Comity Stalls Challenge to New York City Parking Tax Exemption

by Hollis L. Hyans and Amy F. Nogid

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Late in 2011 the Second Circuit Court of Appeals dismissed a complaint in which various parties challenged as unconstitutional an exemption from the New York sales tax on parking services. In *Joseph v. Hyman*,[1] the appeals court relied on the doctrine of comity to narrow even further a taxpayer's ability to bring a constitutional challenge to a tax in federal court.

In New York City, New York state law provides for the imposition of a 10.375 percent sales tax on parking services (composed of a 4 percent state tax, a 6 percent city tax, and a 0.375 percent Metropolitan Commuter Transportation District tax), and authorizes the city as a city "of one million or more" to impose a "Manhattan surcharge," an additional 8 percent sales tax if the parking services are rendered in Manhattan.[2] The law also includes an exemption from the 8 percent Manhattan surcharge for some residents who purchase long-term parking (the residential exemption).[3] Therefore, in Manhattan the total parking tax for those not entitled to the residential exemption amounts to 18.375 percent.

In *Joseph*, a civil rights class action suit commenced in August 2009, the plaintiffs were primarily commuters who parked their cars in the city,[4] and they asserted that the residential exemption was discriminatory and violated the commerce, equal protection, and privilege and immunities clauses of the U.S. Constitution, and article 1, section 11 of the New York State Constitution. Estimates of the revenue effect of the exemption varied from $3 million to $22 million annually. Also, the plaintiffs cited *Lunding v. New York Tax Appeals Tribunal*[5] and *City of New York v. State*[6] to support their position that the various state and city defendants "violated clearly established constitutional law" and "failed to act in an objectively reasonable

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[1]659 F.3d 215 (2d Cir. Oct. 2011). For the decision, see *Doc 2011-21514* or *2011 STT 198-14*.

[2]The city requires enabling legislation from the state to impose taxes. The enabling legislation is in N.Y. Tax Law sections 1210 for a 6 percent sales tax and 1212-A(a)(1) for the 8 percent surtax for parking services rendered in Manhattan. Under those enabling provisions, the city's tax on parking services is imposed by N.Y.C. Admin. Code sections 11-2001(a) (6 percent sales tax) and 11-2049 (8 percent surtax). Also, N.Y. Tax Law section 1105(c)(6) imposes a 4 percent state sales tax and N.Y. Tax Law section 1109 imposes a 0.375 percent sales tax if the transaction occurs within the Metropolitan Commuter Transportation District (the city and Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk, and Westchester counties as provided by N.Y. Public Authorities Law section 1262).

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[3]The exemption is limited to those whose primary residence is in Manhattan and only for one noncommercial vehicle registered or leased to an individual residing at that primary address.

[4]The plaintiffs included three New Jersey residents and a Nassau County resident who paid the tax, a limited liability company that reimbursed the tax paid by one of the New Jersey residents, and a Queens resident who was "denied the benefits of revenues unlawfully forgone by the administration of" the exemption. Amended Complaint at paras. 6-11.

[5]522 U.S. 287 (1998). *Lunding* held that the denial to nonresidents of the right to deduct alimony payments when residents could do so was discriminatory and unconstitutional.

[6]94 N.Y.2d 577 (2000). This case struck down the New York City nonresident earnings tax, also known as the commuter tax, which applied to those who worked in New York City but lived outside the city, when an amendment was made to exempt state residents from the tax, that is, so that it would apply only to out-of-state residents.

manner" and that the state and city defendants were therefore not entitled to qualified immunity. The plaintiffs argued that because the defendants were various state and city government officials and were acting under color of state law, the defendants' actions violated 42 U.S.C. section 1983 (section 1983),[7] and accordingly, the plaintiffs were entitled to attorney fees under 42 U.S.C. section 1988.

Two significant potential barriers to the plaintiffs' position were the Tax Injunction Act (TIA), 28 U.S.C. section 1341, and the comity doctrine. The TIA bars federal courts from taking any action to "enjoin, suspend or restrain the assessment" of a state tax "when a plain, speedy and efficient remedy" is available in state court. Comity, which comes from the Latin "comitas," meaning friendly,[8] stands for the proposition that courts of one jurisdiction may accede or give effect to the decisions of another jurisdiction. Also, abstention doctrines and federal statutes — of which there are many — require federal courts to refrain from involvement in some matters, and to allow those matters to be resolved by state courts. For example, Congress enacted the TIA in 1937 because of concerns that federal courts were interfering in the collection of state taxes, and the enactment was grounded in principles of federalism. Other enactments include the Anti-Injunction Act[9] and the Federal Tax Injunction Act.[10] Abstention doctrines, which are generally known by the name of the case from which they hail, include the *Pullman*,[11] *Younger*,[12] *Burford*,[13] *Colorado River*,[14] and *Rooker-Feldman*[15] abstention doctrines.

At the time of the briefing to the district court in *Joseph v. Hyman*, two U.S. Supreme Court cases, *Fair Assessment in Real Estate Association, Inc. v. McNary*[16] and *Hibbs v. Winn*,[17] set the framework for determining whether the federal TIA or principles of comity would bar federal court review of a constitutional challenge to a state tax.

In *Fair Assessment*, the U.S. Supreme Court held that comity barred a suit brought in federal court to review a local property tax assessment, even though the action was brought under section 1983, alleging that the taxpayers were deprived of equal protection and due process of law because of unequal taxation of real property. Since section 1983 authorizes federal courts to hear cases challenging the constitutionality of state laws, the Court needed to reconcile that federal law with (1) the TIA, which barred federal court access regarding injunctive relief; (2) the prohibition, based on comity principles, against issuing declaratory judgments in state tax challenges;[18] and (3) the notion that comity does not

[7]42 U.S.C. section 1983, Civil Action for Deprivation of Rights, provides in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Section 1983, which originated from section 1 of the Civil Rights Act of 1871, also known as the Ku Klux Klan Act (17 Stat. 13), was intended to protect recently freed slaves living in the South from a breakdown of law and order in the Southern states and provide a civil remedy to address the abuses. Section 1983 was not originally envisioned as a means to address abuses by state officials until *Monroe v. Pape*, 365 U.S. 167, 173-175 (1961), wherein the Court said, based on the debates during the passage of the act, that the "three main aims" of the act were to: "override certain kinds of state laws," provide a "remedy where state law was inadequate," and provide "a federal remedy [which] though adequate in theory, was not available in practice." In *Monroe*, the Court held that actions of state officials, even if contrary to state law, were still actions taken "under color of state law" and that the act was intended to provide a supplemental remedy, so that an injured individual had a separate state right did not foreclose resort to section 1983.

[8]*American College Heritage Dictionary* (3d ed. Houghton Mifflin 1997).

[9]28 U.S.C. section 2283 (enacted by Act of Mar. 2, 1793, ch. 22 section 5, 1 Stat. 335): "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

[10]26 U.S.C. section 7421(a): "Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), and 7426(a) and (b)(1), 7429(b), and 7436 . . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

[11]*Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941) (federal courts should "exercise [their] wise discretion by staying their hands" if a state law is ambiguous and has not yet been interpreted by state courts).

[12]*Younger v. Harris*, 401 U.S. 37 (1971) (in the absence of special circumstances, such as prosecutorial bad faith or deliberate unconstitutional construction, a criminal defendant cannot enjoin a pending state prosecution).

[13]*Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (federal courts should abstain from involvement in questions of state policy).

[14]*Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (a federal court may abstain only under exceptional circumstances).

[15]*Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) (lower federal courts are barred from exercising appellate jurisdiction over state court judgments).

[16]454 U.S. 100 (1981).

[17]542 U.S. 88 (2004).

[18]*Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943).

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apply if a section 1983 violation is alleged.[19] The Court held that comity precluded the commencement in federal court of section 1983 cases challenging state tax systems, as long as the state court remedies were "plain, adequate and complete."

However, in *Hibbs*, in a decision by Justice Ruth Bader Ginsburg, the U.S. Supreme Court held that neither the TIA nor principles of comity barred a suit challenging a state tax credit under the establishment clause on the basis that the credit improperly channeled public funds to pay for parochial schools, because the relief sought did not implicate enjoining the collection of a tax or contesting the validity of a tax imposition, but rather only challenged a credit, and the success of the plaintiff's action would result in greater, rather than diminished, state tax collections. In *Hibbs*, the Court said in footnote 9 that it "relied upon 'principles of comity' to preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection." Relying on that footnote, the First, Sixth, Seventh, and Ninth circuits applied narrow views of the comity doctrine and a broad view of the route left open in *Hibbs*, and allowed some actions to proceed in federal court.[20] The decision in *Hibbs* was regarded as an opening of the door to federal courts when challenging certain state tax provisions.

However, on November 2, 2009, the U.S. Supreme Court agreed to hear the Sixth Circuit case, *Levin v. Commerce Energy, Inc.*,[21] and on June 4, 2010, the Court, in another opinion by Justice Ginsburg, reversed the Sixth Circuit, held that the comity doctrine was "more embracive" than the TIA, and barred a challenge in federal court to Ohio's taxation of gas marketers, which was alleged to be discriminatory.[22] The Court in *Levin* found the "comity calculus" presented in that case to be different from that presented in *Hibbs*, since the economic legislation implicated in *Levin* "does not involve any fundamental right or classification that attracts heightened judicial scrutiny or impinge on fundamental rights," the litigation was intended to "improve [plaintiffs'] competitive position," and the state courts are better positioned to address "state legislative preferences" and could draft remedial options that would affect tax collection and would therefore be unavailable to federal courts.

Oral argument in *Joseph* was held on July 23, 2010, and the district court judge asked right off the bat why *Levin* was not a "game-changer."[23] Judge Richard J. Sullivan said, "I think that you may have some interesting arguments and creative arguments . . . I just think that after *Levin*, you probably should be across the street."[24] In response to the city's argument that *Levin* established that the comity principle applied to plain vanilla or "run-of-the-mine" tax cases, Judge Sullivan noted that "one man's vanilla is another man's tutti-frutti" and recognized that "it's sometimes hard to be able to know, when you're in the trenches, what is a run-of-the-mine tax case."[25] In an attempt to come within *Hibbs*, the plaintiffs in *Joseph* argued that because they were seeking to "enhance rather than deplete state coffers,"[26] the TIA did not prohibit federal court review. The district court recognized that the plaintiffs were attempting to "slip the restraints" of the TIA, but dismissed the case under the comity doctrine, finding that no fundamental right is implicated in the parking tax exemption, that plaintiffs were not third-party challengers of the tax but were "objecting to their own tax burden, however indirectly," and that the state court is "better suited than this Court to identify and implement the remedial option that best comports with the legislative evil."[27] The court also noted that the plaintiffs had not alleged that the state remedies were insufficient.

> ***As recognized by* Joseph*, after* Levin*, the bar to gain entry to the federal court system has been raised.***

In affirming the district court's decision, the Second Circuit added little to the analysis, but did address the plaintiffs' assertion that New York courts could not fashion remedies different from those available to district courts, concluding that state courts could, if necessary, prevent enforcement of discriminatory tax provisions, even if the result was a decrease in state tax revenue. The case was dismissed without prejudice, and resort to the state courts remains available to challenge the exemption.

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[19]*Monroe v. Pape*, 365 U.S. 167 (1961).

[20]*Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3 (1st Cir. 2009); *Levin v. Commerce Energy, Inc.*, 554 F.3d 1094 (6th Cir. 2009), *rev'd* __ U.S. __, 130 S. Ct. 2323 (2010); *Levy v. Pappas*, 510 F.3d 755 (7th Cir. 2007); *Wilbur v. Locke*, 423 F.3d 1101 (9th Cir. 2005).

[21]*Levin v. Commerce Energy, Inc.*, __ U.S. __, 130 S. Ct. 2323 (2010).

[22]__ U.S. __, 130 S. Ct. 2323 (2010).

[23]Transcript at 3, *Joseph v. Hyman*, No. 09-CV-07555(RJS) (July 23, 2010).

[24]*Id.* at 5.

[25]*Id.* at 14.

[26]Plaintiffs' memorandum of law in opposition to defendants' motions to dismiss the first amended complaint, at 1 (S.D.N.Y. Mar. 1, 2010).

[27]*Joseph v. Hyman*, No. 09-CV-07555(RJS), 2010 U.S. Dist. LEXIS 91580, at *5, *12, *14 (S.D.N.Y. Aug. 30, 2010).

Status of Comity After *Levin*

As recognized by *Joseph*, after *Levin* the bar to gain entry to the federal court system has been raised, and only those plaintiffs whose claims involve fundamental rights, or who can demonstrate that the state review system is inadequate, will pass the hurdle. Reliance on the notion that a credit or an exemption provision is implicated, rather than an assessment, or that a suit is commenced by a nontaxpayer, is unlikely to provide the entry ticket.

In some respects, raising the bar was appropriate. Litigants should not be able to cast about for plaintiffs to avoid the prohibition against directly enjoining the collection of tax, that is, by naming as plaintiff someone who is not actually a taxpayer, such as an employer who reimburses an employee for taxes paid. Likewise allowing a challenge to the grant of credits or exemptions of a particular tax, but not to tax assessments, may be too nuanced an approach to determine whether jurisdiction exists, particularly given the goal of the TIA and the comity doctrine, which is to keep most state tax challenges in state courts.

However, it remains true that litigating constitutional issues in state courts can be burdensome and unrewarding. *ANR Pipeline Co. v. Louisiana Tax Commission*[28] highlights the need for federal jurisdiction and shows how easy it may be for a state to establish that the state court process has met the "plain, speedy, and efficient" requirement, thereby thwarting taxpayers' resort to federal courts and any meaningful challenge to unconstitutional statutes. ANR Pipeline challenged as unconstitutional Louisiana's taxation of interstate and intrastate natural gas pipelines at different assessment ratios. The Louisiana trial court had ruled that the tax ratio differential was unconstitutional on due process and equal protection grounds; it did not reach the commerce clause challenge.[29] However, the trial court also concluded that the fair market value would have to be redetermined, a process that would involve revaluations for each year and for each of the 52 parishes in which the pipeline was located. ANR Pipeline challenged the revaluation as violating its due process rights, but neither the Louisiana Court of Appeal, the Louisiana Supreme Court, nor the U.S. Supreme Court would hear the case, even though ANR Pipeline indicated to the U.S. Supreme Court that the review procedure could generate 1,500 new proceedings and that the company faced the possibility that instead of refunds it would receive assessments.[30] ANR Pipeline's fears proved correct. As a result of the revaluations, ANR Pipeline received assessments that more than eliminated the refunds to which it would have been entitled if the reduced valuation ratio had been applied to the fair market value originally reported — clearly a case of "no good deed goes unpunished." ANR Pipeline then sought review by the trial court, which enjoined the revaluation proceedings and ordered refunds, but the Louisiana Court of Appeal vacated the trial court order and directed that the revaluation proceeding continue. ANR Pipeline appealed the revaluations — resulting in additional assessments of $15.7 million — and the Louisiana Tax Commission granted ANR Pipeline relief. Twenty parishes appealed the tax commission ruling in their home districts[31] and ANR Pipeline sued in Louisiana's first, second, and third circuit courts of appeal.[32] The second and third circuit courts of appeal denied the writs (the action in the Third Circuit Court of Appeal is still pending), allowing the 20 separate actions to proceed.

ANR Pipeline then sought the aid of the federal district court, requesting injunctive relief and damages under section 1983. ANR Pipeline stressed that instead of refunds for its constitutional injuries, it received an additional $15.7 million in assessments, and that there had been a "perversion and abuse" of the revaluation process. The federal district court referred to the *Rooker-Feldman* abstention doctrine, which prohibits lower federal court review of state decisions, and said that the doctrine would not apply if an independent claim were presented, even if a ruling on the independent claim would be contrary to the state court decision. Because the trial court never decided the commerce clause question that ANR Pipeline had raised, that issue could be viewed as an exception to the *Rooker-Feldman* abstention doctrine. However, the federal district court ruled that the section 1983 claim grounded in the commerce clause was time barred, and further held that the TIA, the Anti-Injunction Act, and the comity doctrine precluded its exercise of jurisdiction. The court noted that ANR Pipeline had available a plain, speedy, and efficient remedy in the state courts, even if federal courts would have provided a "better" remedy.[33] Regarding ANR Pipeline's post-judgment

[28]646 F.3d 940 (5th Cir. 2011).

[29]*ANR Pipeline Co. v. Louisiana Tax Comm'n*, 774 So.2d 1261 (La. App. 1 Cir. 2000), *appeal after remand at*, *remanded by* 815 So.2d 81 (La. App. 1 Cir. 2002), *aff'd by*, *remanded by*, 851 So.2d 1145 (La. 2003), *decision reached on appeal*, 923 So.2d 81 (La. App. 1 Cir. 2005), *writ denied*, 925 So.2d 547 (La. 2006), *cert. denied*, 549 U.S. 822 (2006), *writ denied*, 957 So.2d 160 (La. 2007), *remanded by*, 997 So.2d 92 (La. App. 1 Cir. 2008), *related proceeding*, 2011 U.S. Dist. Ct. LEXIS 5976 (E.D. La. Jan. 18, 2011), *aff'd*, 646 F.3d 940 (5th Cir. 2011).

[30]2011 U.S. Dist. LEXIS 5976, *17.

[31]Louisiana has 40 judicial districts, each composed of at least one parish and served by at least one district judge; *see* http://louisiana.gov/Government/Judicial_Branch/.

[32]There now are five courts of appeal in Louisiana. *Id.*

[33]2011 U.S. Dist. LEXIS 5976, *49.

claims of due process violations and to the conclusion that such action violated the TIA, the Anti-Injunction Act, and the principles of comity, the court found that ANR Pipeline had failed to allege that the defendants acted under a policy or custom, a necessary element to establish a section 1983 due process claim, and it dismissed that claim as well. The Fifth Circuit affirmed the Louisiana federal district court decision, thus allowing Louisiana's onerous property tax review procedures to continue, even though the revaluations appeared to have been applied in a retaliatory manner, and even though ANR Pipeline would have to defend 20 home-parish review proceedings, finding that this was somehow an "adequate scheme" of state review.[34] Years after the initial decision, the issues remain unresolved.

The U.S. Supreme Court's extraordinarily limited docket may be insufficient to provide taxpayers with protection from state tax actions that transcend constitutional boundaries.

The perception that state courts may be more overly protective of state fiscs than federal courts — regardless of whether that is borne out by empirical evidence — is one that hails from the early days of this country and is one held by many taxpayers. As recognized by Chief Justice John Marshall in an 1809 decision of the U.S. Supreme Court: "the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehension of suitors, that it has established national tribunals."[35] Justice Joseph Story confirmed just a few years later that "the constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice."[36] Not much has changed in nearly 200 years. The notion of state court protectionism was recently acknowledged by the Iowa Supreme Court in its decision in *KFC Corp. v. Iowa Dep't of Revenue*,[37] in which the court observed that "it might be argued that state supreme courts are inherently more sympathetic to robust taxing powers of states than is the United States Supreme Court." It is not uncommon for state counsel to meld the legally irrelevant financial implications of a taxpayer-favorable opinion into briefing and argument, further supporting the perception. States also may harbor fears that they might not fare as well under federal court scrutiny; it is telling that 44 states and the District of Columbia supported Ohio as amici before the U.S. Supreme Court in *Levin*.[38] Another concern is the U.S. Supreme Court's extraordinarily limited docket, which may be insufficient to provide taxpayers with protection from state tax actions that transcend constitutional boundaries. Generally, the Court grants fewer than 100 cases per term; less than 1 percent of the cases in which petitions are filed.[39]

Federal Court Review Not Entirely Foreclosed

Although resort to federal court may be more restrictive after *Levin*, as confirmed by some recent decisions, opportunities remain for federal court review. For example, in *Amazon.com LLC v. Lay*,[40] the federal district court retained jurisdiction and held that the North Carolina Department of Revenue's request for purchaser-specific detailed information, made in connection with its audit of Amazon, violated the First Amendment and the Video Privacy Protection Act. The federal district court distinguished *Levin*, and observed that Amazon's request was not a broad request to enjoin the collection of tax or argue that the state's tax scheme was invalid. Interestingly, the court also found that the North Carolina procedure governing subpoenas was "not plain," stressing that the Department of Revenue could not point to any set of procedural rules to govern tax subpoena disputes.[41] The court was, however, concerned with principles of comity and promised to "fashion the most appropriately narrow relief possible."[42] Likewise, challenges to recently enacted revisions to New Jersey's abandoned property law — not a tax law — were allowed to proceed in federal court over New Jersey's assertion that the *Burford* abstention doctrine, which provides that

[34]646 F.3d at 947 (citations omitted).

[35]*Bank of the United States v. Deveaux*, 9 U.S. 61, 87 (1809).

[36]*Martin v. Hunter's*, 14 U.S. 304, 347 (1816).

[37]792 N.W.2d 308, 322 (Iowa 2010), *cert. denied*, __ U.S. __ (2011), 2011 U.S. LEXIS 6624 (Oct. 3, 2011).

[38]Amicus brief filed by states in *Levin v. Commerce Energy, Inc.*, 2009 U.S. Briefs 223 (2009).

[39]The rate for granting certiorari is, however, greater for paid cases than cases filed by indigents (those who file *in forma pauperis* cases). During the Court's October 2010 term, 90 petitions for certiorari were granted (76 in paid cases and 14 in *in forma pauperis* cases). Of the 9,066 cases disposed of during the 2010 term, 0.99 percent of petitions were granted overall; 4.01 percent of the paid cases had petitions granted. Oct. 2010, Journal of the Supreme Court of the U.S., *available at* http://www.supremecourt.gov/orders/journal/jnl10.pdf.

[40]*Amazon.com LLC v. Lay*, 758 F. Supp. 2d 1154 (W.D. Wa. 2010).

[41]*Id.*, 758 F. Supp. 3d at 1166.

[42]*Id.*

federal courts should refrain from exercising jurisdiction if state policy is implicated, would dictate dismissal.[43]

Another interesting twist to federal court jurisdiction in tax cases was raised in *Swift Frame v. City of San Diego*,[44] in which San Diego sought removal to federal court of the case commenced in a California court by a taxpayer seeking a tax refund, and the taxpayer — not San Diego — filed a motion for abstention. Once in federal court, San Diego moved to dismiss the case on the basis of the TIA and principles of comity. The city's motion was granted and the taxpayer's request to remand the case to state court was not addressed; if the case is not remanded, it is unclear whether the taxpayer's state court remedies would now be barred on statute of limitations grounds.

> ***An alternative federal judicial venue that can hear appeals from final decisions in state tax matters that the U.S. Supreme Court does not have the capacity to hear would provide a welcome safeguard.***

There is no question that taxes are vital to state governments' survival. There is also no question that sometimes tax systems and the actions of government officials violate federal constitutional protections. It is highly questionable whether, given the TIA and the principles of comity, there are adequate protections available to taxpayers. An alternative federal judicial venue that can hear appeals from final decisions in state tax matters that the U.S. Supreme Court does not have the capacity to hear would provide a welcome safeguard.[45] ☆

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[43]*Am. Express Travel Related Servs. Co. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556 (D.N.J. 2010), *aff'd*, 2012 U.S. App. LEXIS 130 (3d Cir. N.J. Jan. 5, 2012).

[44]No. 11cv461, 2011 U.S. Dist. LEXIS 106618 (S.D. Cal. Sept. 20, 2011).

[45]In connection with Congress's enactment of Public Law 86-272, which provided protections from net income tax impositions when the only in-state activity consists of solicitation of sales, Congress ordered the House Judiciary Committee and the Senate Finance Committee to study "all matters pertaining to the taxation of interstate commerce by the States, territories, and possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico, or any political or taxing subdivision of the foregoing." P.L. 86-272, Title II, 73 Stat. 555, 556 (1959). Responsibility for the study was assigned to an 11-person subcommittee headed by U.S. Rep. Edwin E. Willis, and the four-volume report issued as a result of the study is usually referred to as the Willis Committee Report. The report's transmittal letter stated: "This study represents a landmark in our constitutional history. For 175 years, the courts have had to shoulder the entire responsibility for balancing the conflicts between the tax policies of the States and the national policy of assuring the free flow of commerce." H.R. Rep. No. 88-1480, vol. 1, at III (1964). The Willis Committee found that the states' tax systems were "unreasonable because of the jurisdictional reach and fragmentation of liability resulting from the prevalence of market-oriented sales factors." H.R. Rep. No. 88-952, vol. 4, at 1157 (1965). In response to the Willis Committee Report, Congress proposed legislation, H.R. 11798, 89th Cong., 1st Sess. (1965), that included a physical nexus standard, a two-factor apportionment formula composed of property and payroll, full apportionment of all corporate income, and federal oversight over state corporate income taxation through the Treasury secretary. Title V of H.R. 11798 proposed the formation of an "Apportionment Board" within the Treasury Department to address interstate apportionment disputes arising from assessments; the taxpayer would not be a party in the disputes, but would be given notice and an opportunity to be heard. Appeals from the Apportionment Board would be taken to the U.S. Tax Court, and further judicial review would be available to the U.S. District Court of Appeals for the District of Columbia and a petition for certiorari could be filed in the U.S. Supreme Court.