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Since 1937 a federal statute has blocked federal courts from enjoining the collection of state taxes where state courts have provided protesting taxpayers with adequate remedies. This Article reviews this statute and modern abstention law, which is rapidly diminishing the jurisdiction of federal courts over federal claims "adequately" protected at the state level, and considers the ways both affect federal jurisdiction over suits alleging discriminatory property tax assessments. The author concludes that federal courts should assume jurisdiction over these actions where there is biased state administrative review and where class relief is essential but the state does not provide it. Recognizing that even when state remedy is inadequate the doctrines of comity and federalism apply, the author also outlines the types of patterned discrimination cases that should concern the federal courts, and suggests remedies that federal courts can apply to minimize the impairment of state functions.

A lack of uniformity in individual property tax assessments may well cloak systematic discrimination against minorities and the poor.[1] Recent studies have established the existence of nonincidental and non-

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1. Econometric analysis "confirms that wealthier, upper-class communities are assessed at a lower rate than lower income communities." SWARTHMORE COLLEGE CENTER FOR SOCIAL AND POLICY RESEARCH, DETERMINATES OF PROPERTY TAX ASSESSMENT DIFFERENTIALS WITH EMPHASIS ON DELAWARE COUNTY, PENNSYLVANIA 136-38 (1973) [hereinafter cited as SWARTHMORE STUDY]; *see* E. MILLS, URBAN ECONOMICS 237-38 (1972); Black, *The Nature and Extent of Effective Property Tax Variation within the City of Boston*, 25 NAT'L TAX J. 203 (No. 2 1972). For studies documenting inequities not aimed at constitutionally suspect classes, *see* Carr, *Property Assessments*, 17 AD. L. REV. 187 (1965); Clement, *Discrimination in Real Property Tax Assessment: A Litigation Strategy for Pennsylvania*, 36 U. PITT. L. REV. 285 (1975) [hereinafter cited as Clement]; Hellerstein, *Judicial Review of Property Tax Assessments*, 14 TAX L. REV. 327 (1959); Yudof, *The Property Tax in Texas under State and Federal Law*, 51 TEXAS L. REV. 885 (1973) [hereinafter cited as Yudof]; Note, *Inequality in Property Tax Assessments: New Cures for an Old Ill*, 75 HARV. L. REV. 1374 (1962) [hereinafter cited as Note, *Inequality*].

random assessment disparities that could violate the equal protection clause of the Federal Constitution.[2] Widespread inequities on a national scale have been documented by the Advisory Commission on Intergovernmental Relations (ACIR).[3] There has been virtually no progress in removing these administrative partialities over the last decade.[4] State legislatures and courts have deferred to the status quo,[5] refusing to examine the potential federal constitutional issues lurking behind these divergences from uniformity. This is unfortunate because property tax assessment procedures may frequently violate both federal constitutional and civil rights. Violations most often occur where factors are included or excluded from the assessment process and this results in discrimination against a suspect class. The corresponding equal protection claim is most readily available where there is racial discrimination.[6]

Even if property tax assessments do not themselves infringe civil rights, assessment appeal procedures may be so unfair as to deny the taxpayer due process of law. A taxpayer who disputes the tax bill has initial recourse to an administrative review board. In circumstances

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2. It is clear under current law that equal protection challenges in the property tax area will only be recognized where there is racial discrimination. Classifications by race are suspect, whereas those according to wealth are not. Only where strict scrutiny can be applied in judicial review may the state's substantial interest in its taxing power be overcome. Washington v. Davis, 96 S. Ct. 2040, 2047 (1976) (dictum) the intent behind the equal protection clause of the fourteenth amendment was prevention of racial discrimination); San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973); *cf.* Lehnhausen v. Lakeshore Auto Parts, 410 U.S. 356 (1973) (*ad valorem* tax on corporations but not individuals held constitutional). "Where taxation is concerned, and no specific federal right, apart from equal protection is imperiled, the states have large leeway . . . ." *Id.* at 359. Therefore, the equal protection analysis in this Article refers only to claims of racially discriminatory property tax assessments. *See also* Clement, *supra* note 1, at 314-22.

3. SENATE SUBCOMM. ON INTERGOVERNMENTAL RELATIONS, 93rd CONG., 1st SESS., STATUS OF PROPERTY TAX ADMINISTRATION IN THE UNITED STATES 125 (Comm. Print 1973) [hereinafter cited as ACIR].

> Far too long, the average taxpayer in most [s]tates has been at the mercy of inexpert local officials, arbitrary bureaucracies, and privileged interests. Antiquated administrative practices and insufficient commitment of resources have prevented even responsible officials from protecting the public interest . . . . [W]idespread inequities and inefficiences [persist].

Id. at V (Remarks of Senator Muskie). *See also* Clement, *supra* note 1; Note, *Inequality*, *supra* note 1.

4. ACIR, *supra* note 3, at 2-3. California courts, however, have made inroads in this area. *See* Brett Harte Inn, Inc. v. City & County of San Francisco, 16 Cal. 3d 14, 544 P.2d 1354, 127 Cal. Rptr. 154 (1976), *noted in* 65 CALIF. L. REV. 461 (1977); *cf.* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (declaring use of property taxes for school financing unconstitutional on equal protection grounds).

5. ACIR, *supra* note 3; Note, *Inequality*, *supra* note 1, at 1382-83.

6. See note 2 *supra*.

where the board is biased in favor of the assessor's determination, the taxpayer stands little chance of obtaining a fair hearing.

Lawsuits alleging violations of federal rights can generally be brought in federal courts.[7] Federal jurisdiction over suits challenging state and local property tax assessments, however, is limited by a tax anti-injunction statute enacted in 1937.[8] This 1937 Act reads: "The district court 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."[9] It was passed to shield the collection of state and local taxes from injunctive disruption by the federal judiciary.[10]

The broad language of the 1937 Act makes it clear that federal jurisdiction over actions for anticipatory relief from state and local taxes is restricted to rare situations. On the other hand, the Act does provide for federal jurisdiction where state remedies are not "plain, speedy and efficient." Such a determination must be made with reference to the taxing mechanism in question. If a state remedy is practicable, taking into account all appropriate interests, it will not do for a federal court to assume jurisdiction even through a remedy more favorable to the plaintiff might be available.

Still, the federal courts have a duty to vindicate federal rights. The purpose of this Article is to detail exceptions to the jurisdictional bar in the 1937 Act. Part I deals with claims for anticipatory relief based on

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7. This refers to federal question jurisdiction under 28 U.S.C. § 1331 (1966).

8. 28 U.S.C. § 1341 (1970) (hereinafter cited as 1937 Act). For a discussion of the general history of the provision, see Charbonneau Indus. Inc. v. City of Grand Rapids, 198 F. Supp. 629 (1961).

9. There have been slight changes of wording since passage in 1937. *See* 28 U.S.C. § 1341 (1970) (reviser's notes).

10. S. REP. No. 1035, 75th Cong., 1st Sess. 2, 3; 81 CONG. REC. 1416 (1937) (remarks of sponsor Senator Bone). It was one of several statutes restricting federal jurisdiction passed during the Depression. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 976-80 (2d ed. 1973) [hereinafter cited as HART & WECHSLER]. Congress thought that injunctive interference by federal courts with the operations of state and local governments was hampering economic recovery. Accordingly, the 1937 Act was intended to permit smooth operation of the taxing systems so that essential revenues could be collected without interruption. *See* Note, *Federal Declaratory Judgments on the Validity of State Taxes*, 50 YALE L.J. 927 (1941) [hereinafter cited as Note, *Declaratory Judgments*]. It is cousin to the broader concepts of federalism and comity that govern the relations of federal courts with the states in general, but which are of acute concern wherever a state is the defendant. Before the Supreme Court's decision in *Ex parte* Young, 209 U.S. 123 (1908), there were few problems in this area because of the eleventh amendment's bar to federal jurisdiction over suits against a state by either citizens of another state or by its own citizens. *See, e.g.*, Hans v. Louisiana, 134 U.S. 1 (1890). In *Young*, the Court decided that the eleventh amendment did not apply to suits against state *officials*, thus starting the battle anew.

the Civil Rights Act of 1871[11] and the equal protection and due process clauses of the fourteenth amendment. These claims would be cognizable under federal question jurisdiction[12] were it not for the 1937 Act. Two such claims, however, qualify for jurisdiction because of the "plain, speedy and efficient" exception built into the statute. The first is where class relief is essential to remedy the deprivation of constitutional rights and a state denies class relief. The second exception is where administrative review of tax assessments violates due process.

Demonstrating inadequacy, however, only meets a threshold requirement for federal jurisdiction. Recent anti-injunction decisions of the Burger Court have shown that exceptions to statutory prohibitions can be dead letters if abstention policies prevent their use.[13] Part II of this Article shows that where the state assessment remedy is inadequate, dual sets of specific and general comity concerns must be satisfied. While intrusions by federal courts upon state tax collecting must not conflict with the specific policies favoring abstention underlying the 1937 Act, the Act was never intended to prohibit claims of intentional violation of civil rights by state and local authorities.[14]

Additionally, federal jurisdiction must not violate the growing body of more general abstention law that has developed since the Supreme Court's decision in *Younger v. Harris*.[15] That case sparked the revival of a comity concern for "a proper respect for state functions."[16] The Court has been careful, however, not to extend its abstention decisions to encompass broad deference to state executive action as opposed to state judicial action.[17] A strong case can be made for federal relief in assessment cases that do not collaterally attack any completed or pending state judicial proceeding. This Article proposes a test for identify-

11. 42 U.S.C. § 1983 (1970) [hereinafter cited as the 1871 Act]. Jurisdiction is granted under 28 U.S.C. § 1343(3) (1970).

12. See note 7 *supra*.

13. *See, e.g.*, Juidice v. Vail, 97 S. Ct. 1211, 1217 n.11 (1977).

14. See note 10 *supra*.

15. 401 U.S. 37 (1971). The original *Younger* doctrine was that the unconstitutionality of state action on its face did not justify a federal injunction against a state criminal proceeding in the absence of a showing of bad faith or harassment on the part of state officials.

16. 401 U.S. at 44. The plaintiffs in *Younger* sued under the 1871 Act to enjoin their pending prosecution under California's criminal syndicalism statnte, claiming that the statute was unconstitutional. The Court declined to decide the case on the basis of 28 U.S.C. § 2283, which prohibits injunctions against state court proceedings, "except as expressly authorized by Act of Congress." Instead, the Court decided that the federal courts should defer to the state. *Id.* at 54. *See also* Juidice v. Vail, 97 S. Ct. 1211 (1977); Rizzo v. Goode, 423 U.S. 362 (1976); Huffman v. Pursue Ltd., 420 U.S. 592 (1975).

17. Wooley v. Maynard, 45 U.S.L.W. 4379, 4381 (U.S. April 20, 1977); Huffman v. Pursue Ltd., 420 U.S. 592, 610 n.21 (1975).

ing such cases while respecting the comity policy that any federal relief be but minimally intrusive[18] and deferential to important state judicial interests.[19] In this regard special attention is given in the last segment of the Article to fashioning careful, phased federal remedies.

I

FEDERAL JURISDICTION UNDER THE 1937 ACT FOR RELIEF OF EQUAL PROTECTION AND DUE PROCESS CLAIMS

A. The Need for Class Relief

The importance of class relief is illustrated by *Bland v. McHann*.[20] The plaintiffs in *Bland* alleged pervasive racial discrimination in their property tax assessments, and sought an injunction in federal court against collection of those taxes. The facts, as stipulated,[21] were that immediately after civil rights protests in a Mississippi county the assessments of hundreds of properties owned by blacks were raised ten times higher than those of comparable properties owned by whites. Testimony indicated that there was one chance in 100,000 that such a differential on lines of race could be attributed to chance alone.[22] Local authorities had apparently included an improper factor in their assessment, namely race, depriving the class of black property owners of equal protection under the laws. On review, a Fifth Circuit panel held that the state remedy, which apparently provided no class relief, was sufficient to pass the 1937 Act's "plain, speedy and efficient" test.[23] As a result of this finding, the panel denied federal jurisdiction.[24]

The result in *Bland* was both unsatisfactory and incorrect because the court improperly interpreted the "plain, speedy and efficient" language in the 1937 Act. The historical precedents for this language and the subsequent interpretations it has received demonstrate that there was ample basis for requiring class relief. The denial of class relief made the Mississippi remedy "inefficient" for a number of strong policy reasons. Without such relief, state courts will be largely passive in the face of *Bland*-type discrimination. Therefore, some limited provision for federal jurisdiction in such cases is essential.

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18. Wooley v. Maynard, 45 U.S.L.W. 4379, 4381 (U.S. April 20, 1977).

19. Juidice v. Vail, 97 S. Ct. 1211 (1977); Steffel v. Thompson, 415 U.S. 452 (1974).

20. 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973). The claim in *Bland* was brought under the 1871 Act.

21. *Id.* at 23 n.1.

22. *Id.* at 23.

23. *Id.* at 29. The court said that a state need only provide some relief, not the best relief.

24. *Id.*

1. *The Development of the "Plain, Speedy and Efficient" Doctrine*

Prior to 1937, federal courts would intervene in private actions against a state only under equity jurisdiction. Equitable jurisdiction would only be exercised if the state remedies were inadequate.[25] Inadequacy was tested on the basis of two main doctrines, *inter alia:* multiplicity and uncertainty.

The multiplicity doctrine was invoked in cases where the plaintiff would have had to file numerous actions in different courts at different times in order to obtain complete relief in the state system.[26] Restricting the plaintiff to this relief would have violated three important procedural policies. First, having to press several suits on the same cause of action would create unnecessary expense for the litigants. Second, numerous courts would have to hear the same questions of law and fact. This would be a waste of the state's time and money, violating notions of judicial economy. Finally, the threat of inconsistent adjudications and delayed judgments would make it unlikely for litigants to receive complete justice.[27]

The uncertainty doctrine does not differ significantly from multiplicity. Remedies that may involve unnecessary expense and incomplete justice are also uncertain. The uncertainty doctrine is distinct, though, and cases applying it have found state law inadequate where the existence of any state remedy is doubtful[28] because the law is unsettled and unclear at the time of suit.

The legislative introduction of the "plain, speedy and efficient" test to replace the adequacy test might at first appear to call for a different federal view, perhaps more tolerant of tax remedies creating multiplicity or uncertainty. The language first appeared in the Johnson Act of 1934,[29] a provision designed to lessen federal judicial intervention in public utility ratemaking, and received scant attention in the legislative history.[30]

25. *See, e.g.*, Johnson v. Wells Fargo & Co., 239 U.S. 234, 243-44 (1915); Note, *Jurisdiction to Enforce Federal Statutes Regulating State Taxation: The Eleventh Amendment-Section 1341 Imbroglio*, 70 YALE L.J. 636, 642 (1961) [hereinafter cited as Note, *Jurisdiction to Enforce*].

26. *See, e.g.*, Matthews v. Rodgers, 284 U.S. 521, 529-30 (1932); Dows v. City of Chicago, 78 U.S. (11 Wall.) 108, 112 (1870).

27. Wilson v. Illinois S. Ry. Co., 263 U.S. 574, 577 (1924); Greene v. Louisville & Interurban R.R. Co., 244 U.S. 499, 520 (1917).

28. *See, e.g.*, Stewart Dry Goods Co. v. Lewis, 287 U.S. 9 (1932) (relief must be assured); Greene v. Louisville & Interurban R.R. Co., 244 U.S. 499, 513, 521 (1917) (where state law acknowledges an injury but fails to provide judicial relief, remedy is uncertain); Note, *Jurisdiction to Enforce, supra* note 50, at 638, 642 n.44. *See also* Township of Hillsborough v. Cromwell, 326 U.S. 620 (1946). Although decided under the 1937 Act, the case is identical to pre-1937 cases.

29. 28 U.S.C. § 1342 (1970).

30. 81 CONG. REC. 1415-16 (1937).

As with the 1934 Act, there is no clear statement in the legislative history of the 1937 Act indicating why the "plain, speedy and efficient" language was used.[31] Some federal court cases decided immediately after enactment indicated that federal injunctive relief was to be far more generally restrained than under the prior standard.[32] Nevertheless, because the legislative history was less than clear, there was some doubt among the commentators as to whether the federal courts would interpret the new Act as a retreat from the prior standard.[33] This doubt was justified when the Supreme Court, in a series of cases in the early and middle 1940's,[34] used the old and new standards interchangeably. The decisions implied a continuing concern over the fairness of state proceedings and the narrowness of state equitable relief.[35] Since 1937, substitution of the efficiency language for adequacy language "has generally been ignored."[36]

2. *The Need for the Continued Vitality of the Adequacy Standard*

The endurance of the adequacy standard has been reflected in the immutability of two of its constituent doctrines, namely multiplicity and

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The 1934 Act's legislative history was heavily relied upon by Senator Bone, the sponsor of the 1937 Act, and Congress. S. REP. No. 1035, 75th Cong., 1st Sess. 2, 3; 81 CONG. REC. 1416 (1937). The use of "efficient" instead of "inadequate" was viewed by one commentator of the time as manifesting a wish not to impose a requirement that state remedy be everywhere as broad as federal remedy. *See* Note, *Limitation of Lower Federal Court Jurisdiction over Public Utility Rate Cases*, 44 YALE L.J. 119, 129 n.57 (1934) [hereinafter cited as Note, *Rate Cases*]. Some commentary also read this new language as preventing federal relief where there was "any functioning [state] remedy." *See* Note, *The Johnson Act: Defining a "Plain, Speedy, Efficient" Remedy in the State Courts*, 50 HARV. L. REV. 813, 814 (1936) [hereinafter cited as Note, *The Johnson Act*].

This latter view was not firmly rooted in any clear 1934 Act legislative history, for there was no "persuasive reason . . . suggested in the Congressional debates," Note, *Rate Cases, supra* at 129 n.57, or reports, for the use of the word "efficient" and the omission of "adequate." Note, *The Johnson Act, supra* at 813-14, n.2. To the contrary, Senator Austin at the time opposed the use of the word "efficient" because its lack of definition might give federal courts *too much* discretion. *Id.* at 814 n.3. Indeed, use of this word was viewed as a lever for selective federal intervention to encourage more "expedited" state handling of rate cases. Note, *Rate Cases, supra* at 132.

31. Note, *Rate Cases, supra* note 30, at 125.

32. Note, *Jurisdiction to Enforce, supra* note 25, at 636, 643 n.47.

33. 26 VA. L. REV. 374, 375 (1940).

34. Township of Hillsborough v. Cromwell, 326 U.S. 620 (1946); Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101 (1944); Great Lakes Dredge & Dry Dock Co. v. Huffmau, 319 U.S. 293 (1943); *cf.* Tully v. Griffin, 97 S. Ct. 219, 222 (1976) (federal district court is under an equitable duty to refrain from interfering with a state's collection of its revenue except in cases where an asserted federal right might otherwise be lost). *See generally* HART & WECHSLER, *supra* note 10, at 1049-50.

35. Note, *Federal Court Interference with the Assessment and Collection of State Taxes*, 59 HARV. L. REV. 793 (1946).

36. *Id.* at 784.

uncertainty. Initially some circuit courts,[37] on finding uncertainty or multiplicity in state legal remedies, escaped the assumption of jurisdiction by presuming there was a state equitable remedy that would avoid these shortcomings.[38] But the contention that the 1937 Act made federal courts more tolerant of multiplicity or uncertainty was rebutted in *Georgia Railroad & Bank Co. v. Redwine*[39] and *Spector Motor Service Co. v. McLaughlin.*[40] *Redwine* involved a single corporation which, if consigned to a state remedy, would have had to file over 300 separate claims in fourteen different counties to arrest the taxation. The Supreme Court relied expressly upon pre-1937 multiplicity doctrine in holding that there was federal jurisdiction.[41] Similarly, the Court in *Spector* relied on the adequacy standard to justify the assertion of federal jurisdiction in a case where state law had not been authoritatively construed.[42] The Court reasoned that this created uncertainty about the adequacy of state remedy.[43]

The foregoing discussion suggests that there is precedent for asserting federal jurisdiction in spite of the 1937 Act in cases where class relief is not available from the state. The obstacle to this analysis is *Matthews v. Rodgers,*[44] the leading case on the multiplicity doctrine in suits seeking anticipatory relief from the collection of state or local taxes.[45]

Matthews was a class action by several corporations engaged in the interstate sale of cotton. They sought to enjoin the collection of Mississippi taxes of $100 for each person engaged in selling cotton and $25 for each employee so engaged on the ground that the taxes unconstitutionally burdened interstate commerce. Certiorari was granted on the issue of the propriety of federal equity jurisdiction. The plaintiffs argued that the Mississippi remedy, which required them to file individual refund actions, would create multiplicity. The Court rejected this argument, finding the state remedy adequate. Individual actions were viewed as essential for proper determinations.

37. *Id.* at 784 n.19; *see* Note, *Jurisdiction to Enforce,* note 25 *supra,* at 643 n.47.

38. *See, e.g.,* Miller v. City of Greenville, 138 F.2d 712, 719 (8th Cir. 1943); Baker v. Atchison, Topeka & Santa Fe, Ry. Co., 106 F.2d 525, 529 (10th Cir. 1939).

39. 342 U.S. 299 (1952).

40. 323 U.S. 101 (1944). *Spector* has since been overruled on the merits, but its procedural rulings have not been disturbed. *See* Complete Auto Transit, Inc. v. Brady, 45 U.S.L.W. 4259 (U.S. March 7, 1977).

41. 342 U.S. at 303 n.10 (citing Matthews v. Rogers, 284 U.S. 531 (1932)).

42. 323 U.S. at 105-06.

43. *Id.*

44. 284 U.S. 521 (1932).

45. The decision was rendered before enactment of the 1937 Act. As noted in the text accompanying notes 39-43 *supra,* however, decisions under the Act in *Redwine* and *Spector* relied upon *Matthews,* indicating its continued vitality. *See also* cases cited in note 49 *infra.*

The Court stated that the extent to which a tax burdened interstate commerce had to be determined separately for each business. Thus, each plaintiff raised "separate issues of law and fact,"[46] and a class suit was inappropriate. The Court went on to say, in language that has been thought to limit the multiplicity doctrine to the impact of numerous suits on a single plaintiff:

> [I]n general, the jurisdiction of equity to avoid multiplicity of suits at law is restricted to cases where there would otherwise be some necessity for the maintenance of numerous suits between the *same* parties involving the same issues of law or fact. It does not extend to cases where there are numerous parties plaintiff or defendant, and the issues between them and the adverse are not necessarily identical.[47]

But the reason for denying equitable relief was the absence of a common issue, not the presence of different party plaintiffs. The key inquiry is always the similarity of the issues in the various suits.[48] A number of courts have failed to analyze multiplicity in this manner.[49]

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46. 284 U.S. at 530.

47. *Id.* at 529-30.

48. *Matthews* adopted the minority view of its time. As one commentator noted:

> [A]t present there is a large group of decisions holding that jurisdiction exists in many cases [on multiplicity grounds], irrespective of a common interest or title in the subject matter, and without regard to the right of each litigant to resort to equity on other grounds. Apparently these courts only require that there be a community of interest within the parties in the questions of law and fact involved in the general controversy. This is the view taken by Pomeroy, which he states is sustained by the overwhelming weight of authority. . . .
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> [As a result of the conflict between Pomeroy and other authority, courts deny jurisdiction as] common sense, justice, and the convenience of the parties seem to require.
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> . . . [M]ost courts of equity will intervene at the insistence of taxpayers who seek to enjoin the collection of illegal taxes or assessments which affect them in a like manner. . . .

Note, *Equity—Jurisdiction—Prevention of Multiplicity of Suits,* 16 MINN. L. REV. 679, 680-81, 687 (1932).

The requirements in multiplicity cases that there be some legal relation between parcels of property commonly aggrieved (in *Matthews* common ownership) or between persons in a class, has been much criticized because it has thwarted intelligent and unitary treatment of multiple cases involving the same factual and legal problems. *See generally* Chaffee, *Bills of Peace with Multiple Parties,* 45 HARV. L. REV. 1297, 1306, 1320-21 (1932) [hereinafter cited as Chaffee]; Homburger, *State Class Actions and the Federal Rule,* 71 COLUM. L. REV. 609, 619, 623-25 (1971) [hereinafter cited as Homburger].

49. *See, e.g.,* Georgia R.R. & Bank Co. v. Redwine, 342 U.S. 299, 303 n.10 (1952) (*Matthews* contrasted with "same plaintiff" multiple suit case); Kimmey v. H.A. Berkheimer, Inc., 376 F. Supp. 49 (E.D. Pa. 1974) (implies requirement of multiple taxpayer suits over same constitutional wrong proper under *Matthews*); United States Steel Corp. v. Multistate Tax Comm'n, 367 F. Supp. 107, 116 (S.D.N.Y. 1973); Note, *Discriminatory Tax Assessment,* 51 TEXAS L. REV. 999, 1009-10 n.67 (1973). *But see* Miller v. Bauer, 517 F.2d 27, 32 (7th Cir. 1975) (implies if one suit to adjust all assessments

The "same party" language should be read as dictum, and has been so interpreted by the Third Circuit in *Garrett v. Bramford.*[50]

In *Garrett* three plaintiffs brought a class action alleging that a Pennsylvania method of assessment was intentionally racially discriminatory in that assessors had failed to meet the statutory requirement of annual reassessment. Because property values were falling in nonwhite areas of the taxing district and values were rising in white areas, the plaintiffs argued that failure to make annual reassessment meant the effective tax rate in nonwhite areas was higher.[51] It was urged that this was a situation where a relevant factor had been excluded from the assessment process. Local authorities failed to consider how property values changed, due to the racial makeup of the neighborhood, over a relatively short period of time, and how this change redounded predominantly to the detriment of black residents.

The opinion by Judge Rosenn held that

> the factfinding process and the issues would be identical for each plaintiff and their common adversary [the Board of Assessment], for the complaint alleges not the unlawful assessment imposed on each taxpayer individually, but the unconstitutionality of the method of assessment as applied to them as a group. In this posture the issues of law and fact tendered by the plaintiffs meet the traditional requirements for equitable intervention.[52]

Judge Rosemi also found the "same plaintiff" language in *Matthews* to be, in effect, dictum.[53] The court thus found that Pennsylvania administrative and judicial law were inadequate under the 1937 Act because they failed to provide class relief.[54]

On the other hand, the court in *Bland*[55] had found the Mississippi remedy adequate without discussing either the multiplicity doctrine or the *Matthews* "same plaintiff" dictum. It viewed the availability of a remedy for taxpayers as sufficient to bar federal jurisdiction.[56] This

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of multiple parties *Matthews* test requirements are met); Non-resident Taxpayers Assoc. v. Municipality of Philadelphia, 341 F. Supp. 1139, 1143 (D.N.J. 1971), *aff'd*, 406 U.S. 951 (1972) (no mention of *Matthews*).

50. 538 F.2d 63 (3rd Cir. 1976), *cert. denied*, 97 S. Ct. 485 (1977).

51. *Id.* at 65.

52. *Id.* at 71.

53. *Id.*

54. *Id.* at 71-2. *See also* Husbands v. Commonwealth of Pennsylvania, 359 F. Supp. 925, 936 (E.D. Pa. 1973). In that case the federal court refused to dismiss a class action complaint alleging, *inter alia*, equal protection violatious of a school reorganization, which would impose a uniform mileage rate throughout the new districts, notwithstanding the fact that the assessment ratios in the various component school districts were unequal. The court emphasized that the board based relief sought by plaintiffs could not be obtained through Pennsylvania's administrative remedies.

55. 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973).

56. *Id.* at 28. See note 23 *supra.*

was done without distinguishing among causes of action, remedies sought or litigants. The plaintiffs' assertion, that class relief was essential, was rejected as no more than a quest for a "better" remedy.[57] The interpretation thus given the 1937 Act's "plain, speedy and efficient" language in *Bland* is that any remedy suffices.

It is clear that *Matthews* imparted no such meaning to the adequacy standard. Since the 1937 Act embodies this standard,[58] it necessarily follows that the court in *Garrett* was correct in its more exacting analysis of the statute, while the court in *Bland* was in error.[59] An examination of the practical effects of denying class relief to *Bland* and *Garrett* plaintiffs shows that both the *Bland* decision and the *Matthews* "same plaintiff" dictum violate the adequacy standard in the 1937 Act.

The procedural channels for taxpayer relief under the state assessment statutes in *Bland*[60] and *Garrett*[61] mandated administrative and judicial review geared primarily to single complaints, and class relief was not available. This parallels the practice in numerous state courts[62] and

57. *Id.* at 29.

58. See text accompanying notes 34-43 *supra.*

59. The Court in *Matthews* implied that, if it could be persuaded that the method of application of a tax statute presented common issues, it would allow equitable intervention. It was not convinced that the application of the statute impinged upon the businesses identically because of differences in their operation, partly due to their differing involvements in interstate commerce. 284 U.S. at 529-30. Cases like *Bland* and *Garrett* are clearly distinguishable on this ground because *the tax has already been levied,* allegedly against a racial class. The common grievance is clear. Indeed the constitutionally pernicious nature of the alleged discrimination would argue that the federal courts err in cases less clear than *Garrett* and *Bland* on the side of jurisdiction. In this regard, as well, the discrimiuation in *Matthews* (against commerce) is different.

Garrett's "identical issue" and "same plaintiff" result, in the context of possible unconstitutional irreparable injury, was supported by the Court in AFL-CIO v. Watson, 327 U.S. 582 (1945). There equitable relief was granted to several defendant companies who were threatened by criminal prosecutions. Citing *Matthews,* the Court noted "the threat of multiplicity of prosecutions . . . would not be alone sufficient to establish a cause of action in equity." *Id.* at 595. It went on to hold that, since *all* the companies faced "not fanciful, immediate" irreparable injury, it would grant equitable relief. *Id.* This would imply that multiple taxpayers litigating with the state over fact-law issues related to their identical irreparable injuries are entitled to relief in part founded on multiplicity doctrine. Certainly constitutional deprivation has been widely construed as creating irreparable injury. As one court stated, "[w]e believe that the day is long past when such a denial of equal protection of the laws [racial discrimination] is not considered to be, in and of itself, irreparable injury . . . ." Pitts v. Department of Revenue, 333 F. Supp. 662, 670 (E.D. Wisc. 1971).

60. 463 F.2d at 28.

61. 538 F.2d at 70.

62. *See, e.g.,* Anderson v. Blackmon, 232 Ga. 4, 205 S.E.2d 250 (1974) (refund); Blackmon v. Seaven, 231 Ga. 307, 201 S.E.2d 474 (1973); Simpson v. Mulle, 358 Mich. 441, 100 N.W.2d 490 (1960) (strict, literal construction of complaint so as to deny class relief); Village of Edena v. Joseph, 264 Minn. 84, 119 N.W.2d 809 (1962) (special assessment of abutting properties); State *ex rel.* Sampson v. Kenny, 185 Neb. 230, 175 N.W.2d 5 (1970) (refund); Hyde v. State Bd. of Equal., 196 Okla. 28, 162 P.2d 175

administrative tribunals.[63] For the most part, state causes of action fall into two categories: "public" and "private" actions.

The public action is a prayer by a single taxpayer for mandamus to compel the raising of other tax assessments to a level of uniformity.[64] Public actions are rarely successful,[65] and should be considered too uncertain to redress racial discrimination. The numerous procedural obstacles to bringing a public action make it a risky undertaking.[66] In part this is because the public action is essentially a suit against a defendant class made up of those not subject to discrimination. The assessments of a large number of properties must be reviewed. A hearing of this nature will be elaborate and expensive. On the other hand, the plaintiff stands to gain nothing from a pecuniary standpoint, and so has little to gain from pursuing this costly litigation. Poor plaintiffs such as those in *Bland* would probably never prosecute a public action, although a successful public action could effectively eliminate racial discrimination because any judgment would have broad application. As a suit against a defendant class, it would have the desired effect of eliminating discrimination with one action. Hence, it cannot be objected to on multiplicity grounds.[67] The public action, however, lacks the cost spreading attribute of a plaintiffs' class action. Because of the great expense attached to any action of such breadth, the public suit must be deemed too uncertain a remedy for plaintiffs like those in *Bland* and *Garrett*.

Supporting this point to an extent is the fact that neither the parties nor the courts in *Bland* and *Garrett* raise the possibility of a public action. The plaintiffs' proper course in state court was found to be a private action,[68] that is, an action by an individual taxpayer seeking a

(1945) (on judicial appeal); Newberry Mills, Inc. v. Dawkins, 259 S.C. 7, 190 S.E.2d 503 (1972); Borden v. Director, State Dep't of Assessment & Taxation, 19 Md. App. 112, 309 A.2d 773, 779 (1973) (issue left open, but implication that class remedy not available). As to acceptance generally of the class action in the states, see Homburger, *supra* note 48, at 612-17 (in 1967, at least 15 states followed the Field Code, using narrow construction and privity requirements to limit the use of class actions). *See also* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1771 (1972); Yudof, *supra* note 1, at 906-07 (with regard to Texas).

63. *See, e.g.*, Miller v. Bauer, 517 F.2d 27 (7th Cir. 1975); Husbands v. Pennsylvania, 359 F. Supp. 925, 935-6 (E.D. Pa. 1973).

64. Clement, *supra* note 1, at 303; Note, *Inequality*, *supra* note 1, at 1386-87.

65. Note, *Inequality*, *supra* note 1, at 1387. In Township of Hillsborough v. Cromwell, 326 U.S. 620, 623-24 (1946), the Court held that where a public action was a taxpayer's sole relief from discrimination, it was inadequate due to uncertainty. Additionally, the Court found that restricting the taxpayer to this remedy was a denial of equal protection. The discrimination was economic, however, and it is not clear that the equal protection clause still applies to economic classifications. See note 2 *supra*.

66. Note, *Inequality*, *supra* note 1, at 1387.

67. *Id.*

68. *See, e.g.*, 538 F.2d at 70.

reduction of his assessment to a level of uniformity.[69] This is an inappropriate form of relief where the taxpayer is victimized by racial discrimination.

Definitionally, racial discrimination indicates that the individual is mistreated because of membership in a group. If the individual were the only member of that race so treated, a racial discrimination charge would undoubtedly fail.[70] Thus, the aggrieved taxpayer will have to be able to show a discriminatory pattern affecting others of the same race as well. If the discrimination is to be eradicated, relief must protect all who are discriminated against. Restricting taxpayers to individual relief in this situation is tantamount to giving no relief at all.

Achievement of broad relief is made uncertain when patterned discrimination is obscured by haphazard individual actions. If there is pervasive and subtle discrimination, the luck of the draw may mean the weakest actions come to court first. Early reversals could discourage stronger litigants, thus effectively masking the seriousness of patterned discrimination from the public view.[71]

The availability of class relief helps to solve this problem. While the weakest litigants may still represent the class, a stronger case against the patterned discrimination can be built using evidence of the class' deprivation.[72] This evidence will enable courts to sort out common fact-law problems from the multiple complaints.[73] Thus the class action allows the court to examine assessments more methodically and consistently, not allowing "the assessors and boards of equalization to flout the law on a massive scale, subject only to a few minor adjustment."[74] Moreover, those who choose to litigate for a class are better

69. Note, *Inequality*, *supra* note 1, at 1387.

70. If the taxpayer is alone, then of course a class action is unnecessary.

71. Or if the strongest cases are presented first, favorable holdings will not bind other trial courts. Chaffee, *supra* note 48, at 1299-1300. *See also Developments in the Law: Class Actions*, 89 HARV. L. REV. 1366-68 (1976).

Young v. Edgcomb Steel Co., 363 F. Supp. 961, 967, *aff'd in part, rev'd in part on the merits*, 499 F.2d 97 (4th Cir. 1974), seems pertinent here. This case involved a class suit alleging racial bias by Edgcomb in job hiring and promotion practices. The discrimination was subtle and pervasive since job openings were publicized by word of mouth rather than by media advertising. Hence, outsiders would likely be unaware of these openings and concomitant discrimination by the employer. Only insiders would have such knowledge. The representative black plaintiff in this case, however, was objectively unqualified for a promotion, though he alleged racial bias. Thus, his standing to sue was based on dubious grounds and the circuit court so held. Were he the only one sufficiently apprised to bring the suit, discrimination would continue unabated.

72. Huff v. N.D. Loss Co., 485 F.2d 710, 713-14 (5th Cir. 1973) (en banc); C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1771 (1972); *see* Barrett v. United States Civil Serv. Comm'n, 69 F.R.D. 544 (D.D.C. 1975).

73. Chaffee, *supra* note 48, at 1301-03.

74. Yudof, *supra* note 1, at 906-07.

protected from assessor retaliation,[75] for the class representatives can more easily show disproportionate treatment relative to those similarly situated. Taxpayers will be less fearful of bringing an action, and the elimination of unconstitutional assessment practices will be more certain.

Furthermore, denial of class relief creates the possibility of a multiplicity of suits. Suits alleging racial discrimination in the same assessment practices involve similar questions of law and fact.[76] The common inquiry is based on the state of mind of local authorities and the subsequent impact in forcing those of one racial group to pay proportionately higher property taxes than those of another racial group in the same community.[77] Requiring one litigant after another to make these proofs in successive hearings is unnecessarily expensive.[78] Like their counterparts in the public action,[79] private action litigants must normally show that their assessments diverge from the common level of assessment-to-value ratios over a jurisdiction as a whole.[80] The expense of such an action can be enormous.[81] If the class action is not available, plaintiffs cannot share resources to present the strongest possible case and secure broad, binding relief. The class actions' beneficial effect, of bringing to the fore cases where the policy importance is great[82] although the individual injury is small, is lost.

In its multiplicity analysis, *Garrett* gave great weight to the ineffi-

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75. *Cf.* Arkansas Educ. Assoc. v. Board of Educ., 446 F.2d 763, 765-66 (8th Cir. 1971) (noted that teachers remaining in school system would fear retaliation if they brought individual suits alleging discrimination). *Bland* would present the possibility of retaliation if the allegations were proven, 463 F.2d at 23 n.1.

76. See text accompanying notes 52-54 *supra.*

77. See text accompanying note 70 *supra.*

78. Tenney v. City of Miami Beach, 152 Fla. 126, 11 So. 2d 188 (1942) (en banc). The court felt that requiring separate suits here would have been prohibitive and ridiculous and would have deprived many of a remedy. *See also* Chaffee, *supra* note 48, at 1297, 1319; Homburger, *supra* note 48, at 623-24; Yudof, *supra* note 1, at 906-07.

79. See text accompanying notes 66-67 *supra.*

80. Note, *Inequality, supra* note 1, at 1375.

81. Clement, *supra* note 1, at 285, 293-95; Note, *Inequality, supra* note 1, at 1382, 1387.

The fact that an individual taxpayer was unable to pay the necessary bond or prepayment to obtain a full hearing on all his claims, including constitutional allegations, has been held sufficient to find inadequate state remedy. The District Court for Vermont held that this consideration was a "practical" one of "utmost significance." Griffin v. Tully, No. 75-104 (D. Vt. Oct. 20, 1975) (three judge court). The Supreme Court reversed this decision, 97 S. Ct. 219 (1976). The Court held that the district court had misinterpreted state law, finding instead that a suit for declaratory relief and a preliminary injunction were possible avenues by which the taxpayer could avoid prepayment of the tax. Whether an absolute requirement of prepayment would have rendered state relief was unclear in the opinion.

82. *See* Homburger, *supra* note 48, at 609-10.

ciency and expense created by the denial of class relief and to the difficulty of eradicating a pattern of discrimination over time without it.[83] Further, the court noted that the duplicate costs would fall upon those "in the lower economic brackets, . . . , [and could] effectively bar any attack on the allegedly discriminatory tax structure."[84]

From the standpoint of judicial economy trying the same issues in several courts unnecessarily wastes state judicial resources. Moreover, multiple litigation is encouraged because state courts cannot make assessment determinations that bind the tax assessors to stop practices affecting many properties where class relief is unavailable. This creates a situation where, if the courts are serious about eliminating pervasive discrimination, they must take a flood of individual actions that may be exhaustively appealed through the state system. The result is a potential waste of both state judicial resources[85] and those of the federal Supreme Court should the case ultimately be appealed there.

Perhaps the greatest problem in denying class relief is the very real risk that the plaintiff will receive incomplete justice. In a *Bland* or *Garrett* situation, if a minority taxpayer were to bring an individual suit for abatement, it is very unlikely that most state courts would fashion an injunctive or declaratory remedy broader than reduction of the individual taxpayer's assessment.[86] A court would have no justification for granting broader relief on the basis of the record before it.

In *Garrett* the court explained how the state remedy was inefficient in discerning patterned discrimination over time. Noting that the individual remedy could apply only to the year in question, the court observed that "adjustment of plaintiffs' taxes in one year would not necessarily prevent repetition of disparate assessment in succeeding years. . . . Plaintiffs could be required to undergo the administrative appeal route again expending additional time, effort and money."[87]

The court thus accurately described a phenomenon of selective discrimination. Local authorities need only to avoid discriminating against actual litigants, and only on a temporary basis. The discrimination would continue, leaving without protection those too timid or poor to litigate. In addition, the prospect of having to relitigate year after year might cause those who were prepared to sue to give up the fight.

83. 538 F.2d at 72. This could affect, of course, the attorney's motivation to bring suit.

84. 538 F.2d at 71.

85. As a corollary to this argument, the 1934 Act's use of the efficiency language was thought to insure that utility rate cases were in appropriate procedural posture for Supreme Court review of the highest state court determinations. *See* Note, *Rate Cases*, *supra* note 30, at 132.

86. See notes 60-63 *supra*.

87. 538 F.2d at 71-72.

It seems clear, then, that the only effective way to eradicate racial discrimination in property tax assessments is through a class action. In this way the entire assessment process can be cleansed with one proceeding. Then, injunctions protecting the whole class can be employed where necessary to prevent local authorities from reinstating discriminatory practices. Therefore, if the available state remedies do not include the method of class action, they should be viewed as inadequate.

B. Federal Jurisdiction to Review Pervasive State Tax Discrimination: Biased State Administrative Relief

Even those states that afford a class remedy[88] may fail to provide a "plain, speedy and efficient" remedy because biased administrative review violates due process.[89] Fair administrative proceedings are of crucial importance because most state courts attach almost conclusive weight to the findings of the local assessment boards.[90] Conflict of interest on the part of assessment officials may arise in two ways. First, the assessors often sit on the administrative review board and are thus in a position to review their own work. Second, assessors and other board members often serve as a result of having been elected to other positions. This dual role situation is undesirable because it allows perversion of the assessment process for political advantage and discourages assessment practice reforms that might jeopardize an official's elective political position.

Both types of conflict of interest are open to challenge under recent

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88. See notes 62-63 *supra*.

89. Under the adequacy doctrine of the 1937 Act the word "courts" has been construed to embrace administrative tribunals. *See, e.g.*, George F. Alger Co. v. Peck, 347 U.S. 984 (1954); Aluminum Co. of America v. Michigan Dep't of Treasury, 522 F.2d 1120 (6th Cir. 1975); Miller v. Bauer, 517 F.2d 27 (7th Cir. 1975); Randall v. Franchise Tax Bd. of California 453 F.2d 381 (9th Cir. 1971); Husbands v. Pennsylvania, 359 F. Supp. 925 (E.D. Pa. 1973); Abernathy v. Carpenter, 208 F. Supp. 793, *aff'd*, 373 U.S. 241 (1963).

The "plain, speedy and efficient" language of the Johnson Act of 1934, upon which the 1937 Act was modelled, puts "the federal courts in the position of censors of the quality of state administrative and judicial procedures. . . ." HART & WECHSLER, *supra* note 10, at 977.

90. The relevant test is whether the taxpayer faces an adequate remedy *both* administratively and judicially. This is appropriate given the weight initial administrative determinations are given in subsequent judicial determinations.

> In many states an assessment will be reduced on the ground of inequality only upon a showing of fraud, constructive fraud or arbitrary or capricious action on the part of the assessors or the board of review. . . . Courts often emphasize that there is a strong presumption favoring the validity of an assessment. As a practical matter, this presumption is often impossible to rebut.

Note, *Inequality*, *supra* note 1, at 1381. The net result of state judicial review procedures is to restrict review of a taxpayer's proceeding attacking overvaluation or inequality in property tax assessment. Hellerstein, *supra* note 1, at 328, 330-48.

Supreme Court decisions. In *Gibson v. Berryhill*,[91] optometrists licensed by a large optometry firm were charged with unprofessional conduct by the Alabama Optometric Association, acting under the color of a state statute. The charges were upheld in state court. The defendants, who numbered one-half of the optometrists of the state, then filed a suit in federal court under the 1871 Act, alleging that the statute was unconstitutional because it called for review by an administrative board consisting of members of the Association. The federal district court agreed, finding that the members of the review board had too much to gain financially from disqualifying one-half of the optometrists in the state.[92] The Court affirmed, declaring that this finding of possible temptation or bias was enough to amount to a denial of administrative due process.[93] The Court held that this temptation need not be direct and positive.[94] In its comity discussion it found such conflicts enough to excuse the exhaustion of state remedies, permitting the immediate assumption of federal jurisdiction.[95] Finally, after remarking on the "divergence of views" on the matter, the Court left open the issue as to quasijudicial powers an administrative agency might exercise consistent with due proeess.[96]

The Court elaborated on *Berryhill* in *Withrow v. Larkin*.[97] There a state examining board of physicians, empowered by statute, proposed to conduct a "contested hearing" to determine whether a physician's license should be suspended, after it had conducted the initial investigation. A temporary restraining order was granted by a federal court on the physician's allegation that the board was unconstitutionally biased.[98] The Court reversed, saying that adjudicative proceedings are often conducted by those who made prior factual determinations, notably courts themselves.[99] The Court did indicate that it would find unconstitutional bias, on due process grounds, where there are "possibilities of bias in the way particular procedures actually work in practice."[100] An improper procedure is one that displays an "unacceptable risk" of bias.[101]

Withrow made it clear that *Berryhill* is not limited to instances where administrative reviewers have a pecuniary conflict of interest.[102] It

91. 411 U.S. 564 (1973).
92. *Id.* at 571.
93. *Id.* at 578-79.
94. *Id.* at 579 (citing Ward v. Village of Monroeville, 409 U.S. 57 (1972)).
95. *Id.* at 577.
96. *Id.* at 579 n.17.
97. 421 U.S. 35 (1975).
98. *Id.* at 41.
99. *Id.* at 56.
100. *Id.* at 54.
101. *Id.* at 54.
102. *Id.* at 44 n.8.

established a standard for factual review. Thus, evidence of assessor conflicts should be admissible to support federal jurisdiction in tax assessment cases.

The general problem of administrators such as assessors sitting in review of their own work was addressed in *Withrow*. The Court stated that the risk of bias would be intolerable where there is "a sufficiently great possibility that the adjudicators would be so psychologically wedded to their [decisions] that they would consciously or unconsciously avoid the appearance of having erred or changed position."[103] This will be a highly factual determination. All that really can be said is that where the problem exists, it should be a basis for a federal cause of action.[104]

In fifteen states members of the assessment review board are involved in other parts of the assessment process. The ACIR found these administrative-appellate mixtures to be major barriers to a "fair and credible system of property tax assessment."[105] It is obvious that paid assessors sitting in review of their own work are in a position to influence their future livelihoods, and thus have a pecuniary interest in the outcome. Further, other board members, who are not assessors and are probably untrained, are apt to defer to this assessor doubling as reviewer "on the ground that he is supposed to be the authority."[106] State administrative remedies depending on this particular type of administrative body display an unacceptable risk of bias, making them inadequate for purposes of the 1937 Act.

The problem of conflicts of interest, where members of the review board are elected officials serving *ex officio*, presents even more subtle questions, and proof of bias in this situation may be nearly impossible. Nevertheless, the risk of bias should be recognized by federal courts if they are sincere about enforcing federal rights where state remedies are inadequate. In nineteen states assessment review officials serve as a

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103. *Id.* at 57.

104. The *Withrow* Court gave few clues as to what constitutes a situation involving the ego of an administrator. It spoke of the complexities in any administrative process and expressed a reluctance to set guidelines. *Id.* at 52. The assessor may present a special situation. Being responsible for the data being reviewed, the assessor has appraised the property and assessed the taxes. Additionally, property taxes are a sensitive matter for the community. Thus, an assessor is likely to resent charges of ineptitude, sloth, or invidious discrimination and will lobby hard to support the employed methods and determination. *Cf.* Fuentes v. Rohr, 519 F.2d 379, 389 (2d Cir. 1975) (action brought by suspended school superintendent who had criticized the school board; the board was ruled to be biased and could not review the action). Where an assessor heads a large bureaucracy, an obligation to defend subordinates is probably felt.

105. ACIR, *supra* note 3, at 7-10.

106. Carr, *supra* note 1, at 194 (quotation from report to the California Legislature).

result of having been elected to other positions.[107] A municipal or county official sitting in assessment review could easily have the temptation to use the tax assessment process as an economic or political weapon, as was alleged in *Bland*.[108] Further, because these officials are likely to be preoccupied with local expenditures as related to their primary office, they may be predisposed to a certain reluctance to reduce individual assessments for fear of reducing the revenues they have to spend.[109] It would certainly predispose them not to undertake widespread reform of administrative discrimination, because of the uncertain effect of such a step on revenues. Finally, such officials are not likely to jeopardize their electability to their primary office by pursuing unpopular assessment policies that might, in many cases, raise the taxes of the most entrenched and powerful members of the community.[110]

Under *Withrow*'s command that federal courts must examine how administrative procedures perform in practice, evidence of political realities in a given community could be instrumental in avoiding the bar of the 1937 Act.[111] Federal courts should be especially vigilant where assessors and review boards operate in virtual secrecy without the restraint provided by public scrutiny. Discriminatory assessments may go unnoticed for a long time. Even when improprieties are finally suspected, the difficulty a taxpayer faces in obtaining data could eliminate the

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107. ACIR, *supra* note 3, at 9. Only Arizona and California require local assessment reviewers to be elected for that purpose. *Id.* at 10.

108. 463 F.2d at 21, 23 & n.2.

109. Hellerstein, *supra* note 1, at 328-40.

110. *See, e.g.*, Note, *Inequality*, *supra* note 1, at 1380; N.Y. Times, Sept. 21, 1975 § B (Real Estate), at 1; *id.*, Nov. 23, 1975 at 1, col. 6. *See also* Bland v. McHann, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973).

In many communities assessment is seen as part of the political patronage system. *See* SWARTHMORE STUDY, *supra* note 1, at 57.

> The job of assessor in Delaware County is a patronage job. Recorder of Deeds and GOP Chairman Hineman has said 'I wouldn't hire you if you were of no use to me politically.' . . . It can be assumed that this policy also pervades the hiring of assessors and their immediate superiors . . . As part of the political process, assessment is a potent potential weapon to punish or reward friends. . . .
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> Delaware County is controlled by the three-man Board of County Commissioners. The Commissioners appoint the members of Board of Assessment and Revision of Taxes, who in turn select the Assessors themselves. While an attempt is made to select people for assessment jobs who have had previous experience in real estate or property valuation, the chief 'qualifications' for the appointments are loyalty and service to the Party. Several of the assessors who we contacted admitted freely that the jobs were 'political appointments.'

Id. at 59. All this indicates that assessment is used as a political tool. In addition, it is thought in many communities to be an appendage of the elected official's primary office. With all manner of political considerations possibly entering into both the initial assessment and its administrative review because of these political connections, assessment administration may be biased in many cases.

111. See text accompanying notes 98-100 *supra*.

prospects for a successful suit.[112] State requirements that a taxpayer first seek administrative review, combined with the deference paid by state courts to the findings of administrative agencies, make a second look at the assessor's fact findings an improbable event. The chances of public exposure are minimal. It is here that federal courts can play a significant role in preventing unconstitutional assessment discrimination. By assuming jurisdiction and examining administrative boards for bias, federal courts can place pressure on tax officials to operate more publicly, eliminate bias and call attention to what can occur when assessments are shielded from the public gaze.

Where administrative review is found to be biased under the due process tests of *Berryhill* and *Withrow*, state relief is inadequate for purposes of the 1937 Act. First, under the 1937 Act the state remedy must not be unnecessarily expensive.[113] Biased initial administrative redress clearly violates this requirement because the aggrieved taxpayer must appeal in order to achieve a just result.[114] Second, the state remedy must be certain.[115] There is nothing certain about biased determinations at the administrative level. The very finding of a due process violation is a comment on the futility of seeking state relief.[116]

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112. Many states have denied litigants the use of existing data, which could be used to establish the assessment-value ratio which would serve as the norm for the taxing jurisdiction and the measure of relief. The resulting financial burden on the plaintiff, who must establish this information independently, is a great deterent to redress. *See, e.g.*, Garrett v. Bramford, 538 F.2d 63 (3d Cir. 1976), *cert. denied*, 97 S. Ct. 485 (1977). It is a prime reason why widespread assessment in equality has not been effectively challenged in state courts. *See* Note, *Inequality*, *supra* note 1, at 1387, 1393.

> When the full-value provision is disregarded—as is almost universally the case [in most states]—assessors tend to feel that they have a wider margin for error; secrecy as to the ratio or ratios actually being applied serves to conceal inequality . . . and hobble any challenge . . . .

Id. at 1378 (footnotes omitted).

In several states the assessor can choose not to disclose the market (or true) value against which a supposedly uniform intrajurisdictional assessment-value ratio is applied, or the assessment-value ratio itself. Carr, *supra* note 1, at 193; Yudof, *supra* note 1, at 900; Note, *Inequality*, *supra* note 1, at 1378. *See also* Varian Assocs. v. County of Santa Clara, 317 F. Supp. 888 (N.D. Cal. 1970) (final assessment lists not published until final day of assessment appeals).

In Pennsylvania the legislature has forbidden private litigants' use of readily available, computerized data on uniformity for each jurisdiction that is maintained by the state's tax equalization board. PA. STAT. ANN. tit. 72 § 4656.17 (Purdon 1968). Without this continually updated equalization data, plaintiffs cannot examine or assert the illegality of assessment practices without expenditure of substantial resources. Furthermore, there is evidence that this data accessibility problem is not confined to Pennsylvania. For example, of the 30 states conducting regular assessment-value studies, six do not publish the results. When distributed, these studies in all but two states are routinely sent only to public officials. *See* ACIR, *supra* note 3, at 12.

113. See text accompanying notes 28, 39 *supra.*

114. See text accompanying note 112 *supra.*

115. See text accompanying notes 27-28, 40, 42-43 *supra.*

116. See note 95 *supra.*

Thus, on balance, administrative bias provides an alternative route into federal court for the aggrieved property taxpayer, notwithstanding the general prohibition contained in the 1937 Act.

II

THE ABSTENTION DOCTRINE

If the state remedy is inadequate, the federal courts will generally have the power to provide relief from discriminatory assessments. But even so, federal courts must pay heed to those policies underlying the 1937 Act that express a strong preference for abstention,[117] narrowing their relief or even denying jurisdiction accordingly. Moreover, recent Supreme Court decisions have shown that it is not enough merely to examine specific statutes, such as the 1937 Act or the 1871 Act, in order to determine the scope of the role that federal courts are to play in the enforcement of federal rights. It is necessary to look beyond the statute to the overriding principle of federalism.

The rapidly emerging doctrine of abstention is designed to avoid duplicative federal judicial proceedings that would invade legitimate state interests and to avoid or minimize disruption of state processes. But this doctrine does not always bar the door to a federal forum. When state action is clearly unconstitutional and the state remedy clearly inadequate, it is not likely that abstention would be used to deny federal jurisdiction.[118] There are, however, two instances when federal courts, with their eyes nervously on mounting docket queues, might be tempted to abstain even though the state remedy is inadequate to some degree.

The first case is where a recent federal decision, such as *Redwine*,[119] has put state officials on notice that the state remedy is inadequate. A federal court might reason that state courts and administrators ought to have the chance to adjust their practices before a federal court intervenes. A court might also abstain where a federal court has recently held the state remedy inadequate, as in *Garrett*. A broad range of state assessment practices may be found uncertain, and federal

117. See section II.A.2. *infra*.

118. *See, e.g.*, Juidice v. Vail, 97 S. Ct. 1211, 1218 (1977). The Court cited Younger v. Harris, 401 U.S. 37 (1971), for the proposition that federal courts will not be required to abstain on comity grounds when state action is blatantly unconstitutional and in bad faith.

But see Trinor v. Hernandez, 45 U.S.L.W. 4335 (U.S. May 31, 1977) (Court said it doubted that the three judge district court below had actually made a finding that state statute was patently unconstitutional, but, even if it had, it was wrong in light of applicable decision). *But cf.* Bland v. McHann, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973); notes 20-22 *supra* and accompanying text.

119. See note 39 *supra*.

courts might be reluctant to grant relief if there are countervailing abstention concerns. This hesitancy to intervene, however, should be tempered by the dictates of the 1871 Act and the specific aspects of the Court's abstention decisions.

Behind the reluctance of federal courts to intervene in these circumstances is the tension between the Civil Rights Act of 1871 and the abstention doctrine. The Court has declared that "[it] is abundantly clear that one reason the [Civil Rights Act of 1871] was passed was to afford a federal right in a federal court because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced . . . and the . . . enjoyment of rights . . . might be denied. . . ."[120]

In general, federal courts should not be encouraged to balance the degree of right violations against abstention policies. This proposition is partially supported by Court decisions in which executive enforcement of state laws has not been accorded the same deference as have state judicial actions.[121] On the other hand, there may be some areas of state administration that are protected from intervention by the abstention doctrine, even if constitutional deprivation is alleged. In the state tax area, the legislative history of the 1937 Act and the Court's construction of its intent provide comity guideposts. These guideposts restrict federal relief to those instances of patterned, intentional assessment discrimination involving no real threat of plaintiffs avoiding the force of legitimate, adequate state law. Even in these cases, before jurisdiction is exercised it must be shown that an appropriate, limited federal remedy can be provided. This last requirement insures that federal courts do not substantially disrupt local taxing functions while interfering on behalf of private claimants.

A. The Limits of Comity: State Interests to be Accorded Deference

1. *Distinction Between Pending Action and Executive Enforcement Abstention*

The evolution of the general abstention doctrine has yet to engender

120. Monroe v. Pape, 365 U.S. 167, 180 (1961).

121. *See* Steffel v. Thompson, 415 U.S. 452, 462 (1974). *But see* Rizzo v. Goode, 423 U.S. 362 (1974). The opinion, by Justice Rehnquist, stated that principles of federalism and comity applied with equal force to federal restraints upon state executives. He based this on the need for state functions to be administered by the local officials who best understand them. This portion of the opinion was dictum, however, because federal jurisdiction was denied in *Rizzo* on the ground that plaintiffs' complaint failed to allege sufficient facts to support relief under the 1871 Act. *Id.* at 371-73.

Fnrthermore, subsequent Court decisions have continued the executive-judicial distinction. See text accompauying notes 122-31 *infra*. Justice Rehnquist's concern for the impairment of state functions is addressed in the last section of this Article, which analyzes appropriate federal remedies.

policies that would prevent the exercise of federal jurisdiction when executive enforcement of state property tax laws is at issue. Nonetheless, federal intervention should be carefully circumscribed. In the 1975 opinion, *Huffman v. Pursue Ltd.*,[122] the Court noted that "[t]he seriousness of federal judicial interference with state civil functions has long been recognized by this Court. We have consistently required that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence."[123] The Court held that, "if anything," more comity deference is due where there is a pending state proceeding than where the federal interference goes only to the executive administration of state law. This is because federal relief "prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against these proceedings."[124]

In the pending action case, the traditional equitable and comity concerns would be violated if jurisdiction were exercised. These concerns focus on the possibility of duplicative legal proceedings, the disruption of state judicial systems, and the implied aspersion on the dedication of state courts to enforcement of the Federal Constitution.[125] These concerns are not implicated in the executive enforcement situation. There is no duplication of proceedings; in fact, a federal suit might lead to less expenditure of state and federal court time.[126] No pending judicial proceedings are disrupted, and even current *executive* enforcement need not be interrupted.[127] Finally, assumption of federal jurisdiction does not involve a slight to the dedication of state courts, for they are not already addressing the federal question.

The importance of the distinction between the executive enforcement and pending action contexts is illustrated by *Huffman*'s treatment of *Monroe v. Pape*,[128] which held that state remedies did not have to be exhausted in a private action against the Chicago police department

122. 420 U.S. 592 (1975).

123. *Id.* at 603 (footnotes omitted). *Huffman* only addressed the narrower question of whether Younger v. Harris, 401 U.S. 37 (1971), prevented a federal district court from enjoining the execution of a state public nuisance statute under 1871 Act jurisdiction after a state civil judgment, but before any appeal. The Court decided that the federal court should have abstained until state remedies were exhausted. It was reluctant, however, to extend the *Younger* holding to federal civil actions, brought by private parties, that were aimed at the state's executive enforcement of its laws. 420 U.S. at 606, 608-10.

124. *Id.* at 603-04.

125. *Id.* at 603.

126. See text accompanying notes 81-85 *supra*.

127. See text accompanying notes 171-87 *infra*.

128. 365 U.S. 167 (1961).

for damages caused by unconstitutional actions of its officers. The Court found that *Monroe* "had nothing to do" with *Huffman*.[129] *Huffman*, which concerned the propriety of enjoining the execution of a state statute, was characterized as turning on considerations of comity and federalism *peculiar* to the fact that state judicial proceedings were pending.[130] Significantly, the Court refused to distinguish *Monroe* on the grounds that it involved only a prayer for damages, rather than declaratory or injunctive relief.[131] The Court found that the relevant test involved not the nature of the relief, but whether a state *judicial* proceeding had been initiated.[132] If it had not been initiated, plaintiffs were not required to exhaust state remedies.

2. *The Measure of Deference to Executive Enforcement of Assessment Laws*

Although the Court has not opted for abstention *per se* in suits to enjoin state executive action, there are grounds for blocking federal jurisdiction in some situations. The 1937 Act was intended to restrict federal courts where local tax officials are sued. When the state remedy

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129. 420 U.S. at 609-10 n.21. *But see* 420 U.S. at 617-18 (dissenting opinion).

130. *Id.* at 602-06. *See also* Doran v. Salem Inn, Inc., 422 U.S. 922, 930 (1975). In the more recent decision of Juidice v. Vail, 97 S. Ct. 1211 (1977), two judgment debtors, over a nine month period, successively ignored a New York civil default judgment, a subpoena aimed at ascertaining the reason, a contempt show cause order, and a contempt fine. They then attempted to attack collaterally in federal court the default procedures on constitutional grounds. These grounds had not been raised in state court. The Court once again saved for another day the question of the applicability of *Younger* to all civil litigation. *Id.* at 1216. The Court again alluded to *Monroe*, but only in a determination of whether retrospective damage relief could be accorded for allegedly unconstitutional and completed state judicial proceedings. This would be a form of unfavored collateral attack. *Monroe* was cited as presenting only an analogous problem, presumably because it involved no state judicial proceeding. *Id.* at 1219 n.16. This is more evidence that the Court takes the executive enforcement-pending action distinction seriously.

131. 420 U.S. 609-10 n.21.

132. Further evidence of the viability of the executive enforcement and pending action distinction is the Court's most recent abstention foray, Wooley v. Maynard, 45 U.S. L.W. 4379 (U.S. April 20, 1977). There a Jehovah's Witness obscured on his automobile license tag the state motto, "Live Free or Die." He was charged with three violations of the same criminal misdemeanor statute, fined twice a total of $75 and incarcerated for 15 days for failure to pay the fines. Apparently there was no pending state proceeding, only recently completed ones. Three months after completion of the state proceedings, and after the entire sentence had been served, the Jehovah's Witness and his wife, who had use of the automobile in question, filed suit in federal court for prospective injunctive and declaratory relief from further enforcement of the statute. The Court treated the case as involving only prospective, not completed, state litigation. The Court accorded a federal forum on the grounds that "the relief sought [was] wholly prospective." *Id.* at 4380-81. Thus the Court approved federal relief from any state executive action to enforce the statute.

appears inadequate, the exercise of federal jurisdiction must be weighed in terms of its consistency with the policies behind the statute.

Recently the Second Circuit, in *Wells v. Malloy*,[133] held that nontraditional sanctions for nonpayment of state taxes could be reviewed by the federal courts in spite of the 1937 Act. The court employed a "core analysis" test. This test, which has been applied in another constitutional-1937 Act context,[134] emphasizes the role of the Act's legislative history and offers a means of defining the deference due state enforcement of assessment laws. In *Wells* a motorist challenged the revocation of his driver's license in sanction for nonpayment of a Connecticut automotive tax as a violation of his fourteenth amendment rights. The court held that this was a sanction not contenanced by Congress when it passed the 1937 Act, reasoning that Congress only forbade federal intervention when the sanctions were directly related to the tax. By implication, reliance on state remedy is not required when the state steps outside the comity protection afforded it by Congress.

Using this mode of analysis, the history of the 1937 Act, which the Supreme Court has characterized as clear and "convincing",[135]

133. 510 F.2d 74 (2d Cir. 1975).

134. Such core analysis has been accepted by the Burger Court in its attempt to harmonize the state-remedy exhaustion requirement of federal habeas corpus with the 1871 Act. Preiser v. Rodriguez, 411 U.S. 475 (1975). Section 2254 of Title 28 requires a prisoner to exhaust "the remedies available in the courts of the State" if such remedies are available and effective. 28 U.S.C. § 2254(b) (1970). In *Prieser* the Court had to decide whether an 1871 Act suit could be maintained by a prisoner who had not exhausted the remedies required by the habeas statute. The Court held that the exhaustion requirements applied where the prisoners were challenging "the fact or duration" of their confinement, but did not apply when they were challenging the conditions of their confinement. 411 U.S. at 498-99. It noted that "the rule of exhaustion in federal habeas corpus actions is rooted in considerations of federal-state comity . . . It is difficult to imagine an activity in which a State has stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures than the administration of its prisons." *Id.* at 491-92. The Court characterized the relationship between prisoners and state officers as "far more intimate than that of a State and a private citizen." *Id.* It found the internal problems of state prisons to "involve issues so peculiarly within state authority and expertise [that] the States have an important interest in not being bypassed in the correction of these problems." *Id.*

It is important to observe that the Court only required exhaustion when the facts or duration of confinement were at issue. The Court characterized these two issues as at the "core" of the habeas corpus statutes function. *Id.* at 489. Prisoner suits designed to recover damages due to deprivations in the conditions of confinement are outside of this core. *Id.* at 494. When the prisoner was seeking "something other than immediate or more speedy relief," an 1871 Act was permissible in federal court. *Id. See also* Mr. Boston Distiller Corp. v. Pollet, 342 F. Supp. 770, 772 (N.D. Fla. 1972), *aff'd*, 469 F.2d 337 (5th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973). The "principle of comity no doubt (is) of paramount consideration in the context of the 1937 Act, as in the context of the habeas corpus legislation.

135. Department of Employment v. United States, 385 U.S. 355, 356-58 (1960); Hargrave v. McKinney, 413 F.2d 320, 326 n.12 (5th Cir. 1969), *rev'd on other grounds, sub. nom.* Askew v. Hargrave, 401 U.S. 476 (1971).

can serve as a guide to the circumstances in which enforcement of state tax law should be accorded comity deference. The most succinct examination of this history is in Justice Brennan's dissenting opinion in *Perez v. Lesedma*.[136] The Act was interpreted as exhorting federal courts to be chary of throwing into disarray state administrative and adjudicative procedures designed to treat generally complex state tax issues.[137] Such interference would prevent state courts from deciding federal constitutional issues likely to turn on questions of state tax law thereby allowing taxpayers to escape the ordinary procedural requirements imposed by state law.[138] Justice Brennan gave the traditional argument that state courts are more adept at handling state law.[139] But his analysis also suggested that it is undesirable to permit federal courts to concentrate on only one fact of the interconnected operation of the state or local tax system.[140] Finally, and most significantly, the opinion stated that Congress was concerned that, by issuing injunctions and creating uncertainty about the legality of a state's tax laws, federal courts would restrict the flow of the revenues.[141]

The policy, in short, is the avoidance of intervention into complexly balanced state tax systems. It should be noted, however, that despite his statements to the contrary,[142] Justice Brennan imputed broader, more sophisticated reflections on federalism to the Congress of 1937 than may have been actually considered.

Congress intended to prevent (1) haphazard disruption of state tax systems;[143] (2) end runs around available state procedures to litigate state law questions through the abuse of diversity jurisdiction;[144] and (3) the litigation advantage of alien corporations who could use their greater economic resources to wear down state governments attempting to tax them.[145] Larger questions of patterned constitutional

136. 401 U.S. 82 (1971). *See also* Tully v. Griffin, 97 S. Ct. 219 (1976); The Confederated Salish & Kootenai Tribes v. Moe, 96 S. Ct. 1634 (1976); Lynch v. Household Finance Corp., 405 U.S. 538 (1972).

137. 401 U.S. at 127-28 n.17.

138. *Id.*

139. *Id.*

140. *See, e.g.*, Askew v. Hargrave, 401 U.S. 476 (1971).

141. 401 U.S. at 127 n.17.

142. *Id.*

143. Note, *Declaratory Judgments, supra* note 10, at 928 n.5, 931.

144. *Id.* at 928. For precedent as to strong congressional policy of noninterference, *see* Note, *Federal Court Interference with Assessment and Collection of State Taxes*, 59 HARV. L. REV. 781 (1946); Varian Assocs. v. County of Santa Clara, 317 F. Supp. 888 (N.D. Cal. 1970). *Cf. Jurisdiction of District Courts over Suits relating to Orders of State Administrative Boards: Hearings Before the House Judiciary Comm.*, 73d Cong., 2d Sess. (1934) (the Johnson Act of 1936 under discussion).

145. *See* 81 CONG. REC. 1416-17 (1937) (remarks of Sen. Bone). The Senator observed that the Act was also designed to curb corporations which took local governments to federal court to force them to pay higher attorney fees and court costs aud thus

> compel [them] to settle or submit to unjust judgments for the very reason that

discrimination were not within the core of state interests to be accorded deference, at least with regard to the second and third objectives. Any problems with diversity jurisdiction not solved by *Erie Railroad Co. v. Tompkins*[146] are irrelevant to the claims of inadequacy of state remedy, biased administrative review boards and lack of class relief. Such claims are based on federal law. Further, the wealth advantage problem clearly cuts the other way in current tax suits. Now it is the state that has the resources with which to wear down its private opponents. Indeed, regarding the absence of class relief the court in *Garrett* said, "[a] denial of a federal forum in the instant case would allow a state to depend upon burdensome piecemeal review procedures as an effective defense. . . . Such a result would stand the legislative intent of the 1937 Act on its head."[147]

Furthermore, it is likely that Congress never even considered the possible application of the 1937 Act in the civil liberty context. The 1937 Act was passed at a time when enforcement of the fourteenth amendment through the 1871 Act was at a nadir.[148] The 1937 Act should not be construed to bar civil rights actions where state remedies are inadequate in the absence of a strong countervailing comity concern.[149]

[they are] not financially able to follow [the corporation] through the tortuous and expensive route through the Federal court to the Supreme Court of the United States at Washington. And all the time in this dispute there is no federal question involved. *There is a dispute arising under a State statute or law of other origin and nothing more.*

Id. (emphasis added).

146. 304 U.S. 64 (1938).

147. 538 F.2d 63, 72 (1976), *cert. denied*, 97 S. Ct. 485 (1977). As to the administrative bias suits, see notes 112-13 *supra.*

148. *See* Comment, *The Civil Rights Act and Mr. Monroe*, 49 CALIF. L. REV. 145, 147, 169 (1961). The resurrection of the 1871 Act did not begin until 1938. *Id.*

149. This approach mirrors the one taken in California State Board of Equalization v. Coast Radio Prod., 228 F.2d 520 (9th Cir. 1955) which created an exception to the 1937 Act to allow a federal bankruptcy court to enjoin state court actions to recover tax payments owed by the bankrupt. The court wished to protect the bankrupt from the sanction of state court harassment by multiple suits. It found that these suits were often begun with an eye toward hauling a bankrupt into a state tax forum with the hope that the bankrupt's ignorance of those rights granted by the Federal Bankruptcy Acts would permit state court recovery. *Id.* at 523. Further, the Court noted that if the bankrupt simply did not defend against the state court suits, the result could be tremendous financial burdens created by state judgments.

The court stated that exhaustion of state remedies was not a prerequisite to the exercise of a bankruptcy court's jurisdiction, even where state tax collections were involved, because of the policies behind the bankruptcy statute. It thus suggested that the 1937 Act was not intended to countenance federal bankruptcy suits. But with apparent reference to the comity concerns of the 1937 Act, it said "but this federal jurisdiction is permissive and should be exercised only in the sound discretion of the court." *Id.*

Analogous to the general point is Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), where state poll taxes were declared unconstitutional. The 1937 Act's possible

The major comity concern, and the only one that must be taken into account in state or local taxpayer suits seeking anticipatory relief from executive action, is the impairment of state functions resulting from federal intrusions. The impairment will be minimal if cognizable causes of action are restricted to a narrow class, and if federal relief is properly gauged.

3. Executive Enforcement Cases Permitting Federal Intervention

In *Rizzo v. Goode*, the Court held that for comity concerns to be set aside there must be (1) a pattern of civil rights discrimination that is (2) deliberately carried out or encouraged by state and local officials.[150] These two requirements, combined with a third, that the right sued upon be constitutionally established and fundamental, define a class of cases that if brought in federal court should never be dismissed under the 1937 Act.

It is easier to establish a pattern of discriminatory treatment in the assessment context than in the context of police misconduct, which was at issue in *Goode*, because the official action is publicly recorded in the tax records. In *Bland*[151] the class representatives were able to show disparate treatment of hundreds of black-owned properties. In addition, there was statistical evidence that there was only one chance in 100,000 that the disparate treatment could have occurred randomly. Given the permissive rule encouraging class actions[152] and the availability of studies showing the disparate impact of property tax assessment on racial minorities,[153] it should not be difficult or financially burdensome to show patterned discrimination in the assessment context.[154]

The requirement that the discrimination be deliberately carried out

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bar to federal jurisdiction was not mentioned at any stage of the proceeding, in the Court's opinion, or in either of the dissents. A possible inference is that the statute was considered inapplicable to taxes affecting an interest as fundamental as the right to vote.

150. 423 U.S. 362 (1976). In *Rizzo* the "central thrust of [plaintiffs'] efforts . . . was to lay a foundation for equitable intervention, in one degree or another, because of an assertedly pervasive pattern of illegal and unconstitutional mistreatment by police officers. This mistreatment was said to have been directed against minority citizens in particular and against all Philadelphia residents in general." *Id.* at 366-67.

The district court found that there was no specific discriminatory policy on the part of the police supervisors named but it did find "that evidence of departmental procedure indicated a tendency to discourage the filing of civilian complaints and to minimize the consequences of policy misconduct." *Id.* at 368-69. The Supreme Court found that isolated instances of discrimination, *viz.* 20 cases out of a city population of 3,000,000, were not enough to establish a pattern of discrimination.

151. 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973).

152. *See* notes 72-73 *supra.*

153. See note 1 *supra.*

154. *Id.*

or encouraged by the named officials, however, warrants more detailed analysis. A similar standard of deliberateness has already been established by the Court in a case involving state taxes. In *Cumberland Coal Co. v. Board of Revision*,[155] the Court emphasized, in a discussion of the equal protection doctrine, the importance of distinguishing between random assessor mistakes of judgment and methodical, defective assessment resulting in a pattern of discrimination due to assessor exclusion or overinclusion of factors in assessments. This approach commends itself in a comity context as well.

The Court applied a standard allowing the state tax processes considerable administrative discretion. Nevertheless, it did strike down a "deliberately adopted" procedure that assessed all of a coal company's product the same regardless of value.[156] It expressly noted that it was not striking down a *proper* state method, inexpertly or flagrantly misapplied due to judgmental error.[157] The crucial focus in the *Cumberland* deliberateness test was the propriety of the assessment process as a whole.

Deliberate assessment discrimination can be found in two situations. The first is where the assessor excludes a relevant factor, the absence of which is known to cause discrimination against a suspect class or to inhibit the exercise of a fundamental right when omitted from the assessment decision. The second occurs when irrelevant factors are included in the assessment decision, thereby penalizing the exercise of a fundamental constitutional right by the taxpayer, or discriminating against a constitutionally suspect class to which the taxpayer belongs.

The exclusion cases present the difficult problem of inferring intent from a failure to act. Where the exclusion is selective, that is, the factor is only excluded from the assessments of a particular class, the circumstantial case is more easily made.[158] A much harder problem arises when the decisional factor is excluded from all assessments. In this event the discrimination results from the disproportionate impact of official inaction. For example, *Garrett*[159] illustrates how failure to make statutorily required periodic reassessments created discrimination

155. 284 U.S. 23 (1931).

156. *Id.* at 25.

157. *Id.*

158. In Southland Mall, Inc. v. Garner, 455 F.2d 887 (6th Cir. 1972), a corporation operating a shopping center challenged a property tax appraisal. The Sixth Circuit held out the possibility that failure by officials to "consider relevant factors . . . [that] had time and again been held relevant in comparable situations by these same officials or [that] appraisal practice was so clearly settled [might result in the] serious step of inferring intentional discrimination." *Id.* at 891.

159. 538 F.2d 63 (3d Cir. 1976), *cert. denied*, 97 S. Ct. 485 (1977). *Garrett* only resolved the jurisdictional dispute concerning the applicability of the 1937 Act. The merits of the racial discrimination issue have yet to be reached.

against blacks owning property in neighborhoods with declining property values. The differential effect of failure to reassess, where property values were rising rapidly in white areas and falling in black areas, is foreseeable by officials, and can create as pernicious a result as selective reassessment.[160]

Washington v. Davis[161] is relevant to the discussion of whether one can infer discriminatory intent from assessor failure to recognize the disproportionate impact that failure to reassess regularly has on minority neighborhoods. *Davis* does say that "the purpose to discriminate must be present. . . ."[162] But it further states that "[t]his is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant. . . ."[163] Discussing the jury cases the court found it was enough that there were no blacks on the juries and that jury commissioners had failed to inform themselves as to which black jurors were eligible. Where there is a stark pattern of discriminatory tax treatment due to failure to reassess according to statute, a situation similar to the jury case obtains in that there are very few alternative explanations for the pattern. Further, assessors who passively ignore the discriminatory impact of their failure to obey state reassessment requirements are like the jury commissioners who fail to inform themselves of eligible black jurors.

It might be said that *Rizzo v. Goode*[164] is inconsistent with a passive or deliberate-indifference intent test, but in *Goode* the Court found no connection between the alleged statistical pattern of discrimination and any official action or inaction, merely state passivity in the face of the

160. It is improper to argue that the expense of requiring state assessors to live up to their duties of regular reassessments would be prohibitive. The expense problem is the state legislature's problem. It has mandated the statutory requirements and the court is merely enforcing them. Moreover, existing computer systems make annual reassessment more accurate and less expensive. *See, e.g.*, N.Y. Times, Sept. 21, 1975 § B (Real Estate), at 1. While start-up costs of these systems may be high, year-to-year cost of reassessment will be very low. Base assessment data as to the components of each house must be fed into the file only once. Each house is automatically revalued by valuing each component according to the values of similar components in recently sold homes.

Even if this year-to-year reassessment proves more expensive than expected, those concerned with the imposition of expense on localities concede that there should be minimum standards of accuracy (and uniformity if mandated) regardless of cost. *See, e.g.*, Note, *Judicial Review of Property Tax Valuation Methods: A Requirement for Reasonable Accuracy*, 65 CALIF. L. REV. 461, 466 (1977).

161. 426 U.S. 229 (1976). The case involved a claim that civil service tests administered by the District of Columbia police department violated the equal protection clause because they had the effect of excluding more blacks than whites from the police force.

162. *Id.* at 241.

163. *Id.*

164. 423 U.S. 362 (1976). See text accompanying notes 150-54 *supra*.

discriminatory pattern. Of greater significance is the fact that the Court held the facts alleged to be insufficient to support a finding of patterned discrimination. Thus, in the exclusion cases, if the discriminatory pattern is pervasive enough, the requisite unconstitutional purpose can be inferred.

The easier case for inferring deliberateness is where the assessor includes factors in assessing property owned by members of a suspect class that are not included in assessing other property.[165] Deliberateness is shown if the probabilities are heavily weighted against the chance of occurrence of the disparate pattern. This test need not be statistical, although econometric studies could meet the requirement.[166] Such a disparate pattern indicates that racial bias is the factor motivating the assessors to tax disproportionately.[167] This does not really evoke *Davis* intent problems, since statutorily uniform standards are being ignored, and nonuniform assessments are being made of property owned by members of a suspect class.[168]

Even if there is a pattern of discrimination and a finding of official deliberateness, there should be no relaxation of the comity bar if the assessor did not know or have reason to know that, as a result of his performance, a deprivation of an established constitutional right would occur.[169] This third requirement restricts the federal courts to only those cases of deliberate, patterned discrimination presenting basic, broad

165. For example, including property in the tax base that is generally excluded from the assessment calculation. The violation can be as blatant as the one in *Bland*, where property owners were selected on the basis of race and simply taxed at a higher rate than other property owners. *See* Battle v. Cherry, 339 F. Supp. 186, 194-95 (N.D. Ga. 1972), where the court suggested in dictum that there is no equal protection violation where wealthy taxpayers are assessed at a higher rate than poor ones.

166. *See, e.g.*, SWARTHMORE STUDY, *supra* note 1.

167. See notes 20-22 *supra* and accompanying text.

168. *See* Denton v. City of Carrollton, 235 F.2d 481 (5th Cir. 1956) where a union and its labor organizer sought to enjoin enforcement of a statute that required payment of a large tax if organizing activities were to continue. The Fifth Circuit noted: "We start here with an exaction euphemistically called a 'license tax,' but which in its cumulative effect is exorbitant and punitive. Its effect, and therefore its purpose, seems not to regulate, but to prohibit . . . ." *Id.* at 485. The court found that the 1937 Act was not a bar to its jurisdiction.

169. The final requirement is determined by analogy to Wood v. Strickland, 420 U.S. 308 (1975), where the Court limited the immunity of local officials in constitutional right deprivation actions. The Court found that school board members exercising legislative-adjudicative functions at their discretion were entitled to absolute immunity from students' suits challenging the constitutionality of their actions unless the board members had acted in contravention of "settled, indisputable law." *Id.* at 321. Thus, the rule of the case is that local officials are assumed to have knowledge of the constitutional rights of their charges, where these rights are "unquestioned" and "basic." *Id.* at 322. Qualifying the immunity in this way was found necessary to avoid a severe limitation on the reach of the 1871 Act. *Id.* at 320.

constitutional issues.[170] Thus, federal intervention in the executive enforcement cases is permitted only within a rather narrow range, thereby ensuring that comity concerns are respected. But even this intervention must be tailored to meet Congress' concerns by carefully selecting remedies.

B. *Avoiding Impairment of State Functions: The Quality of the Remedy*

Justice Brennan in *Perez*[171] was concerned that federal interference could wreak havoc on the budgetary planning and even solvency of local governments. The 1937 Act was aimed at injunctions issued to prevent collection of local taxes pending litigation.[172] Although "once a right and a violation have been shown the scope of a District Court's equitable power to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies,"[173] there is no need for a sudden injunction of the collection of all taxes to correct discriminatory treatment. No federal injunction need "hold from a state and its governmental subdivisions taxes in such vast amounts and for such long periods as to disrupt state and county finances . . . ."[174] In fact, initial declaratory relief is preferable, under both the 1937 Act more general comity policy.

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170. This last requirement provides a rationale for denying federal jurisdiction under the 1937 Act in school finance cases such as San Antonio Ind. School Dist. v. Rodriquez, 411 U.S. 1 (1973). Neither the Supreme Court opinion nor the district court opinion, 337 F. Supp. 280 (W.D. Tex. 1971), mentioned the 1937 Act, although the Court, in reversing the district court, denied federal relief on abstention grounds. The Court, however, could have easily denied jurisdiction on narrower grounds by relying on the 1937 Act. The suit alleged a denial of equal protection because school financing in Texas was accomplished through property taxes, resulting in lower school expeuditures for poor communities. Since wealth is not a suspect classification and the right of uniform school expenditures is not an established right, and relief might have required an injunction against collection of the property tax, the 1937 Act should have applied.

To complete this discussion it should be noted that the relief provided by the district court may not have actually restrained collection of the Texas tax. The injunction was aimed at use of the property tax for school financing, not to take effect for two years, until state authorities had developed a plan for reallocating the revenues. Presumably, as long as school expenditures were uniform, the property tax was permissible. In a similar case, Parker v. Mandel, 344 F. Supp. 1068 (D. Md. 1972), a district court took this view. It held the 1937 Act inapplicable since the suit was concerned with the allocation of revenues for school financing, and not with the tax. *Id.* at 1072. *See also* Hargrave v. McKinney, 413 F.2d 320, 325-27 (5th Cir. 1969), *rev'd on other grounds, sub nom.* Askew v. Hargrave, 401 U.S. 476 (1971), where the court ruled the 1937 Act inapplicable to a school financing suit seeking an increase in taxes for public education. *Accord,* Battle v. Cherry, 339 F. Supp. 186, 193 (N.D. Ga. 1972).

171. See text accompanying notes 136-45 *supra.*

172. See text accompanying note 10 *supra.*

173. Rizzo v. Goode, 423 U.S. 362, 377 (1976) (quoting Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 15 (1971)).

174. 81 CONG. REC. 1416 (1937). See text accompanying notes 10-15 *supra.*

1. Use of the Refund Action: Remedy for the Period of Litigation

Where there is deprivation of a constitutional right, there is almost always irreparable injury.[175] This argument might support the granting of anticipatory federal relief, before payment of current taxes during the years of litigation as well as for future years' taxes. But there is the countervailing concern that the state fisc might be disrupted on a massive scale if a temporary or permanent injunction were issued to restrain tax collections during litigation, especially if the suit concerned patterned discrimination and thus affected many taxpayers. Such disruption could lead to an irreparable injury of sorts to all citizens if essential services must be curtailed. Assuming that some form of declaratory or phased injunctive relief will be given in subsequent years if need be, an approach is required that will minimize sudden, disruptive effects in the years of litigation. A sensible rule would be that where payment in these years does not substantially chill the exercise of the interest alleged to be protected because of the financial incapacity of the aggrieved party or parties, then the remedy would be limited to a refund.[176] Anticipatory relief would be available only on a showing of irreparable injury, and the burden of showing irreparability would be on the taxpayer because the 1937 Act clearly intended to protect state and local governments from the sudden paralysis of their tax collection.[177]

Under this test, in cases like *Bland*, the magnitude of the disproportionate treatment, the possible indigency of the victims, and the free speech overtones should be sufficient to permit the aggrieved taxpayers to sue without paying the tax.[178] In a case like *Garrett*,[179] however, the equities would appear to be on the side of requiring a suit for refund of the taxes for the years of litigation and for anticipatory relief for

175. See note 59 *supra.*

176. *Cf.* Wooley v. Maynard, 45 U.S.L.W. 4379, 4381 (U.S. April 19, 1977) (declaratory judgments are milder than injunctive relief and are preferred because they are less intrusive). Where, however, the chill resulting from threatened state action is substantial, injunctions are in order. *Id.*

177. Under comity policy this result is analogous to that mandated in Doran v. Salem, Inc., 422 U.S. 922 (1975). There three owners of topless bars filed an 1871 Act suit in federal court seeking a preliminary injunction against enforcement of a local obscenity ordinance. Subsequently, one of the owners violated the ordinance and was criminally charged. The other owners continued to obey the ordinance. The lawbreaking owner was denied relief on the basis of *Younger*. *Id.* at 928-29. See notes 15-16 *supra.* The others were accorded relief. Under comity policy, the lone defendant can be distinguished because he required disruption of a state judicial process; the other two did not. This distinction is valid because avoidance of disruption is a large part of comity's basic rationale. Assessment plaintiffs who do not disrupt current tax collections present less of a comity problem.

178. See text accompanying notes 20-22 *supra.*

179. See text accompanying notes 50-52 *supra.*

subsequent years. There the taxpayers were attacking the cumulative effect over time of annual small-scale discrimination encouraged by official action or inaction. The chill on their cumulative rights was substantial. Nonetheless they had been paying the taxes for the prior years. Without a showing of change of circumstances, such as greater indigency, or a particularly sharp rise in marginal discrimination and relative taxation in the litigation years, it would appear that current taxes should be paid to avoid fiscal disruption. This argument would lose much of its force if there were only a few litigants contesting assessments, *i.e.* if there were little danger of removing more than inconsequential sums from the treasury. Providing only the refund remedy for the years of litigation would respect the 1937 Act's purposes.

The panel in *Southland Mall, Inc. v. Garner*[180] was satisfied that the suit for refund respected the Act's intent. The district court found without discussion that "it is clear . . . [the 1937 Act] does not apply to an action for refund."[181] On appeal the circuit panel explicitly noted proper jurisdiction,[182] and thus approved of this construction. Given the narrow legislative focus on the fiscal and diversity problems of the Act,[183] the *Southland* district court was correct in limiting the 1937 Act's scope so as not to include refunds. Congress wished to assure proper adjudication of attacks on the legality of state and local taxes in an orderly and minimally disruptive manner. Federal court adjudication of refund actions does not work at cross purposes to this policy.

2. *Use of Limited Anticipatory Relief: Years Subsequent to Litigation*

In cases such as *Bland*, where anticipatory relief is required in the years of litigation, and all other 1937 Act cases, where federal relief is accorded for years subsequent to litigation, comity requires that any disruption of state and local tax administration be minimized as much as possible. One device the federal courts could use to achieve this end is the phased injunction. The first step is the use of a declaratory judgment by the federal court; the second, the introduction of gradual

180. 455 F.2d 887 (6th Cir. 1972). See note 158 *supra*.

181. Southland Mall, Inc. v. Garner, 293 F. Supp. 1370, 1371 (W.D. Tenn. 1968) (with supporting district court citations); *see* Note, 8 U. CHI. L. REV. 572, 575 (1941); H.R. REP. No. 1503, 75th Cong., 1st Sess. 2-4 (1937) (legal brief on question of foreign corporations ability to maintain refund action in federal court: if refund is permitted by state law and money has not been disbursed, actions are maintainable in federal courts "if the requisite requirements of federal jurisdiction exist."); *but see* Natural Gas Pipeline Co. v. Sergeant, 337 F. Supp. 88 (W.D. Kan. 1972).

182. 455 F.2d at 888.

183. See text accompanying notes 140-45 *supra*.

injunctive relief if the localities fail to conform to the standards of the declaratory judgment.

The Court has characterized the declaratory judgment as a milder alternative to injunction in testing state criminal laws.[184] The additional virtue of the declaratory judgment in the assessment cases is that it does not immediately deprive the state of needed revenues. It does put the state legislature and courts, as well as citizens of the state, on notice as to the existence of impermissible discrimination. Disclosure of unlawful assessment practices has been found essential for consistent, long term relief by most reformers.[185]

If the state fails to respond to this milder form of intrusion, then the type of phased injunctive relief provided by the federal courts in the school desegregation and reapportionment cases would be in order.[186] The initial injunction would call for official action by the state in the most general terms and require reports to the court of the steps taken. This general injunction could be used by the state officials to justify possibly unpopular actions, an especially important advantage in an area as highly politicized as the assessment process.[187] If administrative recalcitrance continues, the federal court would order more specific reports and requirements.

CONCLUSION

State law adequacy problems concern the provision of class relief to plaintiffs like those in *Bland* and the evil of assessment deceit or indifference created by assessor self-interest. The errors of 1937 Act adequacy jurisprudence are the errors of inappropriate policy analysis in class remedy matters and inappropriate deference to local administrators in many instances of bias. Identification of these errors is necessary to avoid the prohibition of the 1937 Act and to meet the first requirement of abstention analysis. Abstention places other restraints on the exercise of this jurisdiction. While executive enforcement of state law has yet to be accorded comity deference under general elaboration of the doctrine, attention to the 1937 Act's intent cautions against wholesale federal intervention in state tax administration. Where federal constitutional or civil rights are violated, limited federal relief should be accorded. This relief can be make sensitive to the purposes and requirements of the 1937 Act, and federalism can be protected in cases like *Garrett* and *Bland*.

184. Steffel v. Thompson, 415 U.S. 452, 469-70 (1974).

185. See note 112 *supra* and accompanying text.

186. *See* Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L.J. 143 (1968).

187. See text accompanying notes 90-110 *supra*.