comity.[23] Without ruling on the Eleventh Amendment argument, the federal district court granted the Director of Revenue's motion to dismiss the suit on grounds that the TIA and principles of comity preclude the Taxpayers' suit in federal district court.[24]

The TIA provides in its entirety as follows: "[t]he 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] In arguing that the TIA barred the Taxpayers' suit in district court, the Director of Revenue urged that the relief sought by the

16 Kotterman v. Killian, 972 P.2d 606, 610 (Ariz. 1999), *cert denied*, 528 U.S. 921 (1999).

17 *Id*. at 625.

18 J. Elliott Hibbs replaced Mark W. Killian as the Director of the Arizona Department of Revenue on January 6, 2003, and was therefore substituted as the Defendant in this action when it reached the United States Supreme Court by writ of certiorari. Petitioner's Brief on the Merits at 4 n.1, Hibbs v. Winn, 124 S. Ct. 2276 (2004) (No. 02-1809) [hereinafter Brief for Petitioners].

19 *Winn*, 307 F.3d at 1014.

20 *Id*.

21 *Id*. at 1014-15; U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

22 28 U.S.C. § 1341 (2003).

23 *Winn*, 307 F.3d at 1014-15.

24 *Id*. at 1015.

25 28 U.S.C. § 1341 (2003).

Taxpayers—enjoinment of the STO program—would interfere with Arizona's system of tax "assessment" as that term is used in the TIA.[26] Essentially, the Director of Revenue adopted a broad reading of the term "assessment," arguing that it refers to the overall system by which the State determines a respective taxpayer's overall tax liability to the state.[27] The federal district court agreed with the Director of Revenue's argument that the STO tax credit fell within the purview of Arizona's tax "assessment," and accordingly dismissed the Taxpayers' suit.[28]

The federal district court further held, as an alternative ground for dismissal of the suit, that principles of comity required dismissal of the Taxpayers' suit.[29] According to the federal district court, any federal court action that disrupts the tax administration of a state is barred by principles of comity, regardless of whether the action relates to tax collection, tax deductions, or tax credits.[30] Therefore, even if invalidation of the contested tax policy results in an *increase* in state revenues (as would be the case with the invalidation of the STO tax credit program), this nevertheless constitutes federal interference with a state's tax administration, and therefore violates principles of comity.

The Taxpayers appealed the federal district court decision to the United States Court of Appeals for the Ninth Circuit (Ninth Circuit), which reversed the federal district court's decision, holding that neither the TIA nor principles of comity barred the Taxpayers' federal challenge to the A.R.S. § 1089 tax credit.[31] In *Winn v. Killian*, the Ninth Circuit's decision turned on the applicable meaning of the term "assessment" as used in the TIA, and concluded that both the Director of Revenue's and the federal district court's reading of the term was overly broad, and that the TIA does not cover the STO tax credit.[32] The Ninth Circuit referred to common dictionary definitions in determining the meaning of "assessment" as used in the TIA. The Ninth Circuit claimed two definitions as relevant: "(1) 'to estimate officially the value of (property, income, etc.) as a basis for taxation,' and (2) 'to impose a tax or other charge on.'"[33] Regarding the first definition

26 *Winn*, 307 F.3d at 1015. Unless otherwise indicated by the context, when the term "assessment" appears in quotation marks within the text of this Note, the term is to be understood in its general usage.

27 *Id.*

28 *Id.*

29 *Id.* at 1018.

30 *Id.*

31 *Winn*, 307 F.3d at 1020.

32 *Id.* at 1015.

33 *Id.* (citing RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 90 (1979)).

of "assessment" offered by the Ninth Circuit, the court found it persuasive that "the STO [tax] credit available to a taxpayer is a uniform amount that is applied to the calculation of taxes *after* a taxpayer's gross income has been determined and therefore plays no part in the 'assessment' of property or income as a basis for the imposition of taxes . . . ."[34] The Ninth Circuit found the second definition inapplicable to the STO tax credit because A.R.S. § 1089 did not impose a tax; rather, it benefits taxpayers by excusing them from paying an already assessed tax.[35] Essentially, in establishing a taxpayer's ultimate tax liability, the Ninth Circuit narrowly defined "assessment" to cover only those tax calculations made in the course of determining a taxpayer's gross income, and not those made after gross income has been determined.[36]

The Ninth Circuit referred to the two purposes of the TIA in concluding that the relief sought by the Taxpayers, if granted, would not result in a violation of the purposes or policies behind the TIA as desired by Congress in enacting the statute in 1937.[37] The first purpose, which the Ninth Circuit did not view as relevant, involved the ability of foreign parties to bypass state courts for the more favorable federal district court forum in tax cases.[38] According to the Ninth Circuit, the second purpose of the TIA was to prevent the disruption of a state's ability to collect tax revenues.[39] While admitting that the Ninth Circuit had not previously ruled on the TIA's application to state tax credits, the court ultimately held that the TIA does not bar a suit challenging a state tax credit in a federal district court, since the invalidation of a tax credit does not affect a state's ability to raise revenue and therefore does not violate the second purpose of the TIA.[40] On the contrary, if the courts invalidated the STO tax credit, Arizona's ability to raise tax revenues would actually be enhanced, since the contributions that were otherwise going to the STOs would be redirected into the state fund.[41]

In the latter part of its opinion, the Ninth Circuit addressed

34 *Id*. at 1015 (footnote omitted).

35 *Id*.

36 Brief for Petitioners, *supra* note 18, at 6.

37 *Winn*, 307 F.3d at 1016.

38 Prior to passage of the TIA, foreign parties could sue a state for injunctive relief in federal court on the basis of diversity jurisdiction and avoid paying the disputed tax in state court until the case was resolved. State residents, on the other hand, could not obtain diversity jurisdiction and were forced to litigate the matter in state courts, which required the resident taxpayer to pay the tax deficiency prior to litigation. *Id*. at 1016 n.6.

39 *Id*. at 1016.

40 *Id*. at 1017.

41 *Id*.

the federal district court's alternative ground for dismissal of the action: principles of comity preclude suits that involve federal court interference with state tax systems.[42] The Ninth Circuit concluded that Arizona's tax administration would not be substantially affected if A.R.S. § 1089 were invalidated, since A.R.S. § 1089 represents such a small portion of Arizona's tax system.[43] Furthermore, because principles of comity apply to federal court injunctive relief that affect a state's ability to *collect* tax revenue, and because invalidation of A.R.S. § 1089 would increase Arizona's tax collection, principles of comity do not bar the Taxpayers' suit.[44]

Subsequent to the Ninth Circuit's reversal of the federal district court decision, the Ninth Circuit declined to rehear the case en banc.[45] In his dissenting opinion, Judge Kleinfeld criticized the Ninth Circuit's adopted definition of "assessment," and instead used a broader definition of "assessment" as "the process of calculating a person's final tax bill after all deductions *and credits are accounted for*."[46] In support of this broad definition of "assessment," Judge Kleinfeld referred to definitions of the term found in another lay dictionary,[47] a law dictionary,[48] and the Internal Revenue Code.[49] According to Judge Kleinfeld's broad definition of "assessment," the TIA plainly "deprives the federal courts of jurisdiction to enjoin states from granting tax credits as part of the calculation of taxes due."[50] Furthermore, Judge Kleinfeld stated that even if the TIA does not bar the Taxpayers' suit, principles of comity would act as a bar to the suit, since "long before Congress passed the [TIA], federal courts ordinarily declined jurisdiction over challenges to state taxes."[51] Judge Kleinfeld stressed the importance of not assuming that federal judges are in the exclusive position of interpreting the Constitution and the people's federal rights, since "[s]tate judges

42 *Winn*, 307 F.3d at 1018.

43 *Id.* at 1020.

44 *Id.*

45 Winn v. Killian, 321 F.3d 911 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing en banc).

46 *Id.* at 912 (emphasis added).

47 *Id.* at 912 n.9 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 131 (1981) (an "assessment" is "the entire plan or scheme fixed upon for charging or taxing")).

48 *Id.* at 912 n.10 (quoting BLACK'S LAW DICTIONARY 116-17 (6th ed. 1990) ("assessment" refers to "determining the share of a tax to be paid by each of many persons").

49 *Id.* at 912 n.12 (quoting 26 U.S.C. § 6203 (2002) ("assessment shall be made by recording the liability of the taxpayer")). Unless the context indicates otherwise, all references to a "Section," "§," the "Code," or "IRC" are to the Internal Revenue Code of 1986 as in effect on June 1, 2004.

50 *Winn*, 321 F.3d 911, 913.

51 *Id.*

take the same oath to uphold the federal Constitution that [federal judges] do, and like [federal judges] are subject to federal Supreme Court review."[52]

C. The Supreme Court's Holding and its Reasoning

In *Hibbs v. Winn*, the United States Supreme Court granted certiorari to decide whether the TIA bars constitutional challenges to state tax credits.[53] The Court, in a 5 to 4 decision delivered by Justice Ginsburg, affirmed the Ninth Circuit, thus allowing the Taxpayers' suit challenging the A.R.S. § 1089 tax credit to proceed in federal district court without impediment from the TIA or principles of comity.[54]

Justice Ginsburg noted that federal courts, including the United States Supreme Court, have previously adjudicated challenges to state tax credits and have never before viewed the TIA as precluding federal court jurisdiction.[55] Justice Ginsburg noted the line of post-*Brown v. Board of Education*[56] cases in which states used tuition grants and tax credits in an effort to promote racial segregation in public and private schools, and how the Court upheld the Constitution's equal protection requirement under these challenges without impediment from the TIA.[57] Justice Ginsburg therefore rejected the Director of Revenue's argument that the TIA prohibits *all* lower federal court interference with state tax systems.[58]

Justice Ginsburg first determined that the Taxpayers sought the following forms of prospective relief: injunctive relief prohibiting A.R.S. § 1089 tax credits for payments made to STOs that make religion-based grants; a declaration that A.R.S. § 1089, on its face and as applied, violates the Establishment Clause of the United States Constitution; and an order that the Director of Revenue notify all participating STOs that all funds within their possession are to be returned to the state general fund.[59] With this in mind, Justice Ginsburg asked whether this prospective relief, in terms of the TIA, "seek[s] to 'enjoin, suspend

52 *Id*. at 914.

53 Hibbs v. Winn, 124 S. Ct. 2276 (2004). The Court first dealt with the issue of whether Director of Revenue's petition for certiorari was timely under 28 U.S.C. § 2101(c), and ultimately concluded that the petition was timely, thus giving the Court jurisdiction to decide whether the TIA bars Taxpayers' suit. *See id*. at 2284. This issue is not relevant for purposes of this Note, and thus merits no further discussion.

54 *Winn*, 124 S. Ct. at 2281-82.

55 *Id*. at 2281.

56 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

57 *Winn*, 124 S. Ct. at 2281 (citing Griffin v. County Sch. Bd. of Prince Edward County, 377 U.S. 218, 233 (1964)).

58 *Id*.

59 *Id*. at 2284-85.

or restrain the assessment, levy or collection of any tax under State law.'"[60] The answer to this question turned on the meaning of "assessment," as used in the TIA, to determine if a challenge to a state tax credit falls within the prohibition of the TIA.[61]

In determining the correct meaning of "assessment," Justice Ginsburg ruled that it is imperative to read the term in its context and not in isolation.[62] According to Justice Ginsburg, if the term "assessment," as the Director of Revenue asserts, were in isolation to mean "the entire plan or scheme fixed upon for charging or taxing," the TIA would have no need for the words "levy" or "collection" that follow "assessment" in the language of the statute.[63] Essentially, the term "assessment" would be all that is necessary for purposes of the TIA, since this expansive reading of "assessment" would necessarily include the functions of "levy" and "collection."[64] Because the Court follows the "rule against superfluities" in a statute, Justice Ginsburg refused to accept the Director of Revenue's definition of "assessment" as encompassing the entire taxing scheme, since this would render the terms "levy" and "collection" superfluous.[65]

Justice Ginsburg criticized Justice Kennedy's dissenting opinion (discussed *infra*) for adopting a conflicting position on the proper definition of "assessment."[66] According to Justice Ginsburg, Justice Kennedy's dissent twice adopts the Director of Revenue's definition of "assessment" as "'the entire plan or scheme fixed upon for charging or taxing,'" but later defines "assessment" in a manner that "would disconnect the word from the enforcement process ('levy or collection') that 'assessment' sets in motion."[67]

Based on the TIA's legislative history, Justice Ginsburg ruled that the TIA was modeled on earlier federal statutes that paralleled state provisions prohibiting "'actions in State courts to enjoin the collection of State and county taxes.'"[68] Of particular influence was the Anti-Injunction Act (AIA),[69] which bars "'any court'" from adjudicating a suit brought "'for the purpose of restraining the assessment or collection of any [federal] tax.'"[70]

60 *Id*. at 2285 (quoting 28 U.S.C. § 1341 (1994)).
61 *Id*. at 2285.
62 *Winn*, 124 S. Ct. at 2285.
63 *Id*. at 2286 (internal quotation marks omitted).
64 *Id.* (internal quotation marks omitted).
65 *Id.* (internal quotation marks omitted) (citing 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (rev. 6th ed. 2000)).
66 *Winn*, 124 S. Ct. at 2286 n.4.
67 *Id*.
68 *Id*. at 2286 (citing S. REP. NO. 75-1035, at 1 (1937)).
69 26 U.S.C. § 7421(a) (2005).
70 *Winn*, 124 S. Ct. at 2286 (citing 26 U.S.C. § 7421(a) (2005)).

According to Justice Ginsburg, the AIA was meant to serve two main purposes: (1) to reflect the Government's desire to assess and collect taxes as quickly as possible without judicial impediment; and (2) to require that the legal right to any disputed sums be a suit for refund.[71] Therefore, just as the AIA prevents federal court injunctions over federal tax collections, the TIA prevents federal court restraints over state tax collections.[72]

In discussing the legislative history of the TIA, Justice Ginsburg held that the Senate Report identified two state-revenue-protective objectives of the TIA:

> (1) to eliminate disparities between taxpayers who could seek injunctive relief in federal court—usually out-of-state corporations asserting diversity jurisdiction—and taxpayers with recourse only to state courts, which generally required taxpayers to pay first and litigate later; and (2) to stop taxpayers, with the aid of a federal injunction, from withholding large sums, thereby disrupting state government finances.[73]

Based on this legislative history, Justice Ginsburg concluded that in enacting the TIA, Congress focused on taxpayers who sought to avoid paying their taxes by resorting to a federal court forum, which is not the procedure specified by the Internal Revenue Service.[74] Justice Ginsburg therefore read the TIA's legislative history as not indicating a congressional purpose to prevent *all* federal court interference with state tax systems.[75]

In discussing the legislative history of the TIA, the Director of Revenue argued that Congress, in enacting the TIA, relied on the congressional purpose underlying the Johnson Act of 1934.[76] The Johnson Act provides, in relevant part, that "[t]he district courts shall not enjoin, suspend or restrain the operation of, or compliance with, [public-utility rate orders made by state regulatory bodies]."[77] In juxtaposing the TIA with the Johnson Act, Justice Ginsburg concluded that the two Acts were significantly different in their respective underlying congressional intents, since "[t]he TIA does not prohibit interference with 'the operation of, or compliance with' state tax laws," but instead prohibits interference only with the areas of state tax systems that are used to generate revenue, such as

71 *Id.*

72 *Id.* at 2287.

73 *Id.* (citing S. REP. NO. 75-1035, at 1-2 (1937)).

74 *Id.* at 2288.

75 *Id.*

76 Brief for Petitioners, *supra* note 18, at 20 (citing California v. Grace Brethren Church, 457 U.S. 393, 409 n.22 (1982)).

77 28 U.S.C. § 1342 (2003).

assessment, levy, and collection.[78]

Justice Ginsburg held that the TIA, consistent with the will of Congress, has been interpreted by the Court to only apply to cases in which the state taxpayer attempts to avoid paying state taxes by seeking the aid of the federal courts.[79] In furthering this position, Justice Ginsburg cited *California v. Grace Brethren Church*,[80] in which the Court "recognized that the principal purpose of the TIA was to 'limit drastically' federal-court-interference with 'the collection of [state] taxes.'"[81] *Grace Brethren Church*, according to Justice Ginsburg, dealt with taxpayers who attempted to institute federal actions in order to bypass available state remedies, precisely what the TIA is meant to prohibit.[82] Justice Ginsburg announced that *Grace Brethren Church* stands for the proposition that the TIA does not prevent federal court review of *all* aspects of state tax systems, but instead prevents federal court review only of issues pertaining to the *collection of revenue* in state tax systems, which is contrary to the positions taken by both the Director of Revenue and the dissent.[83]

Justice Ginsburg next addressed the issue of what constitutes "'a plain, speedy and efficient remedy'" in a state court as required by the TIA.[84] Justice Ginsburg noted that the Court had previously addressed the issue of what constitutes "'a plain, speedy and efficient remedy'" per the TIA, and concluded that the remedy is not the same for all plaintiffs who sue the State, but is instead custom fit for taxpayers who sue the State.[85]

In the final part of the majority opinion, Justice Ginsburg

78 *Winn*, 124 S. Ct at 2288 n.7.

79 *Id.* at 2289.

80 California v. Grace Brethren Church, 457 U.S. 393, 408 (1982).

81 *Winn*, 124 S. Ct. at 2288 (citing *Grace Brethren Church*, 457 U.S. at 408-09) (citation omitted).

82 *Id.* at 2288.

83 *Winn*, 124 S. Ct. at 2288-89. *See also* Fair Assessment in Real Estate Ass'n, v. McNary, 454 U.S. 100, 105-06 (1981) (taxpayers sought damages determined by alleged tax overassessments based on taxation of real property); Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503, 510 (1981) (taxpayer refused to pay state taxes because she deemed them unfair); Ark. v. Farm Credit Servs. of Cent. Ark., 520 U.S. 821, 824 (1997) (corporations claimed they were exempt from state taxes and refused to pay); Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n, 515 U.S. 582, 584 (1995) (action sought to prevent State from collecting taxes).

84 *Winn*, 124 S. Ct. at 2289.

85 *Id.* (citing *Rosewell*, 450 U.S. at 528 (holding that "Illinois' legal remedy that provides property owners paying property taxes under protest a refund without interest in two years is a plain, speedy and efficient remedy under the [TIA]") (internal quotation marks omitted); *Grace Brethren Church*, 457 U.S. at 411 (holding that "a state-court remedy is plain, speedy and efficient only if it provides the taxpayer with a full hearing and judicial determination at which she may raise any and all constitutional objections to the tax") (internal quotation marks omitted) (citation omitted)).

discussed how there have been many federal court decisions, including decisions of the Court that "have reached the merits of third-party constitutional challenges to tax benefits without mentioning the TIA."[86] Justice Ginsburg held that, "[c]onsistent with the decades-long understanding prevailing on this issue," the challenge to the A.R.S. § 1089 tax credit brought by the Taxpayers may be adjudicated in federal district court without any TIA opposition, thereby affirming the Ninth Circuit's decision.[87]

D. The Dissent

Justice Kennedy, writing for the dissent,[88] criticized the majority for "show[ing] great skepticism for the state courts' ability to vindicate constitutional wrongs" and for treating state courts as "second rate constitutional arbiters."[89] Justice Kennedy offered two points as evidence of the majority's stance: (1) the majority's interpretation of the TIA conflicts with the plain language and a literal reading of the statute's terms, and (2) the majority's assertion that Congress, in enacting the TIA, did not intend to include third-party suits that do not seek to stop the collection of a tax imposed on plaintiffs is not supported by the legislative history of the TIA.[90] Justice Kennedy disapproves of the "[d]ismissive treatment" afforded by the majority to the state courts as constitutional arbiters, since the TIA expressly provides for a "federal safeguard:" federal court intervention if the State court fails to provide "'a plain, speedy, and efficient remedy.'"[91] Therefore, according to Justice Kennedy, the majority disregards "the balance the [TIA] strikes between federal and state court adjudication."[92]

Justice Kennedy notes that while "unexamined custom" may have allowed some cases in the past to proceed as though the TIA

86 *Winn*, 124 S. Ct. at 2291. *See, e.g.,* Byrne v. Pub. Funds for Pub. Sch. of N.J., 590 F.2d 514 (3d Cir. 1979) (holding a state tax deduction for parents with children who attend private schools is a violation of the Establishment Clause), *aff'd*, 442 U.S. 907 (1979); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (state tax benefit for parents of children who attend private schools is a violation of the Establishment Clause); Mueller v. Allen, 463 U.S. 388 (1983) (state tax deduction for parents of children who attend parochial schools is not a violation of the Establishment Clause); Finlator v. Powers, 902 F.2d 1158 (4th Cir. 1990) (holding a state statute that exempts certain religious books from a state tax is a violation of the Establishment Clause).

87 *Winn*, 124 S. Ct. at 2292.

88 Chief Justice Rehnquist, Justice Scalia and Justice Thomas joined Justice Kennedy's dissenting opinion.

89 *Winn*, 124 S. Ct. at 2292-93 (Kennedy, J., dissenting).

90 *Id*.

91 *Id*. at 2293.

92 *Id*.

does not apply to challenges to state tax credits, this "unexamined custom" is not conclusive, and the terms and purpose of the TIA alone are conclusive and controlling in determining the scope of the TIA.[93] To determine whether the TIA bars the federal district court from granting injunctive relief against the STO tax credit, Justice Kennedy presented two necessary inquiries: (1) define "assessment," as used in the TIA, and (2) decide whether an injunction preventing the Director of Revenue from permitting the STO tax credit "would enjoin, suspend, or restrain an assessment" for purposes of the TIA.[94]

Like the majority opinion, Justice Kennedy noted that the term "assessment" is not to be understood in isolation, and must instead be read in light of the surrounding terms in the TIA.[95] Similar to the majority, Justice Kennedy explained that the TIA was modeled on the AIA,[96] which provides "that federal courts may not restrain or enjoin an 'assessment or collection of any [federal] tax.'"[97] In order to determine the meaning of the term "assessment" as used in the AIA, Justice Kennedy referred to other provisions of the Code.[98] Justice Kennedy concluded that, when read together, the provisions of the Code indicate that an assessment, for purposes of the AIA, "must at the least encompass the recording of a taxpayer's ultimate tax liability," and "[t]he recording of the [taxpayer's] liability on the Government's tax rolls is itself an assessment."[99] Therefore, because the TIA was modeled on the AIA, it follows that the term "assessment," as used in the TIA, should be interpreted according to the Code's use of the term, indicating that an "assessment" pertains to "a taxpayer's ultimate tax liability."[100]

According to Justice Kennedy, the Ninth Circuit should not have principally relied on a dictionary definition in determining the meaning of "assessment," since it is imperative that the definition be considered in light of the prior statute on which the TIA was based.[101] Another problem with the Ninth Circuit's reliance on a lay dictionary definition of "assessment" is that the Ninth Circuit used a dictionary that was not available in the year

93 *Id*.
94 *Id*.
95 *Winn*, 124 S. Ct. at 2293 (Kennedy, J., dissenting).
96 26 U.S.C. § 7421(a)(2005).
97 *Winn*, 124 S. Ct. at 2293 (Kennedy, J., dissenting).
98 *Id*. (citing 26 U.S.C. § 1 *et seq*.).
99 *Id*. at 2294.
100 *Id*. (citing Lorillard v. Pons, 434 U.S. 575, 581 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress can normally be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").
101 *Id*.

the TIA was enacted.[102] Justice Kennedy further noted that the Ninth Circuit omitted a relevant definition of "assessment" from the dictionary it used: "(2) to fix or determine the amount of (damages, *a tax*, a fine, etc.)."[103] Justice Kennedy found comfort in Judge Kleinfeld's dissenting opinion from denial of rehearing en banc, which noted that the Ninth Circuit would have discovered relevant, broader definitions of "assessment" had it looked in different lay dictionaries and the Code.[104]

Justice Kennedy addressed the Taxpayers' argument alleging that the TIA does not prohibit the injunction against the STO tax credits, since the Director of Revenue, even after the STO tax credit is enjoined, will be able to enforce taxpayer liabilities, and the elimination of the STO tax credit will actually increase tax revenue.[105] Justice Kennedy dismissed this argument, since it ignores some highly relevant wording in the TIA: "under State law."[106] According to Justice Kennedy, the TIA prohibits federal district courts "from enjoining, suspending, or restraining a State from recording the taxpayer liability that state law mandates."[107] A.R.S. § 1089 is an Arizona State law, and is necessary in determining an Arizona taxpayer's tax liability to the State.[108] Therefore, according to Justice Kennedy, a federal court order directing the Director of Revenue to refrain from recording on the State's tax rolls taxpayer liability in absence of the STO tax credit would effectively prevent the Director of Revenue from accurately recording taxpayer liability under State law.[109] This sort of directive order, according to Justice Kennedy, is precisely what the plain language of the TIA forbids.[110]

Justice Kennedy next distinguished prior cases used by the majority to support the majority's position that the Court and other federal courts have adjudicated non-taxpayer challenges to tax credits without impediment from the AIA.[111] These cases are distinguishable on the grounds that if the plaintiffs in these suits

102 *Id*.

103 *Winn*, 124 S. Ct. at 2294 (Kennedy, J., dissenting) (emphasis added).

104 *Id*. (citing Winn v. Killian, 321 F.3d 911, 912 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing en banc)).

105 *Id*. at 2295 (Kennedy, J., dissenting).

106 *Id*. (quoting 28 U.S.C. § 1341 (2003)).

107 *Id*. at 2296.

108 *Id*.

109 *Id*.

110 *Id*.

111 *Id. See, e.g.*, McGlotten v. Connally, 338 F. Supp. 448, 453-54 (D.D.C. 1972) ("The preferred course of raising [such tax exemption and deduction] objections in a suit for refund is not available. In this situation we cannot read the statute to bar the present suit.").

had been barred by the AIA they would have had no other forum in which to adjudicate their claims.[112] According to Justice Kennedy, the TIA, unlike the AIA, by its own explicit terms ensures that an acceptable forum exists for those suits that it bars.[113] Where a State court is unable to provide "'a plain, speedy, and efficient remedy,'" federal district courts are the next available forum, and ultimately, the litigant may resort to the United States Supreme Court, whether the case was originally heard in a federal district court or a State court.[114] Justice Kennedy noted that the majority mistakenly failed to address this exception in the TIA, and that this exception "represents a congressional judgment about the balance that should exist between the respect due to the States (for both their administration of tax schemes and their courts' interpretation of tax laws) and the need for constitutional vindication."[115] Based on this codified exception in the TIA, Justice Kennedy concluded that this exception does not apply to the instant case, since a similar action was already heard in Arizona State court,[116] in which the State court was able to provide "'a plain, speedy, and efficient remedy.'"[117] Therefore, according to Justice Kennedy's reading of the TIA, the Taxpayers' suit does not fall within this exception to the TIA, and the federal district court accordingly lacked proper subject matter jurisdiction, since the Taxpayers were already afforded an adequate remedy in State court.[118]

Justice Kennedy criticized the majority for its interpretation of the TIA's legislative history, arguing that the majority's reading is inconsistent with earlier Court interpretations of the TIA.[119] Citing *California v. Grace Brethren Church*[120] as a prime example, Justice Kennedy argued that the Court has previously understood the purpose of the TIA as "not only to protect the [State] fisc but also to protect the State's tax system administration and tax policy implementation."[121] In *Grace Brethren Church*, the Court held that "'[i]f 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

112 *Winn*, 124 S. Ct. at 2296 (Kennedy, J., dissenting).
113 *Id*. at 2297.
114 *Id*. (quoting 28 U.S.C. § 1341 (2003)).
115 *Id*.
116 *See* Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999).
117 *Winn*, 124 S. Ct. at 2297 (Kennedy, J., dissenting).
118 *Id.*
119 *Id*. at 2298.
120 California v. Grace Brethren Church, 457 U.S. 393 (1982).
121 *Winn*, 124 S. Ct. at 2298 (Kennedy, J., dissenting).

state law.'"[122] This quote from *Grace Brethren Church*, according to Justice Kennedy, clearly demonstrates that the TIA's primary concern is to prevent federal court interference with a State's *entire* tax collection system, and not merely the revenue collecting aspect of it.[123] Based on this reading of the TIA, Justice Kennedy disagrees with the majority's decision, since the majority assumed that the primary purpose of the TIA is to prohibit federal district courts from issuing orders that would *decrease* tax revenues in state funds.[124] Justice Kennedy argued that the TIA's purpose is not limited to preventing federal court orders that would decrease tax revenues, but is instead meant to prevent federal court orders that would lead to a disruption in a State's *entire* tax collection efforts in *any* manner, which includes invalidating state tax credits.[125]

In the final part of his dissent, Justice Kennedy addressed the majority's argument that federal courts, through "years of unexamined habit," have adjudicated suits challenging state tax credits.[126] Justice Kennedy dismissed this argument by stating that "[t]he exercise of federal jurisdiction does not and cannot establish jurisdiction," and that "[w]hile [the Court] should not reverse the course of our unexamined practice lightly, our obligation is to give a correct interpretation of the statute."[127] Justice Kennedy argued that simply because the Court has never before considered the jurisdictional issue in the case at bar, the Court should not resort to following the unexamined habit of the Court to hear challenges to state tax credits, and should instead follow the clear statutory mandate of the TIA.[128]

122 *Grace Brethren Church*, 457 U.S. at 410 (quoting Perez v. Ledesma, 401 U.S. 82, 127 n.17 (1971) (Brennan, J., concurring in part and dissenting in part)).

123 *Winn*, 124 S. Ct. at 2298-99 (Kennedy, J., dissenting).

124 *Id.* at 2297-98.

125 *Id.* at 2298-99.

126 *Id*. at 2300.

127 *Id*. (citing United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952) (holding that the "Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*.")).

128 *Id.* at 2301.

III. OPENING THE DOOR FOR FEDERAL COURT INTRUSION INTO STATE TAX SYSTEMS—DIFFICULTIES WITH THE *WINN* HOLDING AND ITS REASONING

A. The Majority Misinterpreted the Plain Language and Intent of the TIA

1. The Majority Misinterpreted the Term "Assessment" as Used in the TIA

Prior to the majority's decision in *Winn*, the statutory language of the TIA was seemingly clear, concise, and unambiguous. The TIA prohibits federal district courts from "enjoin[ing], suspend[ing] or restrain[ing] the *assessment*, levy or collection" of any state tax as long as there is a "plain, speedy and efficient remedy" in the state court.[129] The issue presented before the *Winn* Court was whether enjoining a state tax credit qualifies as an interference with an "assessment" as that term is used in the TIA.[130] The plain language of the TIA is the correct starting point for the Court's determination, since plain and unambiguous statutory language is the clearest indicator of congressional intent, and therefore ends the inquiry.[131]

Understood in its most ordinary and sensible usage, in relation to state taxes, "assessment . . . must at the least encompass the recording of a taxpayer's *ultimate* tax liability. This is what the taxpayer owes the Government."[132] Instead of referring to the ordinary meaning of "assessment" as used in the context of both the TIA and federal and state precedent, the Ninth Circuit relied on a lay dictionary definition of "assessment," and concluded that an "assessment" was the official estimate of the value of income or property used to calculate a tax or the imposition of a tax on someone.[133] The most troubling part of the Ninth Circuit's reliance on the lay dictionary definition is that the court ignored a more relevant definition found in the same dictionary: "(2) to fix or determine

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129 28 U.S.C. § 1341 (2003) (emphasis added).

130 *Winn*, 124 S. Ct. at 2281.

131 *See, e.g.,* Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) (holding that the Court begins with the statutory language in its inquiry); Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503, 512 (1981) ("The starting point of our inquiry is the plain language of the statute itself.").

132 *Winn*, 124 S. Ct. at 2294 (Kennedy, J., dissenting) (emphasis added); *see also* United States v. Galletti, 124 S. Ct. 1548, 1553-54 (2004) ("In its numerous uses throughout the Code, it is clear that the term 'assessment' refers to little more than the calculation or recording of a tax liability. . . . The Federal tax system is basically one of self-assessment, whereby each taxpayer computes the tax due and then files the appropriate form . . . .") (internal quotations omitted).

133 Winn v. Killian, 307 F.3d 1011, 1015 (9th Cir. 2002).

the amount of (damages, *a tax*, a fine, etc.)."[134] This additional definition is in accordance with the broad meaning ascribed to the term "assessment" by both the Director of Revenue[135] and the dissent,[136] and suggests that "assessment" refers to a taxpayer's overall tax liability to the government.[137] A tax credit is used in determining a taxpayer's overall tax liability, since the amount of the credit is deducted from the "below-the-line" amount of taxes a taxpayer owes to the government.[138]

Definitions of "assessment" found in other dictionaries, including lay dictionaries available in 1937 when the TIA was enacted, also support this broad definition of "assessment." For example, a lay dictionary available in 1937 provides the following relevant definitions of "assessment": "act of apportioning or determining an amount to be paid;" "the entire plan or scheme fixed upon for charging or taxing."[139] In *Black's Law Dictionary*, "'assessment' is defined as 'determining the share of a tax to be paid by each of many persons'. . . .[and] 'the process of ascertaining and adjusting the shares respectively to be contributed by several persons' such as an individual's *final* tax bill."[140]

What is perhaps the most relevant definition of the term "assessment" is found in the Code, as it provides that "assessment shall be made by recording the liability of the taxpayer."[141] As Judge Kleinfeld correctly noted in his dissent, "under the congressional understanding in the tax code, 'assessment' refers to the bottom line, how much money the

134 *Winn*, 124 S. Ct. at 2294 (Kennedy, J., dissenting) (emphasis added).

135 Brief for Petitioners, *supra* note 18, at 12 ("[A] 'tax assessment' is a tax *bill*: the final amount owed to the government. Under that ordinary and sensible understanding of the word 'assessment,' a federal court challenge to a state tax credit—a component of a taxpayer's ultimate liability—is barred by the plain terms of the [TIA].").

136 *Winn*, 124 S. Ct. at 2294 (Kennedy, J., dissenting) ("[A]n assessment . . . must at the least encompass the recording of a taxpayer's *ultimate* tax liability.") (emphasis added).

137 Further evidence of the broad meaning of "assessment" is found by looking at Arizona's tax system. On the 2000 Arizona Resident Personal Income Tax Return (Form 140), Arizona taxpayers determine their ultimate tax liability by accounting for all deductions and credits. *See also* Brief for Petitioners, *supra* note 18, at 16 n.4 (citing 85 C.J.S. *Taxation* § 1758 (2003) ("In making an assessment [of taxes], the assessing officer should take into account *all deductions and credits* to which the taxpayer is lawfully entitled, and compute them in the manner required by the statute.") (emphasis added).

138 *See* BLACK'S LAW DICTIONARY 1501 (8th ed. 2004) ([A "tax credit" is] "[a]n amount subtracted directly from one's total tax liability, dollar for dollar, as opposed to a deduction from gross income.").

139 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 131 (2d ed. 1934).

140 Winn v. Killian, 321 F.3d 911, 912 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing en banc) (citing BLACK'S LAW DICTIONARY 116-17 (6th ed. 1990)) (emphasis added) (footnotes omitted).

141 26 U.S.C. § 6203 (2005).

taxpayer owes to the government in taxes, after consideration of *any credits* as well as deductions."[142] This broad understanding of the term "assessment" is the most common sense understanding of the term, and is consistent with the broad purpose intended by Congress in enacting the TIA. Because the term "assessment" is followed by the terms "levy" and "collection,"[143] the TIA indicates a congressional intent to encompass the entire taxing process, beginning with the determination of the taxpayer's ultimate tax liability (i.e., the "assessment") and concluding with the collection of that liability.[144]

The *Winn* Court, in construing the meaning of the term "assessment" to counter-intuitive limits, has effectively legislated from the bench by disregarding the clear intent of Congress in enacting the TIA, thereby allowing federal courts with already overburdened dockets to hear cases that Congress specifically legislated to exclude. By accepting an irrelevant lay dictionary definition as conclusive authority, the *Winn* Court has effectively undermined the Legislature in its capacity as the government branch entrusted with the duty of creating and determining laws, and has shown complete disregard for congressional purpose.

2. The TIA Should not be Limited to Instances of Tax Collection

The majority erred in finding that the TIA pertains only to those situations in which the State's revenue *collecting* function has been hindered. The Court has previously made clear that the purpose of the TIA is to protect a State's *entire* tax system and not merely the revenue collecting aspect of it.[145] Nowhere in the language of the TIA is there mention of the TIA being limited to situations in which a challenge to a State tax would hinder the State's ability to collect revenue.[146] Quite the contrary, the language of the TIA clearly demonstrates that "[t]he district

142 *Winn*, 321 F.3d at 912-13 (Kleinfeld, J., dissenting from denial of rehearing en banc) (emphasis added). *See also* American Civil Liberties Union Found. of La. v. Bridges, 334 F.3d 416, 421 (5th Cir. 2003) (defining "assessment" as "'the entire plan or scheme fixed upon for charging or taxing'").

143 28 U.S.C. § 1341 (2003).

144 Hibbs v. Winn, 124 S. Ct. 2276, 2298-99 (2004) (Kennedy, J., dissenting) (The terms "assessment," "levy," and "collection" represent the three main stages of a State tax system: (1) the determination of the taxpayer's overall tax liability ("assessment"); (2) the imposition of the tax ("levy"); and (3) collecting the tax owed ("collection")).

145 *Id.* (Kennedy, J., dissenting); *see also* California v. Grace Brethren Church, 457 U.S. 393, 409 n.22 (1982) ("[T]he legislative history of the [TIA] demonstrates that Congress worried not so much about the form of relief available in the federal courts, as about divesting the federal courts of jurisdiction to interfere with state tax administration.").

146 *See* 28 U.S.C. § 1341 (2003).

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."[147] Because the TIA refers to "any tax," it seems clear that even an aspect of a State tax system that does not add to revenue collection, such as a tax credit, is nevertheless meant to fall under the purview of the TIA, since a tax credit is fundamentally related to a State's entire tax system.[148]

A federal court order that interferes with a state tax credit is just as intrusive into a State's tax system as is a federal court order that interferes with a State's ability to raise and collect taxes.[149] Accordingly, a tax credit should not be deemed to be outside the purview of the TIA simply because a tax credit does not lead to an increase in a State's tax revenues.[150] Tax scholars agree that a tax credit is an imperative determination in the assessment of a tax, and taking account for a tax credit is the final step in determining a taxpayer's overall tax liability.[151] In the case at bar, the majority should not have limited the term "assessment" to the revenue collecting aspect of a State's tax system and should have instead interpreted the term to encompass the taxpayer's overall tax liability, tax credits included.[152]

147 *Id*. (emphasis added).

148 *See id*. It is interesting to note that in a Ninth Circuit decision following *Hibbs v. Winn*, the court discussed the legislative history and congressional intent behind the TIA, stating that "[a]side from its general concern with protecting state revenues, Congress viewed the [TIA] as a mechanism for steering challenges to state tax laws into state courts." May Trucking Co. v. Or. Dep't of Transp., 388 F.3d 1261, 1268 (9th Cir. 2004).

149 *See, e.g.,* United Brewers Ass'n v. Perez, 592 F.2d 1212, 1214 (1st Cir. 1979) (holding that litigation that would increase the amount of taxes collected would nevertheless "disrupt the orderly collection and administration of state taxes"); *In re* Gillis, 836 F.2d 1001, 1008 (6th Cir. 1988) (holding that "the interference by the federal courts into the state tax system is the same in degree and kind as a suit seeking to enjoin a state tax").

150 *See* Davis v. Mich. Dep't of Treasury, 489 U.S. 803 (1989) (holding that the ultimate effect of invalidating a state tax exemption cannot be predicted with complete accuracy).

151 *See* JAMES J. FREELAND ET AL., FUNDAMENTALS OF FEDERAL INCOME TAXATION 929 (13th ed. 2004) ("The final step in computing a taxpayer's regular tax liability is to reduce the taxpayer's tax liability . . . by the amount of any tax credits allowed to the taxpayer. The amount of tax that must be paid by the taxpayer when filing an income tax return is generally less than the computed tax liability for the year, because the potential payment is reduced by tax credits.").

152 In a recent Fifth Circuit decision interpreting *Hibbs v. Winn*, the court was confronted with the issue of whether the federal district courts could exercise proper subject matter jurisdiction over a claim that the State of Louisiana's prestige license plate program facially discriminates against pro-choice views, thus violating the First Amendment. Henderson v. Stalder, 407 F.3d 351 (5th Cir. 2005). The *Henderson* court held that the costs associated with the prestige license plates were in fact "taxes," and in light of *Hibbs v. Winn*, the federal district court was barred from hearing the case as a result of the TIA. *Id*. at 358-59. The *Henderson* court noted that, "*Hibbs* opened the federal courthouse doors slightly *notwithstanding the limits of the TIA*." *Id*. at 359.

3. The Majority Ignored That There Existed a "Plain, Speedy and Efficient Remedy" in Arizona State Court

The language of the TIA itself provides for the appropriate time at which a federal court may intervene in the State tax system: "where a plain, speedy and efficient remedy may [*not*] be had in the courts of such State."[153] As Justice Kennedy noted in his dissenting opinion, the TIA has a "codified exception" to the prohibition against federal court intervention, which allows federal court interference in state tax systems only where the taxpayer is unable to receive "'a plain, speedy and efficient remedy'" in her State court.[154] Justice Ginsburg and the majority overlooked this crucial language in the TIA, which represents the fact that Congress has already made the determination as to what sort of balance should exist among the federal and state courts in regards to a State's ability to administer its own tax system.[155]

In the years following the enactment of the TIA, the Court took a broad stance as to what constitutes a "'plain, speedy and efficient remedy in State court,'" often finding judicial remedies in state courts to be inadequate.[156] However, in more recent decisions, the Court has narrowly construed the statutory language of the TIA and seems to presume that state court remedies are "plain, speedy and efficient" for purposes of the TIA, thus prohibiting federal court intervention.[157] As a result of

(emphasis added). In reaching its decision, the Fifth Circuit interpreted the *Hibbs* decision as allowing federal district court intervention into a state tax matter in spite of the TIA, only if "the suit's success will *enrich, not deplete*, the government entity's coffers." *Id.* (emphasis added).

153 28 U.S.C. § 1341 (2003) (emphasis added).

154 Hibbs v. Winn, 124 S. Ct. 2276, 2297 (2004) (Kennedy, J., dissenting).

155 *Id.*

156 CHEMERINSKY, *supra* note 1, at 710; *see, e.g.,* Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 105-06 (1944) (holding that the federal district court was not barred by the TIA because there was an absence of state court interpretations of the contested tax law, and this created uncertainty sufficient to justify federal court intervention); Hillsborough Twp. v. Cromwell, 326 U.S. 620, 626 (1946) (holding that a "plain, speedy and efficient remedy" did not exist in the State court, thus permitting the federal district court to bypass the TIA, since there existed uncertainty as to the adequacy of the state remedy); Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299, 306 (1952) (holding that because the taxpayer would have been required to file over 300 separate claims in fourteen different counties under state law, the remedy was not "plain, speedy and efficient," and the federal district court was permitted to take jurisdiction as an exception to the TIA).

157 CHEMERINSKY, *supra* note 1, at 711; *see, e.g.,* Tully v. Griffin, Inc., 429 U.S. 68, 73 (1976) (holding that a State requirement that a taxpayer post a bond for the amount of the tax in controversy in order to be heard in State court is a "'plain, speedy and efficient remedy,'" even though situations may exist in which the taxpayer is unable to post the bond); Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503, 528 (1981) (holding that the State remedy was adequate, despite the fact that the taxpayer was required to pay the taxes owed first and then sue for a refund, the taxpayer was not entitled to interest on the refund if successful in court, and it usually took two years for the suit to be heard in State

these recent cases, the *Winn* Court erred in allowing the Taxpayers' suit to proceed in federal district court, since there existed a "plain, speedy and efficient remedy" in Arizona State court, thus divesting the federal district court of subject matter jurisdiction.[158] This is evidenced by the 1999 Arizona Supreme Court case *Kotterman v. Killian*, in which a group of Arizona taxpayers, similarly situated to the Taxpayers in *Winn*, challenged the A.R.S. § 1089 tax credit on Establishment Clause grounds.[159] The Arizona Supreme Court ultimately held the A.R.S. § 1089 tax credit to be a valid law, thus ruling against the *Killian* taxpayers.[160] It is notable that the United States Supreme Court denied review of the *Kotterman* decision.[161]

Based on the current line of Supreme Court cases broadly interpreting the "plain, speedy and efficient remedy" requirement in the TIA, the *Winn* Court should have ruled against the Taxpayers, finding that they had an adequate remedy available in State court, thus divesting the federal district courts of subject matter jurisdiction over the case. As Justice Kennedy noted in his dissenting opinion, the taxpayer who resorts to the State court is not exclusively confined to the State court forum; the United States Supreme Court is always an available federal forum that will review any state court decision.[162]

B. The Majority's Holding is Contrary to the Broad Federalism Purpose of the TIA

1. The TIA was Enacted in the Broad Interest of State Sovereignty

The TIA embodies principles of federalism: state governments are given deference to administer their own tax

court); California v. Grace Brethren Church, 457 U.S. 393, 417 (1982) (holding that "because the appellees could seek a refund of their state unemployment insurance taxes . . . their remedy under state law was 'plain, speedy and efficient' within the meaning of the [TIA], and consequently, that the District Court had no jurisdiction to issue injunctive or declaratory relief.").

158 Following *Hibbs v. Winn*, the Ninth Circuit discussed what constitutes "plain, speedy and efficient" for purposes of the TIA. May Trucking Co. v. Oregon Dep't of Transportation, 388 F.3d 1261, 1270-71 (9th Cir. 2004). According to the *May Trucking Co.* court, "[f]or state-court remedies to be 'plain,' the procedures available in state court must be *certain*." *Id.* at 1270 (emphasis added). Furthermore, "[t]he 'efficiency' of a state-court remedy generally turns on whether it imposes an 'unusual hardship . . . requiring ineffectual activity or an unnecessary expenditure of time or energy.'" *Id.* at 1271 (quoting *Rosewell,* 450 U.S. at 518).

159 Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999).

160 *Id.* at 625.

161 Kotterman v. Killian, 972 P.2d 606, 625 (Ariz. 1999), *cert. denied*, 528 U.S. 921 (1999).

162 Hibbs v. Winn, 124 S. Ct. 2276, 2297 (2004) (Kennedy, J., dissenting).

systems without undue federal impediment since Congress enacted the TIA in the interest of limiting federal interference with the crucial principal of state sovereignty.[163] States may have a legitimate interest in promoting secondary school education for parents and their children because secondary schools are not state-funded, and the respective State may have an interest in decreasing the amount of children attending the public schools for state-revenue purposes. In enacting A.R.S. § 1089, the Arizona Legislature may have been attempting to persuade more Arizona taxpayers to send their children to secondary schools in order to lighten the burden on the State fisc since fewer funds would need to be directed to public schools if more children were attending secondary schools.[164] As an incentive to send their children to secondary schools, Arizona taxpayers would receive the STO tax credit embodied in A.R.S. § 1089.[165] The Arizona Legislature made the determination that a tax credit, as opposed to a tax deduction, was the most persuasive means of motivating taxpayer's to send their children to secondary schools, since a tax credit represents a greater overall deduction in tax liability.[166] Regardless of the Arizona legislature's intent in enacting A.R.S. § 1089, the contested STO tax credit is clearly a matter of Arizona State law, and the *Winn* majority erred in allowing federal courts to take jurisdiction over the matter in spite of the TIA's bar on federal intrusion in state

163 *See* CHEMERINSKY, *supra* note 1, at 710. After the Court's decision in *Winn*, the Ninth Circuit noted, in *May Trucking Co. v. Oregon Dep't of Transp.*, the two comity concerns furthered by the TIA: "[f]irst, '[t]he Act is a gesture of comity toward states; recognizing the centrality of tax collection to the operation of government, the Act prevents taxpayers from running to federal court to stymie the collection of state taxes'. . . . Second, recognizing that challenges to state tax laws are 'more properly heard in the state courts,' the Act ensures that state courts are able to entertain challenges to their own tax laws in the first instance." May Trucking Co. v. Or. Dep't of Transp., 388 F.3d 1261, 1269 (9th Cir. 2004) (citations omitted).

164 *See* Warren Richey, *Case Could Boost Funding for Private Schools*, CHRISTIAN SCIENCE MONITOR, Jan. 20, 2004, at 2, *available at* http://news.findlaw.com/csmonitor/s/20040120/20jan2004091835.html ("[A] ruling [in favor of Arizona in this case] would also provide a green light to those seeking increased government funding of religious schools, provided they have the state legislature's support and the state judiciary's approval.").

165 *See* ARIZ. REV. STAT. ANN. § 43-1089(A)-(B) (2004).

166 *See* FREELAND ET AL., *supra* note 151, at 929-30 ("*A credit of a certain dollar amount is more advantageous to the taxpayer than a deduction of the same dollar amount*, because it reduces tax liability dollar-for-dollar, whereas a deduction reduces only taxable income with a corresponding but smaller reduction in tax liability. Deductions effect greater tax savings as the taxpayer's tax rate increases; in contrast, credits have the same dollar saving for all taxpayers who otherwise would pay tax, regardless of their tax brackets. Tax legislation at one time reflected some movement away from deductions toward credits, *possibly because of a policy decision that credits are more equitable*. With the adoption of modified flat tax rates, the movement from deductions to credits stalled although it has picked up some momentum in recent legislation.") (emphasis added) (footnotes omitted).

tax matters. As noted by Justice Kennedy, "[t]he TIA protects the responsibility of the States and their courts to administer their own tax systems and to be accountable to the citizens of the State for their policies and decisions."[167]

A further problem potentially spawned out of the *Winn* decision is that multi-state corporations are now able to engage in federal court forum shopping, which is one of the primary actions Congress intended to prevent in enacting the TIA.[168] Multi-state or out-of-state corporations are now given the opportunity to move directly into federal court through diversity jurisdiction in order to avoid a possibly prejudicial state forum.[169] An out-of-state corporation may wish to avoid a state court forum in order to avoid local biases and local favoritism towards local corporations. Additionally, a foreign corporation challenging a state tax law may feel as though a state court would not be as quick to strike down the state tax law as would a federal court.[170]

As a result of the majority's decision in *Winn*, an out-of-state corporation that is troubled by the tax breaks afforded to local corporations, whether it be in the form of a tax credit, deduction, or exemption, is now able to challenge the State tax law in federal court, despite the fact that the State may have a legitimate interest in promoting the welfare of its local corporations.[171] According to *Winn*, as long as the foreign corporation's challenge would not have the effect of *decreasing* state revenues, the TIA will not act as a bar to the challenge, and the States will no longer be guaranteed the ability to afford benefits to their local corporations and businesses, which is a serious infringement on principles of state sovereignty. This result is especially unfortunate in light of the fact that in discussing the legislative history of the TIA, Justice Ginsburg recognized that one of the twin objectives of the TIA was "to eliminate disparities between taxpayers who could seek injunctive relief in federal court—*usually out-of-state corporations asserting diversity jurisdiction*."[172] This

167 *Winn*, 124 S. Ct. at 2299 (Kennedy, J., dissenting).

168 *See Leading Case: F. Tax Injunction Act*, 118 HARV. L. REV. 486, 491 (2004); *see also* 72 AM. JUR. 2D *State and Local Taxation* § 986 (2005) ("The two purposes of the TIA are: (1) to eliminate discrimination between state citizens who are required to pursue relief regarding illegal tax assessments in state court and foreign corporations operating in the state which could sue under diversity jurisdiction of federal courts; and (2) to prevent such foreign corporations from paralyzing state fiscal operations with dilatory and expensive legal actions in federal court.") (footnote omitted).

169 *See* 28 U.S.C. § 1332 (2003).

170 *See High Court's Decision Means New Alternative for Corporations*, STATE INCOME TAX ALERT (CCH, Chicago, Ill.), July 15, 2004, at 2-3.

171 *See id*.

172 *Winn*, 124 S. Ct. at 2287 (majority opinion) (emphasis added).

demonstrates that the Court was at the very least reckless in failing to account for the fact that foreign corporations are now able, as a result of *Winn*, to side-step state courts and to instead enjoy a more favorable federal forum.

2. The Majority Treats State Court Judges as Inferior Constitutional Arbiters

As noted by Justice Kennedy in his dissenting opinion, the *Winn* majority's decision seems to rest on a presumption that state courts are incapable of properly adjudicating federal constitutional issues, and that these issues are better left to the federal courts.[173] In the majority opinion, Justice Ginsburg noted that when some of the states were using state tax credits as a means of circumventing *Brown v. Board of Education*,[174] it was "[t]he federal courts, [the Supreme] Court among them, [that] adjudicated the ensuing challenges . . . and upheld the Constitution's equal protection requirement."[175] This presumptuous treatment of state courts is unfounded and dangerous to the fundamental principles of federalism on which our Constitution is based.[176]

Treating state courts as "second rate constitutional arbiters," according to Justice Kennedy, is completely unjustified in light of the fact that the TIA itself has a "federal safeguard:" the TIA allows for federal courts to take jurisdiction when the State court is unable "to provide 'a plain, speedy, and efficient remedy.'"[177] Furthermore, a litigant in a State court always has resort to the ultimate federal forum for review of the State court decision: the United States Supreme Court.[178] Apparent from the majority's decision is the majority's fear that state courts are unable to correct violations of the federal Constitution, and that these violations can only be corrected when reviewed by a federal court. This fear, however, is unfounded and completely ignores constitutional jurisprudence established by Court precedent. Prior Court decisions have clearly established that state courts are not to be treated as inferior interpreters of the Constitution, and in the case a State court incorrectly interprets federal law, the Court is always available to correct any misinterpretations of

173 *Id.* at 2293 (Kennedy, J., dissenting).

174 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

175 *Winn*, 124 S. Ct. at 2281 (majority opinion).

176 *See* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 275 (1997) ("A doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism.").

177 *Winn*, 124 S. Ct. at 2293 (Kennedy, J., dissenting).

178 *Id.* at 2297; *see also* Winn v. Killian, 321 F.3d 911, 914 (9th Cir. 2003) (arguing that "[s]tate judges take the same oath to uphold the federal Constitution that [federal judges] do, and like [federal judges] are subject to federal Supreme Court review").

the federal law.[179] Furthermore, by treating state courts as inferior constitutional interpreters, the majority has effectively disregarded Congress' determination that federal courts are not the only available forums in which a litigant may present constitutional issues.[180] The majority therefore erred in assuming that state courts are inadequate interpreters of the federal Constitution in relation to their federal court counterparts, since the majority ignored the fact that the state court litigant always has resort to the Court to review the State court decision.

Finally, by treating state courts as inferior constitutional interpreters, the *Winn* majority ignored the fact that state court judges are required by the federal Constitution to uphold federal law. In Arizona, State judges are required to take an oath before assuming office that requires them to "support the Constitution of the United States."[181] The Court itself has previously held that state courts are obliged to uphold the federal Constitution, and that state judges are entirely competent to adjudicate constitutional issues.[182] When coupled with the fact that the *Winn* majority disregarded the availability of the Court as a federal forum for a state court litigant, the fact that the majority pays no credence to the constitutional requirement that state judges uphold the Constitution in performing their duties leaves us with the "unfortunate result [that state courts are deprived] of

179 *See* Marbury v. Madison, 5 U.S. 137, 178 (1803) (establishing the authority for the judiciary to review the constitutionality of executive and legislative acts); Martin v. Hunter's Lessee, 14 U.S. 304, 342 (1816) (holding that the Constitution presumes that the Supreme Court has the authority to review state court decisions in order to ensure uniformity in the interpretation of federal laws); Cohens v. Virginia, 19 U.S. 264, 414 (1821) (holding that criminal defendants could seek Supreme Court review of their State court conviction when they claimed that their conviction violated the Constitution); Cooper v. Aaron, 358 U.S. 1, 18-19 (1958) (holding that the Supreme Court has the authority to review state actions).

180 *See* California v. Grace Brethren Church, 457 U.S. 393, 416-17 (1982) ("Carving out a special exception for taxpayers raising First Amendment claims would undermine significantly Congress' primary purpose to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes.") (internal quotations omitted); Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503, 515 n.19 (1981) ("The [TIA] embodied Congress' decision to transfer jurisdiction over a class of substantive federal claims from the federal district courts to the state courts, as long as state-court procedures were 'plain, speedy and efficient' and final review of the substantive federal claim could be obtained in [the] Court.").

181 A.Z. CONST. art. 6, § 26 provides the following in regards to the oath an Arizona State judge must take prior to assuming office: "Each justice, judge and justice of the peace shall . . . take and subscribe an oath that he will *support the Constitution of the United States* and the Constitution of the State of Arizona, and that he will faithfully and impartially discharge the duties of his office to the best of his ability." (emphasis added).

182 *See, e.g.,* Alden v. Maine, 527 U.S. 706, 755 (1999) ("The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. [The Court is] unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States.").

the first opportunity to hear [state tax] cases and to grant the relief the Constitution requires."[183]

3. Principles of Comity Preclude Federal Interference with State Tax Systems

Although the *Winn* majority found it proper to look past the seemingly clear and unambiguous statutory language of the TIA in holding that the TIA does not apply to a federal challenge to a state tax credit, federal courts are still bound by the comity doctrine,[184] which requires federal courts to defer to state courts when a fundamental state interest is being challenged.[185] As noted by Justice Kennedy in his dissenting opinion, a federal court order affecting a state tax credit in any manner "will thwart and replace the State's chosen tax policy," which is precisely what the judicial principle of comity is meant to prohibit.[186]

A federal court order declaring the Arizona STO tax credit unconstitutional and therefore invalid is inherently disruptive to a State's tax system, since it will prevent the State from making a final determination of its taxpayer's tax bills.[187] Arizona's decision to offer the A.R.S. § 1089 tax credit to its taxpayers is purely an Arizona State interest, and as such, it should be afforded the respect and deference mandated by the judicial comity doctrine, since "[i]t is a troubling proposition for [the] Court to proceed on the assumption that the State's interest in limiting the tax burden on its citizens to that for which its law provides is a secondary policy, deserving of little respect from [the Court]."[188] In *California v. Grace Brethren Church*, the Court noted that states have a legitimate interest in administering their respective tax systems, and "if federal declaratory relief were available to test state tax assessments,

183 Hibbs v. Winn, 124 S. Ct. 2276, 2301 (2004) (Kennedy, J., dissenting).

184 *See* BLACK'S LAW DICTIONARY 110 (2d pocket ed., West 2001) (defining "comity" as "[c]ourtesy among political entities (as nations, states, *or courts of different jurisdictions*), involving esp. *mutual recognition of legislative*, executive, and *judicial acts*"; and defining "judicial comity" as "[t]he respect a court of one state or jurisdiction shows to another state or jurisdiction *in giving effect to the other's laws and judicial decisions*") (emphasis added).

185 *See Leading Case: F. Tax Injunction Act*, *supra* note 168, at 495, 496 n.80 (discussing how the principle of comity stems from the abstention doctrine found in *Younger v. Harris*, 401 U.S. 37 (1971), which prevents federal courts from interfering with a state case in which there exists an adequate state court remedy, and when it would be proper to abstain from taking jurisdiction when a respect for state functions demands it).

186 *Winn*, 124 S. Ct. at 2300 (Kennedy, J., dissenting); *see also* Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503, 522 (1981) (noting that the principal purpose of the TIA is "to limit drastically federal court jurisdiction to interfere with so important a local concern as the collection of taxes").

187 Brief for Petitioners, *supra* note 18, at 28.

188 *Winn*, 124 S. Ct. at 2300.

state tax administration might be thrown into disarray."[189]

Furthermore, the TIA is meant to ensure that state courts are granted the exclusive authority to interpret state law, and in turn, to ensure that the State is accountable to its citizens for its policies and decisions.[190] A federal court order either invalidating or upholding a state tax law has the unfortunate effect of a lack of political accountability—distraught citizens are unable to hold state officials accountable because the challenge was adjudicated in federal court, and federal judges are appointed officials who are not subject to the political election process as are state judges. As previously noted by the Court, even if a state tax law has federal constitutional implications, as does the Arizona STO tax credit, "federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts."[191] In the distinct interest of maintaining longstanding principles of judicial comity among the federal and state courts, the *Winn* Court erred in allowing the challenge to the Arizona STO tax credit to proceed in federal court, since principles of comity demand federal courts to refrain from interfering in so delicate and vital an interest as a State's tax system. As noted by Justice Kennedy, "the majority's ruling has implications far beyond this case and will most certainly result in federal courts in other States and in other cases being required to interpret state tax law in order to complete their review of challenges to state tax statutes."[192]

IV. CONCLUSION

Whether the *Winn* Court has opened Pandora's Box in terms of federal court intrusion into state tax systems has yet to be determined, and the true ramifications of the Court's decision are speculative at the present moment. However, what remains true and apparent is that the *Winn* majority disregarded the plain language of a seemingly clear, concise, and unambiguous federal statute and stretched the congressional intent of the TIA to illogical levels. By accepting the Ninth Circuit's definition of "assessment," the Court has essentially approved of federal courts that pick and choose among relevant definitions of a statutory term in order to use those definitions necessary to

189 California v. Grace Brethren Church, 457 U.S. 393, 410 (1982) (quoting Perez v. Ledesma, 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part)).

190 *Winn*, 124 S. Ct. at 2299 (Kennedy, J., dissenting).

191 *Grace Brethren Church*, 457 U.S. at 410 (quoting *Perez*, 401 U.S. at 128 n.17 (Brennan, J., concurring in part and dissenting in part)).

192 *Winn*, 124 S. Ct. at 2300 (Kennedy, J., dissenting).

achieve a desired statutory interpretation.

The *Winn* decision has struck a vital blow to the principles of federalism on which our constitutional jurisprudence and maintenance of state sovereignty are based since federal courts are now granted jurisdiction in a realm previously off-limits to these courts: state tax systems. State court judges, in the eyes of the *Winn* Court, are merely second-rate constitutional interpreters who are not as fit for interpreting delicate constitutional issues as are their federal court counterparts. This result is especially troubling in light of the fact that state courts are traditionally known as courts of general jurisdiction, fully competent to litigate any constitutional issue so long as the issue does not fall under the exclusive jurisdiction of the federal courts.

As a result of *Winn*, with some clever pleading, a taxpayer or taxpaying entity seeking to challenge a State tax law is able to sidestep the State court for the more favorable federal forum, so long as the challenge does not inhibit the State's ability to *collect* revenue. As this Note has attempted to demonstrate, Congress was not exclusively concerned with protecting a State's ability to collect revenue in enacting the TIA, but instead intended to exclude federal courts from interfering with the State's *entire* tax system in any way so long as the State court provides an adequate remedy to the litigant. The *Winn* Court failed to acknowledge the clear intent of Congress in enacting the TIA, thus opening the door for federal court intervention in a traditionally restricted state area.

Hopefully, in light of this troubling decision, Congress, or the Court itself, will act quickly to remedy this wrong in order to maintain fundamental principles of federalism and state sovereignty in the administration of state tax systems. The integrity of our federal judicial system and the maintenance of our States as sovereign entities demand no less.