# SUPREME COURT OF THE UNITED STATES

No. 02–1809

J. ELLIOTT HIBBS, DIRECTOR, ARIZONA DEPARTMENT OF REVENUE, PETITIONER *v.*
KATHLEEN M. WINN ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 14, 2004]

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

In this case, the Court shows great skepticism for the state courts' ability to vindicate constitutional wrongs. Two points make clear that the Court treats States as diminished and disfavored powers, rather than merely applies statutory text. First, the Court's analysis of the Tax Injunction Act (TIA or Act), 28 U. S. C. §1341, contrasts with a literal reading of its terms. Second, the Court's assertion that legislative histories support the conclusion that "[t]hird-party suits not seeking to stop the collection (or contest the validity) of a tax *imposed on plaintiffs* . . . were outside Congress' purview" in enacting the TIA and the anti-injunction provision on which the TIA was modeled, *ante*, at 12, is not borne out by those sources, as previously recognized by the Court. In light of these points, today's holding should probably be attributed to the concern the Court candidly shows animates it. See *ante*, at 1–2 (noting it was the federal courts that "upheld the Constitution's equal protection requirement" when States circumvented *Brown* v. *Board of Education,* 347 U. S. 483 (1954), by manipulating their tax laws). The concern, it seems, is that state courts are second rate constitutional arbiters,

unequal to their federal counterparts. State courts are due more respect than this. Dismissive treatment of state courts is particularly unjustified since the TIA, by express terms, provides a federal safeguard: The Act lifts its bar on federal court intervention when state courts fail to provide "a plain, speedy, and efficient remedy." §1341.

In view of the TIA's text, the congressional judgment that state courts are qualified constitutional arbiters, and the respect state courts deserve, I disagree with the majority's superseding the balance the Act strikes between federal and state court adjudication. I agree with the majority that the petition for certiorari was timely under 28 U. S. C. §2101(c), see *ante*, at 5–8, and so submit this respectful dissent on the merits of the decision.

I

Today is the first time the Court has considered whether the TIA bars federal district courts from granting injunctive relief that would prevent States from giving citizens statutorily mandated state tax credits. There are cases, some dating back almost 50 years, which proceeded as if the jurisdictional bar did not apply to tax credit challenges; but some more recent decisions have said the bar is applicable. Compare, *e.g., Mueller* v. *Allen,* 463 U. S. 388 (1983); *Committee for Public Ed. & Religious Liberty* v. *Nyquist,* 413 U. S. 756 (1973); *Griffin* v. *School Bd. of Prince Edward Cty.,* 377 U. S. 218 (1964), with, *e.g.*, *ACLU Foundation of La.* v. *Bridges*, 334 F. 3d 416 (CA5 2003); *In re Gillis*, 836 F. 2d 1001 (CA6 1988). While unexamined custom favors the first position, the statutory text favors the latter. In these circumstances a careful explanation for the conclusion is necessary; but in the end the scope and purpose of the Act should be understood from its terms alone.

The question presented—whether the TIA bars the District Court from granting injunctive relief against the

tax credit—requires two inquiries. First, the term assessment, as used in §1341, must be defined. Second, we must determine if an injunction prohibiting the Director from allowing the credit would enjoin, suspend, or restrain an assessment.

The word assessment in the TIA is not isolated from its use in another federal statute. The TIA was modeled on the anti-injunction provision of the Internal Revenue Code (Code), 26 U. S. C. §7421(a). See *Jefferson County* v. *Acker,* 527 U. S. 423, 434 (1999). That provision specifies, and has specified since 1867, that federal courts may not restrain or enjoin an "assessment or collection of any [federal] tax." 26 U. S. C. §7421(a) (first codified by Act of Mar. 2, 1867, ch. 169, §10, 14 Stat. 475). The meaning of the term assessment in this Code provision is discernible by reference to other Code sections. Title 26 U. S. C. §1 *et seq*.

Chapter 63 of Title 26 addresses the subject of assessments and sheds light on the meaning of the term in the Code. Section 6201 first instructs that "[t]he Secretary [of the Internal Revenue Service] is . . . required to make the . . . assessments of all taxes . . . imposed by this title. . ." 26 U. S. C. §6201(a). Further it provides, "[t]he Secretary shall assess all taxes determined by the taxpayer or by the Secretary . . ." §6201(a)(1). Section 6203 in turn sets forth a method for making an assessment: "The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary."

Taken together, the provisions of Title 26 establish that an assessment, as that term is used in §7421(a), must at the least encompass the recording of a taxpayer's ultimate tax liability. This is what the taxpayer owes the Government. See also *Laing* v. *United States,* 423 U. S. 161, 170, n. 13 (1976) ("The 'assessment,' essentially a bookkeeping notation, is made when the Secretary or his delegate establishes an account against the taxpayer on the tax rolls"). Whether the Secretary or his delegate (today, the Com-

missioner) makes the recording on the basis of a taxpayer's self-reported filing form or instead chooses to rely on his own calculation of the taxpayer's liability (*e.g.*, via an audit) is irrelevant. The recording of the liability on the Government's tax rolls is itself an assessment.

The TIA was modeled on the anti-injunction provision, see *Jefferson County*, *supra;* it incorporates the same terminology employed by the provision; and it employs that terminology for the same purpose. It is sensible, then, to interpret the TIA's terms by reference to the Code's use of the term. Cf. *Lorillard* v. *Pons,* 434 U. S. 575, 581 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute"). The Court of Appeals, which concluded that an assessment was the official estimate of the value of income or property used to calculate a tax or the imposition of a tax on someone, *Winn* v. *Killian*, 307 F. 3d 1011, 1015 (CA9 2002), placed principal reliance for its interpretation on a dictionary definition. That was not entirely misplaced; but unless the definition is considered in the context of the prior statute, the advantage of that statute's interpretive guidance is lost.

Furthermore, the court defined the term in an unusual way. It relied on a dictionary that was unavailable when the TIA was enacted; it relied not on the definition of the term under consideration, "assessment," but on the definition of the term's related verb form, "assess;" and it examined only a portion of that terms' definition. In the dictionary used by the Court of Appeals, the verb is defined in two ways not noted by the court. One of the alternative definitions is quite relevant—"(2) to fix or determine the amount of (damages, a tax, a fine, etc.)." Compare 307 F. 3d, at 1015, with Random House Dictionary of the English Language 90 (1979). Further,

> "Had [the panel] looked in a different lay dictionary, [it] would have found a definition contrary to the one it preferred, such as 'the entire plan or scheme fixed upon for charging or taxing.' . . . Had the panel considered tax treatises and law dictionaries . . . it would have found much in accord with this broader definition. . . . Even the federal income tax code supports a broad reading of 'assessment.'" *Winn* v. *Killian*, 321 F. 3d 911, 912 (2003) (Kleinfeld, J., dissenting from denial of rehearing en banc) (footnote omitted).

Guided first by the Internal Revenue Code, an assessment under §1341, at a minimum, is the recording of taxpayers' liability on the State's tax rolls. The TIA, though a federal statute that must be interpreted as a matter of federal law, operates in a state-law context. In this respect, the Act must be interpreted so as to apply evenly to the 50 various state-law regimes and to the various recording schemes States employ. It is therefore irrelevant whether state officials record taxpayer liabilities with their own pen in a specified location, by collecting and maintaining taxpayers' self-reported filing forms, or in some other manner. The recordkeeping that equates to the determination of taxpayer liability on the State's tax rolls is the assessment, whatever the method. The Court seems to agree with this. See *ante*, at 8–11.

The dictionary definition of assessment provides further relevant information. Contemporaneous dictionaries from the time of the TIA's enactment define assessment in expansive terms. They would broaden any understanding of the term, and so the Act's bar. See, *e.g.*, Webster's New International Dictionary 139 (1927) (providing three context relevant definitions for the term assessment: It is the act of apportioning or determining an amount to be paid; a valuation of property for the purpose of taxation; or the entire plan or scheme fixed upon for charging or tax-

ing). See also *United States* v. *Galletti*, 541 U. S. —, — (2004) (slip op., at 7–8) (noting that under the Code the term assessment refers not only to recordings of tax liability but also to "the calculation . . . of a tax liability," including self-calculation done by the taxpayer). The Court need not decide the full scope of the term assessment in the TIA, however. For present purposes, a narrow definition of the term suffices. Applying the narrowest definition, the TIA's literal text bars district courts from enjoining, suspending, or restraining a State's recording of taxpayer liability on its tax rolls, whether the recordings are made by self-reported taxpayer filing forms or by a State's calculation of taxpayer liability.

The terms "enjoin, suspend, or restrain" require little scrutiny. No doubt, they have discrete purposes in the context of the TIA; but they also have a common meaning. They refer to actions that restrict assessments to varying degrees. It is noteworthy that the term "enjoin" has not just its meaning in the restrictive sense but also has meaning in an affirmative sense. The Black's Law Dictionary current at the TIA's enactment gives as a definition of the term, "to require; command; positively direct." Black's Law Dictionary 663 (3d ed. 1933). That definition may well be implicated here, since an order invalidating a tax credit would seem to command States to collect taxes they otherwise would not collect. The parties, however, proceed on the assumption that enjoin means to bar. It is unobjectionable for the Court to make the assumption too, leaving the broader definition for later consideration.

Respondents argue the TIA does not bar the injunction they seek because even after the credit is enjoined, the Director will be able to record and enforce taxpayers' liabilities. See Brief for Respondents 16. In fact, respondents say, with the credit out of the way the Director will be able to record and enforce a higher level of liability and so profit the State. *Ibid.* ("The amount of tax payable by

some taxpayers would increase, but that can hardly be characterized as an injunction or restraint of the assessment process"). The argument, however, ignores an important part of the Act: "under State law." 28 U. S. C. §1341 ("The district courts shall not enjoin, suspend or restrain the assessment . . . of any tax under State law"). The Act not only bars district courts from enjoining, suspending, or restraining a State's recording of taxpayer liabilities altogether; but it also bars them from enjoining, suspending, or restraining a State from recording the taxpayer liability that state law mandates.

Section 43–1089 is state law. It is an integral part of the State's tax statute; it is reflected on state tax forms; and the State Supreme Court has held that it is part of the calculus necessary to determine tax liability. See *Kotterman* v. *Killian*, 193 Ariz. 273, 279, 285, 972 P. 2d 606, 612, 618 (1999). A recording of a taxpayer's liability under state law must be made in accordance with §43–1089. The same can be said with respect to each and every provision of the State's tax law. To order the Director not to record on the State's tax rolls taxpayer liability that reflects the operation of §43–1089 (or any other state tax law provision for that matter) would be to bar the Director from recording the correct taxpayer liability. The TIA's language bars this relief and so bars this suit.

The Court tries to avoid this conclusion by saying that the recordings that constitute assessments under §1341 must have a "collection-propelling function," *ante*, at 11, and that the recordings at issue here do not have such a function. See also *ante*, at 11, n. 4 ("[T]he dissent would disconnect the word [assessment] from the enforcement process"). That is wrong. A recording of taxpayer liability on the State's tax rolls of course propels collection. In most cases the taxpayer's payment will accompany his filing, and thus will accompany the assessment so that no literal collection of moneys is necessary. As anyone who

has paid taxes must know, however, if owed payment were not included with the tax filing, the State's recording of one's liability on the State's rolls would certainly cause subsequent collection efforts, for the filing's recording (*i.e.*, the assessment) would propel collection by establishing the State's legal right to the taxpayer's moneys.

## II

The majority offers prior judicial interpretations of the Code's similarly worded anti-injunction provision to support its contrary conclusions about the statutory text. See *ante*, at 11–12. That this Court and other federal courts have allowed nontaxpayer suits challenging tax credits to proceed in the face of the anti-injunction provision is not at all controlling. Those cases are quite distinguishable. Had the plaintiffs in those cases been barred from suit, there would have been no available forum at all for their claims. See *McGlotten* v. *Connally*, 338 F. Supp. 448, 453–454 (DC 1972) (three-judge court) ("The preferred course of raising [such tax exemption and deduction] objections in a suit for refund is not available. In this situation we cannot read the statute to bar the present suit"). See also *Tax Analysts and Advocates* v. *Shultz*, 376 F. Supp. 889, 892 (DC 1974) ("Since plaintiffs are not seeking to restrain the collection of taxes, and since they cannot obtain relief through a refund suit, [26 U. S. C.] §7421(a) does not bar the injunctive relief they seek"). The Court ratified those decisions only insofar as they relied on this limited rationale as the basis for an exception to the statutory bar on adjudication. See *South Carolina* v. *Regan,* 465 U. S. 367, 373 (1984) (holding the anti-injunction provision inapplicable to a State's challenge to the constitutionality of a federal tax exemption provision, §103(a) of the Code (which exempts from a taxpayer's gross income the interest earned on the obligations of any State) as amended by §310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982, 96 Stat.

596, because "the [anti-injunction provision] was not intended to bar an action where . . . Congress has not provided the plaintiff with an alternative legal way to challenge the validity of a tax"). Even that strict limitation was not strict enough for four Members of the Court, one of whom noted "the broad sweep of the [a]nti-[i]njunction [provision]." 465 U. S., at 382 (Blackmun, J., concurring in judgment). The other three Justices went further still. They would have allowed an exception to the anti-injunction provision's literal bar on nontaxpayer suits challenging tax exemption provisions only if due process rights were at stake. See 465 U. S., at 394 (O'CONNOR, J., concurring in judgment) ("*Bob Jones University*'s recognition that the complete inaccessibility of judicial review might implicate due process concerns provides absolutely no basis for crafting an exception" to the anti-injunction act for a plaintiff who has "no due process right to review of its claim in a judicial forum").

In contrast to the anti-injunction provision, the TIA on its own terms ensures an adequate forum for claims it bars. The TIA specially exempts actions that could not be heard in state courts by providing an exception for instances "where a plain, speedy, and efficient remedy may [not] be had in the courts of [the] State." 28 U. S. C. §1341. The TIA's text thus already incorporates the check that *Regan* concluded could be read into the anti-injunction provision even though "[t]he [anti-injunction provision]'s language 'could scarcely be more explicit' in prohibiting nontaxpayer suits like this one." 465 U. S., at 385 (O'CONNOR, J., concurring in judgment) (quoting *Bob Jones Univ.* v. *Simon,* 416 U. S. 725, 736 (1974)). The practical effect is that a literal reading of the TIA provides for federal district courts to stand at the ready where litigants encounter legal or practical obstacles to challenging state tax credits in state courts. And this Court, of course, stands at the ready to review decisions by state courts on these matters.

The Court does not discuss this codified exception, yet the clause is crucial. It represents a congressional judgment about the balance that should exist between the respect due to the States (for both their administration of tax schemes and their courts' interpretation of tax laws) and the need for constitutional vindication. To ignore the provision is to ignore that Congress has already balanced these interests.

Respondents admit they would be heard in state court. Indeed a quite similar action previously was heard there. See *Kotterman* v. *Killian*, 193 Ariz. 273, 972 P. 2d 606 (1999). As a result, the TIA's exception (akin to that recognized by *Regan*) does not apply. To proceed as if it does is to replace Congress' balancing of the noted interests with the Court's.

## III

The Court and respondents further argue that the TIA's policy purposes and relatedly the federal anti-injunction provision's policy purposes (as discerned from legislative histories) justify today's holding. The two Acts, they say, reflect a unitary purpose: "In both . . . Congress directed taxpayers to pursue refund suits instead of attempting to restrain [tax] collections." *Ante*, at 13. See also *ante*, at 14 (concluding that the Act's underlying purpose is to bar suits by "taxpayers who sought to avoid paying their tax bill"); see also Brief for Respondents 18–20. This purpose, the Court and respondents say, shows that the Act was not intended to foreclose relief in challenges to tax credits. The proposition rests on the premise that the TIA's sole purpose is to prevent district court orders that would decrease the moneys in state fiscs. Because the legislative histories of the Acts are not carefully limited in the manner that this reading suggests, the policy argument against a literal application of the Act's terms fails.

Taking the federal anti-injunction provision first, as has

been noted before, "[its] history expressly reflects the congressional desire that all injunctive suits against the tax collector be prohibited." *Regan*, 465 U. S., at 387 (O'CONNOR, J., concurring in judgment). The provision responded to "the grave dangers which accompany intrusion of the injunctive power of the courts into the administration of the revenue." *Id.,* at 388. It "generally precludes judicial resolution of all abstract tax controversies," whether brought by a taxpayer or a nontaxpayer. *Id.,* at 392; see also *id.,* at 387–392 (reviewing the legislative history of the anti-injunction provision, its various amendments, and related enactments). Thus, the provision's object is not just to bar suits that might "interrupt 'the process of collecting . . . taxes,'" but "[s]imilarly, the language and history evidence a congressional desire to prohibit courts from restraining any aspect of the tax laws' administration." *Id.,* at 399.

The majority's reading of the TIA's legislative history is also inconsistent with the interpretation of this same history in the Court's earlier cases. The Court has made clear that the TIA's purpose is not only to protect the fisc but also to protect the State's tax system administration and tax policy implementation. *California* v. *Grace Brethren Church,* 457 U. S. 393 (1982), is a prime example.

In *Grace Brethren Church* the Court held that the TIA not only bars actions by individuals to stop tax collectors from collecting moneys (*i.e.*, injunctive suits) but also bars declaratory suits. See *id.,* at 408–410. The Court explained that permitting declaratory suits to proceed would "defea[t] the principal purpose of the Tax Injunction Act: 'to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes.'" *Id.,* at 408–409 (quoting *Rosewell* v. *LaSalle Nat. Bank,* 450 U. S. 503 (1981)). It continued:

"'If federal declaratory relief were available to test

> state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts.'" *Grace Brethren Church*, *supra*, at 410 (quoting with approval *Perez* v. *Ledesma,* 401 U. S. 82, 128, n. 17 (1971) (Brennan, J., concurring in part and dissenting in part)).

While this, of course, demonstrates that protecting the state fisc from damage is part of the TIA's purpose, it equally shows that actions that would throw the "state tax administration . . . into disarray" also implicate the Act and its purpose. The Court's concern with preventing administrative disarray puts in context its explanation that the TIA's principal concern is to limit federal district court interference with the "collection of taxes." The phrase, in this context, refers to the operation of the whole tax collection system and the implementation of entire tax policy, not just a part of it. While an order interfering with a specific collection suit disrupts one of the most essential aspects of a State's tax system, it is not the only way in which federal courts can disrupt the State's tax system:

> "[T]he legislative history of the Tax Injunction Act demonstrates that Congress worried not so much about the form of relief available in the federal courts, as about divesting the federal courts of jurisdiction to interfere with state tax administration." *Grace Brethen Church*, *supra*, at 409, n. 22.

The Court's decisions in *Fair Assessment in Real Estate*

*Assn., Inc.* v. *McNary*, 454 U. S. 100 (1981), *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 515 U. S. 582 (1995) *(NPTC)*, and *Rosewell*, *supra*, make the same point. Though the majority says these cases support its holding because they "involved plaintiffs who mounted federal litigation to avoid paying state taxes," *ante*, at 14, the language of these cases is too clear to be ignored and is contrary to the Court's holding today. In *Fair Assessment*, the Court observed that "[t]he [TIA] 'has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations.' This last consideration was [its] principal motivating force." 454 U. S., at 110 (quoting *Rosewell*, *supra*, at 522 (in turn quoting *Tully* v. *Griffin, Inc.*, 429 U. S. 68, 73 (1976)) (other citation omitted)). In *NPTC*, the Court said, "Congress and this Court repeatedly have shown an aversion to federal interference with state tax administration. The passage of the [TIA] in 1937 is one manifestation of this aversion." 515 U. S., at 586 (summing up this aversion, generated also from principles of comity and federalism, as creating a "background presumption that federal law generally will not interfere with administration of state taxes," *id.,* at 588). In *Rosewell*, the Court described the Act's language as "broad" and "prophylactic." 450 U. S., at 524 (majority opinion of Brennan, J.). See also *ibid.* (the TIA was "passed to limit federal-court interference in state tax matters").

The Act is designed to respect not only the administration of state tax systems but also state court authority to say what state law means. "[F]ederal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts." *Grace Brethren Church*, *supra*, at 410 (internal quotation marks omitted). See also *Rosewell*, *supra*, at 527. This too establishes that the TIA's purpose is not solely to ensure that the State's fisc is not decreased.

There would be only a diminished interest in allowing state courts to say what the State's tax statutes mean if the Act protected just the state fisc. The TIA protects the responsibility of the States and their courts to administer their own tax systems and to be accountable to the citizens of the State for their policies and decisions. The majority objects that "there is no disagreement to the meaning of" state law in this case, *ante*, at 15, n. 5. As an initial matter, it is not clear that this is a fair conclusion. The litigation in large part turns on what state law requires and whether the product of those requirements violates the Constitution. More to the point, however, even if there were no controversy about the statutory framework the Arizona tax provision creates, the majority's ruling has implications far beyond this case and will most certainly result in federal courts in other States and in other cases being required to interpret state tax law in order to complete their review of challenges to state tax statutes.

Our heretofore consistent interpretation of the Act's legislative history to prohibit interference with state tax systems and their administration accords with the direct, broad, and unqualified language of the statute. The Act bars all orders that enjoin, suspend, or restrain the assessment of any tax under state law. In effecting congressional intent we should give full force to simple and broad proscriptions in the statutory language.

Because the TIA's language and purpose are comprehensive, arguments based on congressional silence on the question whether the TIA applies to actions that increase moneys a state tax system collects are of no moment. Contra, *Winn*, 307 F. 3d, at 1017–1018 (relying on *Dunn* v. *Carey*, 808 F. 2d 555, 558 (CA7 1986)); see also *ante,* at 18 (relying on *Dunn*). Whatever weight one gives to legislative histories, silence in the legislative record is irrelevant when a plain congressional declaration exists on a matter. "[W]hen terms are unambiguous we may not speculate on

probabilities of intention." *Insurance Co.* v. *Ritchie,* 5 Wall. 541, 545 (1867). Here, Congress has said district courts are barred from disrupting the State's tax operations. It is immaterial whether the State's collection is raised or lowered. A court order will thwart and replace the State's chosen tax policy if it causes either result. No authority supports the proposition that a State lacks an interest in reducing its citizens' tax burden. It is a troubling proposition for this Court to proceed on the assumption that the State's interest in limiting the tax burden on its citizens to that for which its law provides is a secondary policy, deserving of little respect from us.

IV

The final basis on which both the majority and respondents rest is that years of unexamined habit by litigants and the courts alike have resulted in federal courts' entertaining challenges to state tax credits. See *ante*, at 19–20 (citing representative cases). While we should not reverse the course of our unexamined practice lightly, our obligation is to give a correct interpretation of the statute. We are not obliged to maintain the status quo when the status quo is unfounded. The exercise of federal jurisdiction does not and cannot establish jurisdiction. See *United States* v. *L. A. Tucker Truck Lines, Inc.,* 344 U. S. 33, 37–38 (1952). "[T]his Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*." *Id.,* at 38. In this respect, the present case is no different than *Federal Election Comm'n* v. *NRA Political Victory Fund,* 513 U. S. 88 (1994). The case presented the question whether we had jurisdiction to consider a certiorari petition filed by the Federal Election Commission (FEC), and not by the Solicitor General on behalf of the FEC. The Court held that it lacked jurisdiction. See *id.,* at 99. Though that answer seemed to contradict the Court's prior practices, the Court said:

> "Nor are we impressed by the FEC's argument that it has represented itself before this Court on several occasions in the past without any question having been raised about its authority to do so . . . . The jurisdiction of this Court was challenged in none of these actions, and therefore the question is an open one before us." *Id.,* at 97 (citations omitted).

See also *Will* v. *Michigan Dept. of State Police,* 491 U. S. 58, 63, n. 4 (1989) ("'[T]his Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.' *Hagans* v. *Lavine,* 415 U. S. 528, 535, n. 5 (1974)" (alteration in original)). These cases make clear that our failure to consider a question hardly equates to a thing's being decided. Contra, *ante*, at 2 (STEVENS, J., concurring) (referring to prior silences of the courts with respect to the TIA as *stare decisis* and settled interpretation). As a consequence, I would follow the statutory language.

* * *

After today's decision, "[n]ontaxpaying associations of taxpayers, and most other nontaxpayers, will now be allowed to sidestep Congress' policy against [federal] judicial resolution of abstract [state] tax controversies." *Regan*, 465 U. S., at 394 (O'CONNOR, J., concurring in judgment). This unfortunate result deprives state courts of the first opportunity to hear such cases and to grant the relief the Constitution requires.

For the foregoing reasons, with respect, I dissent.