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COMMENT

Limiting the Federal Forum: The Dangers of an Expansive Interpretation of the Tax Injunction Act

In *Henderson v. Stalder*,¹ the Court of Appeals for the Fifth Circuit held that the Tax Injunction Act (TIA) of 1937 prevents the federal courts from exercising jurisdiction over any case in which a victory for the plaintiff might reduce state revenues.² In reaching this result, the Fifth Circuit did more than diminish its own power: It gave state legislatures a potentially powerful tool to insulate their actions from constitutional review in the federal courts. The Fifth Circuit's holding is troubling because it threatens the ability of the federal courts to fulfill their historic role in safeguarding rights created under federal law.³

This Comment argues that *Henderson* was wrongly decided. By holding that the court lacked jurisdiction to hear the plaintiffs' claims, the Fifth Circuit needlessly limited the power of the federal courts vis-à-vis state legislatures and opened a door to state legislatures intentionally crafting legislation so that it will be immune from review in the federal courts. Part I describes the legislative program the plaintiffs challenged in *Henderson*. Part II argues that in reaching its decision, the Fifth Circuit not only critically misinterpreted existing Supreme Court precedent,⁴ but also gave the TIA a construction that is

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1. 407 F.3d 351 (5th Cir. 2005). Judge Edith H. Jones authored the opinion, and was joined on the panel by Judges E. Grady Jolly and Edward Charles Prado.
 2. *Id.* at 360; *see also* TIA, 28 U.S.C. § 1341 (2000).
 3. *Cf. Monroe v. Pape*, 365 U.S. 167, 180 (1961) ("It is abundantly clear that one reason [§ 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, . . . the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.").
 4. In 2004, the Supreme Court defined the appropriate scope of the TIA. *Hibbs v. Winn*, 542 U.S. 88 (2004). For additional discussion of *Hibbs*, and *Henderson's* interpretation of it, see *infra* Part II.

at odds with the enacting Congress's intent. Part III discusses the dangerous possibility that the Fifth Circuit's abdication of jurisdiction will spur states to structure legislative programs as "taxes" specifically to insulate them from constitutional review in the federal courts.

I. THE LOUISIANA PRESTIGE LICENSE PLATE PROGRAM

A 1999 Louisiana law authorized the Secretary of the state's Department of Public Corrections and Safety to create "a special prestige license plate" that would "bear the legend 'Choose Life.'"⁵ In addition to the regular motor vehicle license fee, each applicant for the plate was required to pay \$25, as well as a handling fee that would partially offset administrative costs.⁶ The legislation provided that these fees would be placed into a "Choose Life" fund. Qualifying organizations that provided adoption and pregnancy-counseling services could submit grant applications to receive a portion of the funds.⁷

Louisiana citizens and Planned Parenthood of America challenged the statute, alleging that it violated the First Amendment by not authorizing the creation of a pro-choice license plate. The district court held for the plaintiffs and enjoined production of the license plates.⁸ In the district court's view, the government's authorization of the special license plate had created a forum for speech, and its refusal to permit pro-choice license plates was impermissible viewpoint discrimination.⁹ On appeal, the Fifth Circuit overturned the district court's decision, but failed to reach the merits of the plaintiffs' constitutional claim. Instead, it concluded that the TIA, which bars federal courts from enjoining the collection of "any tax,"¹⁰ deprived the federal court of jurisdiction and prevented it from reaching the merits of the constitutional challenge.¹¹ The

5. LA. REV. STAT. ANN. § 47:463.61.A (Supp. 2005). The Secretary could only authorize the plate if at least one hundred people requested it. *Id.*

6. *Id.* § 47:463.61.C.

7. *Id.* § 47:463.61.F.

8. *Henderson v. Stalder*, 265 F. Supp. 2d 699 (E.D. La. 2003), *rev'd* 407 F.3d 351 (5th Cir. 2005).

9. *Id.* at 717-18.

10. TIA, 28 U.S.C. § 1341 (2000).

11. *Henderson v. Stalder*, 407 F.3d 351 (5th Cir. 2005). The Fifth Circuit had previously "remanded to the district court with instructions to dismiss the case for lack of standing unless the plaintiff Keeler [one of the individual plaintiffs] amends her petition within a reasonable time to challenge the state's overall policy and practice of issuing specialty license plates." *Henderson v. Stalder*, 57 F. App'x 213 (5th Cir. Jan. 9, 2003) (unpublished order) (*per curiam*). In response, Keeler amended her complaint, and the district court determined

Fifth Circuit defined the term “tax” broadly to include any “extraction of property from a private person by a sovereign for its use,”¹² and concluded that the license plate charges at issue fell within that definition. Thus, the court remanded the case to the district court with instructions to dismiss.¹³ Although the plaintiffs could bring their claims in state court, they would be foreclosed from renewing their claims in federal court unless the state court system failed to provide them with a forum in which they could raise their constitutional challenge.¹⁴ After the Fifth Circuit issued its opinion, the *Henderson* plaintiffs requested that the Fifth Circuit rehear the case en banc. As of September 2005, that petition is pending; the plaintiffs have not yet decided whether they would appeal an adverse decision to the Supreme Court.¹⁵

II. THE FIFTH CIRCUIT’S DECISION

In recognizing the TIA as a jurisdictional bar to hearing the plaintiffs’ claims in *Henderson*, the Fifth Circuit gave the statute a broad application that Congress did not intend and other federal courts have deemed inappropriate. Before Congress enacted the TIA, many states required taxpayers who believed

that she had met the Fifth Circuit’s requirements for standing. *Henderson*, 265 F. Supp. 2d at 710.

12. *Henderson*, 407 F.3d at 356. In addition, the court of appeals distinguished between taxes and fees on the basis of a number of different factors, holding that “the classic tax sustains the essential flow of revenue to the government,” is enacted by the legislature, and benefits the entire community. *Id.* In contrast, the district court had concluded that the payment that accompanied selection of the “Choose Life” plate was a “fee,” rather than a “tax,” primarily because individuals paid it voluntarily and the amount of the charge varied. *Henderson*, 265 F. Supp. 2d at 720 n.12. The district court stated that the defendants’ citation to a case applying the TIA “border[ed] on the absurd.” *Id.* The Supreme Court has emphasized factors considered by both courts. *See, e.g., Nat’l Cable Television Ass’n v. United States*, 415 U.S. 336, 340-41 (1974) (“Taxation is a legislative function, and Congress [may tax] . . . solely on ability to pay A fee, however, is incident to a voluntary act, *e. g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society.” (footnote omitted)).
13. *Henderson*, 407 F.3d at 360.
14. *See Smith v. Travis County Educ. Dist.*, 968 F.2d 453, 455-56 (5th Cir. 1992) (“[T]he Tax Injunction Act bars the district court from asserting jurisdiction unless the State fails to supply a plain, speedy and efficient remedy for the taxpayers’ claim. The inquiry into whether a plain, speedy and efficient remedy exists focuses on whether a state provides a procedural vehicle that affords taxpayers the opportunity to raise their federal constitutional claims.”).
15. *See Telephone Interview with Sanford Cohen, Deputy Dir., Domestic Legal Program, Ctr. for Reprod. Rights, in New York, N.Y. (Sept. 19, 2005).*

that a tax was invalid to pay the tax before they could challenge its validity in court.¹⁶ Out-of-state taxpayers, however, could bring diversity suits in federal court, and the federal courts could then enjoin the state from collecting the taxes while the federal lawsuit was pending.

To prevent this perceived unfairness,¹⁷ Congress enacted the TIA, which prohibits federal courts from “enjoin[ing], suspend[ing] or restrain[ing] 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.”¹⁸ According to a Senate report, the TIA was intended to serve two different, but related, purposes: (1) to “eliminate disparities” between out-of-state and in-state taxpayers, and (2) “to stop taxpayers, with the aid of a federal injunction, from withholding large sums, thereby disrupting state government finances.”¹⁹

Because the TIA was enacted in response to individuals who wanted to use the federal courts to delay the payment of their personal taxes, such as sales and property taxes, courts have long limited its applicability to that context.²⁰ In *Hibbs v. Winn*, the Supreme Court sanctioned this interpretation when it held that the TIA applies only “in cases Congress wrote the Act to address, *i.e.*, cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes.”²¹ *Hibbs* thus affirms a commonsense and longstanding

16. H.R. REP. NO. 75-1503, at 2 (1937), *cited in* *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 523 (1981).
17. *Rosewell*, 450 U.S. at 522 n.29 (suggesting that the TIA was enacted in large part to “prevent out-of-state corporations, through diversity suits, from delaying payment of state taxes during the pendency of federal litigation while in-state citizens would have to pay first and then litigate in state courts”).
18. 28 U.S.C. § 1341 (2000). Congress actually modeled the TIA after the Anti-Injunction Act (AIA), 26 U.S.C. § 7421(a) (2000), which prohibits “any court” from hearing a suit brought to “restrain[] the assessment or collection of any [federal] tax.” The Supreme Court has recognized that the AIA serves two purposes: “It responds to the Government’s need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference; and it require[s] that the legal right to the disputed sums be determined in a suit for refund.” *Hibbs v. Winn*, 542 U.S. 88, 103 (2004) (internal quotation marks omitted).
19. *Hibbs*, 542 U.S. at 104 (construing S. REP. NO. 75-1035, at 1 (1937)); *see also* S. REP. NO. 75-1035, at 1 (1937) (“It is the common practice for statutes of the various States to forbid actions in State courts to enjoin the collection of State and county taxes unless the tax law is invalid or the property is exempt from taxation, and these statutes generally provide that taxpayers may contest their taxes only in refund actions after payment under protest. This type of State legislation makes it possible for the States and their various agencies to survive while long-drawn-out tax litigation is in progress.”).
20. *Hibbs*, 542 U.S. at 105-06 (listing cases in which the TIA has been applied).
21. *Hibbs*, 542 U.S. at 107. In *Hibbs*, plaintiffs brought an Establishment Clause challenge to an Arizona law that authorized income tax credits for payments to organizations that award

exception to TIA preemption: The TIA does not preempt federal jurisdiction when the taxpayer is a third party who is not attempting to avoid payment of taxes.²²

The *Henderson* opinion is at odds with both congressional intent and Supreme Court precedent. Even if the fee associated with the Louisiana license plate program is a “tax,” the Fifth Circuit should have recognized that this challenge fell within the exception recognized in *Hibbs*.²³ The *Henderson* court, however, concluded that the *Hibbs* exception applied only to situations in which: “(1) a third party (not the taxpayer) files suit, and (2) the suit’s success will enrich, not deplete, the government entity’s coffers.”²⁴ But the court failed to recognize that although both factors were present in the *Hibbs* case, it was the first, and not the second, that was critical to the Supreme Court’s decision. In *Henderson*, the plaintiffs were not attempting to avoid or defer paying taxes, and the fees attached to the license plate program were not a critical part of the Louisiana tax system.²⁵ Given Congress’s intent in enacting the TIA, the fact that the plaintiffs’ successful pursuit of their claim would slightly reduce state revenue should not change the result.²⁶ By ruling that even a nominal decrease

educational scholarships and tuition grants to children attending private schools, including schools that provide religious instruction or give admissions preferences based on religion. *Id.* at 2281. The Court considered both the legislative history and the language of the TIA and determined that it should not apply to all cases in which a state tax was challenged.

22. *Id.* at 110 (“[N]umerous federal-court decisions—including decisions of this Court reviewing lower federal-court judgments—have reached the merits of third-party constitutional challenges to tax benefits without mentioning the TIA.”).
23. The Fifth Circuit recognized the potential applicability of that exception, but unnecessarily circumscribed its scope. *Henderson v. Stalder*, 407 F.3d 351, 359 (5th Cir. 2005) (“Even though the specialty plate charges may be considered taxes within the scope of TIA, the federal courts may entertain [the plaintiffs’] suit if it falls within the Supreme Court’s recent discussion of the TIA in *Hibbs*.”).
24. *Henderson*, 407 F.3d at 359. At least two other courts have followed the *Henderson* court’s lead. In a challenge to similar license plate programs in Oklahoma and Ohio, district courts held that the TIA deprived them of jurisdiction over the plaintiffs’ claims. See *NARAL Pro-Choice Ohio v. Taft*, No. 1:05 CV 1064, 2005 U.S. Dist. LEXIS 21394, at *20 (N.D. Ohio Sept. 27, 2005) (describing *Henderson* as “persuasive”); *Hill v. Kemp*, No. 4:04-cv-00028-CVE-PJC, slip op. at 4 n.3 (N.D. Okla. Aug. 16, 2005) (citing *Henderson* for the proposition that the *Hibbs* exception only applies when a third party files suit and the suit’s success will not diminish state revenue).
25. The *Hibbs* Court also noted that the TIA was designed “to stop taxpayers . . . from withholding large sums, thereby disrupting state government finances.” *Hibbs*, 542 U.S. at 104. If the Fifth Circuit wanted to base its holding on language from the *Hibbs* opinion, it could have easily quoted this language and required the state to show that ending the license plate program would “disrupt state government finances.”
26. It seems strange to condition the TIA’s applicability primarily on whether a successful suit would increase or decrease state tax revenues. Under the *Henderson* court’s view, a tax cut or

in state revenue requires federal preemption under the TIA, the Fifth Circuit expanded the breadth of TIA preemption beyond taxpayers attempting to avoid paying taxes to embrace plaintiffs' challenges to state programs that raise just a small amount of money.

III. THE DANGEROUS DOOR

By holding that federal courts cannot hear challenges to state programs that have the potential to raise revenue for the state, the Fifth Circuit provided state legislatures with a powerful tool to prevent individuals from challenging the constitutionality of state legislative programs in federal courts.²⁷ When a state in the Fifth Circuit wants to pass a law that it fears might be held unconstitutional,²⁸ or even one that it knows is unconstitutional,²⁹ all it need do is attach a "fee" whose proceeds "benefit[] the entire community."³⁰ Under

tax exemption, which would reduce state tax revenues, could be challenged and enjoined in federal court, despite the fact that the suit could interfere with the state's economic policies – the sort of disruption the TIA was designed to prevent.

27. At least one nonprofit organization has heralded the Fifth Circuit decision and called for other limitations on federal court jurisdiction over Establishment Clause cases. *See, e.g.,* America's Future, Court Monitor: Judge Jones Saves Life by Limiting Jurisdiction, <http://www.americasfuture.net/courtmonitor/2005/2005-5-29.html> (last visited Oct. 24, 2005) ("Judges should welcome similar proposed bans on their passing judgment on references to God and depictions of the Ten Commandments.").
28. The Louisiana program at issue in *Henderson* likely is unconstitutional. It is well established that government cannot engage in viewpoint discrimination. *See, e.g.,* *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) ("[G]overnment regulation may not favor one speaker over another."). But that is exactly what the Louisiana legislature did when it created a forum in which individuals could express pro-life views but not pro-choice ones. Indeed, not only had the district court determined that this program was unconstitutional, *Henderson v. Stalder*, 265 F. Supp. 2d 699 (E.D. La. 2003), but the Fourth Circuit had held previously that a similar South Carolina program violated the First Amendment. *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004). Although South Carolina also assessed a fee on those who wanted the special plates, *id.* at 788, the defendants in that case do not appear to have argued that TIA preemption applied.
29. Indeed, a state legislature may declare that the federal courts in its jurisdiction have failed to interpret state law correctly. *See, e.g.,* H.R. Con. Res. 39, Reg. Sess. (La. 2005) (disapproving of a federal district court decision holding that it was unconstitutional to open school board meetings with prayer). In this resolution, the Louisiana House of Representatives expressed its view about what the Framers intended the First Amendment to mean and invoked the 1983 Supreme Court decision *Marsh v. Chambers*, 463 U.S. 783 (1983), to support its view that the district court's decision was incorrect. Although in this case Louisiana expressed its disagreement with this declaration, the *Henderson* court's decision provides the Louisiana legislature, and other state legislatures, with a much more powerful tool to express their disagreement with the federal courts.
30. *Henderson v. Stalder*, 407 F.3d 351, 356 (5th Cir. 2005).

Henderson, that fee will be viewed as a “tax,” and its existence will preclude the federal courts from hearing the case.³¹ The possibilities are numerous. States could violate the Equal Protection Clause by requiring certain classes of individuals to pay taxes before receiving specific benefits from the state; states could subsidize or support a religious program that would violate the Establishment Clause, but require participants to pay a tax; and states could violate the Due Process Clause by requiring individuals to pay taxes to obtain an abortion or purchase contraceptives or exercise other fundamental rights.³² In all of these cases, Fifth Circuit plaintiffs could be denied access to federal courts. Although the TIA jurisdictional bar does not preclude litigants from bringing their constitutional claims, it does make it more difficult for them to do so. For litigants who initially bring their challenge in federal courts and subsequently confront the TIA bar, the costs (monetary and otherwise) of renewing their claims in state court after many years of litigation in the federal system may be prohibitive. But even if the litigants do bring their claims in state court, they are still denied the opportunity to have their federal claims heard in a federal forum,³³ and they may face more difficulty vindicating their constitutional rights for that reason.³⁴ If *Henderson* or a similar case reaches the

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31. While “what is a ‘tax’ for purposes of the TIA is a question of federal law on which a state’s legislative label has no bearing,” *id.* at 356, a state could easily structure a program so that it would be classified as a tax under the Fifth Circuit’s broad definition. *See supra* note 11.
 32. Although the Equal Protection Clause problem might be remedied by a suit seeking to impose the “tax” on everyone, and such a suit would not raise a TIA problem, *see Henderson*, 407 F.3d at 359, the more obvious litigation strategy would be to seek to eliminate the tax. The Establishment Clause and Due Process Clause problems could only be fixed by eliminating the program or tax, which would certainly raise a TIA issue.
 33. A belief that federal courts play a special role in protecting federal rights has been expressed by a number of judges and commentators. *See, e.g.*, *Heck v. Humphrey*, 512 U.S. 477, 500 (1994) (Souter, J., concurring) (suggesting that there must be some federal forum available in which individuals can sue state officials); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1110 (1977) (arguing that “institutional factors” continue to lead “lawyers and judges” to doubt the parity between the federal and state court systems in enforcing federal rights).
 34. While state judges generally act consistently with their obligation to uphold the Federal Constitution, *see* U.S. CONST. art. VI, cl. 2, state judges are subject to pressures that federal judges do not face because many state judges are elected to office and do not serve life terms. *See, e.g.*, Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 428 (1992) (concluding that state supreme court justices “who have views contrary to those of the voters and the court majority, and who face competitive electoral conditions will vote with the court majority instead of dissenting on politically volatile issues”); *see also* S. Christian Leadership Conference, *La. Chapter v. Supreme Court*, 61 F. Supp. 2d 499, 513 (E.D. La. 1999) (“[I]n Louisiana, where state judges are elected, one cannot claim complete surprise when political pressure somehow manifests itself within the judiciary.”). The pressures on state court judges to succumb to public opinion may be

Supreme Court, the Court should embrace the opportunity to clarify the appropriate scope of the TIA. Only by doing so can the Court ensure that the federal courts limit their application of the TIA to the class of cases it was intended to cover—those in which individuals or corporations contest their own tax bill. That application is broad enough to protect the states' ability to raise revenue, but narrow enough to preserve the federal courts' role in protecting federal rights.

BRIANNE J. GOROD

particularly great in cases involving politically volatile issues, which may be the same issues that would lead state legislatures to try to prevent federal court review.

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