

Fall 1982

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Recommended Citation

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COMITY BARS SECTION 1983 ACTION FOR UNCONSTITUTIONAL ADMINISTRATION OF STATE TAX SYSTEM

*Fair Assessment in Real Estate Association v. McNary*¹

In a case that may have far-reaching effects on federal-state relations, the United States Supreme Court has expansively applied the principle of comity² to bar a section 1983³ action for money damages against Missouri tax officials for unconstitutional administration of the state tax system. The decision imposes a significant limitation on the use of section 1983 as a remedy for constitutional infringements, and may signal a future intent to expand comity to bar any action in which a state has a strong interest.

The case arose when Fair Assessment in Real Estate Association, Inc. (FAIR)⁴ and David and Lynn Cassilly filed a section 1983 suit in federal district court⁵ against St. Louis County Supervisor Gene McNary,⁶ alleging an intentional deprivation of equal protection and due process of law by unequal taxation of real property.⁷ Two practices allegedly violated these constitutional guarantees. First, properties with new improvements were assessed at about 33 1/3 % of current market value, while those without new improvements were assessed at about 22 % of their current market value.⁸

1. 102 S. Ct. 177 (1981).

2. "Comity" as used in this Casenote is defined and discussed in notes 16-18 and accompanying text *infra*.

3. 42 U.S.C. § 1983 (1976 & Supp. III 1979). For the text of section 1983, see text accompanying note 30 *infra*.

4. FAIR is a nonprofit corporation formed by taxpayers in St. Louis County to promote equitable enforcement of property tax laws in Missouri.

5. Section 1983 actions are brought in federal courts under the jurisdiction granted by 28 U.S.C. § 1343(3) (1976).

6. The complaint names several other defendants: St. Louis County Tax Assessors Charles Schneider and Frank Antonio; present St. Louis County Director of Revenue William Skaggs and his predecessor, Edmund Pung; and State Tax Commissioners Donald Williams, Stephen Snyder, and Tom Otto. *FAIR v. McNary*, 478 F. Supp. 1231, 1232-33 (E.D. Mo. 1979), *aff'd*, 622 F.2d 415 (8th Cir. 1980), *aff'd*, 102 S. Ct. 177 (1981).

7. The complaint alleged that defendants "maliciously, willfully, invidiously, systematically, knowingly, and intentionally" violated plaintiffs' constitutional rights. 478 F. Supp. at 1232.

8. 102 S. Ct. at 181. The Court explained that this unequal assessment was allegedly the result of the defendants' failure to reassess old property on a regular basis. The last general reassessment occurred in 1960. *Id.*

Second, property owners who successfully appealed their assessments were specifically targeted for reassessment the next year.⁹

The Cassillys prayed for actual damages in the amount of the alleged overassessments from 1975 to 1979 and punitive damages of \$75,000 from each defendant. FAIR sought actual damages in the amount of expenses incurred in its efforts to obtain equitable property assessments for its members.¹⁰ The United States District Court for the Eastern District of Missouri held that such suits were barred by both 28 U.S.C. § 1341¹¹ (the Tax Injunction Act) and the principle of comity,¹² and the United States Court of Appeals for the Eighth Circuit affirmed by an equally divided court sitting en banc.¹³ The United States Supreme Court granted certiorari and held that the principle of comity alone barred section 1983 actions in federal courts challenging the validity of state tax systems.¹⁴ The Court found it unnecessary to consider whether the Tax Injunction Act would bar such suits.¹⁵

The principle of comity has been defined in many different ways and used in many different contexts.¹⁶ In federal-state relations, comity has generally been defined as the "proper respect for state functions" that federal courts should exercise when considering issues that could more properly be

9. *Id.*

10. *Id.*

11. (1976). Section 1341 provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

12. FAIR v. McNary, 478 F. Supp. 1231, 1234 (E.D. Mo. 1979), *aff'd*, 622 F.2d 415 (8th Cir. 1980), *aff'd*, 102 S. Ct. 177 (1981). See notes 16-18 and accompanying text *infra*.

13. 622 F.2d 415 (8th Cir. 1980), *aff'd*, 102 S. Ct. 177 (1981).

14. 102 S. Ct. at 186.

15. *Id.* at 181. Although the Court did not consider the issue, it did find that the Tax Injunction Act was not meant to engulf all situations requiring federal court deference to state courts. The Court concluded that the principle of comity was not restricted by passage of the Tax Injunction Act. *Id.* at 183. Lower federal courts are divided on the question of whether the Tax Injunction Act bars suits for money damages. Compare *Fulton Market Cold Storage Co. v. Cullerton*, 582 F.2d 1071, 1080 (7th Cir. 1978) (Act does not bar action seeking money damages), *cert. denied*, 439 U.S. 1121 (1979); *Bormann v. Tomlin*, 461 F. Supp. 193, 195 (S.D. Ill. 1978) (same), *aff'd without opinion*, 622 F.2d 592 (7th Cir. 1980); *Southland Mall, Inc. v. Garner*, 293 F. Supp. 1370, 1371 (W.D. Tenn. 1968) (same); *with United Gas Pipe Line Co. v. Whitman*, 595 F.2d 323, 330 (5th Cir. 1979) (Act bars action even when remedy sought is money damages); *Kelly v. Springett*, 527 F.2d 1090, 1094 (9th Cir. 1975) (same); *O'Brien v. Dreyfus*, 493 F. Supp. 476, 478-79 (E.D. Wis. 1980) (same).

16. For a discussion of various ways in which the principle of comity has been used, see Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C.L. REV. 59, 61 n.5 (1981). For the historical development of the principle of comity, see generally Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9 (1966).

adjudicated in state courts.¹⁷ Federal courts have relied on comity to defer to state courts in suits seeking equitable relief against administration of allegedly unconstitutional state tax systems.¹⁸ In *Fair Assessment*, the Court gave two reasons for such restraint: (1) taxation is so important to the state that any delay in collecting state taxes may harm the public by disturbing the state government's operation,¹⁹ and (2) there is a "delicate balance" between two independent sovereigns to be maintained.²⁰

17. *Younger v. Harris*, 401 U.S. 37, 44 (1971). The *Younger* Court defined "comity" as:

a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways.

Id. The phrase "Our Federalism" has been used in connection with the principle of comity in the context of federal-state relations. For an explanation of the difference between comity and Our Federalism, see Comment, "Our Federalism"—*The Limitation of Younger-Samuels and their Progeny on Federal Intervention in State Court Proceedings*, 42 MO. L. REV. 559, 586-87 (1977). For criticism of the courts' recent extensions of this principle in the federal-state comity area, see *Juidice v. Vail*, 430 U.S. 327, 346 (1977) (Brennan, J., dissenting); *Francis v. Henderson*, 425 U.S. 536, 551 (1976) (Brennan, J., dissenting); *New Jersey Educ. Ass'n v. Burke*, 579 F.2d 764, 767 n.9 (3d Cir.), cert. denied, 439 U.S. 894 (1978); *Hufstедler, Comity and The Constitution: The Changing Role of the Federal Judiciary*, 47 N.Y.U. L. REV. 841, 867 (1972); *Koury, Section 1983 and Civil Comity: Two for the Federalism Seesaw*, 25 LOY. L. REV. 659, 687-93 (1979); *Wells, supra* note 16.

18. *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932); *Singer Sewing Machine Co. v. Benedict*, 229 U.S. 481, 485 (1913); *Boise Artesian Water Co. v. Boise City*, 213 U.S. 276, 282 (1909).

19. 102 S. Ct. at 179 (quoting *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1870)). The Court noted that Justice Brennan had more fully explained the reasons behind federal court deference in cases involving state tax administration:

The special reasons justifying the policy of federal non-interference with state tax collections are obvious. . . . If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, 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.

Perez v. Ledesma, 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring and dissenting).

20. 102 S. Ct. at 179. The Court also reviewed the application of the principle of comity in other contexts. In *Younger v. Harris*, 401 U.S. 37, 53-54 (1971), the Court held that traditional principles of equitable restraint bar federal courts

Although comity had always been viewed as applicable only to equitable actions,²¹ the Court cited *Great Lakes Dredge and Dock Co. v. Huffman*²² for the proposition that it should bar an action for money damages in this case.²³ In *Great Lakes*, the Court held that principles of comity required federal court restraint in a suit for a declaratory judgment that Louisiana's tax law was unconstitutional.²⁴ Since *Great Lakes* was a suit for a declaratory judgment, the Court in *Fair Assessment* reasoned that comity is not limited to equitable actions but applies to any action that "operate[s] to suspend collection of state taxes until the litigation . . . [is] ended."²⁵ After explaining how a section 1983 action for money damages could have this effect,²⁶ Justice Rehnquist, writing for a five justice majority,²⁷ concluded that it was barred by comity.²⁸

Although the Court extensively explored the history and purpose of comity, it said relatively little about section 1983.²⁹ Because the Court weighed

from enjoining pending state criminal prosecutions except under extraordinary circumstances. In *Huffman v. Pursue Ltd.*, 420 U.S. 592, 610-11 (1975), the Court held that *Younger* barred a section 1983 suit for injunctive and declaratory relief concerning the constitutionality of an Ohio public nuisance statute after state trial proceedings had been completed but before appellate proceedings had been exhausted. The *Younger* and *Huffman* Courts stressed three factors that made those cases suitable for the application of comity principles: (1) state court proceedings were pending, (2) the proceeding was criminal, and (3) injunctive and declaratory relief was sought. None of these factors was present in *Fair Assessment*. The *Fair Assessment* Court stated, however, that these cases illustrate the principles that bar section 1983 suits in actions for money damages. 102 S. Ct. at 184-85.

Other cases have used the principle of comity to bar suits only when one or more of the *Younger-Huffman* factors have been demonstrated. See, e.g., *Moore v. Sims*, 442 U.S. 415, 418-22 (1979) (pending proceeding, injunctive and declaratory relief sought); *Trainor v. Hernandez*, 431 U.S. 434, 435-39 (1977) (pending proceeding, criminal nature, injunctive relief sought); *Juidice v. Vail*, 430 U.S. 327, 328-29 (1977) (criminal nature, injunctive relief sought). In contrast, where there has been no pending state court proceeding, the Court has allowed access to federal courts even when the action was for injunctive and declaratory relief. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 376-77 (1977); *Wooley v. Maynard*, 430 U.S. 705, 711-12 (1977).

21. 102 S. Ct. at 188.

22. 319 U.S. 293 (1943).

23. 102 S. Ct. at 183.

24. 319 U.S. at 301-02.

25. 102 S. Ct. at 183 (quoting *Great Lakes Dredge and Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943)).

26. See text accompanying note 73 *infra*.

27. Justices Marshall, Stevens, and O'Connor concurred in a separate opinion written by Justice Brennan. There were no dissenters.

28. 102 S. Ct. at 186.

29. The Court simply noted that section 1983 cut a "broad swath" by giving a federal cause of action to anyone who had been deprived of his constitutional rights by any state. The Court also noted that *Monroe v. Pape*, 365 U.S. 167, 183 (1961),

the competing considerations of comity and section 1983, further background on section 1983 is necessary to critique the court's analysis and conclusion.

Enacted shortly after the adoption of the 14th Amendment, the now familiar language of section 1983 reads:

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.³⁰

After an exhaustive review of the section's legislative history, the United States Supreme Court, in the landmark decision of *Monroe v. Pape*,³¹ concluded that a principal purpose of the section was to

afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.³²

Monroe revitalized section 1983 after many decades of dormancy.³³ Later cases expanded it further.³⁴ Other cases, however, have limited this expansion

held that state remedies need not be exhausted before such plaintiffs could resort to the federal courts, and that this holding was reemphasized in later Supreme Court decisions. 102 S. Ct. at 179-80.

30. 42 U.S.C. § 1983 (1976 & Supp. III 1979).

31. 365 U.S. 167 (1961).

32. *Id.* at 180. The *Monroe* Court found several other reasons for enactment of the section: to override any invidious legislation by states, to provide a federal remedy where state law was inadequate, and to provide a federal remedy where state law, though adequate in theory, was inadequate in practice. *Id.* at 173-74.

33. *Monroe*, for the first time, allowed a section 1983 plaintiff to bring his suit in federal court in the first instance even though a state would have allowed such suits in state court. *Id.* at 183. It also interpreted "under color of" state law as including acts in which state officials, clothed with authority of state law, misused their power. *Id.* at 187. The impact of *Monroe* was dramatic—in 1960, about 300 suits were filed in federal court under all of the civil rights acts; by 1972, approximately 8,000 claims were filed under section 1983 alone; in fiscal 1976, more than 19,000 civil rights actions were brought in federal court. *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1136 n.7 (1977).

34. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (section 1983 can redress statutory as well as constitutional violations); *Owen v. City of Independence*, 445 U.S. 622, 650 (1980) (disallowing good faith defense to municipalities); *Monell v. Department of Social Services*, 436 U.S. 658, 688-89 (1978) (municipal corporation is a "person" under section 1983); *Mitchum v. Foster*, 407 U.S. 225, 242-43 (1972) (specifically exempting section 1983 actions from the Anti-Injunction Statute); *McNeese v. Board of Education*, 373 U.S. 668, 676 (1963) (allowing section 1983 suit prior to initiation of state administrative proceeding). *But see Preiser v. Rodriguez*, 411 U.S. 475, 490 (1973) (requiring exhaustion of state administrative

sion by use of comity.³⁵ Comity must be viewed as the principal limitation of federal court jurisdiction to hear section 1983 cases.

These conflicting principles represent attempts by the Court and Congress to advance two basic interests. Comity in the context of state tax systems reflects the Court's notion that the state has a legitimate interest in the unfettered administration of its tax system because of its critical importance in financing state government.³⁶ The language and legislative history of section 1983, however, demonstrate the congressional view that a taxpayer has an interest in having his constitutional claims adjudicated in federal court even when a state forum is available.³⁷

In reconciling these two interests, the *Fair Assessment* Court was faced with at least three potential alternatives. First, it could have held that comity does not bar section 1983 suits for money damages against state tax officials for the allegedly unconstitutional administration of the state tax system.³⁸ Second, it could have held that such suits may be brought only after exhaustion of state administrative remedies.³⁹ Third, it could have held that comity bars such suits altogether.⁴⁰ A comparison of how each alternative reconciles the competing interests of comity and section 1983 will expose their strengths and weaknesses.⁴¹

remedies as a precondition to section 1983 suit, at least where Congress has so provided).

35. *Moore v. Sims*, 442 U.S. 415, 434-35 (1979) (barring section 1983 injunctive and declaratory relief against pending state child custody proceeding); *Trainor v. Hernandez*, 431 U.S. 434, 444-46 (1977) (barring injunctive relief against pending state attachment proceeding); *Juidice v. Vail*, 430 U.S. 327, 337-39 (1977) (denying injunctive relief against state contempt procedures). See note 20 and accompanying text *supra*.

36. See notes 18-20 and accompanying text *supra*.

37. See notes 30-32 and accompanying text *supra*. For the provocative view that institutional characteristics, technical competence, psychological set, and insulation from majoritarian pressures make federal courts better able than state courts to decide cases involving constitutional rights, see Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1118-28 (1977).

38. See, e.g., *Fulton Market Cold Storage Co. v. Cullerton*, 582 F.2d 1071, 1079-80 (7th Cir. 1978). See notes 42-56 and accompanying text *infra*.

39. This is the approach taken by Justice Brennan, concurring in the judgment, in *Fair Assessment*. 102 S. Ct. at 186. See notes 57-64 and accompanying text *infra*.

40. This is the majority approach in *Fair Assessment*. 102 S. Ct. at 178. See notes 65-80 and accompanying text *infra*.

41. A potential fourth alternative was to hold that section 1983 suits for money damages against state tax officials for alleged unconstitutional administration of the state tax system are barred by comity when there is a pending state administrative proceeding. There was such a proceeding pending in *Fair Assessment*. 102 S. Ct. at 181. The Supreme Court has not yet fully addressed this issue although it has been presented with the opportunity at least twice. See *Gibson v. Berryhill*, 411 U.S. 564, 575-77 (1973) (remanded on other grounds); *Geiger v. Jenkins*, 401

The first alternative was selected by the United States Court of Appeals for the Seventh Circuit in *Fulton Market Cold Storage Co. v. Cullerton*,⁴² a case almost identical to *Fair Assessment*.⁴³ The central issue addressed by the court was whether the Tax Injunction Act or the principle of comity barred a section 1983 suit for money damages.⁴⁴ The court in *Fulton Market* examined the language of the Tax Injunction Act, its legislative history, and the principle of comity⁴⁵ and concluded that the “primary evil to be avoided . . . [was] federal equitable relief which would disrupt the state’s taxing process.”⁴⁶ It found that an action for money damages would neither under-

U.S. 985, 985 (1971) (summarily affirmed lower court ruling). Lower courts have taken different positions on this issue. Compare *McCune v. Frank*, 521 F.2d 1152 (2d Cir. 1975) (district court instructed on remand to determine whether comity barred action in view of pending administrative disciplinary proceeding), with *Hodory v. Ohio Bureau of Empl. Serv.*, 408 F. Supp. 1016 (N.D. Ohio 1976) (failure of plaintiff to exhaust administrative and state remedies did not require dismissal of action), *rev’d on other grounds*, 431 U.S. 471 (1977). For a discussion of this issue, see Koury, *supra* note 18, at 685-86; Comment, *supra* note 17, at 589-92; Comment, *Applying the Doctrine of Younger v. Harris to State Administrative Proceedings: Federal Rights Further Jeopardized*, 8 OHIO N.U.L. REV. 126, 126-48 (1981).

Another potential alternative was to hold that even if the *Younger* doctrine encompasses section 1983 actions for money damages, certain exceptions to *Younger* based on “bad faith or harassment” would allow such suits in any event. See *Huffman v. Pursue Ltd.*, 420 U.S. 592, 611 (1975); *Younger v. Harris*, 401 U.S. 37, 53-54 (1971); *Perez v. Ledesma*, 401 U.S. 82, 85 (1971). Although the Supreme Court has never found the bad faith exception to be applicable, lower federal courts have. See, e.g., *Fitzgerald v. Peek*, 636 F.2d 943, 944-45 (5th Cir. 1981), *cert. denied*, 452 U.S. 916 (1981); *Krahm v. Graham*, 461 F.2d 703, 707 (9th Cir. 1972); *Show-World Center, Inc. v. Walsh*, 438 F. Supp. 642, 650-51 (S.D.N.Y. 1977); C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4255 (1978); Note, *Limiting the Younger Doctrine: A Critique and Proposal*, 67 CALIF. L. REV. 1318, 1328 (1979). Since the plaintiffs in *Fair Assessment* alleged that property owners who successfully appealed their assessments were specifically targeted for reassessment the next year, this could constitute bad faith and thereby come under the exception to the application of *Younger* principles.

42. 582 F.2d 1071 (7th Cir. 1978), *noted in* 74 NW. U.L. REV. 284 (1979).

43. In *Fulton Market*, a property owner brought a section 1983 suit for money damages against county and state taxing officials alleging intentional deprivation of due process and equal protection by unequal assessment of real property. 582 F.2d at 1073.

44. *Id.*

45. Although not mentioning the principle of comity by name, the court in *Fulton Market* quoted extensively from *Perez v. Ledesma*, 401 U.S. 82 (1971), *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), and *Matthews v. Rogers*, 284 U.S. 521 (1932), when examining the underlying policy considerations of the Tax Injunction Act. These cases applied the doctrine of comity to bar federal actions involving state tax systems.

46. 582 F.2d at 1078. For a discussion of how equitable relief is more offensive to states in tax matters than actions for money damages, see Note, *Fulton*

mine a state's ability to collect its revenues nor seriously damage the delicate balance inherent in our system of government since no taxing process would be enjoined, money damages are retrospective, not anticipatory relief, and the construction of a state statute would not determine the outcome.⁴⁷ A section 1983 suit for money damages against a state taxing official, therefore, was not barred.⁴⁸ The court also held, with little discussion, that state administrative remedies need not be exhausted before a suit may be brought.⁴⁹

This approach fully accommodates the taxpayer's interest in having his section 1983 suit for money damages brought in federal court⁵⁰ but does not withhold critically needed tax funds from the state during the pendency of the suit.⁵¹ In cases like *Fair Assessment*, the taxes have already been paid; the continuity of tax collection is not disturbed.⁵² This approach would intrude only slightly on Missouri's interest in the unfettered administration of its tax system. Unlike some states,⁵³ Missouri law seems to provide that taxpayers need not exhaust state administrative procedures before challenging the validity of the tax in state court.⁵⁴ Missouri's interest in efficient tax

Market Cold Storage Co. v. Cullerton: *Limiting Federal Jurisdiction in Section 1983 Damage Actions Against Tax Officials*, 74 NW. U.L. REV. 284, 295 (1979).

47. 582 F.2d at 1078. This finding is directly contrary to the conclusion reached in *Fair Assessment*. See notes 69-77 and accompanying text *infra*.

48. 582 F.2d at 1079. It is unclear whether the court's holding was based entirely on its construction of the Tax Injunction Act or whether comity principles were also used as support. By examining comity cases, see note 45 *supra*, and noting that these cases enunciated the underlying policy considerations for the Tax Injunction Act, 582 F.2d at 1076, the court arguably decided the case on both grounds. It appears that the court viewed the principle of comity, as applied to federal court interference with state tax systems, as co-extensive with the Tax Injunction Act.

49. 582 F.2d at 1080. The court cited *Monroe v. Pape*, 365 U.S. 167 (1961), as the principal authority for this holding.

50. See notes 18-20 and accompanying text *supra*.

51. The primary concern of Congress in enacting the Tax Injunction Act was not federal interference with state and local taxation, but taxpayers litigating the validity of their taxes prior to payment. See S. REP. NO. 1035, 75th Cong., 1st Sess. 1-2 (1937).

52. For a discussion of the significance of this when the constitutionality of the tax is being litigated, see Comment, *The Tax Injunction Act and Suits for Monetary Relief*, 46 U. CHI. L. REV. 736, 751-56 (1979).

53. Illinois, for example, requires a taxpayer to exhaust administrative remedies before seeking a refund in state court. *People ex rel. Korzen v. Fulton Market Cold Storage Co.*, 62 Ill. 2d 443, 446, 343 N.E.2d 450, 452 (1976), cert. denied, 429 U.S. 833 (1976); *Korzen v. Hoffman*, 20 Ill. App. 3d 531, 533-34, 314 N.E.2d 593, 594-95 (1974).

54. In Missouri, a taxpayer has two basic avenues to challenge a property tax assessment. After notice by the assessor of an increase in his assessment, the taxpayer can appeal to the County Board of Equalization, MO. REV. STAT. § 137.385 (1978), and if not satisfied, he can then appeal to the State Tax Commission, *id.* § 138.430.

Alternatively, a Missouri taxpayer may challenge an assessment under MO.

administration is thus not hampered by allowing federal suits before administrative exhaustion, since Missouri itself allows such suits in state courts.⁵⁵ The only remaining state interest, the desire to have federal constitutional claims against state tax officials adjudicated in state court, does not appear substantial when compared to the individual's right under section 1983 to bring those claims in federal court.⁵⁶

A second alternative in *Fair Assessment* was to hold that section 1983 suits for money damages against state tax officials may be brought only after exhaustion of state administrative remedies. This was the position adopted by the four concurring Justices in an opinion by Justice Brennan.⁵⁷ With respect to comity, Brennan noted that the power to control the jurisdiction of the lower federal courts is assigned by the Constitution to Congress, not the Supreme Court.⁵⁸ The Court, he wrote, has no power to expand the doctrine of comity to defeat the specific grant of jurisdiction given to the lower federal courts to hear section 1983 cases.⁵⁹ He argued further that comity has an established role in restricting a federal court's jurisdiction only in equity cases, not in those for money damages.⁶⁰

REV. STAT. § 139.031 (1978), which provides that he may pay his taxes under protest and then initiate an action in circuit court within 90 days. The Missouri Supreme Court has held that this provision permits an action for money damages before administrative procedures are exhausted. *Mesker Bros. Indus. v. Leachman*, 529 S.W.2d 153, 155-56 (Mo. 1975). *See also Xerox Corp. v. Travers*, 529 S.W.2d 418, 422 (Mo. En Banc 1975). The court has also held that a petition alleging that unequal taxation of real-property denied taxpayers equal protection may be brought under § 139.031. *Breckenridge Hotels Corp. v. Leachman*, 571 S.W.2d 251, 252 (Mo. En Banc 1978). However, in *State ex rel. Cassilly v. Riney*, the court held that a circuit court could not issue a writ of mandamus against state tax officials until the State Tax Commission first had the opportunity to enforce the laws relating to the property tax. 576 S.W.2d 325, 328-29 (Mo. En Banc 1979). The law on this issue is not clear in Missouri. *See C & D Inv. Co. v. Bestor*, 602 S.W.2d 58, 60-63 (Mo. App., W.D. 1980).

55. If Missouri law is someday interpreted to require administrative exhaustion before access to state court is allowed, *see note 54 supra*, a stronger argument can be made for requiring such exhaustion before allowing access to federal court. One of the purposes of the Tax Injunction Act was to achieve parity between state and federal courts. *See 102 S. Ct. at 194*. Also, requiring exhaustion would allow state tax officials to correct any erroneous assessments, thus promoting judicial economy.

56. Note, *supra* note 46, at 306-07.

57. 102 S. Ct. at 186 (Brennan, J., concurring).

58. *Id.* at 191. *See U.S. CONST. art. III*.

59. *Id.* at 189-91. *See 28 U.S.C. § 1343 (1976)*.

60. 102 S. Ct. at 188. Brennan then examined the language and legislative history of the Tax Injunction Act to determine whether it prohibited section 1983 actions for money damages against state tax officials. He argued that prior to passage of the Tax Injunction Act, damage actions for unconstitutional state tax assessments were an established feature of federal jurisdiction. *Id.* at 192. Since the Tax Injunction Act did not concern money damages, Brennan asserted that Congress intended

Brennan believed, however, that plaintiffs should be required to exhaust state administrative remedies first.⁶¹ He argued that, while section 1983 generally does not require exhaustion of state administrative remedies, congressional action demonstrated a policy favoring such exhaustion, and federal courts should require it. He noted that one congressional policy behind the Tax Injunction Act was to assure that federal courts exercise at least the same restraint in dealing with questions of state tax administration as the courts of the state that levied the tax.⁶² Where exhaustion of administrative remedies is a precondition to suit for monetary relief in state court, he concluded, exhaustion should be a precondition in federal court as well.⁶³

This approach would slightly burden the taxpayer's interest in bringing his claim in federal court by delaying it. With regard to the state's interest in timely collection of tax revenues,⁶⁴ this alternative imposes no burden; the suit itself is for refund of taxes that have already been paid. The state's interest in administering its own tax system would be infringed slightly, if at all, by the Brennan approach because the administration process would be completed before the taxpayer could resort to federal court.

The third alternative available in *Fair Assessment*, and the one the Court selected, was to hold that comity completely bars section 1983 suits for money damages against state tax officials for unconstitutional administration of the state tax system.⁶⁵ First, the Court noted that for a plaintiff to prevail in a section 1983 action for money damages, the district court must determine that the defendants' administration of the tax system deprived the plaintiffs of their constitutional rights. This, the Court contended, would amount to a declaratory judgment which is barred under *Great Lakes*.⁶⁶ In *Fulton Market*, the court had rebutted this assertion by pointing out that "[t]he issue is not whether a state statute is constitutionally valid but rather whether an official's conduct violated established constitutional standards."⁶⁷ In his concurring opinion, Justice Brennan distinguished *Great Lakes* by asserting that it, like the prior cases in which comity barred equitable relief, stands for the pro-

that the federal forum remain available in these cases despite its enactment. *Id.* at 194. Therefore, he concluded, federal courts have jurisdiction over claims seeking monetary relief arising from unconstitutional state taxation. *Id.*

61. *Id.* at 194-97.

62. *Id.* at 196-97.

63. *Id.* at 197. Exhaustion of administrative remedies may not be a precondition to suit in Missouri courts. See note 54 and accompanying text *supra*.

64. See note 19 and accompanying text *supra*.

65. It should be noted that even under the majority's holding, such a suit might end up in federal court through a grant of certiorari by the United States Supreme Court. See *Huffman v. Pursue Ltd.*, 420 U.S. 592, 605 (1975); *Matthews v. Rodgers*, 284 U.S. 521, 526 (1932).

66. 102 S. Ct. at 184. See *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297-301 (1943).

67. *Fulton Market Cold Storage Co. v. Cullerton*, 582 F.2d 1071, 1078 (7th Cir. 1978).

position that only relief designed to gain "an adjudication of rights in anticipation of their threatened infringement" is barred by comity.⁶⁸

Second, the Court felt that such a determination would be fully as intrusive on the state tax system as the equitable actions barred by the principle of comity.⁶⁹ The Court noted that because *Monroe* held that exhaustion of state administrative remedies is not required in section 1983 suits,⁷⁰ taxpayers could bring such suits without first permitting the state to correct the alleged constitutionally deficient practices.⁷¹ This, asserted the Court, would exacerbate the intrusiveness of such an action.⁷²

The Court further noted that if tax officials were held liable under section 1983, it would have a "chilling effect" on the actions of other county officials, impairing the state's ability to collect revenues.⁷³ While this may, in fact, occur, the effect is precisely what was intended by Congress in section 1983.⁷⁴ If the defendants were held liable under section 1983 for unconstitutional administration of the Missouri property tax, other Missouri tax officials would promptly cease their unequal assessment of real property and targeting of those who successfully appeal their assessments. As Justice Brennan notes in his concurrence, "I would never have thought this result something to be avoided."⁷⁵

Finally, the Court noted that the official's alleged unconstitutional actions may be the result of forces beyond his control, such as a limited amount of resources.⁷⁶ If this is the case, the official would not be held liable in any event because such an official is entitled to a "good faith" defense.⁷⁷

This approach offers little more protection to the state's interest in the administration of its tax system than the Brennan approach.⁷⁸ It is, however, most abusive to the individual's interest in securing a federal forum for section 1983 tax suits. Although one of the purposes of section 1983 was to provide an initial federal forum for plaintiffs alleging a constitutional violation,⁷⁹ *Fair*

68. 102 S. Ct. at 189 (Brennan, J., concurring).

69. *Id.* at 184.

70. Brennan disagreed with this assessment of *Monroe*. *Id.* at 194-97. See text accompanying notes 61-63 *supra*.

71. 102 S. Ct. at 185. This intrusiveness would not be serious in Missouri, however, since exhaustion of administrative remedies is not required before suits are brought in state courts. See note 54 and accompanying text *supra*.

72. 102 S. Ct. at 185.

73. *Id.*

74. See text accompanying notes 31-32 *supra*.

75. 102 S. Ct. at 189 n.8 (Brennan, J., concurring). Brennan asserts that the rationale of *Great Lakes* was to avoid withholding tax funds from local authorities until the tax is determined to be unlawful, not afterward.

76. 102 S. Ct. at 185.

77. *Fulton Market Cold Storage Co. v. Cullerton*, 582 F.2d 1071, 1080 (7th Cir. 1978) (citing *Wood v. Strickland*, 420 U.S. 308 (1975)).

78. See text accompanying note 64 *supra*.

79. See text accompanying notes 31-32 *supra*.

Assessment virtually abrogates the taxpayer's interest in bringing his challenges to state taxes in a federal forum.⁸⁰

In *Fair Assessment*, the United States Supreme Court went further than was necessary to fully reconcile the individual's interest in having a federal forum for his section 1983 suit with the state's interest in the unfettered administration of its tax system. By barring such suits on the basis of comity, the Court restricted the broad scope that Congress intended section 1983 to have. If section 1983 must be restricted, the more logical approach is to first require exhaustion of state administrative remedies if the state involved requires exhaustion before allowing access to that state's court system. After such exhaustion, a section 1983 plaintiff seeking money damages for the unconstitutional administration of a state tax system should be allowed to bring his claim in federal court. If the state involved does not require exhaustion before granting access to state court, it should not be required before allowing access to federal court.⁸¹

Though it may appear to disregard a specific grant of jurisdiction from Congress, *Fair Assessment* can perhaps best be viewed as a response by the Court to increasing public pressure for restricting federal court jurisdiction. Several pending congressional bills would limit federal court jurisdiction in such areas as school-sponsored prayer,⁸² abortion,⁸³ busing,⁸⁴ and equal treatment of males and females in the armed services.⁸⁵ More pressure is coming from within the judiciary itself. Chief Justice Robert Donnelly of the Missouri Supreme Court recently criticized the expanded power of the federal courts and proposed a constitutional amendment that would severely limit the power of the United States Supreme Court.⁸⁶ *Fair Assessment* may signal that the Court is responding and is ready to further expand the principle of comity to bar access to lower federal courts in other areas where the state

80. The taxpayer may, of course, seek review of his case by petitioning the United States Supreme Court for a writ of certiorari.

81. This means, however, that availability of section 1983 will depend to some degree on the niceties of state tax procedures and will vary from state to state.

82. S. 481, 97th Cong., 1st Sess. (1981).

83. H.R. 867, 97th Cong., 1st Sess. (1981).

84. H.R. 869, 97th Cong., 1st Sess. (1981).

85. H.R. 279, 97th Cong., 1st Sess. (1981). For a discussion of the constitutionality of these bills, see generally Auerbach, *The Unconstitutionality of Congressional Proposals to Limit the Jurisdiction of Federal Courts*, 47 MO. L. REV. 47 (1982). For Congressional criticism of these bills, see 128 CONG. REC. S2225-69 (daily ed. Mar. 17, 1982) (remarks of Senators Baucus, Leahy, Mathias, Specter, Eagleton, and others). *But see* Anderson, *Government of Courts: The Power of Congress under Article III*, 68 A.B.A.J. 686 (1982).

86. Donnelly, *The State of the Judiciary in Missouri—1982*, 38 J. MO. B. 515 (1982).

has a strong interest.⁸⁷ This expansion would, however, further infringe upon the individual's interest in having his constitutional claim adjudicated in federal court.

DON M. DOWNING

87. For a prediction of the future direction that the Court will take regarding the balance of power between federal and state courts generally, and a prediction of the role Justice Rehnquist will play in this area, see Fiss & Krauthammer, *A Return to the Antebellum Constitution—The Rehnquist Court*, *New Republic*, Mar. 10, 1982, at 14.

