COMMENT

THE TAX INJUNCTION ACT: A CALL FOR A CHANGE[*]

I. INTRODUCTION

The United States Congress has grappled with tension created by federal jurisdiction over state tax interests since the earliest days of our nation.[1] Consequently, plaintiffs considering a federal forum for their state and local tax suits face a variety of procedural hurdles to invoke federal jurisdiction.[2] Congress enacted one of these hurdles—the Tax Injunction Act (TIA or "the Act")[3]—in 1937, barring federal jurisdiction over certain state and local tax cases.[4]

This Comment argues that the interest in protecting interstate commerce from undue burdens outweighs the interest in state autonomy. Taxpayers should have the option to challenge state and local taxes in a neutral federal forum in more instances than current TIA exceptions provide.

This Comment proceeds in three Sections. Section II provides a brief overview of how state tax suits are handled in state and federal courts, unpacks the TIA in all its fallacies, and highlights two tax instances where exceptions to the TIA are justified—rail carriers and the internet. Section III argues that, like the bright-line exception for rail carriers, a similar bright-line exception should exist for the internet. Such an exception would not solve all the issues the TIA has presented but would serve as a start.

* Stephanie Terinoni, CPA, J.D. Candidate, Temple University Beasley School of Law, 2024; M. Acc., Temple University Fox School of Business, 2017; B.S. Accounting, B.S. Finance, Drexel University, 2017. I would like to thank my mentors Tom Donnelly and Tony Massimo for their constant guidance and support. I would also like to thank my family and friends for all their inspiration and encouragement.

1. *See, e.g.*, Sean M. Stegmaier, Note, *What Does "Assessment" Mean? The Supreme Court's Misinterpretation of the Tax Injunction Act and its Disregard for Principles of Comity in* Hibbs v. Winn *Leads to the Adjudication of State Tax Credit Issues in Federal Court*, 9 CHAP. L. REV. 157, 157 (2005) (stating Congress has recognized that deference should be given to the states "to administer their own tax systems without unwarranted and unprovoked federal intrusion").

2. *See* Peter D. Enrich, *Federal Courts and State Taxes: Some Jurisdictional Issues, with Special Attention to the Tax Injunction Act*, 65 TAX LAW. 731, 731 (2012). In general, the same procedural hurdles apply equally to both state taxation and local taxation. *Id.* at 731 n.1. For purposes of this Comment, therefore, reference to "state" taxes also includes "local" taxes, unless specifically stated otherwise.

3. Pub. L. No. 75-332, ch. 726, 50 Stat. 738 (1937) (codified as amended at 28 U.S.C. § 1341).

4. 28 U.S.C. § 1341 ("The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.").

II. OVERVIEW

The TIA was enacted to address important concerns but has presented some challenges.[5] Part II.A of this Comment discusses jurisdiction, specifically which courts—state or federal—have jurisdiction over certain state tax suits. Part II.B provides an overview of the TIA, focusing on its legislative intent and how courts have interpreted the Act thus far. Part II.C discusses the states' prohibition from imposing discriminatory taxes on rail carriers and the clear exception to the TIA such prohibition provides. Finally, Part II.D examines the similarities between the legislation providing for the rail carriers' exception and the Internet Tax Freedom Act (ITFA),[6] which prohibits states from imposing discriminatory taxes on electronic commerce.[7]

A. *Jurisdiction Over State and Local Tax Disputes*

"The Constitution establishes the dual sovereignty of the states and the federal government."[8] The United States' judiciary consists of a court system where a state and federal court can have concurrent jurisdiction over a particular matter; in such an instance, a litigant may file suit in its preferred forum.[9] There are two primary ways federal jurisdiction exists: federal question jurisdiction or diversity jurisdiction.[10] "[I]n the state and local tax context, federal question jurisdiction will most commonly apply in cases where a plaintiff is challenging a state [or] local tax provision on the grounds that it is in conflict with a federal statute or constitutional provision . . . ."[11] Because a state, itself, is not a "citizen" of a state, diversity jurisdiction is typically only applicable to cases involving local taxes, rather than state taxes.[12] Even if federal jurisdiction exists,

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5. See *infra* Part II.B for a discussion on the TIA's legislative history and Part III.A for an analysis on the limitations the Act has presented.

6. 47 U.S.C. § 151 note (Internet Tax Freedom Act); Internet Tax Freedom Act, Pub. L. No. 105-277, § 1100, 112 Stat. 2681-719 (1998).

7. § 151 note; § 1101(a)(2), 112 Stat. at 2681-719 (1998).

8. Tracy A. Kaye, *Show Me the Money: Congressional Limitations on State Tax Sovereignty*, 35 HARV. J. ON LEGIS. 149, 149 (1998). The Tenth Amendment states "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

9. *See, e.g.*, Beth Shankle Anderson, *"Our Federalism" The* Younger *Abstention Doctrine and its Companions*, FLA. BAR J., Nov. 2007, at 9, 9. In addition, the U.S. Supreme Court can grant certiorari to review state court decisions. *See, e.g.*, Charles Alan Wright, *Federal Question Jurisdiction*, 17 S.C. L. REV. 660, 660 (1965). However, "observers have noted that the Supreme Court has been particularly reluctant to grant *certiorari* in cases involving state taxes." Jeffrey Friedman, Todd Lard & Justin Brown, *Let's Make a Federal Case Out of It: Time To Revisit the Tax Injunction Act*, TAX EXEC. (July 9, 2021), https://www.stateandlocaltax.com/in-the-news/lets-make-a-federal-case-out-of-it-time-to-revisit-the-tax-injunction-act/ [https://perma.cc/C2QR-MGAR].

10. Enrich, *supra* note 2, at 733. Under federal question jurisdiction, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Under diversity jurisdiction, a plaintiff may bring a claim in federal court if the amount in controversy exceeds $75,000 and no plaintiff shares a state of citizenship with any defendant. § 1332.

11. Enrich, *supra* note 2, at 733.

12. *Id.* at 735–36 ("A state itself . . . is not considered a 'citizen' of any state, and therefore diversity jurisdiction will not apply to a suit brought by or against a state. . . . By contrast, political subdivisions of a

however, federal courts may either (1) choose to decline review based on an applicable abstention doctrine, or (2) be legislatively barred from review.[13]

1. Federal Abstention Doctrines

Federalism, the principle derived from the federal-state structure of the United States government, dictates that the federal government should not intrude on states' rights.[14] Comity is the idea of "avoiding hostility and unnecessary friction between the federal and state governments."[15] These related concepts are not restrained by statutory law, meaning a federal court can refrain from adjudicating a particular dispute despite a statute providing otherwise.[16] The abstention doctrines, rooted in federalism and comity, allow a federal court to decline to hear cases over which it has jurisdiction, thereby rendering state court the sole forum in which those cases may be brought.[17] Abstention takes effect in cases where a state has a high interest in the matter and exists to "preserve the balance between state and federal sovereignty."[18]

The U.S. Supreme Court has recognized four different abstention doctrines: the *Pullman*[19] abstention doctrine, the *Burford*[20] abstention doctrine, the *Younger*[21] abstention doctrine, and the *Colorado River*[22] abstention doctrine—developed in 1941, 1943, 1971, and 1976, respectively.[23] The *Pullman* doctrine states that federal courts may refrain from deciding a federal constitutional issue when the case could be decided on state law.[24] The Supreme Court stated, "constitutional adjudication . . . can be avoided if a definitive ruling on the state issue would terminate the controversy."[25] Under the

state—and, therefore, their officers and agencies as well—are regarded, for diversity purposes, as citizens of their state.").

13. See *infra* Part II.A.1 for a discussion of abstention doctrines and Part II.A.2 for an introduction to the Tax Injunction Act, which bars federal court jurisdiction over state and local tax controversies. There are several other ways federal courts can preclude adjudicating a dispute—such as, mootness and ripeness—but they lie beyond the scope of this Comment.

14. *E.g.*, David Fautsch, Note, *The Tax Injunction Act and Federal Jurisdiction: Reasoning from the Underlying Goals of Federalism and Comity*, 108 MICH. L. REV. 795, 798 nn.13–14 (2010).

15. *E.g.*, *id.* at 813. Comity is "the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Younger v. Harris, 401 U.S. 37, 44 (1971).

16. *See* Fautsch, *supra* note 14, at 806.

17. Anderson, *supra* note 9, at 9.

18. *Id*. (quoting Matthew D. Staver, *The Abstention Doctrine: Balancing Comity with Federal Court Intervention*, 28 SETON HALL L. REV. 1102, 1102 (1998)).

19. R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 498 (1941).

20. Burford v. Sun Oil Co., 319 U.S. 315, 334 (1943).

21. Younger v. Harris, 401 U.S. 37, 44 (1971).

22. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

23. *See, e.g.*, Scott M. Schoenwald, *Discriminatory Demands and Divided Decisions: State and Local Taxation of Rail, Motor, and Air Carrier Property*, 39 VAND. L. REV. 1107, 1139 (1986); Anderson, *supra* note 9, at 9.

24. *See, e.g.*, Schoenwald, *supra* note 23, at 1139; Anderson, *supra* note 9, at 16. In *Pullman*, the Supreme Court recognized that a constitutional issue touching social policy was present but stated, "federal courts ought not to enter [such issue] unless no alternative to its adjudication is open." *Pullman*, 312 U.S. at 498.

25. *Pullman*, 312 U.S. at 498.

Burford doctrine, abstention is appropriate when a federal court decision on state law could result in conflicting interpretations that are "dangerous to the success of state policies."[26] With this doctrine, the concern centers around developing a consistent state policy.[27]

The *Younger* doctrine addresses both federalism and comity concerns.[28] *Younger* indicates that abstention is proper when "federal courts cannot act without unreasonably interfering with legitimate state interests."[29] Over the years, the *Younger* doctrine has expanded from its original version to further limit access to a federal forum.[30] This doctrine has evolved to "include inquiries into the sufficiency of the state interest in its proceedings and the adequacy of the state forum."[31]

As it relates to state and local tax matters, the Supreme Court, in *Levin v. Commerce Energy, Inc.*,[32] invoked the *Younger* doctrine and held comity barred federal jurisdiction over a case challenging the constitutionality of a state tax when the relief requested sought to increase a competitor's tax burden.[33] The plaintiffs in *Commerce Energy* were independent marketers who competed with local distribution companies in selling natural gas to Ohio consumers.[34] Ohio treated the marketers and local companies differently for tax purposes.[35] Ohio entitled the local companies to tax exemptions that the marketers did not receive, which resulted in higher tax liabilities for the marketers.[36] The marketers brought suit in federal court alleging Ohio's tax regime violated the Commerce and Equal Protection Clauses and requested, as relief, that Ohio stop recognizing these exemptions.[37] The Court abstained from review on the basis of comity and pointed to three factors to support its holding.[38]

First, the Court indicated that the suit sought federal review of commercial matters and did "not involve any fundamental right or classification that attracts heightened

26. Burford v. Sun Oil Co., 319 U.S. 315, 334 (1943). In *Burford*, the Supreme Court held that questions about regulation of the gas or oil industry "so clearly involve[] basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them." *Id.* at 332.

27. *See* Schoenwald, *supra* note 23, at 1139 ("[A]bstention is proper when a federal court decision on important state law issues would inhibit the development of a consistent state policy.").

28. Anderson, *supra* note 9, at 9.

29. Schoenwald, *supra* note 23, at 1139. In *Younger v. Harris*, the Supreme Court emphasized the importance of federalism and stated that the federal government should always strive to "protect federal rights and federal interests . . . in ways that will not unduly interfere with the legitimate activities of the States." 401 U.S. 37, 44 (1971).

30. Anderson, *supra* note 9, at 12.

31. *Id.* at 14. In *Moore v. Sims*, the Supreme Court stated "[t]he price exacted in terms of comity would only be outweighed if state courts were not competent to adjudicate federal constitutional claims . . . ." 442 U.S. 415, 430 (1979).

32. 560 U.S. 413 (2010).

33. *Id.* at 413.

34. *Id.*

35. *Id.* at 418.

36. *Id.*

37. *Id.* at 419.

38. *Id.* at 431.

judicial scrutiny."[39] Second, the Court indicated that while the plaintiffs attempted to "portray themselves as third-party challengers to an allegedly unconstitutional tax scheme," (to align themselves with a prior Supreme Court case where comity did not bar review) they were not actually third parties.[40] The Court stated that the plaintiffs, in effect, were contesting their own tax liabilities by seeking to improve such liabilities relative to their competitors.[41] And, third, the Court concluded that the state courts were better suited to fix any violation of the state tax because they were "more familiar with state legislative preferences," and the TIA did not bar them from any possible remedy.[42] Meaning, the Ohio legislature may have chosen to implement a different remedy—such as entitling the marketers to the tax exemptions—than the one requested.[43] The Court stated that these three aspects, individually, may not bar federal adjudication but, *in combination*, compel it.[44]

Lastly, the *Colorado River* abstention doctrine signifies that federal courts may abstain from hearing a case when there is concurrent jurisdiction, either in different federal courts or in federal and state court proceedings.[45] The doctrine reflects "considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'"[46]

2. Federal Legislation Barring Federal Court Jurisdiction

While federal courts have discretion to invoke the judicially-created abstention doctrines, they have no leeway when certain legislation, like the TIA, completely bars federal jurisdiction.[47] Though different, the abstention doctrines and legislation barring federal review may have similar foundations.[48] For example, like the *Younger* abstention

39. *Id.* ("First, respondents seek federal-court review of commercial matters over which Ohio enjoys wide regulatory latitude; their suit does not involve any fundamental right or classification that attracts heightened judicial scrutiny.").

40. *Id.*

41. *Id.* ("Second, while respondents portray themselves as third-party challengers to an allegedly unconstitutional tax scheme, they are in fact seeking federal-court aid in an endeavor to improve their competitive position.").

42. *Id.* at 431–32 ("Third, the Ohio courts are better positioned than their federal counterparts to correct any violation because they are more familiar with state legislative preferences and because the TIA does not constrain their remedial options.").

43. *See id.* at 429 (stating the plaintiffs' requested remedy "may be far from what the Ohio Legislature would have willed").

44. *Id.* at 432.

45. *See, e.g.*, Schoenwald, *supra* note 23, at 1139–40; Anderson, *supra* note 9, at 18.

46. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (alteration in original) (quoting Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952)). The Supreme Court stated, "as between state and federal courts, the rule is that pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction" and "[a]s between federal district courts . . . the general principle is to avoid duplicative litigation." *Id.* (internal quotation marks omitted) (quoting McClellan v. Carland, 217 U.S. 268, 282 (1910)).

47. The TIA bars federal court jurisdiction on cases involving state and local tax controversies. 28 U.S.C. § 1341.

48. For example, federalism concerns, among other things, led Congress to enact the TIA. *See, e.g.*, Fautsch, *supra* note 14, at 803.

doctrine, one of the ideas behind the TIA—that state governments should be able to administer their own tax systems without federal interference—stems from principles of federalism and comity.[49]

Despite these procedural hurdles inhibiting federal review, taxpayers may prefer to litigate certain state tax disputes in federal court.[50] Justifications for this preference differ but typically include concerns such as state court judges' biases towards out-of-state taxpayers, their inclinations to uphold their own state's administrative agency determinations,[51] and the state's potential financial interest in the case.[52] Even if preferable, bringing a state tax case in federal court has almost certainly been impossible since the enactment of the TIA.[53]

B. The Tax Injunction Act

"Congress recognized the imperative need for the states to arrange their tax systems without unnecessary federal court interference when it enacted the Tax Injunction Act in 1937 . . . ."[54] Section 1341 of Title 28 of the United States Code is known as the Tax Injunction Act.[55] The TIA states "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."[56] Stated another way, federal courts do not have jurisdiction to "enjoin, suspend or restrain" assessments, levies, or collections of any tax under state law if the state court offers a "plain, speedy and efficient" remedy.[57] Because local taxes are also imposed under state law, the Act extends to suits against localities within states as well as state officials.[58]

Part II.B.1 discusses the Act's legislative history and historical underpinnings. Then, Part II.B.2 explores how the TIA has evolved through a discussion of instances interpreting the Act. Lastly, Part II.B.3 describes how the Act has been inconsistently interpreted throughout the years.

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49. *See, e.g.*, Stegmaier, *supra* note 1, at 157; Kaye, *supra* note 8, at 150 ("Indeed, the Framers believed that state governments would be more responsive to the diverse needs of the people.").

50. *See* Enrich, *supra* note 2, at 732–33 (stating the preference to litigate state and local tax matters in federal court is typically the taxpayer's rather than the state's).

51. *See id.* at 733 (also stating that taxpayers may prefer the federal judiciary's procedural protections or its "sophistication" and political independence).

52. *Cf.* Fautsch, *supra* note 14, at 815 ("The federal government's only interest [in a case challenging the constitutionality of a state tax] is adjudicating a federal right—there is no scenario where the federal government would benefit from increasing state taxes.").

53. *See* Clark R. Calhoun & Timothy L. Fallaw, *Avoiding the TIA: Not Impossible, but Close*, TAX ANALYSTS, AUDIT + BEYOND, Nov. 8, 2010, at 425, 425 ("Many people believe that [the TIA] insulates state tax determinations almost entirely from federal court oversight.").

54. Stegmaier, *supra* note 1, at 157.

55. *E.g.*, Frederick C. Lowinger, *The Tax Injunction Act and Suits for Monetary Relief*, 46 U. CHI. L. REV. 736, 736 (1979).

56. 28 U.S.C. § 1341.

57. *Id.*

58. Lowinger, *supra* note 55, at 740; Midland States Bank v. Ygrene Energy Fund Inc., 564 F. Supp. 3d 805, 813 (E.D. Mo. 2021) ("[T]he TIA applies to taxes imposed by municipalities as well as those imposed by states.").

1. Congressional Intent and Purpose of the Tax Injunction Act

In enacting the TIA, Congress, pursuant to its Article III power, sought to address diversity jurisdiction concerns by limiting the federal courts' subject matter jurisdiction.[59] State statutes commonly prohibited injunctions of state taxes in state courts and generally provided that taxpayers were only able to contest taxes in a refund posture.[60] Therefore, taxpayers had to first make tax payments before bringing suit in state court.[61] The same did not hold true for challenging state taxes in federal court, however, and litigants were able to bring suit without first paying.[62] Such inconsistency created unwanted consequences, and, *alas*, the TIA was born.[63]

Congress focused on two policy concerns in addressing the procedural inconsistency between state and federal law concerning state tax litigation: (1) discrimination against in-state plaintiffs and (2) disruption of state tax systems' administration and budgeting processes.[64] It was unfair that nondiverse citizens were "required to pay first and then litigate" in state court while plaintiffs able to meet diversity jurisdiction requirements could choose to withhold the tax payment during litigation.[65] Congress recognized this inconsistency provided diverse plaintiffs with an economic incentive to litigate state tax matters in federal court.[66]

This discrimination against in-state plaintiffs would ultimately create problems for state tax administration and budgeting.[67] Because state courts required litigants to pay before bringing suit, the states collected and used tax revenues throughout the entire

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59. Fautsch, *supra* note 14, at 807.

60. *See, e.g.*, S. REP. NO. 75-1035, at 1 (1937); H.R. REP. NO. 75-1503, at 2 (1937) ("It is the common practice for statutes of the various States to forbid actions in State courts to enjoin the collection of State . . . taxes . . . and these statutes generally provide that taxpayers may contest their taxes only in refund actions after payment under protest."). At the federal level taxpayers were also forced into a refund posture until the creation of the U.S. Tax Court—an Article I court. Suing for a refund is still the only way to challenge your federal tax in a U.S. district court. *See History*, U.S. TAX COURT, https://www.ustaxcourt.gov/history.html [https://perma.cc/L7PE-FHXH] (last visited Apr. 1, 2023) ("The Tax Court is one of the courts in which taxpayers can bring suit to contest IRS determinations, and it is the primary court in which taxpayers can do so without prepaying any portion of the disputed taxes.").

61. *See, e.g.*, S. REP. NO. 75-1035, at 1; H.R. REP. NO. 75-1503, at 2.

62. *See, e.g.*, S. REP. NO. 75-1035, at 1; H.R. REP. NO. 75-1503, at 2 (stating that federal courts' existing practice at the time allowed foreign corporations to withhold taxes from states they were bringing suit against).

63. *See, e.g.*, S. REP. NO. 75-1035; H.R. REP. NO. 75-1503. The TIA was modeled on the Anti-Injunction Act—an earlier federal statute barring actions that restrained collection of federal taxes. 26 U.S.C. § 7421. The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any [federal] tax shall be maintained in any court." *Id.* Therefore, at the federal level taxpayers were also forced into a refund posture until the creation of the U.S. Tax Court—an Article I court. Suing for a refund is still the only way to challenge your federal tax in a U.S. district court. *See History*, U.S. TAX COURT, *supra* note 60.

64. *See* S. REP. NO. 75-1035; H.R. REP. NO. 75-1503.

65. *See, e.g.*, S. REP. NO. 75-1035, at 2; H.R. REP. NO. 75-1503, at 2.

66. *See* Fautsch, *supra* note 14, at 802 n.35.

67. *See id.* at 802 (stating Congress was concerned that ligation in federal courts could disrupt the administration of state tax systems and interfere with states' budgeting processes).

litigation process.[68] If diverse plaintiffs were able to withhold those tax payments during litigation, the flow of state government revenue and taxing procedures could be compromised.[69] Both the Senate and House reports on the TIA indicated the following:

> The existing practice of the Federal courts in entertaining tax-injunction suits against State officers makes it possible for foreign corporations doing business in such States to withhold from them and their governmental subdivisions, taxes in such vast amounts and for such long periods of time as to seriously disrupt State and county finances. The pressing needs of these States for this tax money is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost to the States without a judicial examination into the real merits of the controversy.[70]

Such interference undermined the integrity of the states and the states' procedures that ensured a continuous flow of government revenue.[71]

2. Evolution of the Tax Injunction Act

The statute's plain text suggests that the TIA is not all-inclusive and that Congress intended only to address instances restraining the collection of a tax.[72] "Nowhere does the [TIA's] legislative history announce a sweeping congressional direction to prevent federal-court interference with all aspects of state tax administration."[73] After Congress enacted the TIA, however, determining the context in which the Act applied presented quite the challenge.[74] Taxpayers embarked on decades of litigation to establish when and where the Act's application was appropriate.[75]

One of the first major cases defining the Act was decided in 1982—*California v. Grace Brethren Church*.[76] The Court held that the TIA applied to requests not only for

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68. *See* Lowinger, *supra* note 55, at 743 ("A suit by a taxpayer in state court, as an action for a refund, does not disrupt the continuous collection of revenues because the taxing authority has the disputed revenues at its disposal during the pendency of the action.").

69. *See id.* at 741–42 (stating one reason Congress enacted the Tax Injunction Act dealt with the "general federal policy of noninterference with state taxing procedures").

70. S. REP. NO. 75-1035, at 2; H.R. REP. NO. 75-1503, at 2.

71. *See* Lowinger, *supra* note 55, at 743 ("Availability of anticipatory relief in federal court, however, undermines the state procedures designed to maintain the flow of revenue to state and local governments.").

72. *See id.* at 748 ("The courts have also applied a functional approach to the Act in holding that section 1341 does not bar all federal injunctive interference with state or local taxation, but only that which actually 'restrains' collection of the tax.").

73. Hibbs v. Winn, 542 U.S. 88, 105 (2004) (internal quotation marks removed) (quoting Brief for Petitioner at 20).

74. *Cf.* Calhoun & Fallaw, *supra* note 53, at 425 ("Many taxpayer dollars have already been expended—probably unnecessarily—in unsuccessfully combating the broad reach of the TIA.").

75. *See infra* Part II.B.3. Litigation surrounding the application of the TIA is an expensive use of administrative and financial resources. *See* Hertz Corp. v. Friend, 599 U.S. 77, 94 (2010) ("Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims.").

76. 457 U.S. 393 (1982).

injunctive relief but also for declaratory relief.[77] The Court reasoned that "because there is little practical difference between injunctive and declaratory relief, [it] would be hard pressed to conclude that Congress intended to prohibit taxpayers from seeking one form of anticipatory relief against state tax officials in federal court, while permitting them to seek another."[78]

In two subsequent cases, the Court held that the TIA did not bar federal jurisdiction.[79] Specifically, in 2004, the Court in *Hibbs v. Winn*[80] held that the TIA did not bar suit in federal court for a case challenging the constitutionality of a state tax credit.[81] There, the petitioner, the Arizona Department of Revenue, sought to prohibit certain taxpayers from prospectively utilizing state tax credits.[82] To analyze the issue, the Court went through the TIA's language noting that a "collection" or "levy" did not encompass the prospective use of state tax credits and therefore focused on the term "assessment."[83] The Court decided that "assessment" alone did not signify the entire plan of taxation[84] and stated an assessment "is the official recording of liability that triggers levy and collection efforts."[85] The Court explained that the TIA was therefore meant to address "cases in which state taxpayers [sought] federal court orders enabling them to avoid paying state taxes,[86] and the challenge of a state tax credit, which would not negatively impact tax collection, did not fit into any category (i.e., a collection, a levy, or an assessment) that the TIA encompasses.[87]

About a decade later, the Court in *Direct Marketing Association v. Brohl*,[88] held that the enforcement of a Colorado statutory notice and reporting requirement did not constitute an "assessment, levy or collection" within the meaning of the TIA, and the enforcement of such requirements would not restrain an assessment, levy, or collection

77. *Id.* at 408 ("It is plain from the language that the Tax Injunction Act prohibits a federal district court, in most circumstances, from issuing an injunction enjoining the collection of state taxes. Although this Court once reserved the question, we now conclude that the Act also prohibits a district court from issuing a declaratory judgment holding state tax laws unconstitutional.").

78. *Id.*

79. Hibbs v. Winn, 542 U.S. 88 (2004); Direct Mktg. Ass'n v. Brohl, 575 U.S. 1 (2015).

80. 542 U.S. 88 (2004).

81. *Id.* at 94, 107 (holding that the Tax Injunction Act applies to cases in which taxpayers seek to avoid paying taxes, not suits that would have no negative impact on tax collection).

82. *Id.* at 99.

83. *See id.* at 99–100 ("Taking account the prospective nature of the relief requested, does respondents' suit, in 28 U.S.C. § 1341's words, seek to 'enjoin, suspend or restrain the assessment, levy or collection of any tax under State law'? The answer to that question turns on the meaning of the term 'assessment' as employed in the TIA.").

84. *See id.* at 101 ("If, as the Director asserts, the term 'assessment,' by itself, signified '[t]he entire plan or scheme fixed upon for charging or taxing,' the TIA would not need the words 'levy' or 'collection'; the term 'assessment,' alone, would do all the necessary work." (alteration in original) (citation omitted) (quoting Brief for Petitioner at 12)).

85. *Id.*

86. *Id.* at 107.

87. *See id.* at 94 (stating that because the TIA was intended for cases involving state tax collections, it does not apply in the case of a state tax credit that has no negative impact on tax collection).

88. 575 U.S. 1 (2015).

of tax under the TIA.[89] This case centered on a Colorado law that required retailers who did not collect sales and use tax to notify their customers to file returns with the Colorado Department of Revenue for such tax that had not been collected but was nevertheless due.[90] Additionally, the statute required those retailers to provide such tax information to their customers and the Colorado Department of Revenue.[91] Even though compliance with those reporting requirements would most likely increase Colorado's ability to collect taxes, the Court held this alone was not enough for the reporting requirements to fall within the scope of the TIA.[92] "Such a rule would be inconsistent not only with the text of the statute, but also with our rule favoring clear boundaries in the interpretation of jurisdictional statutes."[93]

In addition, the Court concluded that enjoining such reporting requirements did not stop an "assessment, levy or collection" of taxes, rather it only inhibited them.[94] And merely inhibiting those activities does not fall within the definition of the TIA, as it does not restrain the "assessment, levy or collection" of a state tax.[95]

3. Interpreting the Tax Injunction Act

Grace Brethren Church, Hibbs, and *Direct Marketing* are crucial to understanding the TIA as they portray a doctrinal line of how the Act has evolved.[96] Even so, many courts have grappled with deciphering the TIA's plain meaning,[97] leading to circuit splits.[98] Courts have wrestled with distinguishing a "tax" from a "fee" or "penalty" for purposes of the Act.[99] "Generally, courts agree that 'taxes' are levied for the purpose of

89. *Id.* at 11, 14.

90. *Id.* at 4.

91. *Id.* at 5–6.

92. *Id.* at 11 ("Enforcement of the notice and reporting requirements may improve Colorado's ability to assess and ultimately collect its sales and use taxes from consumers, but the TIA is not keyed to all activities that may improve a State's ability to assess and collect taxes.").

93. *Id.*

94. *See id.* at 14 (stating that Congress intended the term "restrain" within the TIA to be used in a narrow sense, for if it was used in a broad sense, the TIA would bar every suit that has negative impacts on state revenue).

95. *Id.*

96. See *supra* Part II.B.2 for a discussion on important cases interpreting the TIA.

97. For example, "the Court of Appeals for the Fifth Circuit held that the Tax Injunction Act . . . of 1937 prevents the federal courts from exercising jurisdiction over any case in which a victory for the plaintiff might reduce state revenues." Brianne J. Gorod, *Limiting the Federal Forum: The Dangers of an Expansive Interpretation of the Tax Injunction Act*, 115 YALE L.J. 727, 727 (2005).

98. *See, e.g.*, Brett J. Wierenga, *The Label Test: Simplifying the Tax Injunction Act After* NFIB v. Sebelius, 84 U. CHI. L. REV. 2103, 2109 (2017) ("Circuit courts have long struggled with the problem of how to handle the definition of 'taxes' under the TIA, a complicated endeavor that produces inconsistent results."). For example, courts are split on whether fees paid for handicapped parking placards are taxes for purposes of the TIA; some courts have held they are, while others have said such fees do not constitute a tax. *See* Andrew M. Campbell, Annotation, *What Constitutes "Tax" Under Tax Injunction Act (28 U.S.C.A. § 1341), Which Prohibits Federal District Courts from Interfering with Assessment, Levy, or Collection of State Taxes*, 151 A.L.R. FED. 387 (1999) (giving examples of how federal cases have constituted an exaction for purposes of the TIA).

99. *See* Calhoun & Fallaw, *supra* note 53, at 426 ("Distinguishing between taxes and fees can be difficult at the margins, but the ultimate test is whether the revenue generated by the amount at issue is put to a general

raising general revenue."[100] However, defining "general revenue" has proven difficult because exactions—demands for a sum of money—may raise such revenue but also serve another purpose.[101] In trying to make this distinction, courts have used a variety of tests over the years.[102]

In *San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico*,[103] the First Circuit Court of Appeals analyzed the distinction between a tax and other state exaction by focusing on three factors: the agency that imposed the assessment, the type of fund the money was placed into, and the purpose for which the money was used.[104] After that decision, the Ninth Circuit Court of Appeals, in *Bidart Brothers v. California Apple Commission*,[105] attempted to clarify the First Circuit's analysis and held, in distinguishing taxes from other state exactions, these three factors should be considered: (1) the nature of the entity imposing the assessment, (2) the population subject to the assessment, and (3) the ultimate allocation or use of the revenues generated by the assessment.[106]

While other circuits also adopted this three-factor test,[107] the test is not uniformly applied.[108] For example, Judge Richard Posner, a former judge on the United States Court of Appeals for the Seventh Circuit,[109] used a single-factor user fee test that solely focuses on the third *Bidart* factor.[110] In *Empress Casino Joliet Corp. v. Balmoral Racing Club,*

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public use (making it a tax) as contrasted with serving as the price of admission of the payer to a specified benefit (making it a fee).").

100. Wierenga, *supra* note 98, at 2110.

101. *See id.* at 2109 ("Penalties pose an especially difficult taxonomic problem, because they may raise general revenue but seem to have the main purpose of regulating specific behavior.").

102. *Id.* at 2109–17.

103. 967 F.2d 683 (1st Cir. 1992).

104. *Id.* at 686. The First Circuit held that the exaction imposed on a firm for providing cell phone service was a "fee" and not a "tax" for purpose of the TIA because a regulatory agency assessed the fee, the money was placed in a special fund, and the money was not used for a general purpose. *Id.*

105. 73 F.3d 925 (9th Cir. 1996).

106. *Id.* at 931–32. The Ninth Circuit ultimately held that assessments apple producers were required to pay were not taxes under the TIA because the assessments were "imposed by a non-legislative body on a small number of organizations, kept segregated from general California funds, and spent only for a purpose that does not directly benefit the public at large." *Id.* at 933.

107. Ass'n for Accessible Meds. v. James, 974 F.3d 216, 222 n.7 (2d Cir. 2020) (indicating the Second, Tenth, Sixth, Fourth, Fifth, and Ninth Circuits have also adopted such factors in analyzing whether an exaction is a tax under the TIA). The Second Circuit used these factors to analyze whether an exaction imposed on opioid manufacturers is a tax within the meaning of the TIA. The court held it is a tax for purposes of the TIA because the payment serves a general revenue-raising purpose, was imposed by the legislature, and was imposed on all manufacturers and distributors of opioids. *Id.* at 223–24.

108. *See* Wierenga, *supra* note 98, at 2112 ("Despite the apparent simplicity of *Bidart's* three-factor test, which continues to be cited as good law, courts have resisted a uniform approach to categorizing charges under the TIA.").

109. *Posner, Richard Allen*, FED. JUD. CTR., https://www.fjc.gov/history/judges/posner-richard-allen [https://perma.cc/S2JN-A2F8] (last visited Apr. 1, 2023) (indicating that Judge Posner served on the U.S. Court of Appeals for the Seventh Circuit from 1981 to 2017).

110. Wierenga, *supra* note 98, at 2112 ("In effect, Posner takes the third factor from the *Bidart* test, isolates it as the only important factor, and construes it mathematically.").

Inc.,[111] Judge Posner indicated that "taxes" are designed to generate revenue, penalties are designed to punish, and fees are designed to "compensate for a service that the state provides" to the one who pays such fee.[112] As simple as these classifications may seem, however, Judge Posner indicated that the lines distinguishing a tax from a penalty and a tax from a fine are "sometimes fuzzy."[113] In addition to Judge Posner's analysis, some federal courts have strayed away from the *Bidart* factors and have focused on the legislative intent behind the exaction in determining whether it is a tax for purposes of the TIA.[114]

Circuits are split on how to resolve similar challenges of exactions.[115] Part II.B.3.a discusses two instances where courts reached different conclusions on cases involving an exaction applying only to a single taxpayer. Similarly, Part II.B.3.b discusses two cases involving exactions that serve a public benefit.

a. Cases Involving Single Taxpayers

The Second Circuit Court of Appeals, in *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*,[116] held that the generating tax imposed on a power plant located in Vermont constituted a tax for purposes of the TIA.[117] The court stated, "[i]t is the actual characteristics of the questioned revenue measure, not posited legislative intent or general political context, that determine its status under the TIA."[118] Therefore, like Judge Posner, the court mainly focused on the third *Bidart* factor.[119] The court reasoned that because the funds were deposited into Vermont's general fund and not used for any particular purpose, they should be characterized as a tax rather than a fine or fee.[120]

The court also held that the generating tax falling on only one taxpayer—the power plant was the only facility in Vermont affected by this tax—did not cut against the justification for the exaction being classified as a tax.[121] The Second Circuit noted that "[m]any revenue measures that are indisputably taxes, however, fall on a limited portion

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111. 651 F.3d 722 (7th Cir. 2011).

112. *Id.* at 728.

113. *Id.* at 729.

114. Wierenga, *supra* note 98, at 2114–16.

115. *Compare* GenOn MidAtlantic, LLC v. Montgomery Cnty., 650 F.3d 1021 (4th Cir. 2011) (holding that an exaction applying to a single taxpayer should not be classified as a tax for the purpose of the TIA), *with* Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 737 F.3d 228 (2d Cir. 2013) (holding that an exaction applying solely to a single power plant in Vermont was justifiably classified as a tax).

116. 737 F.3d 228 (2d Cir. 2013).

117. *Id.* at 231.

118. *Id.*

119. *See id.* at 232 ("As will generally be the case, the [first and second] *San Juan Cellular* factors either reinforce the conclusion drawn from the allocation of the revenue, or are of little significance.").

120. *Id.* at 231.

121. *See id.* at 233 ("While certain non-tax user fees and assessments may well fall on a limited population of payers, such fees are usually assessed upon those who ultimately benefit from the very governmental service for which the assessment is earmarked.").

of the population. A tax on casino revenue, for example, where the proceeds go to general revenues, is no less a tax because the state has licensed only one casino."[122]

In contrast, the Fourth Circuit Court of Appeals, in *GenOn Mid-Atlantic, LLC v. Montgomery County*,[123] held that an exaction on carbon dioxide emissions did not constitute a tax for purposes of the TIA because the charge fell on one taxpayer alone.[124] The court considered all the *Bidart* factors but ultimately concluded this exaction was a "punitive and regulatory matter."[125] Even though the funds were deposited into Montgomery County, Maryland's general fund,[126] the fact that the charge was only borne by one taxpayer was enough for the court to declare that it was not a tax for purposes of the TIA.[127] The court stated, "the whole idea of a tax is that it is, to some extent, a burden generally borne."[128] Therefore, the Second and Fourth Circuits reached opposite conclusions when deciding the same issue: whether an exaction that applies to a single taxpayer should be classified as a tax for the purpose of the TIA.[129]

b. Cases Involving a Public Benefit

In *GenOn Mid-Atlantic*, the Fourth Circuit also viewed the exaction on carbon dioxide emissions to have a regulatory intent.[130] Therein, the court explained that because this charge had regulatory effects and was enacted in response to a public health threat, it further supported a nontax characterization for purposes of the TIA.[131] In contrast, in *Association for Accessible Medicines v. James*,[132] the Second Circuit held that a charge enforced on opioid manufacturers and distributors to support statewide programs that provide opioid treatment, recovery, prevention, and education services was a tax for

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122. *Id.*

123. 650 F.3d 1021 (4th Cir. 2011).

124. *Id.* at 1022, 1024 (4th Cir. 2011) ("The fact that this charge affects the narrowest possible class is compelling evidence that it is a punitive fee rather than a tax.").

125. *See id.* at 1024 ("The process of the bill's enactment, as well as its potential revenue-generating character, are of course relevant factors in this inquiry. However, those features are, in this case, mere masks that cannot be used to disguise what is in substance a punitive and regulatory matter.").

126. *Id.* at 1022 (stating the revenue generated is to be deposited in the county's general fund with fifty percent set aside for the county's general use).

127. *Id.* at 1025.

128. *Id.* at 1024.

129. See *supra* Part II.B.3.a for a discussion of a circuit split between the Second and Fourth Circuit Court of Appeals on whether an exaction is a tax for purposes of the TIA when the exaction only applies to one taxpayer.

130. *GenOn Mid-Atlantic*, 650 F.3d at 1025 (stating the levy had regulatory intent because it was enacted in response to the public health threat posed by greenhouse gases).

131. *See id.* ("[W]here an assessment of this type forms such a significant 'part of a regulatory program,' it is not the sort of mere revenue-raising measure that the Tax Injunction Act leaves solely to the jurisdiction of state courts." (quoting Bidart Bros. v. Cal. Apple Comm'n, 73 F.3d 925, 933 (9th Cir. 1996)).

132. 974 F.3d 216 (2d Cir. 2020).

purposes of the TIA.[133] The court said the programs supported by these funds benefit New York's broader population and therefore serve a general revenue-raising purpose.[134]

C. The Railroad Revitalization and Regulatory Reform Act: An Exception to the Tax Injunction Act

The TIA has been a cause of much controversy over the years. However, where the TIA does not apply, courts and taxpayers need not interpret its meaning.[135] Disputes over the taxation of railroads is one instance in which the TIA is rendered inapplicable.[136] Under the Railroad Revitalization and Regulatory Reform Act ("4-R Act"), which prohibits states from imposing discriminatory taxes on rail carriers, an explicit exception to the TIA exists.[137]

Part II.C.1 discusses the legislative intent and purpose of the 4-R Act, including the provision concerning the TIA. Part II.C.2 examines the challenges this federal legislation has faced.

1. Congressional Intent and Purpose of the 4-R Act

Even though principles of federalism provide for states to have the power to tax without federal government intrusion,[138] under the United States Constitution, Congress is given the power to regulate interstate commerce.[139] Under this power, Congress can "prohibit[] state and local governments from enacting regulations that place an unconstitutional burden on interstate commerce."[140] The Court has said that "activities that are beyond the reach of Congress are 'those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.'"[141] Therefore,

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133. *Id.* at 227.

134. *See id.* at 224 ("But the public health programs that the stewardship payment funds 'relate directly to the general welfare of the citizens of [New York,] and the assessments to fund them are no less general revenue raising levies simply because they are dedicated to a particular aspect of the commonwealth.'" (alteration in original) (quoting Hedgepeth v. Tennessee, 215 F.3d 608, 613 (6th Cir. 2000)).

135. *See* Calhoun & Fallaw, *supra* note 53, at 428.

136. 49 U.S.C. § 11501(c).

137. *Id.* Federal legislation has also been enacted in other areas—such as bankruptcy claims and Indian tribes—to allow state tax cases in federal court. Calhoun & Fallaw, *supra* note 53, at 428.

138. *See, e.g.*, Donald Gentile, *Tax Law—Railroads May Not Challenge a State's Valuation Methodologies for Ad Valorum Tax Purposes Under the 4-R Act*—CSX Transportation, Inc. v. State Board of Equalization, 41 SUFFOLK U. L. REV. 703, 705 (2008).

139. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ."). Through the negative implication of the Commerce Clause, Congress has the power to "prevent[] states from establishing regulations that discriminate or impose an undue burden on interstate commerce." This is known as the dormant commerce clause. Jennifer L. Larsen, Comment, *Discrimination in the Dormant Commerce Clause*, 49 S.D. L. REV., 844, 845 (2004).

140. Michael Wallace, Note, *Taxing the Nontaxable: Are State and Local Governments Allowed to Tax Internet Streaming Service Providers?*, 70 FED. COMMC'NS L.J. 179, 190 (2018).

141. Katzenbach v. McClung, 379 U.S. 294, 302 (1964) (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824)). Even in the absence of federal regulation, the Court has held that under the Commerce Clause,

if state taxation has the potential to impact interstate commerce, Congress has the power to regulate it.[142]

In 1976, Congress exercised this power when it enacted Section 306 of the 4-R Act,[143] which prohibits states from imposing discriminatory taxes on rail carriers.[144] In enacting this legislation, Congress had public interest in mind because the 4-R Act served as a way to "promot[e] competition among all modes of transportation."[145] Congress's main concern, however, was the states' implementation of discriminatory taxes on interstate carriers.[146] The states had the ability to easily single out railroads because "the large and immobile fixed capital of railroads left them captive to the states in which they were located, making them an attractive source of revenue for state legislatures."[147]

States discriminated against rail carriers by valuing rail carriers' property at higher tax rates than property owned by other businesses.[148] A 1961 United States Senate study, known as the Doyle Report, found that of the thirty-one states studied, all assessed railroad property at a higher rate than comparable property.[149] Courts typically deferred to the state and local taxing authorities on these assessments, "reasoning that they should not readily overturn the judgment of local assessors because state legislatures typically did not provide the assessors with standards by which to determine property values."[150] This deference made it incredibly difficult for railroads to meet their burden in proving a state's assessment was improper and overstated.[151] Congress was concerned not only

states cannot discriminate or impose an undue burden against interstate commerce. *See* Larsen, *supra* note 139, at 845.

142. *See* Schoenwald, *supra* note 23, at 1109–10 (stating Congress has the power to regulate state taxation on interstate rail because it could potentially impact interstate commerce).

143. *See, e.g.*, *id.* ("Pursuant to its plenary commerce clause powers, Congress established statutory protection against discriminatory state and local property taxation for rail . . . carriers in the Railroad Revitalization and Regulatory Reform Act of 1976 . . . ." (footnote omitted)).

144. 49 U.S.C. § 11501(b). When the TIA was enacted in 1937, "state taxation of interstate commerce was extremely limited," with rail carriers being one of the only examples. *Examining the Impact of* South Dakota v. Wayfair *on Small Businesses and Remote Sales: Hearing Before the U.S. S. Fin. Comm.*, 117th Cong. 1 (2022) (statement of The FAIR Coalition, Seeking Fair Access to Interstate Remedies) [hereinafter Statement of The FAIR Coalition].

145. Samuel Eckman, *A State-Centered Approach to Tax Discrimination Under § 11501(b)(4) of the 4-R Act*, 79 U. CHI. L. REV. 1051, 1061 (2012) ("[T]he [4-R] Act makes clear that a vibrant rail industry is a critical component of such competition . . . .").

146. *See* Schoenwald, *supra* note 23, at 1110 (noting that interstate carriers were easy "targets" for state and local tax discrimination because "they are nonvoting, often nonresident entities and because they cannot easily remove their rights-of-way and terminals from the state"); Alan D. Viard, *Railroad Taxes, Discrimination, and the 4-R Act: A Misstep by the Eighth Circuit*, TAX ANALYSTS, STATE TAX NOTES, Jan. 9, 2012, at 161, 163.

147. Eckman, *supra* note 145, at 1058.

148. *See* Schoenwald, *supra* note 23, at 1110 ("States frequently practiced this discrimination against interstate carriers by classifying their property at tax rates higher than property owned by other commercial and industrial concerns.").

149. Eckman, *supra* note 145, at 1059. The Doyle Report also indicated that the higher tax rates led railroads to pay over $140 million more in taxes than they would have otherwise. *Id.*

150. Schoenwald, *supra* note 23, at 1112.

151. *Id.*

about such discretion given to tax assessors on valuing railroads,[152] but also about interstate carriers passing the costs imposed by such higher tax rates to their customers.[153] Imposing such cost burdens on customers could deter individuals from using railroads and, therefore, affect interstate commerce.[154]

Due to these concerns, Congress passed the 4-R Act prohibiting states from imposing discriminatory taxes on rail carriers.[155] The first three subsections of § 11501(b) in the 4-R Act prohibit discriminatory property taxes, and the last subsection acts as a catchall provision prohibiting the "impos[ition of] another tax that discriminates against a rail carrier providing transportation."[156] The Court has interpreted this last subsection to apply to all non-property taxes.[157]

Before the 4-R Act, railroads faced procedural hurdles, in all courts, when bringing discriminatory taxation claims.[158] For example, many states required complaints to be brought against the tax collectors rather than tax assessors.[159] Because property taxes are collected at the county level, railroads were forced to bring forth numerous suits at the county level concerning the same state tax.[160] This procedural obstacle, combined with a railroad's challenge of proving an improper assessment, led Congress to recognize interstate carriers needed a federal forum to challenge these purportedly discriminatory state and local taxes.[161] Congress concluded that a federal forum would be much more efficient than state forums with inadequate state remedies.[162] Not only would a federal forum allow for one judicial proceeding, Congress also acknowledged a "need to provide standards to guide state and federal courts in their review of allegedly discriminatory state and local . . . taxes."[163]

Subsection (c) of the 4-R Act does not bar federal court jurisdiction when a state imposes discriminatory taxes on rail carriers.[164] Therefore, in enacting the 4-R Act, Congress created an express exception to the TIA.[165]

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152. *See* Eckman, *supra* note 145, at 1059 (stating the overtaxation of railroads was heightened by "the wide discretion granted to tax assessors and the difficulty of ensuring equitable assessments").

153. *See* Schoenwald, *supra* note 23, at 1110 n.9 ("Congress was aware that consumers paid higher prices for transportation because interstate carriers passed the cost of the discriminatory taxes on to the consumer.").

154. *Cf. id.* at 1110 ("Congress anticipated that interstate commerce would benefit once consumers took advantage of the lower cost of using these carriers resulting from the carriers' protection from discriminatory taxes under this legislation.").

155. 49 U.S.C. § 11501(b).

156. *Id.*

157. Eckman, *supra* note 145, at 1055–56.

158. *See id.* at 1062.

159. *See id.*; Schoenwald, *supra* note 23, at 1112.

160. *See e.g.*, Eckman, *supra* note 145, at 1062 (stating the Southern Pacific "had to bring 48 separate suits in 48 separate California courts to challenge the level of assessments of that railroad's property."); Schoenwald, *supra* note 23, at 1112–13.

161. *See* Schoenwald, *supra* note 23, at 1112.

162. *Id.* at 1112–13.

163. *Id.* at 1113.

164. 49 U.S.C. § 11501(c).

165. *Id.* Subsection (c) states "[n]otwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with

2. Challenges to the 4-R Act

Congress enacted the 4-R Act through its federal Commerce Clause powers.[166] It sought to directly address the effect of discriminatory state taxation of railroads on interstate commerce and eliminate the "discriminatory taxing scheme."[167] State and local taxing jurisdictions challenged this federal statute as a violation of the Tenth Amendment,[168] which "prohibits Congress from acting in a way 'that impairs the States' integrity or their ability to function effectively in a federal system.'"[169] Even though tax revenues are integral to the sovereignty of the states, taxes that directly affect interstate commerce are within Congress's power and "do[] not violate the reasonable expectations of the states."[170] Therefore, a challenge to the constitutionality of the 4-R Act as violating the Tenth Amendment is unlikely to succeed.[171]

D. The Internet Tax Freedom Act

The internet, like railroads, is vulnerable to discriminatory state taxation, with such taxation potentially burdening interstate commerce.[172] Congress, therefore, enacted the Internet Tax Freedom Act of 1998[173] under its Commerce Clause powers, which prohibits states from imposing discriminatory taxes on electronic commerce.[174]

Part II.D.1 discusses the enactment, intent, and purpose of the ITFA, and Part II.D.2 presents some challenges the ITFA has faced. Finally, Part II.D.3 examines litigation surrounding the ITFA, displaying how its interpretation has been a cause of controversy for years.

1. Congressional Intent and Purpose of the Internet Tax Freedom Act

The internet boomed in the 1990s; this decade was the start of the internet as we know it today.[175] The public was attracted to the internet's ability to provide a variety of

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other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section." *Id.*

166. Schoenwald, *supra* note 23, at 1113.

167. *Id.* at 1114.

168. *Id.* at 1114–15.

169. *Id.* at 1115 (quoting Tennessee v. Louisville & N. R. Co., 478 F. Supp. 199, 205 (M.D. Tenn. 1979)).

170. *See id.* In addition, states could change the taxing scheme to eliminate the discrimination and still generate the same amount of tax revenue. *Id.*

171. *See id.* at 1116.

172. *See, e.g.*, Timothy Fallaw, *The Internet Tax Freedom Act: Necessary Protection or Deferral of the Problem?*, 7 J. INTELL. PROP. L. 161, 161 (1999) (indicating that state taxation on the internet could place an undue burden on a major channel of international commerce).

173. 112 Stat. 2681, 2719–26 (1998) (codified as 47 U.S.C. §151 note (Internet Tax Freedom Act)).

174. 47 U.S.C. § 151 note (Internet Tax Freedom Act); Pub. L. No. 105-277, § 1101(a)(2), 112 Stat. 2681-719 (1998).

175. *See* Kim Ann Zimmerman & Jesse Emspak, *Internet History Timeline: ARPANET to the World Wide Web*, LIVE SCI. (Apr. 8, 2022), https://www.livescience.com/20727-internet-history.html [https://perma.cc/KZ36-TCGR]. Early stages of the internet date back to the 1960s with the development of the world's first wide-area computer network. Over the years, the technology evolved, and in the early 1990s, the

functions and services in one place, all at the same time.[176] Consumers quickly incorporated this foreign concept in their daily lives and began to use the internet to engage in electronic commerce.[177] Between 1996 and 1997, aggregate electronic commerce grew by over 4,000%—from $200 million to $8 billion.[178] Such internet activity soon became a focal point for state and local taxing authorities.[179]

The ITFA was enacted through a moratorium in a note in Section 151 of Title 47 of the United States Code.[180] The moratorium was renewed multiple times and became permanent in 2016.[181] The first provision of the ITFA states "[n]o State or political subdivision therefore shall impose . . . [t]axes on Internet access."[182] The ITFA defines "Internet access" as "a service that enables users to access content, information, electronic mail, or other services offered over the Internet . . . ."[183] Therefore, the first provision of the ITFA precludes states from taxing the monthly fees subscribers pay to access the internet.[184] The second provision provides "[n]o State or political subdivision therefore shall impose . . . [m]ultiple or discriminatory taxes on electronic commerce."[185] Pursuant to the ITFA, one way a tax discriminates against electronic commerce is if it "is not generally imposed and legally collectible by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means."[186] The ITFA's second provision is not as

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World Wide Web (i.e., the internet as we know it today) was born. Shortly after, but all within the same decade, Amazon, Yahoo, Google, and more were launched, and internet activity took off. *Id*.

176. *See* Fallaw, *supra* note 172, at 163 ("Due to the Internet's ability to provide the functions of advertising, marketing, order placement, and delivery of electronic goods all at one time, it is possible that it could become the principal means for consumers to obtain such items as television programs, movies, music, software, and news.").

177. *See id.* at 162 ("Consumers are using the Internet both to order tangible items of personal property which are then delivered by mail, and for electronic items which are ordered and delivered over the modem connection."). Examples of electronic commerce include purchasing tangible goods, booking transportation, and buying or selling stocks. *E.g.*, Brian Fagan, Note, *Taxation of Electronic Commerce: Avoiding an Inroad Upon Federalism*, 49 DRAKE L. REV. 465, 468 (2001).

178. Fallaw, *supra* note 172, at 162.

179. *See id.* at 163 (noting that the 30,000 taxing jurisdictions within the United States all wanted their portion of the internet sales revenue).

180. 47 U.S.C. § 151 note (Internet Tax Freedom Act); Pub. L. No. 105-277, (1998) § 1101, 112 Stat. 2681-719 (1998).

181. Wallace, *supra* note 140, at 185.

182. § 151 note; Pub. L. No. 105-277, § 1101(a)(1), 112 Stat. 2681-719 (1998).

183. § 1101(d)(3)(D).

184. Fallaw, *supra* note 172, at 168.

185. § 151 note; Pub. L. No. 105-277, § 1101(a)(2), 112 Stat. 2681-719 (1998).

186. § 1105(2)(A)(i). The ITFA also lists three other ways a tax is a prohibited discriminatory tax on electronic commerce, as follows:

> (ii) [the tax] is not generally imposed and legally collectible at the same rate by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means, unless the rate is lower as part of a phase-out of the tax over not more than a 5-year period;
>
> (iii) [the tax] imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means; [or]

straightforward as its first, however, and courts have inconsistently interpreted its meaning.[187]

The ITFA's main purpose is to protect electronic interstate commerce and ensure neutral tax treatment of the internet.[188] "The principle of tax neutrality indicates a belief that goods or services provided by means of electronic commerce should not be taxed any differently than goods or services procured through more conventional forms of commerce."[189] Ultimately, one of Congress's goals was to ensure that consumers did not base their decision of whether to buy goods or services over the internet or from a physical location on the respective taxes implemented.[190] Additionally, Congress wanted to promote the growth of the internet by allowing American consumers to have unrestricted access without large tax burdens.[191]

2. Challenges to the Internet Tax Freedom Act

Since its enactment, the ITFA has received criticism.[192] For one, opponents of the ITFA have argued that the legislation interferes with state sovereignty and disrupts the basic principles of federalism because it prohibits states from implementing their own tax policies, effectively rendering them "wards" of the federal government.[193] "This argument is based on the fact that the development of state and local tax policy has historically, under the American federalist system, been left largely to the states themselves . . . ."[194] Additionally, opponents supported this argument by asserting the ITFA will result in a direct decrease in state and local tax revenue, which directly interferes with state sovereignty.[195] However, just like with the 4-R Act, because of

> (iv) [the tax] establishes a classification of Internet access service providers or online service providers for purposes of establishing a higher tax rate to be imposed on such providers than the tax rate generally applied to providers of similar information services delivered through other means . . . .

Id. at §1105(2)(A)(ii)–(iv).

187. *Cf.* Fallaw, *supra* note 172, at 170 (stating that the second provision of the ITFA created uncertainty around how electronic transactions should be treated for tax purposes).

188. *See id.* at 164–65.

189. *Id.*

190. *See id.* at 165 ("When tax neutrality is achieved, the tax system will not have the undesired outcome of affecting decisions which are usually determined by market forces, such as whether to do business over the Internet or from a conventional physical location . . . .").

191. Wallace, *supra* note 140, at 189.

192. *See, e.g.*, Fallaw, *supra* note 172, at 179–86; Christina T. Le, *The Honeymoon's Over: States Crack Down on the Virtual World's Tax-Free Love Affair with E-Commerce*, 7 HOUS. BUS. & TAX L. J. 395, 398 (2007) ("The contention between state taxation powers and states' limited constitutional authority to tax Internet sales is '[o]ne of the greatest controversies in the field of state taxation today.'" (alteration in original)).

193. *E.g.*, Fallaw, *supra* note 172, at 179–81 ("State and local interest advocates have objected to the legislation on the constitutional grounds of state sovereignty and autonomy.").

194. *Id.* at 180.

195. *See id.* at 182–83 ("First, companies involved in electronic-type commerce will find[] ways to avoid paying taxes that should still be enforceable notwithstanding the Internet Tax Freedom Act. Second, businesses that were not intended to receive any protection from taxation under the Act will maneuver to position themselves within the protective ambit of the legislation.").

Congress's broad Commerce Clause powers and the importance placed on regulating interstate commerce, such pushback has proven ineffective.[196]

The ITFA's constitutionality has also been challenged on the ground that it violates the anti-commandeering doctrine.[197] The anti-commandeering doctrine represents that "[n]o matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate."[198] However, this argument has not gotten much traction either, as the ITFA has been enacted for over twenty years and does not require the states to regulate but instead preempts the states from regulating in a way that conflicts with the statute[199]

3. Trouble Interpreting the Internet Tax Freedom Act

Since the enactment of the ITFA, litigation has ensued over the application of the legislation.[200] In 2021, for example, two separate suits—one in federal court[201] and another in state court[202]—were filed asserting Maryland's digital advertising tax is unlawful for multiple reasons, including preemption by the ITFA.[203] The Maryland digital advertising tax is "imposed on annual gross revenues of a person derived from digital advertising services in the [s]tate."[204] In both cases, the plaintiffs argue the digital advertising tax discriminates against electronic commerce because it is imposed on advertising through electronic commerce but not on advertising through other mediums like print or radio, and therefore, is preempted by the ITFA.[205] Specifically, the two internet companies who brought suit in state court stated the following:

> The [digital advertising tax] is the prototypical "discriminatory tax" on electronic commerce. The Tax is specifically targeted at "digital advertising services," i.e., advertising delivered over the Internet, to the exclusion of

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196. *See, e.g.*, *id.* at 181.

197. *See, e.g.*, Motion to Dismiss at 30, Comcast of Cal./Md./Pa./Va./W. Va., LLC v. Comptroller of Md., No. C-02-cv-21-000509 (Cir. Ct. Md. Oct. 12, 2021), *cert. granted*, Comptroller of Md. v. Comcast of Cal./Md./Pa./Va./W.Va., LLC, 288 A.3d 1232 (Md. 2023).

198. New York v. United States, 505 U.S. 144, 178 (1992). "The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation." *Id.*

199. *See* Response in Opposition to Defendant's Motion to Dismiss at 32, *Comcast v. Comptroller of Md.*, No. C-02-cv-21-000509.

200. *See, e.g.*, Wallace, *supra* note 140, at 181 ("ISSPs are in a state of confusion regarding its tax obligations for online streaming services. State and local governments have passed and implemented legislation and regulations that require ISSPs to collect and remit sales and use taxes. However, Congress intended to prevent the taxation of Internet access when it permanently extended the Internet Tax Freedom Act in 2016." (footnote omitted)).

201. The United States Chamber of Commerce and various trade associations filed suit against the Comptroller of the Treasury of Maryland in the United States District Court for the District of Maryland Northern Division. Complaint, Chamber of Com. v. Franchot, 595 F.Supp.3d 423 (D. Md., 2022) (No. 21-cv-410).

202. Comcast and Verizon filed suit against the Maryland Comptroller in the Circuit Court for Anne Arundel County. Complaint, *Comcast v. Comptroller of Md*., No. C-02-cv-21-000509.

203. *See, e.g.*, Paul Williams, *Biz Groups Urge Fed. Court to Hear Md. Digital Ad Tax Suit*, LAW360 TAX AUTH. (July 29, 2021, 7:55 PM), https://www.law360.com/tax-authority/articles/1408117/biz-groups-urge-fed-court-to-hear-md-digital-ad-tax-suit [https://perma.cc/8FC8-LK8R].

204. MD. CODE ANN., TAX–GEN. § 7.5-102(a) (West 2021).

205. *E.g.*, Williams, *supra* note 203.

> traditional or offline advertising services. Given the explicit targeting of Internet-based transactions, it is hard to imagine a more direct violation of ITFA Section 1101(a)(2).[206]

The Comptroller of Maryland, on the other hand, argues that the Maryland digital advertising tax is not preempted by the ITFA because the tax is imposed on gross revenues from digital advertising services that materially differ from other advertising services; therefore, the tax is not "discriminatory" because it is not generally imposed on gross revenues from services that are "similar."[207]

The above cases are only one example of confusion interpreting and applying the ITFA.[208] What is clear, however, is that Congress enacted the ITFA to combat interstate commerce being burdened—the same primary reason Congress passed the 4-R Act.[209]

III. Discussion

Section III discusses the consequences of enacting the TIA and proposes a modification allowing federal courts to have jurisdiction over more state and local tax cases. Part III.A addresses the TIA's negative consequences—direct and indirect. Part III.B proposes the ITFA, like the 4-R Act, should provide for a clear exception to the TIA.

A. *Consequences of the Tax Injunction Act*

With the TIA's enactment, Congress resolved diversity jurisdiction concerns in state and local matters but created other concerns.[210] Part III.A.1 discusses how the arbitrary distinction between a tax and fee or fine for purposes of the TIA has led to undesirable consequences. Part III.A.2 further discusses the TIA's consequence of completely deterring taxpayers from litigating in any forum. Finally, Part III.A.3 discusses the power the TIA has given to the states.

1. Arbitrary Distinction between Taxes and Other Charges

Because the TIA only applies to "taxes," and not "fees" or "fines," it has created a whole category of litigation that distinguishes a tax from a different type of exaction.[211] Part III.A.1.a discusses the unnecessary litigation that has arisen from attempting to interpret this language in the TIA. Part III.A.1.b addresses the circuit splits that have resulted from such litigation.

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206. Response in Opposition to Defendant's Motion to Dismiss, *supra* note 199, at 26.

207. Motion to Dismiss, *supra* note 197, at 32.

208. *See, e.g.*, Wallace, *supra* note 140, at 186–87 (arguing ISSPs are protected from taxation under the ITFA because they provide an Internet access service and cannot be compared to cable providers because "ISSPs do not meet the definition of a cable system").

209. *See, e.g.*, Fallaw, *supra* note 172, at 161.

210. *See* Friedman et al., *supra* note 9.

211. *See, e.g.*, Campbell, *supra* note 98.

a. Unnecessary Litigation

The plain text of the TIA specifies that the Act applies only to "any tax under state law" and, therefore, not all exactions.[212] The classification of an exaction for state tax purposes is irrelevant, as this determination involves a question of federal law.[213] Determining whether an exaction is a tax for purposes of the TIA has led to years of litigation.[214] This category of litigation not only increases the courts' dockets but also results in an unnecessary use of resources for both taxpayers and state governments.[215] The resources invested in such litigation are not expended on the merits of a claim but on the determination if a federal court can decide the merits of a claim.[216] Furthermore, these decisions ultimately result in an arbitrary distinction, as evidenced by the circuit splits discussed below, in determining which cases have federal court jurisdiction.[217]

b. Circuit Splits

The category of litigation created by interpreting the plain text of the TIA has led to circuit splits on whether certain exactions constitute a tax for purposes of the TIA.[218] Some circuits have labeled an exaction a "tax" for purposes of the Act, whereas other circuits have labeled an exaction of almost identical characteristics a "fee" or "penalty" for such purposes.[219] For example, as discussed in Part II.B.3.a, the Second and Fourth Circuit Courts of Appeals have classified exactions that apply to only one taxpayer differently.[220]

As a result of these circuit splits, no uniform rule exists on whether an exaction is a tax for purposes of the TIA.[221] Such ambiguity confuses taxpayers, creating uncertainty around the Act's applicability in other instances.[222] In addition, these circuit splits bar

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212. *See id.* at *2 (stating the Tax Injunction Act does not apply to state-imposed fees or other exaction which are not "taxes under state law").

213. *See id.*

214. *See id.* (analyzing over 150 cases dealing with the issue of determining whether an exaction is a tax under the Tax Injunction Act).

215. *See* Friedman et al., *supra* note 9.

216. *See* Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010) ("Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims.").

217. *See* Friedman et al., *supra* note 9.

218. *See, e.g.,* Campbell, *supra* note 98 (analyzing the federal cases which have addressed whether an exaction is a state tax for purposes of the Tax Injunction Act); Petition for a Writ of Certiorari at 1, *Ass'n for Accessible Meds.* 974 F.3d 216 (No. 20-1611) (noting that Tax Injunction Act is a jurisdictional statute "that has spawned inconsistent decisions among the lower courts").

219. *See, e.g.*, Campbell, *supra* note 98 ("Some courts have held that fees paid to obtain handicapped-parking stickers are taxes for purposes of the Tax Injunction Act, while it has also been held that such fees are not taxes for purposes of the Act." (citation omitted)).

220. See *supra* Part II.B.3.a for a discussion of two cases from different circuits where the courts reached different conclusions on controversies involving an exaction only applying to a single taxpayer.

221. *See* Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc., 651 F.3d 722, 729 (7th Cir. 2011) ("The line between a tax and a fee, and a tax and a fine, is sometimes fuzzy . . . .").

222. *See* Petition for a Writ of Certiorari, *supra* note 218, at 16 (stating the disagreement among the circuits over whether an exaction is classified as a tax or fee is confusing).

taxpayers in one circuit from federal court yet allow taxpayers in a different circuit access to federal court to challenge the same type of exaction.[223] This unequal opportunity is entirely dependent on which circuit the state, and its respective tax, falls within and ultimately results in unfair treatment.[224] In *Association for Accessible Medicines*, for example, the petitioners argued that the exaction imposed on opioid manufacturers would have been classified as a penalty in the First, Fourth, and Ninth Circuits.[225] Therefore, if the exaction happened to have been imposed by a state in any of those federal circuits, the petitioners would have been able to bring their claim in federal court.[226]

2. Complete Deterrence of Litigation

For the reasons discussed above, even if litigants believe the TIA would not apply to their case, they are deterred from bringing suitin federal court and are effectively left with state court as their only option.[227] In certain instances, such as challenging the constitutionality of a state tax, the state forum is not preferred, however.[228]

> The time required for a state tax-refund suit alone is frequently sufficient to coerce businesses into compliance: Few companies will choose to spend years in state courts contesting a law's constitutionality while their competitors alter their business practices to comply, especially when [the Supreme] Court has held that nothing in the TIA requires a state tax-refund scheme to "be the speediest."[229]

As a result, taxpayers often find both the federal and state litigation options too burdensome and choose to comply with the state's regulation rather than bring forth their meritorious claims.[230]

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223. *See id.* (noting courts have come to "'opposite conclusion[s]' in cases involving analytically indistinguishable facts" (alteration in original)).

224. See *supra* Part II.B.3 for a discussion on how different circuits have ruled differently on classifying exactions with the same characteristics for purposes of the TIA.

225. Petition for a Writ of Certiorari, *supra* note 218, at 16. The petitioners compared the facts in the present case to the First Circuit's decision in *Trailer Marine Transport Corp. v. Rivera Vazquez*, 977 F.2d 1 (1st Cir. 1992), the Fourth Circuit's decision in *GenOn Mid-Atlantic*, and the Ninth Circuit's decision in *Bidart Bros. v. California Apple Commission*, 73 F.3d 925 (9th Cir. 1996) and concluded that each of those circuits would have held the opposite of what the Second Circuit held. *See id.* at 17–21.

226. The petitioners argue that the Fourth Circuit, under its holding in *GenOn Mid-Atlantic*, would have classified the exaction on the opioid manufacturers as a penalty because it "imposes a 'punitive and regulatory' fee, not a tax, under the TIA." *Id.* at 19.

227. *See* Brief for Amicus Curiae Chamber of Commerce of the United States of America in Support of Petitioners at 17, Ass'n for Accessible Meds. v. James, 974 F.3d 216 (2d Cir. 2020) (No. 20-1611) ("The uncertainties and delays associated with these sprawling inquiries only serve to deter regulated parties from challenging unconstitutional state laws."); *see also* Gorod, *supra* note 97, at 733 ("For litigants who initially bring their challenge in federal courts and subsequently confront the TIA bar, the costs (monetary and otherwise) of renewing their claims in state court after many years of litigation in the federal system may be prohibitive.").

228. *See* Enrich, *supra* note 2, at 732–33.

229. Brief for Amicus Curiae Chamber of Commerce of the United States of America in Support of Petitioners, *supra* note 227, at 17.

230. *See id.* ("The uncertainties and delays associated with these sprawling inquiries only serve to deter regulated parties from challenging unconstitutional state laws."); *cf.* Gorod, *supra* note 97, at 733 ("For litigants who initially bring their challenge in federal courts and subsequently confront the TIA bar, the costs (monetary

3. State Power

In addition to the above, the TIA gives the states troublesome powers. Even though the Constitution establishes a federal government of limited power,[231] it is important that states do not abuse the power granted to them.[232]

Part III.A.2.a discusses how the TIA allows state legislatures to craft legislation to ensure it is barred from federal court review. Part III.A.2.b explains that state judiciaries are required to interpret federal constitutional principles and legislation because of that bar.

a. Crafting Legislation

In addition to creating an entire category of litigation that has resulted in numerous circuit splits and completely deterring taxpayers from bringing forth their meritorious claims, the TIA allows state legislatures to draft statutes in a way that guarantees a bar to federal court jurisdiction.[233] To achieve such bar, it is not uncommon for states "to dress up punitive exactions as revenue-producing taxes."[234] This potential gives the states a great deal of power—it permits them to prohibit taxpayers from challenging the constitutionality of a state exaction in federal court solely because of state's statute text.[235]

For example, in passing the Maryland digital advertising tax, the Maryland General Assembly had guidance from prior Fourth Circuit decisions on how the Fourth Circuit decides whether an exaction is a tax for purposes of the TIA.[236] The United States District Court for the District of Maryland deemed Maryland's digital advertising tax a "tax" for purposes of the TIA, prohibiting federal courts from ruling on the trade associations' constitutional and preemptive challenges to the Maryland legislation.[237] The court applied the *Bidart* factors and held that the digital advertising tax is a "tax" because it was enacted by the legislature—the Maryland General Assembly—it is imposed on many

and otherwise) of renewing their claims in state court after many years of litigation in the federal system may be prohibitive.").

231. *E.g.*, Kaye, *supra* note 8, at 149.

232. *Cf. id.* ("Congress has increasingly preempted the states' power to tax . . . .").

233. *See* Friedman et al., *supra* note 9.

234. *See* Brief for Amicus Curiae Chamber of Commerce of the United States of America in Support of Petitioners*, supra* note 227, at 3.

235. *See* Gorod, *supra* note 97, at 732 ("When a state in the Fifth Circuit wants to pass a law that it fears might be held unconstitutional, or even one that it knows is unconstitutional, all it need do is attach a 'fee' whose proceeds 'benefit[] the entire community.'" (alteration in original) (footnotes omitted)).

236. *See, e.g.*, Campbell, *supra* note 98 (highlighting examples of how the Fourth Circuit has labeled an exaction for purposes of the TIA).

237. Chamber of Com. of the U.S. v. Franchot, 588 F.Supp.3d 633, 642 (D. Md. 2022), *vacated and superseded by*, 595 F.Supp.3d 423 (D. Md. 2022). The court also held that the TIA did not bar plaintiffs' challenge to the tax's pass-through prohibition provision, because this provision does not involve the "assessment, levy or collection" of a tax. *Id.* at 641–42. However, the court later deemed this claim moot by the Circuit Court of Anne Arundel County's decision in the similar case brought in state court. Chamber of Com. of the U.S. v. Franchot, No. 21-CV-00410-LKG, 2022 WL 17404768, at *3 (D. Md. Dec. 2, 2022), *appeal filed*, No. 22-2275 (4th Cir. Dec. 15, 2022).

companies, and its primary purpose is to raise funds for educational improvement, which benefits the entire community.[238] Because the Maryland digital advertising tax "passed" these three factors, it was deemed a tax under the TIA, and the challenge to the constitutionality of the tax was barred from federal judicial review.[239]

In an attempt to overcome the TIA, the plaintiffs argued that the digital advertising tax is really a penalty because it specifically targets a small number of large companies who have over $100 million in gross revenue and does so regardless of whether their revenue was earned in Maryland or from digital advertising services.[240] This argument, however, was based on the consequences of the tax, and delved deeper than the surface-level *Bidart* factor analysis. And, through the Fourth Circuit's analysis in the past, the Maryland legislature has a roadmap on how to draft legislation that will be deemed barred by the TIA in the future.[241] For example, to ensure the TIA's application, the Maryland legislature could have purposefully structured the digital advertising tax to not fall on only one company (as it did in *GenOn Mid-Atlantic*) but still target a small number of companies.

b. Barriers to Uniform Interpretations

The TIA's bar to federal jurisdiction forces state courts to interpret federal constitutional principles and legislation, which is cause for concern. First, there is a concern that taxpayers will face a greater fight in a state forum than in a federal forum over such constitutional claims.[242] One reason for such concern evolves from the inherent pressures state judges face.[243] State judges, for the most part, are elected and do not serve lifetime terms,[244] which makes it more likely they will vote with the majority on political issues even if they disagree.[245] Such issues "may be the same issues that would lead state legislatures to try to prevent federal court review."[246]

Additionally, forcing state courts to take on such constitutional and federal law challenges have led to inconsistent rulings.[247] These inconsistent holdings cause confusion for taxpayers, as some states may interpret state tax legislation to conflict with

238. *See Franchot*, 588 F.Supp.3d at 641–42.

239. *Id.* at 642.

240. Complaint, *supra* note 201, at 8–9.

241. *Cf.* Friedman et al., *supra* note 9.

242. *See* Gorod, *supra* note 97, at 733.

243. *See id.* at 733 n.34.

244. *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST. (Oct. 11, 2022), https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures [https://perma.cc/AN4H-C6XJ] ("Most states use elections as some part of their selection process—39 states use some form of election at some level of court.").

245. *See* Gorod, *supra* note 97, at 733 n.34.

246. *Id.* at 733–34 n.34.

247. *See* Statement of The FAIR Coalition, *supra* note 144, at 2; Friedman et al., *supra* note 9 ("[T]he TIA's bar on federal court jurisdiction has created barriers to the uniform interpretation of the Constitution and federal laws imposing restrictions on state taxation.").

a federal statute or constitutional provision while other states may not.[248] Results like this make it clear that uniform interpretation is needed.[249]

B. *Changes that Allow for More Exceptions to the Tax Injunction Act*

There are many reasons why a plaintiff may want to litigate in a neutral federal forum rather than state court.[250] The option to do so should be more available in cases dealing with state and local tax matters.[251] As discussed in Part II.B.2, the Supreme Court has interpreted the purpose of the TIA more narrowly than it has in the past.[252] This trend towards a narrow interpretation supports the idea that the Court knows the TIA did not intend to completely limit all state and local tax matters from federal adjudication, and in fact, it recognizes the importance of a federal forum for certain state and local tax controversies.[253] This recognition, in conjunction with the TIA's undesirable consequences, some of which are discussed above, makes it clear there should be additional exceptions to the Act, or the Act should be modified in a way, that allows for federal court jurisdiction over certain state tax matters.

Even though there are arguments for federal courts to have jurisdiction over a wide array of state and local tax matters, a good place to start is with controversies over specific federal legislation enacted because of interstate commerce concerns, such as the ITFA.

Part III.B proposes an exception to the TIA, similar to that in the 4-R Act, for cases challenging the constitutionality of a state or local tax as preempted by the ITFA. Part III.B.1 argues that the TIA should not apply to the ITFA because the ITFA is a federal law. Part III.B.2 argues that the TIA should not apply to the ITFA because none of the abstention doctrines would be violated. Finally, Part III.B.3 argues that, even if an abstention doctrine applied, the TIA should not apply to the ITFA because interstate

248. *See* Statement of The FAIR Coalition, *supra* note 144, at 2 ("The lack of federal court oversight of federal questions regarding state taxation has left a spiderweb of inconsistent state court rulings on federal law, which only further complicates the application of, and compliance with, various state tax laws."); Friedman et al., *supra* note 9.

249. *See* Statement of The FAIR Coalition, *supra* note 144, at 2 ("Simple changes to the TIA could alleviate these issues [of state courts inconsistently applying federal law] and create greater uniformity for businesses throughout the country."); Friedman et al., *supra* note 9 ("Cases involving a question of federal law or a constitutional challenge, for example, would clearly benefit from federal court jurisdiction.").

250. *See, e.g.*, Enrich, *supra* note 2, at 733.

251. *See* Statement of The FAIR Coalition, *supra* note 144, at 1 ("[T]he TIA should be amended to allow businesses access to federal courts in cases where state tax issues raise substantial federal questions—such as those requiring interpretation of either the U.S. Constitution or federal law."); *cf.* Friedman et al., *supra* note 9 ("A modernization of the TIA should target those cases where there is a compelling reason for federal court jurisdiction.").

252. *See, e.g.*, *supra* notes 79–95 and accompanying text; Enrich, *supra* note 2, at 745 ("Indeed, not until its decision in *Hibbs v. Winn* in 2004 . . . did the Court decide in favor of the narrower interpretation of the [Tax Injunction] Act's purposes.").

253. *See* Lowinger, *supra* note 55, at 746 ("The legislative history of the Tax Injunction Act does not, however, demonstrate a congressional intention to remove from the federal courts all suits *involving* state or local tax administration, but only those that permitted the taxpayer to adjudicate the lawfulness of a levy prior to payment.").

commerce concerns underlying the ITFA trump policy considerations underlying the TIA and the abstention doctrines.

1. The Internet Tax Freedom Act is a Federal Statute

The TIA should not bar federal jurisdiction over cases challenging a state tax being preempted by the ITFA because the ITFA is a question of federal law. But for the TIA, cases challenging the constitutionality of a state tax under the ITFA would fall within the federal courts' original jurisdiction under federal question jurisdiction.[254] The TIA's legislative history makes clear that Congress enacted the TIA primarily to resolve concerns created by diversity jurisdiction, not federal question jurisdiction.[255] Therefore, in enacting the TIA, Congress may not have realized the consequences the TIA imposes on federal question jurisdiction cases and how barring such cases from federal court adjudication runs afoul of the clear intent of federal question jurisdiction.[256]

There is danger in state courts interpreting federal statutes because of the likelihood of inconsistent holdings and, therefore, a lack of uniformity in the interpretation of federal law among the states.[257] This danger was one of the reasons Congress created an exception to the TIA in the 4-R Act.[258] Such lack of uniformity can come from the states misunderstanding federal law or lack of sympathy for it.[259] Federal judges are more likely to have a better understanding of a federal law by the mere fact that they are constantly exposed to it.[260] Therefore, federal judges should be the ones interpreting the ITFA, and the TIA should not bar federal court jurisdiction over such state tax cases.

2. The Abstention Doctrines Would Not Be Violated

None of the abstention doctrines apply to cases challenging a state or local tax as preempted by the ITFA. Part III.B.2.a discusses the inapplicability of the *Pullman*, *Burford*, and *Colorado River* abstention doctrines. Part III.B.2.b discusses the inapplicability of the *Younger* abstention doctrine.

254. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

255. See *supra* Part II.B for a discussion on the TIA's legislative history.

256. *See* Wright, *supra* note 9, at 660 ("Of course, federal courts should be hearing cases which involve questions of federal law . . . .").

257. *See id.* at 661 (stating a goal of federal jurisdiction is to have uniformity in interpretation of federal law because "it would be an intolerable thing if the Constitution and the laws of the United States were to have different meanings in different states").

258. Schoenwald, *supra* note 23, at 1113 ("Congress also recognized the need to provide standards to guide state and federal courts in their review of allegedly discriminatory state and local . . . taxes.").

259. Wright, *supra* note 9, at 661.

260. *See id.* at 661–62 (stating that federal judges deal with questions of federal law every day and therefore are more likely to have a better understanding of federal law than state judges); Statement of The FAIR Coalition, *supra* note 144, at 3 ("Federal courts are best situated to interpret Congressional intent regarding federal laws regulating state taxation.").

a. The Pullman, Burford, and Colorado River Abstention Doctrines Do Not Apply

The *Pullman* abstention doctrine, which allows federal courts to decline review of a constitutional issue if the case can be decided on state law, and the *Burford* doctrine, which allows federal court abstention if a federal court's decision on a state law could result in inconsistencies, do not apply to cases challenging a state tax as preempted by the ITFA. Whether or not the ITFA preempts a particular state or local tax is not an issue of state law because the ITFA is a federal statute. Thus, a court would decide this issue based on its interpretation of the federal law, not state law. Additionally, the *Pullman* doctrine would also not apply because deciding if the ITFA preempts a state tax necessitates only statutory interpretation and does not address constitutional questions.[261] Further, the *Burford* abstention doctrine would also be inappropriate because evaluating a claim under the ITFA requires a court to apply federal law, not state law, and "[a]pplying federal law poses no threat to the development of a coherent state taxation policy."[262]

The *Colorado River* abstention doctrine is also inapplicable because even if there is a state court proceeding dealing with a similar issue, "pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction."[263] The Supreme Court has said that "[o]nly the clearest of justifications will warrant dismissal"[264] and iterated factors to consider when deciding whether abstention is appropriate.[265] Such factors include the convenience of a federal forum and the ability to litigate all issues in one suit.[266] These factors are "heavily weighted in favor of the exercise of [federal] jurisdiction."[267] Therefore, the mere convenience of a federal court hearing a case that requires interpretation of a federal statute, and the ability for uniform interpretation of the statute, weigh in favor of federal court adjudication—supporting the conclusion that the *Colorado River* abstention doctrine does not stand in this instance.

b. The Younger Abstention Doctrine Does Not Apply

The *Younger* doctrine, which allows for abstention when federal courts cannot act without interfering with legitimate state interests, does not apply to cases challenging a state tax as preempted by the ITFA.

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261. *Cf.* Schoenwald, *supra* note 23, at 1140 ("[T]he *Pullman* abstention doctrine is inappropriate because federal courts can decide federal statutory issues that plaintiffs raise under [the 4-R Act] without addressing constitutional questions.").

262. *See id.* at 1141 ("Applying federal law poses no threat to the development of a coherent state taxation policy.").

263. McClellan v. Carland, 217 U.S. 268, 282 (1910).

264. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 819 (1976).

265. Schoenwald, *supra* note 23, at 1141 n.211.

266. *Id.*

267. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 16 (1983).

First, state autonomy is not threatened by federal courts having the option to interpret whether the ITFA applies to state tax legislation.[268] A federal court merely hearing this type of case does not interfere with a state interest; a state can only make this assertion if a federal court were to invalidate a state tax as preempted by the ITFA, which it may or may not do.[269] And, even if a federal court were to strike down a state tax as unconstitutional, it does not limit a state's ability to experiment.[270] For example, if the TIA did not bar federal adjudication over the Maryland digital advertising tax, and if the United States District Court for the District of Maryland were to strike down the tax as preempted by the ITFA, that ruling would not bar Maryland from revising the legislation in a way to avoid such preemption. Thus, federal adjudication does not ban a state's ability to experiment, and federal court abstention would not further federalism.[271]

Next, comity does not require federal courts to abstain from adjudicating on a case concerning whether the ITFA applies to state tax legislation. In *Commerce Energy*, the Court identified three aspects of the case that, *when combined*, required comity to control.[272] In the case of a federal court deciding whether the ITFA applies to a state tax, these aspects are not present. Regarding the first aspect, while the taxation of electronic commerce may be a "commercial matter," it is an activity subjected to heightened scrutiny as the ITFA was enacted to prevent burdens on interstate commerce under Congress's dormant commerce clause powers.[273] The Supreme Court has consistently held that "cases alleging discrimination against out-of-state economic activities and interests have consistently been subjected to heightened scrutiny."[274] Therefore, the first aspect supporting comity in *Commerce Energy* is not applicable here.

Arguably, since the first aspect is not present, the analysis could end here. However, the remaining two aspects also lend support to concluding that comity should not bar a federal court from interpreting the ITFA's applicability to a state tax. The second aspect, whether a third party is challenging the tax, may or may not be present in this instance. However, even if a taxpayer was contesting its own tax burden, the existence of this aspect is not enough to compel abstention. The vast majority of the time, a taxpayer, itself, is the only one who has standing to bring forth a case challenging the constitutionality of a state tax.[275] If this factor alone was enough to invoke comity, then

268. *See* Fautsch, *supra* note 14, at 816 ("If the federal court decides to hear the plaintiff's challenge to the constitutionality of the state tax credit, the state's ability to serve as a laboratory of democracy is not harmed, because the federal court has not yet passed on the merits.").

269. *See id.*

270. *See id.* at 818 ("Striking down a state tax credit on federal constitutional grounds, however, will not meaningfully diminish experimentation.").

271. *Cf. id.* ("[T]he Constitution places limits on the ability of states to experiment, but does not ban experimentation.").

272. Levin v. Com. Energy, Inc., 560 U.S. 413, 431–32 (2010) ("Individually, these considerations may not compel forbearance on the part of federal district courts; in combination, however, they demand deference to the state adjudicative process.").

273. *See* Enrich, *supra* note 2, at 752 n.139 (citing Supreme Court cases that imposed heightened judicial scrutiny on matters concerning discriminatory taxes).

274. *Id.* at 752.

275. *See id.* at 749.

a taxpayer could never challenge a state tax regime in federal court, even if it could circumvent the TIA. But, as we've seen, history has proven otherwise.[276]

Lastly, the third aspect, concerning choice of remedies, is not applicable in this case. In *Commerce Energy*, the main concern behind this factor was that a federal court could have remedied the state tax's unequal treatment in a way that was different than the Ohio legislature would have liked.[277] However, in the case of a federal court striking down a state tax as unconstitutional under the ITFA, a state legislature is still free to experiment.[278] For example, if the TIA did not bar federal adjudication over the Maryland digital advertising tax, and if the United States District Court for the District of Maryland were to strike down the tax as preempted by the ITFA, that ruling would not bar Maryland from choosing how to achieve equal treatment. In that case, the Maryland legislature could either (1) retract the digital advertising tax and, therefore, not collect tax on digital or non-digital advertising, or (2) enact separate legislation to tax similar, non-digital advertising—rendering the digital advertising tax no longer preempted by ITFA—and, therefore, collect tax on both digital and non-digital advertising.

Thus, allowing federal court jurisdiction over cases challenging a state tax as preempted by the ITFA would not violate any of the abstention doctrines.

3. Unburdened Interstate Commerce Trumps State Autonomy

Even if federal adjudication over the ITFA's applicability to a state tax were to undermine the goals of federalism and comity, the abstention doctrines should not bar federal review because the interest of unburdened interstate commerce the ITFA seeks to protect trumps the interest of state autonomy and avoidance of federal intrusion the TIA and abstention doctrines try to protect.[279] Within the Constitution lies a primary concern of centrally regulating the nation's economy.[280] The Founding Fathers feared "[s]tates would act selfishly and would pass tariffs or impose regulations that would not benefit the greater good of the United States."[281] Consequently, the Constitution grants the federal government the power to regulate, and prevents states from harming, interstate commerce under its Commerce Clause and dormant commerce clause powers, respectively.[282]

James Madison placed such a high importance on the dormant commerce clause; he stated the "Commerce Clause 'grew out of the abuse of the power by the importing States in *taxing* the non-importing, and was intended as a negative and preventative

276. See *supra* Part II.B.2 for a discussion of *Direct Marketing Association v. Brohl*, where the Court held federal court adjudication was proper in a case where retailers contested a Colorado taxing scheme they were subject to.

277. *Com. Energy*, 560 U.S. at 429.

278. *See* Fautsch, *supra* note 14, at 818.

279. *Cf.* Schoenwald, *supra* note 23, at 1141 (stating protecting interstate commerce is more important than maintaining a state tax scheme).

280. *E.g.*, Larsen, *supra* note 139, at 845.

281. *Id.*

282. *See, e.g.*, *id.* at 846.

provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government.'"[283] That being said, it is clear how vital Congress's power to regulate and prevent discrimination against interstate commerce is to the nation.[284]

The Court has cited various reasons justifying judicial review of dormant commerce clause cases, including national unity,[285] economic liberties,[286] and concerns surrounding "political powerlessness of out-of-state interests."[287] These justifications permitted the Court to use the dormant commerce clause to strike down state regulations it found to discriminate or place an undue burden on interstate commerce.[288] The first justification, national unity, is of highest concern. National unity can be broken down into the ideas of economic protectionism and isolationism.[289] "Regulations that constitute economic protectionism are those 'designed to benefit in-state economic interests by burdening out-of-state competitors.'"[290] In reference to state isolationism, Justice Benjamin Cardozo stated "[n]o State may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade."[291]

As discussed, the internet's global reach raises interstate commerce concerns.[292] As a result of these concerns, Congress enacted the ITFA, which prohibits states from enacting "[m]ultiple or discriminatory taxes on electronic commerce."[293] Because the ITFA deals with *taxes* on electronic commerce, it is most likely barred from federal court adjudication under the TIA.[294] However, the TIA was enacted during a time where "the

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283. West Lynn Creamery v. Healy, 512 U.S. 186, 193 n.9 (1994) (quoting Letter from James Madison to J. C. Cabell (Feb. 13, 1829), *in* 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, app. at 478 (Max Farrand ed., 1911)).

284. *See, e.g.*, Larsen, *supra* note 139, at 844 ("The dormant Commerce Clause is one of the few constitutional doctrines effectively utilized by the United States Supreme Court to promote the fundamental economic rights implicit in the Constitution.").

285. *Id.* at 846.

286. *Id.* at 848.

287. *Id.* at 849 ("[A]n out-of-state party burdened by a discriminatory regulation of another state does not have any political weight to encourage the legislature to change the regulation. Consequently, the Court has used the dormant commerce clause to protect politically powerless interests.").

288. *Id.* at 844 ("The Court readily employs the dormant commerce clause to strike down state regulations for the sake of promoting the economic rationales underlying the doctrine. Hence, the doctrine has become a potent weapon to invalidate statutes that burden interstate commerce.").

289. *Id.* at 847.

290. *Id.*

291. *Id.*

292. *See, e.g.*, Statement of The FAIR Coalition, *supra* note 144, at 1 ("By and large, commerce today is interstate due to the internet and expansion of the global economy."); Fallaw, *supra* note 172, at 162 ("[T]he Internet has established itself as a viable commercial storefront with unlimited growth potential.").

293. 47 U.S.C. § 151 note (Internet Tax Freedom Act); Internet Tax Freedom Act, Pub. L. No. 105-277, § 1101(a)(2), 112 Stat. 2681-719 (1998); Fallaw, *supra* note 172, at 170.

294. *See, e.g.*, Calhoun & Fallaw, *supra* note 53, at 425.

national economy was much less interconnected,"[295] and there was little taxation on interstate commerce.[296] Not to mention, the internet was likely not even a thought.[297]

That being said, when Congress enacted the TIA, it did not consider state tax controversies with underlying interstate commerce concerns.[298] Therefore, it did not consider the Founding Fathers' fear of states harming interstate commerce through state and local taxing schemes.[299] But, today, this needs to be considered; this constitutional issue trumps federalism concerns.[300] Congress's interest in ensuring states do not discriminate or place undue burdens on interstate commerce outweighs the interest in state sovereignty that the TIA and abstention doctrines try to protect.[301] Therefore, the TIA and abstention doctrines are not reason enough to bar certain state and local tax controversies from federal adjudication. Federal adjudication over federal legislation prohibiting the implementation of state taxing regimes that burden interstate commerce is justified. The ITFA seeks to protect interstate commerce, which is of higher importance than state autonomy—the TIA and abstention doctrines' focus. Federal courts, therefore, should not be barred by the TIA from reviewing challenges to state and local taxes on the basis of the ITFA.

IV. CONCLUSION

Though Congress enacted the TIA to combat concerns of high importance, the Act has resulted in unintended, negative consequences.[302] Such consequences are so strong and significant that they cannot be ignored. It is time for a change. The option of federal court adjudication is needed for certain state and local tax controversies. However, amending the TIA in a way that maintains its intended purpose while eliminating the consequences discussed above is a challenging task. Therefore, one way to address the adverse consequences of the TIA is to amend other legislation to provide clear exceptions to the Act.

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295. *See, e.g.*, Friedman et al., *supra* note 9; Statement of The FAIR Coalition, *supra* note 144, at 1 (stating the internet completely changed the economic landscape in the years after the enactment of the TIA).

296. Statement of The FAIR Coalition, *supra* note 144, at 1 ("[The TIA was enacted] at a time when the state taxation of interstate commerce was extremely limited."); Friedman et al., *supra* note 9 (noting that at the time the TIA was enacted, the interstate highway system did not exist and commercial air travel was in its very early stages).

297. *See* Friedman et al., *supra* note 9. The internet began in the 1960s for governmental purposes, but the communications protocol allowing computers on different networks to communicate to each other was not established until 1982. Zimmerman & Emspak, *supra* note 175.

298. *See* Friedman et al., *supra* note 9.

299. *See id.*

300. *Cf.* Enrich, *supra* note 2, at 751 (stating that the Court in *Hibbs* sought to justify instances "where the interest in federal-court adjudication of important constitutional issues trumped federalism's interest in state autonomy").

301. *See* Friedman et al., *supra* note 9 ("Congress has recognized the importance of providing federal court jurisdiction for certain state tax cases. Congress' grants of federal court jurisdiction generally have been provided for industries which by their nature involve interstate commerce."); see also *supra* Part II.C.1 for a discussion of Congress, through the 4-R Act, allowing federal court jurisdiction over state taxation against railroads because of interstate commerce concerns.

302. See *supra* Part III.A for a discussion on the negative direct and indirect consequences the TIA.

Congress did exactly this with the 4-R Act, and the ITFA should be modified similarly. The 4-R Act and the ITFA were enacted for the same primary reason: to prohibit states from enacting tax legislation that places an unconstitutional burden on interstate commerce. Just like the 4-R Act bars states from imposing discriminatory taxes on rail carriers, the ITFA bars states from imposing discriminatory taxes on electronic commerce. Because Congress recognized the need for a federal forum to challenge discriminatory taxes on rail carriers, it provided a bright-line exception to the TIA within the 4-R Act.[303] For the reasons discussed above, that exact need exists in cases challenging discriminatory state taxes on electronic commerce. Therefore, the ITFA should provide an exception to the TIA and allow litigants to bring cases challenging state and local taxes as preempted by the ITFA to federal court. This exception would be a step in the right direction, as it would allow federal courts to hear state and local tax controversies over the interpretation of federal law and to decide them on the *merits* of such claims.

303. *See* Schoenwald, *supra* note 23, at 1109.