No. 94-688

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NATIONAL PRIVATE TRUCK COUNCIL, INC., *et al.*,
Petitioners,
v.
OKLAHOMA TAX COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Oklahoma

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, JOINED BY THE MULTISTATE TAX COMMISSION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

RICHARD RUDA*
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

*Counsel of Record for the *Amici Curiae*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether 42 U.S.C. § 1983 provides a remedial scheme for state taxpayers.

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INTEREST OF THE *AMICI CURIAE*

Amici National Conference of State Legislatures, Council of State Governments, National Governors' Association, National Association of Counties, International City/County Management Association, National League of Cities, U.S. Conference of Mayors and National Institute of Municipal Law Officers are organizations

whose members include state, county, and municipal governments and officials throughout the United States; *amici* and their members have a compelling interest in legal issues that affect state and local governments. *Amicus* Multistate Tax Commission, the official administrative agency of the Multistate Tax Compact, is vitally interested in legal issues affecting the ability of its member States to devise effective and innovative tax policies in light of changing economic conditions.

The Court has long recognized "the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems." *Fair Assessment in Real Estate Ass'n, Inc. v. McNary,* 454 U.S. 100, 102 (1981). The issue in this case, whether the Civil Rights Act of 1871, 42 U.S.C. § 1983, provides a remedial scheme for state taxpayers, is of fundamental importance to *amici* and their members. Every State has created remedial schemes for its taxpayers which "are generally complex and necessarily designed to operate according to established rules." *Perez v. Ledesma,* 401 U.S. 82, 127 n.17 (1971) (Brennan, J., concurring in part and dissenting in part). The application of the Court's Section 1983 jurisprudence to state tax disputes would result in the preemption of many of these rules and lead to widespread disruption of state tax administration.

Because the Court's decision will have a substantial impact on the integrity of state tax administration, *amici* submit this brief to assist the Court in its resolution of the case.[1]

SUMMARY OF ARGUMENT

1. No function of government is more essential to sovereignty than the administration and collection of tax revenues. The Court has thus recognized "the important

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems." *Fair Assessment,* 454 U.S. at 102. The issue in this case—whether 42 U.S.C. § 1983 provides a remedial scheme for state taxation—likewise counsels for restraint.

The consequence of holding that Section 1983 provides a remedy for state taxation extends far beyond petitioners' assertion of their right to the "recovery of attorneys' fees under § 1988." Pet. 10. Section 1983 jurisprudence is ill-suited to taxpayer challenges; its imposition would mark an unparalleled degree of federal interference in state affairs. For example, many States require that a taxpayer exhaust administrative remedies before bringing a judicial challenge. The Court has held, however, that a Section 1983 claimant cannot be required to exhaust a State's administrative remedies. Many States impose statutes of limitation in taxpayer challenges which are substantially shorter than their limitation period applicable in personal injury actions. Yet the Court has held that it is the latter which provides the applicable limitation period in a Section 1983 action. Finally, while many States prohibit the awarding of injunctive relief in taxpayer challenges, Section 1983 authorizes a "suit in equity" and petitioners maintain that, under the statute, they are entitled to injunctive relief. *See* Pet. Br. 20 n.11. As the Court noted in *Fair Assessment*, the "very maintenance of [a Section 1983 taxpayer] suit itself would intrude on the enforcement of" state tax systems. 454 U.S. at 114.

The Forty-Second Congress, however, never intended for Section 1983 to provide a remedial scheme for state taxation, as an examination of the remedies sought by petitioners demonstrates. Petitioners acknowledge that Section 1983 does not provide for a refund suit against the State. *See Will v. Michigan Dept. of State Police,* 491 U.S. 58, 68-69 (1989). But at common law, it was the standard practice that taxpayers must seek relief for

unconstitutional taxation through their remedies at law, most commonly a suit in assumpsit which, despite the fictional pleading device of suing the collector, was recognized as being a *de facto* refund action against the sovereign. *See City of Philadelphia v. The Collector,* 72 U.S. (5 Wall.) 720, 731-33 (1866).

Petitioners ignore the historic reluctance of courts of equity to intervene in taxpayer disputes. But as the Court has recognized, shortly before Section 1983's enactment it had held as a matter of federal law that a court of equity lacked jurisdiction to enjoin an unconstitutional state tax where the taxpayer had an adequate remedy at law. *See Fair Assessment,* 454 U.S. at 102 (quoting *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871)). While *Dows* undoubtedly was required by principles of comity, its holding merely reflected the prevailing practice in the States and the Federal government of denying taxpayers equitable relief where an adequate remedy at law exists. In enacting Section 1983, the Forty-Second Congress did not intend to abrogate this venerable rule, which is founded on the recognition that the extraordinary remedy of an injunction "may derange the operations of government, and thereby cause serious detriment to the public." *Dows,* 78 U.S. (11 Wall.) at 110.

Moreover, if petitioners are correct that Section 1983 provides equitable remedies for state taxpayers, then the Forty-Second Congress rejected the universally available and less intrusive remedy of a refund action in favor of the disruptive and extraordinary remedy of an injunction. This conclusion makes no sense. A Congress, which included a Senate whose members were selected by their respective state legislatures, would not have imposed such a disruptive remedial scheme on the States. The Forty-Second Congress simply never intended that Section 1983 would provide a remedial scheme for state taxation.

2. Even if the Court concludes that Section 1983 provides a remedial scheme for state taxation, petitioners'

claim was never ripe for Section 1983 purposes. While a State can act through its legislature, executive or judiciary, *see Home Telephone & Telegraph Co. v. City of Los Angeles,* 227 U.S. 278, 289-90 (1913), the Court has nonetheless recognized that there are some constitutional rights which, by their very nature, are not violated unless and until the State's administrative and judicial processes fail to provide a claimant with adequate relief. *See, e.g., Williamson County Reg. Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 194-97 (1985). As a matter of federal constitutional law, claims alleging the deprivation of such rights are not ripe unless the claimant has utilized the procedure provided under state law for obtaining meaningful relief and the State has denied such relief. *Id.* at 195.

Claims alleging that a State has discriminated in taxation should be treated in the same manner. The Court has recognized that a State may cure asserted discriminatory tax treatment by granting refunds to those who paid at the higher tax rate, collecting additional taxes at a higher rate from those who were benefitted by a lower rate, or creating a scheme combining "partial refund[s]" and "partial retroactive assessments" to create a nondiscriminatory scheme. *McKesson v. Division of Alcoholic Beverages,* 496 U.S. 18, 39-41 (1990). This flexibility, which derives from the Eleventh Amendment's traditional concern for the protection of state treasuries, as well as the principles of comity and federalism embodied in the text and structure of the Constitution, requires that claims of discriminatory taxation cannot be deemed ripe for Section 1983 purposes unless a taxpayer has pursued the State's administrative and judicial remedies for curing discrimination and been denied constitutionally adequate relief.

State tax administration is a highly specialized and complex function. The Court has thus long held that a state taxpayer who does not exhaust the administrative

remedies provided under state law cannot bring a judicial challenge. *See, e.g., First Nat'l Bank v. Board of Comm'rs,* 264 U.S. 450, 455-56 (1924). State tax codes are frequently complex and may well be ambiguous. State courts share responsibility with state tax commissions for the administration and interpretation of state tax codes. "State courts are the principal expositors of state law. Almost every constitutional challenge . . . offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests." *Moore v. Sims,* 442 U.S. 415, 429-30 (1979). It is especially true in matters of state taxation that "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 state courts." *Fair Assessment,* 454 U.S. at 108 n.6. (citation omitted). Indeed, in many instances a claim may be resolved favorably to the taxpayer as a matter of either state statutory or constitutional law. Thus, in matters of taxation, a State's action is not final and a claim of unconstitutional discrimination is not ripe until the State's judicial process has rendered a final judgment upholding the tax.

ARGUMENT

I. CONGRESS DID NOT INTEND FOR SECTION 1983 TO PROVIDE A REMEDIAL SCHEME FOR STATE TAXPAYERS

This Court has long recognized that no function of government is more essential to sovereignty than the administration and collection of tax revenues. *Providence Bank v. Billings,* 29 U.S. (4 Pet.) 514, 561 (1830); *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 425 (1819). Federal interference with this function, whether by Congress or the courts, has grave potential to disrupt the operation of state governments. Indeed, shortly before the enactment of Section 1983, the Court noted that:

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.

Dows v. City of Chicago, 78 U.S. (11 Wall.) 108, 110 (1871). In a long line of cases the Court has recognized "the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems." *Fair Assessment,* 454 U.S at 102.[2]

The issue in this case—whether state taxpayers have a remedy under Section 1 of the Ku Klux Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983—likewise counsels for restraint. As the Court recently reaffirmed, "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft,* 501 U.S. 452, 461 (1991). So long as a State's remedial scheme for illegal taxation comports with the Due Process Clause of the Fourteenth Amendment, its design and operation involve some of the most fundamental decisions a State makes in the exercise of its sovereignty.

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[2] *See also United States v. California,* 113 S.Ct. 1784, 1787-92 (1993); *California v. Grace Brethren Church,* 457 U.S. 393, 407-17 (1982); *Rosewell v. LaSalle Nat'l Bank,* 450 U.S. 503, 522-28 (1981); *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293, 297-301 (1943); *Matthews v. Rodgers,* 284 U.S. 521, 525-26 (1932); *First Nat'l Bank v. Board of Comm'rs,* 264 U.S. 450, 455-56 (1924); *Singer Sewing Machine Co. v. Benedict,* 229 U.S. 481, 485-88 (1913); *Boise Artesian Hot and Cold Water Co. v. Boise City,* 213 U.S. 276, 282-84 (1909).

The consequence of holding that Section 1983 provides a remedial scheme for state taxation extends far beyond petitioners' entitlement to recover attorney's fees under 42 U.S.C. § 1988. As explained below, Section 1983 jurisprudence is ill-suited to taxpayer challenges; its imposition on state tax systems would mark a degree of unparalleled federal interference in state affairs. Because there is no evidence that Congress ever intended to impose Section 1983's remedial scheme on state tax systems, the Court should decline petitioners' invitation to judicially impose this scheme on the States.

A. Section 1983's Tort Based System Of Liability Rules Would Significantly Disrupt State Tax Administration

Since this Court revived Section 1983 from its nearly century long dormancy in *Monroe v. Pape,* 365 U.S. 167 (1961), it has articulated numerous rules of decision to adjudicate the varied categories of claims brought under it. The Court, for example, has noted that a state official can be sued under Section 1983 for injunctive relief. *See Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71 n.10 (1989). It has held that a Section 1983 claimant cannot be required to exhaust a State's administrative remedies. *See Patsy v. Board of Regents,* 457 U.S. 496, 516 (1982); *McNeese v. Board of Education,* 373 U.S. 668, 671-72 (1963); *Monroe,* 365 U.S. at 183. The Court has also held that a state statute requiring that a claimant provide written notice of a claim to a government agency or official before suing is preempted as inconsistent with the purposes of Section 1983. *See Felder v. Casey,* 487 U.S. 131, 153 (1988).

In still other cases the Court has articulated rules of decision premised on the notion that " '[S]ection 1983 creates a species of tort liability.' " *Heck v. Humphrey,* 114 S.Ct. 2364, 2370 (1994) (quoting *Memphis Community School Dist. v. Stachura,* 477 U.S. 299, 305 (1986)). For example, the Court has held that the stat-

ute of limitations in a Section 1983 suit is the State's limitation period applicable to personal injury actions, not the statute applicable to an analogous state law claim. *See Wilson v. Garcia,* 471 U.S. 261, 276-80 (1985). The Court has also held that a state official can be sued for punitive damages under Section 1983. *See Smith v. Wade,* 461 U.S. 30, 56 (1983).

In *Fair Assessment,* the Court noted that "the very maintenance of [a Section 1983 taxpayer] suit itself would intrude on the enforcement of the state scheme." 454 U.S. at 114. There the Court recognized that the principles of comity and federalism which bar the federal courts from awarding injunctive and declaratory relief in taxpayer suits, *see* 28 U.S.C. § 1341; *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293 (1943), likewise bar federal courts from awarding monetary relief in taxpayer suits brought under Section 1983 because such suits are "fully as intrusive as . . . equitable actions." [3] 454 U.S. at 113.

The intrusiveness of a Section 1983 taxpayer suit is not diminished simply because the claim is brought in state court. Many States prohibit the award of injunctive relief [4] or condition its award by requiring that the tax-

[3] The Tax Injunction Act, 28 U.S.C. § 1341, had long barred federal courts from granting equitable relief in taxpayer challenges. The Court has also held that the Tax Injunction Act prohibits a federal court from granting declaratory relief holding a state tax unconstitutional. *See California v. Grace Brethren Church,* 457 U.S. 393, 407-11 (1982).

[4] *See, e.g.,* Ala. Code §§ 40-2A-7(b)(5)(d.3), 40-3-25; Cal. Const. art. XIII, § 32; *Delaware Bankers Ass'n v. Division of Rev.,* 298 A.2d 352, 356 (Del. Ch. 1972); Del. Code Ann. tit. 10, § 342; D.C. Code Ann. § 47-3307; Ky. Rev. Stat. Ann. §§ 139.760(3), 141.235 (1); La. Const. Art. VII, § 3(A), Me. Rev. Stat. tit. 36, § 5301; Md. Tax-Gen. Code § 13-505; Mich. Comp. Laws § 205.28(1)(b); Minn. Stat. § 289A.43; Nev. Rev. Stat. § 372.670; S.C. Code Ann. § 12-47-10; S.D. Codified Laws Ann. § 10-27-1; Va. Code Ann. § 58.1-1831.

payer either pay the amount in dispute or post a bond.[5] Yet Section 1983 authorizes a "suit in equity" and petitioners maintain that, under the statute, they are entitled to injunctive relief. *See Will,* 491 U.S. at 71 n.10; Pet. Br. 20 n.11. Many States require the taxpayer to file a refund claim with the taxing authority and/or exhaust an administrative remedy prior to bringing a judicial challenge.[6] Yet *Felder* holds that Section 1983 preempts a State's notice of claim provision, *see* 487 U.S. at 153, and numerous cases hold that a Section 1983 plaintiff is not required to exhaust administrative remedies. *See, e.g., Patsy,* 457 U.S. at 500, 516; *cf. Fair Assessment,* 454 U.S. at 113-14 (citing *Monroe,* 365 U.S. 167). Many States impose statutes of limitation in taxpayer challenges which are substantially shorter than their statutes governing personal injury actions,[7] which under *Wilson* is the applicable limitations period in a Section 1983 suit. *See* 471 U.S. at 280.

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[5] *See, e.g.,* Tenn. Code Ann. § 67-1-1801(c)(1); Tex. Tax Code Ann. § 112.101(a). Other States require the posting of a bond if the taxing authority determines that collection of the tax "will be jeopardized" or that the taxpayer's position is "frivolous." Or. Rev. Stat. § 305.565(2)-(4); *see also* N.J. Rev. Stat. § 54:49-18.

[6] *See, e.g., Standard Alaska Prod. Co. v. Department of Rev.,* 773 P.2d 201 (Alaska 1989); Ala. Code §§ 40-3-24, 40-18-47; Cal. Rev. & Tax. Code § 6932; D.C. Code Ann. § 47-3310; *Barcroft Info. Group, Inc. v. Comptroller,* 603 A.2d 1289, 1297 (Md. App. 1992); Md. Tax-Gen. Code Ann. § 13-514; *Buck v. Leggett,* 813 S.W.2d 872 (Mo. 1991); Mont. Code Ann. § 15-1-402(2); N.M. Stat. Ann. § 7-1-22; Or. Rev. Stat. § 305.275; *Nutbrown v. Munn,* 811 P.2d 131, 135-36 (Or. 1991), *cert. denied,* 112 S.Ct. 867 (1992); Tex. Tax Code Ann. § 112.151; *Hogan v. Musolf,* 471 N.W.2d 216, 223 (Wis. 1991), *cert. denied,* 112 S.Ct. 867 (1992).

[7] *Compare, e.g.,* Alaska Stat. § 43.05.240(d) (requiring filing of appeal of Tax Commission's decision within thirty days of decision) *with* Alaska Stat. § 09.10.070 (providing two year limitation for personal injury action). *See also* statutes collected in the Appendix to this brief.

As the foregoing demonstrates, far more is at issue here than simply whether, as petitioners assert (Pet. 10), those who successfully challenge a state tax as violative of their federal rights are entitled to attorney's fees. If state taxpayers are entitled to seek relief under Section 1983 for taxes which putatively violate their federal rights, state tax administration will be thrown into disarray as taxpayers invoke this Court's Section 1983 jurisprudence to argue that it preempts state laws limiting the period for filing suit, requiring the payment of taxes under protest and the exhaustion of administrative remedies, and barring the award of injunctive relief.

This result might be understandable if the Forty-Second Congress had ever considered the impact of subjecting state tax systems to Section 1983 suits. But as several members of this Court have noted, the Forty-Second Congress never envisioned the scope of claims that Section 1983 would eventually encompass. *See, e.g., Heck,* 114 S.Ct. at 2374 (Thomas, J., concurring) (noting that Section 1983 has been expanded "far beyond the limited scope [it] was originally intended to have"); *Dennis v. Higgins,* 498 U.S. 439, 451-52 (1991) (Kennedy, J., dissenting, joined by the Chief Justice).

In fact, the Forty-Second Congress never considered the impact of subjecting to Section 1983 suits such a functionally important aspect of state sovereignty as its system for the administration and collection of taxes. In the absence of persuasive evidence of Congress' consideration of the issue, the Court should decline petitioners' invitation to judicially impose this remedy. "[T]he important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems," *Fair Assessment,* 454 U.S. at 102, require that Congress affirmatively make such a choice. *Cf. Gregory,* 501 U.S. at 460-61.

B. Section 1983 Did Not Abrogate Principles Of Equity Barring Injunctive Relief In Taxpayer Suits

Contrary to petitioners' assertion that Congress intended to provide remedies under Section 1983 for unconstitutional taxation, an examination of the remedies sought by petitioner—injunctive and declaratory relief as well as a refund—merely demonstrates the point that Congress has never considered the issue. Having acknowledged that *Will* bars a refund suit against the State, *see* Br. of National Private Truck Council *et al.* in Oklahoma Supreme Ct. 9 n.7, petitioners invoke *Will*'s footnote stating that a suit against an official in his or her official capacity for injunctive relief is not a suit against the State. *See* Pet. Br. 20 n.11 (citing 491 U.S. at 71 n.10). Petitioners thus assert that because they "would have been entitled to injunctive and declaratory relief [against the members of the Tax Commission] under § 1983, they are entitled to recover their attorney's fees and costs under § 1988." Pet. Br. 20 n.11.

This is truly an extraordinary assertion, assuming as it does that *Will*'s dictum settled the question of whether Section 1983 provides equitable remedies to those challenging state taxes. But to suggest as much is to ignore the historic and continuing reluctance of courts of equity to intervene in taxpayer disputes. Indeed, shortly before Section 1983's enactment, the Court held in *Dows* as a matter of federal law that a court of equity lacked jurisdiction to enjoin an unconstitutional tax where the taxpayer had an adequate remedy at law. 78 U.S. (11 Wall.) at 110; *see also Fair Assessment,* 454 U.S. at 102. As the Court stated in *Dows*:

> Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition.

> There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked. . . .
>
> No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked.

78 U.S. (11 Wall.) at 109-10; *see also Hannewinkle v. Georgetown,* 82 U.S. (15 Wall.) 547, 548-49 (1872).[8] Of note, the Forty-Second Congress vested the federal courts, where *Dows* applied, with exclusive jurisdiction over Section 1983 suits. *See Felder,* 487 U.S. at 158 (O'Connor, J., dissenting); Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13. It is thus implausible to argue, as petitioners do, that Section 1983 authorizes injunctive relief in taxpayer suits.[9]

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[8] Sixty years after *Dows* and the enactment of Section 1983, the Court summarized its jurisprudence as follows:

> Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question be involved . . . .

Matthews v. Rodgers, 284 U.S. 521, 525-26 (1932).

[9] The common law exception authorizing an injunction to prevent a multiplicity of suits is of no aid to petitioners. This exception, the purpose of which was to avoid "the attendant trouble and ex-

Moreover, while the decision in *Dows* undoubtedly was required by principles of comity, it also reflected the venerable equitable principle, which was widely accepted throughout the States, that a court of equity will not intervene where an adequate remedy at law exists. *See* 78 U.S. (11 Wall.) at 110-112.[10] Such a rule is of particular importance to the operation of sovereign gov-

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pense" of multiple suits, *see* Thomas M. Cooley, *A Treatise On The Law Of Taxation* 770 (1886), was, like the class action itself, equity's response to the rules of procedure in actions at law which did not allow for the permissive joinder of parties and claims. Indeed, many courts recognized the exception's potential for disrupting the fiscal operations of government and thus limited it to those instances in which each claimant could show that they themselves would be required to pursue multiple suits to recover taxes paid. *See, e.g., Matthews,* 284 U.S. at 529-30 (dismissing complaint filed on behalf of three hundred taxpayers seeking to enjoin tax alleged to burden interstate commerce; "as to each [taxpayer] a single suit at law brought to recover the tax will determine its constitutionality"); *Dodge v. Osborn,* 240 U.S. 118, 122-23 (1916) (dismissing suit for injunction in challenge to federal income tax sought on the ground that "unless the taxes are enjoined many [refund] suits by other persons will be brought"; taxpayers "allege[d] no ground for equitable relief independent of the mere complaint that the tax is illegal and unconstitutional and should not be enforced . . . which . . . if recognized as a basis for equitable jurisdiction would take every case where a tax was assailed because of its unconstitutionality out of the provisions of [the Anti-Injunction Act], and thus render it nugatory").

To the extent the common law exception permitted injunctive relief where a taxpayer would have to file numerous suits, the advent of modern procedural rules has rendered this exception obsolete.

[10] *See also Floyd v. Gilbreath,* 27 Ark. 675 (1872); *Savings & Loan Society v. Austin,* 46 Cal. 415 (1873); *Dodd v. City of Hartford,* 25 Conn. 232 (1856); *Cook County v. Chicago, B. & O. R.R.,* 35 Ill. 460 (1864); *McDonald v. Murphree,* 45 Miss. 705 (1871); *Barrow v. Davis,* 46 Mo. 394 (1870); *Susquehanna Bank v. Board of Supervisors,* 25 N.Y. 312 (1862); *Greene v. Mumford,* 5 R.I. 472 (1858); *Judd v. Town of Fox Lake,* 28 Wis. 583 (1871).

ernments because the extraordinary remedy of an injunction "may derange the operations of government, and thereby cause serious detriment to the public." *Id.* at 110. As the Senate Report accompanying the Tax Injunction Act likewise explained, a suit for injunctive relief allowed corporate taxpayers to withhold from the States and their subdivisions

> taxes in such vast amounts and for such long periods of time as to seriously disrupt State and county finances. The pressing needs of these States for this tax money is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost to the States without a judicial examination into the real merits of the controversy.

S. Rep. No. 1035, 75th Cong., 1st Sess. 1, 2 (1937).

The Court recently reaffirmed the continuing vitality of the prohibition against the award of injunctive relief in taxpayer suits:

> Allowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult. To protect government's exceedingly strong interest in financial stability in this context, we have long held that a State may employ various financial sanctions and summary remedies, such as distress sales, in order to encourage taxpayers to make timely payments prior to resolution of any dispute over the validity of the tax assessment.

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 37 (1990) (footnote omitted).[11]

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[11] *See also id.* at n. 19 (quoting *California v. Grace Brethren Church,* 457 U.S. 393, 410 (1982) ("During [prepayment litigation] the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and

Indeed, the potential harm to the effective functioning of governments caused by the award of injunctive relief in taxpayer suits was recognized by Congress itself several years before the enactment of Section 1983. In 1867, Congress took action to protect the federal government from the harms caused by the award of injunctive relief by amending the Internal Revenue laws to provide that "no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court," Act of Mar. 2, 1867, ch. 169, § 10, 14 Stat. 471, 475, resulting in the consignment of federal taxpayers to their remedies at law.

As the foregoing demonstrates, the prohibition against the awarding of equitable relief in taxpayer suits where an adequate remedy at law existed was of such fundamental importance to the effective functioning of governments at both the state and federal levels that it was already well established at the time of Section 1983's enactment. It is truly implausible to suggest, as petitioners do, that the Forty-Second Congress intended for Section 1983 to abrogate this venerable rule, which was viewed as adequate to protect federal taxpayers. A Congress, whose members "were familiar with common-law principles," *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981), and which included a Senate whose members were chosen by, and were accountable to, their respective state legislatures, cannot be presumed to have done so. And given the importance of this rule to the effective operation of governments, it is all the more remarkable to suggest that Congress would do so given the absence in the debates of any indication of such an intent.[12]

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perhaps a shift to the State of the risk of taxpayer insolvency.") (alteration in original and citations omitted)).

[12] Petitioners and their *amicus* National Retail Federation acknowledge that the practice of some federal courts of entertaining tax injunction suits "imposed a financial burden on state and local governments and forced taxing authorities to accept reduced tax

This Court has on numerous occasions declined to give Section 1983 a literal reading when doing so would lead to a result which would unduly intrude on state sovereignty. For example, notwithstanding its language that "[e]very person who, under color of [state law] subjects, or causes to be subjected, any . . . person . . . to the deprivation of [a federal right] shall be liable . . . in an action at law," 42 U.S.C. § 1983, the Court has held that "immunities 'well grounded in history and reason' ha[ve] not been abrogated 'by covert inclusion in the general language' of § 1983." *Imbler v. Pachtman,* 424 U.S. 409, 418 (1976) (quoting *Tenney v. Brandhove,* 341 U.S. 367, 376 (1951)); *see also Buckley v. Fitzsimmons,* 113 S.Ct. 2606, 2612-14 (1993); *City of Newport,* 453 U.S. at 258-71; *Wood v. Strickland,* 420 U.S. 308, 318-21 (1975).

Most recently, the Court held that a state prisoner cannot bring a damages suit under § 1983 to challenge the constitutionality of a conviction unless that conviction has been invalidated by either state or federal authority. *Heck,* 114 S.Ct. at 2372. Again, a literal reading of Section 1983 did not foreclose the prisoner's suit. The Court, however, relied on the well-established common law principle that "civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments," to hold that the prisoner had no cause of action under Section 1983. *Id.; see id.* at 2373; *see also*

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payments in lieu of protracted litigation." Pet. Br. 23; *see also* Br. *Am. Cur.* Nat'l Retail Fed. 9. Petitioners and their *amicus* do not explain why requiring state courts to hear Section 1983 taxpayer suits for injunctive relief would impose any less of a burden on state fiscal integrity.

Likewise, the Court's longstanding recognition that a State need not provide injunctive relief in taxpayer suits if it provides an adequate post-deprivation remedy, *see, e.g., McKesson,* 496 U.S. at 37 & n.18 (discussing threat to state fiscal integrity caused by injunctive relief), would be rendered a nullity if state courts must entertain a Section 1983 taxpayer suit for such relief.

Preiser v. Rodriguez, 411 U.S. 475, 489-94 (1973); *cf. Younger v. Harris,* 401 U.S. 37, 53-54 (1971).

A State's interest in its fiscal integrity is surely of the same magnitude as its interest in the finality of criminal convictions. The literal language of Section 1983 notwithstanding, there is no evidence that the Forty-Second Congress intended to abrogate the prohibition against the awarding of injunctive relief in taxpayer suits.[13] And given the longstanding and continuing recognition of this Court, the Congress, and the States that equitable remedies are unduly disruptive of the government's fiscal integrity, petitioners' contention that they are entitled to injunctive relief under Section 1983 must be rejected. The Forty-Second Congress simply never considered the possibility that Section 1983 would provide a remedial scheme of any sort for challenges to state taxes.

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[13] Petitioners assert that "the obligation of state courts to entertain § 1983 claims in state tax cases and to provide attorneys' fees to prevailing plaintiffs under § 1988 was implicit in *Dennis v. Higgins,* 498 U.S. 439 (1991)." Pet. Br. 30. But while *Dennis* held that the dormant commerce clause "confers 'rights, privileges, or immunities,' within the meaning of § 1983," *see* 498 U.S. at 446, it "raise[d] far more questions about the proper conduct of challenges to the validity of state taxation than it answer[ed]." *Id.* at 464 (Kennedy, J., dissenting). To say that the dormant commerce clause confers a right under the Constitution within the meaning of Section 1983, is not to say that Section 1983 provides a remedial scheme for state taxpayers. "The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury." *Chelentis v. Luckenbach S.S. Co.,* 247 U.S. 372, 384 (1918).

The question in this case—whether Congress, in enacting Section 1983, intended to provide a remedy for state taxpayers—involves a separate inquiry into Congress' purpose to provide either legal or equitable remedies in such cases. Part of this question was answered in *Will, see* 491 U.S. at 68, where the Court recognized that Congress did not intend to provide a damages remedy against a State. The remaining part of this question is addressed at pp. 12-22, which demonstrate that Congress never intended to provide equitable remedies to state taxpayers.

C. Because The States Have Long Provided Adequate Remedies To Challenge Taxes, Congress Did Not Intend For Section 1983 To Provide A Remedial Scheme For State Taxpayers

The conclusion that the Forty-Second Congress never considered the question and thus did not intend for Section 1983 to provide a remedial scheme to challenge state taxation is buttressed by this Court's recognition in *Will* that the statute did not abrogate the States' sovereign immunity. *See* 491 U.S. at 67-68. At common law, it was the standard practice that taxpayers must seek relief for unconstitutional taxation through their remedies at law, most commonly a suit in assumpsit which, despite the fictional pleading device of suing the collector, was recognized even then as being a *de facto* refund action against the sovereign. *See, e.g., Dows,* 78 U.S. (11 Wall.) at 10-12; *City of Philadelphia v. The Collector,* 72 U.S. (5 Wall.) 720, 732 (1866) (noting that assumpsit/refund suits were available to challenge taxes in "all, or nearly all, of the several States").

As noted above, petitioners acknowledge that Congress did not abrogate the States' sovereign immunity and thus refund suits are not cognizable under Section 1983. *See Will,* 491 U.S. at 68-69. But given this acknowledgement, it is remarkable that petitioners assert that the Forty-Second Congress intended that Section 1983 provide equitable remedies for state taxation. If petitioners are correct, then the Forty-Second Congress rejected the universally available and less intrusive remedy of a refund action in favor of the disruptive and extraordinary remedy of an injunction. Such a conclusion makes no sense.[14]

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[14] Petitioners have also sought declaratory relief, a statutory remedy unknown to the Forty-Second Congress. *See, e.g.,* Charles A. Wright, *The Law Of Federal Courts* § 100, at 670 (4th ed. 1983); Edson R. Sunderland, *A Modern Evolution in Remedial Rights—The Declaratory Judgment,* 16 Mich. L. Rev. 69, 70-73 (1917). Even assuming that as a general matter the Forty-Second Congress intended to authorize declaratory relief in Section 1983

As the foregoing demonstrates, the Forty-Second Congress never intended that Section 1983 would encompass challenges to state taxation. Nor, *amici* submit, was there any reason to. As this Court itself observed several years before the enactment of Section 1983, a remedy in the nature of assumpsit was already available throughout the States. *See Philadelphia v. The Collector,* 72 U.S. (5 Wall.) at 731-32.[15] The traditional justification given for the creation of the Section 1983 remedy—the belief that

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actions, in tax cases it has long been established as a matter of federal law that declaratory relief is functionally indistinguishable from an injunction. *See Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293, 299 (1943) (declaratory relief "may in every practical sense operate to suspend collection of state taxes until the litigation is ended"; "those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure"); *see also California v. Grace Brethren Church,* 457 U.S. 393, 408, 411 (1982) ("there is little practical difference between injunctive and declaratory relief"; Tax Injunction Act bars federal courts from issuing declaratory judgments holding state taxes unconstitutional).

In 1935, one year after the enactment of the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, Congress amended the act to prohibit the issuance of declaratory relief in cases challenging federal taxes, "thus reaffirming the restrictions set out in the Anti-Injunction Act, [Act of Mar. 2, 1867, ch. 169, § 10, 14 Stat. 475 (codified at 26 U.S.C. § 7421)]," which prohibit suits for injunctive relief in federal tax cases. *Bob Jones Univ. v. Simon,* 416 U.S. 725, 732 n.7 (1974).

[15] *See also, e.g., Hays v. Hogan,* 5 Cal. 241, 243 (1855); *Adam v. Litchfield,* 10 Conn. 127, 131 (1834); *Harvey & Boyd v. Town of Olney,* 42 Ill. 336, 337-38 (1866); *Lester v. Baltimore,* 29 Md. 415, 418 (1868); *Shaw v. Becket,* 61 Mass. (7 Cush.) 442, 443 (1851); *Look v. Industry,* 51 Me. 375, 376 (1863); *First Nat'l Bank of Sturgis v. Watkins,* 21 Mich. 483, 488-90 (1870); *Tuttle v. Everett,* 51 Miss. 27, 28 (1875); *People ex rel. Otsego County Bank v. Board of Supervisors,* 51 N.Y. 401, 405-06 (1873); *Grim v. Weissenberg School Dist.,* 57 Pa. 433 (1868); *Babcock v. Town of Granville,* 44 Vt. 105, 107 (1872); *City of Richmond v. Daniel,* 55 Va. (15 Gratt.) 385, 386 (1858); *Phillips v. City of Stevens' Point,* 25 Wis. 594, 596-97 (1870).

a federal forum was necessary because "state authorities had been unable or unwilling to protect the constitutional rights of individuals," *Patsy,* 457 U.S. at 505 [16]—is simply not true in the tax context. As cases such as *Dows* and *Philadelphia v. The Collector* demonstrate, the understanding contemporaneous with the enactment of Section 1983 was that state forums and remedies were adequate for the vindication of taxpayers' rights.[17]

More importantly, the subsequent and continuing understanding of Congress, as manifested in the Tax Injunction Act, 28 U.S.C. § 1341, is that state forums and remedies are suitable for the vindication of taxpayers' federal rights. Given that Congress, when it specifically considered the question of the adequacy of state taxpayers' remedies, concluded that such remedies should displace federal jurisdiction so long as they are "plain, speedy and efficient," 28 U.S.C. § 1341, it is illogical to impute to it the intent to provide taxpayers with remedies under Section 1983. Because such remedies would mark an undue intrusion into state fiscal affairs, they should not be imposed on the States in the absence of clear direction from Congress. *Cf. Will,* 491 U.S. at 65 ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.") (quoting *United States v. Bass,* 404 U.S. 336, 349 (1971)).

There is accordingly no merit to the arguments of petitioners and their *amici* that state courts violate the

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[16] *See also Will,* 491 U.S. at 66.

[17] To the extent that Reconstruction era Congresses may have viewed state procedures as inadequate to protect against racially discriminatory taxes, *see* Br. *Am. Cur.* Nat'l Retail Fed. 11, this problem was addressed in the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified at 42 U.S.C. § 1981), which specifically prohibits racially discriminatory taxes. Moreover, a prevailing party in a proceeding to enforce 42 U.S.C. § 1981 is entitled to attorney's fees. *See* 42 U.S.C. § 1988.

Supremacy Clause when they decline to hear taxpayer claims which invoke Section 1983. *See, e.g.*, Pet. Br. 14-21. As explained above, the Forty-Second Congress did not intend for Section 1983 to provide a remedial scheme for challenges to state taxation. Rather, state "taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate and complete, and may ultimately seek review of the state decisions in [this] Court." *Fair Assessment*, 454 U.S. at 116 (footnote omitted).[18]

II. A CLAIM THAT A STATE TAX UNCONSTITUTIONALLY DISCRIMINATES IS NOT RIPE FOR SECTION 1983 PURPOSES UNTIL THE STATE'S ADMINISTRATIVE AND JUDICIAL PROCESSES HAVE FAILED TO CURE THE DISCRIMINATION

As explained above, Congress never intended to subject state tax systems to Section 1983 suits. While that should be dispositive, *amici* alternatively submit that petitioners' claim was never ripe for Section 1983 purposes.

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[18] Petitioners also assert that the Oklahoma Supreme Court's refusal to hear their Section 1983 claim is "inconsistent" with the purpose of 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Award Act of 1976. *See* Pet. Br. 31-36. As petitioners reason, "[t]he basic Congressional purpose in enacting § 1988 was to ensure that all persons who are required to resort to legal action to vindicate their federal rights, when those rights are infringed by persons acting under color of state law, can recover the costs of those actions, including reasonable attorneys' fees." *Id.* at 32.

The flaw in this argument is that it presupposes the existence of a Section 1983 remedy to challenge state taxation. *See* 42 U.S.C. § 1988. Moreover, Congress can withdraw a Section 1983 remedy (and with it the right to recover attorney's fees) by providing for an exclusive remedial scheme. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 19-21 (1981) (holding that the provision of express remedies in the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1401 *et seq.*, foreclosed "any remedy that otherwise would be available under § 1983"). The enactment of the Tax Injunction Act demonstrates such a purpose with respect to state taxation.

A State has not issued a final decision imposing an unconstitutionally discriminatory tax unless and until its administrative and judicial processes fail to cure the discrimination. Because Oklahoma granted a refund to petitioners for the tax which they alleged was discriminatory, their claim was never ripe as a matter of federal constitutional law.

A. Like Takings Claims, Discriminatory Tax Claims Are Not Ripe Until The State's Remedial Process Fails To Provide Constitutionally Adequate Redress For The Deprivation of Property

The Court has previously recognized as a general rule that a State can act through its legislature, executive or judiciary. *See Home Telephone & Telegraph Co. v. City of Los Angeles,* 227 U.S. 278, 289-90 (1913) (citation omitted). The Court has nonetheless recognized that there are some constitutional rights which by their very nature are not violated unless and until the State has failed to provide a claimant with adequate relief. *See, e.g., Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 194-97 (1985); *Parratt v. Taylor,* 451 U.S. 527 (1981). As a matter of federal constitutional law, a Section 1983 claim alleging the deprivation of such a right is not ripe unless the claimant has utilized the procedure provided under state law for obtaining meaningful relief and the State has denied such relief. *See Williamson County,* 473 U.S. at 194-195.

In *Williamson County,* the plaintiff brought a Section 1983 claim alleging that the application of a zoning ordinance to its property effected a taking of property in violation of the Just Compensation clause. *See* 473 U.S. at 182. The Court held that the plaintiff's claim was not ripe for two reasons. First, the plaintiff had not availed itself of the procedures available under state law for obtaining a variance which, if granted, could have provided relief from the application of the regulation. *See id.* at 186-94.

Second, and most significantly, the plaintiff had not sought "compensation through the procedures the State has provided for doing so." *Id.* at 194. Examining the constitutional right at issue, the Court noted that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Id.* (citation omitted). As the Court further observed, "because the Fifth Amendment proscribes takings *without just compensation,* no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action." *Id.* at 194 n.13.

The Court further recognized that the absence of such a procedure, either before or contemporaneous with the deprivation of the property, did not alter the conclusion that the plaintiff had not stated a constitutional injury which was ripe for review. *Id.* at 194-95. As the Court noted, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195. The Court thus concluded that "because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not 'complete' until the State fails to provide adequate compensation for the taking." *Id.* Because the plaintiff had not availed itself of the State's judicial remedy for obtaining just compensation, the Court held that "its taking claim is premature." *Id.* at 197.

While *Williamson County* involved a claim for just compensation under the takings clause, its reasoning is applicable to claims of discriminatory taxation, whether those claims are raised under the dormant commerce and privileges and immunities clauses, the equal protection clause, or the intergovernmental tax immunity. Claims

of discriminatory taxation are functionally indistinguishable from takings claims in that both involve the deprivation of property by the State. *See McKesson,* 496 U.S. at 36.[19] And just as a takings claim does not arise if the State provides constitutionally adequate post-deprivation relief, *see Williamson County,* 473 U.S. at 194-95 & n.13, a discriminatory taxation claim should not be deemed to arise for constitutional purposes if the State provides a taxpayer with adequate post-deprivation relief. *Cf. McKesson,* 496 U.S. at 18. ("The State may, of course, choose to erase the property deprivation itself by providing petitioner with a full refund of its tax payments."); *see also Iowa-Des Moines Nat'l Bank v. Bennett,* 284 U.S. 239, 247 (1931) ("[t]he right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced").

In cases of discriminatory taxation, the requirement of equality of treatment is, like the just compensation re-

[19] In *McKesson,* the Court observed that "exaction of a tax constitutes a deprivation of property," 496 U.S. at 36, and that Due Process principles require a meaningful opportunity to "prevent[] any permanent unlawful deprivation of property." *Id.* at 40. The Court's takings clause jurisprudence provides another analogy relevant in determining the point at which a discriminatory tax claim becomes ripe for constitutional purposes. As the Court has observed, "the illegality . . . is confined to the failure to compensate . . . for the taking, and affords no basis for an injunction if such compensation may be procured in an action at law. The Fifth Amendment does not entitle [complainant] to be paid in advance of the taking." *Hurley v. Kincaid,* 285 U.S. 95, 104 (1932) (footnote and citation omitted); *see also Williamson County,* 473 U.S. at 194-95. Takings claims thus have in common with tax claims the historic unavailability of equitable remedies where the State provides an adequate remedy at law. And like the Takings Clause's requirement of "just compensation," the standard of non-discrimination in state taxation is the measuring stick for determining whether the State has engaged in "any permanent unlawful deprivation of property." *McKesson,* 496 U.S. at 40. A claim that a state tax discriminates in violation of the Constitution thus does not become ripe unless the State's remedial process fails to cure the unlawful deprivation of property.

quirement applicable in takings claims, the standard for assessing whether the State has provided constitutionally adequate relief for the deprivation of property. A State's failure to remedy unlawful discrimination in taxation is, like the failure to provide just compensation, a condition precedent to the accrual of a constitutional violation. Accordingly, the right to be free from state discrimination is not violated until the taxpayer pursues the remedies provided under state law and fails to obtain constitutionally adequate relief from the deprivation.

This conclusion is supported by the Court's recognition of the flexibility which a State retains in providing constitutionally adequate redress for a discriminatory tax. *See, e.g., McKesson Corp. v. Division of Alcoholic Beverages,* 496 U.S. 18, 39-40 (1990). For example, a State may cure purported discrimination by refunding to those who paid the higher tax the difference between it and the lower tax. *Id.* at 40. The Court, however, has also made clear that a State may retroactively assess those benefitted by the lower tax rate at the higher tax rate even if some of those previously benefitted are no longer in business. *Id.* & n.23. A State may also cure discrimination by creating a scheme which combines "partial refund[s]" to those who paid the higher tax rate and "partial retroactive assessment of tax increases on favored competitors, so long as the resultant tax actually assessed during the contested tax period reflects a scheme that does not discriminate . . . ." *Id.* at 41. As the Court recently explained, "a State may either award full refunds to those burdened by an unlawful tax or issue some other order that 'create[s] in hindsight a nondiscriminatory scheme.' " *Harper v. Virginia Dept. of Taxation,* 113 S.Ct. 2510, 2520 (1993) (quoting *McKesson,* 496 U.S. at 40).

This flexibility derives from the Eleventh Amendment's traditional concern for the protection of state treasuries, *see Hess v. Port Auth. Trans-Hudson Corp.,* 115 S.Ct. 394, 404-05 (1994); *Edelman v. Jordan,* 415 U.S. 651,

663 (1974), as well as the principles of comity and federalism embodied in the text and structure of the Constitution. It requires that claims of discriminatory state taxation, like the takings claim at issue in *Williamson County,* cannot be deemed to be ripe for Section 1983 purposes unless a taxpayer has pursued the State's administrative and judicial remedies for curing discrimination and been denied constitutionally adequate relief. A State's interest in preserving its fiscal integrity is indisputable. A State must accordingly be given the opportunity to exercise the flexibility granted by the Constitution to cure the unlawful deprivation before it can be said to have rendered a final decision which violates the Constitution. *Cf. Williamson County,* 473 U.S. at 195-97.[20]

B. Because Of The Unique Importance Of Tax Administration To State Sovereignty, A Discriminatory Tax Claim Is Not Ripe Until The State's Remedial Process Has Upheld The Tax

The conclusion that a discriminatory tax claim does not become ripe for federal purposes until the State's remedial process fails to provide constitutionally adequate relief for the property deprivation is supported not only by the nature of the right, but also by a recognition of the complexity of state tax administration. Like land use regulation, state tax assessment and administration is a highly specialized and complex function. As Justice

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[20] As the Court has recognized in the analogous context of procedural due process, there are some circumstances in which the Government's interest so outweighs the private interest that a State's "postdeprivation tort remedies are all the process that is due." *Zinermon v. Burch,* 494 U.S. 113, 128 (1990); *see also id.* at 127 (quoting *Mathews v. Eldridge,* 424 U.S. 319 (1976)). In such circumstances, no constitutional claim arises if the State provides an adequate remedial procedure. The State's provision of an adequate remedial procedure, just as its provision of just compensation in a takings claim, precludes the claim from becoming ripe. *See Williamson County,* 473 U.S. at 195 (quoting *Hudson v. Palmer,* 468 U.S. 517, 532 n.12 (1984)).

Brennan explained, "[t]he procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules." *Perez v. Ledesma,* 401 U.S. 82, 127 n.17 (1971) (concurring in part and dissenting in part). The Court has thus expressly recognized that a taxpayer must pursue the administrative and judicial remedies provided by state law. *See, e.g., Jimmy Swaggart Ministries v. Board of Equalization,* 493 U.S. 378, 397 (1990); *First Nat'l Bank v. Board of Commr's,* 264 U.S. 450, 454 (1924).

In *First Nat'l Bank,* the taxpayer alleged that a state property tax had been assessed in violation of the Equal Protection Clause of the Fourteenth Amendment. *See* 264 U.S. at 452-53. The taxpayer did not, however, avail itself of the procedure provided under state law for the equalization of the assessment and brought suit in federal district court, which dismissed the complaint. *See id.* at 454. This Court, after noting that the requirement that a taxpayer exhaust its administrative remedies was "already broadly recognized" and that "such remedies were, in fact, open and available under the [State's] statutes," affirmed, stating:

> Plaintiff not having availed itself of the administrative remedies afforded by the statutes, as construed by the state court, it results that the question whether the tax is vulnerable to the challenge in respect of its validity upon any or all of the grounds set forth is one which we are not called upon to consider.

Id. at 455-56. *See also Gorham Mfg. Co. v. State Tax Comm'n,* 266 U.S. 265, 269 (1924) (holding that dormant commerce clause challenge "was properly dismissed . . . because of the failure of the [taxpayer] to avail itself of the administrative remedy provided by the statute for the revision and correction of the tax"); *Milheim v. Moffat Tunnel Improvement Dist.,* 262 U.S. 710, 723-

24 (1923) ("parties who do not avail themselves of [an administrative remedy] cannot be heard to complain of such assessments as unconstitutional").

Moreover, state tax codes are frequently of extraordinary complexity and may well be ambiguous.[21] State courts share responsibility with state tax commissions for the administration and interpretation of state tax codes. *Cf. Burford v. Sun Oil Co.*, 319 U.S. 315, 326 (1943). The Court has also noted that "State courts are the principal expositors of state law. Almost every constitutional challenge . . . offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests." *Moore v. Sims*, 442 U.S. 415, 429-30 (1979); *cf. Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941). This is especially true in matters of state taxation. As Justice Brennan observed in *Perez*, "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." 401 U.S. at 127 n.17 (citation omitted). Indeed, in many instances a claim may be resolved favorably to the taxpayer as a matter of either state statutory or constitutional law.

As the foregoing demonstrates, state tax administration is a function of governance of unique importance involving complex procedural and substantive law. Moreover, state action in this area implicates the States' fiscal integrity in a manner without parallel in other functions of governance. Likewise, the principles embodied in the Tenth and Eleventh Amendments as well as the structure of the Con-

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[21] In response to the increasing complexity of state tax codes, some States have created specialized courts whose jurisdiction is limited to tax disputes, *see, e.g.*, Or. Rev. Stat. § 305.405; N.J. Stat. Ann. § 54:51A-1, or assigned jurisdiction in such cases to a particular court. *See* Mo. Rev. Stat. § 143.841.5; N.Y. Tax Law art. 40, § 2016; Mich. Comp. Laws § 205.22; Tex. Tax Code Ann. § 112.001.

stitution—respect for state fiscal integrity and non-interference with critical state functions—must inform the inquiry into when state action creates a final decision violative of a taxpayer's rights. As the Court has recognized, these principles embody "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Fair Assessment,* 454 U.S. at 112 (quoting *Younger,* 401 U.S. at 44-45).

These considerations mandate the conclusion that in matters of taxation, a State's action is not final until its administrative and judicial processes have upheld a tax. Accordingly, a claim that a state tax discriminates in violation of the Constitution is not ripe for Section 1983 purposes until the State's court of last resort has rendered a final judgment upholding the tax.

CONCLUSION

The judgment of the Oklahoma Supreme Court should be affirmed.

Respectfully submitted,

RICHARD RUDA*
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

*Counsel of Record for the
Amici Curiae

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APPENDIX

APPENDIX

Selected State Statutes Of Limitations In Taxpayer Suits And Personal Injury Actions

Compare Cal. Rev. & Tax Code § 6933 (requiring filing of suit within 90 days of denial of refund claim for sales and use tax); *with* Cal. Civ. Proc. Code § 340(3) (providing one year limitation for personal injury action);

Mich. Comp. Laws § 205.22(1) (requiring filing of suit in court of claims within 90 days of assessment or decision); *with* Mich. Comp. Laws § 600.5805(8) (providing three year limitation for personal injury action);

Minn. Stat. §289A.50(7) (requiring appeal to tax court be brought within 60 days or refund suit be brought within 18 months of tax commissioner's denial of refund claim); *with* Minn. Stat. § 541.07(1) (providing two year limitation in personal injury action);

Mo. Rev. Stat. § 143.841.3 (requiring filing of suit within thirty days of commissioner's denial of taxpayer's protest); *with* Mo. Rev. Stat. § 516.120(4) (providing five year limitation in personal injury action);

Mont. Code Ann. § 15-1-402 (requiring filing of suit within sixty days after final decision of state tax appeal board); *with* Mont. Code Ann. § 27-2-204(1) (providing three year limitation in personal injury action);

N.J. Stat. Ann. §54:51A-14 (requiring filing of complaint within 90 days of administrative decision); *with* N.J. Stat. Ann. § 2A:14-2 (providing two year limitation in personal injury action);

N.M. Stat. Ann. § 7-1-26(A) (requiring filing of refund suit within thirty days of administrative denial of claim or 120 days when claim is neither allowed nor denied); *with* N.M. Stat. Ann. § 37-1-8 (providing three year limitation in personal injury action);

Okla. Stat. tit. 68, § 226(b) (requiring filing of suit within one year of mailing of assessment); *with* Okla Stat. tit. 12, § 95 (providing two year limitation in personal injury action);

S.D. Codified Laws § 10-27-2 (requiring filing of suit within thirty days of payment under protest); *with* S.D. Codified Laws § 15-2-14(3) (providing three year limitation in personal injury action);

Tex. Tax Code Ann. § 112.052(b) (requiring filing of suit within 90 days after payment of tax under protest); *with* Tex. Civ. Prac. & Rem. Code § 16.003 (providing two year limitation in personal injury action).